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# “No signs of rape”: corroboration, resistance and the science of disbelief in the medico-legal jurisprudence of Bangladesh\*

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**Abstract:** *A major impediment to justice for rape in Bangladesh is the colonial rule of corroboration, which requires judges to verify the truthfulness of a rape complainant’s testimony with other evidence. Medical evidence is the most commonly sought mode of corroboration and can be used to contradict the complainant’s own testimony. The corresponding rule of resistance in turn guides how the rule of corroboration takes on a scientific character, whereby injuries in specific parts of the complainant’s body are sought by doctors and judges as corroborative “signs of rape”. If no “signs of rape” are found, this observation is then noted in the medical report and used to discredit the testimony of a rape complainant, by indicating that either the sexual intercourse was consensual or the rape accusation is false. This paper shows how the unfettered operation of these two rules gives birth to the “science of disbelief” in rape cases, whereby the institutional disbelief in a rape complainant’s testimony is justified on ostensibly scientific grounds and largely restricts their right to seek justice. It illustrates how the science of disbelief was created and preserved through successive legal and institutional reforms in Bangladesh. This paper challenges the long-held yet seemingly unquestioned notion in Bangladesh that medical evidence should be the primary basis through which rape can be proved in court by analysing the pernicious jurisprudence and legal standards this assumption has created.* DOI: 10.1080/26410397.2022.2096186

**Keywords:** rape, medical evidence, medico-legal jurisprudence, rape law, rule of corroboration, sexual violence, Bangladesh

## Introduction

In October 2020, thousands of enraged protestors took to the streets of Dhaka after a gruesome video of a woman from the South-eastern district of Noakhali being gang-raped went viral on social media. Public outrage about the widespread impunity with which rapes occurred was already common, but the video caused it to reach a fever pitch. The government hastily responded by reforming the Suppression of Violence against Women and Children Act 2000 (VAW Act) and reintroduced the death penalty for single-perpetrator rape. This reform was widely (mis)interpreted as “introducing” the death penalty for rape<sup>1</sup> and therefore served a largely symbolic function since the death penalty was already an available punishment for gang rape (and therefore the

Noakhali rape case) under the VAW Act. What this reform should have done was address the longstanding protection gaps in rape legislation perpetuated by colonial legal provisions.<sup>1,2,3</sup> One such impediment is the colonial rule of corroboration, which requires judges to verify the truthfulness of a rape complainant’s testimony with other evidence. Usually, medical evidence is given “higher probative value” than the complainant’s testimony and can even be used to contradict it.<sup>2</sup> The corresponding rule of resistance in turn guides how the rule of corroboration takes on a scientific character, whereby injuries in specific parts of the complainant’s body are sought by doctors and judges as corroborative “signs of rape”. If no “signs of rape” are found, this observation is then noted in the medical report and used to discredit the testimony of a rape complainant, by indicating that either the sexual intercourse was consensual or the rape accusation is false. This gives birth to what I call

\*Substantial research for this paper was conducted while the author was a Research Specialist at Bangladesh Legal Aid and Services Trust (BLAST), Dhaka.

the “science of disbelief” in rape cases, whereby the institutional disbelief in a rape complainant’s testimony is justified on ostensibly scientific grounds and largely restricts their right to seek justice. While “justice for rape” remains a common public demand, why medico-legal evidence should be the primary basis on which justice for rape is achievable, or how the science of disbelief has been preserved through successive reforms, is something that has escaped scrutiny.

In this context, this paper seeks to understand the origins of the science of disbelief by analysing the history behind the twin rules of corroboration and resistance. It then explores the extent to which the science of disbelief permeates contemporary medical and judicial opinion in Bangladesh and therefore how the two rules are applied to limit justice for rape complainants. Finally, this paper attempts to demonstrate how this distrust results in the overreliance on medico-legal evidence in rape cases, where rape is treated as a question of science, rather than a question of law. This overreliance on medico-legal evidence, informed by puritanical and colonial assumptions, sets an almost unattainable evidentiary standard which most rape complainants will simply not be able to meet and therefore will effectively be denied the right to receive justice. The first section sets out the historical and colonial origins of the rule of corroboration and the rule of resistance and how they came to be adopted in colonial India. The second section provides a brief history of legal and institutional reform of rape legislation in Bangladesh, with special emphasis on the legal framework guiding medico-legal evidence in rape cases. The final section analyses the extent to which these two rules are reflected in contemporary medical opinion and pervade the judicial interpretation of medico-legal evidence in rape cases.

### ***Creating a science of disbelief: origins of the rules of corroboration and resistance***

“[I]t must be remembered, that it [rape] is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent”.<sup>4</sup> This was the historic warning issued by the seventeenth-century British jurist Sir Matthew Hale which, as we shall see, continues to echo well into the twenty-first century in former British colonies,

like Bangladesh, despite its untenable assumptions. Since the only study of its kind found that over 90% of rapists face no legal consequences for raping a woman or girl in Bangladesh,<sup>5</sup> rape hardly appears to be an accusation that can easily be made. Moreover, the conviction rate in rape cases is only 3%,<sup>6</sup> and therefore shows that it is certainly a lot harder to prove a rape charge than to defend it. However, it would be palpably wrong to assume that Hale was the only person with this perception. In fact, this distrust is deeply embedded in our social fabric on a patriarchal assumption that women lie and must not be believed.<sup>7</sup> In England, this disbelief was transported into law through the establishment of the “cautionary rule”, which emphasised that the uncorroborated testimony of a rape complainant must be viewed with particular caution.<sup>8</sup> Similarly in British India, the “rule of corroboration” came to be established, whereby judges insisted that the testimony of a rape complainant would not usually be enough to convict a man of rape, and must be corroborated with other, more reliable evidence.<sup>9</sup> It is against this backdrop that medico-legal evidence (or more specifically, the idea of “signs of rape”) was developed in such a way so as to give a scientific character to the law’s disbelief against a rape complainant.

