REVIEWING THE VIEWS

Revisiting mandatory death penalty case

KAWSER AHMED

RECENTLY, the Appellate Division of the Supreme Court has been reported to declare section 6(2) (3) (4) of the Nari O Shishu Nirjaton (Bisesh Bidhan) Ain, 1995 (the Ain of 1995) and section 34(2) of the Nari o Shishu Nirjaton (Bisesh Bidhan) Ain, 2000 unconstitutional. According to news reports, the aforesaid provisions have been held unconstitutional because they provide for mandatory death penalty as punishment for the offence of causing death after rape.

It may be recalled that section 6(2) of the Ain of 1995 was first held unconstitutional by the High Court Division in *Bangladesh Legal Aid and Services Trust (BLAST) and Another* v *Bangladesh represented by the Secretary, Ministry of Home Affairs and Others* [2011] 63 DLR 10. Pending availability of the judgment of the Appellate Division, it will be worth taking a fresh look at the judgment of the High Court Division.

The material facts of the case is Md. Shukur Ali was convicted of rape and murder and was eventually sentenced to death under section 6(2) of the Ain of 1995. At the time of trial, Md. Shukur Ali was a minor. The petitioners filed a writ petition impugning, inter alia, section 6(2) of the Ain of 1995 primarily on the grounds that it provides for mandatory death penalty which is repugnant to the Constitution.

In this case, the petitioners' first submission (which actually comprises three propositions) was that any laws providing for capital punishment if enacted before the Constitution's coming into force would be valid. And, if the laws which have been enacted after the Constitution's coming into force provide for capital punishment would be unconstitutional.

However, in any of the aforesaid cases, the provision of mandatory death penalty would be unconstitutional. The aforesaid submission was mainly built on a combined reading of Articles 26, 32 and 35 of the Constitution. Relying on Article 35(5) of the Constitution – which provides that no person should be subjected to torture or to cruel, inhuman, or degrading punishment or treatment – the petitioners construed death penalty as a cruel and inhuman punishment. The petitioners' argument about validity of the pre-constitutional laws providing for death penalty derived from Article 35(6) which provides that the operation of any existing law which prescribed any punishment or procedure for trial should not be affected. In addition, referring to Article 26(1) & (2), the petitioners sought to vindicate the arguments that all lex lata and lex ferenda providing for mandatory death penalty would be repugnant to the Constitution and therefore, section 6(2) of the Ain of 1995 would be void.

The petitioners, furthermore, submitted that any provision of mandatory death penalty was arbitrary for the reason that it curtailed the discretionary power of the court in adjudicating cases and therefore, would be repugnant to Part VI of the Constitution. The petitioners quoted from the Universal Declaration of Human Right (UDHR), 1948 and the International Covenant on Civil and Political Rights (ICCPR), 1966 as well as cited foreign case laws in support of both of the submissions.

The High Court Division dismissed the first two propositions of the first submission on the grounds that if death penalty is not allowed to be incorporated in the post-constitution laws, there would be discrimination in regard to treatment of offenders under the new laws as compared to those dealt with under the earlier laws. However, the High Court Division appreciated the second submission by noting that the provision of mandatory punishment would render the court into a simple rubberstamp of the legislature. The High Court Division observed that any provision of mandatory punishment would result in prejudicing the court's power of adjudication since the court would be prevented from considering the attenuating factors and compulsorily impose the mandatory punishment upon finding the accused guilty.

Accordingly, the High Court Division concluded that the court should not be bereft of its discretionary power to determine appropriate punishment for any given crime. The High Court Division decided that any provision of law which provided for a mandatory death penalty would be unconstitutional and accordingly held section 6(2) of the Ain of 1995 repugnant (paragraphs 38, 42 & 45). The reasoning that mandatory death penalty is unconstitutional because it curtails the discretion is clearly the ratio decidendi of this case.

