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

"Come into My Parlour..." An Overview of Rape in Custody

by Saira Rahman

Custodial rape is a universal crime, but in Bangladesh, given the recent evidences of police brutality in the form of torture, rape and death in custody, attacks on journalists and political processions, the police force is increasingly becoming an entity of mistrust, violence and corruption. One wonders whether the authorities are really willing to take up the task of cleaning up the police force and taking out those who give the rest a bad name. Could it be that there are too many rotten apples in the barrel to throw out?

RAPE in police custody has become a widely publicised crime in Bangladesh. Unfortunately, the numbers of such crimes do not seem to be diminishing. According to Odhikar's annually documented reports, in 1997 six women were raped by police. In 1998, the number of such incidences was 16 and in 1999 it was ten. Between January and June 2000, seven women were reportedly raped by law enforcing agents. The victims have to live with the physical and mental scars all their lives. What happens to the 'rapists in uniform'?

On 31 August 1997, former police officers Mainul Huq, Abdus Sattar and Amritlal Burman were awarded the death sentence for raping and murdering Yasmin in Dinajpur. The story of the young woman's rape and death in the hands of police in the back of a police van, made headlines for a long time. On 15 June, almost a year later, the case was sent to the High Court Division of the Supreme Court for confirmation. It is now July 2000. The case is still pending in the High Court. Another tragic example of 'justice delayed is justice denied'. According to the police department rules and regulations such misdemeanour results in suspension and departmental proceedings.

According to section 9 (5) of the Prevention of Repression of Women and Children Act 2000, if a woman is raped while in the custody of the police, those who were responsible for the lapse in their duty in protecting her, would be subjected to a maximum of 10 years and a minimum of five years of rigorous imprisonment with a fine of ten thousand taka. A very small price to pay for ruining a woman's life.

How many of these 'rapists in uniform' are actually suspended by their department or punished according to the law? The case of Yasmin created waves and prompted swift action to arrest the criminals due to pressure by women's groups and human rights bodies. Unfortunately, in the other well known case of Shima Chowdhury in Chittagong, all the alleged criminals were acquitted. No one in the jail administration had been held accountable for negligence and the two inquiries into her death – one instituted by the government and one by the parliament - have been disappointing. Shima had no 'concerned public' rallying for her.

According to newspaper reports of the crimes, in all the incidences of rape by police between January 1997 and June 2000 the culprits are either named or ranked. None have been classified as being totally unidentifiable. Why are there no investigations and identification parades to mark the rapists whose names the victims does not know? No one seems to make an effort to support the victims and see that justice is meted out. Even the media just mentions the incident while it is still 'hot', but gives us no follow up as to what happened to the criminal or the victim afterwards. Maybe such pressure will get the clogged wheels of the police department moving.

Rape in custody is not a crime in Bangladesh alone. It is as universal as the crime of 'normal rape'. In India, as per reports, rape by police and people in authority continue. In the courts of law, more emphasis is given on the conduct and character of the girl rather than the issue of the custodial rape. One of the recent cases of custodial rape, incidentally involving Bangladeshi woman, was the gang rape of Hanufa in Calcutta in February 1998. On 25 February 1998, Hanufa was at Howrah train station waiting to board a train to Ajmeer. On the pretext of confirming her ticket and getting her a meal at the station canteen, she was gangraped by railway officials. Police came to rescue her and she was later returned to Dhaka under the protection of the Bangladesh National Women Lawyers Association. Two cases have been filed against the culprits whom she identified in a police identity parade. One has been filed under criminal law and one under public security laws.

Year	Total number of incidences	Number committed by Police
1997	733	6
1998	961	16
1999	841	10
Jan.-June 2000	-	7

According to reports from Pakistan, allegations of rape in police custody are widespread. Apparently, the number of reported cases of police rape grossly understate the actual rate of abuse. Women detainees are often at the mercy of the police and are unaware of their basic rights. Furthermore, they have little hope of freely exercising their rights without fear of retribution against them and/or their families.

