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The Legal Challenges on the way to Judicial Remedy in Rape Cases: The Role of Human Rights and Legal Services Programme of BRAC

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ACRONYMS

AD	Appellate Division
AIR	All India Reporter
All ER	All England Law Report
BCR	Bangladesh Case Report
BLC	Bangladesh Law Chronicles
BLD	Bangladesh Legal Decision
BSCD	Bangladesh Supreme Courts Digest
BSCR	Bangladesh Supreme Court Decision
CRLJ	Criminal Law Journal
Cross-examination	Following the examination of the prosecution lawyers, the defense lawyers examine the victim and witnesses
CrPC	The Code of Criminal Procedure under which Bangladesh criminal justice system operates
DL	Defense Lawyer
DLR	Dhaka Law Report
Evidence Act	The law under which the process of evidence in our (Bangladesh) court is regulated
FIR	First Information Report – when the incident is first reported at the police station and written in a specific document
GD	General Diary
HC	High Court
HRLE	Human Rights and Legal Education Course of HRLS
HRLS	Human Rights and Legal Services
LRIC	Legal Rights Implementation Committee of HRLS
MHC	Malimath Committee
MLR	The Mainstream Law Report
Mohuri	Clerk of the lawyer
Munshi	Clerk in police station, popularly known as *'munshi'*
Naraji Petition	When the police do not recommend the accused for trial via final report after investigation, the prosecution lawyers may put forth application for further investigation
Nari-o-Shishu Nirjatan Daman Ain, 2000	The Women and Children Repression Prevention Act, 2000
Penal Code	Code which defines the crimes and punishment under law
PL	Panel Lawyers
PLD	Pakistan Legal Decisions
PO	Programme Organizer
PP	Public Prosecutor
RSS	Regional Sector Specialist (HRLS programme does not currently have such a post)
SCC	Supreme Court Cases
Shebika	They are the paralegals of HRLS programme and they give training to the learners of HRLE course
SL	Staff Lawyer
Statement u/s 161 of CrPC	Under Section 161 of CrPC, police can take statements from the victims and other witnesses for the investigation
Statement u/s 164 of CrPC	Under Section 164 of CrPC, magistrate takes statements from the victim and other witnesses
Thana	Police Station
VAW	Violence against Women

ABSTRACT

Amongst all the cases of violence against women that BRAC's Human Rights and Legal Services (HRLS) programme deals with, rape has the lowest conviction rate. BRAC's HRLS programme aims to bring judicial remedy to rape victims however, it faces several legal challenges in the process. Remedy has been used in this study to denote conviction of the accused in the rape case. Using a qualitative method, data was collected from thirteen rape cases of the HRLS programme and used for case studies in this paper. This bunch of legal challenges includes the absence of strong legal argument skills on the part of panel lawyers, lack of legal skills on the part of the programme organizers, prejudices and attitudes of the judges to the criminal doctrine and various procedures, weak professional interaction between the public prosecutor and panel lawyers for prosecuting the case and corruption on the part of the police. A success story of HRLS programme where the accused is convicted of the rape charges provides the main basis for the formulation of the recommendations and demonstrates the necessary combined efforts of the HRLS staff and the state. After highlighting the various legal challenges and the processes that the HRLS programme currently follows, this paper provides recommendations that may help to deal with the challenges more effectively and assist the judicial process to increase rape conviction rates.

INTRODUCTION

BRAC Human Rights and Legal Services (HRLS) programme started its journey in 1986 by providing legal education. In 1998, it became a complete legal service programme by adding the alternative dispute resolutions (ADR) mechanism and legal assistance for poor women and children in court proceedings. At present BRAC's HRLS programme has 541 legal aid clinics in 61 districts across Bangladesh that provide legal aid services. BRAC's HRLS programme works in three ways:[1]

1. Providing legal and human rights education and awareness to rural poor in particular women, and to local community leaders

2. Providing legal services, in particular alternative dispute resolution (ADR) and court oriented legal aid

3. Creating and activating social catalysts drawn from among the village elite to respond to human rights violations

One of the actitivities of HRLS programme is to provide legal aid to the poor clients in filing civil and criminal cases in court. In criminal cases, HRLS programme gives legal aid in court cases. These cases include rape, murder etc., having linkage with violence against women (VAW). Rape has the lowest conviction rate among the cases of violence against women that HRLS programme deals with (Table 1). This study has focused on the legal challenges faced by BRAC's HRLS programme in their efforts to bring judicial remedy to rape victims.

In this study, the term challenge has not been perceived as an 'obstacle', rather is used in its etymologic sense. It is something that can be encountered but cannot be completely removed. Legal challenge implies the challenge popping up from the several legal stages of a trial for rape. Here, it is mainly related with legal documents and legal procedures. The legal challenges from legal documents and legal procedures of rape case imply a kind of inevitable situation which have to be encountered and cannot be wiped off.

Remedy has also been perceived from legal sense. Douglas Lay Cock defined remedy as anything a court can do for a litigant who has been wronged (Modern American Remedies 1985). Black's Law Dictionary gives the definition of legal remedy more precisely saying that a remedy available in a court of law as distinguished from a remedy available only in equity (Black's Law Dictionary 2005). In this study, remedy has been taken as the judgment of the rape case which punishes the accused.

[1] Human Rights and Legal Service Programme, A presentation by Faustina Pereira, Director, HRLS, December 13, 2007.

DEFINITION OF RAPE AND PUNISHMENT FOR RAPE

Rape can be defined as a very heinous form of violence against women which implies – sexual relations obtained through physical force, threats or intimidation (Bangladesh National Women Lawyers Association 1999). Bangladesh Penal Code[2] has defined Rape as:

> "A man is said to commit 'rape' who except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions: firstly, against her will, secondly, without her consent, thirdly, with her consent when her consent has been obtained by putting her or any person in whom she is interested in fear of death or hurt, fourthly , with her consent when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she believes herself to be lawfully married, fifthly with or without her consent when she is under sixteen years of age."

The Penal Code further explains that 'penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape' and 'sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape'.

The fifth category rape is called statutory rape where the consent of the victim under sixteen years does not matter.

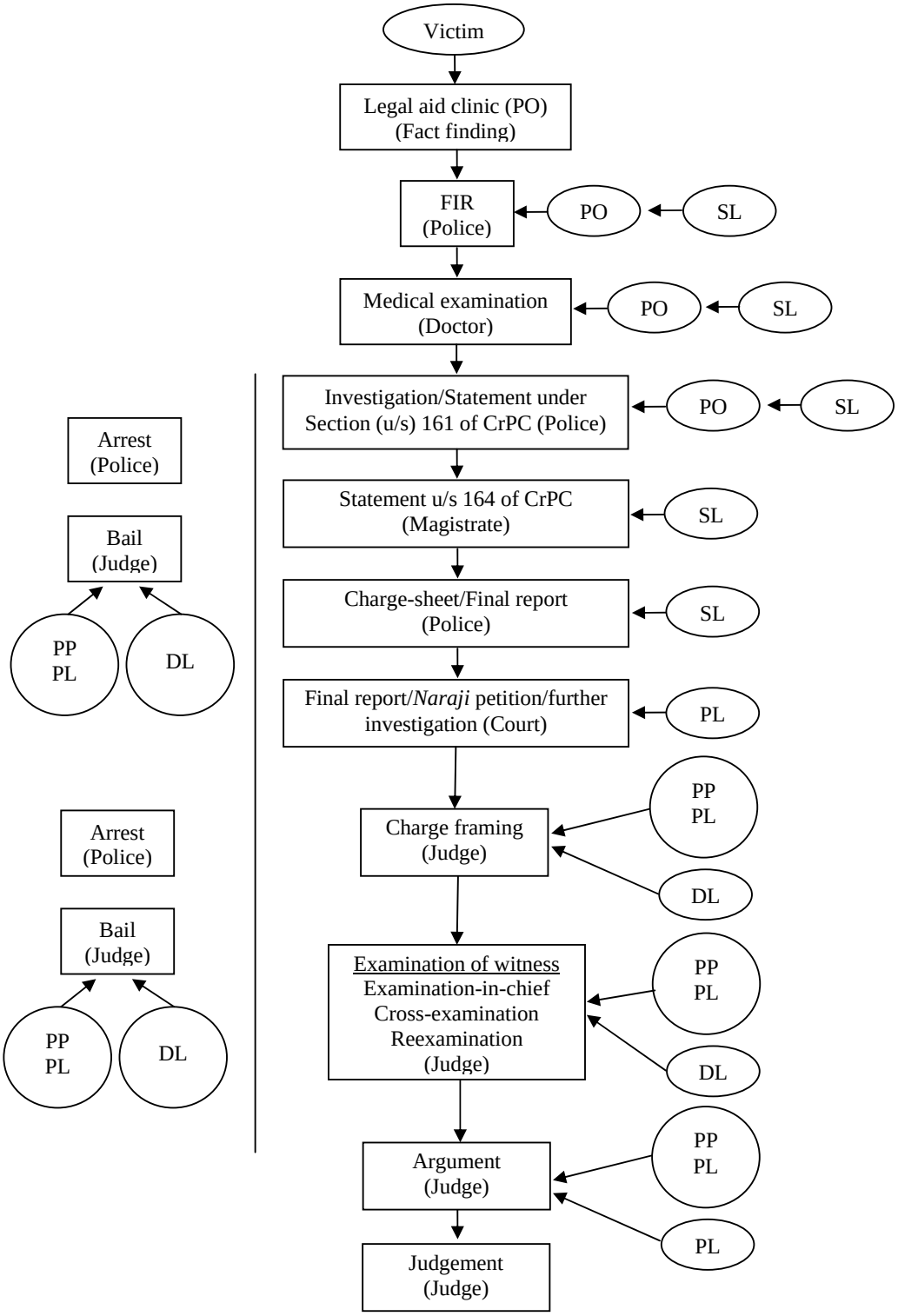
Rape cases are dealt in the Special Tribunal[3] under the Act *Nari-o-Shishu Nirjatan Daman Ain,* 2000. Section 9 of this Act is defining rape as:

> "If any male, without the bond of marriage, have intercourse with a women who is above sixteen years old and the man has made intercourse with her without her consent or acquiring consent through threat or fraud or if he has done intercourse with a girl bellow sixteen years old with or without her consent, he is considered to commit rape."

Section 9 is giving the punishment for rape as life time imprisonment and additional monetary compensation. If the girl faces death for the consequences of rape, then punishment may extend to death. If a male commits rape to a woman, he will get life time imprisonment. If a woman is raped by more than one person and woman faces injury or death for such rape, each of the accused will be given death penalty or life time imprisonment and additional monetary compensation (Section 9.3 of *Nari-o-Shishu Nirjatan Daman Ain,* 2000).

[2] Section 375 of the Penal Code, ACT XLV.
[3] These are the courts assigned only for some particular crimes under a special Act.

Figure 1. The scheme through which rape victims interact with the legal system with the support of HRLS programme



HOW BRAC HRLS PROGRAMME GIVES LEGAL SUPPORT TO RAPE VICTIM

BRAC HRLS programme comes to interaction with rape victims through their legal aid clinic – filing a complaint by the victim. However, not all the time rape victim comes to seek help from HRLS programme. Sometimes, it is the staff lawyer (SL) or programme organizer (PO) of HRLS programme who goes to victim to convince them to come to BRAC for getting their remedy. SLs or POs, if find any information from any learners from human rights and legal education (HRLE) class, *shebikas* or local news paper, they take the initiative to go to the rape victim's house and inform her about the service of HRLS programme. A rape victim starts her bond with BRAC HRLS programme filing a complaint in the legal aid clinic of BRAC. PO, HRLS also conducts fact finding to know the true story of the victim.

From BRAC's legal aid clinic, the victim is told to go the *thana* to file a FIR. PO of HRLS programme helps the victim to file the FIR. After filing FIR, victim is sent for medical examination to the doctor. PO or SL accompanies her some times in this step. The victim has to give her statement before police under Section (u/s) 161 of the Code of Criminal Procedure (CrPC) and before magistrate u/s 164 of CrPC. After the enquiry, police gives a charge-sheet recommending the accused for prosecution or give a final report not recommending the accused for prosecution. If the final report or charge-sheet cannot satisfy the victim (if the charge-sheet recommends one of the accused and does not recommend another), panel lawyer (PL) on behalf of victim gives *naraji* petition. After that, judge may again order for further investigation.

As rape is a cognizable offence[4], police can arrest the accused at any time and can detain him. After submission of the charge-sheet, a charge is framed against the accused after hearing from the lawyers of both sides – defense and prosecution. If the court thinks there is enough reasonable ground for proceeding for the trial, it moves for trial. If the court thinks that the case has no reasonable ground to be proved, it may discharge the accused. In the trial stage witnesses are called, examined and documents are produced from the prosecution and defense side. In the mean time, accused can get bail convincing the court through his lawyers and court can give order for bail or refuse the bail after hearing from both prosecution and defense side.

