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

LAW OPINION

Justice to rape victims: Still a far cry

Md. Abdul Halim

The inhumanity and savagery by rape and sexual offences are on the peak now. Almost every day newspapers are pouring with the horrifying news of rape, gang rape of children and women. Recently, a disabled girl was gang-raped by six persons in Chandpur. Are we not shocked with the plight of the 6-year-old little girl who went to play with her playmates at the rooftop of a house in old Dhaka and was later raped and murdered by a man and her parents had to discover the dead body soaked with her own blood? Can we forget the ordeal of four women who were confined and gang-raped in Feni, over a long period of six months? Have we forgotten that 8-year-old was gang-raped and killed in Bagura on 26 December, 2020? Do our eyes turn blind when we hear that Puja a little girl from Parbotipur who was raped and brutally injured and she is still not out of danger and dragging on with her ordeal of rape trial with her parents for last 6 years? Do our hearts bleed with the news that the 13-year-old girl from Ullahpara, Sirajganj was gang-raped? Do we remember her portrait that was published in almost all newspapers, where she was hiding her face in her hands in 2001?

Tougher punishment has been enacted very recently for rape cases and cases are being recorded by police on a daily basis. But is there any sign of reduction of incidents of rape? Victims, particularly girl children are left behind to undergo an unending struggle to survive in the society with stigma and blame at very cost of their lives and dignity. When a girl is raped or seduced, there is no immediate civil remedy available to her. She faces complete holocaust and devastation. Many sensitive women or girl often commits suicide after rape.

The carriage of justice is often misconceived to the ambit of attainment of conviction of the accused only. A non-government report suggests that the existing system of rape trial results with a meager number of 3-4% of convictions leaving 97% in acquittal. How can the State and justice system be content with 3-4% convictions in cases of violence against women? Does it mean that 97% allegations were false and if that be so, what should be the reasons for giving charge sheets in such a staggering number of cases and burdening the justice system for no practical reason?

The state cannot shrug off its responsibility to pay interim compensation in cases where the condition of the victim is critical and/or where victims are dead as a result of brutal rape and torture.

Here lies the importance of phasing out compensation as well other rehabilitative schemes so that victims of rape and sexual abuses do not feel that they are alienated and neglected by the state and justice system. Without their active participation in the process of justice, it is unlikely that the punishment of criminals can be ensured by the state. Their faith and reliance on justice system must be given the most priority. Further, ending the trial process with acquittal on technical grounds and victims carrying around the stigma, marks and medical proof of treatment and hospitalisation substantiate a huge vacuum or sheer negligence on the part of the prosecution to investigate and lead all evidences properly. Therefore, the state cannot shrug off its responsibility to pay interim compensation in cases where the condition of the victim is critical and/or where victims are dead as a result of brutal rape and torture.

At this point of horrific peak of inhumanity, what should victims of rape do deserve from the state and what role can our apex court, as third pillar of the Constitution, play? "Law should not sit limply, while those who defy it go free and those who seek its protection lose hope". This is what Frank Futer, J opined in *Jennison* v *Baker* back in 1972. The true destination lies at the lap of the victims. The jurisprudence of victimology has set its strong hold today that the responsibility of the State does not end merely by registering a case, conducting investigation, initiating prosecution and sentencing an accused. The turning point here was the case of ***Delhi Domestic Working Women's Forum*** in which the Indian Supreme Court relying on the Oxford Handbook of Criminology (1994 Edn.) opined that "….Should justice to the victims depend only on the punishment? Should the victims have to wait to get justice till such time that the handicaps in the system which result in large scale acquittals of guilty, are removed? ….How can the tears of the victim be wiped off when the system itself is helpless to punish the guilty for want of collection of evidence or for want of creating an environment in which witnesses can fearlessly present the truth before the Court? Justice to the victim has to be ensured irrespective of whether or not the criminal is punished."

The conventional theory of retribution has undergone a notable sea change, as societies have increasingly felt that victims were being neglected by legislatures and courts alike. Legislations have, therefore, been introduced in many countries providing for restitution/reparation. In the USA, a victim gets compensation from the Federal Crime Victims Fund. It covers lost wages, medical costs, and mental health counseling. In the UK, compensation is provided to victims by the Criminal Injuries Compensation Authority (CICA) where victims can apply for compensation ranging from £1,000 to £500,000.

