

## **CHILDREN AND FEMALES IN SAFE CUSTODY- A VIOLATION OF LEGAL RIGHTS IN BANGLADESH**

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“No society is free, no State democratic, unless human rights, ‘in widest commonality spread’, are actualized by every citizen. So everyone has the right in all circumstances to be treated with humanity and with respect for the inherent dignity of the human person.”<sup>1</sup>

Humanity presupposes the assurance of treating every person with dignity irrespective of age, sex, religion, race. Thus children are not exception rather an integral part of humanity. In 1999, the Government of Bangladesh declared the first decade of the millennium, that is 2000-2010 as the Children’s Decade.<sup>2</sup> Moreover, Bangladesh is amongst the first few countries to sign (1990) and ratify (2nd September, 1991) the United Nations Convention on the Rights of the Child (UNCRC). There are also laws regarding children’s rights envisaged in different provisions of the laws and statutes of Bangladesh. For example, the Constitution, the Penal Code, Criminal Procedure Code, the Vagrancy Act 1943, the Children’s Act 1974 are the dominant ones regarding child rights.

Some of the international instruments on human rights like the International Covenant on Civil and Political Rights, the Convention against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Convention on the Rights of the Child are multilateral treaties which impose specific human rights obligations on the States adhering to them. The international norms and standards laid down in these instruments

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1. V.R.Krishna Iyer
  2. UNICEF, Situation Assessment and Analysis of Children and Women in Bangladesh, (SITA-A), Draft, 1999.

are concerned with the promotion of the dignity of all human beings and protection of the rights set out in these instruments. The norms and standards laid down in these instruments are of universal character and touch upon nearly all the important aspects of human life including criminal justice, covering areas like pre-trial detention, administrative detention, post-trial conviction and imprisonment.

The article categorically emphasizes on the issue of the validity of child detention and the consequent impact. The practical need of safe custody is also examined and how young females and children fall prey to situations compelling them to such custody where question arise whether it is safe at all or needed to such individuals in particular circumstances is also scrutinized. The usual question which then arises is that, whether children should be detained in jail or put in safe custody? When and how do these children qualify to be in such places like jail or safe custody? What does the law say? By discussing different laws and the actual situations of young females and children the article shows the catastrophic situation of detention and safe custody.

### ***Pre-conditions of detention:***

#### **a. Presumption of Innocence**

The principle of presumption of innocence is a cardinal principle of the human rights law applicable to pre-trial detention. It requires that pre-trial detainees should be distinguished from convicted persons and should be provided “separate treatment appropriate to their status as unconvicted person”. Article 40 clauses 2 b (I) of the UNCRC guarantees that, every child alleged or accused of, or recognized as having infringed the penal law is ‘to be presumed innocent until proven guilty according to law’.

#### **b. Protection from Arbitrary Arrest**

The process of detention begins with arrest. Arrest should only occur when authorized by law. Article 37 b. of the UNCRC states that, ‘no child shall be deprived of his/her liberty unlawfully or

arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time'. In Bangladesh, the Children's Act 1974, also guarantees that when a child is brought before a court, it shall inquire about the age of the child and cause of detention (section 66). If a child below 16 is arrested on non-bailable offence and cannot be brought before a court forthwith, the officer-in-charge of the police station may release him/her on bail (section 48) and where such a child is not released on bail may be detained in a remand home until he can be brought before a court (section 49).

### **c. Notification of the Grounds of Arrest**

It is of utmost importance that anyone who is arrested must be informed of the reasons for his arrest to enable him to prepare a defence and secure his release. Article 40 clauses 2b(II) of the UNCRC states that, every child alleged or accused of, or recognized as having infringed the penal law is, 'to be informed promptly and directly of the charges against him or her, and, if appropriate through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence. Section 48-50 and section 13(2) of the Children's Act, 1974 of Bangladesh ensure initial contact with the legal assistance to prepare for the child's release and also contact the parents of the child arrested to be present at the court or where the child is not released on bail to detain him in a remand home or place of safety.

### **d. Communication by Detainees**

When a person is detained he is detached from his friends or relations. More so when he is arrested on the street and taken to a police station, no body knows about his where about. Thus the right of detainees to communicate with the outside world is important. Article 37 c and Article 40 clauses 2b (II) of the UNCRC states that, every child who is deprived of liberty and alleged or accused of an offence shall ' have the right to maintain

contact with his/her family through correspondence and visits save in exceptional circumstances'. The Children's Act 1974 of Bangladesh in section 13(2) states that the parents of the child should be informed about his detention so that they may maintain contact with the child.

#### **e. Appearance before a Judicial or Other Authority**

Any person arrested or detained should be brought promptly before a judicial authority, whose function is to determine the lawfulness of a person's arrest or detention in a given case. According to Article 37 d and Article 40 clauses 2b(III) of the UNCRC, every child who is deprived of liberty and alleged or accused of, or recognized as having infringed the penal law is, 'to have the matter determined without delay by a competent, independent and impartial authority or judicial body in fair hearing according to law.' Section 50 of the Children's Act 1974 in Bangladesh states that, 'immediately after the arrest of a child, it shall be the duty of the police officer or any other person affecting the arrest to inform the Probation Officer of such arrest in order to enable the Probation Officer to proceed forthwith in obtaining information regarding the antecedents and family history and other material circumstances likely to assist the court in making its order'.

#### **f. Access to Counsel**

It is internationally recognized that access to legal counsel at the earliest opportunity after a person is detained, is essential for the protection of his/her rights. It has been observed that lack of legal advice at this stage could seriously affect the right to defence of a pre-trial detainee. According to Article 37d and Article 40 clauses 2b(II) of the UNCRC, every child who is deprived of liberty and alleged or accused of, or recognized as having infringed the penal law is, 'to have legal or other appropriate assistance in the preparation and presentation of his or her defence'. Section 31 and 50 of the Children's Act 1974 in Bangladesh also guarantees such right.