The last stage is the argument stage where the lawyers of both side argue in favour of their contentions. After the argument, the judgment comes. During the whole process, SL coordinates with victim, PLs and PO. In filing FIR, giving statement u/s 161 of CrPC, statement u/s 164 of CrPC, in having medical examination, PO and SL assist the victims. PLs of BRAC HRLS prgramme[5] get the case from *naraji* petition or charge framing**.** After that basically PLs play a major role in assisting the victim to get legal remedy. SLs play the role to support PLs – like to contact with investigation officer or medical officer for evidence etc. BRAC's PO, SLs and PLs have to deal with police, public prosecutor (PP), defense lawyers (DLs) and judge for getting the remedy. PP is the lawyer from the state under whom PLs work. PLs have to face

[4] "Cognizable offence" means an offence for, and "cognizable case" means a case in, which a police-officer, may, in accordance with the second schedule or under any law for the time being in force, arrest without warrant (Chapter 1, the Code of Criminal Procedure, 1898).

[5] The lawyers of HRLS programme representing the clients in the court.

DL's legal strategy in proving the case. Ultimately PLs have to convince the judge for bringing the remedy.

RATIONALE

> 'Rape is rarely reported as a crime by the victim for several reasons: fear of rapist's vindictiveness, a sense of shame, social censure, and negligence of law enforcement agency.' (Ain o Salish Kendra 1997)

Among the cases on VAW dealt by BRAC HRLS programme, rape cases have the lowest conviction rate (Table 1). It is the least reported crime and it has the highest pending number of cases among the cases on VAW cases under BRAC HRLS programme. Rape is also a sensitive case because a woman's sense of dignity is related directly to that case very intimately. Although BRAC's HRLS programme deals with a significant number of rape cases, no specific study for rape cases has yet taken place.

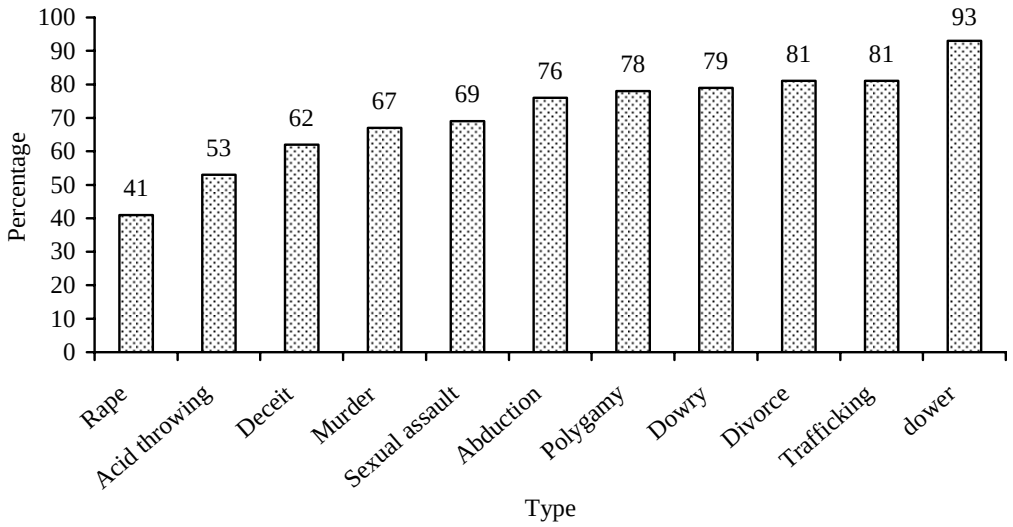
Table 1. The nature of court cases dealt by BRAC HRLS programme since 1998 to 2007 and the rate of judgment coming in favour of the clients of HRLS programme

Case	Pending	Judgment in favour of the clients of HRLS programme	Judgment against the clients of HRLS programme	Rate of judgments coming in favour of the clients of HRLS programme
Dowry	201	154	39	79%
Restitution of conjugal rights	106	68	9	88%
Dower	4862	3011	208	93%
Divorce	6	18	4	81%
Polygamy	40	30	8	78%
Acid throwing	140	96	82	53%
Sexual assault	114	59	26	69%
Murder	98	23	11	67%
Deceit	31	15	9	62%
Abduction	28	13	4	76%
Trafficking	6	13	3	81%
Rape	419	83	119	41%

Source: HRLS programme

The above table and figure show that among all the court cases dealt by BRAC HRLS programme since 1998 to 2007, rape has the least conviction rate – 41%. It is to be noted that HRLS programme assists the case after fact finding and being assured of its true nature. A rape victim is supported from filing FIR to till judgment. All the cost of the proceeding is bore by BRAC HRLS programme.

Figure 2. The nature of court cases dealt by BRAC HRLS programme since 1998 to 2007 and the lowest rate of judgment coming in favour of the clients of HRLS programme in rape cases



Since August 2007, HRLS programme has been going through a huge restructuring process. It has started as an independent programme with a vision of legal empowerment (BRAC HRLS brochure 2009). In the HRLS review report (Hossains and others 2007) it has been accepted that there are still frustrations and obstacles for the clients of the HRLS programme in facing the litigation process. Amidst the transition, when HRLS programme is seriously thinking to mould itself to be more effective, it is necessary to look upon the places pragmatically which have not yet been touched and the study of which area would facilitate HRLS programme to have better performance. Rape is considered in this study as that area where HRLS programme needs to look upon as an unanalyzed chapter.

OBJECTIVES

The objective of the study can be categorized as:

1. Identification of the legal challenges for HRLS programme to get remedy in rape cases
2. Describing the present role of HRLS programme in facing these challenges. This objective includes analyzing the role of BRAC's SLs, POs and PLs. The roles of PP, judge and DLs have been involved for understanding the challenges
3. Envisioning the potential role of HRLS programme to face the challenges in such a way so that more success comes in prosecuting rapist

LIMITATIONS OF THE STUDY

It was not possible to observe all the stages of a particular rape case in the study period as criminal cases go for at least four and five years. Only in one rape case, observation of some stages became possible. Observation of the stages of rape case

could give more insight to analyse the legal challenges. Most of the cases were statutory rape where victim's consent is irrelevant due to her age under sixteen years.

The reason for choosing the number of case studies and the particular cases for the study lie in data collection process. As the rape cases go on for more than three, four years, by this time involved PO, SL and RSS with a particular case study may leave the job. So only those case studies are taken on which POs and SLs, RSS and PLs can provide enough information. Though a rape case may have different dimensions, the study has evolved around only those issues where BRAC HRLS programme can get access through its existing structure.

METHOD

The study started since the last week in September and ended in July 2008. Study areas were Mymensingh and Manikganj.

A qualitative method was used for this study. Interviews were conducted with the victims, the victim's family, witnesses, POs, SLs, RSS and PLs of HRLS programme, judge, PPs and DLs. Informal group discussions among SLS, POs and RSS of HRLS programme, PLs and SLs and direct court observation had also been conducted and used as means for collecting data. Special emphasize was given in the interviews with SLs, POs, RSS and PLs as they were the key persons who could perceive the challenges from legal dimensions.

A total of thirteen case studies were used in this study, of which three cases were pending, two cases ended in compromise in the court and the remainders had been given verdicts. Nine of these case studies involved charges of statutory rape[6]. Four case studies involved victims eighteen years of age. The total number of interviewees was forty nine.

Eight cases of rape for case studies were ended in judgment. Among them, direct court observation was used only in one case (from the stage of examination of witness to the stage of judgment)[7].

As the study is based on the court procedures that take place in the lower court, several criminal law practitioners having long professional practice in the Session Courts (courts dealing with criminal matters) of Dhaka, have been consulted to know the practical legal manners. Also, their chambers were visited to observe how they deal with their clients before the hearing of the case.

Table 2. The method of this study

Qualitative method Group discussion – 4, Total number of cases – 13, Total number of interviewees – 49				
Statutory rape (victims under sixteen years) 9		Non-statutory rape (victims above sixteen years) 4		
Ended in judgment	Pending	Ended in judgment	Pending	Compromised
7	2	1	1	2
Observation used	Observation not used	Observation used	Observation not used	Observation not used
1	8	0	2	2

[6] When rape is committed against a girl sixteen years of age or under, her consent in the sexual intercourse is irrelevant.

[7] Rita case, HRLS, Mymensingh, (pseudonym has been used instead of the real name of the rape victim).

FINDINGS

HOW A RAPE CASE IS PROVED BEFORE THE COURT

According to the Evidence Act 1872, the burden to prove the crime lies in the prosecution's corner and the victim in a rape case. Section 101 of the Evidence Act lays down that:

> 'Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. Section 103 of the Act provides that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence'.

Presently, burden of proof in our inherited legislation system is 200 years old. Two terms closely relate to understanding how prosecution proves the case – one is 'presumption of innocence' and another is 'beyond reasonable doubt'. Presumption of innocence means that the accused is presumed to be innocent until his guilt is established by the prosecution. In civil cases the burden is met by providing a case by a preponderance of the evidence, while in criminal cases the state's persuasion of burden is met only by proof beyond reasonable doubt (Murphey 1980, 74**).** Prosecution has to prove only those components which are material to the offence. If the matter appears to the defense to be material and it is intended to contradict a witness as to that matter, it is the duty of the defense to produce evidence to rebut the statement of the witness.

The term beyond reasonable doubt has no concrete explanation. The question of reasonable doubt is question of prudence. When the prosecution is proving the guilt of the accused, there is no such burden is assigned on the accused to prove one's innocence. It is sufficient for one to raise a doubt as to his/her guilt.

Interviews of the lawyers revealed that in most of the time our court wants circumstantial evidence to prove the rape case. Like – A has listened the fact from the victim that she has been raped by the accused in that particular place in that particular time, B has also listened the same – in this way. In the case studies of this study, it was found that defense was mainly based on the inconsistencies of the statements of the victim and witnesses. When inconsistency arises among the statements of FIR, statement u/s 161 and 164 of CrPC and evidence of the witnesses in the court, the defense takes the plea of benefit of doubt.

In rape cases, the defenses based on bad character of a woman or consented intercourse can work as an important factor. However, in this study, the defense based on bad character of a woman does not seem to be of that much importance. Judges did not found to consider this ground giving grave importance in judgment. One judge commented, '*in our court, lawyers do not go for the marginal defense saying that it was consented intercourse*'. It was found that defense lawyers raise the issue of bad character and personal affair of a girl in rape cases. Even in statutory

rape this issue is raised. It is raised to create a doubt that victim did sexual intercourse not with the accused but with some one else. Though defense is not based solely on this issue.

In criminal legal system of Bangladesh, the two parties in the court are – the state one on hand and the person accused of the crime concerned on other hand. On behalf of state, PP is the main prosecution lawyer. Victim can appoint a private lawyer for a better legal battle in additional of that state lawyer.

Medical reports, documentation of examination and witnesses to corroborate victim's statement are the most credible forms of evidence presented in the court. According to PLs, PO and judges, prosecution proves the case by producing medical legal report and the statement of the doctor, investigation officer and witnesses who hear the incident from the rape victim or from her father or mother or who have seen the victim bleeding. The firm consistency of the statements among the prosecution witnesses and proof of sexual intercourse of medical legal report along with the marks of resistance are enough to convict the accused in our court system.

FACT FINDINGS

HRLS PO conducts fact finding after receiving the complaint from the rape victim. When HRLS PO becomes confident that the incident is credible to believe, he forwards the file to SL. SL supervises the whole fact finding and sometimes he himself goes to the spot. The importance of fact finding is that it gives the rape cases of HRLS programme a strong credibility. Doing fact finding early on also allows for evidence to be gathered while still fresh and while witnesses are most likely available.

In interviews, PLs also express that the report from fact finding also help them to construct the case. The more accurate the fact finding is, the more points are found to make a strong prosecution case.

Though it is true that through fact finding PO and SL bring out the facts, PLs, SLs and POs have agreed that the training for fact finding needs to be improved to bring out more accurate facts.

FIRST INFORMATION REPORT: THE FIRST LEGAL CHALLENGE

The word 'first information report' is not mentioned in the CrPC. It is the information which is given to the police in order to investigate. After occurrence of the incident, rape victim has to file the complaint to the police station. When the description of the incident is confined in the particular form for the purpose of the legal proceeding at the first instant, it is called first information report.

Section 154 of CrPC states that:

> 'Every information relating to the commission of a cognizable offence if given orally to an officer-In-charge of a police station, shall be reduced to writing by him or under his direction and be read over to the informant and every such information, whether given in writing or reduced to writing as aforesaid shall be entered into a book to be kept by such officer in such form as the government may prescribe in this behalf.'

The first information report is important for any criminal cases including rape, because it is the earliest information of an offence and it records the circumstances before there is time for them to be forgotten or embellished. FIR is put in evidence when the informant is examined. It is used for the purpose of testing the fact corroborating the claims of the prosecution story.

