

**DISSERTATION PAPER**

**The Rationality of Incorporation of Section-19 in the Child Marriage Restraint Act, 2017 in Perspective of Bangladesh: A Legal Analysis.**

**Course Title: Supervised Dissertation**

**Course Code: LAW 406**

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**ID: 2016-1-66-081**

**Date of submission**

**12/12/2019**

## **ACKNOWLEDGEMENT**

I am using this opportunity to express my gratitude to everyone who always supported me throughout the research. First of all, I would like to thank respected Mohammed Shahjalal, (Senior Lecturer and Chairperson, Department of Law, East West University) for allowing me to do this research. I am obliged to my supervisor Nabila Farhin, (Lecturer of Department of Law, East West University) for her continuous guidance, patience, advice, effort and valuable suggestions throughout the research. I am also indebted to Ferdousi Begum, (Senior Lecturer of Department of Law at Daffodil International University) for supplying me essentials materials to carry out my research. Last but not the least; I would like to thank Almighty for the good health that was necessary to complete this research.

## **DECLARATION**

I, Farjana Khanam Tumpa, do hereby solemnly affirm and declare that this research paper is original and completely my own work and did not copy from anywhere or anyone's views. The purpose of this research is to complete my undergraduate degree as it is a course. A list of reference is inserted to maintain the citation materials.

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## **ABSTRACT**

Child marriage is a gross violation of child's right as it is carried against their wills and best interests. Bangladesh has enacted a new Child Marriage Restraint Act 2017 by repealing the previous one to prohibit child marriage from Bangladesh but it contains a special provision which allowed child marriage in special circumstances with the consent of the guardians and the Court for the best interest of the child. However, this section does not define what these special circumstances and nor does provide any standard to measure the best interest for children. It appears that this section indirectly encourages child marriage to be happened rather than to discourage it. This is a qualitative research based on primary and secondary data. The research paper analyses the rationality of incorporation of section-19 in the Child Marriage Restraint Act 2017 in perspective of Bangladesh. It maybe contradictory to the Constitution and may validate statutory rape in Bangladesh. This research paper examines the international responsibility of Bangladesh in light of child marriage.

## **LIST OF ABBREVIATIONS**

BNWLA	BANGLADESH NATIONAL WOMEN LAWYERS ASSOCIATION
CMRA	CHILD MARRIAGE RESTRAINT ACT
CEDAW	CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN
CRC	CONVENTION ON THE RIGHTS OF THE CHILD
HCD	HIGH COURT DIVISION
HRW	HUMAN RIGHTS WATCH
ICESCR	INTERNATIONAL CONVENTION ON ECONOMIC SOCIAL AND CULTURAL RIGHTS
ILO	INTERNATIONAL LABOUR ORGANIZATION
MFLO	MUSLIM FAMILY LAW ORDINANCE
NCP	THE NATIONAL CHILDREN POLICY
NWDP	THE NATIONAL WOMEN DEVELOPMENT POLICY
SC	SUPREME COURT
SDG	SUSTAINABLE DEVELOPMENT GOALS
UNICEF	UNITED NATION CHILDREN'S FUND
UDHR	THE UNIVERSAL DECLARATION OF HUMAN RIGHTS



## -----CHAPTER: ONE-----

### INTRODUCTION

This chapter describes the primary concept of child marriage under national and international perspectives and also the objectives, methods, scopes and limitations of this research work.

#### 1.1. Introduction

*Article-16 of the Universal Declaration of Human Rights 1948* set out that men and women of full age have the right to enter into marriage and to give consent for marriage. **According to the Prophet (S.A.W),<sup>1</sup>**

‘A widow (or a divorcee) is not to be married before her consent is sought’ and ‘no virgin girl is to marry without first consulting her and her approval.’

It has cleared that to enter into marriage consent of the parties are required. A person below the age of 18 is defined as child<sup>2</sup> and has no legal capacity to give consent for marriage. If a child is not competent to give her consent, then surely a child cannot marry. A marriage of individuals in which one of the parties is below 18years is called child marriage. Child marriage is the violation of human rights because it is carried against the consent of children.

In many countries child marriage are prohibited by the national law. However, there are some countries in which child marriage is allowed with the consent of the parents and court in special circumstances. **Nelson Mandela said**, ‘True Character of a society is revealed in how it treats it children.’ Child marriage throws the future of child in endangered because it has inherent impacts upon children’s health, education, development and well being.<sup>3</sup> For that reason, between 2015 and 2017, nine countries repealed this special provision from their Child Marriage Restraint Act and made positive changes in their law to secure the rights of child.<sup>4</sup>

On the other hand, in 2017 Bangladesh has enacted a new law repealed the Previous Act of child marriage to prevent child marriage from Bangladesh including *section-19* which allows child

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<sup>1</sup>Abdullah Al-Hatimy, ‘Women in Islam: A Comparative Study’( Lahore: Islamic Publications Ltd, published 1993)  
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<sup>2</sup> The Convention on the Rights of the Child 1989, Art-1

<sup>3</sup>Quentin Wondon, ‘Ending Child Marriage Laws and their limitations’ (2017) CL 2.Chad, Costa Rica, Ecuador, Guatemala, Malawi, Mexico, Nepal, Panama and Zimbabwe repealed this special provision from their law.

<sup>4</sup> ibid

marriage in special circumstances with the consent of parents and court for the best interest of children. After passing this law the government faced huge criticism because according to the report (2017) of (UNICEF), Bangladesh has the fourth highest rates of child marriage around 59% girls married before 18years and 22% girls were married before 15 years.<sup>5</sup>

In this situation, incorporation of *section-19 in the Child Marriage Restraint Act, 2017* may legalize child marriage in the country to be happened. It may be a violation to the Constitutional provision and also may legitimize statutory rape in the country. To do social Justice, it may validate **social injustice per se**.

