

## ESSENTIALITY OF AMENDMENT OF PENAL CODE 1860: A STUDY

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### **ABSTRACT**

This paper critically examines the essentiality of amendment of several sections of the Penal Code 1860 in respect of enhancing the punishment for certain offences namely gang rape, rape by public servant, rape victim being minor under 12 years of age; adultery, mischief, food adulteration etc. at the present age. It also critically analyses the provisions on adultery considering it discriminatory one. It argues that Law of the land in a dynamic society requires to be reviewed and updated to fulfil the demand of time. So is essential in the case of the general penal provisions of the state described in the concerned sections in the Code. With the passage of time, circumstances, tendency and techniques of committing crimes change, and so punishment provided for several offences requires to be enhanced to reduce the occurrence of those offences. So it is needed to change the concerned law. Amendment of more than one and a half century old the Penal Code, 1860 is the essentiality of time.

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## **INTRODUCTION**

The Penal Code was enacted as back as far in 1860 being Act No. XLV of 1860. The Penal law is necessary for any state to maintain law and order in it as there cannot be even thought of society free of crimes. The Penal Code has defined the offences and prescribed separate punishment for each offence. Minor amendments have been made in the Penal Code according to necessity from time to time, but no substantial change has been made or nor needed in the Penal Code. This may be because of the far-sight of the British legislators and high quality of drafting of the code. Provisions on rape in different circumstances, discriminatory and conflicting provisions on adultery, and offences by public vehicle need to be amended. At present day, minor girls are being victims of rape more in number than adult females, so there require more severe penalty to protect them. Due to the enormous increase of crimes relating to adulteration of food, drink and drugs and causing death by rash and negligent driving on the public roads, extortion, and insulting the modesty of a woman, rape, mischief to property etc during the last few years certain sections of the Code need to be amended. The amount of fine in monetary terms fixed long ago becomes quite irrational at present age as purchasing power of money has changed a lot.

## **METHODOLOGY OF STUDY**

This paper applies the qualitative of approach study. It tries to analyze hypothetically the essentiality of amendment by enhancing and increasing punishment for certain offences stated in the Penal Code 1860 having examined rationality with references to certain existing laws and precepts. It also has consulted with primary sources like statutory laws, books, journals, law reports etc.

## **OBJECTIVES OF STUDY**

The general objectives of the study are to examine and analyze the essentiality for amendment of certain provisions of the Penal Code 1860. However, the special objectives are to:

- i. Find out the sections requiring amendment
- ii. Show reasoning in favor of the rationality of amendment
- iii. Recommend certain amendments in the code specifically

## **RATIONALE OF STUDY**

Severity of punishment for some offences requires to be enhanced due to frequent occurrence of those offences and considering their serious impacts on the society. There should be enhanced punishment for certain offences like rape; extortion etc. if committed by public servants whose duty it is to prevent commission of such offences. There should be compensatory relief for rape victims and victims of accident by public transport. Monetary Amount of fine for offences, in cases where fine is

fixed, deems to be quite inadequate at the present era though may be that amount was adequate and rational when the code was passed. Amount of the price of the property damaged and punishment provided for it is disproportionate and irrational in two aspects- duration of imprisonment is irrationally higher in comparison with fine mentioned. Price of time in people's life is more valuable than earlier due to improved and higher earning capacity of them. There may have such other sections or provisions which are also irrational at the parlance of present age but this paper tries to cover the most discussed or applied ones.

### **PROPOSED AMENDMENT WITH REASONS**

Section 160 of the Penal Code 1860 provides punishment for committing affray, here in this section monetary fine is too little in the present age which is only up to one hundred taka as can be imposed alternative to imprisonment for one month. It needs to be at least two thousand to prevent commission of such offences. Section 272 provides punishment for the offender for adulteration of food or drink intended for sale which shall be imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand taka, or with both. At present days food adulteration has become a common phenomenon and punishment should be increased to five years and should also be liable to fine.

Section 273 provides punishment for the offender for Sale of noxious food or drink which shall be imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand taka, or with both. At present days food adulteration has become a common phenomenon and punishment should be increased to five years and should also be liable to fine.