FIR is important for the rape case for the following reasons:

1. The strength of the case depends on FIR
2. The more consistent and credible FIR would be, the more strong prosecution case will become
3. Any lacking, inconsistency in the description of FIR may prove to be fatal in aftermath court proceeding
4. Any alteration, deviation in aftermath legal proceeding from the description of FIR make the prosecution case weak which may ultimately lead to acquittal of the accused.
5. Delay in lodging FIR and not giving any rationale and justifiable cause for such delay erode the credibility of the prosecution case

Lawyers have expressed the view that an experienced skilled lawyer is required to write a FIR. In most of the rape cases, rape victims or their parents lodge FIR in the police station who are not only less educated but also do not have minimum knowledge of criminal law. FIR is recorded by *munshi* and in most of the cases he takes the advantage to manipulate the statements to assist the accused later in return of money. Even, sometimes, FIR gets manipulated by the victim's family at the heat of the circumstances. Police or *munshi* even does not bother to read the statement again to the victim or her family for clarification of what they are saying. As an obvious result, the structure of the FIR becomes crippled, weak and full of inconsistency which becomes the tool to weak the prosecution case by the defense lawyer.

Usually, PO goes with victim to file FIR. POs of HRLS programme do not get any proper training from legal practitioner on how to write an effective FIR for supporting the prosecution case. There is no static format for an effective FIR, but a practicing lawyer can understand the best what to put in FIR depending on the circumstances. POs of HRLS programme have to do one week training before starting their job in HRLS programme and the trainers are not found to have legal background. As a result, the presence of PO can prevent the police to manipulate the statement to some extent, but that FIR also cannot give enough support to the prosecution strategically. In some cases, victim comes to the legal aid clinic after filing FIR and in that case the prosecution lawyers face even more difficulties.

It has been come out from the interviews with PLs that the first legal challenge BRAC HRLS programme has to deal with is regarding FIR. PLs have strongly suggested if they can be involved from the beginning of the case, it would be easier for them to advance the case.

FIR is not substantive evidence (Zahirul Huq 2005). However, the interviews with judges, PPs and PLs have revealed the immense importance of FIR in criminal

law practice of our lower judiciary. Judges mentioned that they got the first impression of the credibility of the case reading the FIR.

'A good judge can understand whether the case is true or false reading FIR'
- A judge, Special Tribunal for *Nari-o-Shishu Nirjatan Daman Ain*

FIR can be relied upon by the defense u/s 145 of the Evidence Act to impeach the informant's credit. According to Section 145 of Evidence Act, a witness may be cross- examined as to previous statements made by him in writing or reduced into writing and relevant to matters in question. When the DL cross examines the witnesses of the prosecution side and finds out any contradiction between the facts stated in FIR and the present statement by the witnesses, it can lessen the credibility of the evidence of the witnesses.

In Gopal Rajgor v. The State (42 DLR, 446), it has been held that where the prosecution has a definite case, it must prove the whole of it; partial departure from the prosecution case affects credibility of the witness and complete departure makes the testimony to be entirely discarded. What is partial departure and what is complete departure varies case to case.

Partial departures in FIR can be sanctioned, if it can be argued that those departures are not substantial in nature. In Khondokar Md. Moniruzzaman v. The State (14 BLD), it is told, '*a FIR may not contain the details of the occurrence in all cases. Omission to mention some material facts in the FIR does not render it false.*' Again, the material facts depend on case to case.

Using legal arguments and instructions to witness and victims, the effect of departure from FIR can be mitigated. In the case studies of study, it was found that the PLs did not take attempt to argue on the departures from FIR using convincing case references. As a result, the judge and the DL could emphasize on the contradictions of FIR and the statement of victim in the court. Ultimately what came out that though contradictions between FIR and the statement of the victim in the court is not the sole reason for taking away the judicial remedy, but it puts a very substantial element to create the circumstances go against the victim.

Another important matter regarding FIR is delay in lodging FIR. Except two cases, all the cases of this study have delayed FIR lodging. Except one case, all the cases have minimum three months delay in lodging FIR which is considered by the PL as the weak point of the cases. In all the cases, the reasons of delay were the attempt of the local influential people to make a compromise with the accused and victim's attempt to hide the incident. In all the cases, very strong attempt was taken to compensate the victim's family for not filing the case or to get the victim married with the accused and thus making delay in lodging FIR.

In criminal cases, it is presumed that the delay is caused to manipulate the prosecution story. In a case Abdul Latif and Budu v. The State (44 DLR, 492), it has been held that court has always viewed the FIR with grave suspicion when there had been unexplained delay in lodging it. PLs and judge have expressed the view that delay in lodging FIR often considered to be one of the factor for getting judicial remedy against the victim.

In an Indian case (1997 CRLJ, 2003), a very pragmatic view has been taken about delay in lodging FIR in rape case –'delay *in filing FIR in rape case must not be viewed with the same sensitiveness as in other cases'*. In Misti and Others v. The State (6 MLR, HC, 2001**,** 394) the court took practical view saying '*in sexual offences, delay in lodging of FIR can be due to variety of reasons*'. The case Karnel Singh v. The State (1995 CRLJ, 4173) considered the reality –'*in rape cases victims are usually reluctant to go to police because of society's attitude towards such victim*'. The case State of Panjab v. Gurmit Singh and Others (1996,2,SCC 384) moved further on this issue stating the court can not over look the real fact in lodging FIR in delay.

Still, long delay in filing FIR may adversely affects the prosecution case. In a case Fakir v. The State (8 MLR, HC, 2003, 355) the reasons behind inordinate delay was not held to be satisfactory as no proof was produced to justify that. The reason was attempt to settle the dispute in local *shalish* and none of the *shalishmen* come to depose about the story of *shalish*.

Delay in lodging FIR can be made up by putting the reasonable explanation and giving enough proof on behalf of it. However, BRAC's PLs were not seemed to argue on such legal points to change the judge's mindset for sanctioning delay in rape cases.

MEDICAL EXAMINATION: DIFFICULTIES FACED DUE TO THE NATURE OF MEDICAL LEGAL REPORT AND PROCEDURAL LIMITATIONS FOR PRODUCING DOCTOR'S EVIDENCE

As rape is physical abuse, it usually leaves signs of abuse on victim's body – like scratches, injury on private parts, proof of sexual intercourse, the existence of semen and blood and spermatozoa. There are physical signs of penetration for instance, however not always are there signs of scratches or other injury. It is particularly complicated if a victim has consensual legitimate sexual relations with another person other than the accused which would mean DNA testing may be the only method of distinction. Statement of the victim corroborated by medical legal report and testimony of doctor are considered by the PLs as strong proof for prosecution.

In a medical examination, the doctor first takes the history of the incident from the victim and follows with an examination of the injuries. The victim has to be examined by a doctor of the local government hospital within twenty four hours after being raped (Bangladesh National Women Lawyers Association 1999). The interviews with judges and lawyers have revealed that even if victim has been taken within forty eight hours, medical and legal reports are still convincing enough to prove the case. If the medical examination is not completed within forty eight hours, the likelihood of tracing injury in the private parts decreases considerably.

If marks are found which imply the resistance of the women, the absence of consent is presumed. It is also a very strong corroboration to the accusation of rape (Shah Khan v. The State, 18 DLR). However, in order to prove a rape case, marks of resistance are not mandatory. The absence of marks of injury on a victim of rape is not fatal in each case nor does in every case the absence of such physical injuries on

the prosecution warrant the presumption of consent on her part (Nawab Khan v. The State, 1990, CRLJ**,** 1179).

The role of medical evidence of sexual intercourse is not mandatory to prove a rape case. It works as corroborative piece of work. According to Mofazzal Alias Md. Mofazzal Hossain and Another v. The State (7 BLD, HCD, 1987, 406), where there is other reliable evidence to prove the offence, medical evidence is not indispensable.

A seal is given in the medical report and the doctor in whose name seal has been given, has to be produced in the court for confirming the report. The evidence of the doctor is another reason for delay in rape cases. By the time the evidence stage comes, doctors get transferred from that area to another area. In none of the cases in this study, doctors received the summons sent from the court. SLs always have to find out the doctor showing their personal communication skill. One SL told, 'only *GOD knows where the summons for the doctor goes. It never reaches to them*'. Doctor has to go through lengthy official formalities to come to court. In all of the cases of the study, it was found that it took more than seven or eight months to get the evidence of the doctor.

In Rita case[*] (Mymensingh, HRLS programme), summon issued for the doctor came back stating that doctor was not found. Then SL found that one doctor had already been transferred to Dhaka and another one was in training in USA. It was very tough to find out the doctor in Dhaka Medical College. At that time, investigation officer came forward for help. His wife was a doctor and she helped to find out the doctor. However, there were two doctors at the time of the examination of the raped victim. One gave the seal in the medical legal report and another just assisted him during the time of examination. The doctor, who was in USA, was supposed to be the witness as he gave his seal in medical legal report. Ultimately, SL with the coordination of PP managed summon for the doctor in Dhaka medical college convincing judge on the limitation of the circumstances.

The importance of the medical evidence varies case to case. In this study, except three cases, in no case medical examination is done within due time. These delayed medical reports only bear the testimony of sexual intercourse but nothing else rape related because the evidence of struggle went away with the passage of time. In such cases, medical evidence played almost no role, as judges were not found to be convinced except with a medical evidence carrying marks of resistance such as like scratches. Prosecution then had to prove the case through corroborative evidence – through the witnesses who have heard about the offence.

The preference of the judge for reports bearing the marks of injury does not suit the practical scenario. The reason has been very nicely described in the case of M.C. v. Bulgaria (M.C v. Bulgaria, Application No. 39272/98, Judgment 4 December 2003, European Court of Human Rights) stating:

> '....the evolving understanding of the manner in which rape is experienced by the victim has shown that victims of sexual abuse – in particular girls below the age of majority – often provide no physical resistance because of a variety of psychological factors or because they fear violence on the part of the perpetrator.'

[*] Pseudonym has been used instead of the real name of the rape victim.

The study shows that the judges did not consider these practical factors. Whenever they did not find any injury in the medical report, they became too prejudiced to the theory of presumption of innocence of the accused.

In Assia case [*](Manikganj, HRLS programme), Assia went for medical examination after six months and no trace was found in her body except proof of sexual intercourse. At that time she was pregnant. DL tried to prove in the court that Assia became pregnant because of having affair with another guy, not for the accused. Judge however, did not mention his views regarding this issue, but emphasized too much on the inconsistencies of the statements of witnesses. It is found that when medical legal report was not in favour of the prosecution, the judge emphasized the statements of the witnesses and became too scrupulous for a minor inconsistency. When a medical legal report came in favour of the prosecution, judges took a flexible view regarding the inconsistencies of the statement of the witnesses. When can a medical legal report be told in favour of the prosecution? According to the case studies and the interviews of judges, it was revealed that the examination done within forty eight hours, presence of injury in the private parts, rapture of hymen, the presence of semen, blood etc are considered to be a medical legal report that is in favour of the victim.

Still, the importance of medical evidence is dependent on the judge's mindset. In Manikganj, PLs told that one judge of the Special Tribunal was very flexible regarding medical reports. If the victim was under sixteen and only proof of sexual intercourse was found in the medical legal report, accused was given punishment.

Now a day a DNA test can be an effective strategy to trace the accused after long time. BRAC's PLs and SLs have expressed the possibility of making the case stronger with the help of DNA test. BRAC has started to give expense for DNA test in some cases, but it is difficult to say that HRLS programme should do it in every case because of its huge expenditure.

INVESTIGATION: THE ROLE OF POLICE

This is the stage of investigation and preparation of criminal case. The police play the only role from the beginning to the end of this stage. After the investigation, police produces charge-sheet. Charge-sheet can be defined as a recommendation for prosecuting the offender. It is then forwarded to the magistrate. A police starts the investigation u/s 156 of CrPC.

An investigation consists of the following steps:

1. Proceeding to the spot
2. Ascertainment of facts and circumstances
3. Discovery and the arrest of suspected offender
4. Collection of evidence

[*] Pseudonym has been used instead of the real name of the rape victim.

5. Examining various persons including the accused and the reduction of their statements into writing if the officer thinks fit
6. The search of the place and the seizure of things
7. Formation of opinion as to whether on the materials collected there is a case to place the accused before a court for trial
8. Making a case diary containing the report

The case diary is of crucial importance for both the court and the prosecuting authority.

It was found in all of the case studies that police never came to investigate into the spot voluntarily unless BRAC SLs or POs constantly told him to do so. Except in Rita case (HRLS, Mymensingh), in all the case studies, police reached the spot after such unusual delay that hardly any evidence remained there to collect. Victim's families had common allegation that police did not give enough time to investigate – they just came, carried a few conversations and then returned back. Such negligence affected the prosecution case negatively because a good investigation provides sufficient evidence to the trial court for conviction.

STATEMENT UNDER SECTION 161 OF CrPC: SCOPE OF MAKING INCONSISTENT AND CONTRADICTORY STATEMENT

Under Section 161 of the CrPC, any police officer may examine orally any person who is supposed to be acquainted with the facts and circumstances of the case. Police officer keeps the record of that statement. Under this Section, police officer takes the statement of the victim, sometimes her family members who can be the witness of the incident, accused and other witnesses. The object of this procedure is to obtain evidence for the trial. An advocate for the accused can use the statement for the benefit of his client at the time of cross examination.

