LAW IN-DEPTH

Sketching out the shades of discrimination laws: Colourism in context

Psymhe Wadud and Tahseen Lubaba

THE Black Lives Matter campaign inspired informed debates and discussions on racism and colourism across the world. In this backdrop, several notable beauty conglomerates recently decided to remove words like 'white/whitening' and fair/fairness from their products' packs and communication with a view to evolving their skin care portfolio to a more inclusive vision of beauty. This move has resurfaced the debate on whether colour is as much a prohibited ground of discrimination as is race, among several other issues. Race and colour are seemingly overlapping but distinct grounds of discrimination. Although colourism is deeply entrenched in our culture, skin colour is yet to be popularly considered as a prohibited ground of discrimination in Bangladesh. We submit that a creative interpretation of the provisions on discrimination in the Constitution on their own and a reading of the said provisions and international jurisprudence in tandem can accommodate 'colour' as a prohibited ground of discrimination. Additionally, we advocate for legislative and policy measures addressing commercials of products perpetuating a particular type of colour-based superiority.

We submit that a creative interpretation of the provisions on discrimination in the Constitution on their own and a reading of the said provisions and international jurisprudence in tandem can accommodate 'colour' as a prohibited ground of discrimination.

The provisions pertaining to equality were among the least disputed or discussed provisions of the Bangladesh Constitution in the Constituent Assembly Debates. Articles 28(1) and 29(2) list 'race' as one of the prohibited grounds of discrimination. The English text gives the impression that 'colour' is not a prohibited ground of discrimination as such. However, the proviso to article 153(3) of the Constitution states that in the event of conflict between the Bengali and the English text, the former shall prevail. The Bengali equivalent for the word race is '*barno*', which is inclusive of both 'colour' and 'race'. In an event of conflict between the inclusive expression '*barno*' and exclusionary English terminology, 'race', '*barno*' shall prevail. This implies that even a very literal interpretation may make room for having colour as a prohibited ground of discrimination.

If such an interpretation fails to stand scrutiny, resort may be made to comparative constitutional law jurisprudence concerning 'discrimination on the basis of unlisted grounds.' As far as such jurisprudence concerns, discrimination based on listed grounds is presumed to be unfair; but no such presumption exists in case of discrimination based on unlisted grounds. However, in any event when the party having the onus to prove that the discrimination based on any of the unlisted grounds is unfair, succeeds in proving so, his/her claim shall stand [see, *Larbi-Odam* v *MEC for Education (North-West Province)* (Constitutional Court of South Africa) (1998)]. Additionally, the duty of domestic courts not to straightaway ignore international obligations (as espoused in a number of judicial decisions in Bangladesh) and to let international law fill in for 'vacuum' in domestic law, too can come in play.

While including 'colour' as a ground of discrimination seems an arduous task (if not impossible) in the domestic context, international jurisprudence suggests otherwise. Historically, colour and race were used almost interchangeably. The issue arose while drafting the non-discrimination provisions of the Universal Declaration of Human Rights (UDHR). While one group supported retaining the four original grounds of the UN Charter (i.e. race, sex, language and religion) and understood race to include colour, others raised concerns that race and colour are not concepts that 'necessarily cover one another'. Ultimately, both race and colour were included as prohibited grounds of discrimination.

PHOTO: KATHMANDUPOST.COM

Both race and colour have been recognised as prohibited grounds in major human rights treaties to which Bangladesh is a party, including International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR) and International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). General Comment no. 18 of the UN Human Rights Committee notes that some prohibited grounds of the ICCPR are absent in several Constitutions and inquires about the significance of such omission. General Comment no. 31 reaffirms a state party's obligation under article 2 of the ICCPR to adopt legislative, judicial and administrative actions to uphold the rights guaranteed under the Covenant. In the same vein, the Committee in its 2017 Concluding Observations of Bangladesh's initial report reiterates the need for an anti-discrimination law containing a 'comprehensive list of grounds' including colour. The absence of anti-discrimination laws has also been highlighted in multiple observations of the Committee on the Elimination of Racial Discrimination (CERD) to Bangladesh's state party reports.

Over the past decades, civil societies and activists have consistently expressed disapproval of the beauty brands and their advertising tactic of portraying dark-skinned women as unattractive, unhappy and professionally unsuccessful individuals. Prohibiting beauty brands from selling skin lightening products may be seen as an encroachment on their business. However, allowing them to air commercials portraying the superiority of a particular skin colour (which in turn creates artificial colour-based hierarchies in society) may not be condoned either. It is also very difficult to draw a separating line between the effects of manufacturing a skin lightening product and those of its commercials.