### **PROVISIONS ON OFFENCES RELATING TO VEHICLE**

Firstly, section 279 of the penal code states that "whoever drives any vehicle, or rides, on any public way in a manner so rash or negligent as to endanger human life, or to be likely to cause hurt or injury to any other person, shall be punished with imprisonment of either description for a term which may extend to three years,....." Section 304B provides that "whoever causes the death of any person by rash or negligent driving of any vehicle or riding on any public way not amounting to culpable homicide shall be punished with imprisonment of either description for a term which may extend to three years,....." 338A. Whoever causes grievous hurt to any person by driving any vehicle or riding on any public way so rashly or negligently as to endanger human life, or the personal safety of others shall be punished with imprisonment of either description for a term which may extend to two years.....' Both these three sections are contradictory considering the gravity of offences and punishment provided for them. In section 279 rash or negligent driving which is likely

to endanger human life or cause hurt to any person is made punishable upto three years of imprisonment. In section 304B same punishment is provided for causing death, not amounting to murder, by rash or negligent driving. The matter to be mentioned here is that when section 304B was inserted by ordinance No. X of 1982, punishment was upto seven years, but in 1985 the same is substituted for three years, and causalities by road accident got on the rampant. It should be substituted for seven years again to reduce road accident causalities. Again section 338A provides punishment which may extend to two years for causing grievous hurt by rash or negligent driving. This section is also amended by substituting two years imprisonment in the place of five years in 1985 by ordinance No. XLVIII. It should be substituted for five years again to reduce road accident causalities.

### **THE ROAD TRANSPORT ACT 2018: IMPACT ON THE PENAL CODE 1860**

For both cases of grievous hurt or causing death by rash or negligent driving the same punishment is provided under section 105 of the Road Transport Act 2018 those are five years of imprisonment or fine upto five lacs or with both. Proviso to section 105 this Act overrides the punishment imposed under section 304B or section 338A of the code. Section 105 of the Road Transport Act 2018 provides the same punishment for both the offences under sections 304B and 338A of the said code. But Section 105 of the Road Transport Act 2018 keeps the other provisions on rash or negligent driving of vehicle unchanged.

Section 52 of this Act enumerates for compensation to the affected person or his family. For this end the government will establish Financial Support Fund as per section 53, and the said fund will be operated by a Board of Trustees formed under section 54 of the same Act. This is a good provision for ensuring survival or rehabilitation of road accident victims or of his depending family. Law Commission Final Report on a proposed law relating to payment of compensation and other reliefs to the crime victims.

Section 366A provides that “whoever, by any means whatsoever, induces any minor girl under the age of eighteen years to go from any place or to do any act with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable with imprisonment which may extend to ten years.....” Under this section intentionally causing a girl to be forced or seduced to illicit intercourse is an offence only when the girl is under the age of eighteen years. The humorous and at the same time reproachful provision underlying this section is that a person is allowed to force a girl to illicit intercourse when the age of the girl is eighteen or more. [Amdad, H. 2014]

366B importing a girl into Bangladesh from any other country, for the purpose of or with the knowledge that she will be forced or seduced to illicit intercourse, is a punishable offence only so long as the girl’s age is below twenty-one years; it is not an offence at all if she is a girl of

minimum twenty-one years.

### **PROVISIONS OF RAPE: UNSOCIAL ACTIVITIES**

Sec. 375 defines the offence of rape, and this definition allows 'living together' of two adult male and female if sexual intercourse is done with mutual consent and free will. Then why and under which law are the couples, making unsocial activities, arrested from hotels etc.? If this is to be made punishable there must be amendment of section 376 of the Penal Code, 1860 as "even if sexual intercourse is committed with mutual consent and will in that case they both will be punished with imprisonment which may extend to five years or with fine or both". Sometimes arrest drive of couples on accusation of unsocial activities in hotel is operated. Is this arrest is legal? Is there any specific legal provision prohibiting living together with mutual consent and understanding of the adult couple? The answer is No. Rather this type of living together is directly or indirectly allowed by the legislators in the Penal code 1860 under section 375.

### **PUNISHMENT OF RAPE: VICTIM MINOR UNDER 12**

Under this section Punishment of Rape should be increased from life imprisonment to death when victim is minor. The reasons are- This is due to more vulnerability of minor to be rape victims. About 86% of rape victims are child and adolescent; two-thirds of this percentage is killed due to rape. [Prothomalo, 19 Feb '19] Amendment of the Indian Penal Code 1860 by the Indian parliament which enhanced penalty for offence of rape committed against minor less than 12 years of age. The Criminal Law (Amendment) Ordinance, 2018 with effect from 21<sup>st</sup> April, 2018 has increased penalty to death if the victim is minor less than twelve years of age.

### **Rape: Committed by Public Servant**

There should be 'enhanced punishment' for the offence rape if the person committing this offence is a public servant within the definition of section 21 of the Penal Code, 1860 especially for personnels of law enforcing agencies.

