"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*

LAW WATCH

Dissection of Penal liability: Is it discriminatory?

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IT has been generally accepted that the theory of Penal liability is concerned with the punishment of wrong. A person is liable to be punished if he does a wrongful act intentionally or negligently. Where the law presumes that there can be no way at all, no penal liability can be imposed. Ordinarily, only that person is liable for wrong which someone has committed himself. In this endeavor the major concern is that if extra marital is not included in penal liability, is not it the contempt to the theory of penal liability? Again where women are exempted from penal liability arising out of adultery is not it discriminatory?

Extramarital affairs are relationships outside of marriage where an illicit romantic or sexual relationship or a romantic friendship or passionate attachment occurs and female partner may or may not be married one. On the other side, adultery is a sexual relationship which requires the consent of both the parties and where the female partner must be married one. In fact there is a very substantial difference between the term 'Adultery and Extra marital'. Though both the offence could be treated as the mother offence of so many other offences but extra marital is yet to be included in our Penal Code as an offence. Let us explain. In adultery there must be sexual intercourse with a married woman who is and whom he knows or has been reason to believe to be the wife of another man without the consent of the husband of that woman. Here, to commit the offence of adultery the woman is mandatorily need to be married and the man could be married or not. On the other hand, in extra marital sometimes the woman may be married or unmarried where the man is supposed to be married, in another way the man may be married or unmarried where the woman is supposed to be mandatorily married. It is so, as it is an extra marital relation. So very simply we can say that in case of adultery the woman must be a married one but the man is not necessarily to be married. Where as in case of extra marital, the woman must not be married where the man is married but the woman is necessarily to be married when the man is not. So problem lies with the fact that when the woman is married it may either adultery or extra marital but when the woman is not married it is definitely extra marital but not adultery. But unexpectedly the married woman cannot be punished under our existing penal laws neither for doing adultery nor for extra marital. Again what about the punishment of the unmarried woman who does an extra marital with a married man? Though the concept of vicarious liability mostly unwelcome in criminal law, the presence of joint liability sharpen the philosophy of penal liability. Joint liability arises where common intention found between or among the wrong doers. If it is so, why women should not be made liable under section 497 of penal code, as we find here manifest consent, on the part of the women?

Legal provisions prescribed in this regard is section 497 which provides that for doing adultery that means for entering into a sexual relationship with married women the penal code of Bangladesh suggests fife year's imprisonment or fine or both as punishment only for man and not for woman. The offence under this section is limited to adultery committed with a married woman. In the case of *Nurul Huq Bahadur* v. *Bibi Sakina and other 1985 BLD 269*, it has been held that to establish the charge of adultery it must be proved that sexual intercourse took place without the consent or connivance of the husband. And adultery cannot be committed with unmarried woman, widows or prostitutes.

So there may a very vital question arise whether in Bangladesh the married women are legally allowed to enter into a relation with anyone else with the permission of their husband? This section creates a scope for the husband to compel their wife to enter into illicit relationship for monetary benefit. This is against Article 34 of the Constitution of Bangladesh. Because no one can be subjected to forced labor like forced prostitution. If we interpret section 497 of the penal code then unexpectedly we found the existence of discrimination. Is the section exempted the wife from the penal liability to create the scope for the husband to compel her wife to involve into an illicit relation without any hassle? If happen so, how this should be treated or whether it would be a distinct offence or not, also appear as a hot concern.

Very recently Samiul has been killed by his mother and mother's lover. Still the investigation is carrying on finding out the evidence regarding the murder. Neither the media, nor the judiciary focused the extra marital relation of the mother. When mother is killing her own child only for keeping her extra marital relation alive, then it really becomes a concern for the society. Even in murder case of *Kh. Ehtasham Uddin Ahmad alais Iqbal* Vs *Bangladesh and others, BSCR 1980,239*, the accused husband had an illicit relation with his maid servant and due to this relation the husband killed his wife. He was only punished for killing his wife and was not punished for zina. More over the maidservant was totally beyond the liability of the offence according to our own laws, whereas as a prudent person we cannot ignore her liability. In another case, *State* Vs *Munir Hussain alais Suruj and others, 1989* where the husband killed his wife for having extra marital relation with others. Though the accused was convicted for horrendous murder but he was not punished for extra-marital relation. Finally, khuku with whom munir entered into the extra marital relation has been acquitted. From the above two judgment we can come to the conclusion that though for adultery sometimes man are getting punished but for extra marital neither the man nor the woman is punished. Consequently, the rate of extra marital and illicit relation by the married men and women is increasing in an alarming way.

SHUTTERSTOCK

Someone may argue that falling in love is ones substantive right. But when a mother kills her child to enjoy her own right, no doubt it is contempt to her Childs right to life. Time has come to decide whether mother's right to fall in love or Childs right to life should get preference? There after Penal code should introduce the term extra-marital as a punishable offence both for men and women. It is no doubt strange that, neither the man nor the women may be punished for doing extra-marital under our existing penal law

It was back in 18th century while Dr. Sutherland refuses to innate trial of women which suggests that they are more law abiding as compared to their male counterpart because they are excluded from the dominant role of bread career and other masculine activities. But for the recent days the scenario has been totally changed. Today, even though women are being involved with so many significant responsibilities, nevertheless still we possess the belief that 'A women is physically week intellectually poor mentally inconsistent, timid irrational and psychologically emotional'. It is generally accepted that female criminality is more damaging to wider society. True, in 1860 the women belonged to the backward class of the society. But days are changed now. Women are asking for equal treatment and equity. Even every where they are supposed to be equally treated. Therefore doing adultery by the men with a married woman if considered as punishable offence then not only the men but also the women is supposed to be punished.