In Sri Lanka, the beautiful island nation, the monster of custodial rape rears its ugly head. In October 1995, a police inspector and six policemen were remanded on rape charges. In July 1996, a 45-year old woman, who was arrested on drug charges, had complained that she was raped by four policemen who were on night duty at the station. Although the suspects were well known to her, they were kept away from the identification parade and another three were displayed. Since she failed to identify the suspects, they were released on a hefty bail. The presidfng judge, Judge Ratnayake Bandara, commented "When suspects in a criminal case were police officers and when they continued to serve the same police station together with the investigating officers, how could an impartial and fair investigation be expected." It was also revealed that there was no matron on duty at the police station to protect the female suspect during the night – this was a mandatory requirement under the law.

Incidents of custodial rape are common in the 'developed' nations of the north as well. It would be untrue and unfair to think that this happens in 'less developed' countries only. There are widespread reports of rape and forms of sexual abuse by male warders and policemen in female prisons and police cells in the United States. In the United Kingdom, too, the crime is common.

The British local daily the 'Metro' reported on 22 June 2000 that from that day, a 33 year old policeman, Paul Banfield begins his eighteen year sentence for sexually assaulting and raping four women in the police cells of the Parkside Police Station in Cambridge while he was custody officer. On passing the sentence, Judge Justice Morland told him "You subject these women to humiliating and terrifying experiences to satisfy your squalid sexual depravity".

Britain has a Police Complaints Authority which states that every custody cell complex should have at least one female officer on duty and that more close circuit televisions need to be installed in order to keep a check on the inmates and prevent further such occurrences. The chairperson of the Authority, Molly Meacher commented "Banfield has let down the police force and the women he was sworn to protect. Women must be able to feel safe in custody".

Banfield admitted to indecently assaulting two women in the cells at Parkside police station in September and October 1999. One woman was a twenty-year-old, arrested for shop lifting. Another was a 24-year-old arrested for being drunk and disorderly. His arrest came after a third victim, a 26 year old women who had been arrested for failing to appear in court, complained that Banfield had sexually assaulted and then raped her.

According to the Metro, the Police Complaints Authority stated that it had dealt with a rising number of allegations of sexual harassment by police officers. In a 1998 report, it stated that "women complaining of harassment had sought police protection only to suffer the same treatment from the officer supposed to be assisting them." In the year the report came out, more than 30 officers were suspended over allegations of indecency, indecent assault and rape. It is nice to know that more developed countries suffer the same problem - but what is unnerving is that for some reason, we do not apply the same solutions.

In order to protect women from the risk of abuse by law enforcement agencies, the government could take steps in providing gender-sensitive human rights training to the police. It could also make sure that female police personnel (more than one) are present when a woman victim or suspect is brought to the police station and when she is interrogated and specially when she has to stay in the police cell over night. It must be ensured that a matron or female police officer is present when any contact occurs between the female detainee and a male officer.

The police force anywhere is an institution built to protect the citizens of any country and any breach in that protection and trust needs to be swiftly dealt with in order to prevent the disease from spreading. Custodial rape is a universal crime, but in Bangladesh, given the recent evidences of police brutality in the form of torture, rape and death in custody, attacks on journalists and political processions, the police force is increasingly becoming an entity of mistrust, violence and corruption. One wonders whether the authorities are really willing to take up the task of cleaning up the police force and taking out those who give the rest a bad name. Could it be that there are too many rotten apples in the barrel to throw out?

Human Rights Situation in India

by Y S R Murthy

INDIA is a country of amazing diversity. There are eight major religions and 25 recognised languages. As for religious sub-sects and linguistic dialects, their number is much more. It is a nation of one billion people, unparalleled pluralism, and subcontinental proportions. India is the world's largest democracy with a strong and Independent judiciary and a free press. There is a vibrant civil society with non-government organizations carrying on their activities freely. Scholars have documented on the crucial links between democracy, independent judiciary and free press on the one hand and the protection and promotion of human rights on the other.