### **The Reasons are**

There are several cogent reasons in favor of this proposition as are- *Firstly*- There should not be same punishment for ordinary people and members of law enforcing agencies. They have a duty to prevent offences and they have power to arrest any person designing to commit any cognizable offence and rape being a cognizable offence their duty is much more obligatory Police to prevent cognizable offences [Section 149, Code of Criminal Procedure, 1998]. From this stand if they commit this crime they should be punished more severely. They have also power as well as duty to arrest the prospective offenders to prevent such offences sec. [Section 151, Code of Criminal Procedure, 1998].

*Secondly*- there are several offences under certain sections of the Penal Code, 1860 where enhanced punishment are provided for those offences if committed by public servants e.g. section 409 of the Penal code, 1860 Criminal breach of trust by public servant, or by banker, merchant or agent.

*Thirdly*- under article 21 of the constitution of the People's Republic Bangladesh they have a duty to strive at all times to serve the people.

*Fourthly*- Section 116 of the penal code 1860 provides double punishment for abettor or person abetted if he is a public servant whose duty it is to prevent offence; even if offence is not committed, he will be punished for half of the punishment provided of the offence. And it is one fourth of the punishment provided of the offence the abettor is ordinary people.

### **Fine for Committing Rape**

If rape is proved, fine in that case needs to be paid to victims for reasonable medical expenses and rehabilitation of the victim as amended in the Indian Penal Code, 1860 by insertion of section 376AB by 'The Criminal Law (Amendment) Act, 2018' with effect from 21<sup>st</sup> April, 2018 as is mentioned herein 'provided that any fine imposed under this section shall be paid to the victim; and fine imposed shall be just and reasonable to meet the medical expenses and rehabilitation of the victim.' [The Criminal Law (Amendment) Act, 2018' in India]

### **PROVISIONS ON MISCHIEF**

**Section 427** of the Code provides punishment of imprisonment of either description for a term which may extend to two years, or with fine, or with both for causing loss or damage to the amount of fifty taka or upwards, Here price of the property damaged is only fifty taka but punishment provided for is upto two years...

Is this punishment rational? The answer must be 'No'. Section 427 is an original section of the Code which was passed in 1860. In that era purchasing capacity of taka 50 and its purchasing capacity in 2019 is far different. Here in this case price of damaged property needs to be at least twenty thousand taka to provide punishment of two years imprisonment.

**Section 428** of the Code describes punishment for mischief by killing, poisoning, maiming or rendering useless any animal or animals of the value of ten taka or upwards, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Here if the value of an animal or animals is ten taka or upwards then punishment is two years. It is also quite irrational and unreasonable. Is there any animal which value is only taka ten? The simple answer is no.

Here in this case price of animal or animals needs to be at least twenty thousand taka to provide punishment of two years imprisonment.

**Section 429** of the Code states- Whoever commits mischief by killing, poisoning, maiming or rendering useless any animal of the value of fifty taka or upwards shall be punished with imprisonment of either description

for a term which may extend to five years, or with fine, or with both.

Here in this case value of these animals needs to be at least one lac taka or more to provide punishment of five years imprisonment.

**Section 435** of the Code states punishment for mischief by fire or any explosive substance, intending to cause, or knowing it to be likely that he will thereby cause, damage to any property to the amount of one hundred taka or upwards or of imprisonment of either description for a term which may extend to seven years and shall also be liable to fine.

Here in this case value of the property damaged by fire or explosive substance needs to be at least one fifty thousand taka or more to provide punishment of seven years imprisonment. Here more irrational point is where value the property is agricultural produce worth taka ten or upwards in that case also same punishment of seven years is provided. Value of the agricultural produce should be at least of taka ten thousand.

#### **Amendment of section 497**

Section 497 of the penal code 1860 provides discriminatory provisions as here only the male having sexual intercourse with mutual understanding of a married woman, wife of another person, is punished and the counterpart wife is exempted from the liability of adultery under this section. The male person is also exempted the act is committed with consent, express or implied, or at connivance of the husband. This is also a matter of regret that this made the male punishable only when the case is filed by the husband of that woman. This is as if woman is the property of her husband. The wife is not made liable even for abetment for that. Here it is not a question fact whether the male is married or not.

Section 497 is discriminatory from several respects:

*Firstly-* The wife committing adultery is exempted from punishment even though the husband can file case only against the counterpart of his wife. No provision for legal action against the wife by the husband.

*Secondly-* If the husband commits sexual intercourse with a married or unmarried woman, widow or prostitute with mutual understanding, the wife cannot file a case against that counterpart of her husband. As held In the case of *NurulHaqueBahadur vs. BibiSakian and another 1985 BLD 269*. That means the wife is deprived of taking legal action against the woman committing adultery with her husband.