Major Collis Barry (1902) in his early twentieth century book identified four “signs of rape” that ought to be searched for during a medical examination: (i) signs of infection; (ii) signs of injury to the body; (iii) signs of seminal fluid or blood; and (iv) “signs of defloration”, including bruising of the genitalia and the condition of the hymen.<sup>9</sup> However, it is Indian forensic doctor Jaising Modi’s canonical *Medical Jurisprudence and Toxicology* which had a lasting impact on rape jurisprudence in the Indian subcontinent. Modi advanced the colonial legacy set by his British predecessors but his local adoption gave these discriminatory assumptions against a rape complainant a veneer of native legitimacy.<sup>9–11</sup> He regurgitates the Hale warning and disbelief towards rape complainants in a more unabashed fashion and similarly treats them as having a default state of dishonesty. He casually states that in the “majority of rape cases” relating to adult women, the complainant makes the accusation “with the object of blackmail” or to “get herself out of the trouble” when consensual intercourse is discovered (p.244).<sup>12</sup>

Modi essentially instructs doctors to pay attention to precisely those four “signs of rape” identified by Barry.<sup>13</sup> Modi would have particular impact on how the second and fourth “signs of rape” (i.e. physical injuries and condition of the hymen) would be understood. For instance, in prescribing what kind of injuries to the body should be found on rape victims, he stated:

*The body, especially the face, chest, limbs and the back should be examined for marks of violence, such as scratches and bruises as a result of struggle. If present, they should be carefully described as regards their appearance, extent, situation and probable duration. Such marks are more likely to be found on the bodies of grown up women, who are able to resist, than on the bodies of children who are incapable of offering any resistance.*<sup>12</sup>

This decisive paragraph may be viewed as the establishment of a “rule of resistance” which would be most decisive in helping doctors and judges understand whether “signs of rape” could be found on the body of a rape complainant so that they could in turn decide whether rape had in fact taken place. Additionally, Modi considered a ruptured hymen as the “most reliable sign of virginity”, despite himself noting at least six reasons other than sexual intercourse which could rupture a hymen and that “even prostitutes have been known to possess the intact hymen” (p.218–219).<sup>12</sup>

The purpose of such excessive, and sometimes exclusive, reliance on medical evidence is to “provide a purportedly ‘objective’ judgment as to whether or not the woman had in fact made such resistance by examining her body for ‘signs’ of the ‘true’ rape”.<sup>14</sup> By analysing Indian jurisprudence and legal practice, Baxi<sup>15</sup> describes the prevalence of the presumption of falsity in the creation and interpretation of medico-legal evidence as the “medicalization of falsity” which is a “specific combination of power and knowledge” and authorises “the idea that science can be used to make a female body speak despite, or even to spite, her testimony” (p.61).<sup>15</sup> This disbelief took on medico-legal authority through the rules of corroboration and resistance, which dictate that the word of a rape complainant is bound to be unreliable, so more reliable evidence can only be found in her body through medical enquiry. This, therefore, gave the two rules a kind of thinly veiled scientific authority to cloak

their apparent impartiality, giving birth to the “science of disbelief” in rape cases. In 2010, the UN condemned the rule of corroboration as being “based on the belief that women lie about rape and that their evidence should be independently corroborated” (p.43) and called for legislation abolishing the rule.<sup>16</sup> It also recommended legislation to specifically state that “medical and forensic evidence are not required in order to convict a perpetrator” (p.41).<sup>16</sup> Subsequently, a toolkit issued by the World Health Organization<sup>17</sup> stressed that penetration of the adult vagina or anus does not result in injury in most cases and that the hymen is a “poor marker” of virginity in post-pubertal girls. Unfortunately, as we shall see in the next section, the rule of corroboration and overreliance on medico-legal evidence have escaped various reform efforts in Bangladesh and the science of disbelief remains well preserved.

### ***Medico-legal evidence in rape cases: a brief history of reform***

The VAW Act was enacted with the objective of being the cardinal legislation to combat and prosecute violence against women and girls in Bangladesh, including rape. Nevertheless, it refers back to the outmoded and gender discriminatory definition of rape in Section 375 of the Penal Code 1860, introduced by the British Raj in the Indian subcontinent. However, neither this definition nor the provisions in subsequent rape legislation specifically require medico-legal evidence to prove rape. Rather, there is a clear focus on lack of valid consent or will, even in the colonial legal definition of rape. The reliance on medico-legal evidence over the complainant’s testimony was entrenched in the colonial law of evidence.

### **The reliable doctor and the unreliable rape complainant**

Section 45 of the Evidence Act 1872 (also a law passed by the British Raj), requires the Court to treat expert opinion, such as that of doctors, as relevant facts when deciding on a question of science.\*<sup>18</sup> Therefore, if proof of rape is treated as essentially being a question of science, then

\*Other than science, this provision also deals with experts relating to foreign law, art and identity of hand writing or finger impressions.

the examining doctor's opinion would be afforded fact-like credibility in the eyes of the Court. This privilege given to medical opinion can be contrasted with the disparaging manner in which a rape complainant's testimony is viewed under the law of evidence. Section 155(4) of the Evidence Act 1872 allows the defence to discredit the testimony of a rape complainant in the eyes of the Court by showing that "she was of a generally immoral character". In leaving "immoral character" undefined, every rape complainant is potentially an "immoral character" worthy of suspicion. As a result, the trial no longer focuses on whether rape has taken place, but whether the rape complainant is a "good" woman or a "bad" woman.<sup>19</sup> In practice, therefore, the phrase "not of a generally immoral character" can become synonymous with "not of unimpeachable character", where the threshold of believability becomes a seemingly unattainable standard for a rape complainant to attain.<sup>19,20</sup> The combined effect of these two provisions in the colonial law of evidence has therefore been to institutionalise disbelief against a rape complainant, entrench the rule of corroboration and cause medical opinion to be literally treated as "fact". Therefore, the colonial law of evidence gave the science of disbelief the legal sanction it needed to operate unfettered.

