Tough Row to Hoe:  
Can CEDAW’s Optional Protocol Help Muslim Women in Rural Bangladesh Realize Their Right to Development?

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Bangladesh is one of only 30 States to have ratified the Optional Protocol\(^1\) to the Convention on the Elimination of All Forms of Discrimination Against Women.\(^2\) Of the Parties to the Protocol, Bangladesh is one of the few categorized by the UN Development Program (UNDP) as low in human development.\(^3\) The circumstances of rural women are particularly harsh in a country that ranks 121 out of 146 States in the UN Gender-Related Development Index\(^4\) and 62 out of 64 in the Gender Empowerment Measure.\(^5\)

Having made significant reservations upon acceding to CEDAW, Bangladesh seemed poised to seize the moral value of being a Party without seriously embracing the substance of women’s equal rights. However, it subsequently withdrew parts of its reservation and ratified the Protocol, both causes for measured optimism. Bangladesh has a bar that is very active in public interest litigation, especially as it relates to women. Advocates may be ready to utilize a powerful new tool to advance the rights of rural women: the right to development in conjunction with the international adjudication of sex discrimination complaints.

Sex Discrimination with respect to Property in Bangladesh

“Property is the ultimate potential asset of every poor person.”\(^6\)

The State religion of Bangladesh is Islam\(^7\) and approximately 80 percent of the population is Muslim. Under Islamic law, Muslim women achieve access to real property primarily through men, either from their father through inheritance or from their husband through marriage.\(^8\) Dowry is another method of property transfer from fathers to brides but it is ordinarily comprised of movable property such as jewelry and, in fact, may take the place of land inheritance where a father finds it expedient to avoid fragmenting agricultural land.\(^9\)

Property by Inheritance

The Islamic law of succession recognizes five “primary heirs”: child, father, mother, husband, and wife.\(^10\) Although each primary heir is entitled to share in the estate,
women’s shares are smaller than men’s and are particularly vulnerable to reduction due to the existence of a male with a greater claim.

- A daughter is entitled to one half of a parent’s estate unless she has a brother. Then she becomes a “residuary heir” and inherits only one half of her brother’s share. Thus, for example, an only child would inherit half of her father’s estate. Two daughters would inherit one quarter each, dividing equally the half share. However, if there were a daughter and a son, the daughter would inherit one sixth and the son one third of the estate. While a daughter’s right to patrimonial inheritance is inalienable under Islamic law, in reality the property is usually managed by her husband or brother and may be wrongfully appropriated from or even forfeited by the woman.

- A mother is entitled to a third of her deceased child’s estate unless a spouse, a child, a child of a son, or two siblings of the deceased survive the deceased. If the survivor is a spouse, the mother receives one third of the remainder after the spouse has received a share. If the survivor is not a spouse but another of the listed parties, the mother receives one sixth of the estate.

- A wife is entitled to a quarter of the estate of her husband unless there is a child or a child of a son, in which case she receives only one eighth. Polygamy can be an aggravating factor, since a man may legally have up to four wives who must split the one-eighth or one-quarter share among them. While the wife’s or wives’ share may be reduced if the estate is over-subscribed, it may not be increased in the opposite case. Furthermore, a husband who wishes to provide for his wife must make a gift to her while he is still alive. Any attempt to do this by way of a testament will be void unless the remaining heirs agree.

Property through Marriage

Upon marrying, a woman is entitled to gifts from her groom called *mahr*. These gifts are legally the inalienable property of the woman but in practice they may be given in installments, the marriage guardian may appropriate all or part of them, and the husband assumes managerial rights over the wife’s property in any event. Final *mahr* installments are frequently deferred indefinitely, and although the balance owing should be paid upon the husband’s death, this does not always occur. While married Muslim women have independent property rights, these rights are often trampled by male relatives who argue that they will have to support the women if they become divorced, separated or widowed.
Recent Developments in Women’s Use of Property

It has been noted that as land values have increased in recent years, women’s access to land through their male kin has decreased. First, their access to small plots has been diminished by overgrazing, decreased fertility, over-cropping, and erosion. Second, such plots are seen as low in productivity since they cannot be used for cash crops. Even where land reforms occur, women are often left out. This is compounded by the lack of collateral for credit and the means of gaining membership to cooperatives.