Such commercials perpetuate a social stereotype on the basis of colour which, alongside giving birth to many societal evils, tends to have a disproportionate impact across sections of the society who are likely to fall for drastic or immensely unsafe measures for lightening their skin colour. Some countries have adopted specific legislative measures addressing discrimination in advertising. Finland's Consumer Protection Law was amended in 2008 to prohibit discriminatory advertising (on an array of non-exhaustive grounds). A self-regulating ethics council came in place to oversee such matters. Similarly, in India, Drugs and Magic Remedies (Objectionable Advertisements) (Amendment) Bill 2020, has sought to bring skin lightening advertisements within the purview of law.

The recent decision of the beauty brands of renaming their products seems commendable. However, this decision also has the potential of downplaying the societal stereotypes perpetuated over the years. At this point, the issue of letting colourism sustain across generations through commercials and the sale of skin lightening products need to be rethought.

The Anti-Discrimination Bill which is yet to be passed as an Act of parliament in Bangladesh, is drafted in Bangla and uses the expression '*barno*'. While upon coming into being as an Act, this bill too may fall short on making business entities compliant by making room for an expansive and inclusive interpretation, a combination of overarching policy guidelines and legislative initiatives may do the job.

THE WRITERS ARE LECTURER IN LAW, BANGLADESH UNIVERSITY OF PROFESSIONALS AND LLM STUDENT, UNIVERSITY OF DHAKA, RESPECTIVELY.

LAW VISION

Digital payment system to boost up the operation of virtual courts

Mazharul Islam

THE Covid-19 crisis has tremendously increased the use of internet and accelerated the digitalisation of many businesses and services through introducing teleworking and video conferencing in different sectors. Just after the outbreak of the coronavirus, many countries having e-readiness took immediate steps to conduct judicial proceedings online. Bangladesh also embarked upon its journey of conducting judicial proceedings through virtual courts on 11 May, 2020.

The initiative of introducing virtual courts has already been praised by many, and to make this initiative more effective, introducing digital payment of fees (chargeable under the Court Fees Act 1870, compensation and fines leviable under the Civil Procedure Code 1908 and the Criminal Procedure Code 1998) applying Mobile Financial Service (MFS) is now felt necessary. Otherwise, the objective of introducing virtual courts may remain incomplete.

During the outbreak of the pandemic, the MFS has turned into one of the major tools of payment for individuals as most of the financial activities have gone online. Moreover, mobile phones are also becoming more accessible across the country and it is time to use these devices to boost up the economy. According to the BTRC, the total number of mobile phone subscribers has reached 162.920 million at the end of this April, while the number of active internet connections has crossed the landmark of 10 crore this year.

It is to mention that the Court Fees Act, 1870 was amended in 2016 making provision for collection of fees electronically or digitally. According to section 25 of the Act, the government may appoint, in addition to scheduled banks, any MFS providers to receive court fees including fees chargeable for serving and executing processes issued by a certificate-officer in the proceedings in execution of certificates filed for recovery of land revenue or rent collectible in cash, electronically or digitally. In that case, MFS providers who receive fees shall be required to grant a receipt or e-receipt accordingly. The Act also mandates the government to make necessary rules, from time to time, for regulating the collection of such fees through MFS. However, the provision is yet to be implemented.

It is high time the amended provision of the Act was implemented as transactions through MFS accounts are increasing every year due to the rising acceptance of digital payments by private and public entities. Even amidst this coronavirus outbreak, the MFS was resorted to disburse the stimulus packages announced by the government which include BDT 5,000 crore for payment of salaries of RMG workers and BDT 1,250 crore cash assistance among five million poor families hit hard by the pandemic. According to Bangladesh Bank, through MFS accounts there was average daily transaction of Tk. 1,425.34 and Tk. 1,283.39 crore in February and March of this year respectively and total number of active MFS accounts have reached 26.845 million till March of this year.

In addition to the foregoing, the government may issue directives for collection of compensation, fines, stamp duties and registration fees through MFS which will ensure more revenue collection for the government and contribute to the reduction of corruption as well. If such fees and fines are collected through MFS, litigants will be able to pay fees or fines relating to the suit or case without hassles and the judiciary will be able to make its accounts more transparent.

With the vision of Digital Bangladesh, the use of technology is currently reshaping every government level operation. It is expected that the government will take all necessary measures to introduce digital payment system through MFS accounts in the country's judicial system. Bangladesh Bank has to come up with necessary directives for MFS providers to ease the collection of revenues through MFS accounts. The Supreme Court may also come up with a short-term, mid-term, and long-term action plan to introduce digital payment system in all courts across the country and make virtual courts sustainable.