The nest important case was ***Railway Board v. Chandrima Das,*** in which the Supreme Court of India held that rape is not a mere matter of violation of an ordinary right of a person but the violation of the victims most cherished right, namely, right to life which includes right to live with human dignity contained in Article 21. In this case the Supreme Court, while the rape case was pending, directed Indian Railway Board to give compensation of Rs. 10 lacs to a Bangladeshi victim who was gang-raped by Indian Railway employees. The Supreme Court further held in ***Suresh*** that the responsibility of the State does not end merely by initiating prosecution and even after acquittal the responsibility of rehabilitation of the victim remains. The Indian Supreme Court has taken robust activism by phasing out interim compensation scheme in ***Nirbahya*** case and finally in ***Nipun Saxena*** (2018) case in which it held that the Gang Rape victims will be compensated from Rs.5 Lacs to Rs.10 Lacs, the rape victim's from Rs.4 Lacs to Rs.7 Lacs, unnatural sex assault victims from Rs.4 Lacs to Rs.7 Lacs depending upon cases and this amount of compensation is to be paid irrespective of conviction or acquittal.

In most developed and developing systems, the judiciary has come forward to fulfill the gap between fast changing society and rigid laws. This is because of the long and time consuming procedure of enactments of laws by legislature. The changes that we have seen in India, both legislative and judicial, are yet to be received and adopted by our judiciary and legislature not only for the best interest of the victims but also for the interest of the justice system and revenue expenditure.

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GLOBAL LAW UPDATES

Promoting biodiversity-friendly trade

UNCTAD has launched its updated BioTrade Principles and Criteria, a set of guidelines for governments and companies to conduct biodiversity-friendly trade, to address new challenges and priorities now and in the future.

The term "BioTrade" refers to the supply and commercialisation of goods and services derived from a country's biodiversity. The illegal wildlife trade is a global, multibillion-dollar enterprise accelerating biodiversity loss, with an estimated one million plant and animal species now at risk of extinction, according to a United Nations report. The threat is not only ecosystem collapse but also a heightened risk of new pandemics such as COVID-19.

The guidelines, first created in 2007, set out how the Earth's precious natural resources can be traded in an environmentally, socially and economically sustainable manner. "Biodiversity is a global concern and priority. Learning from practices, experiences, legal and policy frameworks is key, as reflected in these updated principles and criteria, which guide practitioners in this field," said UNCTAD Deputy Secretary-General Isabelle Durant.

The seven principles address issues such as conservation, restoration and sustainable use of biodiversity, equitable sharing of the benefits of BioTrade between different actors, and respect for the rights of indigenous people and local communities. The updated principles and criteria take into account experiences, best practices and lessons learned by partners and practitioners since the first edition, adding new elements such as climate resilience, marine biodiversity and sustainable tourism. They also update elements such as workers' rights, health and safety, and access and benefit sharing under the Nagoya Protocol.

Proven benefits to governments, companies and workers

The principles and criteria seek to encourage trade and investment in developing countries' unique natural resources, including various species of flora and fauna, genetic resources and ecosystems, while ensuring their long-term conservation and enhancement. They have been implemented in more than 65 countries to date, with several examples of successful adoption by governments, companies and communities.

BioTrade: Sustainable now and in the future

The principles and criteria were updated as part of the global BioTrade programme launched by UNCTAD in 2018, with the support of the Swiss State Secretariat for Economic Affairs SECO. They are more closely aligned with key multilateral environmental agreements, notably the Convention on Biological Diversity (CBD) and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). They are also in line with the UN 2030 Agenda for Sustainable Development, the Paris climate agreement and the Nagoya Protocol on access and benefit-sharing of genetic resources.

Partners of UNCTAD's BioTrade programme have called for the updated principles and criteria to be reflected in the new Post-2020 Global Biodiversity Framework, which will provide the biodiversity roadmap for the next decade. The framework is expected to be adopted during the 15th Conference of the Parties to the CBD, slated for the second half of 2021. The partners have also encouraged more countries and stakeholders to use the principles and criteria to build resilient sectors, businesses and communities.

