

RIGHTS WATCH

RAPE, LIMITATION, AND DUE PROCESS: CONSTITUTIONAL RIGHTS IN ACTION

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Democratic society is based on consent. Sexual relationship must be consensual. Otherwise, it amounts to a crime according to section 375 of the Penal Code, 1860. The question of consent is raised in defence of the accused and therefore the *onus probandi* (burden of proof) rests on the accused, although the general principle is that the *onus* is on the prosecution. In *State of Himachal Pradesh v Shree Kant Shekari* [AIR (2004) SC 4404], it was held that rape is a crime against fundamental right to life provided in article 21 of the Indian Constitution. This provision is akin to article 32 of

the Bangladesh Constitution. Both the provisions protect not only the right to life, but also personal liberty. No offence is more severe an attack on personal liberty than the crime of rape. Sexual violence, the same court held, ‘is an unlawful intrusion on the right of privacy’. The ‘two-finger test’ has been declared unconstitutional both in India (2013) and Bangladesh (2018) because it violates women’s right to privacy, physical and mental integrity, and dignity. Moreover, the presumption of consent cannot be inferred from such an inhumane test. Should there be any limitation in rape cases? There is a common law doctrine: *nullum tempus occurrit regi*.

Time does not run against the crown. He has the divine right to run a state. People’s relation to God is mediated through the State. Consequently, crimes are committed against the State, and it is a party to a criminal case. Moreover, it has the authority to lodge a criminal case at any time. It is called sovereign immunity.

Earlier the sovereign was not barred by limitations in civil suits either. Now sovereign immunity in civil suits is progressively diminishing. Bangladesh, one of the heirs of the colonial legal system, still recognises sovereign immunity in some civil cases. As per section 26 of the Limitation Act, 1908, an individual cannot file a suit for easement right against the government after an ordinary period of 20 years. It requires an extraordinary period of 60 years.

To ensure fairness to the defendant, limitations are imposed, and adverse possession is recognised. The poor, under-privileged and women are susceptible to this principle due to the power imbalance in society. If such limitation is imposed in rape cases, the victims will be overpowered by the perpetrators. In most of the jurisdictions, no limitations are imposed in criminal cases. However, there are some summary offences barred by limitations in some jurisdictions. For example, unlawful use of a driver’s license is barred by limitation in Maryland. But the grave offences such as murder, rape and robbery have no limitation period.

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of evidence. In *State of Himachal Pradesh v Shree Kant Shekari* [AIR (2004) SC 4404], it was held that delay in filing FIR does not create any doubt as to the authenticity of the prosecution case. But the court must seek satisfactory explanation of such delay.

Whether it would be a violation of due process to deny any rape victims the right to file a case after 72 hours, even if semens of the perpetrator cannot be traced? The answer is yes. The victim would not be given the reasonable opportunity to present her case. It infringes the essential fairness of criminal procedure. Thereby it does manifest injustice. If medical evidence is not reliable, eyewitness, if any, and circumstantial evidence shall be adduced in the court of law. Fair procedures must be maintained for ensuring justice for the accused.

There is no time limitation in sections 154 and 157 of the Code of Criminal Procedure, 1898 or in any

other law. The Bangladesh Constitution provides in articles 31 and 32 that criminal justice shall be done ‘in accordance with law’. The Indian Constitution is more specific in this regard. It uses ‘according to procedure established by law’ in article 21. In *Maneka Gandhi v Union of India* [AIR (1978) SC 597], it was held that procedure must be reasonable and non-arbitrary. These are two elements of ‘equality before law’ and ‘equal protection of law’ as provided in article 27 of the Bangladesh Constitution and article 14 of the Indian Constitution. Equality before law, one of the three aspects of Diceyan rule of law, has been incorporated in both the Constitutions. The 72 hours limitation certainly violates due process and equality before law.

In Mahmudul Islam’s opinion, the Indian Supreme Court *virtually imported* due process from the United States of America. However, article 31 of the Bangladesh Constitution begins with ‘[t]o enjoy the protection of the law, and to be treated in accordance with law, and only in accordance with law, is the inalienable right of every citizen’. This provision is broader than the American due process clause. It not only provides protection of life, liberty and property, but also of dignity, privacy and so on. In *Naripokkho v Bangladesh* [10 SCOB (2018) HCD 140], it was held that protection under article 31 ‘undoubtedly include[s] protection from sexual harassment’. It could be easily inferred that it also includes protection of law in rape cases.

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LAW EVENT

Should there be a regional body to deal with human rights issues?

Imagine a human rights violation that suffers impunity inside the country, but that can be held accountable by an international body of some sort. Examples could be custodial torture, or enforced disappearances, or extra-judicial killings – all of which have abysmal track records of getting justice at Bangladesh’s courts.

When faced with the prospect of impunity inside national borders, the cause can be taken up by a regional body such as a court or a commission; that does not have the same trappings that national, non-independent judiciaries may have.