Though the need for virtual courts only arose due to the unprecedented outbreak of the pandemic, the demand for e-judiciary is long awaited. The law ministry had taken a project worth Tk. 2,690 crore to establish e-judiciary even last year. The abstract idea of stepping into e-judiciary is now seemingly real with the enactment of the new Act. While we cannot predict how long the crisis will last, introduction of digital payment for collection of fees, fines or compensation would make the initiative of virtual court or e-judiciary more effective and successful.

THE WRITER IS CORPORATE LEGAL PRACTITIONER.

LAW REFORM

Need for legal reform to regulate business ethics

K. Shamsuddin Mahmood

THE study of business ethics and practices deals with issues like lack of corporate governance, insider trading, rampant practice of bribery, presence of discrimination, absence of corporate social responsibility, etc. At times, law guides the business ethics; but it is the basic framework that businesses may follow to gain public acceptance, and this is where lies the essence of business ethics. Developing ethical standards for businesses is crucial not only for the leaders to act virtuously as an example for the rest of the employees, but also for everyone associated with businesses to be diligent towards enforcement of policies and be realistic. Although, maintaining ethical expectation at all times may not be feasible and rules will inevitably be broken, therefore, the organisations/enterprises need to accept zero tolerance towards unacceptable business behaviours.

Although there exist critics who do not believe in relying in the use of 'law' to evaluate 'ethical standards' of an organisation and tend to say that it cannot be said – if it is legal than it is ethical, or that anything not prohibited by law is obviously proper and ethical or to assume that legal standards articulate or establish ethical principles, since law and rules do not depict what a professional ought to do to be ethical. It is also true that enterprises/organisations that lay the framework for business ethics in all features of operation are more likely to become and remain profitable than those who conduct their business in an unethical manner. Statistics from the last two decades have been quite enlightening as it has been seen that businesses succumb to core ethical standards impacting not only their immediate shareholders but also the industries and entire economy of the country. However, in the last decade or so, the responses from the business community towards violation and breaches of integrity are growing wider and stronger, which is encouraging as societies or for that matter companies are creating better ways to address the issues of eroding values, integrity and ethics. Anyways, the bottom line remains, for long term sustainability to a great extent depends on policies, standards and the legislative support, i.e., legal enactments, statute and rules towards the framework

of business environment.

In Bangladesh, the failure of legislative support towards effective good governance has resulted significantly for lack of business ethics and unsatisfactory culture of corporate social responsibility. Enterprises in private sector is busy in earning profit ignoring question of responsible behaviour by not bothering to earn trust and respect of their consumers/customers; issues like sell of adulterated products, asking exorbitant prizes, capitalising certain product name and goodwill, fraudulent practices in weight and measurement, hoarding to earn profit with dishonest intentions are all such phenomena that signify the present scenario of business world in the country.

Leaving aside the laws relating to companies/corporations where huge capitals are invested and also, some statutory provisions/requirements as well as social dicta do exist to encourage a culture that would further the practice of ethics and corporate social responsibility, the reality under the Partnership Act, 1932 is not at all congenial, rather to certain extent demoralising. The legal framework towards Rules on Conduct in the management of partnership business as contained under Chapter III and IV of the 1932 Act fails to demonstrate whether at all the legislature had any good intention to integrate ethics and social business etiquette as business standards, strategies and goals behind the back of their head while making the law.

A review of the scheme as envisaged under sections 9-16 of the Act (in terms of broad headings of partners' rights and liabilities, rules of conduct for partners while participating in management of their business and concerns of mutual rights and liabilities) does not demonstrate any concerns for ethical behaviors of partners, or for that matter, 'aspects of social responsibility' of the entrepreneurs. Rather sections 12, 13 and 16 explicitly allow partners to determine their internal business environment freely 'as they like', since the above sections are all subject to contracts that partners may choose to decide, thereby possibly ignoring the prescribed legal requirements that were contemplated by the legislature.

The above observations may, to certain extent, be acceptable for the reason that the 1932 Act is an age old law of British period, and hence, the legislature could not contemplate modern expectations of business ethics and corporate social responsibility to be incorporated in the law. Almost 75 years have passed and modernity in business practices now demand the law to be amended to accommodate or totally be reformed (as Companies Act, 1913 was done) to incorporate present-day views of ethical practices and corporate social responsibility.

THE WRITER IS PROFESSOR & DEAN, SCHOOL OF LAW, BRAC UNIVERSITY.