Sex Discrimination

The laws and customs described above were a radical improvement over the pre-Islamic customary law wherein females were excluded from inheritance altogether. Nonetheless, by current human rights standards, they constitute a clear case of distinction in treatment based on sex. Apologists say that these legal inequities are justified by the fact that, according to the Qur’an, men are the primary earners and logically require more income-generating resources. However, in modern Bangladesh there are many female-headed households. Rising poverty has propelled growing numbers of women from their homes to other (paid) fields of work, including industry and agriculture. Yet even this apparently positive development is problematic. First, there is a loss of status associated with entering the traditionally male public sphere, or with laboring in the fields, which are considered part of the intermediate sphere. Second, working outside the home does not excuse a woman from her household duties. Dr. Atiar Rahman of the Bangladesh Institute of Development Studies (BIDS) estimates that women work 21 hours more per week than men. Third, even when they take up paid work, “as farm labor, women get roughly 40 percent of a man’s wage.” Although the Government and aid agencies have adopted female-centered norms for wages, the same cannot be said of private individuals. Finally, childbearing and heavy work responsibilities alongside a culture of self-sacrifice leave women prone to nutritional deficiencies and poor health: “A woman who eats last and least and quietly takes all the abuse from her husband is considered an ideal woman, particularly in rural Bangladesh.”

It is tremendously important that women own and control the land they work in order to maximize the yield from their labor. Thus, even if we accept that the Shar’ia provisions regarding women and property serve a protective purpose, it is clear that the laws are discriminatory as a “distinction, exclusion or restriction made on the basis of sex which has the effect . . . of impairing or nullifying the recognition, enjoyment or exercise by women . . . on a basis of equality of men and women, of human rights and fundamental freedoms in the . . . economic . . . field.”
Is There a Human Rights Solution?

In 2000, the Beijing +5 Conference recognized as an obstacle to women’s economic growth the fact that “women’s full and equal rights to own land, . . . including through the right to inheritance,” were not yet enshrined in the legislation of some States. Significant skepticism exists about the efficacy of development programs to improve conditions of life for rural women. Progress is impeded by the refusal of authorities and service providers to confront the basic ideological, political, and material structures of gender subordination. The only way to make real progress in Bangladesh is to reform property and inheritance law and to sustain the reforms with enforcement. Many lawyers argue that such reforms would not necessarily conflict with Muslim law; still others acknowledge a conflict but point out the current coexistence of the Bangladeshi Constitution with contradictory Shar’ia law. There are obvious objections to the reform of laws that many believe are founded on the teachings of the Prophet. Conservatives will doubtless hurl accusations of heresy and cultural relativism. Even those who are apparently sympathetic balk at such reforms. In 1999, the Bangladeshi Law Minister stated that although his government supported equal rights for women, it was impossible to “take a step that might hurt the religious faith of the people.” He astutely avoided speculation on the eventuality of more favorable inheritance laws for women, remarking that constituents must first be ready to accept change before the government can make a decision.

Yet experience has proven that a human rights approach can work in the most surprising circumstances in Bangladesh. In a 1998 case, women’s rights advocates won the ear of one High Court judge in the battle of a group of prostitutes to return to their brothel, from which they had been evicted with the assistance of local police. Hoque J., dissenting, found that the sex industry was not prohibited and was a “necessary evil” of society, the main reason for which was poverty. The judge declared the eviction illegal and would have used the High Court’s power to enforce fundamental rights to order the women’s reinstatement in their former home pending permanent alternative arrangements. Ameen J. for the majority agreed that prostitution was legal and that Constitutional rights under Article 40 (freedom of occupation) had been violated but found that there could be no constitutional remedy against the landlords as private actors. The campaign begun in 1998 was successfully concluded in 2000, when the Court was persuaded that a second group of evicted sex workers had the right to return to their place of work. One advocate stated: “No other approach but that of human rights [such as the rights of a citizen and the right to work] would have worked in Bangladesh.”