In fact, SAARC (South Asian Association for Regional Cooperation) is the only regional body in the world without some form of regional human rights mechanism, pointed out experts. They were discussing this crucial need at a consultation session by Ain O Salish Kendra (ASK) and Asian Forum for Human Rights & Developments (FORUM-ASIA) last Monday, titled “National Strategy Consultation for the Establishment of Human Rights Mechanism”.

Experts discussed specific issues or sectors where regional cooperation is needed to tackle human rights violations, saying that currently only civil society organisations take on this role and they are not sufficiently active. “There are no laws that protect the rights of migrant workers in receiving countries,” said Shaheen Anam, the Executive Director of Manusher Jonno Foundation (MJF).

Advocate Syeda Rizwana Hasan, the Chief Executive of Bangladesh Environmental Lawyers’ Association (BELA), said when issues such as Teesta river’s water-sharing comes up, India points to the lack of international laws.

“What we cannot speak out about, others can talk about, if such a body exists,” said Advocate Hasan. One solid example of this could be LGBTQI issues on which both India and Nepal have made considerable strides, while other South Asian countries remain behind.

Dr Imtiaz Ahmed, the Professor at the Department of International Relations, emphasised that global politics always decides which kinds of human rights violations get highlighted and addressed, and what does not, further underscoring the need for such a body.

Can these goals be met by SAARC? Dr Faustina Pereira, the Director of Human Rights and Legal Aid Services at BRAC, begged to differ saying that SAARC is barely functional with their current workload.

Similarly, Shamsul Haque, the

Additional Foreign Secretary at the Ministry of Foreign Affairs also pointed out that currently no new sub-bodies can be formed at SAARC.

But then what would this body look like? Experts argued that it could be a regional human rights court – with a caveat that it should be made time-bound so that it does not drag its feet like the European regional court.

It could also be a regional human rights commission. “A proposed South Asian Human Rights Commission shall be the entry point for adjudication of both the individual and inter-state communication. The proposed Commission should act as a quasi-judicial organ where complaints can be made following a certain list of admissibility criteria,” said a keynote paper presented by Mohammad Golam Sarwar, the Assistant Professor of Law at Dhaka University.



However, experts also feared that such bodies can also be besieged by one major problem – none of the regional countries have a homogenous relationship with one another.

For example, India and Pakistan will always find it difficult to sit together for possible negotiation on the issue. Furthermore, the unequal power distribution across the region could very well result in certain issues taking precedence with other countries – like Maldives for instance – taking a backseat.

This can be further exacerbated by the interference of external powers. “The growing presence of the United States and China in this region has been one of the instrumental factors in influencing the relationship among SAARC countries,” highlighted Assistant Professor Sarwar’s paper.

Lastly, there could always be differences in political ideology hampering the process. One country could have no electoral democracy, while another could have right wing party in power – can these countries ever see eye-to-eye?

But this still does not mean that the body cannot come together to tackle certain issues where contentions are not as high, such as child labour, pointed out MJF’s Executive Director Anam.

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LAW REVIEW

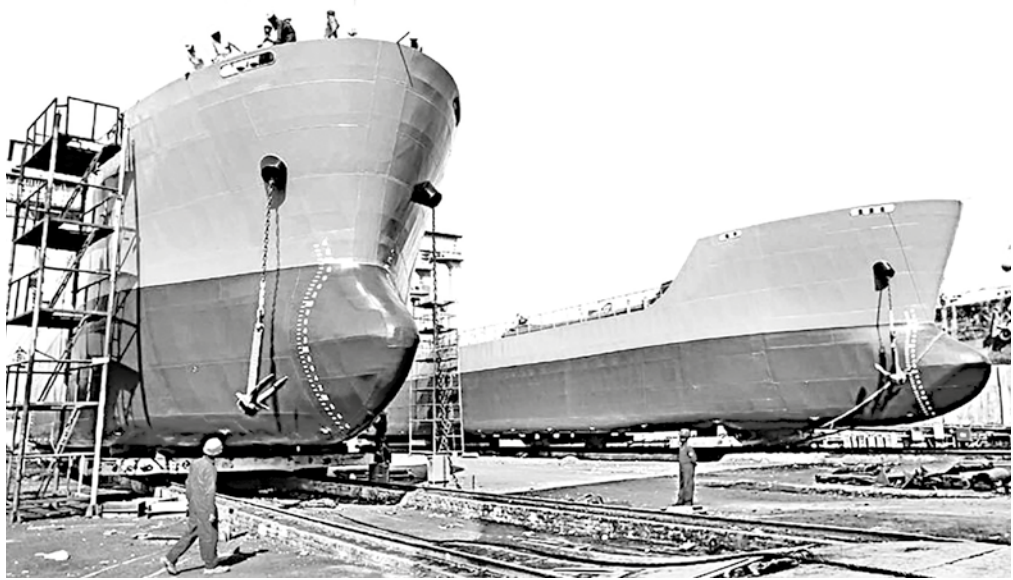
The New Shipbuilding Policy: A new future ahead

SHWEETA MISHRA AND ZAHIRUL BASHAR

As a riverine country, Bangladesh has a long history of shipbuilding. Chattogram which is known as the port city of Bangladesh, has been involved in building of ships since the Mughal empire and with the flow of time, the tradition continues. The modern era of shipbuilding started in the 1960s during the Pakistan regime. However, international contracts were awarded to Bangladeshi shipbuilders from 2008. With over a hundred shipyards, Bangladesh has taken lead in shipbreaking and the process of shipbuilding has also accelerated in course of time. With the plan of 2041 to make Bangladesh a developed country, the government is emphasising on shipping and business related to shipping to achieve the goal. Over the last ten years, the Bangladesh government has taken several steps such as enacting the law and making rules to improve the sector.

