The Use of Compromise in the Formal Courts of Bangladesh for Alleged Incidents of Violence against Women and Girls

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I. Introduction:

The people of Bangladesh, particularly women and children, traditionally have no viable legal recourse when they are victims of crimes or deprived of their fundamental rights. The formal justice system is expensive, complex, and time consuming, making it inaccessible to the vast majority of its citizens. Similarly, the local justice system, which is typically controlled by the male village elders, tends to protect the status of the male social elite rather than the rights of women or the poor. To complicate matters further, women in rural villages are typically dependent on their husbands for financial support, which leaves them almost no means by which to escape dangerous domestic situations.

In order to improve the accessibility of justice for women and children who are victims of violent crimes, the Government of Bangladesh enacted the Nari-o-Shishu Nirjantan Damon Ain ("the Anti Women and Children Oppression Act" or simply "Nari-o-Shishu"). The Act establishes special tribunals with exclusive jurisdiction over all cases brought under it in each of Bangladesh's sixty-four districts. Punishments under the Act are formidable, including the death penalty and mandatory life imprisonment. Many crimes, such as rape, carry life imprisonment as the only available sentence. All of the offences are considered crimes against the state, and thus are not technically permitted to be compromised out of court.

In many respects, the application of the Nari-o-Shishu Act has been an astounding success. Forty-two special tribunals in thirty-two districts have already been established.[1] The most recent police statistics compiled by the Bangladesh Bureau of Statics reveals that in 2007 alone a total of 13,244 cases under the Act were filed with the police, indicating it is accessible to women and children. In actuality, the number of cases filed is likely to be even higher, as an additional 2-5 cases per day is typically filed in each tribunal and thus not recorded by the police.

Unfortunately, the tribunals are also criticized by many judges, prosecutors, and defense lawyers who commonly estimate that upward of 90% of the cases are "false", which the Bangladesh legal system tends to defined as cases that result in the acquittal of the accused because the case against him/her could not be proved beyond a reasonable doubt, but implies they were filed vexatiously to harass a husband, scorned-lover, neighbor, or any other person. It is not uncommon for the citizens of Bangladesh, both those who work within the legal system and those who do not, to assert the tribunals are a way to "torture" men rather than a means to sanction the injustices suffered by women.

False cases within the tribunals have been well researched and documented as a means of social control when a daughter marries a man to whom her family does not approve, likely because he

[1] United States Department of State, "Trafficking in Persons Report" (*2011*) *available at* http://www.state.gov/j/tip/rls/tiprpt/2011/164231.htm (last visited Feb. 20, 2012).

is of a different religion or from a lower social class, and the parents file a case alleging that their daughter is both a minor and victim of a crime at the hands of her lover, such as kidnapping or rape. The charges tend to land him in prison and her a ward of the state.[2] These studies have focused on cases that have been filed by third parties, rather than cases where the alleged victim is the petitioner. Further, they focus on the impact that the false cases has on the alleged victim, and give little attention to the impact that these cases have on the accused and the rule of law.

There has also been research on compromising cases concerning Violence against Women, including rape, in neighboring India, from which the area now known as Bangladesh gained its independence in 1947. These studies, however, limit their focus to how compromise allows the victim, her family, and even the alleged perpetrator to preserve honor.[3]

In this study, I focused on false cases as a means to promote financial security, particularly in cases where the alleged victim filed a case in the tribunals to compel the accused, typically an (ex)husband, to take financial responsibility for her well-being rather than pursue criminal sanctions. In essence, these women are using the tribunals to secure social justice rather than retributive justice. Several of the cases observed are based on facts that have been exaggerated or even made-up in order to bring chargers under the jurisdiction of the Act. Others are grounded in fact, but are generally regarded as false by the Bangladesh legal community because they did not end in conviction.

I neither condemn nor condone the practice of using the tribunals as a means to negotiate financial and social security for some of the country's poorest and most-vulnerable citizens. Rather, I aim to shed light on the existence of the technically illegal and heavily criticized practice that has emerged as a means to empower the country's most un-empowered and highlight some of the negative consequences that have resulted, likely as a result of it being unregulated.

This paper is divided into four main sections. Following this introduction, which sets out the methodology and limitations of the study, is section two, which describes the current state of women and girls in Bangladesh, emphasizing their secondary position in society which makes them vulnerable to violence. Section three outlines the options for women and girls who have been victims of violence in Bangladesh, analyzing the pros and cons of each. It includes an

[2] Sara Hossain, "Wayward girls and well wisher parents: Habeas corpus, women's rights to personal liberty, consent to marriage and the Bangladesh Courts" in A. G. (Eds), *Contesting Forced Marriages: Introducing a Human Rights and Social Justice Approach to Issues of 'Harmful Practices'.* Zed Press. Forthcoming; Dina Siddiqi, "Forced Marriage in Bangladesh: of Consent and Contradiction." In Hossain and Welchman (Eds) *'Honour' Crimes, Paradigms, and Violence Against Women.* (2005).

[3] Pratiksha Baxi, "Justice is a secret: *Compromise* in rape trials", *Contributions to Indian Sociology* 44, 3, (2010): 207-233; Daniela Berti, "Hostile Witnesses, judicial interactions and out-of-court narratives in a north Indian district court" *Contributions to Indian Sociology* 44, 3 (2010) 235:263.

analysis of the Nari-o-Shishu Act and demonstrates how it is currently the strongest and most user-friendly legislation for women and children in Bangladesh. Section four discusses how compromise is used within the tribunals as a means to provide financially vulnerable women with economic and social support. Through the course of the paper I assume that the alleged victims are female, because only one male child[4] was alleged to be a victim during the entire course of trial observation.

Methodology:

The primary methodology used in this study was participant observation in the formal courts of Bangladesh. A total of thirty-four days were spent in court during the course of the research period. Trials were observed in a variety of locations to gain an understanding of how both the size of the district and philosophies of the judges and public prosecutors influence the proceedings. The locations selected were Barisal, Chittagong, Dhaka, Khulna, Madaripur, Rangamanti, and Sirajganj,[5] to allow for diversity in geographic location and size of jurisdiction.

In addition to the Nari-o-Shishu tribunals, family courts and Sessions (criminal) courts were also observed to gain an understanding of how the tribunals compare to the other available options for obtaining justice through the formal justice system, and mediation sessions were observed to gain a deeper understanding of the informal justice system.

Whenever possible, interviews were conducted with judges and public prosecutors of the tribunals and courts visited. In total, seven Nari-o-Shishu judges and fifteen public prosecutors were interviewed. Three family court judges were also interviewed. A set of standard questions was prepared for each interview, but most of the interviews quickly became free-flowing conversations which focused on the judge and public prosecutor's philosophies and concerns with access to justice, particularly for women. In addition, informal interviews were frequently held with defense lawyers, who were eager to share their perceptions of the tribunals and the court system in general.

Interviews were also conducted with lawyers from four of the country's most prominent legal aid NGOs: Ain o Shalish Kendra (ASK), the Bangladesh Legal Aid and Services Trust (BLAST), Bangladesh National Women's Lawyers Association (BNWLA), and the Madaripur Legal Aid Association (MLAA). These free-flow interviews focused on the services that the organizations provide and the challenges they see in the delivery of justice for women and children who are victims of violent crimes.

[4] The Anti Women and Children Oppression Act, 2000 amended 2003 at 2(k) defines a child to be under the age of 16

[5] It should be noted that neither Barisal or Rangamanti had a dedicated tribunal at the time of the visit.

Two NGOs, Nijera Kori, which does not provide direct legal services but assists the "ultra poor" in obtaining legal services, and MLAA, mentioned above, provided the opportunity to travel to villages in Khulna, Madaripur, and Sirajganj, to speak with people who were affected by the Nari-o-Shishu tribunals, either as victims, petitioners, or accused. All of the people we spoke with were pre-selected by MLAA or Nijera Kori, and the staff sought preliminary permission to conduct the interview. Those that agreed were again informed of the voluntary nature of their participation at the beginning of the interview. At the conclusion of the interview, their permission was again sought to share their information with people who are interested in learning more about their lives. All of the participants were clear that they were happy to share their experiences with as many people that were willing to listen.

Interviews were also conducted with users of the Nari-o-Shishu tribunals through a prepared questionnaire administered by bi-lingual law students. Before beginning the interview, the alleged victims and the accused were told that the interview was for academic research and would in no way impact their case. Several people opted not to participate or stop in the middle of the survey, which indicated to us that they were aware they were not required to participate in the study. Surveys were only conducted directly with the alleged victim or an accused, and any requests for a family member to serve as a spokesperson were declined. In total, 73 at-court interviews were concluded with the accused and 17 with alleged victims. This is further addressed in the study limitations section below.

Limitations of the Study:

This study was not able to capture all of the nuances that exist in the Nari-o-Shishu tribunals. One of the major obstacles is that it was conducted by a non-Bangla speaking foreigner. The language barrier was addressed by hiring three translators who were fluent in both English and Bangla and could easily whisper translations in real time during participant observations and quickly translate interviews and conversations. In addition to the language barrier, my presence clearly impacted the observations and interviews. For example, on two occasions the lawyers stopped speaking to the judge in Bangla and began making their arguments to me in English. On another occasion, the judge requested that a sensitive case not be heard in my presence. In villages a large crowed would often gather to hear the interviews I was conducting. While this problem could never be truly over-come, efforts were taken to reduce it, including not appearing in court on a regular schedule and reassuring people that I was there to observe and not critique individual performances.

Another limitation of the study is that time and resources did not allow for the workings of the tribunals to be quantified. Several months were required to grasp many of the intricacies of the tribunals' workings, which left insufficient time to gather a sufficient amount of datum for a

meaningful analysis. Additionally, financial limitations inhibited the surveys from being conducted in locations outside of Dhaka. The survey data here can present a sense of the thoughts and experiences of some of the participants, but a more intensive survey is needed to give conclusive evidence of people's experiences with the tribunals.