## **1.2. Objectives of the study**

- A. The objective of this study is to analyze the rationality of incorporation of *Section-19* [Special provision] *in the Child Marriage Restraint Act 2017*;
- B. To challenge the constitutionality of *Section 19 of the Child Marriage Restraint Act 2017*;
- C. To show the implementation of *Section-19* acts as a threat to legalize statutory rape in Bangladesh.
- D. To show the ambiguity of *Section 19* to evaluate the existing legal system of Bangladesh;
- E. To show the failure of Bangladesh to perform international responsibility to end child marriage from Bangladesh.

## **1.3. Methodology**

This research work is primarily a qualitative research based on primary and secondary sources. For this study, Analytical research method was utilized. I mainly used primary source by collecting data from Constitution, statutes, personal laws and also case decision of Bangladesh. This research is also depending on some secondary source by searching various books, newspapers, articles, online published journals, websites and different blogs etc. To conduct this research, I went to BNWLA (NGO) to collect data but I failed to collect any data.

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<sup>5</sup> Girls Not Brides, 'Child Marriage Around The World: Bangladesh'(2017) <<https://www.girlsnotbrides.org/child-marriage/bangladesh/>> accessed 9 November 2019

#### **1.4. Scopes and Limitation**

This paper tries to analyze the rationality of incorporation of *Section-19 in the Child Marriage Restraint Act, 2017*. For my research purpose, I divided rationality in two points. First point; challenge the constitutionality of *section-19*. Second point, addresses the implementation of *section 19* as a threatened to legalize statutory rape in Bangladesh. Over and above, the limitations of this research are time and resource limitations. Doing this research, I did not get enough published material on this research work. I complete my research work based on the Constitution, statutory laws, personal laws, International Convention, articles, newspapers and online published journals.

After describing the objective, methods, scopes and limitations of this research, I will discuss the definition of child marriage and *Section-19 (special provision) of Child Marriage Restraint Act 2017*.

## -----CHAPTER: TWO-----

### DEFINITIONS & SPECIAL PROVISION

This Chapter focuses on the definitions of child marriage and statutory rape and also focuses on the special circumstances under which child marriage would be allowed in Bangladesh.

#### **2.1. Definition of child marriage**

Any person under a certain age settled by the law (which varies from country to country and time to time) is treated as a child in modern legal system.<sup>6</sup> In Bangladesh, girls below the age of 18 and boys below the age of 21 are considered as child in case of marriage.<sup>7</sup> *Section- 2(3) of Child Marriage Restraints Act, 2017* defines the minimum legal age of marriage for girls 18 years and for boys 21 years. So, if the boys and girls get married before reaching their minimum legal age of marriage, it would be called child marriage. According to UNICEF, “Child Marriage is defined as a marriage of a girl or boy before the age of 18 and refers to both formal marriages and informal unions in which children under the age of 18 lives with a partner as if married”.<sup>8</sup>

#### **2.2. An Overview of the Child Marriage Restraint Act (CMRA), 2017**

The new Child Marriage Restraints Act had passed in February 2017 by the Bangladesh Parliament repealed the previous *Child Marriage Restraint Act 1929*. Even though Bangladesh has the fourth highest rate of child marriage in the world, there were no reported cases regarding child marriage in Bangladesh under the previous Act.<sup>9</sup> The legislature had recognized numerous gaps in the previous Act for its limited implementation and thought to enact new Act<sup>10</sup>.

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<sup>6</sup>Dr Muhammad Ekramul Haque, *Muslim Family Law* (Dhaka: London College of Legal Studies, first published 2015)73

<sup>7</sup> Child Marriage Restraint Act 2017, s- 2(1)

<sup>8</sup> United Nation Children’s Fund (UNICEF), ‘Child Marriage’ (22 October 2014)

<sup>9</sup> Supreme Court Of Bangladesh, ‘Annual Reports’ (2013- 2014)

<sup>10</sup> Shabina Begum, ‘Ending Early and Forced Marriage: Bangladesh and UK Perspective’ (2016) EP 6.

### **2.2.1. A Comparative Study between Previous and New Act:**

A comparative overview between previous and new Child Marriage Restraint Act has given in below:

Under *section- 7(1) of the new Act*, an adult men or women who marries a child could face up to two years imprisonment or a fine of up to BDT 1lac or both and Under *section- 11 of the new Act*, the license of Registrar who conduct the marriage would be cancelled and could face up to maximum 2years imprisonment and minimum 6months imprisonments or BDT 50,000 fine or both.<sup>11</sup> Under *section-8*, the parents and guardians who arrange or negligently fails to prevent child marriage could face up to maximum 2years imprisonment and minimum 6months imprisonments or BDT 50,000 fine or both.<sup>12</sup> On the other hand, The 1929 CMRA prescribed less punishment than the 2017 CMRA. As per 1929 CMRA, offenders face imprisonments of up to one month and/or a fine up to BDT 1000 for child marriage.<sup>13</sup>

*Section- 3 of CMRA 2017* stated that government shall formulate “prevention committees” comprising governmental officials of national, district, sub-district and union level, local government representatives, and officials of non-government organization and also local elite person to work towards to prevent child marriage.<sup>14</sup> *Section- 4* identifies the role of existing officers including local government officers, education officers, and police officer who are bound to prevent child marriages or take legal action upon receipt of news of child marriage.<sup>15</sup> On the other hand, 1929 CMRA has no such provisions of constituting prevention committees by the government officer to prevent child marriage.

