

Between ‘Virtue’ and ‘Immorality’:

Why Character Evidence
Must Be Prohibited
in Rape Cases

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Acronyms

BLAST	Bangladesh Legal Aid and Services Trust
BLC	Bangladesh Law Chronicles
BLD	Bangladesh Legal Decisions
BLT	Bangladesh Law Times
BNWLA	Bangladesh National Women Lawyers Association
DLR	Dhaka Law Reports
FSC	Federal Shariat Court
HCD	High Court Division
PLD	Pakistan Law Decisions

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1. Introduction

A recent study which surveyed perpetrators of rape in Bangladesh found that 95% of men in urban areas and 88% of men in rural areas reported facing no legal consequences for raping a woman or girl.¹ This is largely in line with data from the One Stop Crisis Centre which shows that 78% of rape survivors who sought its help between 2001 and 2013, decided not to take legal action after taking the initial step of seeking medical treatment and examination.² These harrowing statistics demonstrate the harsh reality that the vast majority of rape victims and survivors are precluded from seeking justice for one reason or another, whereby rapists remain unpunished.

Section 155(4) of the Evidence Act 1872, expressly allows defence lawyers to introduce character evidence against rape complainants during trial. Section 155(4) is a discriminatory, colonial-era law which is rooted in archaic and patriarchal assumptions about women's and girls' virginity and reinforces gender inequality.³ It contributes to the culture of impunity enjoyed by rapists in two key ways: at the procedural stage and in substantive law. Firstly, the very act of rape is traumatic and debilitating for the victim-survivor, while seeking justice for rape involves cumbersome hurdles.⁴ Even where the victim-survivor is part of the minority that is able to overcome these barriers and bring their case to court, defence lawyers use character evidence as a tool of re-traumatisation and

harassment by asking her degrading questions in an open courtroom, leading to this practice being labelled as 'the second rape'.⁵ Secondly, even where the victim-survivor is able to withstand the degrading process of cross examination, the use of character evidence may cause her testimony to be considered unreliable by the judge, especially if uncorroborated by other witnesses and circumstantial evidence. This then adversely impacts a rape victim-survivor's ability to secure a conviction.

Therefore, ensuring the inadmissibility of character evidence in rape trials arose as a key demand in BLAST's *Rape Law Reform Now* campaign, one which was also echoed by various stakeholders in expert consultation seminars and the National Conference on Rape Law Reform.⁶ It is in this context that this report seeks to highlight the impact admissibility of character evidence has on rape prosecutions and the urgent need to reform this area of law, drawing on legal amendments made in two other South Asian countries which inherited the identical Evidence Act as Bangladesh, namely India and Pakistan.

This report is the first installment in the Rape Law Reform Research Reports series, which highlights procedural and substantive laws on rape which obstruct justice for rape survivors in Bangladesh, with recommendations for reform.

2. Methodology

This report (particularly Part IV) draws on the analysis of Supreme Court judgments on rape, namely cases filed under Section 6 of the *Nari o Shishu Nirjatan Daman (Bishesh Bidhan) Ain 1995* (Women and Children Repression Prevention (Special Provisions) Act 1995) and Section 9 of the *Nari o Shishu Nirjatan Daman Ain 2000*, (Women and Children Repression Prevention Act 2000), where character evidence was either used by the defence or the judge made important observations on its use. These judgments were sourced from four of the oldest and most reputed law reports in Bangladesh, the Dhaka Law Reports (DLR), Bangladesh Legal Decisions (BLD), Bangladesh Law Chronicles (BLC) and Bangladesh Law Times (BLT).

The case study in Part V is translated and paraphrased from two research reports authored by Fatama Sultana Suvra '*Shotir-e*

Kebol Dhorshon Hoy' ('Only the Chaste are Raped') and '*Beshyar Konodin Dhorshon Hoy Na'* ('Prostitutes are Never Raped') for BLAST in 2016.

In analysing the reform of character evidence in Pakistan and India in Part VI, this report draws on findings from a comparative study by TrustLaw, Thompson Reuters Foundation in 2016.⁷

The recommendations in Part VII are formulated in light of the findings from the research and feedback received from relevant stakeholders in BLAST's expert consultation on witness protection held as part of its Rape Law Reform Now campaign in 2018.⁸

An abridged version of this report was presented by BLAST before Saber Hossain Chowdhury, M.P., in a consultation meeting on 3rd September 2019.

3. Legislative Framework

Table 1: Provisions on Admissibility of Character Evidence in the Evidence Act 1872

Part I: Relevancy of Facts, Chapter II: Character When Relevant	
<p>Section 53. In criminal cases, previous good character relevant</p>	<p>In criminal proceedings the fact that the person accused is of a good character is relevant.</p>
<p>Section 54. Previous bad character not relevant, except in reply</p>	<p>In criminal proceedings the fact that the accused person has a bad character is irrelevant, unless evidence has been given that he has a good character, in which case it becomes relevant.</p> <p>Explanation 1.-This section does not apply to cases in which the bad character of any person is itself a fact in issue.</p> <p>Explanation 2.-A previous conviction is relevant as evidence of bad character.</p>
Part III: Production and Effect of Evidence, Chapter X: Of The Examination of Witnesses	
<p>Section 146(3). Questions lawful in cross-examination</p>	<p>When a witness is cross-examined, he may, in addition to the questions hereinbefore referred to, be asked any questions which tend . . . (3) to shake his credit, by injuring his character, although the answer to such questions might tend directly or indirectly to criminate him or might expose or tend directly or indirectly to expose him to a penalty or forfeiture.</p>
<p>Section 155(4). Impeaching credit of witness</p>	<p>The credit of a witness may be impeached in the following ways by the adverse party, or, with the consent of the Court, by the party who calls him: . . . (4) when a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character.</p>

The Evidence Act 1872 (‘the Evidence Act’) is the main law on admissibility of evidence in court proceedings. Section 5 of the Evidence Act states that in any suit or proceeding, evidence can only be adduced as to the existence and non-existence of facts in issues and facts deemed to be ‘relevant’. As can be seen in Table 1, in certain circumstances, character evidence

is deemed relevant and can be adduced in relation to not only the accused person but also those testifying in court as witnesses.