### The doctor's obligation

While medico-legal evidence of rape has been heralded in evidence law, a rape complainant's access to medical examinations first received legal intervention in 2000. The VAW Act obliged doctors and hospitals to conduct immediate medico-legal examination of rape survivors. If a doctor fails to conduct the medical exam immediately, the Suppression of Violence against Women and Children Tribunal (henceforth "VAW Tribunal") has the power to direct their appointing authority to take steps against the doctor for negligence of duty. In 2003, when the VAW Act was first amended, Section 32 was replaced with a more elaborate provision. When a survivor approaches the hospital to be medically examined, the doctor on duty now has a two-tiered statutory obligation to expedite the examination and issue a certificate to the survivor, and then inform the local police station. If the doctor fails to conduct the medical exam within a "reasonable period of time", such failure is recorded as misconduct and may result in disciplinary action being taken for negligence of duty. Between the 2003 and 2020 Amendments

to VAW Act, two public interest litigation cases resulted in the Supreme Court issuing important directives on justice for rape, including on the collection of medico-legal evidence. This is discussed next.

### Prohibition of the "two finger test"

In 2013, six women's rights NGOs and two scientists challenged the practice of subjecting rape complainants to the humiliating "two finger test" in the case of *Bangladesh Legal Aid and Services Trust (BLAST) v Bangladesh*.<sup>21</sup> The test was used by doctors to detect the extent of damage to the hymen and vaginal laxity. The petitioners argued that the test had "no scientific basis" but remained in use because "courts required such findings to be provided" (p.127),<sup>22</sup> thereby furthering the rape myth that the hymen could determine virginity. They referred to Modi's textbook as the theoretical basis for the test, since it reasoned that if two fingers could easily pass through the vaginal orifice then the possibility of sexual intercourse having taken place without rupturing the hymen could be inferred. They further argued that the test was now used by doctors to also assess whether the complainant was "habituated to sexual intercourse" (p.127).<sup>22</sup> The defence would then use this finding to disprove rape, either by arguing she was immoral, and therefore unreliable, or by suggesting the alleged rape was actually consensual intercourse. Finally, in 2018, the Supreme Court ruled in favour of the petitioners and declared the test to be unscientific, unreliable and unconstitutional. The Court issued eight directives relating to the collection of medico-legal evidence in rape cases, one of which specifically bans the use of the test on rape complainants and another prohibits the use of the degrading term "habituated to sexual intercourse" in medical reports. Despite over three years having passed since then, the judgment is yet to be published and therefore its jurisprudential visibility is limited. Nevertheless, the Gender, Participation and Stakeholder Unit of the Ministry of Health issued a set of guidelines on "Health Sector Services for Gender Based Violence" in a circular dated 21 July 2019, pursuant to the directives issued by the Supreme Court in the *BLAST* (2013) case.<sup>21</sup> The guidelines specifically prohibited the use of the two finger test on rape complainants and the term "habituated to sexual intercourse" in medical certificates. This

prohibition therefore invalidates a particularly repugnant method that was deployed to advance the science of disbelief. However, there is no data on the extent to which this prohibition is being upheld in practice.

### The police's obligation

In 2014, several women's rights organisations challenged the refusal of the police to accept the complaint of a gang rape survivor who was turned away by two police stations.<sup>23</sup> Even though the third station accepted her complaint, they spent 48 hours before taking the survivor to get medically examined. The Court noted that immediate medico-legal examination of a survivor is "the most important factor" in a rape case and that Section 32 of the VAW Act focused solely on the doctor's obligation but remained "absolutely silent" about the responsibility of the concerned police officer. It issued 18 directives on responding to rape survivors, including one that requires police to escort the survivor for medical examination as soon as the complaint has been filed, without causing delay. Failure to take the survivor to the nearest hospital for medical examination would amount to a punishable offence.

### The 2020 amendment

In 2020, when the VAW Act was amended in immediate response to the protests, two important changes were made in relation to medico-legal examination of rape complainants. Section 32(1) was amended to apply not just to survivors but also to those accused of committing crimes under the VAW Act, and it also requires the examination to be conducted using the latest available technology. More crucially, the reform introduces mandatory DNA testing of both the survivor and the accused according to the provisions of the DNA Act 2014 "with or without their consent".<sup>†</sup> Therefore, even if the survivor or the accused refuses a DNA test, they may still be compelled to undergo it. By contrast, consent is a prerequisite to DNA testing under the DNA Act 2014 itself. Section 6 of the 2014 Act, for instance, states that no DNA sample shall be collected (for investigation purposes) from any person under the Act, without first obtaining the written consent in the presence of a minimum of two witnesses. The only two exceptions to this rule are: for those

considered legally incapable of giving consent (e.g. minors), in which case their guardians would consent on their behalf, and DNA testing through court order, where consent of the person would no longer be needed. Therefore, the 2020 amendment bypasses the general rule of consent being a prerequisite for any form of DNA testing, and is likely to result in medico-legal evidence being granted even higher probative value than before.