### **2.2.2. Gaps in New Child Marriage Restraint Act 2017**

Even though the new *Child Marriage Restraint Act 2017* provided certain legal protection to children, it has also some gaps which are discussed in below:

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<sup>11</sup> Child Marriage Restraints Act 2017, ss-7(1) & 11

<sup>12</sup> *ibid.* s- 8

<sup>13</sup> Child Marriage Restraint Act, 1929, ss- 4 & 6

<sup>14</sup> Child Marriage Restraint Act, 2017 s-3

<sup>15</sup> *ibid.* s- 4

- Marriage in Bangladesh is largely regulated by the personals laws.<sup>16</sup> Whereas, personal laws do not fix such minimum age of marriage for girls and boys. *Section- 2(3) of the new Act* fixed minimum legal age of marriage for girls and boys. While the new Act restrict child marriage, it does not clarify that it has primacy over contradictory provisions of personals law regarding minimum legal age of marriage.
- Even though child marriage is a punishable offence, is not void *ab initio* under the *Child Marriage Restraints Act 2017*. There is no provision in CMRA Act 2017 which contains that child marriage is invalid.
- *Section 10 of the CMRA 2017* permit exemptions from punishment if the accused provides deposition or bond in the form prescribed by the rules that he shall not be involved with any incidents of child marriage and shall attempt to prevent child marriage in his/her community.<sup>17</sup> In this provision, there is no accountability for subsequent violations and provided inadequate punishments and/or compensations for the offenders.
- Under the CMRA 2017 a complaint of an offence must be made within two years from the commission of that offence.<sup>18</sup> This is too short time limitation to bring a complaint before the police or Court. If a complaint could not brought within that time is likely to mean that many infringement of the law will go unpunished.
- While the law sets the minimum age of marriage for girls 18 and for boys 21, *Section – 19 of the Child Marriage Restraint Act, 2017* allowing child marriage in special circumstances below the minimum age. It contradictory with itself.

### **2.3. A Critical Analysis of Section-19 (Special Circumstances) and its Prospective Outcome:**

The preamble of the Child Marriage Restraint Act stated that “it is expedient and necessary to repeal the *Child Marriage Restraint Act 1929* and to enact this new Act.”<sup>19</sup> The purpose of the Act is to prevent child marriage. But *section-19* of this Act allowed child marriage by stating that

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<sup>16</sup> Shabina Begum, ‘Ending Early And Forced Marriage: Bangladesh and UK Perspective’ (2016) EP 4

<sup>17</sup> The Child Marriage Restraint Act 2017, s- 10

<sup>18</sup> *ibid*, s- 18

<sup>19</sup> The Child Marriage Restraint Act 2017, preamble

marriage under special circumstances with the consent of the guardians and directions of the Court for the best interest of the child will not be considered an offence. However, this section does not define under which special circumstances child marriage would be permissible in this law. The legislators of this Act stated in the parliament that in case of accidental or illegal pregnancy of any unmarried girl under the age of 18 years, child marriage would be allowed under special circumstances.<sup>20</sup> Since abortion of an unborn child is not legal in Bangladesh under section-312 of the penal code, a girl could not abort her child.<sup>21</sup> So if a girl became pregnant and could not abort her unborn child, what will be the future of that girl and her unborn child? The Legislators stated that society does not want to accept an unmarried girl along with her illegitimate child and it will become difficult for an illegitimate child to get admitted in any educational institutions.<sup>22</sup> To prevent this situation child marriage has allowed in Bangladesh. However, the legislators did not consider at the time of enacting section-19 about *Section-13 of the Prevention of Oppression against Women and Children Act* which stated that if a child is born aftermath of rape the Government will bear the maintenance of the child and Government may collect the maintenance from the rapist and the child will be introduced by the identity of his/her father/mother or both.<sup>23</sup>

Another circumstances to allow child marriage in Bangladesh is, if the minor's parents or relatives (brother/sister, grandmother/grandfather) is no more and it is difficult to ensure the

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<sup>20</sup> Star Online Report, 'Nothing to be worried about child marriage' The Daily Star ( Dhaka,7 December 2016) <<https://www.thedailystar.net/country/nothing-be-worried-about-child-marriage-law-pm-1326595>> accessed on 3 November 2019

<sup>21</sup>The Penal Code 1860, s- 312. Section 312 stated that a woman/girl shall not voluntarily cause miscarriage of her unborn child unless and until for the purpose of saving her life.

<sup>22</sup>Star Online Report, 'Nothing to be worried about child marriage' The Daily Star (Dhaka,7 December 2016) <<https://www.thedailystar.net/country/nothing-be-worried-about-child-marriage-law-pm-1326595>> accessed on 3 November 2019. For example, after committing a rape if a girl illegally became pregnant or if a girl gives consent to sexual intercourse with a man and accidently became pregnant, child marriage would be allowed with that rapist or with that person to whom she gave consent for sexual intercourse.

<sup>23</sup> Prevention of Oppression against Women and Children Act 2000, s-13

security and maintenance of that minor, child marriage would be allowed to ensure the security of that minor.<sup>24</sup>

Allowing child marriage in special cases does not turn a child into an adult person, the child would remain a child even after marriage. The implementation of *section-19* creates an obstacle to end child marriage from Bangladesh and hence it contradictory to the purpose of *Child Marriage Restraint Act 2017*.

## **2.4. Statutory Rape**

The laws of the statutory rape has established on the premise that a person cannot give his/her consent for sexual intercourse before reaching a certain legal age which is fixed by the law for that purpose.<sup>25</sup> According to *the Penal Code 1860*, age of consent for girls in Bangladesh is 14 years but no age of consent for boys has fixed by that law. *Section-375 of the Code* stated that where a man has done sexual intercourse with a girl with or without her consent when she is under 14 years of age would be considered as statutory rape.<sup>26</sup> However, *Prevention of Oppression against Women and Children Act, 2000* raised the age at which consensual or non-consensual sexual intercourse with a girl who is less than 16years of age, will be defined as statutory rape.<sup>27</sup>

### **2.4.1. Inconsistency in the statutory law regarding Age of Consent**

There is no ‘uniform statutory law’ in Bangladesh for girls to give consent for sexual intercourse. On the above, we saw a contradiction between the *Penal Code, 1860* and *Prevention of Oppression against Women and Children Act, 2000* regarding the age of consent. However, *Section-5 of the Code* says that general law will not affect the special law.<sup>28</sup> Since the Penal Code

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<sup>24</sup> Shahana Huda, ‘Child Marriage Restraint Act 2017: Things that need to be clarified’ The Daily Star (Dhaka, 9 March 2017) <<https://www.thedailystar.net/bangla>> accessed on 2 December 2019