Similarly, the questions that could ethically be asked at an in-court survey were limited to questions that would not have an impact that would influence a case if it was overheard by the judge or opposing party/lawyer. For example, while this study would be greatly augmented by asking an alleged victim whether she preferred the case to resolve through compromise or a final judgment, the potential for it to influence the outcome of the case was too high.

This study was also limited in focus to how women in the lowest socio-economic status chose to redress incidents of gender based violence. Women from higher classes were typically quick to point out that their options are more restricted because of more societal pressure to keep such incidents quiet. While additional studies should focus on how women from middle and upper classes resolve similar issues, it is fascinating to note that the perception in the higher classes is that women from lower classes have greater access to justice, despite the increased financial barriers.

Finally, because this paper is not intended to criticize or single out judges and lawyers, the names of those interviewed and/or observed have been intentionally excluded from the paper. The location of the observations have also been excluded because there is only one tribunal in many of the districts that were observed.

II. Status of Women and Girls in Bangladesh

Bangladesh is permeated by a strong patriarchal culture that subjects the majority of women to a lifetime of relentless discrimination, neglect, and violence in all facets of their public and private lives.[6] To quote the government "Women's social vulnerability is all-pervasive and endemic. Discrimination against women at the social level are reflected in their confinement within the homestead, lack of mobility in the public space, women's early marriage, etc. Women have weak protection socially and legally in the event of break-up of marriages. They face high levels of vulnerability such as losing honour, high degree of divorce and abandonment."[7]

[6] Naripokkho, "Situation Analysis Report of Violence against Women in Bangladesh" (2011) at para 9; Naila Kabeer "Growing Citizenship from the Grassroots: Nijera Kori and Social Mobilization in Bangladesh." *The Journal of Bangladesh Development Studies*. Vol. XXIX, September-December 2003 Nos 3 & 4.

[7] Government of Bangladesh, *Poverty Reduction Strategy Paper (*2005) *available at* http://www.imf.org/external/pubs/ft/scr/2005/cr05410.pdf (last visited Feb. 12, 2012) at 5.384.

The government should share in the culpability of creating an environment that is caustic and potentially dangerous to women, as it has repeatedly fallen short of recognizing women as equal to men. For example, the Constitution of Bangladesh, 1972, enshrines the principle that "women shall have equal rights with men in all spheres of the State and of public life,"[8] but fails to extend the fundamental right to the private sphere. Similarly, when Bangladesh became party to the United Nations Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) on November 6, 1984, it made reservations on accession to several articles that it believed contradicted *Sharira* Law.[9] The reservations were made with respect to Article 2, which requires party states to "pursue by appropriate means and without delay a policy of eliminating discrimination against women" which must take such measures including a) embody the principle of equality between men and women in the national constitution, b) adopt legislation that prohibits discrimination against women, c) establish equal legal protections for women, d) refrain against policies that discriminate against women, and e) take actions to eliminate discrimination against women by any person, organization or enterprise; and Article 16 (1)(c) which requires member states to ensure the same rights and responsibilities during marriage and its dissolution for men and women.

It is believed that as recently as 2009, only half (51%) of the Bangladeshi women over the age of fifteen were literate, a rate 17% less than that of males (60.7%).[10] Similarly, girls are commonly married below the age of 19 (46%) and have their first baby before reaching 18 (40%),[11] resulting in them dropping out of school and devoting the remainder of their lives to housework and raising children.[12] Less than a third of all women (29.2%) participate in the labour force.[13] The government fears that the current state of many women leaves them highly vulnerable to trafficking.[14]

One of the most serious problems facing women within Bangladesh is violence (VAW). To quote the government again "the worst form of social discrimination takes place in terms of VAW both in public spaces and also within the households. Such high incidence of VAW

[8] Constitution of Bangladesh, 1972 at Article 28(2).
[9] UN Convention on the Elimination of all Forms of Discrimination against Women, 1979 .
[10] UNESCO, *Institute of Statistics focus on Bangladesh, available at* http://stats.uis.unesco.org/unesco/TableViewer/document.aspx?ReportId=124&IF_Language=eng&BR_Country=500&BR_Region=40535 (last visited Feb. 22, 2012).
[11] UNICEF, *fact Sheet by country 2009, available at* http://www.unicef.org/infobycountry/bangladesh_bangladesh_statistics.html (last visited Feb. 20, 2012).
[12] BRAC Global Learning Conference, February 6-8, 2012.
[13] Bangladesh Bureau of Statistics (2005) *available at* http://www.bbs.gov.bd/Home.aspx (last visited Feb. 29, 2012).
[14] Poverty Reduction Strategy Paper, *supra* note 7 at 5.385.

makes them economic and social liabilities to their families and to the society. Thus it adds to their devaluation in the society."[15]

Domestic violence is rampant in the country. In a 2008 study of women in rural areas of Bangladesh, it was found that 67% of the respondents had been beaten by their husbands.[16] Similarly, a 2001 study of women in urban and rural Bangladesh conducted by the World Health Organization found that 53% of the women in urban areas and 62% in rural areas had ever been subjected to physical or sexual violence by a partner.[17] The official government numbers are even higher: in 2006 it was believed that 75% of women had experienced both physical and sexual violence.[18] A recent study by CARE-Bangladesh quantified the cost domestic violence had on women, the perpetrators, their families, communities, and the state and found that, to date, the price tag is at 1.7 billion USD.[19]

Moreover, violence against women is frequently accepted by society. A recent research study found that 60 percent of men in urban and rural areas of Bangladesh believe both that a) at times a woman deserves to be beaten and b) a woman should tolerate violence to keep her family together.[20] Worse, a 2005 study found that three-quarters (77%) of the interviewed Bangladeshi female respondents believed that a husband had the right to beat his wife.[21] This sentiment holds true even in the younger generation: 41% of females aged 15-19 reported that a husband is justified in hitting or beating his wife under certain circumstances.[22] By way of illustration, on June 5, 2010 a university professor's eyes were gauged out and her nose bitten off by her husband who suspected her of having an affair.[23] The law students of Dhaka University, the country's premiere university, were reportedly split on whether she deserved the attack.[24]

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[15] *Id* at 5.384

[16] Sydney Ruth Schuler and Farzana Islam, "Women's Acceptance of Intimate Partner Violence within Marriage in Rural Bangladesh" *Studies in Family Planning* 39:1 (2008) 49-58 at 55.

[17] World Health Organization, "Multi-country Study on Women's Health and Domestic Violence against Women, Bangladesh Country Findings" *available at* http://www.who.int/gender/violence/who_multicountry_study/fact_sheets/Bangladesh2.pdf (last visited February 29, 2012).

[18] Bangladesh Bureau of Statistics, *supra* Note 13

[19] Kaniz Siddiqi, "Violence Against Women: Cost to the Nation", CARE-Bangladesh, *forthcoming*

[20] Naved Huque and Farah Shuvra, "Men's Attitude and Practices regarding Gender and Violence against Women in Bangladesh, Preliminary Findings,"ICDDR,B, forthcoming, cited from Naripokkho, *supra* note 6.

[21] Hamida Akhta Begum, "Combating Domestic Violence through Changing Knowledge and Attitude of Males: An Experimental Study in Three Villages of Bangladesh" 12 *Empowerment* (2005) 53-74.

[22] UNICEF fact sheet, *supra* note 11.

[23] No Ray of Light, *Daily Star,* June 19, 2011 http://www.thedailystar.net/newDesign/news-details.php?nid=190568 (last visited Feb. 29, 2012).

[24] Informal conversation with Dhaka University law student on June 30, 2011.

III. Options for Women and Girls who are Victims of Violent Crime in Bangladesh

In this section I examine some of the resources and recourses currently available for women and girls who are victims of violent crime, focusing on those who are not financially able to obtain their own services. My intention is to demonstrate both that the ability to access necessary social services is quite limited and that the traditional justice system remains the most accessible means for resolving conflict in Bangladesh, including incidents of gender based violence. The section also includes an analysis of the legislative options available for women who opt to pursue a case through the formal courts.

Admittedly, the options listed are heavily focused on victims of domestic violence, but this accurately reflects both the services available and the predominant form of Violence against Women in Bangladesh. Further, it is by no means an exhaustive list, but is my understanding of the most common methods after spending close to two years in the country. The list is also not mutually exclusive, a woman or girl may pursue any combination of the options.

Return to the Natal Home:

From the perspective of a person unfamiliar with the culture of Bangladesh, one of the perceived simplest options for a woman who has been a victim of a violent crime, particularly one at the hand of an intimate partner, would likely be to seek refuge in her natal home. Unfortunately, in Bangladesh, many families marry their daughters because they simply cannot afford to continue to support them. As such, it is difficult for women to return to their natal homes if they become victims of domestic violence. A 2008 study into why women did not return to their natal home collected the following comments from victims of domestic violence or their families:

- A forty-year-old farmer's wife stated "No way to go back and stay in one's father house. What would a woman eat after going back to her parents? They have trouble enough providing for themselves. That's why a woman stays in her husband's home no matter what he does to her."[25]
- A mother shared that her daughter's husband had brutally beat her with a club. She went to their house and demanded her daughter back, but the son-in-law refused to give the dowry money back. The mother left without her daughter.[26]

[25] Sidney Ruth Schuler, Lisa M. Bates and Firzana Islam, "Women's Rights, Domestic Violence, and Recourse Seeing in Rural Bangladesh" *Violence Against Women,* 14:3 (2008) 326-345 at page 332.
[26] *Id.*

- Another mother explained that her daughter, who was regularly tortured by her husband, lived with her for 15 days every month. She wishes her daughter could live with her full time, but she cannot afford it.[27]

Relying on Social Services from the Government and Community:

The Government of Bangladesh currently offers around thirty social safety net programs to support its citizens with financial needs. The programs include a 100-day employment guarantee scheme, a food for work program, and vulnerable group feeding.[28] A maternity allowance program for "poor lactating mothers" is also being piloted.[29]

According to the NGO Nijera Kori, a common problem with these safety net programs is that the people most in need of the services are often not the recipients, either because they are required to pay a bribe above their financial means or corrupt politicians see that the services go to their friends. Additionally, even if those who needed services were able to easily obtain them, the services offered still might not meet the specific needs of women and children who have been victims of violent crime: a 2007 study on acid based violence concluded that the social services offered by the government are insufficient to provide female victims of violent crime adequate medical, legal, and social support.[30]

Below are descriptions of four initiatives, two led by the government, that have gone to great lengths to attempt to fill the gap of addressing the specific needs of female victims of violent crime. Unfortunately, limitations in funding and resources severely limit the number of women and girls who are able to take advantage of the services.