The concept of Human Rights is not alien to this country with a 5000-years civilization and history. It ingrained in the ancient scriptures and literature and the Indian ethos. It is also reflected in the provisions of the Part III(Fundamental Rights) And Part IV (Directive Principles of State Policy) of the Indian Constitution. The country is also a party to the International Covenant on Civil and Political Rights, International Covenant on Economic and Social and Cultural Rights, the International Convention on Elimination of all Forms of Racial Discrimination, the Convention on the Rights of the Child, the Convention on the Elimination of all forms of Discrimination against Women, to mention a few important treaties.

As for legislative steps and mechanisms for the protection of Human Rights, the most significant one is the Protection of Human Rights Act, 1993 which provides for setting up National Human Rights Commission, State Human Rights Commissions and Human Rights Courts. Pursuant to this legislation, the National Human Rights Commission was set up in October, 1993 and has been carrying on its work with great aplomb ever since. Ten States have set up Human Rights Courts, which have been carrying on their work. Also significant are the legislation enabling the setting up of the National Commission for Minorities, women, Scheduled Castes and Scheduled Tribes and Backward classes, The Child Labour (Prohibition and Regulation) Act, 1986, the Prevention of Atrocities against Scheduled Castes and Scheduled Tribes Act, 1989 and the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act 1995 are some instances of important legislation passed by the Indian Parliament in the field of human rights.

The protection of human rights in a developing country like India with about one third people under the poverty line, illiteracy and socio-economic inequalities, is a very complex task indeed. While the country, its people and its institutions continue to grapple with some of the complex issues, whose dimensions are staggering, what is heartening is that the importance of the protection and promotion of human rights is shared by one and all.

The Government has been taking a number of steps for the empowerment of women. One third of posts have been reserved for women in the units of local self-government at the village level. A legislation reserving one third of seats in the House of people and State Legislatures for women is being seriously considered at present and is on the anvil. The Government has finalized a National Policy on the Empowerment of Women. Keeping in view the discrimination inherent in a patriarchal society which manifests itself in the form of domestic violence, low literacy level as compared to men and other violations, there is a great deal that needs to be done in this regard. The awareness on women's right is growing and hopefully, far more determined steps would be taken in the times ahead to redress gender imbalances.

The National Human Rights Commissioner in its six and-a-half year of existence has been able to raise the level of human rights awareness through its activities. Its functions cover the entire gamut of civil, political rights as well as economic, social and cultural rights. In addition to redressing individual complaints of human right violations, it has been taken up systemic reforms of prison and police. It has been reviewing implementation of treaties from the standpoint of human rights and has been making recommendations. Concerned with the abuse of the Terrorist and Disruptive Activities Act. 1985 the Commission was in the forefront of a campaign to remove it from the statute books, which eventually succeeded in 1997. When there were moves to introduce Prevention of Terrorism Bill 2000, the –Commission carefully went through its provisions and gave an opinion to the government that normal laws were sufficient and that there is no need for a new law.

The commission has also been studying conditions in prison, juvenile homes, mental hospitals and other such institutions and has been making recommendations for improvement. The commission catalyzed central and state agencies to include human rights in the educational system right from school to university level. In the wake of some recent instances of attacks against Christian minorities, the commission stepped in decisively and took suo moto cognizance in respect of individual cases soon after their occurrence and sensitized various central and state agencies on the imperative need for preventive steps so that members of minorities could live in security and dignity.

There have been several misconceptions about the state of Human Rights in the areas affected by terrorism and insurgency. The Government of India follows a policy of transparency in matters dealing with human rights. In the state of Jammu and Kashmir, which has been imposed on outsiders, foreign visitors journalists and diplomats. The International Committee of the Red Cross has been given unrestricted access to all jails and detention centers in Jammu and Kashmir. Strict directions have been issued to the police, army and paramilitary forces to look into allegations of human rights violations, and take action against the guilty after prompt enquiries. Human Rights have also been added in their training programmes.

As for child labour, it is a complex phenomenon with roots in poverty, under development and illiteracy. While a multi-pronged and a holistic approach is required to tackle this issue, any short-sighted action by way of sanction on products will do more damage to the children than in remedying the situation. The strategy should cover education of children either in formal system or non-formal mode, income-support to families, stricter law enforcement, awareness generation etc.