<sup>25</sup> Martin A. Finkel DO & Mark V. Sapp MD, ‘Adolescent Sexual Assault and Statutory Rape’ (2011) <<https://www.sciencedirect.com/topics/immunology-and-microbiology/statutory-rape>> accessed 5 November 2019

<sup>26</sup> The Penal Code 1860, s- 375

<sup>27</sup> The Prevention of Oppression against Women and Children Act,2000, s- 9(1)

<sup>28</sup>The Penal Code 1860, s- 5. Section- 3 of Prevention of Oppression against Women and Children Act 2000 says if any other statutory law is inconsistency with Prevention of Oppression against Women and Children Act, this law



is a general law and *Prevention of Oppression against Women and Children Act, 2000* is a special law; *Prevention of Oppression against Women and Children Act, 2000* will get primacy over the *Penal Code* at the time contradiction. In Bangladesh, a girl can give consent for marriage at the age of 18 years under the CMRA 2017 but she can give consent for sexual intercourse at the age of 14 years under the Penal Code. It appears from the laws that extra-marital sexual intercourse before marriage is legalized in Bangladesh. Moreover, this inconsistency of age influenced the legislators to enact *section-19 of the CMRA Act 2017* to give validity of child marriage in exceptional circumstances.

#### **2.4.2. The New Law may Validate Statutory Rape in Bangladesh**

When any person committed rape to a girl and she became pregnant, parents' of the victim wants to marry off their daughter with the rapist to save the honor of that girl in the society because the society does not want to accept an unmarried pregnant girl.<sup>29</sup> The rapists also agreed to marry the victims because they want to save themselves from the punishment.<sup>30</sup> Bangladesh has enacted a new law which allows child marriage in case of unexpected pregnancy of any girl less than 18 years with her rapists in the name of save her honour under *section-19 of the New Act*. It appears that *section-19 of the New Act* gives an opportunity to the offenders to become savior of the girl by marrying her after committing her rape. It will encourage the perpetrators who enjoy sexually harassing and abusing a girl.<sup>31</sup> Where *Section-9(1) of the Prevention of Oppression against Women and Children Act, 2000* provides rigorous imprisonment for life and also fine to commit rape to a child, *section-19* provides that exceptional circumstances. Rape has always been considered a heinous crime and state has continuously taken strict punishment against rapist but this special provision creates an ambiguity to evaluate the existing legal system of the country.

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will get primacy over the other law to such extent of such inconsistency. So, if any contradiction arise in future, *Prevention of Oppression against Women and Children Act* will get primacy over the other law.

<sup>29</sup> Girls Not Brides Bangladesh, 'Child marriage around the world' (February, 2018) <<https://www.girlsnotbrides.org/child-marriage/bangladesh/>> accessed on 5 November 2019

<sup>30</sup> *ibid*

<sup>31</sup> Saira Rahman Khan, 'All in the name of protection' (16 March 2017) <<https://www.dhakatribune.com/opinion/oped/2017/03/16/all-in-the-name-of-protection>> accessed on 6 November 2019

This create a dilemma in the mind of people which law would be followed, will the rapist be punished for his heinous crime or will he be forgiven when marry his child bride?<sup>32</sup>

It appears from section-19 that it indirectly validates statutory rape in Bangladesh in the name of child marriage. Such law should not enact which give the perpetrators an opportunity to misuse the law. After examining section 19, I am trying to find out whether it is consistence with the rest of the existing provision of Bangladesh.

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<sup>32</sup>TaskinFahmina, “No to ‘Special circumstances’ in Law, No to Child Marriage” Odhikar (9 December, 2016) <<http://odhikar.org/no-to-special-circumstances-in-law-no-to-child-marriage/>> accessed on 9 November 2019

## -----CHAPTER: THREE-----

### THE LAWS REGARDING CHILD MARRIAGE IN BANGLADESH

The Constitutions of the People's Republic of Bangladesh has guaranteed certain fundamental rights for children's. This Chapter analyses the fundamental rights of children which is guaranteed by the Constitution and also analyses statutory laws and personal laws regarding child marriage and their enforcement in Bangladesh.

#### 3.1. Constitutional Aspects

From the independence of Bangladesh, the Constitution of the People's Republic Bangladesh has focused on children's rights in its fundamental principle of State policy in *Article- 17* and fundamental rights in *Articles- 27, 28, 31, 32, and 34*. *Article – 7(2) of the Constitution* stated that the Constitution is the supreme law of Bangladesh and if any other law is inconsistency with this Constitution are void to the extent of that inconsistency.<sup>33</sup>

*Article- 17(a) of the Constitution* stated that the state shall adopt effective measures for the purpose of ensure free and compulsory education to all children.<sup>34</sup>*Articles– 27&31 of the Constitution* say all citizens are equal before the law and to enjoy the protection of law, no action shall be taken which is detrimental to the life, liberty of any person.<sup>35</sup>*Article- 32 of the Constitution* says that the state shall ensure the right to live and personal liberty of the person.<sup>36</sup> *Article- 34(1) of the Constitution* stated that all forms of forced labour are prohibited and any contravention of this provision shall be punishable offence in accordance with law.<sup>37</sup>*Article- 28 (4) of the Constitution of the People's Republic of Bangladesh* provides for making special law for the advancement of under-developed children.<sup>38</sup>

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<sup>33</sup> The Constitution of the People's Republic of Bangladesh 1972, Art- 7(2)

<sup>34</sup> *ibid* Art- 17(a)

<sup>35</sup> *ibid* Art- 27 & 31

<sup>36</sup> *ibid* Art- 32

<sup>37</sup> *ibid* Art- 34(1)

<sup>38</sup> *ibid* Art- 28(4)

➤ **The Special Provision of the Child Marriage Restraint Act may be Contradictory to the Constitution of the People’s Republic of Bangladesh**