### **g. Length of Pre-trial Detention**

A person detained on a criminal charge shall be entitled to trial within a reasonable time or to release pending trial. International law prohibits indefinite pre-trial detention and requires States to establish a maximum period of time during which a person may be detained without trial. Article 37d and Article 40 clauses b(III) of the UNCRC ensures the prompt decision by a competent court of the matter in question.

At this point it is relevant to mention few other international documents relating to juvenile offenders. These documents explicitly deal with the guidelines for the treatment of children coming into conflict with the law. For example, the UN Standard Minimum Rules for the Protection of Juveniles, best known as the Beijing Rules (it predates the CRC by five years), UN Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines) and the UN Rules for the Protection of Juveniles Deprived of Liberty. The latter two were adopted in 1990.

#### ***Situation in Bangladesh***

If we consider all these standards as stated above and apply the cases to be discussed in this article we may well presume that none of the provisions are maintained in the pre-trial process. Furthermore, the post-trial condition or imprisonment system also lacks minimum standards.

Often children are being arrested and detained on suspicion that they have committed a criminal offence. They are held for weeks, months or even years before a judicial authority passes judgement on their case. The conditions in which they are held are often the worst in national system. Their legal status is undermined- they are suspected, but have not yet been found guilty, and they are also under enormous personal pressure such as economic loss and separation from family.

It is a well established principle of the criminal jurisprudence that a person should not be deprived of his/her fundamental rights of

life and liberty without just cause and except according to procedure established by law. The Bangladesh Constitution also guarantees fundamental right of every citizen under Article 27,28,31, 32, 33 and 44. Thus every person has the right to be treated with human dignity in all situations including that which involve arrest, detention and trial for offences.

In Bangladesh according to different studies<sup>3</sup> it is reflected that children are being arrested on trifle matters or even on grave charges for example, on apprehension of being involved in riot or making explosives without giving much consideration of the circumstances under which they are thus found. These children often fall prey to *mastans* of different political parties who use them for political ends but deny any responsibility. Reports thus indicate that often children are charged with a crime they could not have committed (see case study below). The police show little sensitivity to these children's needs or rights. Thus, children mostly end up in jail without any fault of their own. However, even if they are arrested on valid charges they have the right to be defended according to the existing laws. As mentioned above section 48/49 of Children's Act 1974 requires children to be released or sent to remand home accordingly. They should not be in jail without valid cause.

The Children's Act 1974 reiterates the pledge to a fair trial and punishment. The Act specifically point to separation of trial of child from that of adults (section 4,6-8). The Bengal Jail Code 1864 states that undertrial prisoners may be kept separate from convicted prisoners. The Jail Code categorically lays down norms and standards to follow in juvenile offence. The Children's Act 1974 portrays these rules that had so long ago been incorporated in the Jail Code 1864. Nevertheless, children are tried like adults

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3. Haque, Dewan Mahmudul: Freedom from Arbitrary Arrest and Detention. In Ain O Salish Kendra Human Rights Report 2001; A study of Odhikar on 'Our Children in Jail: Year Book (2001) on the state of Juvenile Justice and Violence against Children in Bangladesh'. Save the Children UK.

and cases of child offenders are not tried separately as age cannot be verified in the absence of birth certificate or proper medical evidence the process of which is cumbersome. In regard to punishment it categorically disallows association of the young offender sentenced to imprisonment with adult prisoners (section 51).

Section 51 of the Children's Act 1974 specifically discourage death sentence, transportation or imprisonment on any child, unless when a child is found to have committed an offence of so serious nature that the court is of opinion that on punishment, which under this Act is authorized to inflict, is sufficient or when the court is satisfied that a child is so unruly or of so depraved character that he cannot be committed to a certified institute and none of the other methods in which the case may legally be dealt with is suitable, the court may sentence the child to imprisonment or order him to be detained in such place and on such conditions as it thinks fit.

Provided further that no period of detention so ordered shall exceed the minimum period of punishment to which the child could have been sentenced for the offence committed. Furthermore, at any time during the period of such detention the court may, if it thinks fit, direct that in lieu of such detention the youthful offender be kept in a certified institute until he has attained the age of eighteen years. According to section 52 any child convicted shall not be detained not less than two years and not more than ten years, but not in any case extending beyond the time when the child will attain the age of eighteen years.

Sentencing is thus an area that should be taken into serious consideration in regard to juvenile offenders. The legal system often fails to pay due attention to the standards laid down for juvenile offenders. They are often sentenced to prison although this sanction should only be used as a last resort and for the shortest possible period of time. The cases show the reverse where children suffer in jail for years even where they are not yet proved guilty.

***National standards on the condition of detention: Prison system and correction centers***

There are eighty one prisons in Bangladesh, of which ten are Central jails, fifty five are District jails and sixteen jails are at the thana level, known as sub-jails (although sub-jails are presently defunct). Apart from the formal prisons there are six vagrant homes and two correction centers in the country which are extended forms of prisons. They are run under the control and supervision of the Department of Social Services. Mostly minors and adolescents apprehended by police on different charges and alleged juvenile offenders are kept in these institutions until their legal guardians are found or terms of detention are complete or are 'properly rectified'.

A recent study<sup>4</sup> shows that most jails are not suitable for prisoners accommodation. They are mostly ancient buildings and have become risky due to non-maintenance. However, the government has recently constructed a jail in Kashimpur of Gazipur with a capacity of 2000 males and 300 females. Other new jails are also under construction in several districts.

