

# Law and Our Rights

"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

## Defamation: A Case Study

by A K Roy

CHARACTER assassination has become the curse of modern civilization, and our politics has enhanced this 'virtue' a thousand fold. With the wireless, radio, TV and press at our service, we have lost the flow of our pen and tongue, surpassing all bounds of social norms, values and culture. From the narrow precincts of one's family to the unlimited international sphere, the malady has spread, poisoning the entire global atmosphere.

So deep and strong has this sordid business taken roots that it is being taken for granted. Instead of resorting to legal action, the issue is settled preferably in the streets. Tit for tat is the practical and shortest remedy in ninety nine cases out of a hundred. Those unwise few who approach a court gain more notoriety in the bargain! The complainant is subject to tortuous cross-examination. Dirty linen is washed in the very presence of the learned Judge, and the public thronged to 'enjoy' the proceedings is provided with free entertainment.

Be that as it may, defamation is defamation. Section 499 of the Penal Code puts it this way:

"Whoever by words either spoken or intended to be read, or by sign or by visible representations makes or publishes any imputation concerning any person intending to harm, or knowing or having reasons to believe that such imputation will harm the reputation of such person, is said, except in the case hereafter excepted, to defame that person."

The exceptions are:  
(i) Imputation of 'truth' which public good requires to be made or published.  
(ii) Expression of opinion, in good faith, respecting the conduct of a public servant, or his character, appearing in that conduct, or  
(iii) Any person touching any public question and respecting his character, appearing in that conduct.

(iv) Publication of a substantially true report of the proceedings of a Court of Justice, or the result of such proceedings.  
(v) Opinion, in good faith, respecting the merits of any case or conduct of witnesses and others concerned.  
(vi) Similar opinion respecting merits of a public performance.

(vii) Censure, in good faith, by persons having lawful authority over another.  
(viii) Accusation, in good faith, to authorized person.

(ix) Imputation, in good faith, of person for protection of his or other's interests or for public good.

(x) Caution intended for good of person to whom conveyed or for public good. It is quite possible that the accused feels strongly secure and out of danger behind the barbed wire fencing of these formidable exceptions and may be it is this realisation or misconception that prompts him to make wild and reckless imputations against his foe.

But we ought to know that there is one class of persons whose speeches are above law, in this respect.

An absolute immunity attaches to the speeches made on the floor of the Parliament. The members of the Legislative Assembly and of the Parliament are absolutely privileged and they can make with impunity libellous statements while participating in the deliberation of the House and the Court has no jurisdiction to entertain an action in respect of defamatory utterances by them as the members. Under the law, they are not amenable to civil or criminal action, despite the fact that the statements are grossly defamatory and deliberately false.

This privilege, however, does not extend to a statement published by a member outside the House though it may be an exact reproduction of what was said during the debates.

Neither ill-will nor malice is an ingredient of the offence of defamation and want of either cannot serve as a defence.

### Plea of Exception and Burden of Proof

The burden is on the accused to prove that their case would come under any one of the exceptions to Section 499 BPC. By virtue of Section 105 of the Evidence Act, the court is bound to presume the absence of circumstances which would bring the offence within any of the special exceptions contained in Section 499 and the burden would primarily rest on the accused to show that the exception applies.

Where an accused person is called upon to prove that his case falls under an exception, law treats the onus as discharged, if the accused person succeeds in proving a preponderance of probability. As soon as that is proved, the burden shifts to the prosecution which has still to discharge its original onus. It must be remembered that basically the original onus never shifts, and the prosecutions has, at all stages

of the case, to prove the guilt of the accused beyond a reasonable doubt. That is not to say that if an exception is pleaded by an accused person, he is not required to justify his plea, but the degree and character of proof which the accused is expected to furnish in support of his plea cannot be equated with the degree and character of proof expected from the prosecution which is required to prove its case.

### What Amounts to Defamation: Some Typical Cases

(i) The accused was prosecuted for having printed and published a photograph with a false caption with the intention of harming the reputation of the complainant. It was held that publication of a photograph with a false caption would amount to defamation.

(ii) "Goonda" means a hooligan or a vagabond and includes a person who is dangerous to public peace or tranquility. It is a well understood term and to characterise a person as a "Goonda" or a soldier of a "Goonda" is not per se defamatory and it does not convey a sinister or defamatory meaning.