The importance of these statements have been described in the case Nazir Hossian v. Md. Shafi (17 DLR 40, SC) as – when a witness is contradicted by a statement recorded by police in the course of investigation, the only effect that it can have is to reduce the evidentiary value of his testimony in court and makes the witness unreliable on the point on which he is so contradicted.

Usually BRAC staffs are not present when these statements are taken. That is why there remains a huge scope for the police to manipulate these statements which can assist the defense lawyers to emphasize on the discrepancies and contradictions from the statement of the victim and make the prosecution case weaker. As a rape victim, the girl remains traumatized and BRAC's SLs and POs are not skilled enough in psychological counseling of a rape victim which may help her to answer all the questions to the point appropriately. Taking the benefits of such emotional strains, police cunningly put some issues of contradictions in the statements. These limitations ultimately contribute to a large extent to hinder the remedy.

Victims and witnesses sometimes receive some sort of instructions from the SLs about how to answer before the police. Unfortunately those are not enough to tackle the tricky question of police. PL suggested if PL can be involved before victim go for

statements u/s 161 of CrPC, the case can be moved on a good strategy. Aftermath, it is the PL who has to plead for the victim based on the statement u/s 161 of CrPC.

STATEMENT BEFORE MAGISTRATE UNDER SECTION 164 OF CrPC/ SECTION 22 OF NARI-O-SHISHU NIRJATAN DAMAN AIN, 2000: THE IMPORTANCE OF MAKING STATEMENT BEFORE MAGISTRATE BY THE VICTIM AND WITNESSES

Under Section 164 of CrPC, a metropolitan magistrate, any magistrate of first class and second class is specially empowered in this behalf by the government may record the statements of the witness which also include rape victims in rape cases. Section 22 of *Nari-o-Shishu Nirjatan Daman Ain*, 2000 is akin to Section 164 of CrPC which is telling that if the investigation officer feels that for the sake of justice, the statement of any witness of the crime needs to be recorded before the magistrate, he can request the magistrate to do so.

A statement made u/s 164 of CrPC is admissible in evidence and may be used to corroborate or contradict the statement made in the court according to the Evidence Act. It can only be used in cross-examination of the witness in order to show that the evidence given in court was false, but not to use it to show that the statement recorded was true (Asaddar Ali v. The State, 9 BLD, 187).

Despite of the importance of statement u/s 164 of CrPC, victims do not receive any instruction from the PL before giving statement u/s 164 of CrPC. If any inconsistency comes out from this statement during the trial, it is the PL who has to deal with that.0

According to the lawyers and SLs of BRAC HRLS programme, statement u/s 164 of CrPC bears immense importance in comparison to statement u/s 161 of CrPC – as the person giving statement under this Section, puts his or her signature there. In court, a person can often raise the plea that police has manipulated his or her statement u/s 161 of CrPC and court often gets convinced as there remains no signature in the statement given u/s 161 of CrPC. Through the interviews of two judges, PLs and PPs, it has been confirmed that even judge thinks that police manipulates the statements u/s 161 of CrPC but it is not possible to do so when statement is given u/s 164 of CrPC as the statement bears the signature of the person giving it.

According to Section 22 of *Nari-o-Shishu Nirjatan Daman Ain*, it is up to the investigation officer whom he wants to take to the magistrate for such statement and it may extend to the witnesses also. In our country, only victim is taken for such statement. In reply to the hypothetical question to the judges, PPs and PLs in this study – 'if witnesses are also bought to give statement u/s 164 of CrPC, what would be the consequence?', it came out that there is a strong possibility that the case may come in prosecution's side. Generally, statement u/s 164 of CrPC is taken shortly after the incident. So, the witnesses can give their statement with fresh memory and less inconsistencies and less chance of being intimidated by the opposite lawyer. Also, doing so, witnesses have the less chance to deviate from the statements later which usually they do due to memory declination or intimidation or provocation, as they have already given the statements putting their signature.

PLs and Sls are in opinion that it is better to give statements before the magistrates, because magistrates are not as corrupted as the policemen. Magistrates remain sympathetic to the rape victims and always cooperative instead of asking questions which would make the victim nervous and prone to make inconsistency in the statements (which the police usually do). When it was asked – why do not you put the same effort to bring the other witnesses before the magistrate as you do in case of victim? The answers came in reply lacked the realization of the importance of this process and utmost difficulty to bring all the witness before magistrate for too much work load on SLs and POs. PLs have also mentioned the absence of this culture in our court proceeding.

Though according to the law, it is the investigation officer's wish that will bring this process into application, it was found in the case studies that it is the pressure from SL that brought the victims to give statement before the magistrate. In Rita case (HRLS Mymensingh), SL made the victim to give statements before the magistrate. Later, PLs did not use this statement during the time of hearing for bail of the accused and even not in the argument stage. Pls were not found to possess the copy of statement u/s 164 of CrPC in Rita case. Even the file of the case did not contain the statement. A question may be easily asked – if the statement under 164 is not to be used later, what is the use of the effort of the SL for bringing the victim u/s 164 of CrPC?

CHARGE-SHEET AND *NARAJI* PETITION

Under Section 169, 170 and 173 of CrPC, police gives the final report after completing the investigation showing the result of the investigation. Under Section 169 of CrPC, the report is made when it appears to the officer-in-charge or the police officer making the investigation that there is no sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to a magistrate. Under Section 170 of CrPC, the report is made when it appears to the officer-in-charge or the police officer making the investigation that there is sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to a magistrate. Section 173 of CrPC contains general directions relating to both. Section 173 does not contain the term 'charge-sheet' or final report.

A police report in which no accused is recommended to be prosecuted is ordinarily known as final report (6 BCR 174, AD). On the other hand, police report recommending the accused for trial is called charge-sheet. Sometimes, one report may recommend some persons to be accused and others to be not (when more than one person is involved in an offence).

If the police submit a final report, the magistrate may accept it or reject it. After rejecting the final report, he may order for further investigation. If the magistrate accepts it, the aggrieved informant can file a *naraji* petition in the court. *Naraji* petition is considered as a complaint and the court if upon examination of the complaint or other witnesses, if any, is satisfied, may issue process upon the accused or may direct inquiry into it by another magistrate. When *naraji* petition is given, BRAC's fact finding report helps a lot provided that it is properly written.

In our country police is habituated to show negligence to prepare charge-sheet. As a result, prosecution hardly gets any assistance from it. Police some how mentions the name of the accused, just gives short description of the place of occurrence and finishes the duty. Bribe to the police from defense source is the major reason for this intentional negligence. BRAC's SLs and PLs told that in most of the cases police do not give final report if they are informed that the case is being assisted by BRAC, rather they give charge-sheet. BRAC's SLs and POs have to keep close contact with local *thana* to foster the process of giving charge-sheet. All they do in their personal communication skills. BRAC do not have regular interaction with local police station through any workshop, seminar etc.

CHARGE FRAMING AND DISCHARGE BEFORE TRIAL: THE CHANCES OF DISCHARGE OF THE ACCUSED IN ABSENCE OF PRIMA FACIE CASE

When the court finds there is a *prima facie*[8] case, then the court frames the charge. The trial of the accused starts with charge framing. According to Section 221 to 224 of CrPC, a charge has to be framed specifying the offence with sufficient description, particulars as to time place and person, the manner of committing offence and the law under which the offence is punishable. Charge framing is very crucial for the prosecution.

During the stage of charge framing, if the court finds that there is no *prima facie* case against the accused, it can discharge the accused before proceeding for trial. In this stage, the court takes into consideration the FIR, charge-sheet, statement u/s 161 and statement u/s 164 of CrPC and medical legal report.

In Sabina case[*] (HRLS, Mymensingh)**,** all three accused got discharged at the time of charge hearing. Lawyer gave the reason of weak FIR and statement u/s 161 of CrPC. SL told that the victim gave a reliable statement u/s 164 of CrPC to magistrate. The victim was under sixteen years old and was disabled (she could not speak). Before magistrate, she showed with her closed fist that she wanted punishment of the accused. Still during the time of charge framing, the lawyer did not give any convincing reply to the defense and the court did not find any *prima facie* case against the accused. Though PL's non convincing argument was not the sole reason for such discharge, it was a contributing factor. In Rita case (HRLS Mymensingh), during the time of charge framing, accused was shown as juvenile without any concrete proof. At that time also, prosecution lawyers did not protest. During the time of argument, that issue created legal complications. According to the case studies, it seems that PLs did not take the event of charge framing seriously.

Unless there is *naraji* petition, PL's involvement starts from charge hearing. All the PLs interviewed for this study were of opinion that it becomes too late for them to do something for the victim if there is error in FIR, statement u/s 161 and 164 of CrPC.

[8] A *prima faci*e case is one that at first glance presents sufficient evidence for the victim to win.
[*] Pseudonym has been used instead of the real name of the rape victim.

ARREST: DIFFICULTIES IN ARRESTING THE ACCUSED

According to our court custom, police can arrest an accused of a rape case even without waiting for arrest warrant. PLs told in interviews that usually police can arrest the accused for rape cases under *Nari-o-Shishu Nirjatan Daman Ain* without arrest warrant from the court. However, in all of the case studies, delay and negligence were found to arrest the accused. SLs and POs had to contact police on regular basis to create pressure for arresting the accused. This sort of request from SLs and POs do not work all the time.

In Parboti case[*] (HRLS, Mymensingh)**,** police did not arrest the accused for almost one year (until May, 2008, the accused was not arrested). Parboti's brother told that both the accused often visit home and keep on telling local people that police was in their favour and police would never arrest the accused. In Rita case (Mymensingh, HRLS), accused persons were got arrested after the press conference. It is not possible for to go for such coverage for all the rape cases.

If a person cannot be arrested, there is strict provision to make him present in the court, like proceeding for trial in absence of the person (trial at absentia according to Section 339 B of CrPC). Despite of having this provision, our court culture is to wait and wait for the accused rather than to move for such action. Even panel lawyers also told that trial in absentia is not exercised by the court. '*Yes we do have provisions to start trial if accused cannot be arrested, but our court do not do that, also do not encourage the prosecution to plead for that* – one PL admitted frankly.

BAIL: EASILY AVAILABLE BAIL IN NON-BAILABLE OFFENCE

Basically there is no specific law for bail. The main points for consideration of the application of bail is – whether there is any likelihood of the accused absconding or whether there is any likelihood of the accused tempering with the evidence by threatening the witness (Karim 2005). It is the duty of the court to see that both sides are not hampered.

In a case Siekh Shahidul Islam v. State, (44 DLR, 192), it has been told that it is not the *prima facie* case against the accused but reasonable grounds for believing that he has been guilty which prohibits granting of bail and in this respect, the onus is on the prosecution to disclose those reasonable grounds. Court examines the data available in the case to find out whether reasonable grounds exist to connect with the crime alleged (20 DLR, 271).

Basically, in the case studies, no specific practice has been found on what basis bail is granted. As an offence under *Nari-o-Shishu Nirjatan Daman Ain*, rape is non-bail able offence[9]. It is found that judge hardly refuses any application for bail.

[*] Pseudonym has been used instead of the real name of the rape victim.

[9] Bailable offence – bailable offence" means an offence shown as bailable in the second schedule, or which is made bailable by any other law for the time being in force; and "non-bailable offence" means any other offence (Chapter I, The Code of Criminal Procedure 1898). Usually court looks for rigorous reasons to grant bail in non-bailable offence.

Non-bailable offence does not mean that bail cannot be granted. Bail can be granted in non-bailable offence and even bail can be refused in bailable offence[10]. It depends on the court's discretion and lawyer's arguments in the time of hearing for bail. In case of non-bailable offence, court is supposed to be much more reluctant to issue an order of bailment (Karim 2005).

In the case studies, it is found that bails were granted in rape case whenever they were asked for and without any reluctance from judge's part. DLs often showed that mother of the accused was sick and judge granted the bail without further consideration of victim's security. What made the judge give bail in non-bailable offence like rape? In answer to this question, no PL could give specific answer. They just mentioned – it is all up to judge, but usually judges do not refuse bail. PLs of Manikganj mentioned that sometimes judge's mentality depends a lot in granting bail. Some judges remain very strict to grant bail in VAW cases even after silence on the part of prosecution lawyer.

In Selina Akhter's case[*] (HRLS, Manikganj), accused got the bail just after three months and started to give threat to Selina's mother. In Assia's case (HRLS, Manikganj), accused got bail just after few days. Assia's father expressed astonishment, '*I wonder, the way he has come out of jail as if he has never done anything*'. Despite of having strong prima facie case, accused Holud Mia in Rita's case (HRLS, Mymensingh) got bail. At the time of hearing, BRAC's PL was not even present in the court and the bail was given in a date which was not pre-determined. BRAC's PL told that she was not even properly informed about the hearing of the bail. The defense just showed the excuse that accused Holud Mia's mother was sick and managed to have the bail.