In conclusion, a number of watchdog mechanisms at various levels, both within and outside the Government, are closely monitoring the protection and promotion of human rights. The protection of human rights in a developing country like India with about one third people under the poverty line, illiteracy and socio-economic inequalities, is a very complex task indeed. While the country, its people and its institutions continue to grapple with some of the complex issues, whose dimensions are staggering, what is heartening is that the importance of the protection and promotion of human rights is shared by one and all.

Contempt of Court versus Freedom of Expression

A Global Snapshot

A. H. Monjurul Kabir writes from London

FREEDOM of expression and the free flow of information, including free and open debate regarding matters of public interest, even when this involves criticisms of individuals, are of crucial importance in any democratic society. They are key to personal development, dignity and fulfilment of every individual, as well as for the progress and welfare of society, and the enjoyment of other human rights and fundamental freedoms.

Freedom of expression is not, however, absolute. Every system of international and domestic rights recognises a carefully drawn series of restrictions on freedom of expression, taking into account the overreaching values of individual dignity and democracy. Such restrictions include, for example, prevention of obscenity and racial and ethnic hatred, and the protection of personal reputation and public safety. Article 29 of the Universal Declaration of Human Rights provides:

"In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."

A more precise legal standard is articulated in Article 19 (3) of the International Covenant on Civil and Political Rights (ICCPR). Under that article, restrictions on freedom of expression may only be legitimate if they are 'provided by law and are necessary: (a) For the respect of the rights and reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals'.

The interference must be prescribed by law. This implies that the law is accessible and "formulated with sufficient precision to enable the citizen to regulate his conduct." (European Court of Human Rights decision, *The Sunday Times* v. *United Kingdom*, 26 April 1979). Secondly, the interference must pursue one of the legitimate aims listed in Article 19(3) of the ICCPR. Thirdly, the interference must be necessary. This implies that it serves a pressing social need, that the reasons given to justify it are relevant and sufficient and that the interference is proportionate to the legitimate aim pursued. This is a strict test, present a high standard which any interference must overcome.

Unfortunately, judiciary, the ultimate guarantor of rights, falls short in overcoming this test when it comes to offences related to contempt of court. The offence of contempt of court continues to be used by the courts across the world to restrain offensive critique. Even in England, where the last successful prosecution for scandalising the court was brought in 1931, as David Pannick asserts, "there can be little doubt the bringing of such prosecutions had an inhibiting effect on newspaper and magazine reporting of judicial affairs generally...the continued existence of the offence, and the memory of successful prosecutions, inhibits journalists, who wrongly suspect that they have a legal obligation to speak respectfully and cautiously when discussing the judiciary."(*Judges*, 1987)

Defining Contempt of Court

Any wilful disobedience to, or disregard of, a court order or any misconduct in the presence of a court, action that interferes with a judge's ability to administer justice or that insults the dignity of the court; punishable by fine or imprisonment or both. There are both civil and criminal contempts; the distinction is often unclear.

A judge who feels someone is improperly challenging or ignoring the court's authority has the power to declare the defiant person (called the contemnor) in contempt of court. There are two types of contempt - criminal and civil. Criminal contempt occurs when the contemnor actually interferes with the ability of the court to function properly - for example, by yelling at the judge. This is also called direct contempt because it occurs directly in front of the judge. A criminal contemnor may be fined, jailed or both as punishment for his act.

In *Attorney- General* v. *Leveller Magazine Ltd (1979)*, Lord Diplock identified a common characteristics of different forms of criminal contempt by saying:

"My Lords, although criminal contempts of court may take a variety of forms they all share a common characteristic: they involve an interference with the due administration of justice, either in a particular case or more generally as a continuing process. It is justice itself that is flouted by contempt of court, not the individual court or judge who is attempting to administer it."

Civil contempt occurs when the contemnor wilfully disobeys a court order. This is also called indirect contempt because it occurs outside the judge's immediate realm and evidence must be presented to the judge to prove the contempt. A civil contemnor, too, may be fined, jailed or both. The fine or jailing is meant to coerce the contemnor into obeying the court, not to punish him, and the contemnor will be released from jail just as soon as he complies with the court order. In family law, civil contempt is one way a court enforces alimony, child support, custody and visitation orders which have been violated.