(iii) If a well defined class is defamed, each and every member of that class can file a complaint.

(iv) Where a member of the police force, in a communication to the District Panchayat Officer alleged that, the complainant was a woman of loose character, who was having illicit connection with goondas, her paramours coming to her frequently at nights and that her immoral activities reflected badly on the locality in which he lived, it was held that there is no doubt that this was grossly defamatory of the complainant.

(v) The description of a person as illegitimate is certainly a very serious imputation to make and it has to be accepted that such an imputation would harm the reputation of the persons against whom it is made. Where the parties are people of high or special status, the imputation is all the more damaging.

(vi) In a meeting presided by the accused and attended by a large number of persons including some officials, the accused used, such defamatory words as "Chor" (Thief), "Shala" (Rakshas), as against the complainant. It was held that the accused must have intended to defame or at any event must have known that such defamatory words must injure the rep-

utation of the complainant and lower his position in the estimation of others... His action undoubtedly comes within the mischief of Section 499.

(vii) Reliance upon rumours, even if widely current, is no defence to a charge of a criminal libel not being protected by exception 9.... By proving prevalence of rumours, the accused can neither substantiate the defence of truth nor of good faith. The accused can only succeed on producing proof of the truth of the matter charged, as libellous, and not by leading evidence as to his own belief in its truth.

(viii) It is no defence in the matter of defamation of the accused to say that he has acted on the information given to him by another, it is for him to establish that the source on which he has acted was the proper source on which he is entitled to act and he did so with care and circumspection.

(ix) No absolute privilege was attached to a first information report in this country. Such a privilege did not attach even to a statement in Court.

(x) The petitioner (appellant) lodged a report regarding theft of a radio from his house and expressed therein his 'suspicion' against one Basante, a neighbour. Hardly a week had elapsed after the report when the radio was found inside the house of the petitioner himself.

Since no theft had taken place in his house, there was no occasion for him to suspect anyone of having committed it.

(xi) It was held on the facts that the imputation made by the accused against the complainant that she had conceived through him by illicit intercourse, was false to her knowledge and was neither made in good faith nor to protect the interest of the accused nor for public good and therefore, the case did not fall under the ninth exception to Section 499.

(xii) It is well settled that in a defamation case based on an allegation that a woman has had illegal pregnancy, she cannot be compelled to submit to a medical examination against her consent and her refusal to do so is not evidence against her.

(xiii) Filthy abuses 'per se' are not obscene within the meaning of Section 294 and vulgar and abusive epithet are not sufficient in themselves to form a basis for criminal prosecution, for defamation.

### Complaint by Person Aggrieved Necessary

No court shall take cognizance of an offence except upon a complaint made by some

person aggrieved by such offence.

In a defamation case, who is the person aggrieved? Can another person represent the really aggrieved person?

**Father:** Where unchastity is imputed to a wife who has left the protection of her husband and is living separately by herself, her father is not an aggrieved person and his complaint under Section 500 is not maintainable.

**Father-in-law:** In a case where a false imputation of unchastity is made against the daughter-in-law, who is living with her father-in-law, the reputation of the entire family suffers, and if the husband of the woman is absent, the father-in-law is an equally aggrieved person.

**Brother:** Where a woman comes to reside with her brother as a result of a domestic quarrel with her husband and she is not under the brother's guardianship nor is he under any responsibility to take care of her god name, a court has no jurisdiction to take cognizance of the complaint made by the brother against his sister's husband who has imputed unchastity to her.

**Brother-in-law:** Since there was no imputation against the brother-in-law, there was no defamation of his within the definition contained in Section 499 and that his sister-in-law being the person defamed, ought herself to have made the complaint.

**Son:** Where the complaint was lodged by the adopted son with whom the person defamed, the adoptive mother, was residing, it was held that the adopted son was a person aggrieved.

**Master of defamed servant:** It was held, that the allegation defamed not the master but his servants and hence action for defamation could not be sustained at the instance of the master.

Provided that where such person is under the age of eighteen years, or is an idiot or a lunatic, or is from sickness or infirmity unable to make a complaint, or is a woman who, according to the local customs and manners, ought not to be compelled to appear in public, some other person may, with the leave of the Court, make a complaint on his or her behalf.