1. One Stop Crisis Center

The Government of Bangladesh, led by the Ministry of Women and Child Affairs, in collaboration with eight ministries and in partnership with the Government of Denmark, has established six one stop crisis centers (O.C.C.) in major cities throughout the country that provide women who are victims of violent crime with free medical treatment, psychological services, shelter, police protection and legal assistance. The O.C.C. receives clients either

[27] *Id.*
[28] United Nations Development Program, "Social Safety Net Programs in Bangladesh" (2009) *available at* http://www.undp.org.bd/library/reports/2009-02-09%20SSNPs%20in%20Bangladesh%20Upload.pdf (last visited Feb. 29, 2012).
[29] *Id.*
[30] Elora Halim Chowdhury, "Negotiating State and NGO Politics in Bangladesh: Women Mobilize Against Acid Violence" *Violence Against Women* 13:8 (2007) 857-873.

through referrals from the hospital, NGOs, or the woman going directly to the center. Since its inception in 2001, the O.C.C. has dealt with 3,023 cases.[31]

An O.C.C. visited through the course of the research proved to be a clean, bright, secure facility led by a staff of truly dedicated medical practitioners. The doctor of the center was proud of what it had been able to accomplish, but frustrated by its limited resources and inability to provide sufficient services for women to truly escape dangerous living situations; currently women who are unable return to their natal or maternal home are given a sewing machine so that they can have at least some means to generate income. He was also acutely aware of the limited scope of the centers; the O.C.C. where he worked only has 8 beds.[32]

2. Victim Support Centers

The police of Bangladesh, in partnership with the United Nations Development Program (UNDP) established a Victim Support Center in Dhaka in 2009 to provide shelter and coordinate medical and legal assistance for women and children who have been victims of domestic violence, trafficking, acid burns, sexual harassment and rape. Shelter can also be offered to women for up to five days, and reportedly women have been permitted longer stays on a few occasions. The centers are staffed by female police officers, and partner NGOs rotate through the center to provide additional services.[33] In January 2011, the Government of Bangladesh announced plans to establish another seven centers around the country. As of January 12, 2011, the center has been able to provide assistance to 828 alleged victims.[34]

3. Shelter Homes

It is believed that there are several small shelter homes for female victims of violence throughout Bangladesh. An example is one run by the Bangladesh National Women's Lawyers Association, with support from the Asia Foundation, which provides shelter for female victims of domestic violence, over the age of eighteen, while they are pursuing justice through legal aid and community mediation in Chittagong since 2007. The program provides women with shelter, food, counseling, medical services, and access to legal assistance. The women live in a beautiful communal house where they can form a community of support. There is also a huge push to ensure that the women receive job training so that they can be self-reliant after leaving the

[31] Network for Improved Policing in South Asia *available at* http://www.nipsa.in/bangladesh-takes-the-lead-in-the-protection-of-women/ (last visited on Feb. 15, 2012).
[32] Visit on October 20, 2011.
[33] Website of the Police Reform Program *available at* http://www.prp.org.bd/menuvsc.htm (last visited on Feb. 15, 2012).
[34] "More Victim Support Centers to be Established" *the Daily Star*, January 12, 2011, *available at* http://www.thedailystar.net/newDesign/news-details.php?nid=169706 (last visited of February 15, 2012).

homes. Women who have basic skills are sent to school, and those that do not receive basic training, such as learning the alphabet and signing their name, as well as vocational training, such as sewing. The shelter usually has about eight women in the home and is able to help about fifteen women a year.[35]

4. Acid Survivor Foundation

The Acid Survivor Foundation (ASF), was established in 1999 to eliminate acid violence and to provide holistic support for the hundreds of people in Bangladesh blinded and permanently disfigured by acid attacks, particularly women and children. The support provided includes medical, legal, and psychological services free of charge. The NGO hosts its own operating room with skilled surgeons, and has a strong international network of expert surgeons who are willing to perform in the most complicated cases. Victims and their families may remain in the facility for as long as they require medical or psychological care, including physical therapy. Most of the survivors remain with the organization for years, however, as employees who can reach out to the most recent survivors, helping them come to terms with the attack and welcoming them into their tightly-knit community. According to the executive director, one of the biggest challenges faced by the NGO is pursuing legal cases as it is hard to produce sufficient evidence to secure a conviction.[36] In 2008, the organization provided 623 survivors with counseling and therapeutic services.[37]

Mediate Conflict through the Traditional Justice System:

Many women may choose to work with the perpetrator or estranged party to find a solution through the traditional justice system. Traditional dispute resolution is typically mediation, known in Bengali as *Shalish*. It is the preferred method for conflict resolution in Bangladesh because it is faster, more familiar and less expensive than the formal courts.[38]

One drawback of *Shalish* is that the male social elite, who typically serve as mediators, might not be aware of, or sensitive to, the needs of women, particularly those who have been victims of gender based violence or discrimination. This can lead to the impositions of *fatwas,* extra-judicial punishments which typically involve corporal punishment, such as whipping. The High Court recently clarified that extra-judicial punishments are illegal to enforce, but the practice

[35] Visit on October 28, 2011.
[36] Visit on July 7, 2010.
[37] Acid Survivor Foundation Annual Report 2008 *available at* www.acidsurvivors.org/asf_ar2008.pdf (last visisted Feb. 29, 2012).
[38] *See,* Siddiqi, *supra* note 19

remains widely practiced in the rural areas of the country.[39] As an extreme example, in February 2011 Bangladesh received global attention after a fourteen year old girl died as a result of receiving 100 lashes ordered by the village elders as punishment for being raped by her cousin.[40]

To overcome the traditional problems with the informal justice system, the Madaripur Legal Aid Association ("MLAA") modernized traditional Salish into a mediation method that is unbiased, participatory, and rights sensitive, known as the Madaripur Mediation Model ("MMM"). The MMM can be completed within a matter of months and boasts a 96% success rate, measured six months after the completion of the mediation.[41] All of the mediators, a mix of village elders and respected members of the community, including women, receive at least a week of intensive training on the laws of Bangladesh, human rights principles, and mediation techniques. [42]

Mediation outcomes are neither binding nor admissible in court, but most parties abide by the decisions because the parties reached a resolution that was win-win, or at least more preferable to both parties than what could be achieved through the formal court. Key to the success of the MMM is allowing the parties to address and work through the root cause of their problems. A decision is never rushed and mediations are frequently continued to later dates. [43]

The community has responded to the approach: in 2010 MLAA received 9,066 requests to resolve a dispute through mediation and only 436 through the formal courts. Sixty percent of the requests for mediation were initiated by women.[44]

The major problem with the MMM is simply that it not practiced in the vast majority of Bangladesh; MLAA has restricted itself to working in three districts in order to ensure the service delivery is high quality. The Bangladesh Legal Aid and Services Trust has adopted the MMM for its mediations, but it too has restricted its service delivery to only 19 districts. A mapping exercise of the availability of community legal services in Bangladesh undertaken by the Asia Foundation in 2007 found them available in less than forty percent of the country, indicating that the majority of the country does not have access to community legal services, let

[39] Human Rights Watch, "Bangladesh: Protect women against 'fatwa' violence" July 6, 2011, *available at* http://www.hrw.org/news/2011/07/06/bangladesh-protect-women-against-fatwa-violence (last visited Feb. 12, 2012).
[40] "Bangladesh Girl Lashed to Death After Being Raped by Cousin" *The Huffington Post*, February 5, 2011 *available at* http://www.huffingtonpost.com/2011/02/05/bangladesh-rape-fatwa-girl_n_819074.html (last visited Feb. 12, 2012).
[41] MLAA provides free legal assistance to its clients when mediation is not appropriate or achievable.
[42] Madaripur Legal Aid Association Annual Report, 2010. On file with author.
[43] *Id.*
[44] *Id.*

alone the specialized MMM.[45] Another limitation of the MMM is that it is not conducted in cases that are considered crimes against the state, such as incidents of extreme violence.

In addition to the NGOs, local elected officials are also increasingly becoming a trusted means for resolving conflicts within the community. In a 2011 World Bank study of citizen perspectives and experiences with the formal justice system, 90% of the respondents reported that elected representatives should play a role in resolving conflicts.[46] The study points out that while the elected officials may also curtail to the interest of the male elites, the necessity of winning the popular vote in the next election tends to serve as a strong motivator to be accessible and fair to their entire constituent. In fact, the elected officials have significantly more accountability to the general public than do the police or judges.[47] It is not currently known how many women feel comfortable going to an elected official with a personal issue such as domestic violence, nor the level of respect for the law and human rights principles being employed by the elected officials, but it warrants further study.

Adjudicate Conflict through the Formal Justice System

The 2011 World Bank study of citizen perspectives and experiences with the formal justice system revealed that almost all citizens agree with the statement "the courts are an important way for citizens to enforce their rights, even if they access them only on rare occasions" (94%) and "it should be the responsibility of the state to provide free legal aid to indigent citizens to access the formal system (97%).[48] Despite seeing the formal justice system as an essential part of a just society, almost none of the respondents reported to "see the courts as playing a legitimate role in bringing to justice those who commit crimes" (8%).[49]

The main reasons why the courts are not seen as playing an important role in bringing justice to criminal acts is likely because the associated time and costs make it inaccessible to the general public.[50] In 2010, BRAC published a judicial policy note that stated "one of the major problems of the justice sector is delayed dispensation of justice due to huge backlog of cases." It estimated that it would take two years and nine months to dispose of all current pending cases if no additional cases were filed during this period.[51] Costs, which include traveling to court, paying lawyers, and court fees, can quickly exceed the means of most people, especially considering

[45] The Asia Foundation, "Promoting Improved Access to Justice: Community Legal Service Delivery in Bangladesh" (2007) at para 26.