The High Court Division's decision in this case deserves some discussion. For example, it appears from the reasoning of this case that section 6(2) of the Ain of 1995 (provision of mandatory death penalty) was held inconsistent with Part VI of the Constitution ('Judiciary'), and not with Part III ('Fundamental Rights'). Had the opposite been done, alternative sentencing would have been recognised as a fundamental right of the convicted persons.

The High Court Division did not specifically point out which particular provision of the Constitution invests her with 'mandatory power of judicial discretion' in determining the degree and amount of sentence and how it is in conflict with a mandatory sentencing provision of law. If mandatory death penalty is unconstitutional because it limits the court's judicial discretion, all other mandatory penalties should accordingly be unconstitutional for similar reason although the court did not elaborate on this aspect anywhere in its judgment. Although in the final sense, the ratio of this case strictly involves aspects relating to functions of the judiciary or judicial independence, the decision, nevertheless, carries a strong human rights message which we are eagerly waiting to see to be capitalised.

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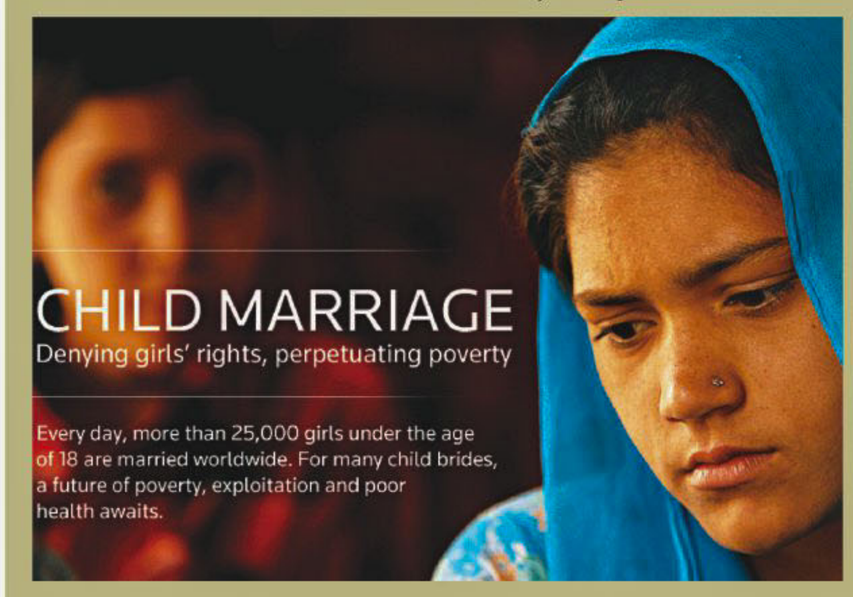
THE WRITER IS AN ADVOCATE, SUPREME COURT OF BANGLADESH.

LAW OPINION

Lowering of marriage age requires amendment

OLI MD. ABDULLAH CHOWDHURY

THE proverb goes, "bad news travel fast" and we have witnessed it regarding draft law on child marriage. As we went to a remote village, namely Banisanta in Dacope, Khulna and our purpose was to monitor an extreme poverty programme run by the government of Bangladesh with the support of bi-lateral donors, we discovered with utter surprise that guardians are already aware that government is considering to lax legal ages of marriage. The law has not been promulgated yet, but news have travelled so fast.



A national survey on child marriage in 2013 conducted by Plan Bangladesh and ICCDRB revealed a grim picture. The study shows that in Bangladesh, 64% of women currently aged 20–24 were married before the age of 18. It has happened despite the fact that the current minimum legal age of marriage for females in Bangladesh is 18 years and 21 for males.

Debate renewed with the government drafting a new law, the Child Marriage Restraint Act, 2014, to replace the earlier Child Marriage Restraint Act, 1929. The internationally recognised legal age for pre-adulthood is 18 and it has also been ratified as such in the Children Act.

It has been stated at the very first article in Convention on the Rights of the Child (CRC), "For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier". Bangladesh is one of the earliest signatories of this globally venerated convention. Bangladesh promulgated a number of laws following the suggestions of CRC committee and submitted periodic reports to the committee delineating improvements in realising rights of the children.