### Defamation of a deceased person

The children of the deceased are directly interested in up-

holding the honour of their father. The same view may be taken of the brother or grandson of the deceased, though a cousin of the deceased was apparently not so regarded.

However, the imputation must be of such a nature as would not only have harmed his reputation if he were alive but was also 'intended' to be hurtful to the feelings of his family or other near relatives. Imputation made by a person 'possessed' of a spirit:

Facts are often stranger than fiction.

The complainant alleged that on the occasion of the Dasser festival, in the presence of a fairly good crowd of devotees, while the accused was possessed of a spirit (*Dev Baba*), the latter on being questioned by 'A' revealed that his (A's) wife was suffering from some mysterious disease because of black magic practised on her by the complainant. This imputation sent a wave of horror and hatred among those present and seriously injured the complainant's reputation and lowered him in their esteem.

The author defended the accused.

In cross-examination, the complainant admitted the following facts:

(i) It is common knowledge that the accused has been under the influence of 'Dev Baba' for the last ten years or so.

(ii) Every year, on the Dasser-day, the accused is possessed of the *Dev Baba* and at that state, (*Balthak*), people present their problems to the *Baba*, seeking his divine help and guidance.

(iii) They have implicit faith in the *Baba*.

(iv) During the 'Balthak', the facial expressions the tone and the voice of the accused undergo a remarkable transformation, for, it is the *Baba* who speaks, not the accused.

Thus, it was by now crystal clear that so far as the alleged imputation relation to the practise of Black-magic was concerned, the accused had absolutely nothing to do with it. It was the *Baba* who had made the 'defamatory' statement, not the accused. Of course, the accused was being used as a suitable 'medium'.

The accused was discharged. The learned Counsel for the complainant was at his wit's end, for he knew not how to get the *Baba* arraigned before the Court!

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## Criminals in Uniform

by Adilur Rahman Khan

Unfortunately, the Law Enforcing Agency, that is incumbent to protect the people against all criminal acts and provide them safety and security, is perpetrating alleged criminal actions like toll collection, mugging, robbery and even death, rape and torture in custody.

Recently the national dailies reported that one Major (ret.) Joynt Abedin, was arrested at the airport and was taken to police custody on the ground of suspicion of his alleged involvement with some anti-state activities. He was arrested on the basis of some secret information provided by some agencies who are entrusted to look after the issues of national security. He was produced before a Magistrate in Dhaka and was sent for remand in the custody of police, where he was interrogated by the so-called 'Joint Interrogation Cell', which is comprised of all the intelligence agencies. He was not provided with the opportunity of the presence of a lawyer of his choice or any other legal support.

The 'interrogation' failed to frame any charge against Major Abedin for his alleged anti-state activities and he was set at liberty by the order of the Magistrate. All the 'secret information' provided against him were baseless. However, the Magistrate failed to pass any order for compensation for harassment and unlawful arrest already done against Major Abedin based on false information by the 'protectors of law'.

This is not the case only of Major (Ret.) Joynt Abedin. Mr. Nurul Absar of Chittagong and Ms. Nasima Akhtar of Dhaka had also faced similar harassment by the police and the members of the intelligence agencies without any compensation.



Failure to prosecute the rapists and murderers of Shimo Chowdhury of Chittagong, who was raped and murdered in the custody of police, has, in a way, encouraged many such incidents of custodial death, rape and torture in the recent years.

On one hand, the police department and the intelligence agencies are remaining unaccountable, non-transparent and above the law to some extent. On the other hand, inefficiency to prosecute the criminals within the law enforcing agencies has given the alleged offenders a free license to roam around and do their so-called 'job'.

The arrest and prosecution against the criminals within the law enforcing agencies have mostly become impossible due to their alleged close connection with 'political and influential' sponsors.

Surprisingly people in power always ignored the proposals for making the law enforcing agencies accountable, transparent, efficient and people friendly.

The government and the ruling party members in Parliament seem to be more interested in enacting repressive and stringent laws to control their opposition with the help of the law enforcing agencies. A large number of these law enforcing agents are corrupted and engaged in terrorising the ordinary citizens of the country.