Child marriage has negative effects upon the education of a girl because after marriage girl’s drops out from her school and she also lose her employment opportunity which limited her financial, social, and physical autonomy and decision making authority.<sup>39</sup> Child marriage also has a negative impact upon health of the girl which affects right to life of a girl. Child marriage is linked to forced labour and child brides are forced by their older husband to perform the majority of housework.<sup>40</sup> According to ILO, child labour refers to work that deprives children (any person under 18) of their childhood, their potential and their dignity, and that are harmful to their physical and/or mental development.<sup>41</sup> Domestic violence is also a serious legal issue in child marriage. According to the report of Bangladesh Bureau of Statistics, It is estimated that more than 72.6% woman experienced domestic violence in their lifetime and girls who married earlier are suffered more than woman who married later in life.<sup>42</sup> Very few girls take legal action after experiencing domestic violence and most of the time offenders used influence and power to delay investigations or pressure upon the victim to drop charges.<sup>43</sup>

As review of the above, children are the worst sufferers of child marriage. Child marriage creates discrimination against girl child because the rights of the girl child mostly affected by the child marriage. It is contradictory to *Article-28 of the Constitution*. Child rights are guaranteed by the Constitution of Bangladesh. Since child marriage violated the fundamental rights of the children, *section-19* which allows child marriage in special cases also indirectly violates the fundamental rights of children which has guaranteed by the Constitution. According to *Article – 7(2) of the Constitution of the People’s Republic of Bangladesh* if any law is inconsistency with this

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<sup>39</sup> Avon Global Centre for Women and Justice, “Child Marriage in Bangladesh: Causes, Consequence and Legal Frameworks “, (2013) CF 7-12. Each year child marriage leads to decrease of 4-6 percentages points in the probability of secondary school completion girl.

<sup>40</sup> Aparna Bhat, Aatreyee Sen & Uma Pradhan, ‘Child Marriage and the law in India’ (2005) CI 36

<sup>41</sup> International Labour Organization (ILO), ‘What is child labour (IPEC)?’ <<https://www.ilo.org/ipec/facts/lang--en/index.htm>> accessed 20 October 2019

<sup>42</sup> Government of Bangladesh, “Ministry of Planning, Report of Violence against Women (VAW) Survey” (2015) MW xvii

<sup>43</sup> CEDAW Committee, concluding Observations: Bangladesh, ‘Five Years after Domestic Violence Act, 2010’ (2016) U.N. Doc Para, 19.

Constitution are void to the extent of that inconsistency, so section-19 are also void to the extent of that inconsistency.

### **3.2. Purview of Statutory Law in Marital Rape**

American sociologist Sr. David Finkelhor says, ‘when you are raped by a stranger you have to live with a frightening memory, when you are raped by your husband you have to live with your rapist.’<sup>44</sup> Unfortunately, marital rape is not recognized in Bangladesh. As per *section- 375 of the Penal Code 1860*, sexual intercourse by a man with his own wife, wife is being under 13 years of age, is considered marital rape. If the wife is not being under the age of 13years, sexual intercourse with her wife without the consent is not considered marital rape. However, ***AIR 1917 Sind 42*** cases held that even in the case of a husband, sexual intercourse by him with his wife against her will or without her consent will be an offence of rape if the wife is below fifteen years of age.<sup>45</sup> Even though the age of the marital rape has increased in this case decision, in the provision of the Penal Code has not brought any amendment yet.

*Section-19 of the Act* allowed child marriage in special cases with the consent of parents and court. If the Court allows child marriage in special cases, it indirectly allows sexual intercourse with that child by her husband and the law which already fails to provide protection to the women, it will also failed to provide protection to the female child from the endangered of marital rape. So allowing child marriage, it would be harmful for girls.

### **3.3. Purview of Personal Laws**

In Bangladesh, majority of the people are Muslim religion but there has also other religious people like Hindu, Buddhists, Christian and each religion has separate personal law to govern their marriage.<sup>46</sup>

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<sup>44</sup> Zahirul Huq, Penal Code (Dhaka: Anupam Gyan Bhandar, 5<sup>th</sup>edn, 2005) 1088

<sup>45</sup>ibid, 1096

<sup>46</sup> Leigh Blomgren, ‘Child Marriage in Bangladesh: Impact of Discriminatory Personal Laws’ (28 August 2013)

<<https://www.ohchr.org/Documents/Issues/Women/WRGS/ForcedMarriage/NGO/WomenAndJusticeFellow5.pdf>>  
accessed 30 October 2019

### 3.3.1. Muslim Law

A marriage between a Muslim male and female is a civil contract, not a sacrament.<sup>47</sup> The laws relating to marriage and divorce of Muslim people are governed by the Islamic Law.<sup>48</sup> The *Muslim Family Law Ordinance, 1961(MFLO)* regulates the solemnization and termination of marriage of the Muslim people but MFLO does not set the minimum legal age of marriage. In Sharia Law, puberty is the determinant factor for a child marriage.<sup>49</sup> According to Islamic Law, a person who has reached the age of puberty must give consent to his/her marriage.<sup>50</sup> The parent or other guardian of a child who attained age of majority has no right to give consent on behalf of that child and neither the court does have the right.<sup>51</sup> In Muslim Law, a guardian may give marriage to his/her child before she attains puberty. But after attaining puberty within one year she has the right to repudiate that marriage.<sup>52</sup> This is called **option of puberty**.

On the other hand, *Section- 19 of the Child Marriage Restraints Act, 2017* allows the child marriage in the special circumstances with the consent of parents and Court. But this section does not say about the consent of child brides for marriage who attained the age of majority under the Muslim Law and also does not say anything about the option of puberty. This new law does not ensure the right of the Muslim girls which they got through their religious law.

### 3.3.2. Hindu Law

The Dayabagha School is the origin of most Hindu laws on marriage and separation governing Hindu Practices.<sup>53</sup> According to Hindu Law, marriage is a holy union and is considered

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<sup>47</sup> Anwar Hossain vs. Momtaaz Begum, [1999] CLC 18 (HCD)

<sup>48</sup> The Muslim Personal Laws (Shariat) Application Act 1937, s- 2

<sup>49</sup>Dr Muhammad Ekramul Haque, *Muslim Family Law: Sharia and Modern World* (Dhaka: London College of Legal Studies, first published 2015)75.