The jails allow women with children under four years (which may extend till six years with permission). However, these children are not counted for they do not receive any material support from the jail. The study reveals that these children stay along with convicted and under-trial prisoners. Thus children alleged or accused of an offence are not the only ones who end up in jails but also innocent children with mothers accused or convicted end up in jails. The following table shows the number of such children in jails in the year 2000.<sup>5</sup>

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4. A study of Odhikar on 'Our Children in Jail: Year Book (2001) on the state of Juvenile Justice and Violence against Children in Bangladesh'. Save the Children UK.
  5. Ibid



MONTH	Under Trial Children	Children with mothers
January	247	263
February	231	249
March	204	256
April	199	254
May	230	246
June	258	272
July	334	310
August	252	278
September	218	248
November	175	221
December	160	261

Therefore, children who come into conflict with law do not always get the protection they deserve from the police, magistrate, probation officers or in jail. In most cases study show that mothers do not want to give up their babies rather keep them in jail. In this regard arrangements may be made to bring up these children in a humane environment. Recently newspaper<sup>6</sup> report showed that a day care center for children is about to open in Dhaka Central jail with facilities to provide education as well as entertainment to these children detained with mothers.

Therefore, it may be well presumed that, although some progressive laws like the Children's Act, 1974, have some positive measures but are hardly implemented. Furthermore, children who are juvenile offenders up to the age of 16 and protected under the Children' Act, 1974, are sometimes detained under the Special Powers Act 1974 and the Public Safety Act, 2000. Moreover, the differences in different laws regarding the age of criminal liability also acts as a barrier in upholding children's rights.

### ***Ambiguity in age of criminal responsibility***

Ambiguity in defining the age of responsibility affects the treatment

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6. The Daily Star, Monday, March 31st, 2003.

of juvenile offenders. For example, section 82 of the Penal Code 1860 exempts a child below seven years from criminal responsibility, whereas the Children's Act 1974 defines a child as any person below 16 years of age. The Convention on Child Rights defines child as being below 18 years. Again section 83 of Penal Code 1860 exempts children aged from seven years up to twelve years from criminal responsibility 'who have not attained sufficient maturity' or who do not understand the consequences of their actions. Adolescent offenders aged between sixteen and eighteen years receive no special protection under Bangladesh law.

Children are however, not considered differently from adults when these laws are tried in courts. The following case in a recent study <sup>7</sup> states such reality:

On May 27, 2001 Khulna Metropolitan Police arrested 15 children under section 54 of the Code of Criminal Procedure. On May 28, 2001 the police lodged a general diary (no. 1873) against these children who belonged to marginalized families. Police recorded their ages as being between 10 to 12 years. Under the Special Powers Act, 1974 the Khulna District Magistrate passed an order awarding them 30 days detention. Later, with the approval of the Ministry of Home, the detention was extended for another month. Grounds stated for the detention were, a) they were plotting a destructive bomb attack, b) they were all studying in Madrassas, and c) they all belong to an 'Islamic Group'.

Odhikar filed a habeas corpus petition in the High Court Division challenging the arrest and detention of these children. It was revealed in the hearing that there was a seven day gap in between the first and second phases of detention. The court directed to keep the children separate from adults in jail. After a long hearing the detention was declared illegal and without lawful authority by the court.

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7. See Supra note 4.

A study<sup>8</sup> in Bangladesh shows that a majority of the children are arrested under special laws such as the Special Powers Act, the Arms Act, the Narcotics Control Act, the Public Safety Act, section 54 of the Code of Criminal Procedure and section 86 of the Dhaka Metropolitan Police Ordinance (the last two allow police to arrest any person on 'reasonable suspicion' without warrant). The study revealed that, in most cases there were evidence of maltreatment and political decisions play a crucial role in combating crime. As police have little or no knowledge about child rights or laws relating to child rights, children are often sent to prison. At times they are wrongly registered as over aged and are arrested for charges which are not juvenile crimes.

*However, in this regard the observation of the Chief Metropolitan Magistrate is pertinent. He pointed out that they always try to comply with the Children's Act, 1974. But the cases are recorded wrongly by the police either not recording the age of the child or intentionally enhancing the age of the child. In such circumstances it is not possible to ensure fair trial of the detainee.*

The Children's Act 1974 categorically states that a child should be identified separately from an adult. Sections 4,6-8 enumerate the jurisdiction and trial of such cases:

#### **Section 4**

The powers conferred on a Juvenile Court shall be exercisable by the High Court Division, a Court of Session, a Court of Additional Sessions Judge and Assistant Sessions Judge and a Magistrate of the First Class.

#### **Section 6**

No child shall be charged with, or tried for any offence together with an adult.

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8. See Supra note 4.

### **Section 7**

In the trial of a case in which a child is charged with an offence, court shall sit in a building, or a room different from that in which the ordinary sittings of the court are held, or on different days, or at different times from those at which the ordinary sittings of the court are held.

### **Section 8**

When a child is accused along with an adult of having committed an offence, the case shall be separated and transferred to the Juvenile Court or the Court empowered to exercise the powers of a Juvenile Court.

However, the violations of the rights under the laws in reference to arrest, detention and sentencing have been challenged by different organizations working for the promotion of human rights and legal rights. The advocacy activities of these progressive NGO's through Public Interest Litigation have made some significant impact on the judiciary regarding the arrest, detention and illegal sentencing of juvenile offenders. For example, in the Zaved's case<sup>9</sup> BLAST, an NGO filed a habeas corpus petition against an illegal detention of a ten year old boy. The High Court ordered his release giving direction to frame a code of conduct for law enforcing agents. BLAST also addressed juvenile justice procedure by challenging the verdict of life imprisonment in the conviction of 14 year old Alamgir Hossain, who was tried and sentenced as an adult in direct contravention of the Children's Act 1974. BLAST in its writ<sup>10</sup> challenged the trial courts judgment as unconstitutional, illegal and outside of its jurisdiction. A final judgment concurring with BLAST's argument was issued.