[46] World Bank, "Disputes, Crimes and Pathways of Redress: A household survey on Citizen's Perceptions and Experiences of the Justice System in Bangladesh" (2011) at page 12.

[47] *See, Id* at page 14

[48] *Id* at page 22

[49] *Id* at page 12

[50] Asia Foundation, supra note 46

[51] BRAC "Judicial Policy Note" (2010), on file with author.

that about half of the population currently lives under the international poverty line of USD 1.25 a day.[52]

The police are another major barrier to the formal justice system. The CARE-Bangladesh study referenced earlier found that only 7.5% of rural Bangladeshi women who are victims of domestic violence are willing to go to the police. [53] This finding is supported by the 2011 World Bank study of citizen perspectives and experiences with the formal justice system which concluded that the police were the least trusted public institution.[54] The World Bank survey also found that more respondents did nothing in response to a formal crime than went to the police, and those who went to the police reported poor-record keeping or that their cases were not accepted.[55]

There are a considerable number of female victims of violent crime who opt not to resolve their case through the formal justice system when they are victims of violent crime, even when they are provided access to free support services. Ain o Shalish Kendra ("ASK"), one of the country's most prominent legal aid NGOs, reviews twelve English and Bangla medium newspapers on a daily basis for any mention of violent crimes against women, and then follows up with the alleged victim to see whether she has pursued legal action. If she has not, the organization offers her free legal assistance, which includes having a lawyer accompany her to the hospital and police station to ensure she is treated with respect and the proper procedures are followed. Even with this offer, in 2010, only 13% of the reported torture for dowry incidents (51 of 394), 48% of the attempted rape incidents (44 of 91), and 53% of the rape incidents (272 of 509) opted to take their cases to the formal courts, with or without assistance from ASK. Further, only 50% of the families of women who had been murdered for dowry (112 of 224) were willing to file a case.

The reason why such few victims are willing to file cases is not entirely clear, especially because these women have already have had their name published in the newspaper and are thus less likely to be motivated by fear of social stigma or shame. In addition, because these women are being offered not only access to free services, but assistance with obtaining them, it is unlikely that they do not want to bring a case because of the expense or difficulty filing. Reasons may include that women and their families prefer to resolve the case quickly with a financial settlement, are worried about additional attacks if a case is brought, do not think that the incident warrants legal intervention, or are distrusting of the formal justice system.

Similar to the experience of Ain o Shalish Kendra, statistics from the O.C.C.s also show that female victims of violent crime do not always adjudicate their cases in the formal court, even

[52] UNICEF, *supra* note 11.
[53] Siddiqi, *supra* note 19.
[54] World Bank, *supra* note 46 at page 12.
[55] *Id.*

when services are available to them free of charge. Of the 3,023 cases dealt with to date by the O.C.C., only 207 have reached a final judgment (6.8%: 1.1% in conviction and 5.7% in acquittal). An additional 740 cases are currently pending in the courts (36.6%), meaning that less than half of the alleged victims (43.4%) have opted to pursue a case until the verdict.[56] According to the Network for Improved Policing in South Asia, the victims who seek services at the O.C.C.s "are afraid to initiate legal proceedings against their attackers for fear of divorce and/or being socially ostracized. Due to this reason, women might make several visits to the O.C.C., but return to their homes with their attacker only to come back to the centre within a short period of time. The lawyers at the centre also talked of the stigmas attached to these sorts of cases as far as the police and judiciary is concerned. Mediation seems to be the most successful solution best suited to the victim's needs."[57]

Bangladesh is not alone in having dissatisfaction with the formal court process. Internationally victims are frustrated with the punitive approach to violence, especially victims of domestic violence and sexual assault, who often feel they are further victimized by the process and the outcome did little, if not nothing, to improve their current reality.[58]

Legislative Options for Women and Girls who Pursue the Formal Court

If a woman opts to resolve a case in the formal courts of Bangladesh, there are several pieces of legislation specifically targeting women and children that have been specifically enacted to help them access justice. In this sub-section, I review the four main laws that focus on access to justice for women and girls and illustrate why the Nari-o-Shishu Act is typically preferred.

Family Court Ordinance, 1985

In 1985 Bangladesh established family courts through the Family Court Ordinance. The ordinance is not intended to address criminal matters, but establishes civil family courts with exclusive jurisdiction to entrain, try, and dispose of any suit pertaining to dissolution of marriage, restitution of conjugal rights, dower, maintenance, and guardianship and custody of children,[59] which is beneficial to many women who have experienced domestic abuse. If a case settles through an out-of-court compromise, the court should memorialize the agreement in a

[56] Network for Improved Policing in South Asia, *supra* note 31.
[57] *Id.*
[58] Linda G. Mills, Peggy Grauwiler, Nicole Pezold, "Enhancing Safety and Rehabilitation in Intimate Violence Treatments: New Perspectives" *Public Health Reports* 121 (2006) 363-368 at 367.
[59] Family Court Ordinance, 1985 at Article 5.

decree,[60] which can later be executed if one of the parties fails to meet the terms of the agreement.[61]

In practice, the courts work well to meet people's needs when there are two parties willing to participate in the trial and resolve the issue, but are typically resolved through mediation by the judge rather than adjudication.[62] One judge kept statistics on the number of cases she attempted to mediate a month, the time spent on the mediation, and the success rate. In August of 2011, she spent eight hours mediating twenty cases, sixteen of which were successful.[63]

When both parties are not interested in resolving the issue, however, the case can drag on for years, and the aggrieved party, typically the wife, receives no financial support. A family court judge provided us the procedural history of one of the cases that appeared on his docket the day we visited to illustrate the inability of the family courts to either compel or expedite the administration of justice. The petitioner/wife filed the case in 2008 requesting that she receive *dower* (financial compensation promised to the bride at the time of marriage) and maintenance. The respondent/husband refused to answer her *plaint*, the document that sets out the issue at hand and what she was requesting as compensation. In 2010, the judge issued an order that the husband must pay 3,000 taka (≈ 40 USD) in costs and that the wife be allowed to file the case *ex-parte* (without a defendant). The husband appealed, and the case was put on hold while the district judge heard the appeal. In 2011, the district judge ruled that the husband did not need to pay costs, but permitted the case to proceed *ex-parte*. The family court judge believes that the district court judge reversed the order to pay costs to avoid the husband filing yet another appeal to the High Court, which would have taken between 3 and 20 years to resolve and further delayed the wife obtaining any financial relief.[64]

Domestic Violence (Protection & Prevention) Act, 2010

In 2010, the *Domestic Violence (Protection & Prevention) Act* was implemented into law to protect women and children from physical, sexual, economic and psychological abuse. Under the Act, the court is authorized to award a victim of domestic violence with just and reasonable monetary compensation for personal injury (including trauma and psychological damage), property damage and financial loss. The offender may also be punished with a prison sentence ranging from six months for a first offence and up to two years for habitual offenders. Shelter homes must be made available to victims, and the Act specifies a woman may never be placed there without her consent. The court has the power to issue an interim protection order against

[60] *Id* at Article 14.
[61] *Id* at Article 16.
[62] Interview on September 20, 2011.
[63] Court statistics on record with author.
[64] Interview on September 11, 2011.

the respondent while investigation is pending. If the respondent violates the interim order, he is subject to six months in prison, a fine not exceeding Taka 10,000 or both. The court may also grant temporary custody orders for the victim's children. All trials must be completed with 60 working days from the issuance of the notice to the respondent.[65]

In practice, the Act has not been well integrated into the Bangladesh legal system. Reportedly, its current lack of circulation is credited to a combination of a limited education campaign about its presence and a strong preference to adjudicate cases under the Nari-o-Shishu Act. Further research is needed to determine the prevalence of the use of the Domestic Violence Act, and if it becomes more accepted by society, the effect that it has on the recourses taken by women and girls who are domestic violence survivors.

Children Act, 1974

In theory, another option for girls under the age of sixteen is the Children Act, 1974, which addresses both child protection and children in conflict with the law. In terms of protection from violence, the Act only covers incidents where a child is mistreated by a person charged with their care, and the maximum penalty is two years in prison and a 1,000 taka fine (≈ 15 USD).[66] Due to the limited scope of the Act and the minor penalties, it is not commonly used. A new Children Act is reportedly in draft form, but it has not yet been signed in to law.

The Anti Women and Children Oppression Act, 2000 Amended 2003

As mentioned earlier, in 2000, the Government of Bangladesh enacted the Nari-o-Shishu Nirjantan Damon Ain ("the Anti Women and Children Oppression Act") to "prevent rigidly the offences relating to Women and Child Prosecution."[67] In this section I provide the reader with some of the important and progressive elements of the Act, focusing on the offences and punishments, investigations, length of trials, protections of women and children victims, and penalties for filing a false case. In some instances, I offer insights on how theory differs from practice, but reserve most of this commentary for section IV which discusses both the use of compromise and pre-trial detention.

[65] The Domestic Violence Bill, 2010 best current English summary available at http://www.bdtips.com/Article_Body.php?Article_ID=5106#2nd (last reference Feb. 26, 2012).
[66] Children Act, 1974 at Article 34.
[67] The Anti Women and Children Oppression Act, 2000, *supra* note 4 at preamble.