After Bangladesh Environmental Lawyers Association (BELA) filed a writ petition in 2008 seeking to ban the entry of the hazardous vessels listed by Greenpeace into the Bangladesh territorial water and frame necessary rules concerning the matter, the government passed the Ship Breaking and Recycling Rules 2011. The Rules were made taking into consideration several legislations and international instruments, namely the Bangladesh Labour Act, 2006; ILO Guidelines for safety and health in shipbreaking activities; the Hong Kong International Convention for Safe and Environmentally Sound Recycling of Ships, 2009; and Basel Convention, 1989. The Rules was in force till 2018. Further to boost the shipping industry, the Parliament passed the Ship Recycling Act, 2018. The Act contained provisions requiring the adoption of environment-friendly methods for ship recycling. The Act relied on the Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships, 2009 as a model of international standard. The Act gave the power to formulate a Board. The purpose of the Board is to oversee and make reports concerning the ship recycling process, ensuring labor healthcare, taking safety measures, suggesting the government for the improvement of ship recycling industry, research and connection with national and international agencies on concerned matters.

The Act has vested the inspection in the authorised person approved by the Board. Five chapters are dedicated to environmental protection and labour health safety. Under one of the chapters, the government is to establish Treatment Storage and Disposal Facility (TSDF) to disperse the waste from the shipyards. The chapter additionally addresses the labour training facilities, maintaining a database for the workers, compulsory insurance, compensation for any injury, death. Moreover, the Act prescribed criminal proceedings and penalties for the violation of the provisions. It is noted that



the existing laws do not address the issues of the environment or hazardous material or gas emissions from the vessels. Therefore, the government has taken steps to improve the shipping policy for a better future.

As per reports published by the Ministry of Industry of Bangladesh in 2021, the Norwegian government assured continued assistance from their government in the field of shipbuilding and ship recycling industry of Bangladesh. In a virtual meeting, the Norwegian Ambassador mentioned that the future bilateral relationship between two countries in terms of training skilled workers in shipbuilding and ship recycling industry, assistance to make environment-friendly, greener shipping industry and post-pandemic aid.

To develop the shipbuilding industry, the Shipbuilding Industry Development Policy, 2020 has been drafted. The government of Bangladesh targets a growth of USD 4 billion by 2026 in this sector.

The government is emphasising on developing private investment and entrepreneurship in shipping industry. In view of the same, the policy proposes to ease by reducing bank interest to 4% per annum. Additionally, a low-cost bank guarantee, performance guarantee and letter of credit have also been proposed.

Moreover, to have and maintain the international standard, the government is planning to make the Bangladesh Ship Classification Society. Another objective of the policy is to produce Tankers, Carriers, and Mining Vessels for Bangladesh. The draft of the policy has proposed to have a 5000 crore BDT fund regarding shipbuilding.

The proposed policy aims at environmental protection and makes provisions to prevent the emissions from greenhouse gases and carbon emissions. The government also focuses on technologies.

Moreover, the draft policy has thirteen actions planned to be implemented between 2021 and 2026. The plans are related to export development, making bilateral,

multilateral agreements, maintaining international standards product quality, loan facilities, withdrawal of imposed duty as well as tax holiday of ten years, suing ultra-modern technology, research, education, training to adopt the new mechanism of shipbuilding.

In addition, with direct ship financing, the government would also promote bunkers services and strengthening the capital market. Another aspect of the shipping industry is male domination. However, the government inserted the provisions to empower women and to give facilities for women entrepreneurship.

After the aforesaid discussions, even though shipbuilding is hundreds of years old in Bangladesh, the country is still behind in creating international-level vessels.

To elevate the shipbuilding industry, the government needs new Act, Rules, Policies to enhance the shipbuilding sectors. The recent steps of the government are contemporary are taken for the betterment of the shipbuilding industry. Bangladesh government has taken the Hong Kong International Convention for Safe and Environmentally Sound Recycling of Ships, 2009 as a model to make its new policies for the industry.

Moreover, though the government took the initiative for research, education, and training concerning shipbuilding, a dedicated technical group separated from the board may be beneficial. Furthermore, the policy provided ADR mechanism. However, Bangladesh has yet to see a separate specialised Tribunal for maritime sector as it will expedite the adjudication of the disputed matters.

Hence, a proper specialized tribunal would be beneficial for the shipping industry in order to adjudicate the disputed matters promptly and provide relief to the parties involved.

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