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9. Writ Petition No. 3806/98 (filed on 28th November, 1998). BLAST.

10. Writ Petition No.1341/2000. BLAST.

However, not only in Bangladesh but all over the world children are being exploited by the law enforcers or the judiciary in the name of protection. Children are being arrested and brought to police stations or detained in police custody and put in prisons or in juvenile correction centres. Children without home or “street children” are often picked up from street and brought to prison on charge of theft, vagrancy, prostitution or begging. Nevertheless, the law of the country should guarantee the minimum legal rights of these children when they are arrested, detained, tried or imprisoned. Instead children are denied of their rights as laid down in the domestic laws or international conventions.

### **Vagrancy Act 1943**

Street children, especially adolescent girls who sell flowers, water, snacks on the street are often target of sexual and physical harassment.<sup>11</sup> They also face physical abuse from local mastans, police and employers. Street children under fourteen are frequently picked up by the police under the Vagrancy Act 1943 and detained in vagrants homes. Without any prior notice given to their families these children are picked up and detained, purportedly in the ‘interest of public order’. This law is used mostly to lock up street children and young females suspected of prostitution for indefinite periods of time.

However, for lack of legal aid, these children are denied the right to legal representation, the right to any remedy against police action and prompt hearing of their case. Thus, violating the international convention on the rights of children (UNCRC). Moreover, in the absence of any specific policy on street children NGO’s also face complexity rehabilitating street children, especially sex workers, ‘given the need to address societal prejudice and the children’s own unwillingness to lose their freedom’.<sup>12</sup>

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11. Star Magazine, 17th September, 1999

12. Human Rights in Bangladesh, 1999. Ain O Salish Kendra.

Police is no doubt under a legal duty and has legitimate right to arrest a criminal and to interrogate him/her but *it must be borne in mind that the existence of the power to arrest is one thing and justification for the exercise of it is quite another*. No arrest can be made in routine manner on a mere allegation of commission of an offence made against a person. For example, in some countries “street children” are rounded up and brought to prison in an effort to get them off the streets, particularly before official events or before the tourist season starts.<sup>13</sup> Again, adolescent girls married on their own accord without parent’s permission may also find themselves in ‘safe custody’ pending the trial of their husband’s who are charged of abduction/kidnapping by the parents (see below).

#### ***Abduction/Kidnapping and Conflict of Age and the law***

There are several reported cases where the girls are being arrested along with their husband and either taken to jail custody first or after hearing given to parents custody without their consent. For example, in Profullah Kamal Bhattacharya V. Ministry of Home Affairs, Government of Bangladesh, a girl allegedly 19 was sent to jail custody first when recovered by police rejecting their bail prayers. But the father produced certain document, for example, passport, school certificate to prove her age as 13 and therefore, after deliberation even when she refused to go to her father (petitioner). The father was given her custody.<sup>14</sup> Again, Rani Bala embraced Islam to marry one Razzaque. But there was conflict about her age and finally she was handed over to her mother.<sup>15</sup> There are other reported cases (Sukendra Chandra Das Vs. The

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13. Children in Conflict with the Law: A Survey of the Situation in Pakistan. Radda Barnen. Swedish Save the Children. 1995.

14. 28 DLR 1976, p123.

15. 17 DLR 1965, p 544.

Secy. M/O Home Affairs, Government of Bangladesh and others and Khairunnesa V. Ily Begum and another) where the main contention is the conflict of age in abduction/kidnapping and the parents are given custody whether the girl agrees or not.<sup>16</sup> Thus, in the case of Sukhendra Chandra Das, one Ranjana Rani Das, aged about 17, converted to Islam to marry Md. Shahidul Islam. However, in this case also major consideration was age and it was observed by the court that the detenu, Ranjana Rani Das be released from her detention and be given to her father's custody because the court observed that, 'it is in the best interest of the victim that she remains in the custody of her father, the petitioner, as the father is the greatest well-wisher of the victim girl.'<sup>17</sup>

The provision of safe custody was again argued in the case of Arun Karmakar Vs. State represented by the DC, Sathira and another, where the victim, married Iqbal Hossain by converting into Islam, without parents consent and thus ended up in safe custody by the order of the court ignoring her contention under section 164 Cr. P.C. that she is a major, also disregarding doctor's opinion as to her age being between seventeen and a half and eighteen and a half. The fact of the court's power under section 491 Cr.P.C. was also questioned. The point of consideration was whether to act under section 491 of Cr.P.C in this case is appropriate when it is found that the victim, a minor, as per order of the Sessions Judge, has been illegally and improperly detained in safe custody. Moreover, whether a detenu can be kept in confinement for an indefinite period for determining the age. Furthermore, whether the court committed illegality in refusing to interfere in the matter when it had jurisdiction to do so under habeas corpus. In the instant case she was ultimately given in custody of her parents.<sup>18</sup>

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16. 42 DLR, 1990, p 79 and 48 DLR 1996, p 67.

17. 42 DLR 1990, p 79

18. 7 BLC, 2002, p 61.

However, the point of determination in all these cases relate to the encroachment of one's fundamental right to freedom. Be it a victim or an alleged offender, the court is always prejudiced and guided by the patriarchal norms. Therefore, as far as women are concerned, it appears that beliefs surrounding the family, the material status of women and existing structural inequality between sexes play a central role in determining the redress available to women.