### Preserving the science of disbelief

As we have seen, the legal and institutional reform relating to medico-legal evidence in rape cases has primarily focused on two trajectories whereby the science of disbelief in rape cases has been preserved. The first has been to legally oblige doctors and police officers to ensure that rape complainants are medically examined without delay. The second, more substantial change, has been to outlaw the two finger test and the use of the term "habituated to sexual intercourse", which was a particularly repugnant method in which the science of disbelief was applied. The assumption that medico-legal evidence should be the central way in which rape is proved informs even otherwise holistic reform proposals outside public interest litigation. For instance, Sunga & Ahmed<sup>2</sup> in a study commissioned by the National Human Rights Commission of Bangladesh, offer reform proposals to address most of the pitfalls in rape legislation, such as proposing limits on the use of character evidence, and a ban on the two finger test. However, none of these reform proposals challenge the overreliance on medical evidence, despite the study recognising the damaging impact such "excessive reliance" can have on rape prosecutions.<sup>2</sup> Furthermore, they suggest that the medical examination of the accused can also help ascertain certain important factors, such as "marks of injury on the accused person caused by the victim's struggle" (p.24).<sup>2</sup> In so doing, they give the rule of resistance an increased scope of operation, whereby absence of marks of injury on the accused person's body may well be interpreted as there being "no sign of rape". What has not happened, therefore, is a challenge to the assumption that medico-legal evidence is an essential component of proving rape as required by global best practices,<sup>16</sup> as a result of which this presumption permeates medical and judicial opinion, as we shall now see.

<sup>†</sup>Section 32A, VAW Act.

### *The science of disbelief in action: medical and judicial opinion on rape*

As a member of the technical committee under the Rape Law Reform Coalition, I began reviewing Supreme Court jurisprudence on rape under the VAW Act to understand the extent to which judicial attitudes perpetuate impunity for rape.<sup>‡</sup> The Supreme Court of Bangladesh comprises two branches: the High Court Division (HCD) and the Appellate Division. A rape case is usually tried before the VAW Tribunal and the Tribunal's decision may be challenged before the HCD through appeal. After reviewing rape cases filed under the VAW Act which were reported in six leading law reports between 2000 and 2019, I discovered 44 rape cases where the VAW Tribunal's decision was challenged.<sup>§</sup> In 43 of these 44 cases, the defendant appealed a conviction by the Tribunal, while in the remaining case a rape complainant challenged an acquittal by the Tribunal. One of the most common grounds of appeal by the defendant was the argument that the medico-legal evidence produced by the prosecution was not enough to prove rape. In 25 out of these 43 cases, the Supreme Court accepted the defendant's challenge, reversed the VAW Tribunal's decision and ruled that rape had not taken place. This section analyses four out of these 25 cases, as they provide the most telling instances of the science of disbelief in action. Additionally, it looks at one case where the defendant's

challenge was unsuccessful. This section also simultaneously draws on journal articles published in medical college journals between 2010 and 2020, by doctors who were tasked with examining rape complainants to gauge the extent to which contemporary medical opinion reflects the science of disbelief.<sup>\*\*</sup> As court judgments are public documents, and the medical journal articles are open-access, no ethical clearance was required.

#### Standardising disbelief

The starting point in the medico-legal scholarship on rape in Bangladesh inevitably appears to be disbelief against the rape complainant, whereby the Hale warning is unconsciously echoed. For instance, Barek<sup>25</sup> quotes an Indian author (KS Narayan Reddy) as saying “rape is an accusation easily to be made and hard to be proved and harder to be defended by the party accused” (p.16).<sup>25</sup> Therefore, Barek endorses the Hale warning despite recognising earlier in the article that “a good number” of rape survivors do not report the crime to the police due to various obstacles, such as intimidation and harassment by the police, defendant's relatives and defence lawyer.<sup>25</sup> Ali et al.<sup>26</sup> also regurgitate the Hale warning and state “Accusation of rape is easy to be made, very hard to prove and harder to disprove” (p.34).<sup>26</sup> As recently as 2020, Fahmida & Jabin,<sup>27</sup> two (female) forensic scientists, commence their article with the Hale warning: “Rape is a legal term rather [than] a medical one, for which [it is] easy to complain of, difficult or hard to prove and harder disprove by the accused” (p.41).<sup>27</sup> Hale is not cited in any of these articles, but his words echo like gospel truth. Other authors express their suspicion in more direct terms. Haque et al.<sup>28</sup> for instance, warn, that “An unscrupulous woman having recent sex with her husband or any other man may accuse her enemy of rape on her” (p.149).<sup>28</sup> Like Modi, they explain: “After a sexual act with consent an unscrupulous woman can put a man in danger claiming that the act was done without her consent and will” (p.151).<sup>28</sup> They also mention how it was necessary for more male doctors to conduct the genital examination of the complainant in the presence of a third-party female attendant “to avoid any complaint of sex related ill behavior” against

<sup>‡</sup>The Rape Law Reform Coalition is a collective of 17 rights-based organisations as well as individual experts and activists advocating for reform of rape legislation in Bangladesh. The Coalition is led by the Bangladesh Legal Aid and Services Trust (BLAST) as its secretariat, and supported by UN Women as part of its Combating Gender Based Violence Project in Bangladesh (CBGV) Project.