If this trend of criminalisation and corruption continues, the citizens, finding no other alternative may build up their own resistance against these 'criminals in uniform' to keep the nose above water. How will the state, confront that?

## Miles to Go, Promises to Keep

A H Monjurul Kabir writes from UK

Millions of children receive no education, work long hours under hazardous conditions, or languish in inhumane conditions in institutions. Others endure harassment and physical abuse by police, are subject to trafficking and sexual exploitation, or are forced to become soldiers or refugees from armed conflict. Sheer lack of political commitment on the part of the governments make the situation worse. The promises of the Convention remain hollow to the most of the children of the world.

"A century that began with children having virtually no rights is ending with children having the most powerful legal instrument that not only recognizes but protect their human rights." Carol Bellamy (1998), Executive Director, UNICEF.

It is true the Convention on the Rights of the Child is unique in its holistic approach in addressing human rights for children. It is also submitted that never in history has so much attention been paid to children's rights especially from the last two decades of the 20th century. The World Summit of 1990 can for instance, illustrate this for Children which brought together seventy-one Heads of States and Prime Minister in order to put children's rights higher on the agenda for the next decades. However adoption by the UN and ratification by individual countries, whilst important, will not in themselves, create real change in children's lives. Moreover this growing recognition and popularity of children's rights, however, is not free from danger of becoming a fashion. Today's final episode of this series on the implementation mechanism of the CRC attempts to explore a desired agenda for action. The proposals are modest, aimed simply at what seems possible in the short or medium term.

### Reporting Guidelines for States Parties

The reporting system for the Convention is intended to foster a global monitoring process of the state of the children. The administrative and procedural articles of the Convention establish a system encouraging progressive movement toward compliance for the Convention standard. It embodies (a) accurate reporting of relevant societal status and trends conditions, (b) availability of that information to all interested and affected parties, and (c) Application of moral persuasion by states parties, NGO communities and an informed public. The Committee framed the Convention Articles according to substance. It has divided the rights into five cate-

gories: (a) civil rights and freedoms; (b) family environment and alternative care; (c) basic health and welfare; (d) education, leisure and cultural activities; and (e) special protection measures.

At its first session in October 1991, the Committee adopted guidelines to assist states parties producing initial reports addressing both the process and structure. With regard to process, the purpose of the Committee is to let the states parties use the report for conducting a comprehensive review of the various measures undertaken to harmonise national law and policy with the Convention. Governments are recommended to prepare their reports according to these guidelines, which stress that the report should indicate "factors and difficulties" encountered by the state in the implementation of the Convention. The report should be problem-oriented and self-critical. States are also asked to specify "implementation priorities" and "specific goals for the future". Unfortunately such guidelines are not followed properly by many states parties in preparing reports.

It is also apparent that very few states parties have followed such advice in the passage of new legislation and development of policy proposals. In UK the Education Act 1993 offered an ideal opportunity to introduce the principles of participation (article 12) and the best interest of the child (article 3) into education legislation but all efforts to achieve this. During the passage of the bill through Parliament were totally rejected by the Government. Such instances are apparent in most of the countries. The states parties have to change their attitude of neglect and apathy at their earliest.

### Dealing with Reservations

A challenge lies ahead for the Committee, in dealing properly with reservation problem. Under Article 51, reservations, which are contrary to the object and purposes of the Convention, are not permitted, but the

Convention does not provide guidance on the effect of incompatible reservations. The ambiguity and lack of clarity in many formulations of the age old 1969 Vienna Convention on the Law of Treaties assists countries to justify their vague and all encompassing reservations. The need for the further codification and progressive development, especially with regard to human rights treaties, is apparent. The Committee should make request to the International Court of Justice for advisory opinions on the issue of reservations. Like the Human Rights Committee, it should take a robust approach and persuade state parties to withdraw reservations.