### ***The age conflict***

In most of the cases of abduction/kidnapping the main point of determination is age. However, in *Shariah* Law age of marriage is determined when a girl reaches puberty or 15 years whichever comes first. On the other hand, it is 18 under the Child Marriage Restraint Act 1929 (amended in 1984). Under this Act, although a minimum age is mentioned, however, it does not invalidate the child marriage but only provides punishment. Under the Children's Act 1974 a child means a person under the age of 16 years. Thus there is always a conflict about age of the girl when she marries on her own free will against her parents. The father/guardian files an abduction/kidnapping case against the boy/husband. Here the courts mostly rely on the age laid by the Act and hence confers the custody of the girl to her parents even when she declines to go back to her parents/guardian. Here legally the marriage is not void or even voidable but valid according to *Shariah* Law. Therefore, plurality of laws is the crucial problem in these cases that should be resolved.

Moreover, in most cases it is found that, even where the girl alleged the marriage with her consent the court decides her custody in favour of her father/guardian disregarding her free will. Thus, her right to express her consent is also denied so also human rights violated. The following cases are from Law and Society Trust and Ain O Shalish Kendra.

Tania Mustafa is a meritorious student and passed HSC in 1998 with a hope to join the medical profession. But her dreams were shattered



as she was sent to “safe custody” instead of pursuing medical profession. In 1998 after HSC she got married to Apollo a boy of different religion than hers. This was her fault. Her parents could not accept her marriage and so filed a case under section 9 (gha) of the Women and Repression (Special Provision) Act, 1995, against her husband, Apollo. However, she was also arrested along with Apollo and sent to Central jail for safe custody on 6/12/1998. Later she was taken to Nirmal Asray Kendra. She had to spend a miserable time in this center from 4th May 1999 to 8th May 2001.

A writ was filed in the High Court Division challenging the legality of her detention in this center by Bangladesh Law and Society on 22nd April 2001. The Court ordered her release the same day. It was learnt that even when Tania confessed under section 164 of the Criminal Procedure Code that ‘she married on her own accord and that she was not a victim of abduction’, she was placed in the safe custody against her will. Tania lamented her miserable condition in the safe custody where she had to spend these two and half years of her life with women of different strata including sex workers. She was tormented every moment of her stay. Her question is why she had to suffer in safe custody against her will for marrying a person of her choice? Why she was sent to this prison in the name of safe custody by the learned court? Who will compensate her for her loss of study and the valuable time of her life spent in prison like safe custody? (Source: Law & Society Trust)

Shahana a deaf and dumb girl lost her mother when she was still a baby and her father who is an irresponsible person never took care of her and married four times. Shahana fled from the house on account of torture by her step mother. Her brother-in-law helped her to run away but took advantage of her innocence and raped her. Later she was given to one Jubaida Khatun as a maid servant. On 30th July 1998 in greed for money Jubaida let eight (8) men to enter her room and violate her. She was then taken to a distant relatives home by the accused. Shahana could somehow make them understand by sign language about the terrible offence committed on her. One Muslem Uddin filed a case under section 6(3)/14 of the Women and Repression (Special Provision) Act, 1995. She was sent to the safe custody of Chittagong jail. However, the criminals were released on bail. From 1998 to 2000 for two years she stayed in jail custody. On 25th May 2000, her story was published in “Dainik Janakantha” a daily newspaper. On learning this, a writ was filed on behalf of Bangladesh Law and Society and Bangladesh Bar Council challenging the violation of article 27,31,32,35

and 36 of the Constitution of Bangladesh. Shahana was finally released. (Source: Law & Society Trust)

A beautiful and talented Nipa Das (fictitious name) was a student of tenth grade in Jessore. She fell prey of Sumon who abducted her. However, on a case filed by her father police recovered her. But Sumon again abducted her and she could not be traced for nine months. When she was found she was pregnant with two months. Her father prayed to the court for her custody but the court refused his prayer and sent her to safe custody in Jessore jail. Ain-O-salish a human right organization came to know about Nipa and filed for her release three times but was refused by the court. Finally they filed a writ in the High Court Division and the court ordered Nipa to appear before the court. Nipa told the court that she wanted to go to her father. The court granted her wish and she was given into her father's custody. A baby was born three days after her release. (Source: Ain O Shalish)

In all these cases it is seen that police have arrested and detained the victim. Later the victims were sent to either jail custody or safe custody. However, these safe custody turns out to be another jail for these girls who are victims of circumstance and does not belong here. In such situation an item of a renowned newspaper<sup>19</sup> needs to be mentioned here,

“Two girls have fled from a safe custody and four others were injured in an escape attempt in the early hours of 8th March, 2003. The girls had recently been brought from the Dhaka Central Jail.”

Why these girls had to escape a “safe custody” is a pertinent question to ponder. These girls risked their lives by climbing down with the help of a saree from the fourth floor of a custody home in the dead hour of the night. Only two were successful in escaping while the rest were injured and taken to hospital. If the custody home is so “safe” why would they risk their lives to get out of it? Therefore, in the light of the case studies let us discuss the concept of “safe custody” and its legal implications.

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19. The Daily Star, 9th March, 2003.

## **Safe Custody**

The very word “safe custody” denotes that it is a place that is safe in true sense. However, there may be several misrepresented phrases in different vocabularies. But no phrase is as misrepresented as the present one in question. In Bangladeshi culture it is well established that a woman’s safety can only be ensured if she is kept behind closed door. This prompts that if a woman has to be safe she has to give up her freedom. “Safe custody” is only a reflection of this attitude. Therefore, whenever a woman becomes bound to leave home due to torture or any other reason and she has no place to live, then whether she feels safe or not she is always sent to jail custody in the name of “safe custody”.

Therefore, in Bangladesh, “safe custody” is a debatable issue. There is a misunderstanding regarding this term. Generally, what is understood by “safe custody” is that when a person suffers from insecurity then on application by that person the State ensures his/her security by providing a “safe custody”. Before 2000 there was no specific provision in law for “safe custody”. It was exercised by judicial practice. The court applying its discretion ordered for “safe custody” and this became a practice of the day.