Denial of Property as a Violation of Human Rights

National Standards
The Constitution of Bangladesh is the supreme law of the land and any law inconsistent with it is void to the extent of the inconsistency. There is a wealth of material in the document to support women’s equal right to property. Fundamental rights are enumerated in Part III, the relevant provisions of which include:

- Equality before and equal protection of the law;
- Prohibition of discrimination on the ground of sex and protection of affirmative action programs for women;
- The right to property;
- The inalienable right to protection of the law with respect to property.

All of these fundamental rights are fully justiciable in the High Court under Articles 44 (Enforcement of Fundamental Rights) and 102 (Powers of the High Court). As with the other Articles of the Constitution, any law contradictory to the fundamental rights enumerated in Part III is invalid to the extent of the inconsistency.

The High Court demonstrated its commitment to women’s right to equality in a 1995 case where legislation attempted to impose mandatory retirement upon female members of an occupation ten years earlier than for males. The Court held that women and men are entitled to the same status. The regulation, therefore, was a violation of the prohibition on discrimination under Article 28 of the Constitution. The State was required by the enforcement of Constitutional protection to withdraw legislation that had a discriminatory effect. While this ruling is encouraging, the obvious distinction from the issue of property rights is that there was no apparent religious implication in this case.

Article 42(1) of the Constitution states that “every citizen shall have the right to acquire, hold, transfer or otherwise dispose of property,” subject to restrictions imposed by law. Unfortunately these restrictions are unnamed, in addition to being unqualified by such language as the word “reasonable,” which would leave them open to constitutional scrutiny. Of course there can be legitimate non-discriminatory reasons for such a stricture: the State may wish to impose zoning limitations or to introduce procedural safeguards for vendors and purchasers of real property. However, the restrictions referred to would likely also include aspects of Shar’ia inheritance and property law, the discriminatory effect of which has been discussed above. If that is the case, women’s advocates may have no recourse to the Constitution against this discrimination. However, this seems an unreasonable interpretation since it would nullify the effect of the intended Constitutional protection.

While the protection of Article 42 is not absolute, it must be read in context of the fundamental principles of State policy cited in Part II of the Constitution. No fewer than seven of the seventeen national aims listed therein directly support the notion that women should be able to hold and control land in the same way as men. Before even the guarantee
of fundamental human rights and freedoms, there is the admonition that steps “be taken to ensure the participation of women in all spheres of national life.” Furthermore, individual private ownership of the means of production is explicitly recognized, although again subject to legal limitation. It is “a fundamental responsibility of the State to attain, through planned economic growth, a constant increase of productive forces and a steady improvement in the material . . . standard of living of the people, with a view to securing to its citizens . . . the provision of the basic necessities of life.” The drafters of the Constitution further expressed a commitment to rural development and the progressive removal of disparity between the standards of living in urban and rural areas. Raising the level of nutrition is among the State’s primary duties. Finally, the State is obliged to “endeavor to ensure equality of opportunity to all citizens.” These principles are not judicially enforceable. However, the High Court has held that they are fundamental to good governance and to interpreting the meaning and content of basic rights.

In light of the dire circumstances in which some women find themselves when they are landless and cannot rely on relatives to support them, it could be argued that even the right to life is violated. Such an argument might be weakened by the perceived remoteness of death from malnutrition due to non-ownership of land. Nonetheless, a 1999 case indicates that an argument linking land and the right to life might find a sympathetic audience in the High Court of Bangladesh. The Court held that the Government’s summary eviction of residents from the Dhaka slums was not conducted in accordance with just and fair procedures established by law. Therefore it was unconstitutional as a deprivation of life and livelihood contrary to Article 21.

