

LAW

opinion

# The new arbitration act and some afterthoughts

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BA NGLADESH has recently enacted the Arbitration Act 2001 (the Act). It came into force on 10 April 2001, repealing the Arbitration (Protocol and Convention) Act 1937 and the Arbitration Act 1940, legacies of the British Raj in India. The new Act was again amended in 2004 in certain respects. Such legislative steps were urgent in the face of increasing foreign investment in Bangladesh in various sectors, especially in natural gas and power, and the ever-growing export trade with the rest of the world. The Act, consolidates the law relating to both domestic and international commercial arbitration. It thus creates a single and unified legal regime for arbitration in Bangladesh. This modernisation gives Bangladesh a facelift as an attractive place for dispute resolution in the field of international trade, commerce and investment. Although the new Act is principally based on the UNCITRAL Model Law, it is a patchwork quilt as some unique provisions are derived from the Indian Arbitration and Conciliation Act 1996 and some from the English Arbitration Act 1996.

## The salient features of the Act are

- The preamble specifically mentions that it is "An Act to enact the law relating to international commercial arbitration, recognition and enforcement of foreign arbitral award and other arbitrations." However, the Act is also applicable to domestic arbitration.
- In an international commercial dispute one of the parties to the dispute must be either a firm registered abroad or a foreign national.
- The dispute in question must arise out of a legal relationship, whether contractual or not, but considered as a commercial dispute under the law in force in Bangladesh.
- The parties are free to determine the number of arbitrators. If the parties fail to fix the number of arbitrators, the tribunal is to consist of three arbitrators.
- The parties may choose an arbitrator or arbitrators of any nationality and the chairman of the tribunal may be of any nationality if that is accepted by the parties.
- The courts (i.e. the District Judge's Court in respect of domestic commercial arbitration and the High Court Division of the Supreme Court of Bangladesh in respect of international commercial arbitration) can intervene in regard to appointments of the arbitrators on behalf of the parties as well as of the chairman of the arbitral tribunal within sixty days from the receipt of a party's application, to facilitate the arbitral process.

- The court shall respect the parties' agreement to arbitrate and refer any party to such agreement to arbitration and stay any legal proceedings that may have been commenced against the other party.
- The parties are free to agree on the venue, failing which the arbitral tribunal, having regard to the circumstances of the case, including the convenience of the parties, shall determine it.
- In the absence of the parties' agreement as to the language of the proceedings, the tribunal can use any language it deems appropriate.
- The Act preserves the doctrines of severability of the arbitration agreement and kompetenz-kompetenz, so that the tribunal can rule on its own jurisdiction.
- The tribunal is not bound to follow the Code of Civil Procedure 1908 or the Evidence Act 1872. Subject to the parties' agreement, it may adopt any procedure for conducting the arbitral proceedings.
- In respect to the substance of a dispute, the parties are free to choose the rules of law or legal system of any country. In the context of the substantive law chosen by the parties, the Act expressly discards renvoi, unless the parties agree to the contrary.
- If the parties do not choose the applicable substantive law, the Act authorises the tribunal to apply the rules of law anything short of a legal system such as transnational commercial rules or the rules of lex mercatoria - which the tribunal deems most appropriate in the circumstances.
- If all the parties agree, the tribunal may use mediation, conciliation or any other procedure at any time during the arbitral proceedings to encourage settlement. This is in keeping with the Asian tradition of settling disputes in a consensual process rather than western confrontational method.
- The Act makes provision for the arbitral tribunal, and for the Court (by way of a latter amendment, i.e. Act II of 2004) to make interim orders in respect of the subject-matter of the dispute.
- No appeal lies against the tribunal's order of interim measure of protection.
- The tribunal can summon any persons to appear before it, albeit through the competent court, to give evidence or to submit materials if they do not do so of their own accord.
- The tribunal has no power to act in respect of consolidation of arbitral proceedings and concurrent hearings, unless it is given by the parties on agreed terms. The parties are free to agree on these matters.
- The tribunal must deal with any dispute submitted to it as quickly as possible and act fairly and impartially by giving each party 'reasonable opportunity' to participate in the proceedings, and in its deciding procedure and evidence and in exercising



other powers conferred on it.