It is not found in any case where the prosecution has succeeded to prevent bail or cancel the bail later. The prosecution lawyers were found to just mention that rape was non-bailable offence at the time of hearing of bail and his or her client may face insecurity rather than mentioning the appropriate case references to justify the refusal to bail, and creating reasonable grounds for believing that the accused may have committed the crime. PLs were found to be not acquainted properly with the legal arguments to prevent bail.

The criminal law practitioners of the court in Dhaka told that in order to cancel a order for bail, first GD has to be made in the court. Then application has to be submitted before the court for cancellation of the bail. The court then wants the report from *thana* about the credibility of such allegation – like apprehension of insecurity of the victim and family etc. If the report comes in favour of such allegation, the court may cancel the bail. In all of the case studies, victim's family found granting bail to the accused amounted to threat to the security of the victim. What is found that this point was not taken very seriously by the court. The study has found that bail gave the scope the accused and his family to intimidate witnesses and victim's family with impunity.

What should be a salient approach of the court in this respect for granting bail? A case filed by *Ain O Salish Kendra* in High Court Division has come up with profound

[10] Ibid.

[*] Pseudonym has been used instead of the real name of the rape victim.

answer to this question (21 BLD, HCD, 2001 503). The court observed that Article 27 (guaranteeing the right to equality before the law), Article 31 (the right to enjoy equal protection of law) and Article 32 (the right to life and personal liberty) of the Constitution of Bangladesh, read together impose a duty and obligation on the state to protect and safeguard a citizen and ensure his/her security. The court also cited Article 3 of the Universal Declaration of Human Rights, which states that everyone has a right to life, liberty and security of person. The court then observed that in a democratic country governed by rule of law, the government is responsible for ensuring free and fair trial not only to the accused but also to the victims. It emphasized that the court is not only to see the right of the accused persons, but also to see the right of the victim of crime and society at large.

This judgment promises to impact on the system of the administration of criminal justice in the country, inasmuch as it sets a precedent that the courts must weigh the rights of both the accused and the complainant in order to ensure that the scales of justice are balanced. Unfortunately, in this study, PLs and judges were not found to be concerned about this precedent in granting bail to the accused.

TRIAL STAGE

Trial stage starts with charge framing. After charge framing, the next step is for the prosecution to prove the case. In this stage, prosecution produces their documents and witnesses in support of their contentions. Examination of witnesses is taken place in this stage. Case studies tell that examination of witness plays a vital role to determine the remedy of rape case. The main weapon of the defense is to decline the credibility of the witnesses showing inconsistency among their statements.

EXAMINATION OF THE WITNESS: DELAY, INTIMIDATION AND LACK OF INTERACTION BETWEEN LAWYERS AND WITNESSES

There are three kinds of examination – examination-in-chief, cross-examination and reexamination. Rape victims, accused and all other witnesses have to go through such examination.

Examination-in-chief is a direct examination of the witnesses through which witnesses simply explain the facts to the judge. Cross-examination is the examination by the adverse party with the intention to find out the inconsistency of the statements of the witnesses. Reexamination is to mitigate the confusions arising out of the cross examination. Reexamination is completely dependent on the issue raised in cross-examination.

Examination of witness often goes against the prosecution for three reasons:

a) Delay in examination of witness
b) Intimidation of witnesses by the defense
c) Lack of proper interaction between PLs and victims and witnesses before examination

The effect of delay in examination of witness

Delay in examination of witness takes the case against the prosecution in two ways – firstly, it declines the pros and cons of the incident from the memory of the witnesses; secondly, witnesses were intimidated or provoked by the accused's family and lawyer. In all of the case studies, delay has been caused during the time of taking statement of doctor and investigation officer. By the time trial stage comes, investigation officer and medical officer get transferred from one place to another. Then they have to face lots of official formalities to come to another place for giving evidence.

Another reason for delay is adjournment of court proceeding. During the case studies, it has often found evidence was not taken on due date, or hearing was not been held in due time. Sometimes, witnesses did not come and sometimes judge had too large a work load to hear the case. The stockpiles of cases on one judge are very important reason for such delay.

An incident – how delay is caused in our court

In Rita case (HRLS, Mymensingh), after examination of witness, it takes almost two and half months to have a date for the argument because of over loads of the case in the Special Tribunal. Even that date was also delayed for two times making gap of one month between each date. On the first day, judge told that he had to hear the arguments for a long time. On that day he had lots of cases and could not give proper time to hear the arguments. In another date, DL did not coordinate properly. On that date judge came in the court lately. Then DLs told that they could not carry the arguments. DL started to time pass having irrelevant conversation with judge saying, '*sir, I have not taken lunch, how come I will argue in empty stomach. Please sir, you please forgive me, I am going to take food*'. By this time another forty minutes got passed. Judge then told, '*I have to hear the argument taking a long time. Today only thirty minutes left. Set a next date so that I can hear it*'. SLs then urged the PL to raise voice. One PL then made the judge notice of the delay. Judge then expressed his helplessness; he mentioned that his staffs had to work even on holidays to dispose too many cases.

Intimidation and provocation

As time passes, it becomes easier for the family, lawyers and the accused to intimidate and provoke the witnesses including the victims and her family. In the case studies, either the opposite party threat victim's family to take back the case or they tried to persuade the victim's family with money or offered for marriage with the accused in future. One PL told, '*delay makes easier for the accused to purchase the witnesses*'. When a case rolls down year after year, victim's family starts to loose confidence from the rule of law and BRAC's staffs loose close contact with the witnesses. Though BRAC staffs can take care of the victim, but it is not possible for them to have contact with the witnesses all the time. The family of the accused takes this chance for their benefit.

It is a usual matter in all the case studies that witnesses did not give evidence as they were expected. Witnesses were intimidated and provoked to talk according to

the direction of the DL. In Rita case (HRLS, Mymensingh), some witnesses who were supposed to say that they had seen blood in the body of Rita, said in the court that they heard about the fact. Hearsay evidence is considered to be weak evidence in the trial and thus gradually makes the prosecution case weak. Even Rita's father, being provoked by the defense told in the court that he gave the name of the accused on presumption. He even told that the accused were his relatives and they were not involved with this case.

In Selina Akhter case (HRLS, Manikganj), Selina's little sister was the main witness of the incident. Before her eyes, Selina was forcibly taken by the accused. Selina's mother told that the little sister could not go to school because of the threat from the accused. Selina's mother found to be panic for her little daughter. BRAC's PO told that they know about the shelter home, but it is for the victims[11]. They did not know where to send a witness. If witness feels insecurity, the only way is to file a GD in *thana* which is of no practical use. Sometimes BRAC's PO and SLs visit the place to motivate the local elites to take care of the fact. It should be considered that SL and PO have so much work load that it is not possible for them to concentrate on the matter properly.

Lack of proper interaction between panel lawyers and victims and witnesses before examination

In examination of witness, DL always tries to find inconsistencies of the statements of the witnesses. Usually lawyers sit with the witnesses and victims and give them directions about giving statements in the court. It is observed that PLs and PP did not allocate enough time for giving such directions. DLs make questions such cunningly that a layman will never understand how his innocent answer is going to be used adversely by the lawyer. Sometimes, the examination makes the witnesses so nervous that they fail to give statements as they are supposed to. Considering all such things, prosecution lawyer gives the directions to witnesses and victims in such a way that they do not become nervous and keep vigilant to the points where they can be targeted by the DL. Before the trial, lawyers make demo questions to the witnesses which the opposite lawyers may ask. They also make the witnesses prepared to answer the questions according to the legal strategy. In the case studies, it was found that in many cases PLs gave instructions to the witnesses in the court premises just before entering into the court for examination and most of the time witnesses did not understand the directions clearly in such a short time.

In a discussion, one staff from HRLS programme told that basically their intention to recruit PLs for client was to make close coordination between PP and client. According to our legal system, criminal offence is committed against the state and a PP as a state appointed lawyer is supposed to lead the prosecution case. However, being a government lawyer, he remains extremely busy. That is why, PLs are there to give time to victims and witnesses. Allegations came from victim and her families that lawyer did not give them proper direction about the statements of the case. If they would know how to approach before the lawyers of other side, they would not make such statement of which defense lawyer could take benefit.

[11] If victim feels insecurity, she is sent to the shelter home of *Ain o Salish Kendra.*

ARGUMENT: NARRATION OF THE STATEMENTS INSTEAD OF CONVINCING LEGAL ARGUMENTS

According to Section 256 of CrPC, '*when the examination of the witnesses (if any) for the defense is complete, the prosecutor shall sum up his case and the accused or his advocate shall be entitled to reply*'.

When the case is in argument stage, lawyers from both of the parties, describe the evidence of the cases and mention the case references and the laws. The main intention is to convince the judge about the case linking the fact with the law. In practice, it is seen that usually PLs describe the case and PP just formally sums up the case. In argument stage of Rita case (HRLS, Mymensingh), it was observed that PLs just stated the statements of the witnesses. Though DLs mentioned case references, PLs did not mention a single case reference in favour of the case.

Though a lawyer can submit a legal written argument during the time of argument and it is better to submit a legal written argument for assisting the judge, lawyers were not found to practice this useful process.

BRAC's PLs were hardly found to mention the case references in the argument stage. Also, most of them did not link the fact with the law and considered argument as a narration of the statements of the witness and FIR and investigation report. However, it has been observed that lawyers in the lower court hardly mention legal precedents and arguments based on interpretations of laws to bring the judgment in favour of their clients. The culture of argument by the lawyers is confined within narration of statements and contains less legal reference.

THE ROLE OF PANEL LAWYERS: LACK OF COMMITMENT AND COMPETENCE

In Selina Akhter case (HRLS, Manikganj), when the trial was going on, Selina's mother took Selina in the court. At that time Selina was totally mentally traumatized and could not speak. DL demanded Selina to be appeared in the court. Her mother protested saying that her daughter was sick and incapable to be appeared in the court. DL tried to prove that Selina was mentally insane from the very beginning and hence, her allegation did not have any worth. Selina's mother protested and told the court that her daughter became mentally stigmatized because of the rape and if she was put alone in the court room for examination, she would be again stigmatized. She wanted to be with her daughter. No one paid heed to her – Selina was snatched from her mother and her mother was forced to leave court room leaving her mentally traumatized daughter at the mercy of the hostile court room atmosphere. She found no one from BRAC at the premises of the court room to help her. The PL was not present on that time who was supposed to be present.

Later, I asked the judge that if a victim is mentally traumatized and is not in the position to appear before the court what would be the remedy. He told that if the lawyer would produce doctor's certificate of the victim's mental disturbance, the victim could get relief from the hassles.

Assia was thirteen years old when she was raped by her neighbor who is fifty five years old. The incident happened in 2001. After the occurrence of the act, Assia concealed the matter but it came into light when her pregnancy became apparent. After six months, she came to BRAC legal aid clinic. The case was filed. After fours years of waiting she got the judgment as '*the prosecution has failed to prove the case*'. In the judgment, it was pointed – '*the parents told that they could not understand their daughter was pregnant till six months which is not believable. A girl must tell her mother about the recent change in her body*'. DLs show that inconstancy was grave between Assia's statement in FIR, statement u/s 161 of CrPC and the statements of other witnesses. Prosecution lawyers could not give convincing reply to such points.

The judge of the case, in an informal discussion, told that if the consistency was found in the statement of Assia and it was shown that Assia immediately told the incident to her mother, he would think twice before he discharged the accused. It can be understood that Assia was not directed to talk according to the FIR and lawyer did not make an effective strategy to prove the case giving much concentration on FIR, statements u/s 161 of CrPC. In conclusion, judge remarked – '*prosecution created a serious doubt in the case in presenting the evidence*'. Assia's father was found to be too disappointed with PL's ineffective role.

PLs themselves told that if they would have training on more effective legal strategy, they could do better job. PLs also told that they are not provided adequate training on human rights law. Most of the PLs have their degree from law colleges. During their study they were not taught comprehensively about interpretation of laws to promote women rights, well drafting skills and improved skills of arguments. PLs also mentioned about the court culture in lower court based on the influential role of power and money which play more vital role than the legal skills. One PL told that victim remains very traumatized and stigmatized during the time of trial. PL is the only person who remains with her most closely. His/her proper interaction can make the victim more comfortable to answer the DL. PL told that if they can receive training regarding client counseling, they can do better. They also objected about the unsatisfied nature of job. PLs alleged that their salary is very low, even they do not have money to give *mohuri***.** They also mentioned that money is allotted for *mohuri* in other legal aids which often demoralizes BRAC lawyers.

The most striking thing is the mentality of the lawyers towards their clients. They mould their behavior and service to the clients taking the yardstick of money. The clients who pay them more, become their priority. In our court culture, high skilled lawyers demand high payment. As a result, skilled lawyers do not come as panel lawyer for BRAC, and those who come either cannot give proper output for lack of skills or do not want to give proper time at the cost of the time allocated to other clients who can pay them more money.

POs and SLs expressed the concern that there is less scrutiny on the PL's work and attendance in the court. Even such incident has been come to know that sitting in court, judge was telling, '*I want to see BRAC's case first*', but PLs were not present in the court. It has been observed that if SL was present in the court, PLs became more prompt. It has also been observed that clients were waiting hours after hours for the lawyer in the court, lawyer was not coming. When SL reached the court and found

the clients were waiting, he called the lawyer immediately and then the lawyer came. By this time, some clients went back thinking that lawyer would not come.