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

LAW ANALYSIS

Laws regulating guardianship of a minor in Bangladesh

Mazharul Islam

The fundamental law to regulate guardianship in Bangladesh is the Guardians and Wards Act (G&W Act) which was enacted in 1890 with the purpose of consolidating and amending all laws relating to a minor for whose person or property or both there is a guardian in the country. This Act extends to the whole of Bangladesh and is applicable for all people irrespective of their religion and status.

However, there are few other laws in place which regulate the matter of guardianship for specific group of people. For example, if the parties to any proceeding are Muslims, all questions regarding guardianship shall be determined by the Muslim personal law (Shariat), notwithstanding any custom or usage to the contrary, as per section 2 of the Muslim Personal Law (Shariat) Application Act, 1937.

Again in 1985, the Family Courts Ordinance (FCO) was enacted for the establishment of Family Courts having exclusive jurisdiction to entertain suit relating to 'guardianship and custody of children' among other special matters. Though the FCO has provided the Family Courts exclusive jurisdiction to entertain suit relating to guardianship, it has not expressly invalided the application of the G&W Act to questions of guardianship before the Family Courts. Rather according to section 24 of the FCO, the Family Court is required to follow the procedure specified in the G&W Act in dealing with matters of guardianship of a minor.

It is pertinent to mention here that, a non-Muslim can also seek remedy as to the matter of guardianship of a minor in the Family Court because the FCO has not made it clear whether the FCO is applicable to the citizens having any specific religious faith. In the case of ***Nirmal Kanti Das vs Sreemati Biva Rani***, [47 DLR 514] the High Court Division held that, "a person professing any faith has got every right to bring suit for the purpose as contained in section 5 of the FCO."

In addition, there is another speedy remedy for any person interested to take guardianship or custody of a minor by filing an application under section 100 of the Criminal Procedure Code, 1898 to a Metropolitan Magistrate or Magistrate of the first class or an Executive Magistrate seeking immediate action issuing search warrant though this section does not purport to deal with guardianship.

It appears that there are sets of laws to deal with guardianship and although the G&W Act was enacted with the purpose of consolidating and amending all laws relating to guardian and ward, the G&W Act has failed to consolidate all applicable laws on guardianship. There is no express provision in the G&W Act which makes it an overriding law nor makes invalid to appoint or declare a guardian under any other laws in force. Therefore, if a guardian is validly appointed for a child under Muslim personal law, that guardianship will not be cancelled by exercising powers under the G&W Act.

Besides, in some cases, the G&W Act has also created anomalies and confusion and it has some conflicting effect with Muslim Law. Firstly, while a guardian is charged with the 'custody of the ward' according to section 24 of the G&W Act, the Sharia law, on the other hand, has clearly distinguished between 'custodial care' and 'guardianship of person'. According to the Sharia law, a mother enjoys the right to 'custodial care' only while the father may enjoy the right of both 'guardianship and custodial care' at the same time. Apart from that, according to section 361 of the Penal Code, 1860 the term 'lawful guardian' refers only 'care or custody' of such minor or other person. As per Sharia law, mother can never enjoy the right of 'guardianship of a minor.

Secondly, according to Sharia law, there is no scope of considering the welfare of minor in appointing guardian while there is a chronology to follow which are— (a) the right of guardianship of person belongs to father first, then to grandfather and other male agnates. (b) right of guardianship of property belongs to father first, then to grandfather and anyone according to their will or anyone appointed by the Court. (c) in case of guardianship of both person and property, no one else other than father and grandfather would be able to enjoy this guardianship. On the contrary, according to section 17 of the G&W Act, in appointing or declaring the guardian of a minor, the Family Court shall have to consider the welfare of the minor. If the minor is old enough to form an intelligent preference, the Court may consider that preference. The Court shall not appoint or declare any person to be a guardian against his will.

In addition, according to section 8 of the G&W Act, any person – desirous of being, or claiming to be, the guardian of the minor, or any relative or friend of the minor, or the Collector of the district – are entitled to apply for guardianship of a minor.

It is now in practice that the Family Court takes cognisance of the suit regarding guardianship of a minor as per FCO and in appointing or declaring guardians, the Court follows the procedure mentioned in the G&W Act along with the FCO, as applicable, instead of following the chronology required for appointing guardians as per Sharia law. In appointing or declaring a guardian of a Muslim, considering any other matter rather than the order prescribed by Sharia law and charging a mother with guardianship of person overrides the provision of the Muslim Personal Law (Shariat) Application Act, 1937.

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