Section 146 of the Evidence Act allows for three types of questions during cross examination. Section 146(3) allows the imposition of questions which may injure the character of the witness in order to

verify their credibility.

Section 155 of the Evidence Act goes further and specifies four situations where the credit of a witness may be impeached through evidence, whereby Section 155(4) makes character evidence admissible in relation to a rape complainant if they were of a 'generally immoral character'. Since there is no legal definition of what constitutes a 'generally immoral character', this provision can be and is used by the defence to adduce character evidence against any and all rape complainants, with the judge then left to decide whether the evidence proves the rape complainant was of a 'moral' or 'immoral' character. Therefore, even if Section 155(4) is repealed, Section 146(3) could still be an avenue through which character evidence could be used to undermine rape complainants.

Moreover, since there is no offence named 'attempt to ravish', in including this term, it could be argued that the application of Section 155(4) may well extend not only to the offence of 'attempt to rape'⁹ but also to other forms of sexual offences not amounting to rape, such as 'sexual oppression'.¹⁰

Section 155 deals with three other situations where a particular witness can be considered to be unreliable: where a witness is believed to be 'unworthy of credit' by other persons who testify, where a witness has received a bribe or other corrupt inducement and where a witness has made contradictory statements in the past. Therefore, in lumping a rape complainant together with these

types of witnesses who have allegedly done something to justify being treated as being unreliable, Section 155(4) can have the effect of creating a negative presumption on rape complainants by default.

Section 53 of the Evidence Act makes the 'good character' of an accused person relevant, whereas Section 54 makes their 'bad character' irrelevant. Evidence as to their 'bad character' would only be relevant in reply, meaning if the defence used Section 53 to suggest that the accused was someone of 'good character'. In other words, the law by default treats negative character evidence to be irrelevant and therefore inadmissible for the accused, whereas Section 155(4) has the reverse effect by making negative character evidence admissible against the rape complainant, even though she is the person seeking justice for an offence committed against her.

There are certain safeguards in place under the Evidence Act which could (and should), in theory, extend to victims of sexual violence facing harassment from defence lawyers in court. These include prohibition of questions 'intended to insult or annoy' which are 'needlessly offensive in form' (Section 152) and reporting of lawyers who asked questions 'without reasonable grounds' to the appropriate body which has jurisdiction over the lawyer (Section 150). However, given the application of Section 155(4) and the absence of specific rape-shield laws, these safeguards have offered little or no respite to rape victims and complainants, as we shall go on to see in the next part of the report.

4. Use of Character Evidence in Rape Prosecutions

4.1 Woman of 'Loose Moral' Character

In *Abdul Majid vs State*,¹¹ a woman alleged that while she was sleeping in her house at night with her young daughter, the accused entered and forcibly raped her.¹² The defence made her admit during cross-examination that she was 'given in marriage at four places' and that she was a 'divorced woman'.¹³ The defence then alleged that she was a 'woman of loose moral character' involved in 'anti-social and immoral activities' who filed this 'false case' as the accused along with others tried to put a stop to such activities.¹⁴ The trial court found the accused guilty of rape and sentenced him to life imprisonment.

On appeal, the High Court Division (HCD) stated:

*"The withholding and non-production of independent material witnesses create[s] a serious doubt on the prosecution case which lends support to the defence case that the victim is a woman of loose moral character and involved in anti-social and immoral activities and the accused along with others used to give her resistance, for this reason informant (PW 1) filed this false case against the accused only to harass and humiliate the accused."*¹⁵

No one appeared on behalf of the appellant before the HCD.¹⁶

In *Uzzal alias Hossain vs. State*,¹⁷ four men were accused of gang raping a teenage girl and photographing the incident. Several witnesses deposed that the day after the girl's father went to the house of the accused to 'beg' for the return of the photographs, the accused and their family members came to the girl's house, rebuked the father by suggesting his daughter was of 'immoral character' and threatened that if he took legal action then his daughter's 'obscene photographs would be pasted at all the street corners'.¹⁸ The next day, the girl committed suicide 'in order to preserve her self-esteem and honour' by ingesting poison, which her family alleged resulted from the men's refusal to return the photographs.¹⁹ The defence suggested that she committed suicide not because she was raped but 'due to family reasons' and because she was of 'immoral character'.²⁰ They alleged that the girl 'had an affair with a boy' of the village and because the father 'refused to give her in marriage to him she committed suicide'.²¹ The trial court convicted the men under Section 9(2) of the *Nari O Shishu Nirjatan Daman Ain 2000* ('the 2000 Act') which deals with rape causing death, However the HCD modified the conviction to one of Section 9(1) finding that there was no causal link of the suicide to the rape.²² This case illustrates how the character assassination of the rape victim begins socially and is then transported to the courtroom.

It also shows that the practice of using character evidence to humiliate rape victims is so pervasive, that even when the victim is no longer alive to testify her character and alleged ‘immorality’ are still not spared.

4.2 ‘Woman of Easy Virtue’

In *Sree Pinto Pal vs. State*,²³ the father of a seventeen year old girl,²⁴ filed a rape case under Section 9(1) of the 2000 Act against Pinto Pal, alleging that he ‘forcibly took her in his dwelling hut and committed rape on her’.²⁵ The trial court found Pal guilty of rape under Section 9(1) of the 2000 Act and convicted him to rigorous life imprisonment and 5000 taka fine.²⁶ On appeal before the HCD, Pal argued that the girl worked as a maid at his house of and that this case had been filed out of vengeance because the accused, ‘a man of wealth’ had turned down a proposal of marriage to the girl made by her father.²⁷ The defence further argued that ‘the story of taking the victim to the house of the accused is totally false and concocted as the victim herself deposed that she intentionally went to the house of the accused’.²⁸ When examining the evidence on record, the judge stated:

*“Victim herself stated that in the following day of the occurrence, the victim entered into the house of the victim by climbing paupa tree as the gate of the house was closed which also proves that the victim is a woman of easy virtue, so her evidence cannot be believed without the corroboration of reliable evidence”.*²⁹

In making this statement, the HCD relied on *Daler Sing vs. State*,³⁰ wherein the Court held that ‘no implicit reliance can be placed on the testimony of the prosecutrix who is a woman of easy virtue’. Pal was ultimately acquitted by the HCD.³¹

4.3 Constructing the Good Victim, Bad Victim Dichotomy

In *Fatema Begum vs. Aminur Rahman*,³² when reversing the trial court’s acquittal and convicting the accused, the HCD stated that:

*“...The learned advocate has submitted that in this case the prosecutrix an unmarried college girl who comes of a respectable educated family has deposed narrating the prosecution case... there was no plea of this prosecutrix being of questionable character.”*³³

In *Monowar Mallik vs. State*^{3,4} a woman filed a rape case under Section 9(1) of the 2000 Act, alleging that her neighbour, Monowar Mallik, caused her to have repeated sexual intercourse through ‘false inducement’ by making her believe ‘he had married her in witness of religion’.³⁵ When she asked Mallik to ‘marry her socially’, he retorted that he had ‘fulfilled his wish’ and would ‘never marry her’.³⁶ She also alleged that in one particular incident, the accused had forced her to have sexual intercourse against her will when she had stepped out of the house in the middle of the night to respond to the ‘call of nature’.³⁷ The trial court found Mallik guilty of rape under Section 9(1) of the 2000 Act and convicted him,

sentencing him to rigorous imprisonment for life and payment of a 5000 taka fine.³⁸ He appealed before the HCD, arguing, inter alia, that he had been falsely implicated in this case at the instigation of the complainant's uncle, with whom he had a dispute over some landed property.³⁹

The defence counsel in the Mallik case referred to *Misti and others vs. State*⁴⁰ to argue that 'if the victim comes of an ordinary and lower strata or she is proved to be **woman of ill repute** or **easy virtue** corroboration must be sought as a rule of caution and prudence.'⁴¹ Thereafter, the HCD judge stated:

*"As per the submission of the learned Advocate for the appellant, victim girl comes of a very lower status and she is proved to be **woman of ill repute** and **easy virtue**. In such circumstance, strong corroboration must be sought as a rule of caution and prudence. But the prosecution has failed to prove its case by corroborative evidence."⁴²*

In *Misti and others vs State*,⁴³ the father of a fourteen year old girl had filed a case under Section 9(c) of the *Nari O Shishu Nirjatan Daman (Bishesh) Bidhan Ain* 1995 alleging that his daughter had been abducted and raped. The defence argued that the case had been filed out of enmity since the accused had previously initiated a shalish against the informant's daughters for causing 'unsocial activities', and the informant was asked to immediately arrange for the marriage of his daughters to

put a stop to these undesirable activities.⁴⁴ The defence further argued on appeal that the trial court 'committed an illegality in convicting the appellants solely relying on the solitary evidence of the victim girl.'⁴⁵ Interestingly, character evidence (of the victim's 'good character') was used by the judge in support of the informant and to undermine the defence's allegation:

*"In the instant case, the victim girl comes of a **respectable educated family** having **good background** as she is a daughter of a professor of a college. She as well as her father is not expected to lodge any false case outraging her modesty and **dignity** and **honour** of her family."⁴⁶*

Interestingly, the defence in the *Mallik* case used character evidence (as relied on in the *Misti* case in favour of the victim and which emphasised the reliability of a rape victim's sole testimony), to distinguish the reliability of a rape complainant from a 'respectable educated family' as opposed to one from a 'lower status'.⁴⁷

More generally the *Mallik* case shows that even though Section 53 of the Evidence Act does not make 'good character' of a witnesses relevant (as it does for the accused), judges and prosecution lawyers may focus on the 'good' character of the victim and their family in order to justify their conviction and reliance on the victim's testimony. In so doing, they are essentially constructing a 'good victim' and 'bad victim' dichotomy, which is inherently problematic. This dichotomy then

proves fatal to those victims who are considered to fall on the 'bad' end of the spectrum, such as the complainant in the *Mallik* case.⁴⁸

In *Tariqul Islam vs. State*,⁴⁹ the HCD, after considering the medical evidence on record to be insufficient in proving that rape took place stated:

"..in absence of corroboration it is most unsafe to act on the solitary testimony of the victim which is not of unimpeachable character. In a case of rape the prosecutrix must be corroborated with independent evidence."

This case illustrates how the sole testimony of a rape complainant is treated with utmost suspicion and how the phrase 'not of a generally immoral character' (as stated in Section 155(4) of the Evidence Act) can in practice become synonymous with 'not of unimpeachable character'. The implications of such a conflation are tremendously adverse for the rape complainant.

4.4 Lack of Character Evidence: A Sign of Reliability

Another problematic trend is found in some rape judgments - in addition to the good victim, bad victim dichotomy. Even where the defence has not adduced character evidence against the complainant, this very fact has sometimes been used by judges as a reason to uphold the truthfulness of the victim's testimony. This implies that had the defence raised questions as to the rape complainant's character, the judge may not have been as willing to

rely on the testimony of the victim-survivor. For instance, Justice A K Badrul Huq's impassioned judgment in *Al Amin vs. State*⁵⁰ is often referred to as having established (or at least reinvigorated) the principle that the sole testimony of a rape complainant is sufficient for the conviction of a rapist, even if not corroborated by other witnesses or circumstantial evidence.⁵¹ Yet, in establishing this principle, Justice Huq immediately justified his decision to rely on the sole testimony of the rape complainant by stating:

"In this regard one aspect of the matter must be taken into consideration. There is no case of the defence that the victim A is a girl of questionable character or a girl of loose moral character... No suggestion even had been made to that effect."

It is unclear what his stance would have been had the defence actually adduced character evidence against the rape complainant and whether the sole testimony of the victim can only be relied on when the defence does not raise any questions as to her character, as has been held in *Sree Pinto Pal*,⁵² and *Abdul Majid*,⁵³ discussed above.