It is not possible for a SL to be present in every day to guide the PL (for example, on one SL in Manikganj, there rests the duty to supervise seventeen branches). POs and SLs express that if the work load can be reduced or more staffs can be recruited, PLs can be supervised frequently.

ROLE AND INFLUENCE OF PUBLIC PROSECUTOR

It is the PP, who represents the state. Appointment of PP is an executive function of the government. Section 493 of CrPC is stating that if any private person appoints a private lawyer for conviction, the PP shall conduct the prosecution and the advocate so instructed shall act therein, under his direction. The status of PL is that of private lawyer. When PP gives the PL the scope to work on the case, PL can work and play an important role. In most of the time, PP does not coordinate effectively with the PL and ultimately the victim suffers. Although according to the provisions of law, PP decides how far PL may work; in court observation it was seen that judge decided who would plead.

In one study area, BRAC's PLs found to be satisfied with the present PP. They also mentioned that the previous one was not so cooperative. In Rita case (HRLS, Mymensingh), PP's cooperation can be an example for other PPs. For having summons and legal issues relating to juvenile matters, PP's pro-victim role was praised by BRAC's staffs.

THE LAST STAGE – THE JUDGMENT

According to Section 265 of CrPC, after hearing the arguments and points of law, the court shall give its judgment. Usually, the judge takes time to write the judgment after the day of argument. He gives a date for the judgment and on that day, a court official simply mentions the judgment and provides a brief explanation.

The way in which judgment is pronounced does not allow people to understand the legal aspects for why the judge came to such a decision. If at least, the main issues would be pronounced, it would not be required to have a copy of judgment for taking preparation for appeal in the case of the acquittal of the accused. The pronounced issues of judgment would assist the lawyers to think over or study over the issues before he or she starts the appeal in a formal way with the copy of judgment (BRAC HRLS programme does not give support for appeal. They just transfer the cases to partner organizations). PLs told that too much loads of cases is the reason for such short judgment.

APPEAL

As many rape cases lost in the battle in lower court, these cases move for appeal in High Court. HRLS programme does not work in High Court Division. In this step, it transfers the cases to partner organizations – like *Ain O Salish Kendra*. In this stage, victims were found to loose contact with HRLS programme and ultimately go beyond the reach of the staffs of HRLS programme. The victims and their families were

found to be unsatisfied with the disconnection in this step and the whole process started to be a new beginning for them.

OUT OF COURT SETTLEMENT OR COMPROMISE BETWEEN THE PARTIES IN RAPE CASES: ILLEGALITY AT THE LEGAL PREMISE

Rape is not a case which can be mediated or for which out of court settlement can be made. Even if parties do compromise themselves, it will not affect the legal procedures for the accused. The accused has to face the punishment if the allegation is proved, no matter whether he has given money to the rape victims as compensation in out of court settlement. Compromise is illegal in rape case. The result of compromise is the end of the case without any judicial remedy.

After filing FIR and going through several legal steps, lots of cases are found where compromise has been made between the parties at the court room. Sometimes, judges were found to give different gestures to make such compromise. Sometimes, parties themselves make the compromise and then the lawyers of both sides plead to the judge to dismiss the case informing about the compromise and surprisingly, judges did it accordingly. PLs told that this is usual practice in all over Bangladesh. Sometimes, parties themselves made compromise and did not keep any contact with BRAC's staffs. Before receiving any legal aid, victim's guardian or victim herself has to sign an agreement with BRAC that if they do any compromise without discussing with the staffs of BRAC, they have to give back the money to BRAC that is spent for the case to date, but no such step has been taken against the parties who made compromise with the accused without the knowledge of BRAC's staffs. BRAC's PLs and SLs told that most of the time, parties apprehend long time procedure and expenditure of the case and moves for compromise.

In Shakila case[*] (HRLS, Mymensingh), the victim and accused were given married with each other at the suggestion of the judge. After six months, accused gave divorce to the victim. One lawyer opinioned that marriage was the best option for that girl as the case was so weak that she would surely lost. On the other hand, this marriage was considered to give her one kind of security in the society instead of living a life just as rape victim – a girl whom no one would marry. In Nuri case[*] (HRLS, Mymensingh), the parties made compromise themselves and quit all sort of contact with BRAC's staffs. BRAC has not yet taken any action against them. Staffs of HRLS programme told that they felt sympathetic to the poor financial condition of the victim and did not want to harass them again. In Selina Akhter case (HRLS, Manikganj), Selina's family was made isolated in the village using the social power of the accused to pressurize them for compromise.

Enormous incidents are available where compromise was done between the parties and judge and lawyers encouraged that. This court culture and the ways through which the compromises were done, should be a concerning issue for BRAC HRLS programme. Cause this atmosphere affects adversely on the fair way to seek justice for rape victims. It should be mentioned that in Rita's case (HRLS, Mymensingh), a very strict punishment is given to two accused in the court which was prone to do compromises.

[*] Pseudonym has been used instead of the real name of the rape victim.
[*] Pseudonym has been used instead of the real name of the rape victim.

In one study area, culture was springing up in the open court to have compromise between the victim and the accused providing money as compensation to the victim. Except BRAC' staffs, all the lawyers appreciated the compensation scheme very loudly. They told that their clients were very happy in this scheme. One lawyer told, '*previous judge did not want to do any reconciliation. We had great hardship then'*. Lawyers mentioned that it would be better to have money rather then carry a case for many years and spending money. Lawyers were even found to plead for marriage between the victim and the accused before the judge. It was seen that lawyer was telling in the court that his client gave birth a child due to this rape and the judge should order for marriage between accused and victim at least for some hours and then the accused could give divorce to the victim. Their contention was, at least their client's son would have father's name instead of having the status of illegitimate child. Lawyers mentioned that sometimes clients wanted such compromise for the sake of the society. According to the perception of the clients, marriage is the ultimate resort for woman. When a girl is raped, she lost the chance to get married again. Again carrying on court case takes the toll of huge expenses. In this situation, clients and her family thinks marriage or compensation is the better option and unfortunately, judges and lawyers comply with them.

Though BRAC's PLs took part in such reconciliation scheme for their non-brac clients, but they become very reluctant to do it in BRAC's case because of strong resistance from the SL. In Rabeya case[*], (Muktagacha, Mymensingh, 2007, HRLS), ninety thousand *taka* was offered from the side of defense. BRAC's SL immediately stopped the process convincing the victim. Even in Rita case (HRLS, Mymensingh), attempts were taken for compromise. Rita's father even decided to take the land from the accused and provoked by the offer of getting Rita married with one of the accused persons. For making this compromise successful, he even filed case against PO Nilu of HRLS programmme, BRAC and staff of partner organization *Ain O Salish Kendra* to get the custody of Rita. BRAC's staffs firm determination and intermediary injunction of the Family Court of Dhaka for not giving the custody of Rita to her father, made such attempt futile.

JUDGE'S DISCRETION IN GIVING THE REMEDY AND PROOVING THE CASE

Interviews revealed that many things depend on judge's discretion. How judge's discretion affects in getting bail, considering the nature of medical legal report and giving the scope to private lawyers have been already discussed in the study. A judge is legally empowered to use his discretion in taking decision on the legal points only. However, it should be mentioned that his discretion is limited within the legal domain, like he can decide whether he can give bail or not but he cannot tell the victim to get married with accused using his discretionary power.

Even in the question of proving a rape case, discretion of a judge determines the remedy. Like, one of the judge from a study area found to be too strict with the principle of benefit of doubt and beyond reasonable doubt. Lawyers told that he needs the case to be proved in a manner which is sometimes impossible under the context of the victim. Judges were found to possess an idea that most of the rape

[*] Pseudonym has been used instead of the real name of the rape victim.

cases are false and that also affects their judgment. PLs also mentioned about the judge in whose tenure except two or three cases, all the rape cases had judgment in favour of the victim because of his sympathy towards women victims.

The concerned issue is the indifference of the judges to the practical limitations of a victim. In Rahela case[*] (HRLS, Mymensingh), the victim was detained in a house for a long time and raped repeatedly, but she did not reveal the matter to anyone. Afterwards, she got married to another guy. After six months, when she gave birth to a child, her husband refused to accept the baby as his child and made her leave his house. Then victim filed a case against the accused. Judge announced that the story was not believable, because she did not inform the police about the incident immediately. However, judge did not take into account about the emotional and social situation of the victim which compelled her to hide the matter for such a long time.

What was revealed in the interviews with judge that they were not that much aware of BRAC's works. When they were informed that BRAC takes a case after fact finding, they appreciated the fact telling that then the cases are supposed to be factual. They appreciated human rights NGO's job in giving legal aid to rape victims, but also mentioned that often girls take advantage of these NGOs. They admitted that when they found any human rights NGO's involvement behind any rape case, they usually take it seriously and try to be flexible with prosecution.

An example of motivating the discretionary power of judge

Case name: Rita v. Holud Mia and Shahjahan Ali, Nari-o-Shishu Mamla (case, no- 620/04)

In 2004, in the month of June, seven years old girl Rita got brutally raped by Holud Mia and Shahjahan Ali in *Mrigali* village of *Ishwarganj*, Mymensingh. After the occurrence, Rita returned home crying and having blood in her body. Just arriving at home, she got fainted. When she got consciousness, she narrated the story to her mother and other neighbours. She was taken to Mymensingh hospital at night. When BRAC staffs came to know about the incident, they immediately went to the hospital and found Rita in a very critical situation.

Local newspaper narrated the story as – '*she was fighting with death. Her whole body was injured with the bite of the rapists. Stitches had been given in her private organ. Still bleeding could not be stopped. Even bleeding was coming out from mouth*' (from BRAC HRLS file on Rita case). Rita's uterus was removed and it took a long time for her to get recovery from mental stigma. Since then to this day, BRAC provided all the financial and legal support to Rita. She was kept in the shelter home of *Ain O Salish Kendra* and provided care and counseling.

BRAC's field staffs put immense dedication to carry this case. BRAC's PO Nilu had to face the arrest warrant and threats from the side of the accused that PO's son would face the consequence. Even she could not do her official job for few months for such threat. BRAC's SLs had to run from here to there to manage doctor's

[*] Pseudonym has been used instead of the real name of the rape victim.

statement and other legal formalities. After such struggle, when the case reached the last stage, strong apprehension came that may be the judgment was not coming in Rita's favour.

The case Rita v. Holud Mia and Shahjahan Ali was tried in the court of *Nari-o - Shishu* Tribunal (Special Tribunal for the crimes under *Nari-o-Shishu Nirjatan Daman Ain*, 2000), where lots of out of court settlement took place. Even on the first day of argument, judge told, '*I will do such justice where both the accused and the victim would be happy*'. Judge and all the lawyers were talking about their confusion on juvenile issue on the first day of argument (one of the accused Holud Mia was shown less than sixteen years at the time of charge framing). When HRLS Head Office in Dhaka came to know about this fact from the researcher, one HRLS staff went to Mymensingh to assist the prosecution lawyers in the next day of argument. He took the book on juvenile delinquent by Dr.Shahdeen Malik. PP informed the judge in the open court that they got a book like that and if judge would like to read that, he can take that. Judge accepted the book gladly.

In the last day of argument (both the parties did oral argument), DLs pointed the inconsistent statements of the witnesses. Later, DLs frankly admitted their strategy – they wanted to send Holud Mia to juvenile center and Shahjahan Ali to be acquitted taking the benefit of doubt. It was apprehended that the strategy was going to be implemented. Witnesses created a doubt in Shahjahan Ali's involvement. Prosecution lawyer brought nine witnesses to prove the case. Among them, two were doctor and investigation officer who could only tell about the rape but not about the rapists. One was Rita herself. Among rest six witnesses, five created serious doubt about Shahjahan Ali's involvement in the commission of rape. The other witness Rita's mother was not so firm about Shahjahan Ali's involvement. In this regard, there was a strong apprehension that all the effort of struggling for justice could be into vain.

In this crucial stage, some case references and legal contentions were sent to PP as a last resort. The contentions were based on several decisions of High Court of Bangladesh and India where it has been told again and again that rape is such a crime where the best witness is the rape victim herself. If a rape victim can give statement of her rape and the commission of the rape by the accused beyond reasonable doubt, judge can give verdict in favour of the victim. In juvenile matter, Section 51 of the Children Act 1974 has been referred where a juvenile can be given life time imprisonment in case of severe crime. PP submitted the legal written contentions on his behalf before the judge. DL did not submit any thing in reply.

On 24 June, 2008 judge gave the judgment giving both of the accused life time imprisonment. In the judgment, he mentioned, '*rape is such a crime where no eye witness remains*'. In rape case, victim is the best witnesses. He mentioned the following cases from the legal written submission –

'*It is settled principle that in a case of sexual offence, there is no legal bar in believing the sole testimony of the prosecutrix if it is found to be reliable and worthy of credence*'(Delower Hossian and Ali Hossian Bhuiyan v. The State, 54 DLR, 2002). Corroborative evidence is not an imperative component in every case of rape (Shibu Pada Acharjee v. The State, 8 MLR, HC, 2003, 275). In a case Soosalal Bania v.