- Subject to the parties' agreement, the tribunal may appoint experts, legal advisers or assessors to assist it on specific issues.
- The tribunal may continue the proceedings in the absence of a party and make an award on the basis of the evidence before it.
- The tribunal must give its award without undue delay and the award will have the same force of law as if it were a decree of a court.
- An award shall be made by the majority of the arbitrators and shall be in writing and signed at least by the majority where the tribunal consists of more than one arbitrator.
- An award can be challenged in the court only on specified grounds.
- The Act makes provision for appeal against an order of the court setting aside or refusing to set aside an award, or refusing to recognise or enforce any foreign arbitral award. All these appeals go to the Appellate Division of the Supreme Court of Bangladesh.
- The new Bangladesh legal regime on arbitration has embraced such fundamental tenets of modernisation as party autonomy; minimal judicial intervention; independence of the tribunal; fair, expeditious and economical resolution of disputes; and effective

enforcement of awards. This has also been brought about in domestic arbitration. Although the new Act is principally based on the Model Law, it has introduced the improvements highlighted above. In many respects the Act allows more freedom to the parties than the Model Law. As the Act is only just over four years old, it is premature to express any judgment on its efficacy as an arbitral legal regime and the impact it will have in the future for Bangladesh as a place for settlement of international commercial and investment disputes by arbitration. Certainly Bangladesh, as a prospective destination for increasing foreign investment in the future, has made a positive step in the right direction by enacting the new law. Bangladesh, like its sub-continental counterparts, has a long tradition of settlement of disputes by alternative methods a phenomenon that has pervaded the social fabric for centuries. But it can still improve its international arbitral legal regime by incorporating, as appropriate, lessons from other jurisdictions in its efforts towards modernisation and internationalisation of arbitration. No doubt there is still room for improvement in the Act itself.

It has to be appreciated that for making Bangladesh an attractive place for her much needed foreign investment for economic growth and development and for alternative dispute resolution (i.e. ADR), it is

not enough to enact a new law on arbitration only, the Government has to go a long way to achieve the stated purpose. Bangladesh needs more than a mere piece of legislation on arbitration at the present time. The Government, the judiciary as well as the legal profession must take initiatives and make constant efforts towards the development of legal infrastructure and institution building in the field of alternative dispute resolution including arbitration. In this respect the following tentative suggestions may be worth considering:

- The efficacy of the Arbitration Act 2001 depends, to a great extent, on the attitude of the judiciary. While interpreting the new Act Bangladesh courts should not be detracted from the spirit of modernization of arbitration as a global phenomenon and should not be guided by the 1940 Arbitration Act as a source of inspiration. Not only the judiciary, but also the legal profession has to change their traditional mind-set developed under the old legal regime.
- The judiciary as well as the legal profession have to appreciate the reality that in the era of globalization dispute settlement by alternative methods is not only a domestic matter, but also an increasingly growing international phenomenon in the context of cross-border transactions. They have to be prone to absorbing international values, norms and principles while performing their professional functions in the field of international dispute settlement, otherwise their professionalism will prove moribund and will be useless to the international business community.
- It is noteworthy, the new Act authorizes the High Court Division to set aside any arbitral award made in an international commercial arbitration held in Bangladesh, whereas for recognition and enforcement of foreign arbitral awards it is the District Judge's Court, exercising the jurisdiction within the district of Dhaka, that is entrusted with the responsibility. With this latter provision the Act seems to have downplayed the importance of international arbitration for which so much efforts have been given to modernize the arbitration law in Bangladesh. International commercial arbitration is a complex matter. It involves expertise in public international law, private international law and also knowledge of international commerce, law and practice. It is not too much of an expectation that District Court Judges should be well equipped with sufficient knowledge, expertise and training to handle foreign arbitral awards that may very often involve complicated international legal issues. If it is at all, perhaps High Court Judges with requisite specialism may be better placed to deal with the responsibility for enforcement of foreign arbitral awards. It is desirable that this specific responsibility should be given to the High

Court Division even if it means to adjust the Code of Civil Procedure mutatis mutandis for the purpose.