### Comparison with other UN Treaty Mechanisms

A number of international human rights bodies contribute to improving respect for the rights of the child in their particular areas of competence. In addition to the Commission on Human Rights, the Sub-Commission on Promotion and Protection of Human Rights and its Working Group on Contemporary Forms of Slavery, which deals with aspects of the exploitation and mistreatment of children, relevant international human rights treaty bodies include the following:

- Committee on the Elimination of Racial Discrimination (CERD) for monitoring the implementation of the Convention on the Elimination of Racial Discrimination;
- Human Rights Committee (HRC) of the International Covenant on Civil and Political Rights;
- Committee against Torture (CAT) of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment;
- Committee on Economic, Social and Cultural Rights (CESCR) for the International Covenant on Economic, Social and Cultural Rights;
- Committee on the Elimination of Discrimination against Women (CEDAW) of the Convention on the Elimination of All Forms of Discrimination against Women;

mentioned treaty bodies have more intrusive procedures of compliance monitoring in addition to the review of periodic reports. They may all receive inter-state complaints. All three may also receive complaints from alleged victims where the option has been accepted by the state against which the complaint is made. Only CAT has, under Convention Article 20, a function to inquire into a situation where torture is being systematically practised in the territory of a state party. This is essentially a unique procedure allowing the CAT to take up a situation *ex officio*.

In the absence of any such complaint (inter-State or individual) mechanism or *ex officio* investigation power, the Committee on the Rights of the Child becomes circumscribed within conventional review of periodic reporting system. The CRC should have, at least, an individual complaint mechanism. Lacking a procedure to deal with individual communications, the Committee would benefit from better information as to the treatment that is being given to the provisions of the Convention in domestic courts.

### Lack of Regional Mechanism in Asia and Possible Role for NHRIs

Regional bodies have joined the global drive to implement the Convention at respective levels. The European Parliament, the Council of Europe, the Organisation of African Unity, the Organisation of American States played a significant role in having almost global ratification of the Convention. They also took a number of initiatives for protecting the best interests of children including creating separate regional instrument and organisation for children. In a number of recent cases involving children, the European Court of Human Rights followed the standards of created by the Convention. Absence of any regional human rights mechanism in Asia creates severe problem. National Human Rights Institutions (NHRIs), often viewed as an Asian response to regional

mechanism, can play a significant role in this regard. In 1997 the National Human Rights Commission of India took a welcome initiative on the abolition of child labour in carpet industry in six districts of the State of Uttar Pradesh. The commission, after considering a comprehensive report from a Special Rapporteur appointed by it, adopted a two-pronged approach to tackle this issue. Instructions were given to the Magistrates to effectively enforce the laws against child labour. The Commission also enlisted the co-operation of the Carpet Manufacturers Association for the eradication of child labour and for taking steps for rehabilitation. The Australian Human Rights and equal opportunity Commission is conducting a national inquiry into the provision of school education to rural and remote children throughout Australia. The primary focus of the inquiry is to ascertain whether all children in Australia have access to school education and whether this education complies with their human rights. Thus national human rights institutions can play a significant role in Asia-Pacific region towards better implementation of the Convention.

### Involvement of NGOs

Article 45, somewhat different from other UN human rights treaties, encourage the Committee to invite UN specialized agencies, UNICEF, other United Nations organs and other competent bodies (interpreted as including appropriate non-governmental organizations) to provide expert advice and to submit reports. In fact, it sets out additional arrangements to foster effective implementation of the Convention and to encourage international co-operation. The governments should involve NGOs in their formal process of preparing periodic report for the Committee. NGOs can intensify their role in reviewing the performance of the respective governments towards the implementation of the Convention. They can also influence governments to withdraw reservations entered by them to the Convention.

### Rights-based Approach at National Level

Implementation of the Convention at national level, integrating it within the existing structure, making it works for children and ensuring that it will survive the context-specific roadblocks remain the biggest challenge. Formulating 'Children Policy', Initiating 'Program of Action' at national level in line with global targets formulated at the World Summit for children in 1990 has offered slow but positive responses in some developing countries. Recently UNICEF in co-operation with national governments has launched a rights-based approach towards implementing the Convention. Bangladesh adopts a rights based approach in line with the governments adoption of the National Plan of action for Children (1997-2002). A draft Master Plan of Operation (MPO) for Bangladesh-UNICEF during 2001-2005 is under active consideration. The key priorities include the 'unfinished agenda' for achieving global goals set at the World Summit, countering the threat of arsenic contamination of ground water on a priority basis, combating emerging issues like HIV/AIDS, ensuring access to quality pri-

mary education for all children, improving the situation of the adolescent girls and promotion of birth registration. No doubt, such joint initiative at national level is a welcome development and should be replicated at other levels and regions.