**International Standards**

As a matter of first principles, the modern international basis for the right to property is the Universal Declaration of Human Rights (UDHR), which states that “everyone has the right to own property alone” and “without distinction of any kind, such as sex . . .” While the UDHR is not a legally binding instrument, there has been considerable discussion pointing to the conclusion that parts of it have become binding customary international law. The Declaration on the Right to Development of 1986 stated, in Article 8, that:

1. States should undertake, at the national level, all necessary measures for the realization of the right to development and shall ensure, inter alia, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income. Effective measures should be undertaken to ensure that women have an active role in the development process. Appropriate economic and social reforms should be carried out with a view to eradicating all social injustices.

2. States should encourage popular participation in all spheres as an important factor in development and in the full realization of all human rights.
Also a non-binding instrument, the Declaration is nonetheless an articulation of international consensus on the existence of the right and the way toward its realization.

In addition to these general responsibilities, Bangladesh has actively undertaken obligations as a Party to CEDAW and other international instruments. The grounds for deeming the status quo discriminatory under the broad provisions of CEDAW have been explored above. Bangladesh has made reservations to CEDAW that have been a source of considerable international concern. Upon accession to the Convention, Bangladesh stated that it did not consider itself bound to Article 2 because it conflicted with Shar’ia law based on the Qur’an and Sunna. Article 2 is an important umbrella provision in which States Parties condemn discrimination against women and pledge to eliminate it by the enumerated means. Although other aspects of Bangladesh’s reservation have since been withdrawn, this part has not. Germany, Mexico, the Netherlands, and Sweden registered objections that the reservation was contrary to the object and purpose of the Convention. As such, it was argued that the reservation was impermissible under Article 28(2). While there has never been any adjudication on the validity of the reservation, the Committee has been encouraged to “continue its review of reservations that are contrary to the object and purpose of the Convention or which are otherwise incompatible with international treaty law.” It is widely believed that this was a sly criticism of the “Islamic reservations to CEDAW.”

It is understandable that entering a reservation against such an important provision would give rise to doubts about the commitment of Bangladesh to the substance of the Convention. Nevertheless, in light of the accession and the absence of further reservations, Bangladesh must be taken to have committed wholeheartedly to the remainder of the Convention. Furthermore, it can be argued that the obligations Bangladesh sought to avoid by means of this reservation are nonetheless implied by its later accession to the International Covenant on Civil and Political Rights, which contains provisions (to which Bangladesh has not entered any reservation) regarding equality of men and women and anti-discrimination. The Human Rights Committee has interpreted Article 3 to ensure the rights of women to equal treatment by both public and private actors as to ownership, administration, and inheritance of property, and Article 26 to require States Parties to bring their legislation and its application into conformity with non-discrimination norms.

Two CEDAW provisions are particularly germane to the situation of rural women in Bangladesh:

(Article 14)

1. States Parties shall take into account the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families, including
their work in the non-monetized sectors of the economy, and shall take all appropriate measures to ensure the application of the provisions of this Convention to women in rural areas.

2. States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right:

   a. To participate in the elaboration and *implementation* of development planning at all levels; and

   b. To have access to agricultural credit and loans, marketing facilities, appropriate technology and *equal treatment in land and agrarian reform* as well as in land resettlement schemes . . .

*Article 15*

1. States Parties shall accord to women equality with men before the law.

2. States Parties shall accord to women, in civil matters, a *legal capacity identical to that of men* and the same opportunities to exercise that capacity. In particular, they shall give women *equal rights to conclude contracts and to administer property* and shall treat them equally in all stages of procedure in courts and tribunals . . .

The Committee has affirmed that when States restrict the legal capacity enjoyed by women, or permit third parties to do so, they are discriminating against women and impairing their ability to provide for themselves and their families. It is clear that women in rural areas remain under-represented in the development agenda. Because they are not landowners, they are frequently absent from the fora in which development options and future reforms are discussed. They clearly do not share a legal capacity identical to men with respect to property and, as noted above, seldom administer even land that may be registered in their name. Following consideration of Bangladesh’s third and fourth periodic reports in 1997, the Committee on the Elimination of All Forms of Discrimination Against Women stated, “the Government should give high priority to the issues and problems of rural women, especially their ownership of land, . . . with a view to strengthening their productive and employment capacity.” This statement not only indicates a level of dissatisfaction with the status quo but may also signal a willingness to hear more on the issue.