In *Harun-or Rashid vs State*,⁵⁴ the HCD similarly took into consideration the fact that "No suggestion was offered to this witness from the side of the accused-appellants that victim Anwara Begum was a lady of questioned character."

More recently, the HCD in *Ibrahim*

Dewan vs. State,⁵⁵ also used the omission of the defence to raise questions as to the rape complainant's character as a reason for relying on the victim-survivor's testimony.⁵⁶ This sets a dangerous precedent that ties the reliability of the victim's sole testimony to whether or not the defence raised questions as to her character.

4.5 Judicial Recognition of the Misuse of Character Evidence

The practice of defence lawyers misusing character evidence was condemned by Justice A K Badrul Huq in *Al Amin vs. State*:⁵⁷

*"With the above observations another fundamental matter in dispensation of Criminal Justice has to be noticed now. The treatment of the victims, of sexual assault in the court by the defence lawyer during cross-examination must not be overlooked. In total disregard of the provisions of the Evidence Act regarding the relevancy of facts, some defence lawyers attempt to cast a stigma on the character of the victim of sex crime and twist the interpretation of events given by her so as to make her appear inconsistent with her allegations. The court must not sit as a silent spectator while the victim of sex crime is being cross-examined by the defence. **The court must effectively control the recording of evidence in the court. The court must ensure that cross-examination is not made a means of harassment and causing humiliation to the victim of sex crime . . . (Emphasis ours).**"⁵⁸*

Justice Huq also highlighted the unfairness of questioning a rape complainant as though she were on trial:

"It must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of sexual assault and it is improper and also undesirable to test her testimony with certain amount of suspicion, treating her as if she was an accomplice."⁵⁹

Justice Huq again decried the misuse of character evidence in rape trials in *Shibu Pada Acharjee vs. State*,⁶⁰ noting that the defence posed 'wild and indecent questions' to the rape complainant, 'touching her character'.⁶¹ He 'highly disapproved and deprecated' such cross examination noting it 'could not be allowed to be carried out'. He further stated:

"In the United States of America during [the] mid 1970[s], feminists led a widespread movement to change rape laws and to give rape victims more sympathetic treatment. Several states passed laws strictly limiting defence lawyers in questioning [the] prosecutrix [o]n her general sexual conduct. In our country Court must rise to the occasion to limit cross-examination touching the character of victim of sexual assault for irrelevant purpose and Court must not sit as [a] silent spectator while [a] victim of sex crime is cross-examined in an indecent manner and Court must effectively control the recording of evidence. Enactment of laws in this regard requires to be passed. [Emphasis laid]."

In *BNWLA vs. Bangladesh*,⁶² although the judge is speaking in relation to the 'character assassination' a female faculty member had to face outside the courtroom, simply because she participated in a meeting which sought accountability of a male faculty member facing rape allegations by a female student, the overarching culture of chastising and moral policing of women daring to seek justice is poignantly highlighted:

*"It is to be noted that in Bangladesh culture, character assassination of woman to put her in her 'proper place' is very common. In a society where great emphasis is given on woman's chastity and where her standing within the family and society depends on it, character assassination affects her in multifarious ways. She loses her dignity, her reputation and value as a woman not only within her immediate family like her husband and children but also within her extended family and in-laws family. She is put to shame to an extent that she gets psychologically shattered."*⁶³

5. Case Study: Shima Faces Overwhelming Odds

Shima⁶⁴ of Mirzapur, married into the Aratdar family. Six months into their marriage, her husband Zaman, who lived abroad, left the country, and in a big family of ten siblings, Shima had to take on the role of the oldest daughter-in-law. Nazrul, one of Zaman's younger brothers who was much older than Shima and unmarried, was the only one who lived in the Aratdar house, while the rest of his siblings were all married and lived elsewhere with their own families. Soon after Zaman left, Shima found out she was pregnant. However, she miscarried when one day, she accidentally slipped on some oil dropped on the floor of her room by someone without her knowledge.

Right after this incident, her brother-in-law, Nazrul, started behaving with her in a manner which Shima found very disturbing. He kept insisting that she should not feel that she was all by herself, in the absence of her husband, as he would now fill that role. Since Shima's mother-in-law was in support of him, no one in the house objected to Nazrul's behavior. Whenever Shima, whose own family was considerably poorer than the Aratdars, tried to explain the situation to her husband on the phone, Zaman would ask her to 'adjust' to his family and forbade her from telling anyone about this. Soon enough, Nazrul became more brazen in his attempts to make sexual propositions to Shima. He would call her into his room and ask her to massage his feet; when

she refused to do these things, she got into trouble with her mother-in-law. They began to restrict Shima from contacting her family.

One day, 16 months into Shima's marriage, Nazrul aggressively propositioned her, carrying a container of acid in his hands. During the scuffle that ensued, the acid sloshed and fell on Shima's body. In a bid to save herself with a blanket, Shima sustained acid burns from her chest to her knees. While she screamed in agony, other members of the house, in particular her mother-in-law, two sisters-in-law and Nazrul used candles to set fire to Shima's body. She was subsequently taken to the One-Stop Crisis Centre by a representative of a women's rights organisation. A case was filed against Nazrul under Section 9(4) of the *Nari o Shishu Nirjatan Daman Ain* 2000 for attempted rape, which dragged on for three years. In 2010, Shima's own husband Zaman threatened her with rape following the notice she had filed against him for divorce. Zaman went onto adduce character evidence against Shima in court, to the effect that she had "in her husband's absence, made sexual propositions to more than one brother-in-law as well as outsiders" and when Nazrul refused to accept her proposals, "Shima, in her greed for money, set fire to herself and brought a false allegation against him", and also stated, "Shima is a harlot ('beshya')."