Offences and Punishments:

All of the offences under the Act are non-compoundable,[68] meaning that they are not eligible for compromise. The offences are also non-bailable, meaning that bail is not given as a matter of right.[69] If any woman or child is accused under the Act, bail may be granted if the tribunal is "satisfied that for bail justice shall not be violated."[70] Bail may also be granted to any other person, provided that the reasons for giving bail are cited, unless (a) the complaining party has not been informed of the petition for bail and (b) the tribunal believes there are reasonable grounds for conviction.[71] Any person who is proven to have abated or provoked an offence is liable to the same punishment as the offence itself.[72]

If the tribunal orders a fine be paid, it has the authority to compel payment of a fine or compensation through selling any property owned by the accused at the time of conviction[73] or that is inherited at a later date.[74] All of the sentences may be appealed to the High Court within sixty days of the final judgment[75], and a death sentence may not be executed without review by the High Court. [76]

The offences covered under the Act fit into three broad categories: 1) murder, grievous hurt and simple hurt, 2) sexual violence, and 3) abduction and trafficking. Of the 183 cases observed where it was possible to determine the nature of the crime committed, 106 (58%) related to murder, grevious hurt, and simple hurt; 40 (22%) to sexual violence; and 37 (20%) to abduction and trafficking.

1. Murder, Grievous Hurt, and Simple Hurt

Contrary to common belief, the Act does not cover all incidents of Violence against Women. Most notably, murder, grievous hurt, and simple hurt can only be tried by the tribunal if one of four conditions are met: 1) it resulted from a rape or attempted rape; 2) if it was motivated to compel dowry from a woman, 3) the offence was committed with a "combustible, erosive or poisonous substance" or 4) if it was inflicted on a child for the purpose of begging or selling limbs. Notably, in its 2005 Poverty Reduction Strategy Paper, the government stated that it

[68] Code of Criminal Procedure, 1898 at schedule 2.
[69] *Id.*
[70] Anti Women and Children Oppression Act, *supra* note 4 at Section 19 (3).
[71] *Id* at Section 19.
[72] *Id* at Section 30.
[73] *Id* at Section 16.
[74] *Id* at Section 15.
[75] *Id* at Section 28.
[76] *Id* at Section 29.

planned to include domestic violence in the Act as punishable crime,[77] but to date that amendment has yet to be made. As will be described in greater depth in section IV, these restrictions frequently result in women, often at the insistence of their lawyer, to state that the violence was motivated by dowry in order to fall under the jurisdiction of the Act.

Details of the specific offences that fall under the jurisdiction of the Act, such as the elements of the crime and punishments, are described below. Rape, which is an offence whether or not it results in physical injuries, is discussed in detail in the next section.

Abusing a woman to compel her or her family to pay dowry[78] results in being liable to fine and life in prison if she dies, five to twelve years for grievous hurt, and one to three years for simple hurt.[79] It is important to note that although demanding dowry has been illegal in Bangladesh since the Dowry Prohibition Act was passed in 1980[80], it is still frequently demanded from a wife and her family during the entire course of the marriage. In fact, one of the government's goals in its Poverty Reduction Strategy Paper is to have "effective implementation of the Dowry Prohibition Act."[81]

The use of a combustible, erosive or poisonous substance to kill or attempt to kill a woman or child results in a sentence of death or rigorous life imprisonment and a fine up to 100,000 taka.[82] If the attack was not intended to kill, but results in a) loss of eyesight or auditory function or b) "distortion" or loss of breast or other sexual organ, the sentence is life imprisonment and a fine up to 100,000 taka.[83] If the attack distorts or causes the loss of another part of the body, the penalty is between seven and fourteen years of imprisonment and a fine up to 50,000 taka.[84] If there is a lesser injury or an attempt to throw acid, the punishment is three to seven years imprisonment and a fine up to 50,000 taka.[85] For all of the offences, if the substance used is

[77] Poverty Reduction Strategy Paper, *supra* note 37 at 5.388.
[78] Anti Women and Children Oppression Act, *supra* note 4 at Section 2(j) defines dowry as "i) any type of money, goods or another property as demanded by the bridegroom of any marriage or the father of a bridegroom or the other of the bridegroom or any other person who is directly related to marriage in favour of the bridegroom a consideration for the marriage on the condition to perpetuate the marriage during the period the marriage to be held or in the easlier period or in the time of consideration or marriage; or ii) any money, goods or property that is payable or likely to be paid up by the bridegroom or the father or mother (of the bridegroom) other person directly related to the marriage of the bridegroom to the party of the bride to on the condition to perpetuate the marriage, as the consideration of the marriage, in the period of the marriage to be held or in any earlier period or during the time to continuation of marriage."
[79] *Id* at Section 11.
[80] Dowry Prohibition Act, 1980, Section 4. Demanding dowry is punishable with one to five years imprisonment and liability to a fine.
[81] Poverty Reduction Strategy Paper, *supra* note 7 at 336.
[82] Anti Women and Children Oppression Act, *supra* note 4 at Section 4(1).
[83] *Id* at Section 4(2)(a).
[84] *Id.* at Section 4(2)(b).
[85] *Id* at Section 4(3).

acid, defined as a corrosive, burning, or poisonous chemical, it is tried in a special acid tribunal where the penalties include the death penalty and life imprisonment.[86]

Women and children who have been victims of hurt or murder may seek redress under the Penal Code, but with the exception of murder, the punishments are more severe under the Nari-o-Shishu Act. The Penal Code sets the penalty for simple hurt as one year in prison plus liability of a fine up to 1,000 taka,[87] for grievous hurt at up to 7 years and a fine,[88] and murder at death or life imprisonment.[89] In practice, the Penal Code is rarely, if ever, used for incidence of violence against women.

2. Sexual Violence

Rape, the definition of which varies greatly in jurisdictions around the world, has the following "explanation" in the Act: "if any person without any marital tie, cohabits with a woman succeeding the age of sixteen years without her consent or with her consent gained through intimidation or fraudulently or cohabits with a woman of aged less than sixteen years with or without her consent he shall be deemed to rape such woman."[90] While the Act is vague on exactly what sexual activity constitutes rape, an examination of the Penal Code indicates that it is likely only vaginal penetration by a penis.[91]

It should be noted that neither marital rape, unless the bride is under sixteen years of age, or an assault by someone of the same gender is recognized as rape. Interestingly, enticing a woman to have sexual intercourse with an un-honored promise to marry constitutes rape. The promise to marry provision has allegedly been used by scorned lovers, often at the insistence of their lawyer, to compel marriage when a woman wants to reconcile with an ex-boyfriend, particularly if he is the father of her child and denies paternity.

Rape carries a sentence of life imprisonment and liability of a pecuniary penalty. If a woman or child dies "by the result of rape or any other act of rape", the minimum pecuniary penalty is 100,000 taka. It is not clear what "any other act of rape" means, but it likely means any other criminal act during the commission of the rape. If more than one person rapes a woman or child, and in doing so causes death or a wound, the minimum penalty is also 100,000 taka per person. This is more severe than the penalty under the Penal Code, which gives the judge discretion in

[86] Acid Crime Prevention Act, 2002 at Article 4.
[87] Penal Code, 1860 at Section 323.
[88] *Id* at Section 325.
[89] *Id* at Section 302.
[90] Anti Women and Children Oppression Act, *supra* note 4 at Section 9.
[91] Penal Code, *supra* note 87 at Section 375.

determining whether the penalty should be life imprisonment or a term up to ten years of prison.[92]

The Act mandates that the state provide maintenance for a child born of rape up until the age of twenty-one years, longer if a daughter is not married by this age or if a son is "crippled."[93] While I did not have the opportunity to witness a judge utilize this provision, there is a buzz within the legal community that some judges are starting to use it. The amount of maintenance that the state is obliged to provide was not able to be obtained.

The crime of "Sexual Abuse" appears to serve as a catch-all for all other unwanted sexual acts; the Act defines it with the following sentence: "If any person, for satisfaction of his sexual desire, touches the genital organ or any other organ of any woman or a child illegally with any part of his body or by any object or causes indecency to a woman, it shall be presumed as sexual abuse."[94] Sexual abuse carries a penalty of three to ten years rigorous punishment and liability to a fine.[95]

Another offence is inducing a woman to commit suicide; if a woman is found to have committed suicide as a "direct result of any willful act of any person that causes her dis-reputation," the responsible party shall be sentenced to 5-10 years of prison and liable to a fine. This provision is commonly criticized; many argue that it is not possible to know a person's reasons for committing suicide beyond a reasonable doubt. Neither sexual abuse nor inducing suicide are punishable under the Penal Code.

3. Abduction and Trafficking

Although Bangladesh has been placed on the US State Department Tier 2 Watch List in 2011, 2010 and 2009 for failure to "fully comply with the minimum standards for the elimination of trafficking," its efforts to combat the trafficking of women and children through the Nari-o-Shishu tribunals has been commended by the U.S. State Department.[96]

For trafficking women, the Act punishes anyone who a) "imports a woman from abroad for the purpose of her employment to prostitution on any illegal or immoral activities," b) "sends a woman to any foreign country," c) "buys or sells a woman," d) "transfers a woman for 'persecution' in hire," or e) "in any other way for any aforesaid purposes keeps a woman in his

[92] *Id* at Section 376.
[93] Anti Women and Children Oppression Act, *supra* note 4 at Section 13. Note that the State is entitled to recover this amount from the convicted rapist.
[94] *Id* at Section 10.
[95] *Id.*
[96] The failure is attributed to the lack of legislation protecting men. Trafficking in Persons Report, *supra* note 1.

possession, surety or custody" with life imprisonment or rigorous punishment of ten to twenty years. S/he is also liable to a fine.[97]

For trafficking children, the Act punishes anyone who a) "imports any child from abroad," b) transports or sends to a foreign country," c) "buys or sells," d) "for any such purpose keeps any child in his possession, surety or custody," or d) "steals any newly-born-baby from any hospital or maternity, nursing lane, clinic, etc. or from the possession of the guardian" with a life sentence and a pecuniary fine.[98]

Abducting or kidnapping a person for any other reason that what is listed above carries a sentence of life imprisonment or rigorous punishment of not more than fourteen years and the convicted shall be liable to a pecuniary punishment,[99] but if ransom is demanded, the only available punishment is a life sentence.[100] In contrast, under the Penal Code, the sentence is only 7 years.[101]

Investigations:

Unlike the Code of Criminal Procedure that simply states "investigations should be completed without necessary delay,"[102] the police investigations for the tribunals must be conducted within fifteen working days if the accused is caught in the act or within sixty days of the filing of a police report or case with the tribunal. The Act further specifies procedures for cases when an investigation cannot be conducted within the specified time limit, including disciplinary action if the delay was due to misconduct.[103] Judges noted that while there were exceptions, most police reports were received on time.