<sup>§</sup>For the full list see: Huda 2020, 45–46.<sup>24</sup> The six law reports are: Dhaka Law Reports (DLR), Bangladesh Legal Decisions (BLD), Bangladesh Law Times (BLT), Bangladesh Law Chronicles (BLC), Mainstream Law Reports (MLR) and Appellate Division Cases (ADC). The electronic version of the Bangladeshi Supreme Court judgments cited in this paper were accessed through the Bangladeshi case law database BDLEX (a subsidiary of Manupatra), which compiles the judgments reported in these six law reports. I have used the equivalent law report citations in the footnotes, however, the paragraph numbers in the electronic version of the judgments in BDLEX occasionally differ by a couple of numbers from that of the hard copy version published by the law reports.

<sup>\*\*</sup>These articles are sourced from Bangladesh Journals Online (BanglaJOL), an open-access database.

them (p.150).<sup>28</sup> This explanation illustrates that the disbelief is so pervasive that they foresee false complaints against the examining doctor by the rape complainant as a potential risk to “avoid”. This distrust is a natural segue into the search for “signs of rape” on the complainant’s body, with the question of whether a female who has been raped is treated as a medical diagnosis.

In *Sree Pinto Pal vs. State* (2010)<sup>29</sup> the doctor stated in the medical report that “no sign of recent sexual intercourse is detected” but was not examined by the prosecution, while the apparel of the complainant was seized but not chemically examined. Therefore the HCD referred to the case of *Seraj Talukder vs. State* (1998)<sup>30</sup> where the Court had held “absence of sign of rape in the medical report and non-examination of the wearing cloths made the whole case most doubtful one”. The HCD also referred to the much older case of *Shan Khan vs. State* (1966, para 38)<sup>31</sup> decided by the High Court of West Pakistan in 1951, wherein the paragraph in Modi’s book establishing the rule of resistance was cited:

*In the case of rape, according to the Modi’s Medical Jurisprudence, the body specially the face, breasts, chest, lower part of abdomen, limbs and back should have marks of violence such as scratches and bruises as a result of struggle. Such marks are likely to be found on the bodies of grown up women who are able to resist.*<sup>31</sup>

Thereafter the HCD held that medical report is a crucial factor which impacts “the entire case” and the medical report in this case, coupled with the non-examination of the apparel and “absence of scratches and bruises in face, breasts, chest, abdomen, limbs and back” did not support the allegation of rape (para 39).<sup>29</sup> Notably, the HCD accepted that it is a “settled principle” that there is “no legal bar” to relying on the sole testimony of a rape complainant, if it is found to be “reliable and worthy of evidence” (para 41).<sup>29</sup> However, the fact that the complainant in this case climbed a paupa tree to enter the house of the accused the day after the alleged rape took place, “proved that she was a woman of easy virtue, so her evidence cannot be believed without the corroboration of reliable evidence” (para 40).<sup>29</sup> As we can see, in this case the science of disbelief prevailed, necessitating the rule of corroboration and the rule of resistance, neither of

which were met and therefore the defendant was acquitted.

In *Ibrahim Dewan vs. State* (2016)<sup>32</sup> one of the grounds of appeal argued by the defendant was that the medical report relied upon by the prosecution was insufficient as “there was no mark of violence upon the person of the victim” (para 9).<sup>32</sup> Like the defence in the *Sree Pinto* (2010) case, the defence in this case also referred to the paragraph of the 1951 High Court of West Pakistan judgment in *Shan Khan* (1966)<sup>31</sup> citing Modi’s book establishing the importance of injuries in certain parts of the body (para 10).<sup>32</sup> In response, the prosecution lawyer, a female Deputy Attorney General, referred to *Badal vs. State* (1999)<sup>33</sup> where the HCD had reaffirmed the conviction in a rape case despite medical evidence stating that “no sign of rape” or marks of violence were found on the complainant’s body (para 18).<sup>32</sup> In the *Badal* (1999) case,<sup>33</sup> the complainant had come running to a shop right after the rape incident without any *pajama* (lower garment) on her body and told the shop owner and other persons present there that she was raped by the two defendants, and these witnesses subsequently testified in court corroborating this. Ultimately in the *Ibrahim* case, the HCD was not convinced by the defendant’s appeal and highlighted that since both the doctors who examined the complainant found evidence of “forceful intercourse” and deposed to that effect, the defence’s argument about it being a concocted case fell through (para 84).<sup>32</sup> However, which specific finding from the medical examination was viewed as an indication of forceful intercourse is not discussed in the judgment. Notably, a crucial factor for the HCD’s judgment was that two local witnesses, like in the *Badal* (1999) case,<sup>33</sup> corroborated the complainant’s statement, since they had found her naked and sobbing inside the graveyard, one of whom even mentioned that she had genital bleeding and injury (paras 24–26).

### Rape as a medical diagnosis

Like colonial literature, contemporary medical opinion also offers guidance on what counts as “signs of rape” which would help corroborate rape claims. Barek<sup>25</sup> lists three “important corroborative signs to diagnose rape”: (i) signs of active resistance, (ii) presence of spermatozoa and (iii) diplococci (a bacterium) in the vaginal swabs. Not only are these “signs of rape” almost identical to those listed by Barry<sup>13</sup> and reinforcing of Modi’s

rule of resistance but more crucially, Barek presents these signs as a basis to “diagnose rape”. Therefore, medico-legal evidence is no longer just sought to corroborate the complainant’s testimony, but being raped is treated as a medically diagnosable condition. Barek<sup>25</sup> studied a total of 176 cases, where the police brought a rape complainant to him for medico-legal examination “with the request to give opinion as to [whether] rape [took place] or otherwise”. He opined that rape only took place in 46 cases (26%) while sexual intercourse was deemed to be consensual in the remaining 130 cases (74%). In 27 cases where he held rape had taken place, the complainant was below the statutory age of consent (i.e. 16), so he had to treat these automatically as rape if evidence of sexual intercourse was present (p.17).<sup>25</sup> Haque<sup>28</sup> provides examples of two rape complainants, where they found evidence of recent sexual intercourse, but no signs of “forceful intercourse”, which made it difficult for them to establish it as “forceful rape”. They also accepted the possibility that “accused rapists were known to them and the intercourse could be of consenting nature” (p.151).<sup>28</sup> Both these examples show how the science of disbelief operating through the rule of resistance led doctors to produce unfavourable medical reports which would ultimately pose a huge evidentiary challenge in ensuring a successful prosecution.