<sup>50</sup> Dr. Shahnaz Huda, 'A Policy Brief on the Child Marriage Restraint Act, 2017: CARE Bangladesh' (2017) AB 7

<sup>51</sup> ibid

<sup>52</sup>Dr Muhammad Ekramul Haque, *Muslim Family Law: Sharia and Modern World* (Dhaka, published 2015) 76

<sup>53</sup> Human Rights Watch, 'Harm to Women from Bangladesh's Discriminatory Laws on Marriage, Separation and Divorce, 28-29 (2012) <<https://www.hrw.org/sites/default/files/reports/bangladesh0912ForUpload.pdf>> accessed 30 October 2019

indissoluble.<sup>54</sup> The marriage of Hindu people is governed by the Hindu customary law and under Hindu Law there is no minimum age for marriage.<sup>55</sup> The child marriage has allowed with the consent of the guardians under Hindu law. In 2012 Bangladesh has enacted the *Hindu Marriage Registration Act, 2012* by stating that such Hindu marriage will be registered in which the minimum age for brides 18 and for grooms are 21years of age.<sup>56</sup> The *Hindu Marriage Registration Act, 2012* allows Hindus to register their marriage but does not make it compulsory.<sup>57</sup>

It appears that it indirectly gives an opportunity to the perpetrator who commits child marriage to keep it undocumented. The Hindu law does not protect the minor from child marriage and there is no provision of divorce in Hindu Law of Bangladesh and if a marriage is constituted under the *special provision of CMRA 2017*, the marriage will prevail for lifetime of Hindu child. For that reason, the new law could not ensure the right of the Hindu minors to get rid from child marriage because of *section-19 of the CMRA 2017*.

Due to time and resource limitations, I could not able to discuss the Christians law and other special law regarding child marriage.

After analyzing *section 19* in the existing legal provisions of Bangladesh, we are trying to find out whether it is applicable in the case decision of Bangladesh.

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<sup>54</sup>Sara Hossain and Lynn Welchman, 'remedies for forced marriage' (2014) <<https://www.blast.org.bd/content/Resources/Remedies-for-Forced-Marriage-Bangladesh.pdf>> accessed 30 October 2019

<sup>55</sup> *ibid*

<sup>56</sup> Hindu Marriage Registration Act 2012, Sec- 4 (5)

<sup>57</sup> *Id* Sec-3

## -----CHAPTER- FOUR-----

### THE ROLE OF JUDICIARY

Since the new Child Marriage Restraint Act 2017 has recently been introduced by repealing the previous Act, case law on its application is not yet publicly available. This chapter analyses the case law and the role of Judiciary in determining the best interest of child.

#### 4.1. Case laws:

In the below cases, the parents of the minor girls filed the case under 1929 CMRA for declaring a marriage invalid on the ground that their minor girls were kidnapped or abducted and forced into marriage. Therefore, the Court provides different Judgment in different cases and could not resolve the ambiguity regarding the validity of child marriage.

In *Mst. Bakshi v Bashir Ahmad & Anr case*,<sup>58</sup> the petitioner filed the case alleging the respondent that respondent forcibly married her minor daughter. The issue was whether the marriage between them was legally valid? The court held that the marriage under 16 years of age is considered as punishable offence under the Act but it does not become invalid. The Court also found that petitioner could not regain custody of her married daughter who is above the age of 15 because after marriage the parental guardianship rights are terminated under the Muslim Law.

In *Fatema Begum v Gageswar Nath & the State case*, the petitioner filed a complaint against respondent alleging that respondent kidnapped her minor daughter and forcibly married her but the minor denied it and told before the court that she married the respondent at her free will. The issue was whether a married girl above the age of 16 years of age should be compelled to return her parent? The court held that the girl could not be considered minor under *section 361* of the Penal Code and there is no basis for compelling a married girl to be under the custody of her father.<sup>59</sup>

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<sup>58</sup>Mst. Bakshi v Bashir Ahmad & Anr [1970] DLR 22 (SC) 289

<sup>59</sup>Fatema Begum v Gageswar Nath & the State [1989] BLD 9 (SC) 469. Section- 361 of the Penal Code states that ‘any person who takes a female above the age of 16 with her consent, out of the keeping of the lawful guardian is not guilty of the offense of kidnapping.’



In *Krishana Pada Dutta v The Secretary of Home Affairs & Others case*,<sup>60</sup> the Court held that even though the girl accepted before the court that she had married at her free will, a married girl below the age of 18 to be put her in her parent's custody under the Majority Act 1875 read with the Guardian and Wards Act 1890.

In *Bimal Kanti Roy v The States & Others case*, the court reviewed previous case decisions under the 1929 CMRA and found them to be conflicting with regards to who is entitled to the custody of a minor girl until she becomes a major in circumstances where she goes away with a boy and gets married to him.<sup>61</sup>

As review of the above cases shows that child marriage has not declare invalid and there is no uniform decisions from the court regarding the custody of minor child, even in the new Act, these ambiguities has not been cleared. If a minor girl goes away with a person and get married to him, court declared it as a punishable but according to *section-19* of the new Act, if that girl became pregnant, child marriage would not be considered as punishable offence. So, there has an apprehension of legalizing child marriage under this section.