Some of the judges, however, voiced concern about the number of police reports they believed to be false, despite the fact that the police are criminally liable under the Act if they prepare a false police report,[104] prompting at least five of the judges to request independent inquires of the incident be conducted either in conjunction with or in lieu of police reports.[105] Independent inquiries are typically conducted by female leaders in the community, government welfare workers, magistrate judges, and human rights based NGOs. There is no budget for conducting the inquiries, and many of the investigators have received no formal training. Defense lawyers

[97] Anti Women and Children Oppression Act, *supra* note 4 at Section 5.
[98] *Id* at Section 6 (2).
[99] *Id* at Section 7.
[100] *Id* at Section 8.
[101] Penal Code, *supra* note 87 at Section 363.
[102] Code of Criminal Procedure, 1898 at Section 173.
[103] Anti Women and Children Oppression Act, *supra* note 4 at Section 18.
[104] *Id* at Section 18 (8).
[105] *Id* at Section 18 (9).

commonly complain about biases in the inquiries, particularly those conducted by magistrate judges and welfare workers, who reportedly speak exclusively to the alleged victim and her witnesses when gathering evidence for the report. The judges interviewed who rely on them are pleased with the quality and reliability of the reports.

Length of Trials:

Once a trial commences, it is to continue on every consecutive working day until it is heard. If the trial is not completed within 180 working days,[106] the tribunal, public prosecutor, and concerned police officer are required to submit a report to the government and high court detailing the reasons for the delay in the case and the "concerned authority", after reviewing the report is instructed to take "proper action against the person liable for not disposing the case within the specified time."[107] In addition, the accused must either be granted bail or the tribunal must state the reasons why bail has not been given.[108] This is much faster than the 360 day time limit set out under the Code of Criminal Procedure.[109]

To further accelerate the trials, summons and warrants for the appearance of witnesses should be filed with the police, and if the concerned police commissioner shows "willful negligence" to produce the witness before court, than the tribunal should inform the controlling officer and instruct him/her to take proper action.[110] In the event that a trial is delayed because an expert witness, such as a physician, blood examiner, or chemical examiner is not available, either because s/he has passed away or "any attempt to bring him before the tribunal is of such delay, expense or discomfort which is not desirable for any circumstances" the tribunal may accept the signed report "as witness" provided that it is not the sole basis for conviction.[111]

Unfortunately, in practice cases commonly drag on for years. It was not infrequent to hear a case dating from as far back as 2000, the year of tribunal's inception. Cases are rarely heard on consecutive days, but rather witnesses are usually spread out every one to three months. The prosecution frequently asked for further time extensions claiming that the witnesses failed to appear: in one extreme example only four witnesses appeared out of the thirty that were set for testimony.[112] Witnesses were occasionally seen on the court premises on days when a continuance were requested, indicating that they may be serving as a scape-goat for ill-prepared or over-burdened lawyers who need to request more time from the court.

[106] *Id* at Section 20.
[107] *Id* at Section 31-A.
[108] *Id* at Section 20 (4).
[109] Code of Criminal Procedure, *supra* note 102 Section 339(C)(2).
[110] Anti Women and Children Oppression Act, *supra* note 4 at Section 24.
[111] *Id* at Section 23.
[112] Court observation on October 20, 2011.

Protection of Alleged Victims:

The legislature also implemented provisions intended to protect women and children who bring a case to the formal courts after falling victim to a violent crime. For example, any duty medical officer in a government or authorized hospital who fails to conduct necessary medical tests on an alleged victim within a reasonable period of time is subject to disciplinary action including having the incident recorded on his/her annual review. The duty medical officer is also required to provide a certificate of examination and report the incident to the police.[113]

In practice, however, it is not uncommon for an alleged victim to state that she went to the hospital but the doctor refused to issue a medical report. Further, lawyers at Ain o Shalish Kendra report that women often come to them and report that a doctor refused to examine her, and that they must then accompany the woman to the hospital to ensure a proper medical report is issued.[114] There is no apparent follow-up with the offending doctors in these instances.

The Tribunals are also authorized to keep any woman or child in safe custody, in any facility it deems appropriate with the explicit exception of prison.[115] Unfortunately, the facilities used are similar to prisons; women are reportedly kept under twenty-four hour lock down and are not able to have contact with their friends or families (including cell phone use). The women in safe custody who are brought to court accompanied by a police officer who holds their arms firmly and ensures that they do not speak to anyone. The Special Rapporteur on Violence against Women, commented that safe custody: "constitutes a violation of [women and children's] human rights by discriminating on the basis of gender, but also places women and children at great risk of custodial violence."[116]

The media is also specifically prohibited from publishing any information that would allow a victim to be identified, and can be sentenced to up to two years in prison for violating the provision.[117] Rape cases may also be tried *in-camera* if deemed necessary by the tribunal, whether or not a formal request has been made.[118] To offer further protection to women from the police, the Act states "if any woman is raped at the time of her remaining under police custody,

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[113] Anti Women and Children Oppression Act, *supra* note 4 Section 32.
[114] Interview on March 16, 2011.
[115] Anti Women and Children Oppression Act, *supra* note 4 at Section 31.
[116] Report of the Special Rapporteur on violence against women, its causes and consequences, 54th session on the Commission on Human Rights, UNESCO 1998 E/CN.4/1998/54 A(e)2-3 *Available at* http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/c90326ab6dbc2af4c125661e0048710e?Opendocument (last visited on Feb. 29, 2012).
[117] Anti Women and Children Oppression Act, *supra* note 4 at Section 14.
[118] *Id* at Section 20.

the person or persons shall be presumed to be directly related to such rape under whose custody the woman has been raped, he or they individually shall be, if otherwise proved, convicted to a punishment of not more than ten years but not less than five years rigorous imprisonment and in addition shall be liable to a pecuniary punishment of not less than ten thousand taka for failure of proper custody."[119] Unfortunately, none of the above mentioned provisions appear to be utilized.

Also concerning is the number of the courtrooms where actions and remarks that can be perceived as degrading to women were allowed, creating a hostile environment in which for women to testify. It was not uncommon for a lawyer to aggressively reach into the witness box and pull a head covering off a conservative woman to reveal an injury or scar. While seeing her uncovered head might help her case, the alleged victim should personally decide whether she feels comfortable exposing her hair in open court and should be given the option to remain covered or show the judge in chambers. Similarly, comments by some lawyers could be perceived to mock women, and sometimes these comments met with great bouts of laughter from the lawyers who packed the courtroom, making the words even more offencive. Two such examples are a lawyer asking a witness if she was "mad ('crazy') just like [the victim]"[120] and stating that "sometimes it is hard to keep an educated woman inside the house."[121]

Another area of concern is the costs of attending court faced by the alleged victim, which should be borne by the state who is technically bringing the case. Of the seventeen alleged victims surveyed, only four reported that their appointed lawyer was free (all had legal representation). Two of the alleged victims shared with us that the public prosecutor required that she pay 500-1,000 taka per appearance, and if she did not pay, the public prosecutor would ask for a continuance. While the sample size is not sufficient to be conclusive, the allegations warrant further study.

False Cases:

If any person "with the intention to cause harm to any other person, files any case or complaint under any other section of this Act knowing that there is not just or legal cause of accusation" is subject to up to seven years of rigorous imprisonment and liable to a fine.[122] Any person is allowed to file a case directly to a Nari-o-Shishu tribunal alleging that a false case has been filed.[123] This penalty is much more severe than the Penal Code, which punishes both making a

[119] *Id* at Section 9(5).
[120] Court observation on February 27, 2011.
[121] Court observation on March 7, 2011.
[122] Anti Women and Children Oppression Act, *supra* note 4 at Section 17 (1).
[123] *Id* at Section 17 (2).

knowingly false statement under oath[124] and providing false evidence with three years in prison;[125] and filing a false charge or offence with intent to injure with two years in prison.[126]

It has been observed, however, that one can file a false case in Bangladesh with "virtual impunity,"[127] and the Nari-o-Shishu tribunals are no exception. Despite all of the allegations of false cases, I did not hear of an instance when this provision was used in the tribunals. Judges, lawyers and litigants asserted that it was because a) the process is too complicated, b) the aggrieved party just wants to stop going to court, and c) it goes against the prevailing culture.

IV. Compromise in the Tribunals

The Nari-o-Shishu tribunals commonly serve as a means to conduct culturally preferred *Shalish* with the power and resources of the penal system. Although compromise is technically barred, it is not uncommon for the practice to be openly acknowledged by the judges, with some even encouraging the parties to engage in a compromise. It is not clear how judges are able to circumvent the law and allow the cases to compromise, and a question on the procedure to one of the most respected lawyers in Bangladesh caused him to place his head in his hands and repeat "how do they do? how do they do?"[128] This section will therefore accept that the practice exist without diving into the specifics of how. Rather, it explores how the traditional justice system is being implemented in the tribunals, focusing on the reasons why alleged victims and the accused may enter into a compromise. It also highlights how the current, unregulated, system leaves the citizens of Bangladesh vulnerable to the denial of their fundamental rights and erodes the strength of the rule of law.

Compromise Out of Financial Necessity:

In this section, I present two case studies obtained from women who filed cases in the tribunals to compel a compromise out of financial desperation. Both of their lawyers insisted that their motives in bringing the case were common and I found their stories to be representative of the other women with whom I spoke. In addition to presenting their stories, I explain how their actions impact the state and the power of the rule of law.