**Using an International Mechanism**

While it can be seen that the Bangladesh Constitution, liberally interpreted, might be perfectly capable of advancing the cause of women’s equality in the sphere of land ownership and control, it is clear that there has been insufficient political will within the government to make the necessary changes to conflicting legislation that is based on Shar’ia law. This difficulty has been compounded by either judicial conservatism or a
dearth of opportunity to address the problem through case law. If the judiciary is reluctant or unable to strike down discriminatory provisions within Shar‘ia, then advocates should use the Optional Protocol to CEDAW in order to gain international attention and support. Censure from an international adjudicative body may be the necessary catalyst to propel the Government of Bangladesh past the self-preservationist instinct of waiting for a shift in popular opinion before acting.

Choice of International Mechanism

Feminists of the ‘mainstreaming’ school would argue that in order for women’s rights to be viewed as human rights, it is necessary to avoid ghettoizing women’s right to equality. Furthermore, such advocates view the general human rights instruments as more effective tools in light of their long history and developed jurisprudence. On the contrary, if CEDAW and other group-specific international human rights instruments are not to fall into disuse and disrepute, it is necessary to utilize all of the law available. Women’s rights activists should boldly argue the law that has been crafted especially to aid women through the body appointed to implement it, and they should do so capitalizing upon the experience and jurisprudence of other bodies.

Putting forward a Complaint

Rural communities are often ignorant of or at odds with law reforms and developments better understood by their urban counterparts. This may mean that rural women are unable to articulate or comprehend their desire for equality within a human rights framework. It may also mean that even where they understand human rights, women are unable to assert them with sufficient strength to shake rural traditions. Yet nowhere is the incentive to gain control stronger than among the rural poor. For better or worse, many of these women have been forced to work outside their homes and exposed to ‘Western’ feminist ideologies about their capabilities. Therefore it is conceivable that a distinctly non-traditional approach to land ownership may be gaining strength among rural women. Because of this possibility, a group of rural women would be the obvious and proper initiator of a communication under Article 2 of the CEDAW Protocol. While it may be perceived as less empowering for the women, a wise advocate might seek to include rural men in the communication as well. Liberally-minded fathers or husbands might add their voices to the challenge of restrictive inheritance laws if they are inclined to leave their daughter or wife a larger proportion of their property than is allowed under Shar‘ia. There is international precedent for striking down restrictive inheritance law on the basis of the right to property. In a European Court of Human Rights case, legislation intended to restrict a mother’s right to leave a share of her property to an illegitimate child was found to violate her right to dispose of her property.

Exhaustion of Domestic Remedies
Any individual or group wishing to make an effective communication to the Committee must first attempt to exhaust domestic remedies. On its face, this means that the communicator must launch a constitutional challenge in the High Court of Bangladesh and, if unsuccessful, appeal to the Appeal Division, and only after a second failure consider international remedies. However, there are two arguments that this might not be necessary. First, the Bangladeshi court system is notoriously inefficient. International observers have noted that the expenditure of time and money necessary to pursue a case is a daunting prospect for most would-be litigants. Despite this chilling effect, the Courts have a significant backlog at all levels. The High Court reported in 1993 that it had over 5,000 cases pending that were greater than ten years old. These facts could anchor the persuasive argument that any remedy sought through the Courts in Bangladesh would be “unreasonably prolonged” within the meaning of Article 4(1) of the Protocol. Second, given the built-in qualifier on the right to property in Article 42 of the Constitution, it could be argued that proceedings in the Supreme Court of Bangladesh would be “unlikely to bring effective relief,” bringing them within the second exception outlined in Article 4(1).

\[ \text{Procedure of the Committee} \]

Provided that the communicators met the remaining admissibility criteria in Article 4, the Committee would bring the communication to the attention of Bangladesh. The government would then be expected to respond in writing within six months, outlining its view of the matter and any remedies it has provided. Following the Committee’s consideration of all the information from the communicator and the State, it would transmit its views and recommendations, if any. Without prejudging the matter, it is likely that the Committee would find a violation of the rights to equality and property. This is apparent from the earlier comments of the Committee noted above. Assuming that was the case, Bangladesh would have the obligation to “give due consideration to the views of the Committee, together with its recommendations” and to respond in writing within six months, including information on remedial actions taken.