Emperor (AIR 1925, Nag 74) it has been held, '*in the case of rape on an innocent girl of tender age, her evidence is of great value'*. Especially the case Re. Boya Chinnappa (AIR, 1951 Mad 760) again emphasized the fact telling, *'where a girl of immature years has been raped and has made disclosure of the rape at the earliest possible opportunity to her mother and another, the court will not insist upon independent testimony connecting the accused with the crime when she makes a statement immediately after the occasion*'.

In judgment, it was told that Rita has told again and again in FIR, statement u/s 161 and statement u/s 164 of CrPC and in the court that she has been raped by both Shahjahan Ali and Holud Mia. From first stage to last stage, she was consistent in describing the whole incident. The court ended in judgment as '*the case has been proved beyond reasonable doubt under Section 9(3) of Nari-o-Shishu Nirjaton Daman Ain. Both the accused have done inhuman, barbaric offence and such crime is beyond forgiveness. Considering the age of the accused people, instead of giving death penalty, life time imprisonment has been given'*. The court also charged extra monetary compensation to the accused and half of that is to be given to the victim.

What is noteworthy here that judge took a new approach to prove the rape case. The court that always looked for consistency of the statements of the witnesses got deviated from its tendency to make the rape case tough to win for the prosecution and adopted victim friendly interpretations of law to secure remedy for the rape victim. On the argument stage, DLs again and again emphasized that one of the accused was not adult and he should not be given life time imprisonment, but the judge remained stick to his point saying that he was empowered to use his highest discretionary power to apply any law. PP shared his joy with BRAC staffs mentioning that this judgment was land mark judgment in the history of that court.

CORROBORATION, BEYOND REASONABLE DOUBT AND PRESUMPTION OF INNOCENCE IN RAPE CASES: THE CHANGING ASPECTS

> **'***One day a judge of a dispute came to our prophet and told that he was in dilemma – he could not decide whether he should punish a person or not. Because, he was not sure that whether the person really committed the crime. Our prophet suggested that if he was not sure, then he should give the alleged person acquittal. If the accused really committed the crime, Allah will punish him after death. But if the accused did not commit the crime, the judge would get punishment for giving penalty to an innocent person'*. Narrating the story, judge expressed his wish –'*I do not want to get the punishment from God, that is why, I give acquittal to the accused of rape cases when there is any doubt***'.**
> - One judge in reply to the question –'*why there are so many acquittals in rape cases in his tenure?*'

Findings of this study show that presumption of innocence and proof beyond reasonable doubt notion affect judge's mindset in a way that ultimately works against the remedy for a rape victim according the prevailing circumstances of our country.

Finding shows that the rape victims remained very reluctant to disclose the matter instantly unless it caused severe injury. Even if they disclosed it to their parents, it was discouraged to spread the incident. After rape cases, strong attempts were made to make for a mutual compromise and thus delay was caused in making FIR. Most of the rapes were done putting the victim in extreme fear and signs of injury (like

scratches) did not remain. As a result, the medical report could not be used to prove that there were signs of struggle. This type of medical reports did not convince the judge about the commission of rape.

Police administration remained extremely corrupted and their investigation gave the DLs lots of opportunity to defend the accused. The most serious problem for prosecution lawyers happened when inconsistency was found among the statements of the witnesses, victims and among the statement in FIR, statement u/s 161 of CrPC and statement for the examination of the witness in the court. Such inconsistencies were used by the DL to sustain the doctrine of benefit of doubt.

The study depicts that after filing FIR, giving statement u/s 161 and u/s 164 of CrPC, at least after two years the time for giving statement in the court came. PLs told that in this long gap, witnesses and victims forgot about the pros and cons of the case – like the exact time or whom in what manner it was told. Intimidation and provocation of witnesses were another major reason for giving contradictory statements.

These limitations contribute a lot to create doubts and ultimately the benefit of doubt and beyond reasonable doubt's theory just assist the rapists to get acquittal.

The aim of the study was not only to find out the challenges, but also to have an idea of confronting the challenges more strongly. That is why when the doctrine beyond reasonable doubt and corroboration appeared to be a challenge before the lawyers of BRAC, the study attempted to discuss its possible solution.

Until 1994, in England a mandatory corroboration ruling had to be given at a rape trial. This means that the judge always had to give a ruling that it was unwise to convict on the woman's evidence alone, if there was no other evidence to corroborate what she was saying. It has been recommended that this rule should be removed. The 1994 Act has removed it, but judges are still allowed to use it at their discretion (Rape and Criminal Justice System, manchesterrapecrisis.co.uk).

Amnesty International is campaigning to incorporate the highest standard in the prosecution of rape cases in national law. One of the provisions of highest standard is – in rape cases a judge should not depend on corroboration of the victim's testimony (How to use international criminal law to campaign for gender-sensitive law reform, Amnesty International.htm). Common Law system always makes the judge to look for corroboration for justifying victim's testimony. The requirement of corroboration in law entrenches an inherent mistrust of women's testimony, and is based on the assumption that women lie about having been sexually assaulted (Fionnuala Ni Aolain 1997:883). International Criminal Court and International Tribunal for Former Yugoslavia do not look for any corroboration for proving sexual crimes, though they did not give up the contention of proving the crime beyond reasonable doubt. Amnesty International is urging this provision to be incorporated in domestic jurisdiction.

There are also judgments of the courts of India and Bangladesh in favour of not seeking corroboration of the testimony of the rape victims.

In Bharwada Bhong Hirjibhai v. State of Gujrat (AIR 1983, SC 753) it was held that the statement of the victim can be regarded as factual. Cause according to our conservative society's approach, hardly any girl will come to allege rape allegation voluntarily and want to face the embarrassing court procedure of examination and other complicated matters only for satisfying some previous enmity with the accused.

According to Indian Supreme Court, to insist on corroboration except in the rarest of rare cases is to equate a woman who is victim of the lust with an accomplice to crime and thereby insult womanhood (State of Maharastra v. Chandraprakash Kewal Chand Jain, AIR 1990, SC 658). Bangladesh High Court has also taken the same view in Al- Amin and Others v. The State (51 DLR 1999) where it was told that the court should find no difficulty in acting on the testimony of a victim of a sex crime alone to convict an accused where her statement inspires confidence and is found to be reliable. Refusal to act on the sole testimony of a victim of sexual assault in the absence of corroboration, as a rule is adding insult to injury suffered by the victim (1986 CRLR, 175).

Even the High Court of Bangladesh has similar decisions regarding the testimony of the victim in cases like – Delower Hossian and Ali Hossian Bhuiyan v. The State (54 DLR, 2002), Jahangir Hossian v. The State (1 MLR 1996,HC, 142), Shibu Pada Acharjee v. The State (8 MLR, HC, 2003, 275).

In India, a strong gradual change is coming in case of criminal cases considering the practical limitations for the victim to fight with the doctrine beyond reasonable doubt and presumption of innocence. The Supreme Court in India in a case of rape told that while acquitting the accused on benefit of doubt, the court should be cautious to see that doubt is a reasonable doubt (http://www.rediff/news/02rape).

Regarding the requirement of shifting from such aged old doctrine of benefit of doubt and proof beyond reasonable doubt, the report of the *Malimath Committee* is very important in our context. The Home Ministry of Indian Government formed *the Malimath Committee* for examining the criminal justice system (India together, 20 April, 2008).

It is to be noted that the reality for which the committee moved for the following recommendations, is the same as it is found in this study regarding the rape cases of Bangladesh (like delay in court procedures, the contradictory statements of the witnesses for delay, intimidation and corruption and ultimately the contribution of all these factors to benefit of doubt resulting in acquittal of the accused). The report of the committee is too long to be discussed in details in this report. However, the contentions and legal arguments made by the committee are essential to understand the ways to confront the limitations of benefit of doubt and beyond reasonable doubt doctrine in our criminal law system on rape cases (http://www.mha.nic.in/ criminal_justice_system.pdf). Hence those contentions and legal arguments are discussed here to a limited extent.

The committee has recommended placing an increased burden on the defendant reminding a very important quotation from the case Jennisen v. Baker (1972, AII ER 1997) – '*law should not sit limply while those who defy it go free and those who seek its protection lose hope'*. The committee has accepted the same thing as it was found in this study that inordinate delay contributes to the acquittal of guilty person because

in the lapse of time witnesses do not remember all the details, or witnesses do not come forward to tell the truth because of intimidation, threat or sympathy and ultimately justice becomes causality. The committee has expressed the imbalanced representation by the parties as the accused is normally represented by a very competent lawyer. In this study also, through group discussion it has come out that in all the rape cases the accused are represented by better skilled lawyers.

The committee noticed the limitations of the adversarial criminal justice system where judges have no duty to quest for truth. In both India and Bangladesh, adversarial system prevails. The committee has expressed the attitude for adversarial system as thus – the system is heavily loaded in favour of the accused and is insensitive to victim's plight and rights. Then the committee approached the true solution mentioning that over the years taking the advantage of several lacunas in the adversarial system, large number of criminals is escaping conviction. This has seriously eroded the confidence of the people in the efficacy of the system. The committee felt that it is necessary to plug the escape routs and to block the possible new ones.

In criminal law, there are two systems – adversarial and inquisitorial. In inquisitorial system, there is also presumption of innocence. In this system, judge plays more active role to find out the truth. For example, judge can decide what questions need to be asked to witness taking the suggestion of the parties. In this system the standard of proof required is the inner satisfaction or conviction of the judge and not proof beyond reasonable doubt as in the adversarial system (MHC's committee's report, p. 33).

In the adversarial system, two or more opposing parties gather evidence and present the evidence and their arguments to a judge or jury. The judge or jury knows nothing of the litigation until the parties present their cases to the decision maker. The defendant in a criminal trial is not required to testify. In the inquisitorial system, the presiding judge is not a passive recipient of information. Rather, the presiding judge is primarily responsible for supervising the gathering of the evidence necessary to resolve the case. He or she actively steers the search for evidence and questions the witnesses, including the respondent or defendant. On the other hand, the adversarial system seeks the truth by putting the parties against each other in the hope that competition will reveal it, whereas the inquisitorial system seeks the truth by questioning those who are most familiar with the events in dispute. The adversarial system places a premium on the individual rights of the accused, whereas the inquisitorial system places the rights of the accused secondary to the search for truth.

The committee suggested for merging of two systems. According to the discussion of the committee, deviations can be made from the doctrine of proof beyond reasonable doubt. Proof beyond reasonable doubt is not inherent in the laws. Section 3 of Evidence Act has not talked over of proof of evidence beyond reasonable doubt. In Madras v. P. Bhoormal (AIR 1974), the court told that legal proof is not necessarily perfect proof, often it is nothing more than a prudent man's estimate as to the probabilities of the case.

However, the cardinal principle of criminal law jurisprudence that the burden rests on the prosecution of proving its case has been deviated in several statutes. Under Section 105 to 114 (a) of the Evidence Act, the burden of proof is shifted to the

accused. There are other provisions where burden of proof shifts to the accused after the prosecution establishes certain facts – Section 107 to 111, 112 etc. Presumption of facts is always rebuttable. Supreme Court of India in several cases upheld the constitutionality of statues providing such presumption, for example – prevention of corruption Act which places the burden on the accused to rebut the statutory presumption. It is therefore, clear that proof of beyond reasonable doubt is not an absolute principle of universal application and deviation can be made by legislature. Deviations can take different forms, such as, shifting the burden of proof from the prosecution or prescribing a standard of proof lower than proof beyond reasonable doubt.

As long as the accused has the opportunity to adduce evidence to nullity, the adverse effect of such deviation will not offend article 14 to 21 of the Constitution. In should be mentioned that our Constitution has the same provision.

Proof beyond reasonable doubt has no static definition and plays a strong role to acquit the accused. Prof. Wigmore in his classic treaties on evidence points out the difficulty in ascertaining how convinced one must be to be convinced beyond reasonable doubt.

The committee came to a recommendation to mitigate the adverse affect of proof beyond reasonable doubt giving some important quotations. Like – in Shivaji v. State of Maharastra (1983, CRLJ), justice Krishna Iyer told that if accused is acquitted on the basis of every suspicion or doubt, the judicial system will lose its credibility with the community. The committee moved for the suggestion to take the good sides from inquisitorial system. The committee gave the example of UK, Australia where deviations have been made from proof beyond reasonable doubt by the legislature for the better interest in the community.

Giving such convincing background, the committee base its recommendation as thus – legislature may indicate lower standard of proof than proof beyond reasonable doubt**.**

One of the finding of this study was the contribution of the doctrine benefit of doubt in releasing the accused. The report of *Malimath Committee* has admitted that –'our *experiences show that operation of the standard of proof beyond reasonable doubt has contributed to large number of guilty persons escaping punishment. This standard followed all these years has failed to achieve the main object of ensuring that the guilty are punished'* (MHC's committee's report, p.72).