6. Reform of Character Evidence Law in South Asia

A comparative study of seven (mostly common law) legal systems⁶⁵ found that there is a 'general trend' of restricting the admissibility of character evidence in rape and sexual assault trials in order to protect victim-survivors from being stigmatised and re-traumatised during cross examination.⁶⁶ Even in countries which prescribe limited circumstances under which such evidence is permitted, there tends to be a further restriction on how this evidence may be provided or obtained (e.g. in camera or in judge's chambers, instead of in an open courtroom).⁶⁷ Therefore, Bangladesh stands out among these countries whereby character evidence is not only admissible in rape trials, but in the absence of any restrictions, remains unabated.

6.1 Pakistan

Pakistan replaced the colonial Evidence Act 1872 with the Qanun-e-Shahadat Order 1984 ('the 1984 Order') with minimal revisions. As a result, many of the same provisions appear in the 1984 order, including those pertaining to character evidence as are applied in Bangladesh. Article 151(4) of the 1984 order is identical to Section 155(4) of the Evidence Act of Bangladesh and can be used by the defence in rape cases to impeach the credit of the complainant.

In 1983, the Committee on the Draft Evidence Ordinance 1983 had recommended that a proviso be added after Article 151(4) subjecting this right of the defence to the provisions of Offence of

Qazaf (Enforcement of Hadd) Ordinance, 1979. The 1979 Ordinance for its part criminalises the act of imputing zina (sex outside marriage) to a person, typically falsely and without good faith, thereby causing harm to the person's reputation or hurting their feelings.⁶⁸ However, the Law Commission of Pakistan⁶⁹ considered the addition of such a proviso unnecessary in light of the existing provisions of the 1979 Ordinance since 'the remedy is available to the aggrieved party under substantive law'.⁷⁰ Therefore, in theory, the Commission accepted that a rape complainant whose reputation or feelings were injured due to allegations about past sexual history which were presumably false, could seek relief under the 1979 Ordinance.

More recently, Article 151(4) was challenged before the Federal Shariat Court in 2009 as being discriminatory, "repugnant" to the teachings of Islam and therefore unconstitutional.⁷¹ While the Federal Government and the Provincial Governments of Balochistan, Punjab, and Sindh publicly opposed the petition, the Government of Khyber Pakhtunkhwa supported it.⁷² The Court agreed with the petitioners and stated:

*"Article 151 (4) of Qanun-e-Shahadat Order, 1984 is discriminatory on the basis of sex and violates Article 25 (2) of the Constitution as it purports to impeach the credit of a woman, and above all it negates the concept of "gender equality" as enshrined in the Holy Qur'an."*⁷³

As a result, the Court directed the President of Pakistan to take appropriate steps for repeal of Article 151(4) of the 1984 Order within six months, holding that otherwise the provision would cease to have effect.⁷⁴ Although the Parliament of Pakistan did not act within the time period, it did repeal Article 151(4) of the Qanun e Shahadat, 1984 in 2016.⁷⁵

6.2 India

In India, many reports suggested that the defence routinely misused Section 155(4) of the Indian Evidence Act, 1872 in rape trials to discredit the complainant's testimony as that of a 'woman of loose morals'.⁷⁶ In 1980, the Law Commission of India in its 84th Report recommended reconsidering the provision on character evidence:

*"The provision in section 155(4) sometimes causes serious hardship. The victim of rape, questioned at length, very often feels **humiliated** . . . Self-consciousness and **shame** resulting from queries and **adverse comments**, might even result in a **permanent scar** on her peace of mind and **psychic well-being**. In this respect, the provision in section 155(4) may be regarded as deserving of **serious reconsideration**."*⁷⁷

The Law Commission also stressed:

*"It is **wrong** to assume that a female witness is **less likely** to tell the truth when she has a generally immoral character. Evidence of sexual immorality **cannot** be admitted in **other cases** as substantive evidence."*⁷⁸

It found that Section 155(4) was being used to adduce evidence about the victim's past sexual history not only with the accused, but also other people. Furthermore, the Commission found that the provision was being used even where consent was immaterial, i.e. where the rape victim was below the statutory age of consent.

*"This provision, it will be noticed, is **not confined** to past sexual familiarity only with the accused. It is **wide enough** to cover sexual immorality in relation to others . . . What needs to be emphasised is that matters in which the accused is **not at all concerned** can also be brought on the record under the head of "general immoral character" by virtue of section 155(4). This means that even if the charge is one of sexual intercourse with a girl below the age of sixteen years . . . which is punishable irrespective of the girl's consent, evidence can be given of her "general immoral character."*⁷⁹

The Commission argued that in order to avoid this problem, the law needs to treat the past sexual history of the rape complainant separately, under two headings: "(i) previous sexual relations with the accused and (ii) such relations with other persons."⁸⁰ While the first may be relevant in some cases, the justification for retaining the second is "totally weak, if not completely without foundation".⁸¹ To stress this point it famously stated:

“when a *harlot* or a *prostitute* is raped, her consent at the time of commission of the crime must be proved by *evidence aliunde*”.⁸²

The Law Commission, therefore, made it clear that the sexual history of a woman is irrelevant. The Commission made three specific recommendations for reform of Indian Evidence Act, 1872:

i. Amend Section 155(4)

Section 155(4) should be modified and ‘confined to sexual relations with the accused and that too only where consent is in issue’.⁸³

ii. Insert Section 146(4) to Limit Section 146(3)

The Commission recognised that amending Section 155(4) alone would not be enough since Section 146(3) could still be an opening through which questions about the rape complainant’s character could still be permissible.⁸⁴

Therefore it suggested a new subsection 146(4) to be added

“(4) *In a prosecution for rape or attempt to commit rape, where the question of consent to sexual intercourse or attempted sexual intercourse is at issue, it shall not be permissible to adduce evidence or to put questions in the cross-examination of the prosecutrix as to her general immoral character, or as to her previous sexual experience with any person other than the accused for proving such consent or the quality of consent.*”⁸⁵

iii. Insert Section 53A

The Commission further recognised that for the reform on admissibility of character evidence to be holistic and effective, the relevance of character evidence in rape trials had to be limited by inserting a section in Chapter II of Part I, which deals with when character can be treated as a relevant fact. So it suggested a new Section 53A to be added as follows:

“53A. *In a prosecution for rape or attempt to rape, where the question of consent to sexual intercourse or attempted sexual intercourse is at issue, evidence of the character of the prosecutrix or of her previous sexual experience with any person other than the accused shall not be relevant on the issue of such consent or the quality of consent.*”

• *Legal Reform (2003 and 2013):*

The Law Commission’s recommendations were finally partially implemented in 2003, 23 years after being made, and after the 2012 Delhi Gang Rape (*‘Nirbhaya’*) case and ensuing protests. The Committee headed by Justice Verma, former Chief Justice of India, endorsed the need to carry out the Law Commission’s 1980 recommendations. The following changes were made by successive amendments:

i. Repeal of Section 155(4)

The Parliament of India went further than the Law Commission’s recommendations of modifying Section 155(4) and repealed it in its entirety.⁸⁶

ii. Amendment of Section 146: Victim's Character and Sexual History Cannot be Questioned

The Parliament of India amended Section 146 of the Evidence Act to apply Section 146(3) not only to rape but other related offences, such as sexual harassment, voyeurism, stalking and 'assault or criminal force to woman to outrage her modesty' and attempts to commit these offences. The proviso states:

*"Where the question of consent is an issue, it shall **not be permissible** to adduce evidence or to put questions in the cross-examination of the victim as to the **general immoral character, or previous sexual experience, of such victim with any person** for proving such consent or the quality of consent."*⁸⁷

iii. Insertion of Section 53A: Victim's Character and All Sexual History Irrelevant

The Law Commission had recommended that the sexual history of the complainant with the accused not be considered relevant. Parliament went further by declaring previous sexual experience, with or without the accused, to be irrelevant for rape and the other aforementioned offences, along with the character of the victim:

*"where the question of consent is in issue, evidence of the **character of the victim or of such person's previous sexual experience with any person** shall **not be relevant** on the issue of such consent or the quality of consent."*⁸⁸

iv. Judicial Duty to Ensure Safeguard

Judges presiding over rape trials have a duty to ensure that questions relating to the rape complainant's character, however remote, are not allowed during trial.⁸⁹ Additionally, sentencing cannot be influenced by the rape complainant's past sexual history and character.

7. Recommendations*

i. Repeal Section 155(4) of the Evidence Act

Section 155(4) of the Evidence Act should be repealed so the perceived 'general immoral character' of a rape complainant can no longer be used by the defence to impeach their credibility as a witness during trial.

ii. Restrict questions on the character of the complainant in cross-examination – Amend Section 146(3) of the Evidence Act

Section 146(3) of the Evidence Act (which determines which questions are lawful during cross examination) should be amended to add a clause to prohibit the defence from raising questions about the complainant's past sexual experiences with persons other than the accused and questions intended to injure the character of the complainant during trial of offences under Sections 9 and 10 of the *Nari o Shishu Nirjatan Daman Ain* 2000 and Sections 354, 375, 376, 493 and 509 of the Penal Code, 1860, and attempts to commit these offences.

Such restriction should also apply to any proceedings for sexual harassment under the proposed Sexual Harassment Bill.⁹⁰

iii. Limit relevance of facts relating to the character of the complainant – Amend Section 53 of the Evidence Act

Insert a clause under Section 53 of the Evidence Act (which deals with relevance of good character in) providing for inadmissibility of evidence about the character of the complainant and their past sexual

experiences with any person other than the accused during trial of offences under sections 9 and 10 of the *Nari o Shishu Nirjatan Daman Ain* 2000, and/or Sections 354, 375, 376, 493 and 509 of the Penal Code 1860 and attempts to commit these offences. Such restriction should also apply to any proceedings for sexual harassment under the proposed Sexual Harassment Bill.

iv. Introduce judicial duty to ensure limits on use of character evidence are enforced in practice – Amend Section 150 of the Evidence Act

Insert a clause under Section 150 of the Evidence Act (which deals with questions asked without reasonable grounds) to prescribe a statutory duty for judges to ensure complainants of the aforementioned offences are not subject to questions about their character and past sexual history other than with the accused. It should also prescribe specific disciplinary action to be taken against lawyers who contravene the prohibitions above by seeking to cast stigma on the complainant and lay out the process to be taken for such disciplinary action.

v. Limit relevance of complainant's past sexual history with accused – Amend Sections 53, 146, 150

Add a proviso to the above proposed clauses under Sections 53, 146, and 150 of the Evidence Act to ensure that questions about sexual history with the accused cannot be asked if such past intercourse is remote in time and context.

*The term complainant in this section is intended to cover all victims and survivors of sexual violence who (or whose family) take legal action, including deceased victims on behalf of whom legal action is taken.

GLOSSARY*

Character evidence: evidence pertaining to the character of a witness in a case, which is usually adduced in order to indicate their reliability in the eyes of the court.

Rape: “physically forced or otherwise coerced penetration – even if slight – of the vulva or anus, using a penis, other body parts or an object.”⁹¹

Sexual harassment: a wide range of offensive and unwelcome conduct of a sexual nature, be it in or outside an institutional setting.⁹²

Sexual violence: “any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or acts to traffic, or otherwise directed, against a person’s sexuality using coercion, by any person regardless of their relationship to the victim, in any setting, including but not limited to home and work.”⁹³

*The definitions of rape, sexual harassment and sexual violence included in the glossary reflect what we intend these terms to cover, as per international best practices and not necessarily what they mean under Bangladeshi law. For the official legal definitions of offences relating to sexual violence under Bangladeshi law, please refer to Annex I.

