"ALL CITIZENS ARE EQUAL BEFORE LAW AND ARE ENTITLED TO EQUAL PROTECTION OF LAW"-ARTICLE 27 OF THE CONSTITUTION OF THE PEOPLE'S REPUBLIC OF BANGLADESH ● dslawdesk@yahoo.co.uk

LAW INTERVIEW

Death penalty for rape: The severity of punishment has nothing to do with impunity

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Keeping the alarming rise in the number of sexual offences, including rape in context, Law Desk *talks to him on the following issues.*

Law Desk (LD): What would be your general observations on the increasing number of rape and its relation with the culture of impunity?

Muhammad Mahbubur Rahman (MMR): Reported rapes have been on the rise for many years. And what is more alarming and disturbing is that the incidents of gang rape in peacetime, the number of which has significantly decreased in many countries, appear to have increased in our society. True, we do not have sufficient scientific data or studies to underscore the impact of the culture of impunity on the increasing number of sexual offences, including rape. However, the debilitating impact of a failed criminal justice system and lower rate of conviction on the increasing number of offences is quite easily perceivable and deducible. There indeed is a relationship although it is not the only reason.

LD: What are the challenges for the implementation of the existing laws? Do you think that the existing punishment for rape is inadequate?

MMR: The punishment for rape under the existing law is harsh. Nonetheless, there is a growing perception that increasing the punishment further will solve the problem. The effectiveness of punishment as deterrence depends on many factors. The certainty of punishment is more important than its severity. The main problem is that most offenders in rape cases go unpunished and the severity of punishment has nothing to do with impunity. Without addressing the problem of low conviction rate, we cannot just assume that the existing punishment is inadequate and a more severe punishment would be the only answer to the problem. Our focus should be on why convictions are not being awarded. In my understanding, the reasons for this low conviction rate are well known to anyone having a minimum knowledge of our criminal justice system but unfortunately they are not addressed. Understanding the problems and addressing them in an honest way is the key.

LD: Should there be death penalty for rape?

MMR: The existing law prescribes the death penalty for rape leading to death and gang rape. Now the question is whether we should introduce it for all rapes. If we could maintain an acceptable conviction rate and punish the offenders with life imprisonment (which is the only punishment for rape under the existing law) and still unable to deter rape, then the question could come as to whether we should consider increasing the existing punishment and introduce the death penalty instead of or in addition to life imprisonment. Since we are now miserably failing to ensure conviction, the question of increasing the punishment is irrelevant and cannot be an agenda. When an alarmingly low conviction rate has almost broken the sequence of crime and punishment, our first priority should be to establish this sequence. Introduction of the death penalty, without taking any meaningful step to that direction, is nothing but a hysterical response to a serious problem.

From a penal policy perspective, it is dangerous to put rapists on the same footing with murderers. The superiority of force which enables a man to commit rape can enable him to go further - to add murder to his guilt. The only restraining motive that can prevent murder in this situation is to inform him that the punishment of murder is more severe than the punishment of the crime which he has already committed. In this way, the differential treatment of rapists and murderers contributes to the security of life of rape victims. Even the authors of the Penal Code of 1860 were well aware about this concept of marginal deterrence. That's why they did not accept the popular demand of death penalty for rape. If we now choose to surrender to this popular demand, it would be disastrous for us in the long run. It would contribute to an increase in number of rape followed by murder, encourage more false cases, unduly curtail liberty of accused in many cases and possibly result in fewer convictions.

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LD: What should reforms be directed at, then?

MMR: We should aim at a reform of the entire criminal justice system. No piecemeal intervention will bring about meaningful and sustainable changes. In reforming the system, there are several key areas of interventions. First, there is a strong need to reform the police. Many positive proposals on police reform are pending with relevant ministries for many years. We should generate more discussion on why our policy makers are hesitant in implementing these proposals. If we could reform the police, give them functional independence, ensure accountability and make the processes of investigation more transparent, we could ensure better and effective investigation leading to a significant increase in conviction rate. In many cases, we end up in unwarranted acquittals due to faulty investigations. Second, we should seriously rethink about the prosecution system which is heavily controlled by the executive. This arrangement is not conducive for an effective criminal justice system.

The third area of reform could be the management and protection of witnesses and victims. A law was drafted by the Law Commission long ago, but it is yet to be enacted. In 2017, the Supreme Court laid down a praiseworthy draft policy for witness management, but there is no noticeable progress in implementing the policy. If we have comprehensive witness and victim protection and management laws and policies, we can do a lot to ensure better criminal justice system. Additionally, we should focus more on countering false cases and appointing adequate number of judges. Reform in all these areas and not in respect of one only in exclusion of others, can bring positive changes in the truest sense. If we keep the entire criminal justice system in chaos and intervene only for sexual violence or rape, there will be very little improvements.