However, many courts have realised that, at least regarding various procedural matters such as appointment of counsel, the distinction between civil and criminal contempt is often blurred and uncertain. It is often said that there is a distinction between 'civil' contempt and 'criminal' contempt, although no one appears able to state the distinction precisely and it is conceded generally that the distinction is of little practical significance. In fact in most of the jurisdictions, contempt of court appears to be a strange element of law, which is both unclear and anomalous.

The Breadth of Contempt

The sheer breadth of contempt contributes greatly to the confusion and non-transparency surrounding this offence. Geoffrey Robertson and Andrew Nicol list five types of contempt: *Strict-liability contempt* (completely unintentional prejudicing of the legal proceedings by publishing material on an 'active case'), *deliberate contempt* (directly influencing legal proceedings e.g., by placing unfair pressure on a witness or a party to proceedings), *scandalising attacks on the judiciary* (making false and 'scurrilous' attacks on the judiciary), *jury deliberation* (publishing accounts of how jurors reached their verdict), *disobedience to and order of the court meaning* disobeying an order of a court to postpone reporting or suppress evidence. (Geoffrey Robertson and Andrew Nicol, *Media Law* 1992).

Contempt in the face of the court, which is directed at the judiciary or other personnel and constitutes behaviour other than speech, or speech that has crossed over into overt acts would mostly fall outside the reach of any ordinary doctrine of free speech, irrespective of any other protection to which it may be entitled. This point merits emphasis because the distinction must be drawn between contempt involving and not involving free speech considerations is often blurred. To recognise and evaluate the problem inherent in a system of legal free speech, a strict and almost hermetic distinction must be maintained between speech (whether conveyed by mouth, in writing, or by technological means) and overt action.

The description of 'contempt of court' no doubt has an historical basis but it is nonetheless most misleading and confusing. In fact, the law does not exist, as the phrase 'contempt of court' might misleadingly suggest, to protect the personal dignity of the judiciary nor does it exist to protect the private rights of parties or litigants. Lord President Clyde commented in *Johnson* v. *Grant* (1923), "The phrase "contempt of court" does not in the least describe the true nature of the class of offence with which we are here concerned ... The offence consists in interfering with the administration of law; in impeding and perverting the course of justice ... It is not the dignity of the court which is offended – a petty and misleading view of the issue involved – it is the fundamental supremacy of the law which is challenged."

The phrase 'contempt of court' has often been criticised as being inaccurate and misleading in a number of leading cases: in England: e.g., Lord Cross in A-G v. Times Newspapers Ltd. [1974] AC 273 at 315 and salmon LJ in Jennison v. Baker [1972] 2QB 52 at 61; in Australia e.g., Mahoney JA in A-G (NSW) v. Willesee [1980] 2 NSWLR 143 at 161 and the High Court of Australia (comprising Gibbs CJ, Mason, Murphy Wilson and Brennan JJ) in Lane v. Registrar of the Supreme Court of New South Wales (1981) 55 ALJR 529 at 534; in New Zealand e.g., Richmond P. in Solicitor General v. Radio Avon Ltd [1978] 1 NZLR 225 at 229. The Phillimore Committee's Report on Contempt (1974 Cmnd 5794) acknowledged these criticisms but could not offer any suitable alternative name.

Contempt of Court and Free Expression

The laws of contempt are primarily designed to balance the freedom of expression with the judiciary's attempt to maintain its authority and safeguard public order. Broadly speaking, contempt of court is of three kinds: I) violation of an order of a court, II) interference in the judicial process and III) criticism of a judge, his judgement, or the institution of the judiciary. It is this last category, also known as the offence of 'scandalising the court' at which the right of freedom of expression is most often sought to be sacrificed by the courts.