(4) In due course, the need to create a specialist arbitration bench in the High Court Division may arise for the purpose of dealing with international arbitration matters more effectively and professionally. Such a specialist bench may be constituted by appointing a certain number of judges in the High Court Division with the appropriate expertise and background in the field of arbitration. It may even mean to relax the constitutionally requisite qualifications and experience for the appointment of judges in order to attract suitable people for the positions. The constitution of a specialist bench in the High Court Division would show the Government's seriousness in the matter of international arbitration. Such an arrangement would command respect from the international business community and create confidence in prospective parties to settle their disputes in Bangladesh and to enforce any foreign arbitral awards there. The Government has to consider seriously these matters in order to promote arbitration in Bangladesh and make it an attractive place for dispute resolution by arbitration as a method.

(5) It is not enough to enact a piece of legislation on arbitration in terms of modernization of arbitration law. The Government, the Bar and the Bench must attend to the development of the culture of arbitration in Bangladesh. Judges and lawyers must be aware of the value of alternative dispute resolution when the courts are heavily overburdened with caseloads. They must actively promote arbitration and ADR.

(6) The Government and professional organizations should promote arbitration and ADR and enhance the understanding of them by sponsoring and conducting educational and training programmes for both the bar and the bench and for arbitration and ADR professionals to keep them abreast of recent developments in theory and practice of arbitration, and by allowing cross-fertilization of knowledge in the field of dispute resolution by organizing occasional seminars and regional and international conferences under the auspices of the Ministry of Law and Parliamentary Affairs and concerned institutions.

(7) Last but not least, the Arbitration Act 2001 could be amended, on a later occasion, to incorporate rules on conciliation based on The UNCITRAL Model Law on International Commercial Conciliation (2002). There seems to be a trend in many countries now-a-days to incorporate arbitration and conciliation rules in the same document.

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FOR long in the criminological discourse there was no focus on the causes of female criminality. Most of the criminology theories have tried to look into the matter by assuming man as the only being. The researchers did not enquire into why the male criminality has been so high and why the female criminality remained so low? Global crime situation suggests that 80 to 90% criminal activities are being committed by males. Is there any crucial physiological difference behind this huge difference of crime rates between female and male? Should the difference in the process of rearing and socialization be identified to have been operative for the high rate of male delinquency and females being more law-abiding?

## Cesare Lombroso on female criminality

Cesare Lombroso, an Italian Criminologist, portrays criminals as primitive in their nature. He argues that white males are the most advanced forms of human and non-white females are the most primitive. Women having more 'atavistic' characteristics would become more criminal than others. Lombroso maintains that all females are less advanced than males. If crime is to be explained in terms of primitive traits, female crime, according to Lombroso, would be greater than male crime, but in real world the female criminality is much more lower than male criminality. He tries to repair the anomaly of his theory by holding that prostitution is female substitute for crime. He attributes the lower female crime rate to the women's proximity to lower life forms. He claims that women are less intelligent and less capable of abstract reasoning because of their small cerebral cortex. This made females more vulnerable to be caught by psychological disturbance and



sexual anomalies. He maintains that like domestic animals women are more adaptable and they can survive in any situation. Due to this capability to adapt they tolerate male manipulation and male control. According to Lombroso, criminal women are unnaturally masculine and show signs of atavism. Lombroso concludes that the

more passive a woman, the more highly developed she is.

Due to the causes which he attributes to female criminality Lombroso has been criticised as being racist. He stands for patriarchy which erects a role model for women and hold that an ideal woman ought to be very gentle and passive and be confined within

their home bound.

## Sigmund Freud on female criminality

For Freud, the explanation of female criminality is placed on sexual neurosis. Female develops a sense of inferiority when she understands that she lacks a vital organ (private part of a male.) This scarcity determines her destiny as wife and mother rather than breadwinner. Freud maintains that a female during childhood understands that she has inferior sexual organs and pondering this as a punishment she then becomes envious and revengeful and develops feminine behaviour. They become exhibitionist and narcissistic. To win the love of men the women always try to be well dressed and physically beautiful. Freud argues that the women are passive and masochistic due to physiological difference and their receptive sexual role.

Freud argues that females are more controlled due to their passivity and their strong desire for love and affection of the male. Due to the fear of disapproval and withdrawal of male love and affection, female usually do not break law. Women are self-centred and busy with family matters because of their preoccupation with envy. They do not understand justice due to their weak Super Ego. They, therefore, have no role in production and property ownership.