On the face of worsening condition of young female and children being sent to jails or vagrant homes for long period of time ostensibly for their protection and safety, which turned more unsafe or far worse than they would be for these persons on the street, BLAST and other organisations filed a writ petition<sup>20</sup> in 1997 against the Secretary of the Ministry of Home Affairs, the Secretary of the Ministry of Law, Justice and Parliamentary Affairs and other officials on behalf of Sufia Begum, who was being held in ‘safe custody’.

This case along with other similar cases resulted in the enactment of the Women and Children Repression Prevention Act, 2000, which mandates the provision of safe arrangements for minors

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20. Writ Petition no. 1157/97

and women who are victims of crimes and who cannot be protected by their families. Nevertheless, the very phrase that is, “safe custody” has been incorporated in the Act but with ‘limited’ application as far as police and magistracy think of it.

According to section 31 of the Women and Children Repression Prevention Act, 2000:

“During investigation of the case, if the Tribunal is of the opinion that any woman or child needs to be kept in safe custody, it may order that such woman or child be taken out of the prison and be kept in safe custody home designated by the government or in consideration by the Tribunal be handed over to any organization or person in this regard.”

So in practice, save the limited instances created by section 31 of the 2000 Act, nothing called “safe custody” exists in our statute book and accordingly there exists no specially designated place called “safe custody”. Nevertheless, the government is keen on the issue of safe custody and has opened a few custody homes in different districts recently. There are three such custody homes.

However, safe custody is nothing but ordinary prisons and our children and women who are either victims of a crime or may be offenders are not really sent to safe place but to ordinary prisons. They are subjected to the same kind of regimentation, rules, disadvantages and predicaments applicable to criminals and under-trial accused are subjected to, thus, depriving these children and women their right of liberty. In this regard Article 32 of our Constitution states without ambiguity that the liberty of a person cannot be curtailed save in accordance with law.

This means that a person’s liberty cannot be taken away unless that person is convicted of or charged with an offence or engaged in activities prejudicial to the interest of the State (Special Powers Act 1974). Therefore, neither a police nor a magistrate has a legal power to send an innocent victim of an offence to any custody whether safe or otherwise. It follows that whenever, a police sends a victim of rape or otherwise to safe custody or a magistrate passes

an order to that effect, he, whether a police or magistrate commits an offence under section 341/342 of Penal Code<sup>21</sup>. Additionally he also becomes liable to compensate the victim under the law of tort and the provision of the Constitution.

In respect of a minor where an offence has been alleged to have been committed by someone relating to the said minor, there is no specific law in our country allowing the detention of the minor into custody for the minor is not an accused and could not, therefore be arrested and detained. The High Courts Act 1861 empowered the High Courts established under the Act to make its own rules. Moreover, the High Courts were conferred to make rules under section 491 of the Code of Criminal Procedure in matters of the Writ of Habeas Corpus. In exercise of those powers, the Rules 28 to 41, part II chapter XI of the Appellate side Rules were framed in matters of the nature of Habeas Corpus. This rule making power given upon the High Court by legislature are wide to entitle the High Court Division to say that a person improperly detained be delivered to the person entitled to his/her custody.

Section 552 of Code of Criminal Procedure empowers a Metropolitan Magistrate and District Magistrate to direct the restoration of the minor to the legal guardian. In the absence of any statutory specific provision of law, it should not be read a prohibition and if the minor is recovered, a Magistrate in appropriate cases may make such orders as in the circumstance of the case seems proper, to order for detention in judicial custody under section 100 of the Code until the custody of the minor is determined by a competent court having jurisdiction to decide the same (2IBLD, 2001). In Bombay, section 14 of the Bombay Children Act 1924 (Act XIII of 1924), enables the court to make arrangement for the proper custody of a minor who is involved in an offence.

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21. The Penal Code (Act XLV of 1860) states whoever wrongfully restrains any person (section 341) or whoever wrongfully confines any person (section 342) is liable to penalty.

A study<sup>22</sup> during the first six months of 2001 showed that as of July 1, a total of 258 women and 97 children were kept in safe custody throughout the country. Of the 14 women and 4 children who remained in safe custody as of July 31, 8 have been locked up since last year. In an unthinkable state, these hapless women and children have to share toilets, bedding and other facilities with imprisoned criminal offenders. Although many women accept the award of 'safe custody', it becomes difficult for them to get released or have access to families or even to consult with a legal practitioner. Thus violating the Children's Act 1974 (see above). Police excesses on women and children, particularly rape, were reported during the last year as well. But no such violation was reported in the year. But numerous incidents of sending women and children to 'safe custody' were reported in the newspapers.

### Female Children in Jail in 2002

Name of District	Category/no. of children	Category/no. of children	Total no. of Female
Chittagong	Safe custody (8)	Under-trial (9)	17
Narayangonj	Safe custody		2
Manikgonj	Safe custody		2
Munshigonj	Safe custody		1
Jamalpur	Safe custody		2
Tangail	Safe custody (2)	Under-trial (3)	5
Kishorgonj	Safe custody (2)	Under-trial (4)	6
Mymensingh	Safe custody (3)	Under-trial (1)	4
Thakurgaon	Safe custody		2
Rangpur		Under-trial	2
Lalmonirhat	Safe custody (2)	Under-trial (1)	3

*Source : Save the Children (UK) and partners/ January 2003*

22. Haque. Dewan Mahmudul: Freedom from Arbitrary Arrest and Detention. In Ain O Salish Kendra Human Rights Report 2001.

In most of the cases the females held either in safe custody or still in trial stage are aged between 9 and 18 years. Furthermore, it is to be noted that, the ones who are under-trial are also in custody either in jail or otherwise. Therefore, it is most regrettable that, even before conviction and also a victim of crime finds herself in prison in the name of custody or safe custody.