### The fixation with ruptured hymens

Whether or not a “ruptured hymen” (one of the “signs of rape” identified by Barry) counts as sufficient proof of rape has been the subject of significant judicial debate. Notably, however, this issue was not discussed in any great detail in the contemporary medical journals reviewed. In *Md. Wasim Mia vs. State* (2003)<sup>34</sup> the VAW Tribunal convicted a man for the rape of a fourteen-year-old girl with hearing and speaking disabilities. The doctor who examined the survivor indicated that “No sign of forceful intercourse was found at the time of examination” but that her hymen was found ruptured (para 5).<sup>34</sup> The VAW Tribunal considered this to be sufficient proof of rape. On appeal, the HCD reasoned that since the defence did not argue that the “hymen was ruptured by some other person” who “was responsible for ravishment of [the] victim”, the medical evidence, like other oral and circumstantial evidence, supported the prosecution (para 27). Therefore it rejected the defendant’s appeal and reaffirmed

the Tribunal’s conviction. Here, the Court, just like Modi, looked to the condition as a means to ascertain virginity, and essentially clarified that it would not have been able to interpret the ruptured hymen as a “sign of rape” if the defence had suggested that the rupture was caused by intercourse with another person. The defendant was, however, later acquitted by the Appellate Division as it found from the evidence on record that none of the prosecution witnesses identified the defendant as the person responsible for rape. The survivor’s mother, for whatever reason, disowned her initial accusation against the defendant, as recorded in the First Information Report (FIR).

The question about the evidentiary value of a ruptured hymen came before the Court again in *Suren Bairagi vs. State* (2005)<sup>35</sup> The doctor testified that he found the victim’s hymen to be recently ruptured along with signs of recent sexual intercourse, even though no signs of violence were there. In cross examination he admitted that the hymen may be ruptured for a number of reasons other than rape, and if it is caused by rape “there will be injury” (para 16).<sup>35</sup> He further admitted that no radiological or pathological examination had taken place, no spermatozoa were found and that there was no “external violence on the private part of the body of the victim” (paras 16–21).<sup>35</sup> The defence asserted that the doctor “did not notice any sign of rape” on the body of the victim and that he had issued a false medical certificate after being “gained over” by the complainant’s side, which the doctor denied (paras 16–21).<sup>35</sup> The defence further asserted that this was a false rape charge lodged by the complainant’s father out of vengeance owing to a previous dispute with the accused. To impeach the credibility of the prosecution, the defence also added that the victim’s father often smoked marijuana with “bad men” at his house and his daughters were of “questionable character” (paras 17).<sup>35</sup> Due to the doctor’s admissions during cross examination, the HCD held that the medical evidence was insufficient to support the prosecution’s case (paras 21).<sup>35</sup> To support the dissatisfaction with the medical evidence on record, the HCD’s reference to a book on medical jurisprudence (which took the science of disbelief to new heights), is worth quoting in full (para 21):

*In view of evidence of the doctor P.W. 8 we may refer to the observation of C.C. Mallik so made in his Short Text Book of Medical Jurisprudence, at*

page 296, that injuries might be produced over the genitals of children and infants by introducing of foreign bodies or fingers just to show that they were sustained as a result of rape. It has also been reported that parents sometimes not only produce injuries to the genitals of their children, but even kill them by suffocation in order to bring the false charge of rape and murder against the enemy. Adult women may occasionally stain their clothes with blood or with starch (to stimulate seminal stains) in order to level false charge.<sup>35</sup>

The HCD held that the “mere rupture of hymen” of the complainant “in absence of any mark of injury on her body” is insufficient to prove rape “as she was supposed to obstruct the accused-appellant during the occurrence” (para 21).<sup>35</sup> Therefore, the complainant failed to meet the threshold required by the rule of resistance. Furthermore, the failure of the doctor to hold radiological and chemical examination of the complainant’s apparels, coupled with evidence of the complainant’s father not being a “good man” since marijuana was allegedly often taken in his house, all indicated to the Court that it was a false rape case (para 21).<sup>35</sup> That the Court also accepts the possibility that parents could deliberately injure (or even kill) their children, or that adult women could fabricate evidence just to file a false rape case, shows just how deep the institutional disbelief remains.

In *Horon vs. State* (2018)<sup>36</sup> a man was convicted of raping a 12-year-old girl, the daughter of a poor shop owner. On appeal, the defence argued that the medical report failed to support the prosecution story. The doctor had stated that although they did not find “any sign of violence on the body of the victim”, her hymen was found ruptured. Furthermore, the medical board opined that “no sign of forceful sexual intercourse” was found on her. The Court interpreted this medical opinion as stating that “no forceful sign of rape was found during medical examination of the victim”. On the question of the ruptured hymen, the Court chastised the child rape complainant stating that “there may be many reasons for rupturing of hymen of a 12-year-old girl in our society like the victim” (para 39).<sup>36</sup>

This case clearly shows that judicial adherence to the rule of resistance is so pervasive that “no sign of forceful intercourse or violence” on the victim is taken to mean “no sign of rape” even for a 12-year-old. The fact that any sign of sexual

intercourse on a 12-year-old victim should automatically be considered as evidence of rape, given that she was well below the statutory age of consent, seems to be lost on the judge. It also shows that the judicial disbelief is equally strong given that a ruptured hymen of a 12 year-old-child was rationalised by implying possible illicit social conduct. The Court also pointed to the contradictions in the prosecution’s testimonies with that of the FIR as a reason for acquittal, without considering it to be an outcome of the complainant’s family’s illiteracy and unfamiliarity with complex court procedure. When questioned about this contradiction during trial, the victim’s father responded that he could not read, and therefore did not know what the FIR stated. This did not, however, seem to soften the Court’s disbelief in the slightest.