Furthermore, any boy or girl below the age of 18 is not considered as adult according to the Majority Act 1875. It has been stated in Section 3 of the Majority Act that subject to some provisions mentioned in the Act, every other person domiciled in Bangladesh shall be deemed to have attained his majority when he shall have completed his age of eighteen years and not before.

The draft law has been criticised for simply following the old law in its concept, without addressing the wide prevalence of child marriage in Bangladesh. Increased penalties and stronger implementation of punishments are also viewed as problematic and inadequate.

For many lawyers and rights groups, the draft law falls short as it remains ambiguous and does not outright declare child marriages as illegal. Human Rights Watch (HRW) has also called that the Bangladeshi government should set 18 as the minimum age for marriage to comply with international prohibitions against child marriage.

THE WRITER IS A HUMAN RIGHTS WORKER.

FOR YOUR INFORMATION

Access to genetic resources and benefit sharing

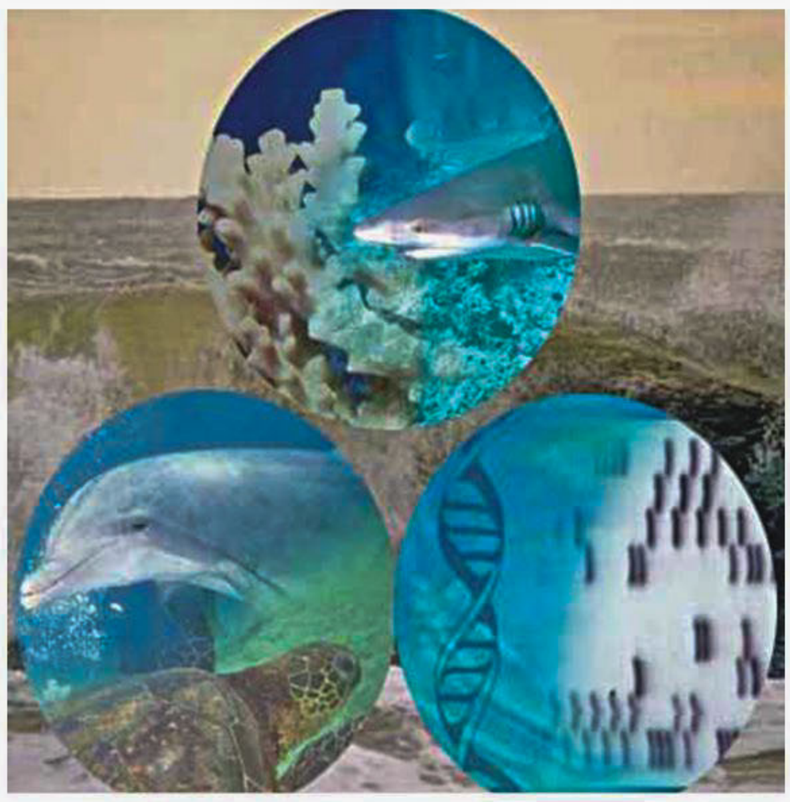
MD. KAMRUL HASAN ARIF

THE Convention on Biological Diversity (CBD) 1992 is the main international instrument providing a general framework for the conservation and sustainable use of biodiversity and the fair and equitable sharing of the benefits arising out of the utilisation of genetic resources. The Nagoya Protocol to the CBD on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits (ABS Concept) arising from their utilisation, adopted an international treaty in October 2010.

The CBD seeks to establish a comprehensive international regime for the sustainable management of biological resources. According to Article 1, the CBD has three main objectives: conservation of biological diversity; sustainable use of its components; and fair and equitable sharing of the benefits arising out of the utilisation of genetic resources. Article 2 of the CBD defines biological diversity as the variability among living organisms from all sources, occurring at three levels: diversity within species (genetic diversity), diversity between species, and diversity of ecosystems.