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- 4 See for example: Taqbir Huda and Abdullah Titir, *Why Rape Survivors Stay Out of Court: Lessons from Paralegal Interventions*, BLAST (2018).
- 5 See for example: Lee Madigan and Nancy Gamble, *The Second Rape: Society's Continued Betrayal of the Victim*, Macmillan (1991); both the authors of this book are psychologists who found that the degrading process that rape victim-survivors have to endure in the courtroom is a subsequent 'emotional' rape which is often more debilitating than the first physical act of rape itself.
- 6 Taqbir Huda and Abdullah Titir, *Rape Law Reform in Bangladesh: Conference Report*, BLAST (2019).
- 7 Thomson Reuters Foundation and BLAST, 'Character Evidence in Rape Trials: A Comparative Study of Rape Shield Laws and the Admissibility of Character Evidence in Rape Cases', (2015) and Fatama Sultana Suvra, *Shotir-e Kebol Dhorshon Hoy (Only the Chaste Are Raped)*, BLAST (2016).
- 8 Report of Expert Consultation Seminar on Ensuring Witness Protection in Rape Trials held on 22 October 2018 at BILIA Auditorium. The consultation was attended by representatives from the National Human Rights Commission Bangladesh, Bangladesh Law Commission, Women's Support & Investigation Division of the Dhaka Metropolitan Police, UN Women, Ain O Salish Kendra, Naripokkho, Department of Law of the University of Dhaka and Department of Anthropology of Jagannath University, among others.
- 9 Section 9(4)(b) of the Nari-O-Shishu Nirjatan Daman Ain 2000 specifically criminalises the attempt to rape.
- 10 Section 10 of the *Nari-O-Shishu Nirjatan Daman Ain* 2000 defines the offence of 'jouno piron' (commonly translated as 'sexual oppression') or "touching a woman or child with any part of one's body or with a foreign object or "violating a woman's modesty" ('narir shhilotahani') in order to "illegally satisfy one's sexual desires"
- 11 13 BLC (HCD) (2008) 53.
- 12 Ibid at para 2.
- 13 Ibid at para 14.
- 14 Ibid at para 15.
- 15 Ibid at para 66.
- 16 Ibid at para 10.
- 17 59 DLR (HCD) (2007) 505.
- 18 Ibid, para 19. See also paras: 16, 17, 22, 23 and 26.
- 19 Ibid, para 2.
- 20 Ibid, para 16; as implied by the HCD recounting the father's denial of this suggestion.
- 21 Ibid, para 2.
- 22 One lakh taka fine was also to be paid by each convict to the victim's father as compensation.
- 23 30 BLD (HCD) (2010) 220.
- 24 As stated by the prosecution.
- 25 30 BLD (HCD) (2010) 220, para 1.
- 26 Ibid, para 7.
- 27 Ibid, paras 30-32.
- 28 Ibid para 32. The complainant did mention that she went to the house after the accused requested her and that after the date of the alleged rape, she returned to his house.
- 29 Ibid, para 40.
- 30 1995 Cr. L. J. 614.
- 31 Other reasons for acquittal included: insufficiency of medical evidence and prosecution's failure to summon key witnesses.
- 32 25 BLD (HCD) (2005) 342.
- 33 Ibid, para 49.
- 34 59 DLR (HCD) (2007) 301.
- 35 Ibid, para 1.
- 36 Ibid, para 2.
- 37 Ibid.
- 38 Ibid, para 9.
- 39 Ibid, paras 8 and 31.
- 40 6 BLC (HCD) 138.
- 41 59 DLR (HCD) (2007) 301, para 36.
- 42 Ibid, para 37.
- 43 6 BLC (HCD) 138.
- 44 Ibid, paras 7 and 19.
- 45 Ibid, para 22.
- 46 6 BLC (HCD) 138, para 25.
- 47 59 DLR (HCD) (2007) 301.
- 48 Ibid.
- 49 14 BLT (HCD) (2006) 407.
- 50 19 BLD (HCD) (1999) 307.
- 51 See for example *Abdus Sobhan Biswas vs State* 54 DLR (HCD) (2002) 556, para 21, where the HCD cited *Al-Amin* as authority for

- holding the sole testimony of the rape complainant in the case to be sufficient when dismissing the appeal and upholding the conviction of the rapist.
- 52 30 BLD (HCD) (2010) 220.
- 53 13 BLC (HCD) (2008) 53.
- 54 8 BLT (HCD) (2000) 402.
- 55 21 BLC (HCD) (2016) 813.
- 56 Interestingly the exact same wording is used by Justice Huq in *Al-Amin* (note above) though the case is not cited. though the case is not cited.
- 57 19 BLD (HCD) (1999) 307.
- 58 *Ibid*, para 102.
- 59 *Ibid*, para 36.
- 60 56 DLR (HCD) (2004) 285.
- 61 *Ibid*, para 61.
- 62 *BNWLA vs. Bangladesh* 29 BLD (2009) (HCD) 415.
- 63 *Ibid*, para 4.
- 64 This case study is based on Fatama Sultana Suvra, *Shotir-e Kebol Dhorshon Hoy*, BLAST (2016) and Fatama Sultana Suvra, *Beshyar Konodin Dhorshon Hoy Na*, BLAST (2016). A pseudonym has been used for the rape complainant.
- 65 Canada, India, Pakistan, Singapore, South Africa, United Kingdom and the United States of America.
- 66 Thomson Reuters Foundation and BLAST 'Character Evidence in Rape Trials: A Comparative Study of Rape Shield Laws and the Admissibility of Character Evidence in Rape Cases', (2015), p. 4.
- 67 *Ibid*.
- 68 Reference Received From The Federal Government About The Proposed Ordinance Relating To Qanun-E-Shahadat, Ninth Report of the Law and Justice Commission of Pakistan (1983); For the full definition of the offence of qazf, see: section 3 of the Offence of Qazaf (Enforcement of Hadd) Ordinance, 1979
- 69 As it was then called.
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- 74 *Ibid*.
- 75 Section 16, The Criminal Law (Amendment) (Offences Relating to Rape) Act, 2016 (Act XLIV of 2016) states that 'In the Qanun-e-Shahadat, 1984 (P.O. No. 10 of 1984), in Article 151, clause (4) shall be omitted.'
- 76 *84th Report on Rape and Allied Offences: Some Questions of Substantive Law, Procedure and Evidence*, Law Commission of India (1980), p. 38; Thomson Reuters Foundation and BLAST, Character Evidence in Rape Trials: A Comparative Study of Rape Shield Laws and the Admissibility of Character Evidence in Rape Cases', (2015), p.12-13.
- 77 *84th Report on Rape and Allied Offences: Some Questions of Substantive Law, Procedure and Evidence*, Law Commission of India (1980), p. 37, para 7.2.3.
- 78 *Ibid*, p. 37, para 7.2.2.
- 79 *Ibid*, p. 36, para 7.17.
- 80 *Ibid*, p. 37, para 7.20.
- 81 *Ibid*, p. 37, para 7.2.1.
- 82 *Ibid*, p. 37, para 7.2.1.
- 83 *Ibid*, p. 38, para 7.25.
- 84 *Ibid*, p. 38, para 7.26.
- 85 *Ibid*, p. 38, para 7.27.
- 86 Section 3, Indian Evidence (Amendment) Act 2003 states that 'In section 155 of the principal act, clause (4) shall be omitted.'
- 87 Section 146, Indian Evidence Act, 1872; inserted by Section 28 of the Criminal Law Amendment Act 2013, as amended by section 9 of the Criminal Law Amendment Act 2018.
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Annex I: Laws on Sexual Violence in Bangladesh