[124] Penal Code, *supra* note 87 at Section 181.
[125] *Id* at Section 193.
[126] *Id* at Section 211.
[127] Sara Hossain, Greg Moran and Adam Stapleton, "Joint Assessment of Prospects for Harmonization within the Justice Sector in Bangladesh" CIDA (2007) at paras 82-88.
[128] Interview on April 18, 2011.

Case Study #1:

In the first case study, the alleged victim is put in the precarious situation of deciding whether to bring a false case under the tribunal or obtain financial support. By choosing to lie under oath, and technically manipulate the judicial system for her own personal gain, she has demonstrated disrespect for the rule of law and deteriorated the power of the state. While her actions are technically sanctionable with seven years imprisonment, they also invoke a sense of understanding that makes punishment seem unconscionable. Rather, it is the state that appears culpable for failing to provide a means of legal redress for her dire situation.

> Fatima was raised in a very poor family and when she was fourteen years old her family could no longer afford to feed or clothe her. Her father arranged for her to marry the inspector of the postal department, a forty-five year old man who was a friend of his brother, and she was sent to live with him and his family. After just a few months, he was no longer interested in Fatima. He would say to her "when I married you, you were beautiful, but you are not beautiful anymore." She was kept in his home, but he would not visit, and she felt very lonely. The situation kept getting worse and she begged her family to take her home. Her family said that they were unable to afford to take her back, and that she should try to save the marriage by having a child. She soon became pregnant, which pleased her husband until he learned they were having a daughter, not a son. He refused to pay the medical expenses associated with the birth and kicked his wife and daughter out of the house shortly after the birth. She had no choice but to move home, but her family was unable to support her. The family often goes to bed hungry and she does not bring her baby to the doctor when she is sick because she knows she cannot afford any medicine he would prescribe. She tried to file a case in the family court, but the husband did not appear for over a year. Her lawyer suggested that she bring a case for torture for dowry under the Nari-o-Shishu Act. She knows that she should not bring the case because her husband never physically tortured her nor demanded dowry, but she is not sure how else she can get him to take the financial responsibility for her and her daughter.[129]

Case Study #2:

In the second case study, the alleged victim uses the accusation of rape in an attempt to reconcile her relationship with a scorned lover and father of her child. It is important to note that while the allegation meets the definition of rape under the Act, the petitioner does not view the incident as a crime against the state, but implies that it is for as long as is necessary to ensure protection

[129] Interview on April 20, 2011.

for herself and her child. Once a compromise is reached, she will likely take the stand and recant her previous accusation under oath. While the case can technically still proceed because it is a crime against the state, in a country like Bangladesh, where there is basically no forensic evidence, such as DNA evidence, it is very difficult for the prosecution to convict without the testimony of the alleged victim. As such, the state is obliged to invest in the case, through providing a court and public prosecutor, despite the fact that its interests, mainly punishing a wrongful act and deterring future acts, will not be realized. Further, it requires the state to divert resources from other cases that could lead to a criminal conviction, thus deteriorating its power, both actual and perceived, to prosecute cases. Similarly to the first case study, however, the story is one of desperation rather than malice that invokes a sense of sympathy rather than ill-will.

> Rafia was spending a lot of time with a man from the neighborhood, and upon his promise to marry her, agreed to enter into a sexual relationship. They had not yet married when she conceived a child. Her boyfriend denied paternity the moment he learned of the pregnancy. Rafia, not knowing how she will pay the bills to support herself and her child, threatened to file a rape case against him unless he agreed to marry her. At first he agreed, but then he absconded before marrying her. A local NGO attempted to assist her with compromising the case, but the boyfriend did not appear. They then advised her to file a rape case against him, which she did. The boyfriend has still not been found, but she believes that he filed a false murder case against her father so that he would need to go into hiding and not support the family during the trial. Despite their now strained relationship, she is clear that she does not want him to serve time in prison, but rather to marry her and take personal and financial responsibility for her child. She is concerned that if they do not marry, she will never find anyone to support her or her child.[130]

Compelling Women to Compromise:

While the practice of compromising a case can theoretically help financially destitute women, in practice, little to no safeguards appeared to exist to ensure that the compromise reached is in the interest of the alleged victim. In several instances when the court would accept an out of court compromise, the alleged victim needed to consult her father to learn the terms of the settlement, indicating that the daughter was not involved in the negotiation process nor aware of the resolution. Questions also arise regarding whether the alleged victim will benefit from the settlement or whether it will be given to another family member.

[130] Interview on April 13, 2011.

There were also several observed examples where the alleged victim would testify that a compromise had been reached, but would do so with such obvious emotional distress that it should raise concerns about whether the agreement was personally acceptable. In one poignant example, a woman sobbed as she testified that she had reached a compromise with the man who allegedly raped her: he would pay an undisclosed amount of money and they would marry. The alleged rapist was granted bail to start his married life.[131]

According to a prominent Bangladeshi lawyer, the tears that women display on the stand might be tears of shame associated with the crime or embarrassment for bringing a case that might not have been true, rather than not agreeing to the settlement.[132] Still, watching a woman cry on the stand while agreeing to marry her alleged rapist should raise a higher level of scrutiny to determine whether the alleged victim's rights are being protected and whether she is being compelled to enter a potentially dangerous living situation.

Judges "Encouraging" Victims to Compromise?

It was even not unheard of for female victims to be compelled by judges to compromise cases when they try to move forward with criminal proceedings. By way of illustration, the following interaction was transcribed in a tribunal on March 30, 2011:

> Judge: "You married him, now you don't want to marry him, isn't there a chance of reconciliation?"
>
> Alleged victim [crying]: "No, please don't send me back. They all beat me up. I am happy in my father's home and I do not want to go back. Please, I will withdraw the case, but do not make me compromise."
>
> Accused [from the lock-up in the back of the courtroom]: "We tried to mediate, but she refused."
>
> Judge: "Where is her father. Bring her father in."
>
> Father enters
>
> Judge to the father: "Are they paying maintenance?"
>
> Father: "No"

[131] Court observation on March 7, 2011.
[132] Interview on March 9, 2011.

Judge to the father: "If you want mediation the court can help."

Judge to the alleged victim: "Once you pass a certain period there is no way back, are you sure you want to move forward, think twice."

Alleged victim: "I am sure I want to move forward."

Judge: "Most of these cases can be resolved through mediation, are you sure?"

Alleged victim: "I want justice."

Judge: "If it is possible to live together this lawyer can help you figure it out, but if you don't want to, that is ok. I will give you more time to think about it."

Alleged victim leaves the courtroom and is brought back about ten minutes later by an assistant to the court clerk.

Judge: "How long do you think you need to think about whether you want mediation? 15 days? Is that enough?"

Alleged victim: "Yes"

Judge: "Ok, see you in 15 days."

Although the judge is motivated by protecting the best interest of the woman, discrediting her opinion and making a paternalistic judgment on how she should proceed obstructs her ability to access justice and impedes the state's ability to prosecute the case. Further, it is not clear whether the judge would have suggested that the alleged victim compromise if he thought that she had the financial means to support herself. If a judge only compels those who s/he believes needs financial assistance for survival to compromise, s/he would in essence be creating two justice systems: one for those who are able to support themselves and another for those who cannot, with penal sanctions only executed in cases where the alleged victim does not need financial support. In doing so, clear messages would be sent to society that the state prioritizes the safety of the wealthy over the poor and that a crime against a poor woman is less serious than a wealthy one.

Compelling the Accused to Compromise:

The tribunals are a powerful resource for women who want to compromise cases with men who are unwilling to negotiate because the man can be pressured into an agreement through the use of pre-trial detention and the cost of defending a case.

It was not unusual to observe a judge, motivated by a desire to serve the best interest of women and girls, persuade an accused individual to resolve a case through compromise. As four judges explained, keeping a man in pre-trial detention for a few months is a good way to get him to agree to a settlement. This is undoubtedly true: the prisons of Bangladesh, where untried prisoners are held with the convicted, were designed to accommodate a maximum of 28,969, but now house 74,042 persons (256% of capacity). The overcrowding is far worse in specific prisons, such as the Narayanganj prison, where the prison capacity of 200 is exceeded by 1,500 people.[133] The prisoners must sleep in shifts due to the severity of the overcrowding.[134] Inside the prisons there is insufficient nutrition and sanitation; the tuberculosis rate is twenty-one times the rate outside its walls.[135]

One observed judge was very open about his policy to assist women to compromise through the use of pre-trial detention. While his actions, detailed below, are not representative of all of the tribunals of Bangladesh, it is representative of the experience of all the people with cases currently pending in his district. Further, as his philosophy is similar to that of other judges, it is possible that similar practices are being employed in other courtrooms in a more clandestine fashion.

The observed judge shared that bail was only granted for the accused who were willing to compromise. In court, he proved to hold true to his word: out of six bail hearings, five involving torture for dowry and one for kidnapping, the only man who received bail was the one who said that he was willing to compromise. The lawyer of one of the accused men argued that the accused had already been detained for months, but the judge stated he would not grant bail unless the accused agreed to attempt a compromise.[136]

The above mentioned judge would also dictate the terms of the compromised reached. In a torture for dowry case the alleged victim stated that she and the accused agreed to dissolve the marriage and he would pay her 70,000 taka (≈ 850 USD). The judge refused the settlement on the grounds that the *dower* was 200,000 (≈ 2,500 USD), and set the new settlement amount for

[133] German Technical Institute, "Improving the Real Situation of Overcrowding in Prison" (2010), on file with author.
[134] *Id.*
[135] German Technical Institute, "Locked up and Forgotten?" (2010), on file with author.
[136] Court observation on April 18, 2011.