To Freud deviant women are those who refuse to accept their passive role and who are driven by the desire to claim private part of a male. This sort of desire is totally hopeless and they will become 'neurotic'. Such women should be given assistance to cope with their expected sex role.

## Limitation of earlier theories

All the earlier theories are more or less similar in the sense that they picture women in stereo-typically. They ascribe to women a socially (particu-

larly by patriarchy) erected sexual model role. In their view women should adhere to their role as wife, mother and home-maker. If any woman violates the socially erected norms (made by the male), that woman is categorised as deviant and criminal. Their theories are reminiscent of the concepts that women always remain a source of evil, causing the downfall of human being from the heaven. The criminality of female are considered more destructive to social fabric and men cannot do more damage to social order which women can do. This fear about female criminality has exposed the apprehension of patriarchy to lose their dominating position. They have tried to maintain the status quo. The early theorists have tried to incarcerate the female within confines of home and family. Obligation of a woman, in their view, is to conform to the role of a law abiding, passive and submissive woman.

## Sociological theories

In a fascinating manner sociologists have explained why the male crime rate is much higher than female crime. Sutherland, famous American Sociologist, pointed out that females are socialised in a different way than males. He argues that "females of all classes and ages are socialised into the same sex role: they are taught to be nice rather than egotistical; they are brought up to behave in a non-criminal fashion which is only true of some men; and they are more closely supervised and controlled."

Sutherland ponders that women are more law-abiding because of their exclusion from dominating male culture. Potentialities of girls and boys are different, so their capabilities and interests are channelled and developed through different training and education. It is the main cause of their differential behaviour. Factors like lack of access to deviant

or criminal inputs and the learning which fit them to play their role as wife, mother and home-maker, are mentioned by Sutherland as operating behind the low crime rate of females.

Some sociologists view that maleness gives rise to masculinity and femaleness to femininity. Women become criminal when this natural process breaks down. In human society gender roles are among the strongest learnt social roles.

Talcott Parsons, another American sociologist, depicts two different roles of father and mother. As father is the breadwinner, so he stays outside home and works to meet up expenditure of the family. Mother stays at the residence and busy with upbringing of the children and household matters. Children observe different roles of father and mother. A boy understands that he has to take the role of his father and a girl similarly realises that she has



to emulate her mother. Parsons argues that boys understand that the role of mother is less prestigious than that of the breadwinner. They realise that passivity, conformity, and being gentle are characteristic features of female, so they avoid these traits. If they want to become important, they must be

very active and assertive. This develops aggressive attitude among the boys which is ultimately expressed as criminal activities. The family environment teaches girls to mature emotionally and give the lesson how they would become feminine, slowly and surely. Social structure is determining the ultimate destiny of a girl to become feminine, and a boy masculine. It also teaches the girls to be conformist and law-abiding.

## Female criminality in a changing situation

The static picture of female and male (an active and breadwinner male and passive and home-maker female) has been changing with the females becoming the major or joint breadwinner. Now the females are experiencing the same pressures and strain as the male are. This increased strain causes increased female criminality. Freda Adler argues that with the women

started to fight the battles which men had always fought. This social reality causes increased female criminality.

Rita James Simon argues that women have been coming out of their home confines, so they have now more access to outside world, thereby they have now more opportunities to commit crime.

## Concluding remarks

Different brains and difference in hormonal interaction between female and male cause the genetic passivity of females. All the experiments so far have been made on animals. A number of tests are made on rats. A rat's brain becomes either male or female soon after its birth. The brain becomes female if there is predominance of female hormones (Oestrogens), the brain becomes male if predominance of male hormones (androgens) has taken place. If a female is injected with androgens in early life, she will be exhibiting male characteristics including enhanced aggressive behaviour and an early castrated male will become more passive like females. Similar tests on monkeys produced the same result and the researchers claimed that the same may be true for human being.

To infer anything from experiments on rats and monkeys and impose it on human is very risky. The continuous works on genetics, biology and sociology again and again brought before us the nature versus nurture debate. It is really very difficult to ascertain which, social or biological, factors play greater role in shaping different behaviour of female and male.

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