Lord Russell CJ defined the 'offence of contempt of court' as " any act done or writing published calculated to bring a court or a judge of the Court into contempt, or to lower his authority." However, Lord Russell explained "that description of that class of contempt [scandalising the court] is to be taken subject to one and an important qualification. Judges and Courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no court could or would treat that as contempt of Court." As eloquently pronounced by Lord Atkin, " Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and the respectful even though outspoken comments of ordinary men." (*Ambard* v. *Att. Gen. for Trinidad and Tobago* 1936).

In the Anglo-Saxon countries, it is the institution of contempt of court that always been the most important means of protecting the prestige of the administration of justice and the dignity of the personalities involved therein. The protection afforded individual officers, especially judges, is invariably based and justified on the protection of the institutions of the administration of justice. The rationale behind the contempt law is an abiding British fear of 'trial by newspaper' of the sort that often disfigures major trials in America, where the First Amendment permits the press to comment directly on matters involved in litigation. The First Amendment to the US Constitution states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the government for a redress of grievances."

American judges also do not accept the argument that public confidence in their authority and in the fair administration of justice will necessarily be shaken by hostile comment. The public interest in freedom of expression has been accorded a clear preference over the public interest in securing fair trials and any constraint on such freedom are permissible only to the extent that they constitute a clear and present danger to the administration of justice. (*Nebraska Press Association* v. *Stuart*, 1976). It is the truth of the comment, not the mere fact that it is made, which may undermine such confidence; and if the remarks are true, the public should certainly be allowed to digest them.

The dangers of 'trial by media', are often exaggerated to justify the contempt of court. As the Court of Appeal stated in *Gee v. BBC* (1986),"More importantly an inward-looking atmosphere built up during the trial and the jury and judge tended less and less as the trial proceeded to look outwards and more and more to look inwards at the evidence and arguments being addressed to them."

Contemporary jurists, such as Geoffrey Robertson and Andrew Nicol, describe the offence of scandalising the court in England as "...an anachronistic relic of eighteenth-century struggles between partisan judges and their vitriolic critics" Eric Barendt adds that the offence of scandalising the court is "now so unimportant in practice that it may appear fruitless to spend much space in debating its justification."

Given the inherent vagueness and elasticity of almost all formal speech restrictions – and especially speech restriction in the legal arena – there would, as far as criminal sanctions are concerned, be an obvious temptation to use the sanction against unpopular people with dissenting views. The obvious tendency, in such cases, towards invocation of sanctions, would not be what was said but by whom it was said. Leading contempt cases in the leading contempt jurisdictions of the world reflect this reality – heavy stress put on the protection of legal institutions with a corresponding underselling of the interests of the civil libertarian rights of the public and individuals.

Contempt and Freedom of Discussion

Another aspect of contempt that deserves special mention is that which operates to protect the fairness of trials and to maintain the authority of the courts. Although there is a public interest in doing this, the rules thereby imposed also impede and ultimately conflict with another public interest, namely freedom of discussion. Freedom of discussion is an important public interest for as Lord Simon stated in *A-G v Times Newspapers Ltd* (1974) "People can not adequately influence the decisions, which affect their lives unless they can be adequately informed on facts and arguments relevant to the decisions."

The continuing growth of media and its crucial role in consolidating democracy calls for greater scrutiny of somewhat restrictive nature of contempt laws. This is not to say that the media should interfere an ongoing trial and thereby may cause a potential harm to the fairness of trials. As Lord Denning once said in his famous Road to Justice (1955), "the press plays a vital part in the administration of justice. It is the watchdog to see that every trial is conducted fairly, openly and above broad ...But the watchdog may sometimes break loose have to be punished for misbehaviour."

Few Points to Ponder?

From the above brief discussion it appears that the very term 'contempt of court' is misleading and inconsistent with the notion of democracy and human rights. The distinction between civil and criminal contempt is often blurred and uncertain. The general trend is to put heavy stress on the protection of legal institutions with a corresponding underselling of the interests of people. The concerns for the protection of administration of justice are often vague and overemphasised at the cost of freedom of expression. The offence of scandalising the court continues to be used by the courts across the world to restrain offensive critique. The courts of law, the ultimate guarantor of free expression, have sometime found it difficult to come to terms with free speech critically directed at the courts themselves.