#### **4.2. The Role of Judiciary in Determining Best Interest of Child**

On 4<sup>th</sup> April, 2017 a writ petition filed by the BNWLA and Nari pokkho to challenge the Constitutionality of section 19.<sup>62</sup> On following such writ petition, a circular was passed by the HCD being **Circular No. 9844 dated 19 November 2017**. It has found from the circular that even though section-19 says about the permission of the Court has to be taken in special cases; some courts gave the permission of child marriage under section-19 without conducting the inquiry or investigation to determine the best interest of child.<sup>63</sup> For that reason, HCD gave a direction in that circular that in case of disposal of any application made under section-19 of the CMRA, the court have to make local inquiry in order to determine the truth of the incidence to

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<sup>60</sup> *Krishana Pada Dutta v The Secretary of Home Affairs & Others* [1990] 10 BLD (SC) 301

<sup>61</sup> *Bimal Kanti Roy v The States & Others* [1994] 46 DLR 541

<sup>62</sup> Staff Correspondent, 'Anti-child Marriage Law: HC questions spl provision, (Dhaka, 11 April 2017) <<https://www.thedailystar.net/newspaper?date=2017-04-11>> accessed 8 December 2019

<sup>63</sup> Staff Respondent, 'The proper execution of section-19 of the Child Marriage Restraint Act should be ensured' ProthomAlo (Dhaka, 19 November 2017) <<https://www.prothomalo.com>> accessed 9 November 2019

follow the procedure of section-16 of the CMRA.<sup>64</sup> The circular had issued before the Secretaries of Law Ministry and Women and Children affairs Ministry, before the District and Session Judge, the judge of Nari-O-Shishu Nirjatan Domon Tribunal, Chief Metropolitan Magistrate and Metropolitan Magistrate.<sup>65</sup> On 3 January 2018, to execute the direction of HCD, Women and Children affairs Ministry issued a notice before the Upazila Women Affairs Officers.

To determine the best interest of child, the court should consider wishes of the child if she is capable to express her reasonable preference, evidence of child abuse, age of child, presence of any pattern of violence, emotional abuse, mental or physical health with the ultimate safety and happiness of the child. After analyzing best interest of child, I am trying find out international responsibility of Bangladesh in light of child marriage.

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<sup>64</sup> *ibid*, Section-16 of the CMRA says that the court may in case disposal any complaint or application make local inquiry of its own or may direct any government official or any representative of any local government or any other to ascertain the truth within 30 days, if such inquiry cannot not complete within that period, then complete within additional 15days.

<sup>65</sup> *ibid*

## -----CHAPTER: SIX-----

### THE INTERNATIONAL FRAMEWORK REGARDING CHILD MARRIAGE

This chapter analyses the dimension of child marriage in International law perspective and the obligation of Bangladesh to follow those International law.

#### 5.1. International Frameworks

From the following conventions, it would be found that consent is required to inter into marriage and a child has no legal capacity to give consent and every state has the responsibility to ensure the best interest of child.

##### 5.1.1. The Universal Declaration of Human Rights (UDHR) and International Convention on Economic Social and Cultural Rights (ICESCR)

*Article-16(1) of the UDHR* says that men and women of full age have the right to marry and they are entitled to equal rights as to a marriage, during marriage and at its dissolution.<sup>66</sup> *Article-16(2)* says that the parties shall have the right to enter into the marriage with free and full consent.<sup>67</sup> *Article 10 of ICESCR* provides that marriage must be entered into with free consent of the intending spouse.<sup>68</sup> UDHR is considered as a part of customary international law and Bangladesh is signatory of these conventions and has obligation to follow them.

##### 5.1.2. The Convention on the Elimination of All forms of Discrimination against Women (CEDAW)

According to *section 16(1)* State to take appropriate measures to provide equal rights to the parties to enter into marriage and have the equal rights freely to choose a spouse with their free and full consent and the same rights also provides in case of dissolution.<sup>69</sup> According to Article-

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<sup>66</sup> The Universal Declaration of Human Rights 1948, Art- 16(1)

<sup>67</sup> *ibid* Art- 16(2)

<sup>68</sup> International Convention on Economic Social and Cultural Rights 1966, Art-10

<sup>69</sup> The Convention on the Elimination of All forms of Discrimination against Women 1979, Art- 16(1)

16 (2) of the Convention, ‘the betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage.’<sup>70</sup> The CEDAW has recommended that age to be 18years.<sup>71</sup> Bangladesh has ratified CEDAW in 1984 and one of the active members of CEDAW. Bangladesh had formulated *National Women Development Policy 2011* to implement this convention. According to the policy, stern enforcement legislation against child marriage, rape of female child, abuse and repression has formulated to development of female child.<sup>72</sup>

### **5.1.3. Convention on the Rights of the Child (CRC)**

CRC does not address child marriage directly but it sets certain rights to protect the children from child marriage. *Article- 3 of the CRC* says that state undertakes all appropriate legislative and administrative measures to ensure best interests of the child.<sup>73</sup> Article-12 says that child has the right to express his/her views freely in all the matters affecting the child in accordance with age and maturity.<sup>74</sup> *Article- 19 & 34* says that state shall ensure the right to protection from all forms of physical or mental violence including sexual exploitation. <sup>75</sup> Bangladesh ratified the CRC on 1990. Bangladesh had formulated *National Children Policy 2011* to implement this convention. According to the policy, children have the rights to protect from violence, child marriage, trafficking and forcing into commercial sex. <sup>76</sup>

## **5.2. Sustainable Development Goal (SDG) and the Role of Bangladesh**

Bangladesh is an active participant of Sustainable Development Goal (SDG). One of the targets of SDG is to achieve gender equality and empower girl and to eliminate all harmful practices of child marriage. <sup>77</sup> Bangladesh has the responsibility to end child marriage from Bangladesh and

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<sup>70</sup>ibid, Art- 16(2)

<sup>71</sup> CEDAW Committee, “General Recommendation No. 21, ‘Equality in marriage and family relations, UN GAOR,” (1994) Doc No A/47/38

<sup>72</sup> The National Women Development Policy 2011, policy-18.1

<sup>73</sup> The Convention on the Rights of the Child 1989, art-3

<sup>74</sup> ibid Art-12

<sup>75</sup> Ibid Articles- 19 & 34

<sup>76</sup> The National Children Policy 2011, policy- 7(4)

<sup>77</sup> Sustainable Development Goal (2016-2030), SDG5

to ensure gender equality. To fulfill the obligation, Bangladesh has formulated the National Plan of Action to End Child Marriage (NPA), (2018- 2030) which aims to enhance the awareness of harmful effects of child marriage and to introduce the legal remedies for girls whose rights are violated for child marriage.<sup>78</sup>

In contrast, Bangladesh has enacted section-19 which indirectly allows child marriage in special cases. In Bangladesh, a child has no legal capacity to give consent for marriage but she can force to inter into a marriage. If a child has no legal capacity to give consent, then surely child cannot marry. *Section-19* creates an obstacle for Bangladesh to fulfill the International responsibility of Bangladesh in light of the International Conventions and SDG. *Section-19* of the Act is contradictory to the other works of Bangladesh to eliminate child marriage from Bangladesh. In the next chapter, the outcome of this research will be discussed and prospective solutions of those problems have been provided.