There are three standards of proof – preponderance, a clear and convincing and beyond reasonable doubt. The middle course is in the opinion of the committee, makes a proper balance between the rights of the accused on one hand and public interest and the rights of the victim on the other hand. The committee recommended finally, *'a standard between pre ponderence of probabilities and beyond reasonable doubt would be answer'* (MHC's committee's report p. 73)**.**

These legal contentions of MIC committee can be applicable for reforming criminal justice system of Bangladesh as the Evidence Act and Penal Code are almost same in India and Bangladesh.

RECOMMENDATIONS FOR HRLS PROGRAMME

After getting a comprehensive picture of the legal challenges faced by HRLS programme and a unique example of a success story of Rita case of Mymensingh, the recommendations are prescribed as thus:

RECOMMENDATIONS FOR IMPROVING THE SKILLS OF THE LAWYERS AND INVOLVING THEM MORE INTIMATELY WITH THE CASE

a. Involve PLs from the time of filing FIR, in every legal step. Victims and witness should give statement before police and magistrate after proper consultation and according to the instruction of the PL.

b. PLs should inform the judge at the beginning of the case that it is a case supported by legal aid. Judges can take flexible attitude to prove rigorous legal issues in the case.

c. Proper counseling of the victims, her family and the witness by the PL before giving statement u/s 161 and u/s164 CrPC and examination in the court.

d. Submitting written legal arguments during the time of argument. It will assist the judge to write judgment.

e. Having workshop with PPs and PLs together to create better coordination between them.

f. Training for the lawyers on proper counseling to the rape victims.

g. Train the PL for using recent judgments of High Court in the time of bail and arguments. Training is also required for the PL on drafting and improving pleading skills.

h. Motivating the PL to take their profession as a service to protect human rights of the poor.

i. The presence of monitoring on the role of PLs at the time of charge hearing, hearing of bail and argument.

j. Building long term vision to encourage *pro bono* lawyering[12] and human rights lawyering[13]. This vision includes targeting young law students, make them work for the poor as paralegal, giving training to them and thus building them as potential lawyers who will willingly give better service to the poor. Training should also be given to the lawyers to help them understand the wide duties of the human rights lawyer which extend beyond litigation, have right based

[12] The designation given to the free legal work done by the lawyer.

[13] This term has no static definition. It denotes alternative lawyering which takes the duty of a lawyer beyond litigation, to the empowerment of the client and community mobilization with right based approach.

approach, help the empowerment of the client and involve community mobilization.

RECOMMENDATIONS FOR POS AND STAFF LAWYERS

a. POs and SLs have to receive training from practicing lawyers on how to write effective FIR so that they can utilize this skill while they will be accompanying victim during the time of filing FIR.

b. Providing training to POs and SLs by legal practitioners to know how to response to police and magistrate strategically.

c. Providing training to POs and SLs on how to do proper counseling to rape victims and her family.

d. Reducing work loads of SLs so that they can get time to concentrate on the coordination between PLs and clients and witness and victim protection.

e. Making the witnesses to appear before the magistrate to give statement u/s 164 of CrPC with in the shortest period after the incident.

RECOMMENDATIONS FOR ADVOCACY WITH THE JUDGES OF THE SPECIAL TRIBUNAL

a. Having workshop with judges of Special Tribunal to let them know the credibility of BRAC's work. It was found that none of the judge was fully aware of BRAC's works.

b. Sending books and materials to judge on recent legal development on women rights issue of other countries and changes in corroboration issue and the doctrine of beyond reasonable doubt.

RECOMMENDATIONS FOR JOINT WORKSHOPS WITH POLICE, LAWYERS, JUDGES AND JOURNALISTS

a. Arranging joint workshops with lawyers, judges and police and journalists. If they can be bought together in a platform created by BRAC, it will facilitate their interaction which will extend to their professional field. This interaction will help to the BRAC clients to communicate with them effectively. For getting the best result, this workshop should be held in district level.

b. Arranging workshops with local police authority to make them understand their important role in investigation and charge-sheet. In SP office, when conference is held among all the OC of all *thanas*, there BRAC can send representative.

RECOMMENDATIONS FOR USING MEDIA

Campaign through newspapers for creating pressure on the police to arrest the accused as soon as possible or to prevent bail.

RECOMMENDATIONS FOR USING OTHER COMPONENTS OF HRLS PROGRAMME

a. Making LRIC and other local elites active for protecting victims and witnesses and having close observation on the witnesses at the community level.

b. Creating massive awareness through HRLE regarding medical legal report, giving true statement as witness and not doing compromise in criminal cases.

c. Taking legal action against the clients who go for compromise without consulting the staffs of BRAC.

ADVOCACY FOR REFORM IN LAW AND PRACTICE

a. Starting advocacy with government to have new amendment in the law of evidence to make the prosecution of rape case easier. The amendment may include requirement of less standard of proof and shifting the burden on the accused. Like in India, through incorporating 114 A of the Evidence Act, it has been applied that where sexual intercourse by the accused is proved and the victim states in her evidence that she did not consent, the court shall presume that she did not consent and the burden of proof shifts to the accused to prove that she had given her consent.

b. Advocacy to confer more powers on private lawyers of the victim. European system assigned a very active role to the victim or his representative in criminal proceeding. Victim's representative may conduct the proceeding if the PP does not show due diligence. This practice can be initiated in our country.

c. Advocacy to take the evidence of medical witness, government scientific experts in endorsed as evidence in the form of affidavits and the challenge to the same by the opposite party shall be by means of counter affidavit. Evidence of witnesses related with medical examination should be made on priority basis.

d. Advocacy to make judges accountable for delay. Huge long vacation should be curtailed.

DISCUSSION AND CONCLUSION

This study has kept its focus on the legal aspects of challenges in judicial cases of rape and the role played by the components of HRLS programme in this regard. Eight stages of a rape case (Fig. 1) have been selected to identify these challenges – from filing FIR in police station to the pronouncement of judgment in the Special Tribunal for *Nari-o-Shishu Nirjatan Daman Ain*. Challenges of several stages have been linked up with the result of judicial remedy in rape case that is the conviction of the rapist.

The fate of the victim in getting a remedy is dependent upon and determined from filing a FIR, the investigation, taking statements of victims and witnesses u/s 161 of CrPC, taking statements of the victim u/s 164 of CrPC, a medical legal report, the charge framing, the examination of witnesses during trial and finally by judgment. BRAC's POs and SLs remain involved until the charge framing and assist the victim in preparing FIR, statement u/s 161 and statement u/s 164 of CrPC. It should be considered that POs and SLs do not receive training from any legal practitioner for writing these legal documents and according to lawyers if these documents can be written with strategic legal skills, prosecution case can be made stronger. Lacking proper legal knowledge the PO and SL often make lacunas in these legal documents which later DLs use for the benefit of the accused. The study strongly recommends the training of POs and SLs by the legal practitioner.

FIR, statement u/s 161 and statement u/s 164 of CrPC play a vital role in the time of charge framing, examination of witnesses during trial and argument. Examination of witnesses during trial and the argument stage are dependent on the strategy of the PL and determinant of the judgment to a great extent. PLs are not involved in the time of writing FIR, statement u/s 161 and statement u/s 164 of CrPC. Recently, POs are told to take advice from PLs while assisting to write a FIR if they think necessary. It is the PL who ultimately decides how to present the case before the judge and he/she has to deal with the FIR and other statements. As a result, there lies the necessity for the involvement of PLs from the initial stage of the case, so that he/she can mould a good strategy to deal the case. The weakness of PLs in proving a case in a convincing way before the court became apparent in different case studies, for which training and monitoring of the PL are pertinent.

This training of the PL should also include training on the development in the legal literature in international domain which may assist our national court to move forward. The study has mentioned about lack of cooperation on the part of PLs to the poor clients. It also reveals lack of commitment of the lawyers to protect the rights of poor clients. This cooperation and commitment can only be invoked when there is strong motivation for serving poor people. Recommendations are given for encouraging *pro bono* lawyering and human rights lawyering[14] which can make lawyers more motivated to uphold the human rights of the poor.

[14] Ibid. p. 63

The study deals with some subjects which are not directly linked with legal procedures for remedy, but inherently linked with the judicial remedy. The first one is intimidation and provocation of the victim. The study found that one of the important factors in defense of rape cases is the inconsistencies of witnesses. Intimidation and provocation from the side of the accused play a major role for such inconsistent statements. Another crucial issue on the way to judicial remedy is illegal compromise. The study by Alim and others shows that despite of an offence of severe nature, rape is being tried in a village *shalish* (Alim and others 2006). In this study it has been found that in open court premises, rape has been compromised with the indulgence of judge and lawyers.

It has been pointed out that how the discretion of the judges towards a medical legal report, bail, the doctrine 'benefit of doubt' and 'beyond reasonable doubt' in legal literature contributes in the acquittal of the accused along with other factors. To find out the ways to mitigate such stringent attitudes towards the doctrines of law, the study has discussed legal literature from *Malimath Committee*'s report and examples from other jurisdictions.

The study emphasizes a particular rape case (Rita case, HRLS, Mymensingh) where BRAC's staffs put their heart and soul efforts into bringing remedy to a victim with coordination of police, doctor and PP. However, coming to the last stage when all the efforts were going to be in vain because of the inconsistent statements of the witnesses and the manipulation of legal limitations by the DL; advocacy with judge through providing legal literature worked to bring a remedy. The study formulates recommendation to start advocacy with the state components putting a concrete example of that particular case. As the findings of the study denote some limitations of law and practice in the court and the effect of these drawbacks in securing remedy for the victim, recommendations are also put forward for advocacy to reform those law and practice.

In HRLS review report (Hossains and others 2007, Draft Operational Plan), the proposed changes for HRLS programme have been recommended as undertaking closer monitoring of the problems faced in the legal process, developing more effective legal responses to systematic problems identified, monitoring the PL, involving PL in advocacy, capacity development of PLs, SLs and POs through training and engaging in advocacy with the local judiciary and the bar as well as with the concerned authorities at central level, in particular Supreme Court for legal reforms. The study also comes up with recommendations having similarity with that of the review report.

The study unfolded that the scheme through which BRAC's HRLS programme is encountering the challenges in rape case for remedy is not enough to ensure remedy to the victims. To bring more remedies in favour of the rape victims, HRLS programme needs to expand the capacities of their staffs and lawyers on legal skills. At the same time, based on case studies and legal literature, the study strongly recommends for HRLS programme to incorporate advocacy in their scheme to have success in prosecuting the rapist.

Despite limitations in the existing scheme through which HRLS programme is supporting the rape victims to get legal remedy, it has to be admitted that this is the

supporting system for the poor rape victims who would otherwise not be able to face the legal system for seeking remedy. The real scenario of the struggle of the staffs of HRLS programme against the legal system that gives ample scope to manipulate the laws in favour of the accused, hence depriving the rape victim from her due, has been reflected in the case studies. These case studies are just the short glimpse of a wide picture occurring every day all over Bangladesh. It should be acknowledged that the determination of POs and SLs of HRLS programme at grass root level to prevent illegal compromise in rape case, in assisting the victim to communicate with the lawyers and providing evidence before the court is praise worthy.

As the objective of the study ended up in getting legal remedy of the rape victim, it was not deeply enquired as to whether the conviction of the accused opens the door for the rape victim to start a normal dignified life in the society. In this regard, I would like to conclude with my personal observation of a case. *I visited a remote village to meet a fourteen years old girl who was gang raped. Her mother died several years ago. Her brother and father told me that they were planning to give her in marriage now. I informed them that she could not be given marriage until she is eighteen years old. They told me that after the occurrence of rape she had to quit her school in shame. Now the only option for her was to move from her home place to another one where no one would know her and marriage could be a good prospect for her. They also informed me that as the girl was raped, the groom side demanded some money as dowry and also as a promise that they would not bother the girl about the rape incidence.*

In reply to my question on what more BRAC could do more to help them, they said they wanted assistance from BRAC so that they could give this marriage as early as possible. I asked the girl whether she wanted to marry or not. In reply, she just lowered her head and shed tears with no words. Those tears kept a big question before me as a lawyer and a researcher –'even if the three accused would get life time imprisonment, could this little girl get back her normal life; could she again start her school? Unfortunately, from the experiences of what I saw and felt during this study, I could say that the community would never accept her without the stigma of the rape.

HRLS programme, BRAC which is the largest NGO-led legal aid service in this world and whose present mission of legal aid is 'to protect and promote human rights through legal empowerment especially for the poor and marginalized'(HRLS brochure), should not end its endeavour in a rape case with the conviction of the accused. Their endeavour should go beyond the conviction and include the reintegration of the rape victim with the legal remedy in the community in a dignified way. This research leaves further scope of new research on how the components of HRLS can be used effectively at grassroots level to help the rape victim start a normal life after getting legal remedy with the support of the community. The implications of the legal remedy can be utilized effectively to reestablish the victim with dignity in the community using the organizational power of HRLS programme of BRAC.

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