*Thirdly-* The unmarried man and woman committing sexual intercourse with each other with mutual understanding are exempted from any accusation or conviction, though in existence of marriage tie, only the husband can file a case against the another man committing sexual intercourse with his wife.

Fourthly – the provision of this section is contradictory to articles 27, 28 (1) (2), 33, which ensure equality and equal protection for all irrespective of sex etc., of the Constitution of the Peoples’ Republic of Bangladesh.

So there should be equal punishment for both man and woman committing the offence of adultery; and the wife also should have right to take legal action against the woman committing the same offence with her legally

married husband.

Section 509 deals with insulting the modesty of a woman by gesture and posture or by uttering words or exhibiting any object and the punishment is prescribed for one year only. Such kind of offence has increased now a days. Therefore, the law commission recommends that the punishment of one year under this section be enhanced to the extent of three years. (Final Report by Law Commission proposed amendment of certain sections of the Penal Code, 1860 (Act no XLV of 1860). Section 510 states whoever, in a state of intoxication appears in any public place, or in any place which it is a trespass in him to enter, and there conducts himself in such a manner as to cause annoyance to any person, shall be punished with simple imprisonment for a term which may extend to twenty-four hours, or with fine which may extend to ten taka, or with both. Here under this section punishment of misconduct in public by a drunken person is upto 24 hours imprisonment or fine upto ten taka or both. This fine should be increased to at least five hundred taka.

### **RECOMMENDATIONS**

This study recommends the following to apply deterrence theory of punishment, also to apply preventive theory of punishment

1. Section 160 fine of taka one hundred should be substituted for 'two thousand' to prevent commission of such offences.
2. Section 272 at present days food adulteration has become a common phenomenon and punishment should be increased to five years and fine should also be mandatory.
3. Section 273 at present days sale of noxious food or drink has become a common phenomenon and punishment should be increased to five years and fine should also be mandatory.
4. Section 279 to prevent the offence of rash or negligent driving as defined under Section 279, the state must enforce the provisions of compulsory license under section 66 of the Road Transport Act 2018 strictly so that no unlicensed driver can drive anymore. Because as per report of the Daily Prothomalo published on 23 March 2019, 47 % of the drivers don't have driving license; and 53% of road accident is caused due excessive speed of the vehicle.
5. The Road Transport Act, 2018 should be enforced soon. Though this Act has been passed on 8<sup>th</sup> October 2018, it is not enforced till now as is reported on the Daily Prothomalo on 10<sup>th</sup> April, 2019, page-1.
6. Section 304B 'three years' should be substituted by 'seven years' which was originally inserted in 1982.
7. Section 338A 'two years' should be substituted by 'three years'
8. Section 366A and 366B should be omitted.
9. Section 376 of the Penal Code, 1860 should be amended as "Provided that any fine imposed under this section shall be paid to the victim; and fine imposed shall be just and reasonable to



meet the medical expenses and rehabilitation of the victim:

Provided further that even if sexual intercourse is committed with mutual consent and will of the accused in that case they both will be punished with imprisonment which may extend to five years or with fine or both”

10. New section 376A or sub-section should be added to section 376 as (1) ‘ if rape victim is minor under 12, or the offender is a public servant, or victim is gang raped and injured or dead then the convicted shall be punished with death penalty’.
11. Section 427 Here in this case price of damaged property needs to be at least twenty thousand taka to provide punishment of two years imprisonment.
12. Section 428 Here in this case price of animal or animals needs to be at least twenty thousand taka to provide punishment of two years imprisonment.
13. Section 429 Here in this case value of these animals needs to be at least one lac taka or more to provide punishment of five years imprisonment.
14. Section 435 Here in this case value of the property damaged by fire or explosive substance needs to be at least one fifty thousand taka or more to provide punishment of seven years imprisonment. Value of the agricultural produce should be at least of taka ten thousand.
15. Section 497 So there should be equal punishment i.e five years for both man and woman committing the offence of adultery; and the wife also should have the right to take legal action against the woman committing the same offence with her legally married husband.
16. Section 509 the punishment of one year should be substituted by three years as recommended by law commission of Bangladesh as well.
17. Section 510 Fine under this section should be increased to at least five hundred taka.

### **CONCLUSIONS**

The enactment of the Penal Code 1860 was a milestone judicial measure to generally combat crimes in this subcontinent, which introduced a general code applicable for all irrespective of religion, caste, color, sex etc. It is well recognized fact that law has to grow and be updated in order to satisfy the need of the changing society. About 160 years it is essential to amend the code to ensure justice and to prevent occurrence of above-mentioned offences. The amendment proposal, if accepted by the honorable legislators, may add a bit to ensure justice in criminal cases on concerned areas.

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