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<sup>78</sup> UNICEF, ‘Plan of Action launched to eliminate child marriage in Bangladesh’ (2018) <<https://www.unicef.org/bangladesh/en/press-releases/plan-action-launched-eliminate-child-marriage-bangladesh>> accessed 9 November 2019

## -----CHAPTER- SIX-----

### FINDINGS, RECOMMENDATIONS& CONCLUSION

In this chapter, it illustrates the findings from above research and then I have recommended some prospective solutions for the outcomes of the research with a concluding remark.

#### 6.1. Findings of the Research

The main purpose of this research is to find out the rationality of incorporation of *section 19 of the Child Marriage Act 2017* in perspective of Bangladesh. It is found out that:

- i. The incorporation of *section- 19* is contradictory to the purpose of the Act itself. *Section-19* allows child marriage in special cases but giving validity to get married to any child under special circumstances does not make the child an adult; it also amounts to a child marriage, it also violates the rights of the child.
- ii. Child rights are guaranteed by the Constitution of Bangladesh. Since child marriage violated the fundamental rights of the children, special provision which allows child marriage in special cases also indirectly violates the fundamental rights of children which is guaranteed by the Constitution.
- iii. *Section-19* may allow the parents to marry off their minor daughter with her rapist. It appears that section-19 indirectly validate unwanted physical relationship in statutory rape cases.
- iv. *Section-19* allows child marriage in case of unlawful pregnancy of an unmarried girl because abortion of unborn child is not legal in Bangladesh but the legislator did not consider that Bangladesh has an extensive provision for the child born as an aftermath of rape under *section-13 of the Prevention of Oppression against Women and Children Act, 2000* .
- v. Bangladesh has no ‘uniform statutory laws’ regarding age of consent for marriage and sexual intercourse. A girl can marry at the age of 18 but she can give consent for sexual intercourse at the age of 14. It appears from the laws that extra-marital sexual intercourse before marriage is indirectly legalized in Bangladesh.

- vi. In Muslim Law, consent is required to give marriage of a girl after attaining age of puberty. But in statutory law, a child has no legal right to give consent for anything. If a child cannot give her consent, then surely she cannot marry. Section-19 creates an inconsistency in age and consent.
- vii. In Hindu Law, consent of child is not required for marriage and there is no provision of divorce in Hindu Law. If a marriage is constituted under the *section-19*, the marriage will prevail for lifetime of Hindu girl and it would be injustice with her.
- viii. Bangladesh has ratified CRC to ensure best interest of child and also an active participant of SDG which targets is to end child marriage from the world. Bangladesh has obligation to fulfill its responsibility. But *section-19* is contradictory to the international responsibility of Bangladesh to end child marriage and ensure best interest of child.
- ix. Even though court permission is required for child marriage in special cases, some courts gave the permission upon the application of the parents without conducting inquiry or investigation.

## **6.2. Recommendations**

The core argument of my paper is that *section-19 of the Child Marriage Restraint Act 2017* has an apprehension to be misused by the people. Therefore, there are some proposals for the outcomes of the research for ensuring children rights. This are-

- i. The lawmakers should enact ‘uniform statutory laws’ regarding age of consent for marriage and sexual intercourse of girls and should amend those provisions of statutory laws which contained this different age.
- ii. Enable evidence based advocacy and communication at national and local level to raise awareness on the issue of age and gender based discrimination, child marriage and its consequences.
- iii. Empower the girls with necessary training on life skills, vocational and livelihood skills which will help the girl to gain the self confidence to looks jobs alternatives to marriage. The guardians also reconsider marrying them off too early after seeing their daughter to do job.

- iv. Creating a powerful system for data collection/ analysis on the sexual and reproductive health of adolescents including unmarried minor girl to inform policy and program.
- v. If the government's goal is to reduce minor girl's pregnancy, it should teach practical lessons about family planning in all schools, make it easy for young people to obtain contraception and make abortion safe, legal and unrestricted for unmarried minor girl.
- vi. The government should ensure that in every educational institution moral education must include besides the academic education for the adolescent's to teach them to do sexual harassment and assault with any people is wrong.
- vii. *Section-19* is creating anomalous situation in the evaluating existing situation. The court should give specific directions and guideline in case of applying *section-19*. To interpret *section-19*, mischief rule of interpretation should apply. The court need to check what was the previous Act before enacting this special provision in order to find out the gap of the law and to interpret the intention of legislators for enacting this law.
- viii. One of the targets of SDG is to achieve gender equality and to eliminate child marriage from the world. Since Bangladesh is a participant of SDG, the government of Bangladesh should amend such law which encourages child marriage.
- ix. Since *section-19* is contradictory to the Constitution, it should be amended and cleared out. The HCD should give a proper direction to clear the ambiguities of this provision.

### **6.3. Conclusion**

Child marriage grossly violates the rights of the girl child to be free from all kind discrimination and slavery. Although our society does not want to accept an unmarried girl along with her illegitimate child, child marriage is not the solutions of that problem. Child marriage in special circumstances does not make a child to an adult; it still remains a child marriage. It violates the fundamental rights of the children which has guaranteed in the Constitution. The government should empower the girls with necessary training of life skills and livelihood so that they can gain confidence to looks job rather than to marry. Section 19 creates an anomalous situation in



evaluating the existing legal system. Section-19 also creates obstacles to fulfill the international responsibility in light of child marriage. There are lots ambiguities in implementation of section-19 and to clear these ambiguities, the HCD should give specific guidelines.

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