However it is high time, to reconsider the issue of penal liability in case of adultery and consider the inclusion of extra marital as a substantive criminal offence. Particularly, introduction of penalty for woman in case of adultery, and inclusion of definition and punishment of extra marital both for women and men. Simultaneously, the legal scope which has been created for the husband to compel his wife to involve with illicit relation under section 497 should be abolished to protect and preserve the right and dignity of the womanhood.

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LAW ANALYSIS

Legal analysis on deathpenalty

COLORLINES

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"Death cases are indeed different in kind from all other litigation. The penalty, once imposed, is irrevocable", Justice John Paul Stevens.

FOR most of the world's history, death penalty was, and has been, used as a punishment for crime, with little thought given to its legitimacy or justification, until recently. It was simply accepted as an efficient mechanism for dealing with criminal offenders. From the earliest days of colonization in the Indian subcontinent, capital punishment was considered neither cruel nor inhuman nor unusual.

The death penalty historically was not peculiar to the British rulers in the Indo Pak Bengal Subcontinent. It had been recognized from the Vedik throughout the Hindu and Muslim Periods. The Mahabharata and the Ramayana contain certain references of punishment by Vadhadanda which meant amputation by bits. According to Manu, in order to refrain people from sinful acts, death penalty was necessary. In the absence of such penalty, the state of anarchy will prevail and people would devour each other as the fish in the water, the stronger eating the weaker , known as the Matsanyaya.

Death penalty in murder cases were inspired by the Babylonian Code of Hammurabi (eye for an eye). But the Penal Code 1860 for the first time codified this sentence as a legislative i.e. judicial procedure.

Colonial Mindset of the Drafters and the historical background: The Penal code first was codified and drafted in the year 1860 by the British legal minds under the chairmanship of Lord Macaulay. It is to be borne in mind that the period of this codification followed the previous period of great upsurge of the Sepoy Mutiny of 1858 followed by queen Victoria's taking direct control over the domain. This mutiny for the first time made the colonial rulers conscious of the fact that a stronger well equipped iron hand and similarly strong and sound legal instruments are necessary to control the sub continental colonies.

This historical background is well reflected in the sections of the penal code. Capital punishment in this code(original) can be found only in the cases of high treason, state mutiny and other grievous crimes. Prevention of crime is the foremost jurisprudential aspect of Penology , while other sections concerning offences against the state were the reminders of the capital punishment awarded to Khudiram, Mongol Pandey as well as the trio of Badol, Binoy and Dinesh. On the other hand, similarly Section 396 dealing with Dacoity, murder might have been inspired by the looting of Chittagong arsenal by Masterda Surjo Sen .

Jurisprudential aspect of the death penalty within the purview of the PC 1860:

Death is the highest form of punishment authorized by Bangladeshi Law. When a person is sentenced to death, the sentence shall direct that "he be hanged by the neck till he is dead." In Bangladesh, only the High Court Division, the Courts of the Sessions Judge or the Additional Sessions Judge may pass a death sentence. However, any death penalty passed by the sessions judge court or additional sessions judge court is subject to confirmation by the High Court division(Section 368, Code of Criminal Procedure, 1898). This whole concept of death penalty in today's world requires a close scrutiny under the shade of contemporary practices in other countries.

In S v Makwanyane (1995 (3), SA 391 (CC)), the South African Court held that the constitutional right to life and dignity is the most important of all human rights, and also is the source of all other rights. The Hungarian Court (Decision 23/1990 (X31) AB) also has cited that it is of absolute nature. Langa J. stated that state must demonstrate society's own regard for human life by refusing to destroy the life of the criminals. The African concept of Ubuntu also upholds that the life of another person is at least as valuable as one's own.But under the Bangladesh Constitution and other International Instruments such as ICCPR and European Convention on Human Rights, right to life has been qualified , providing that the right may not be deprived arbitrarily or other than in accordance with a sentence of the court (the Penal Code in this case). For instance, it has been held in the same case that:"Self defence is recognized by all the legal systems. Where a choice has to be made between the lives of two or more people, the life of the innocent is given preference over the life of the aggressor……". If we focus on the sections of the Penal Code 1860 which propound for death penalty, then we might find out the intrinsic jurisprudential and theoretical philosophy.

Sections 121 and 132 pose a deterrent effect in respect of offences against the state. The most notable section is 302 providing punishment for murder and culpable homicide. It is thus evidently clear that a heavy duty cast by sec 302 of the PC on the judge, of choosing between death and imprisonment for life for the person found guilty of murder, is now expected to be discharged in a highly responsible manner by the provisions of the CrPC so that the principle of natural justice and fair play holds its sway in the sphere of sentencing. It also helps the judge to individualize sentencing justice and make it befitting to the crime and the criminal. Another exclusive section is section 303 providing punishment for a person already convicted with death penalty. The provisions of this section require overview. It is a common rule of administration of criminal justice that while giving the judgment of certain offences, all other external and psychological factors affecting and causing the commission must be taken into consideration. The law mentions that gravity of offence is supposed to be lessened if there is any provocation (whether sudden and grave or not) which leads the offender towards committing the offence, the amount of punishment is generally never the maximum. It is to be mentioned that every other section of PC contain plurality of sentences ranging from a minimum to a maximum except section 302. Thus giving solitary definite punishment that also in the extreme from violates natural justice and also human rights. in that sense it is also unconstitutional. Thus the section overlooks the other extenuating, motivating /contributing factors. The legislators could have provided for two consecutive terms of life imprisonment rather than the irreversible sentence of death.

This is the first part of a story. Check next issue for concluding part.

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