#### Moving past the rule of resistance?

Contrary to the medical opinion discussed so far, some recent scholarship shows progress. Ali et al.<sup>26</sup> studied 330 cases and found that “negative opinion” had to be given in the vast majority of them (i.e. 72.4%). However, unlike Berek,<sup>25</sup> they recognised that a negative opinion in a medical report is due to the fact that most complainants take legal action (and are therefore brought for medical examination) after 24 hours have already passed since the assault and after having washed their genitalia. Crucially, they also recognise that this delay could be caused by the “lack of awareness” or the distance of the police stations from the district headquarters, where the forensic testing facilities are usually located.<sup>26</sup> Therefore they caution that negative findings should not exclude rape, while also cautioning that positive evidence (i.e. presence of sperm) does not necessarily confirm rape. Essentially, they appear to be saying what should be obvious: that medico-legal evidence is merely indicative, and cannot be seen as a definite basis within which to assess whether rape has occurred.

In contrast to Berek<sup>25</sup> and Haque et al.,<sup>28</sup> Bose et al.<sup>37,38</sup> and Fahmida and Jabin<sup>27</sup> accept that rape can take place without imparting injuries and that doctors should not use “negative findings” to opine that rape has not taken place. However, Bose et al.<sup>37</sup> caution that “corroboration by eye witness or circumstantial evidence is necessary in such cases” (p.106).<sup>37</sup> Fahmida and Jabin<sup>27</sup> also issue an identical caveat. While it is progress-

ive in that they have clearly moved past the rule of resistance and recognise that the occurrence of rape is not a medical diagnosis, ultimately, they still subscribe to the rule of corroboration, which ought to be satisfied by eye witnesses or circumstantial evidence, even if not medico-legal evidence. The clearest warning against treating rape as a medical diagnosis comes from Rahman (p.65):

*Rape is not a medical diagnosis; it is only a legal definition. The report should contain negative as well as positive findings. The doctor should never make a diagnosis of a rape. He may give opinion that there are signs of recent vaginal perpetration, recent sexual intercourse.*<sup>39</sup>

Rahman's refusal to treat rape as a medical diagnosis is particularly significant since this seemingly obvious caveat is usually not present in judicial opinion, where the limits of medico-legal evidence are seldom acknowledged. The discussion of the probative value of ruptured hymens aside, the *Md. Wasim* (2003) case<sup>34</sup> is more significant because the Courts recognised just how time-sensitive the medico-legal evidence in rape cases is, and therefore should not be the sole basis on which rape cases get determined. The VAW Tribunal had observed that the reason that no sign of injury could be found on the private parts of the victim was because she was examined one month and two days after the rape (para 11).<sup>34</sup> The HCD echoed the reasoning of the VAW Tribunal and exclaimed "It cannot be at all suggested and imagined that after a period of long thirty-two days signs of sexual assault and intercourse could be found from the victim of sex felony" (para 27).<sup>34</sup> Despite the ultimate acquittal in the *Md. Wasim* (2003) case,<sup>34</sup> the HCD judgment remains significant since it progressively recognised the causal link between delay in medical examination and absence of signs showing forceful intercourse on a rape complainant's body. This obvious realisation, which was also expressed by Ali et al.,<sup>26</sup> is seldom seen in other judgments of the HCD, whereby the causal relationship between the very real possibility of delay in medico-legal examination and lack of signs is hardly acknowledged. On the contrary, delay in filing the complaint is often used as a further ground of appeal and acquittal, in addition to non-corroborative medico-legal evidence.††

Additionally, the *Badal* (1999) case<sup>33</sup> cited by the female prosecution lawyer in the *Ibrahim*

(2016) case<sup>32</sup> clearly stands out since the HCD reaffirmed convictions despite the medical report stating "no sign of rape" had been found. However, it is unlikely that the outcome would have been the same had two local witnesses not seen the complainant in the immediate aftermath of the rape incident and corroborated her statement in Court. This is reflective also of the stance taken by Bose et al.<sup>37,38</sup> and Fahmida and Jabin<sup>27</sup> who, while accepting that rape can take place without injuries (thereby bypassing the rule of resistance), ultimately insisted that the rule of corroboration must be satisfied through other means, such as eye witnesses or circumstantial evidence.