### The Long Walk to A Better World

Millions of children receive no education, work long hours under hazardous conditions, or languish in inhumane conditions in institutions. Others endure harassment and physical abuse by police, are subject to trafficking and sexual exploitation, or are forced to become soldiers or refugees from armed conflict. Sheer lack of political commitment on the part of the governments make the situation worse. The promises of the Convention remain hollow to the most of the children of the world. The greatest danger for the Convention is complacency, given its widespread ratification. No state desires to be branded as unfriendly towards children rights thus it was hardly surprising that states were in such a hurry to ratify the Convention. By ratifying the Convention states parties clearly undertake the obligation to take concrete steps for ensuring the enjoyment of rights recognized in the Convention. In the absence of effective co-operation and true willingness on their part, it is hardly possible for the Committee of the Rights of the Child to change the face of the reality.

## The Child Marriage Restraint Act 1929: An Inadequate Shelter of Law

by Dewan Abdun Nasir

THE function of law is to achieve stability and peaceful change in society. Therefore, it has to be reformed according to the social necessity. The English Rulers had enacted most of the laws in our country. The Child Marriage Restraint Act is more than seventy years old. However, no efforts were made to amend it or reform it and to make it more beneficial and effective. This article is initiated to focus on the existing defects of this Act and to provide some recommendations for amendment.

The said law was enacted in 1929 to restrain the solemnization of child marriages. It came into force on the 1st day of April 1930. This Act contained 10 sections.

Under this Act, a 'child' means a person who if a male is under twenty-year of age and if a female is under eighteen years of age. Child marriage means a marriage to which either of the contracting parties is a child.

Under Section 4, whoever being a male above twenty-one of age and being female above eighteen years age contracts a child marriage shall be punished with simple imprisonment which may extend to one month or with fine which may extend to one thousand taka or with both.

Under Section 5, whoever performs, conducts or directs any child marriage shall be punishable with simple imprisonment which may extend to one month, or with fine which may extend to one thousand taka or with both.

Section 6 of this Act provides that, where a minor contracts a child marriage any person having charge of the minor whether as parent or guardian or in any other capacity, who does any act to promote the marriage or permits to be solemnized or negligently fails to prevent it from being solemnized shall be punished with simple imprisonment which may extend to one month or with fine which may extend to one thousand taka or with both.

Section 12 provides injunction for prohibiting child marriage. Under this section, the court may issue an injunction if satisfied from information laid before it through a complaint or otherwise, that a child marriage has been arranged or is about to be solemnized in contravention of this Act. And whoever disobeys such injunction shall be punished with imprisonment of either description for a term, which may extend to three months or with fine which may extend to one thousand taka or with both.

Under Section 10, the court taking cognizance shall make an inquiry itself or direct a Magistrate of the first class to make such inquiry whether there is a *prima facie* case or not.

The most important feature of this Act is that under Section 9, the court shall not take cognizance of any offence except on a complaint made by the Union Parishad or Pouroshava or City Corporation. An aggrieved person or a citizen cannot come directly before the Magistrate with a complaint alleging child marriage. This act does not offer any mandatory provision upon the Union Parishad or Pouroshava or City Corporation to lodge a complain of child marriage. Naturally, either party of child marriage or their guardians would not complain incriminating themselves to the offence.

For this limitation this law seem to be inactive. That is why, hardly any case of illegal child marriage has come up before a magistrate court, though thousands of illegal child marriages are still being solemnized almost everyday.

The Supreme Court in 1962 made a remark in the case of *Mst. Bakshis Bashir Ahmed and others, 22 DLR SC, 289*. "But for the cognizance obstacle in the Section 9, this law has been proved to be useless during the last three and half decade..."

There should be a provision to enable any citizen to make a complaint before a Magistrate or to lodge a complaint with the Police Station alleging the offence of child marriage. The sentence imposed for illegal child marriage is inadequate. More strict punishment should be prescribed. A marriage should be declared void until the bride-groom attains the age of 21 years and bride attains the age of 18 years. Thousands of child marriages are still being performed, conducted and directed by showing false age in the *Kabinama*. So there should be a provision in this law that the age of the parties is to be determined by the certificate issued by the Birth and Death Registrar.