### **List of Detained children from 5 Division in 2002**

<b>Name of division</b>	<b>Male child</b>	<b>Female child</b>	<b>Others</b>	<b>Total</b>
Dhaka	320	56		376
Rajshahi	97	20	06	123
Khulna	18	15	28	61
Barisal	59	06		65
Chittagong	127	10		137
TOTAL	621	107	34	762

*Source : Save the Children (UK) and partners/ January 2003*

### **Trafficking**

Trafficking is also a significant problem in Bangladesh. The victims, both women and children come from poverty stricken families. The women and children are often abducted from outside their home while working at household chores or at play. Some children or young women are sold by their parents out of sheer necessity, regardless of the knowledge about the dangers their child may face or not.

The agent usually approaches the parents or the victim with false promises to provide a lucrative job in cities or even outside the country. Children are thus sold as 'commodities' both in cities and beyond national borders. There are also cases of unsuspecting young women being enticed into false marriage, only to be sold by their 'husbands' once they reach a certain destination. In spite of the stringent law namely, the Women and Repression Control Act, 2000, trafficking is increasing. However, more tragic is the

fact that when the trafficked women and children are recovered – they are sent to jail custody or safe custody. Following are cases collected from a recent study.<sup>23</sup>

On January 3, 2001, the Daily Jugantor reported: 27 Rohongya women and children were arrested by Jessor Police on 1st March, 1998 while they were being trafficked to India via Bangladesh. Nobody prayed for their bail for long three years. The Court ordered to send them to the 'safe custody'. In an inhuman condition, they languished in the prison with ordinary criminals eventually, two human rights organizations namely Savior and Human Rights pleaded for their bail. They were all released on bail after long three years.

The Daily Star, on May 19, 2001 reported: Narayangonj Bandar police had picked up a dumb girl from a local road on May 27 last year for suspicious movement and detained her. When the girl was produced in a magistrate's court, police was asked to find out her parents and hand her over to them. But they could not collect any information about the girl and her parents. She was then sent to Narayangonj Jail on June 7 and later shifted to the Dhaka Central Jail in the city. Finally, the dumb girl who spent almost a year in jail for no reason was taken to a shelter home on Thursday. Save the Children UK in Bangladesh took the seven-year-old girl to its centre from the government vagrant home at Mirpur in the city for her rehabilitation. Earlier, the girl was shifted to the vagrant home from Dhaka Central Jail recently after a magistrate's court allowed it. She was virtually a prisoner in the name of 'safe custody'. A report on the plight of the girl was published in the Daily Star on April 28.

On 11th October, 2001, The Daily Ittefaq reported: The two adolescent girls of Mymensingh do not know what is their offense. Yet, they have to spend the valuable time of their life in the 'safe custody' of the prison. In the first incident, Sumaiya Khatun, a girl from Bhutalir Char village under Sadar Thana, was kidnapped by some *maastans* (terrorists) on 23rd April. She was rescued by the local people and sent to the Shonatola police station on the 25th instant. But what the Shonatola police did was all that they showed her detained under safe custody and sent her to the Bogra Jail.

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23. Ibid.



On 13 January 2001, the Daily Banglabazar Potrika reported: 9 women including their children are passing inhuman life at the Khulna Jail. They were also being trafficked to India. When police rescued them, the Court sent them to the safe custody. Although nine months have passed, they have not been granted bail.

On 17th February, 2001 the Janakantho reported: 33 women are passing a hell-like life. All of these 33 women prisoners have been given a room that was actually allocated for two inmates. Now, with 33 persons in this little space of area, they can neither eat nor sleep. All these women and children were arrested by the Cox's Bazar Police and sent to the jail in the name of the safe custody.

### ***State response***

An important point to notice is that even in cases where government has initiated policies to advance women's situation in Bangladesh, yet lack of effective control over the organizations that implement such rights has failed to produce the desired results. On the basis of section 31 of the Women and Children Repression Prevention Act 2000, government initiated several steps to effectuate the provision of "safe custody".

However, the wide scope given to police for arrest together with the inadequate facilities of the custody homes, women and children actually fall prey to the worst condition of their lives in the name of 'safe custody'. Moreover, there have been many instances where members of law enforcing agencies themselves have committed violence against women leading to rape and death in custody, for example, Yasmin murder in Dinajpur in 1994, Sima Chowdhury in Chittagong in 1996 and Tania in Dhaka CMM Court Building in 1998.

Nevertheless, the government of Bangladesh is pledge bound to uphold children's rights. The meeting by the Ministry of Homes<sup>24</sup> on 26th January 2003, evaluating the present position regarding

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24. Meeting held on 26th January 2003 in the Home Ministry headed by the Principal Secretary, Dr. Kamaluddin Siddiqui.

safe custody, shows that the government is considering situations to improve the position of children regarding detention and safe custody. The relevant features of the minutes of the meeting are as follows:

- It has purchased a microbus to carry children to and from court to the Tongi correctional center.
- For women, young female and children who are in jail taka 50,08,535.66 has been allotted from the Prime Minister's Rehabilitation Fund to the Secretary of Social Welfare for establishing three new custody homes in Rajshahi, Khulna, Chittagong.
- In Barisal and Sylhet two safe custody homes have already been established. However, in the absence of any direction from the concerned Ministry to the District and Session Judge to send the victims/accused to safe custody, only one male was sent.
- In juvenile correction center in Jessore a female Magistrate has been appointed.
- Nevertheless the meeting expressed its concern that the custody homes and the correction centers do not have as many children as it can hold. Rather according to the report of the Chief- Inspector of jail 1057 children below 18 years are detained in jail until 1st January 2003.
- In Gajipur a female Magistrate has been appointed but cases are sent beyond the power of 1st class Magistrate whereby she cannot execute her job.
- The notification regarding insertion of correct age has not been found in the office of the concerned police department.