### Looking ahead

As we have seen in this section, the science of disbelief largely defines medical and judicial opinion. While some doctors and judges appeared to move past the rule of resistance, the rule of corroboration was still upheld, whereby in the absence of corroborating medico-legal evidence, the production of eyewitnesses was heralded as an alternative means of corroboration. This is hardly helpful since the possibility of a rape complainant being able to summon an eye witness in court is perhaps as slim as (if not slimmer than) the possibility of producing a medical report indicating "signs of rape" which satisfy the rule of resistance. It is one thing to ensure rape survivors have access to timely and gender-sensitive health services, but quite another to mandate medico-legal evidence collection in every rape case. While the former would ensure proper treatment for rape survivors who require medical attention, the latter preserves the science of disbelief by reinforcing the presumption that medico-legal evidence must necessarily play a central role in every rape prosecution. Yet this distinction has not been given due recognition in reform efforts so far. Therefore, what has remained unquestioned is the judicial tendency to treat the very occurrence of rape as a medical diagnosis rather than a legal wrong based on the absence of valid consent, where physical signs on the body ought not to be the *sine qua non* of proving rape. Therefore, this paper has been an attempt to question the unquestioned supremacy of

††See for example: *Horon vs. State*<sup>37</sup> discussed above, where an eight day delay in lodging the first information report was as a ground of appeal and acquittal.

medico-level evidence in rape cases and has offered a brief insight into how the twin rules of corroboration and resistance continue to guide contemporary medical and judicial opinion on rape. However, the paper was based entirely on desk review of existing laws, judgments and secondary sources. It did not entail any primary research methods, such as interviews with survivors, whose perspectives and lived experiences should necessarily drive any reform efforts.

### Conclusion

For centuries, rape complainants have been subject to disbelief not just by society at large, but also by the legal system that is meant to be the impartial forum for attaining justice. This widespread presumption guided the colonial law of evidence and gave birth to the pernicious rule of corroboration, which mandated that the sole testimony of a rape complainant would not usually be enough to convict a man of rape, so there must be other, more reliable evidence to corroborate her statement. In this context, medico-legal evidence was developed in England and subsequently adopted in British India (which included Bangladesh) as the central way in which to corroborate rape complaints, with doctors being trained in the science of searching for “signs of rape” in the body of the complainant. This search has essentially been guided by the rule of resistance which dictated that a “real” rape survivor would have clear “signs of rape”, meaning marks of injuries on certain parts of her body, as a result of resisting her attacker to the utmost extent. In this paper I have attempted to demonstrate how the twin rules of corroboration and resistance gave birth to a science of disbelief which continues to shape both medical and judicial opinion in Bangladesh. The need for corroborative or

medical evidence to prove rape (and therefore these two rules) violates the global standards set by the UN<sup>16</sup> and the WHO.<sup>17</sup> While there is some literature indicating that the rule of resistance has been bypassed in certain cases, doctors and judges ultimately still stressed the need for the testimony of the complainant to be corroborated by other sources, such as eyewitnesses. Legal reform is seldom enough to catalyse social change. However, doing away with these two rules would go a long way towards ending impunity for rape by eliminating the pernicious science of disbelief which has enjoyed a longer life than it deserves.

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## Résumé

Un entrave majeure de la justice en cas de viol au Bangladesh est la règle coloniale de la corroboration, qui exige des juges qu'ils vérifient la véracité du témoignage d'un plaignant pour viol avec d'autres éléments d'appréciation. Les preuves médicales constituent le mode le plus fréquemment recherché de corroboration et peuvent être utilisées pour contredire le témoignage du plaignant. La règle de résistance correspondante guide à son tour la manière dont la règle de corroboration assume un caractère scientifique, selon lequel les lésions dans des parties spécifiques du corps du plaignant sont recherchées par les médecins et les juges comme des « signes de viol » corroboratifs. Si « aucun signe de viol » n'est trouvé, cette observation est notée dans le rapport médical et utilisée pour discréditer le témoignage d'un plaignant pour viol, en indiquant que soit le rapport sexuel avait été consensuel soit que l'accusation de viol est fautive. Cet article montre comment l'application sans entraves de ces deux règles donne lieu à la « science de la méfiance » dans les affaires de viol, où l'incrédulité institutionnelle dans le témoignage d'un plaignant est justifiée sur des bases ostensiblement scientifiques et restreint nettement son droit à demander justice. Il illustre comment la science de la méfiance a été créée et préservée par les réformes juridiques et institutionnelles qui se sont succédées au Bangladesh. L'article remet en question la notion acceptée de longue date et apparemment incontestée au Bangladesh selon laquelle les preuves médicales devraient être la base principale sur lesquelles un viol peut être prouvé au tribunal en analysant la jurisprudence et les normes juridiques pernicieuses que cette hypothèse a engendrées.

## Resumen

Un gran impedimento a la justicia por violación en Bangladés es la regla colonial de corroboración, que dispone que jueces verifiquen con otra evidencia la veracidad del testimonio de la persona que denunció la violación. La evidencia médica es el modo más buscado de corroboración y se puede utilizar para contradecir el testimonio de la denunciante. A su vez, la regla correspondiente de resistencia guía la manera en que la regla de corroboración asume un carácter científico, por lo cual lesiones en partes específicas del cuerpo de la denunciante son buscadas por médicos y jueces como “señales corroboradoras de la violación”. Si no se encuentran “señales de violación”, esta observación se anota en el informe médico y se utiliza para desacreditar el testimonio de denuncia de violación al indicar que el coito sexual fue consensual o que la acusación de violación es falsa. Este artículo muestra cómo la aplicación sin restricciones de estas dos reglas da a luz a la “ciencia de la incredulidad” en casos de violación, por lo cual la incredulidad institucional en el testimonio de la denunciante de violación se justifica por razones aparentemente científicas y restringe en gran medida su derecho a buscar justicia. Ilustra cómo la ciencia de la incredulidad fue creada y preservada por medio de sucesivas reformas legislativas e institucionales en Bangladés. Este artículo cuestiona la noción de larga data pero aparentemente no cuestionada en Bangladés de que la evidencia médica debe ser la principal base mediante la cual la violación puede ser comprobada en corte al analizar la jurisprudencia y normas jurídicas perniciosas creadas por este supuesto.