Penal Code 1860	
Section 354. Assault or criminal force to woman with intent to outrage her modesty	Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.
Section 375. Rape	<p>A man is said to commit "rape" who except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the five following descriptions:</p> <p>Firstly. Against her will.</p> <p>Secondly. Without her consent.</p> <p>Thirdly. With her consent, when her consent has been obtained by putting her in fear of death, or of hurt.</p> <p>Fourthly. With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.</p> <p>Fifthly. With or without her consent, when she is under fourteen years of age.</p> <p>Explanation. Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.</p> <p>Exception. Sexual intercourse by a man with his own wife, the wife not being under thirteen years of age, is not rape.</p>
Section 376. Punishment for Rape	Whoever commits rape shall be punished with imprisonment for life or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, unless the woman raped is his own wife and is not under twelve years of age, in which case he shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

<p>Section 493. Cohabitation caused by a man deceitfully inducing a belief of lawful marriage</p>	<p>Every man who by deceit causes any woman who is not lawfully married to him to believe that she is lawfully married to him and to cohabit or have sexual intercourse with him in that belief, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.</p>
<p>Section 509. Word, gesture or act intended to insult the modesty of a woman</p>	<p>Whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen, by such woman, or intrudes upon the privacy of such woman, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.</p>
<p><i>Nari o Shishu Nirjatan Daman (Bishesh Bidhan) Ain 1995 (Repealed)</i> (Unofficial Translation)</p>	
<p>Section 6. Penalty for rape</p>	<p>(1) Whoever rapes any child or woman shall be punished with death or life imprisonment.</p> <p>(2) Whoever causes the death of any child or woman in or after committing rape shall be punished with death.</p> <p>(3) Where more than one person rape any child or woman, each of them shall be punishable with death or life imprisonment.</p> <p>(4) Where more than one person jointly cause the death of any child or woman in or after committing rape, each of them shall be punishable with death.</p>
<p>Section 9. Penalty for abducting any woman for using her in unlawful or immoral etc. activities</p>	<p>Whoever abducts any woman with the intent that</p> <p>(a) she shall be employed or used for the purpose of prostitution or any other unlawful or immoral activity,</p> <p>(b) she shall be forced to marry against her intentions,</p> <p>(c) she shall be forced or seduced or allured to sexual intercourse,</p> <p>shall be punished with life imprisonment or a term of rigorous imprisonment which may extend to ten years but shall not be less than seven years, and shall also be liable to fine.</p>

Nari o Shishu Nirjatan Daman Ain 2000 (Unofficial Translation)

<p>Section 9. Punishment for rape or death in consequence of rape:</p>	<p>(1) Whoever commits rape with a woman or a child, shall be punished with rigorous imprisonment for life and with fine.</p> <p>Explanation: Whoever has sexual intercourse without lawful marriage with a woman not being under fourteen years of age, against her will or with her consent obtained, by putting her in fear or through fraud, or with a woman not being above fourteen years of age with or without her consent, he shall be said to commit rape.</p> <p>(2) If in consequence of rape or any act by him after rape, the woman or the child so raped, died later, he shall be punished with death or with transportation for life and also with fine not exceeding one lakh taka.</p> <p>(3) If more than one man rapes a woman or a child and that woman or child dies or is injured in consequence of that rape, each of the gang shall be punished with death or rigorous imprisonment for life and also with fine not below one lakh taka.</p> <p>(4) Whoever attempts on a woman or a child: (a) to cause death or hurt after rape, shall be punished with rigorous imprisonment for life and also with fine. b) to commit rape, shall be punished with imprisonment for either description, which may extend to ten years but not less than five years rigorous imprisonment and also with fine.</p> <p>(5) If a woman is raped in the police custody, each and every person, under whose custody the rape was committed and who were directly responsible for safety of that woman, shall be punished for failure to provide safety, unless otherwise proved, with imprisonment for either description which may extend to ten years but not less than five years of rigorous imprisonment and also with fine.</p>
<p>Section 10. Punishment for sexual oppression:</p>	<p>Whoever, to satisfy his sexual urge illegally, touches the sexual organ or other organ of a woman or a child with any organ of his body or with any substance, his act shall be said to be sexual oppression and he shall be punished with imprisonment for either description which may extend to ten years but shall not be less than three years of rigorous imprisonment and also with fine.</p>

This report seeks to highlight the damaging impact admissibility of character evidence has on rape complainants and the urgent need to reform this area of law, drawing on legal amendments made in other South Asian countries which had inherited the identical Evidence Act 1872 as Bangladesh, namely India and Pakistan.

It is the first installment in the **Rape Law Reform Research Reports** series, launched as part of our *Rape Law Reform Now* campaign, to highlight issues in procedural and substantive laws on rape which obstruct justice for rape survivors in Bangladesh, with recommendations for reform.



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