Nevertheless, the judiciary is also not blind regarding the issue of 'safe custody'. The High Court on 9th April, 2003 called upon the government to send over 1200 children detained in 65 jails on different charges to correction centers. A division bench passed the order following a petition according to a press release of

Bangladesh Legal Aid Services Trust (BLAST). The court also directed to withdraw all criminal charges filed against children below 12 years, if not possible the government has to free them on bail.<sup>25</sup>

Moreover, a landmark judgement relating to section 54, 167 of Cr. P.C. by the High Court is worth noting. The High Court Division asked the government not to put anyone under Special Powers Act following arrest on suspicion under section 54 of the Criminal Procedure Code. Certain guidelines in regard to the provision of remand in section 167 are also passed.<sup>26</sup>

Thus considering the responses it is regretful to note that although the government has initiated a lot of programmes for the betterment of children's right, yet owing to the lack of coordination amongst the different organs of the government many directions or steps are not carried out in practice and therefore lie only in paper.

### ***Response from Society regarding Safe Custody***

According to the Attorney General of the Government of Bangladesh, A.H.F.Hassan Arif, jail can never be a safe custody for a victim. It is absolutely against one's fundamental rights. In the name of safe custody, if a victim is put in jail with other criminals, it is no doubt a violation of human rights. But the decision of keeping victims of safe custody in government homes rather than jail is a step forward. This will be fully materialized when there will be a coordination between home ministry and the court.

Advocate Arfan Uddin Khan, Public Prosecutor, Nari o Shishu Nirjaton Doman Tribunal, (No.2), states the condition under which a female is brought to safe custody. From his experience he says that, amongst the situations that calls for ordering safe

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25. The Daily Star, Sunday, April 9, 2003.

26. The Daily Star, Sunday, April 13, 2003.

custody the most common is where the girl marries on her own choice and disagrees to go back to parents and parents file a case of kidnapping/abduction against the man (husband). Unfortunately, these girls are kept with other arrested females, like sex workers or trafficked women who are recovered by police or otherwise. The mental torment of these innocent girls are beyond words. Firstly they are deprived of their right to freedom and secondly, they are separated from their husbands without any justification.

Moreover, there is no specific provision to transfer the females to the Women's Directorate after the court order of safe custody is passed. Therefore, they have to go to jail custody like ordinary prisoners. Furthermore, there is also no guidance about the duration of the period of detention in safe custody. For example, a victim who needs only medical examination for determination of her age need less time to stay in custody home. Again, others may need to have a permanent arrangement. Therefore, government should consider all these before ordering for safe custody that turn out to be literally a jail for many.

Advocate Sigma Huda, President, Bangladesh National Women's Lawyers Association, says that the concept of safe custody is still vague. Safe custody should be for offenders who are not yet proved guilty but not for innocent victim of circumstances. It is unfortunate to see that victims of rape or abduction remain in jail/ safe custody whereas the offenders are enlarged on bail.

According to Sultana Kamal, the Executive Director, Ain O Salish Kendra, a person's position cannot be judged by the place he/she is staying. The courts order of safe custody makes a place for the victim in custody home instead of jail like before. This has only changed the place for the victim but has not taken into consideration the different situation under which she is taken to such safe custody. It does not consider the basic right of the victim that has been violated, that is, she is taken into safe custody without her consent. Therefore this is not a solution. Law should be more specific regarding safe custody. The provision regarding

the duration of safe custody for each particular case should be specified with certainty. It happens so that a victim has to spend years in safe custody owing to the loopholes of law.

### **Concluding Remark**

The Progress of a Nation is a clarion call for children. It asks every nation on earth to examine its progress towards the achievable goals set at the World summit for Children in 1990 and to undertake an honest appraisal of where it has succeeded and where it is falling behind.<sup>27</sup>

We can heal our criminal justice system by treating each person who comes before the courts as a unique human being. It can be done only by deciding each case individually, one on one and one at a time. Thus the issue of safe custody can also be tackled by a sincere commitment to uphold human and legal rights of an individual. The article showed how indifferent the organs of the government, for example, the police, the judiciary is while exercising their power in determining the issue of safe custody.

It is indeed regrettable to note that arbitrary arrest and detention has become a common feature of our system of governance. The unchecked practice and frequent misuse of authority is much due to the wider range of the repressive laws. Had the laws been followed properly, the excesses by the law enforcement agencies could have been minimized to a desired level. It is observed, for lack of commitment it is not possible to amend the existing laws. For example, the Public Safety Act has been declared ultravires the Constitution, it is likely that the ruling will be sustained by the Appellate Division of the Supreme Court. However, this may take a longer time to dispose of. Likewise, the Children's Act needs to be incorporated in practice by all quarters. To ensure juvenile justice the State should be more committed in upholding the rights of every child. Law in paper is futile unless it is practiced.

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27. A portion of speech by Kofi A. Annan, Secretary General, United Nations, 1998

In regard to the concept of safe custody, it is believed to curtail the very right of the female/child to which they are entitled, that is freedom of movement. Therefore, it must be exercised in a wider perspective given the fact and situation of each particular case. It is observed that, the courts in a traditional manner order for safe custody without judging the nature of each case and rather relying on precedents.

To ensure the constitutional guarantees of equality for all citizens the State should be more neutral. To this end, the stereotypical mindset of the organs of the state has to be changed. A close scrutiny of all the repressive laws is necessary for ensuring human rights. The law should be balanced and therefore, check the present flow of arrest and detention. Besides amendments of the laws, reforms in the judiciary and police have to be carried out with immense caution.