Furthermore, we need to focus on an underdiscussed area: the moral authority of law, of criminal justice system and the criminal justice agencies. The perception that criminal justice system works only through administration of punishment is a flawed perception. The moral authority of law emanates from the logical underpinnings and reasonableness underlying law. For instance, a criminal law may lose its moral authority if it is unjust in terms of ensuring the due process rights and maintaining a just sentencing calculus. Besides, the criminal justice agencies also need to have moral authority. When the moral authority erodes, the criminal justice system ultimately fails to command compliance. The said authority emanates, among others, from an impersonal rule of law. For instance, if a popular perception, even if wrong, is created that criminal justice responses are markedly different on the basis of political or social status or connection of offender or victims, then criminal justice agencies need to think in retrospect if they have an impersonal moral authority. The same thing happens when it appears that criminal justice responses in cases of "viral" incidents compared against other incidents are significantly different. Adhocism may be a good strategy to fool or appease the mass people but it ultimately diminishes the moral authority of criminal justice system and its agencies. In this connection, we should also look at how criminal justice agencies are exercising their coercive powers. If there is an arrogance of power, it not only affects their credibility but also contributes to growing criminality by those possessing different forms of power at the societal level. We should also address the crisis of credibility of these agencies.

LD: Thank you for your time.

MMR: You are welcome.

LAW REFORM

Redefining rape: A medico-legal call for justice

SUMAIYA ANJUM TROYEE

Rape is one of the most heinous crimes that can happen in a society. In ensuring justice for rape victims, an unbroken chain of medical evidence plays a significant role. However, in many cases, an inchoate legal conceptualisation of rape downplays sexual violence and its gruesomeness.

Section 375 of the Penal Code 1860 states that, a man is said to commit rape, if a sexual intercourse with a woman happens under certain statutory circumstances. An explanation to the section states that penetration is sufficient to prove sexual intercourse. This century old rape definition coupled with the explanation is silent as to what extent penetration is sufficient to constitute rape. This inchoate rape definition often puts medical officers in a serious dilemma. This is high time this archaic definition was changed. In this regard, the amended rape definition of Indian Penal Code is a good example to consider.

In a bid to prioritise rape justice, in the post-2012 gang rape context, India amended section 375. After amendment now the section is defined broadly as this "a man is said to commit rape if he (a) penetrates his penis, to any extent into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person or (b) inserts to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person, or (c) manipulates any part of the body of a women so as to cause penetration into the vagina, urethra, anus or any part of body of such women makes her to do so with him or any other person or (d) applies his mouth to the vagina, anus, urethra of the woman or makes her to do so with him or any other person. This amended provision looks beyond the colonial conception of 'rape' and duly considers the needs of time and the changing facets of rape violence in general.

Defining rape narrowly is particularly problematic and the same can keep numerous instances of sexual violence amounting to rape outside the perimeter of what is statutorily defined as 'rape'. Medically speaking, complete act of intercourse is not necessary for an act to constitute rape. Rape can be committed even when there is inability to produce a penile erection. Rape can occur without causing any injury and as such negative evidence does not exclude rape.

It is necessary therefore, for the aid of justice to amend section 375 of the Penal Code 1860. A comprehensive definition of rape can initiate fight against such a social evil like rape and can amply enable medical persons and anyone concerned with the medico-legal as well as legal process involving rape, to examine a situation claiming rape, in a proper way.

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FOR YOUR INFORMATION

Need for accelerated action to end child marriage

A new report from UNICEF calls for accelerated action to end child marriage in Bangladesh by 2030. Despite significant progress in recent years, Bangladesh has the highest prevalence of child marriage in South Asia and ranks among 10 countries in the world with the highest levels. The report is a data brief laying down the trends in child marriage across the country since 1970. It also found that prevalence of child marriage in Bangladesh is less common than in previous generations, dropping from over 90 per cent around 1970 to just over 50 per cent today. Nonetheless, it is worth noting that, because of economic uncertainty, interruptions in schooling, disruptions of services and other factors, the pandemic has the potential to threaten progress made thus far against child marriage.

Following are some key facts that the report highlighted:

- Bangladesh is home to 38 million child brides, including currently married girls along with women who were first married in childhood. Of these, 13 million are married before age 15. Fifty-one percent of young women in Bangladesh were married before their 18th birthday.
- Bangladesh ranks among the top 10 countries in the world with the highest levels of child marriage and has the highest prevalence of child marriage in South Asia.
- A girl's risk of child marriage is influenced by certain background characteristics. For example, child brides are somewhat more likely to reside in rural areas and to live in poorer households, and are less likely to have more than a secondary education.
- Bangladesh has made less progress than its South Asian neighbours, but compared to other countries with the world's highest levels of child marriage, its progress is exceptionally strong.
- Married girls are over four times more likely to be out of school than unmarried girls. Declines in the practice have been observed across wealth groups, with more progress seen among the richest.
- Those with an education beyond secondary school are least likely to be child brides, even if they live in poorer households and reside in rural areas.
- Among districts most affected by child marriage, differences in prevalence are most evident by education levels, rather than wealth or place of residence.
- Nearly one in three child brides have a spouse who is at least 10 years older compared to one in four young women who married in adulthood. Nearly 5 in 10 child brides gave birth before age 18, and 8 in 10 gave birth before age 20. Early childbearing is much less common among those who married later.
- At least 2 in 10 women have family planning needs that are unmet by modern methods; levels are similar among child brides and those who married in adulthood.
- Many women lack antenatal and delivery care in Bangladesh. In some divisions, child brides are even less likely to receive such services than other women Married girls are over four times more likely to be out of school than unmarried girls.
- Child brides are more likely to say that wife-beating is justified than their peers who married later.
- Meeting the Sustainable Development Goal to end child marriage by 2030, or the national target to end child marriage by 2041, will require a major push. Progress must be at least 8 times faster than the rate observed over the past decade to meet the national target, or 17 times faster to meet the SDG target.

COMPILED BY LAW DESK (SOURCE: UNICEF.ORG).