\[ \text{Avoiding Accusations of Cultural Relativism} \]

The Committee will have to tread carefully in order to avoid accusations of cultural relativism. This difficulty should be eased by several factors. First, a Bangladeshi woman has chaired the Committee and been openly critical of Islamic law as one of the obstacles to women’s advancement in her country. It cannot be argued that she is an outsider, seeking to impose her views on South Asia. Second, experts in Shar’ia law have argued strenuously that discrimination is not sanctioned by religion. Third, and perhaps most persuasively, some Islamic States have implemented reform in areas of the law claimed to be ‘immutable’ by others. Tunisia, like Bangladesh, has entered a reservation to Article 2
of CEDAW. Nonetheless, the Tunisian government has reformed the law of inheritance, and its personal status law is the most advanced among Muslim States.85

Conclusion

Bangladesh has a daunting task ahead to meet its constitutionally enshrined objectives of the full participation of women in national life and “radical transformation in the rural areas.” The nation is particularly constrained by conservative attitudes and laws regarding appropriate roles for men and women that not only retard progressive development but also simply fail to reflect the reality of many rural Bangladeshi populations. The majority of women in rural areas are Muslims who have limited or no access to land as a means of production. Either they do not own or they do not control real property. They are forced by poverty to work outside the home. Furthermore, they sell their limited hours of labor for a discriminatory wage. They are systemically excluded from self-sufficiency and the ability to support their dependants. An international human rights approach will be a useful catalyst for change. The combination of the right to development and the prohibition of sex discrimination—now backed by the complaints mechanism of CEDAW’s Optional Protocol—can be utilized by advocates to exert pressure for law reform, to interpret or challenge existing laws in domestic courts, or ultimately to bring a grievance at the international level. An insightful government will recognize that the two goals of women’s advancement and national development are inextricably linked. A courageous government will use that insight and all the tools at its disposal to found the necessary legislative changes.

Notes

4 Ibid., at 213.
5 Ibid., at 217.
7 Constitution of the People’s Republic of Bangladesh (as amended to April 30, 1996) [hereinafter “Constitution”], Art.2A, inserted by the Constitution (Eighth Amendment) Act, 1988 (Act XXX of 1988), s.2. Others are free to practice their religions and are governed by their own traditions in matters of personal status.
9 Ibid., at 437.


14 Pastner, *supra* n.8 at 437.

15 Nasir, *supra* n.10 at 210-211.


17 Coulson, *supra* n.11 at 46.


19 Pastner, *supra* n.8 at 436.


25 Nasir, *supra* n.10 at 195.

26 De Seife, *supra* n.13 at 61.


31 Chen, *supra* n.28 at 43.

32 Islam, *supra* n. 29.

33 CEDAW, *supra* n.2, Art.1.


36 Howard, *supra* n.35.

37 Youssef, *supra* n.23 at 281.

38 Islam, *supra* n.29.


42 Constitution, Art.7.

43 *Ibid.*, Art.27.
Ibid., Art.10.
Ibid., Art.13(c).
Ibid., Art.15(a).
Ibid., Art.16.
Ibid., Art.18(1).

Ibid., Art.19(1). Troubling is the inconsistent reference in Art.19(2) to the elimination of “social and economic inequality between man and man.”

Ibid., Art.8(2).


ASK, supra n.59.


Ibid., Art.2.


CEDAW, supra n.2 (emphasis added).
74 Ibid., at 366.
75 Coulson, supra n.11 at 48.
76 Kurshan, supra n.73 at 382.
78 Askvik, supra n.27 at 110.
79 Protocol, supra n.1, Art.6(1).
80 Ibid., Art.6(2).
81 Ibid., Art.7(1),7(3).
82 Ibid., Art.7(4)
83 Islam, supra n.29.
84 Islam, supra n.29.
85 Mayer, supra n.66 at 114.