300,000 (≈ 3,700 USD). The accused refused (or was unable) to pay this amount, and was sent back to prison until he agreed. In another instance, a father testified that his daughter, who alleged she had been kidnapped and raped three times, had compromised the case with the accused for 60,000 taka (≈ 750 USD). The judge refused to accept the amount because the alleged victim had also testified that she wanted to marry the accused. The judge told the accused that he would remain in custody until he was willing to marry the alleged victim, in effect forcing him into a marriage. [137]

The judge was even willing to compromise murder cases, where the victim could not benefit from financial relief. In one observed instance the family of a woman who had been murdered testified in court that they had reached a compromise with the alleged perpetrator and asked for his release. The judge inquired about the settlement amount and was told 200,000 taka (≈ 2,500 USD). The judge determined the settlement was too low and renegotiate a payment of 400,000 (≈ 5,000 USD) with the accused and demanded that the first 100,000 (≈ 1,250 USD) must be paid before he could be released from custody. The judge shared that he agreed to a compromise in this case because he wanted the deceased woman's children to have a secure life. [138]

There are also judges that do not permit compromises, or are willing to acquiesce to the practice but not overtly participate. One judge explained that it was not possible to "compromise" any case under the Act, but noted that in family matters it was best for him to "keep silent" because a divorce would be detrimental to the wife and future of the children. He thought that most of the women who brought cases against their husbands did so out of anger after an argument or misunderstanding, and that it was important for them to drop charges after the "proverbial dust had settled." In fact, he added that most of the cases in his court were like this, adding it was "rare to see a truly contested case."[139]

Having a judge that does not overtly force compromise, however, does not mean that pre-trial detention is not still a powerful force to compel the accused to compromise. In Bangladesh, police arrest first and investigate later,[140] meaning that almost everyone serves some time in pre-trial detention. Out of our sample of 73 accused men, 71 served time in pre-trial detention (97%). Due to the cost of filing a bail application and hiring a lawyer to defend a case, I suspect that many detained individuals are willing to compromise to ensure that the alleged victim will support his bail application, making it significantly more likely to be accepted on the first try.

[137] *Id.*

[138] *Id.*

[139] Interview on September 18, 2011.

[140] Adam Stapleton, "Activating the Justice System in Bangladesh"European Commission (2005) at para 3.89

The costs of hiring a lawyer ranged from 3,000-15,000 taka to begin the case and 500-5,000 taka per appearance. Bangladesh technically has a legal aid scheme for indigent clients, but in our experience, most of the accused still need to pay out of pocket. Of the alleged victims interviewed, only 4 of the 73 (5%) reported that their lawyer was free. Of the four with a free lawyer, only one received the lawyer from the government legal aid scheme, the other three were represented by a family friend. Similarly, an investigation of one prison revealed that 98% of the pre-trial prisoners did not have access to legal advice or assistance, and the figure is believed to be representative of most prisons in Bangladesh.[141] The number of unrepresented pre-trial detainees is especially frustrating because the legal aid fund is grossly underspent: in 2003 the government revealed that only 18% of the budget allocated for legal aid had been spent[142], and it does not appear that improvements have been made since.

Problem with Using Pre-Trial Detention to Compel Compromise:

Although bail is not a matter of right within the tribunals, holding an untried person, who is thus legally innocent, in prison as a means to compel a compromise, violates the principle of due process that is the very cornerstone to any democratic society. The Constitution of Bangladesh requires all people be treated in accordance with the law,[143] prohibits arbitrary arrest and detention,[144] and provides the right to consult with a defense attorney.[145] Similarly, the United Nations Declaration of Human Rights, to which Bangladesh is party, prohibits arbitrary arrest[146] and pronounces "everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has all guarantees necessary for defence."[147] Additionally, the International Covenant on Civil and Political Rights (ICCPR), to which Bangladesh is also a member, mandates that everyone accused of a crime be entitled to "defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, to this right; and have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him an any such case if he does not have sufficient means to pay for it."[148] The government of Bangladesh did make reservations to parts of this provision at the time of accession, but only to the section that required an accused be tried in person.[149]

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[141] Hossain, *supra* note 127 at 140.
[142] BLAST, "Government Legal Aid Services in Bangladesh", on file with author
[143] Constitution of Bangladesh, *supra* note 32 at Article 31.
[144] *Id* at Article 32.
[145] *Id* Article 33.
[146] Universal Declaration of Human Rights, 1948 at Article 9.
[147] *Id* at Article 11.
[148] The International Convention on Civil and Political Rights, 1966 at Art 14 (3) (d).
[149] United Nations Treaty Collection *available at* http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en#EndDec (last visited Feb. 12, 2012).

In fact, the practice of holding a person in pre-trial detention until they are willing to compromise could technically be considered extortion, which the Bangladesh Penal Code defines as "whoever intentionally puts any person in fear of any injury to that person, or to any other, and thereby dishonestly induces the person so put in fear to give donation or subscription of any kind to deliver to any person any property or valuable security or anything signed or sealed which may be converted into a valuable security, commits 'extortion.'"[150] The Code itself provides the following as an example of extortion "A threatens Z that he will keep Z's child in wrongful confinement unless Z will sign and deliver to A a promissory note binding Z to pay certain money to A. Z signs and delivers the note. A has committed extortion."[151]

While some people might support the use of pre-trial detention on the belief that the accused is likely to have committed some crime against a woman for which s/he should atone, in practice it affects many more people than the stereotypical image of a rapist or a "wife beater." I observed one boy, likely not older than twelve, accused of sexual harassment be denied bail after spending two months in detention (it was not clear whether he was being held in the adult prison). His crime? The prosecution explained to the judge that on valentine's day he told a girl that he loved her and gave her flowers.[152]

Similarly, the following case study details the impact that using pre-trial detention to force a compromise can have on the accused. It is particularly interesting because the alleged victim will only offer a compromise that dictates the accused agrees to marry her, raising concerns over both forced marriage and child marriage for males as well as females.

> Al-amin is a 17 year old boy who was accused of raping a 30 year old woman when he was just 14. He claims that he is innocent, and his family is supporting him in defending his case. Despite the fact that Al-amin is still legally innocent because he has not been tried, he spent three years as a pre-trial detainee in a juvenile detention center, separated from his family, not able to go to school, and literally starving due to inadequate nutrition while waiting for his day in court. Several times the alleged victim offered to compromise, but requires that Al-amin agree to marry her. Al-amin's family does not want to subject their son to a lifetime of living with a woman who has brought a false case against him. The family is frustrated that the court has not heard their son's side of the story and that a mere accusation was enough to lock him in prisons for years.

[150] Penal Code, *supra* note 87at Section 383.
[151] *Id* at Section 383 Illustration (b).
[152] Court observation on April 14, 2011.

> They also feel that the alleged victim's desire to marry her alleged rapist should indicate to the court that it is a false case. If convicted, the judge will have no option but to sentence him to life in prison.[153]

What Makes the Offender Continue to Abide by the Agreed Compromise?

One of the dangers of compelling compromise is that the parties have not reached a mutually agreeable solution, making them less likely to be honored after the threat of pre-trial detention and high legal costs has subsided. There is very little that is currently done to ensure that out of court compromises are fulfilled. Unlike family court, the agreements are not memorialized in a contract that is enforceable in a court of law. As evidenced by the following case study, out of court compromises, especially those without the assistance of a mediator trained in human rights, can leave a woman in the same situation, if not worse, that she was in before the compromise.

> When Rashida was eleven years old, she was grabbed by the throat, abducted, and raped. She told her mother, who took her to the hospital and filed a case with the police. She spent two days in the local hospital and was then transferred to the better equipped district hospital. After a few months, her family, worried about their daughter's future, compromised the case with the perpetrator: the two would marry. Rashida and her husband lived together for several years and had two children, who Rashida adores. A few years ago the husband left without warning and has not looked after them since. She has heard rumors that he has married again. It is hard for her to support her children without his assistance. She feels desperate, but has resigned herself to accept that justice does not exist and will try to find a way to make due on her own.[154]

In an attempt to rectify the desperate situation women are in if the compromise does not hold, one observed judge followed-up with the alleged victims who had previously requested that the accused be released on bail because of a compromise. In two of the three instances observed, the women insisted that they were happy living with their husbands and would like the case to be discharged (the opinion of the husband was not asked). In the other instance, the woman testified that her husband had resumed torturing her for dowry. He was not present in court, but a warrant was issued for his arrest and the case against him was set to continue.[155] While this practice is too immediate to help women like Rashida, it might help others when it is imminently clear that the proposed compromise will not be honored.

[153] Interview on April 11, 2011.

[154] Interview on April 4, 2011.

[155] Court observation on June 7, 2011.

V. Conclusion:

Well-reasoned arguments can be made to promote compromise in the tribunals because it serves an essential social function for destitute women and children. Similarly, there are also powerful and convincing reasons to protest its very existence because it invites abuse and deteriorates the rule of law. Practically speaking, however, it will be difficult, if not impossible, to effectively implement the ban on compromising cases in the tribunals given the current culture and degree of infiltration. The challenge now becomes how to ensure the simultaneous protection of both the victims and accused, strike a balance between reconciliation and retribution, and differentiate between malice and despair.

It might be in the state's best interest, as well as its citizens, to acknowledge the interplay between the formal and informal justice system within the tribunals. Rather than continue to deny its existence, the state could allow, if not provide, human rights based mediators to facilitate mutually agreeable resolutions to conflicts when the alleged victim is not interested in pursuing criminal sanctions. By doing so, it could clarify the role of judge as adjudicator rather than mediator, provide greater oversight of abuse, and increase the prosecution rate by focusing judicial resources on cases where the alleged victim is invested in prosecuting the alleged perpetrator. Further, it could help couples who agree to reconcile, or begin a relationship, to work through the causes of their conflict and find a strategy for making a long lasting and safe solution. Agreements could also be memorialized, as they are in family courts, so that parties have a judicial recourse if the other party does not abide by his or her obligations.

Ultimately, if the state wants to truly relieve the tribunals of their current tribulations and provide female victims of violent crime the financial luxury to decide whether to seek retribution, the state must go beyond trying to mend existing conflicts and address the fundamental reasons the tribunals are currently necessary for some women to obtain sufficient financial and social security to survive, particularly poverty, gender inequality, and lack of social mobility.