Genetic resources, whether from plant, animal or micro-organisms, are used for a variety of purposes ranging from basic research to the development of products. In some cases, traditional knowledge associated with genetic resources that comes from indigenous and local communities, provides valuable information to researchers regarding the particular properties. It also emphasise the value of these resources and their potential use for the development. A user of genetic resources includes research, academic institutions and private companies operating in various sectors such as pharmaceuticals, agriculture, horticulture, cosmetics and biotechnology.

Article 15 of the CBD tries to balance the interests of the users of genetic resources, who want to have



continuous access to those resources, with the interests of the providers of such resources, who want to receive an equitable share of the benefits that may be derived from the use of such resources. It recognises the sovereignty of States over their natural resources and provides that access to these resources shall be subject to the prior informed consent of the contracting party providing such resources. It also provides that access shall be based on mutually agreed terms in order to ensure the sharing of benefits arising from the commercial or other utilisation of these genetic resources with the contracting party providing such resources.

The Nagoya Protocol is a legally binding, supplementary agreement to the Convention. It aims to develop the legal ABS framework provided by the CBD. It establishes a framework for regulating how users of genetic resources and traditional knowledge associated to each other and can obtain access to such resources and knowledge. It obliges Parties to ensure that users under their jurisdiction respect the domestic ABS legislation and regulatory requirements of the Parties where the resources or knowledge have been acquired.

The Nagoya Protocol further builds on the access and benefit-sharing provisions of the CBD by creating greater legal certainty and transparency for both providers and users of genetic resources. The issue of access to genetic resources and traditional knowledge associated with genetic resources forms a core part of the ABS concept. Finally, it is highlighted that the Nagoya Protocol aims at contributing to the conservation of biodiversity and the sustainable use of its components.

Bangladesh is a signatory to the CBD in 1992 and ratified it in 1994, while it also became the signatory to the Nagoya Protocol in 2010. Bangladesh prepared the National Biodiversity Strategy and Action Plan for Bangladesh in 2004 as a commitment to fulfil its international obligations and also to conserve nation's biodiversity for sustainable livelihoods and development. Bangladesh is a very rich country in biodiversity.The people of Bangladesh depend on biodiversity for their day to day sustenance as well as overall livelihood security. Over 60 million people are dependent on aquatic resources every day. One million people are full time fisher folk and another 11 million have taken to part time fishing in the country.

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LAW NEWS

Sustainability a 'moral and historical duty'

THE world is facing complex challenges regarding the future of sustainable energy which demand comprehensive and immediate solutions, United Nations Deputy Secretary-General Jan Eliasson declared on May 20 as he delivered remarks to the General Assembly's Global Energy Ministerial Meeting.

"All of us have a great responsibility. Future generations will judge us harshly if we fail to uphold our moral and historical duties in this year of action," affirmed the Deputy Secretary-General as he spotlighted the importance of charting a new course for global sustainable development.

"Success depends on Governments, companies, investors, educators, scientists, civil society and citizens acting in concert," he told in the meeting, which is being held in connection with the second annual Sustainable Energy for All (SE4All) Forum. "Working together, we can light rural clinics, empower local businesses, invigorate economies and protect the environment."

According to the World Bank's recently released report, Progress Toward Sustainable Energy: Global Tracking Framework 2015, some 1.1 billion people in the world still live without electricity and almost 3 billion still cook using polluting fuels like kerosene, wood, charcoal and dung. And, while picking up steam, renewable energy generation and energy efficiency improvements will need to accelerate dramatically, it says.

Speaking to the gathered delegates, Mr. Eliasson underscored that 2015 would be "a milestone year" for the UN and the international community as it addressed these economic, social and environmental imperatives at three key meetings: in Addis Ababa in July, where UN Member States will work to agree a new forward-looking financing framework for development; in New York in September where they would seek to adopt "a bold universal new post-2015 development agenda" and in Paris in December where they would work to reach a robust universal climate agreement.

"Our aim is – and must be – to bring about transformative change across sectors and across societies," he added. "We need new approaches that go to the heart of unsustainable production and consumption patterns – across agriculture, industry, infrastructure and transport, and from factories to offices, from homes to market places."

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