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WORLD INTELLECTUAL PROPERTY DAY

LAW INTERVIEW

The future of Bangladesh to be an IPRs-owner country

Professor Dr. Mohammad Towhidul Islam teaches intellectual property law at the University of Dhaka and has published his PhD thesis titled "TRIPS Agreement of the WTO: Implications and Challenges for Bangladesh" from Cambridge Scholars Publishing in 2013. Emraan Azad from Law Desk talks to him on the following issues:

Law Desk (LD): Would you please tell us about implication or challenge that the TRIPS Agreement has protecting intellectual property rights (IPRs) for Bangladesh?

Mohammad Towhidul Islam (MTI): The WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) with its 'one size fits all' approach for the protection of intellectual property rights has created both options and challenges for Bangladesh in the fields of public health, agriculture and development.

The TRIPS has provided Bangladesh with unique opportunities for its informal and rural SMEs, inter alia, to create niche market for geographically indicative goods like Jamdani or Hilsha Fish, Fazli Mango, traditional medicinal plants like Turmeric and Neem. Further, despite being a consumer of industrial property related IPRs-goods like patents, or industrial designs, Bangladesh has some booming sectors like software, textiles, ship-building and ICT where it can be an IPRs-owner country.

However, enforcement of IPRs like patents would create some serious challenges for its subsistence needs like public health or agriculture. For example, our pharmaceutical companies can reverse-engineer the medicines to supply the generics at a cheaper price. With the strict enforcement of patent rights in pharmaceuticals as required by the TRIPS would push up the prices rendering them inaccessible for the poor Bangladeshis.

LD: Like on pharmaceuticals sector, does the TRIPS have any impact on Bangladesh's agriculture and farming sector?

MTI: Yes, it has. Patents or plant breeders rights (PBRs) as required by the TRIPS to ensure plant variety protection (PVP) would seriously inhibit the traditional farming practices for the Bangladeshi farmers. The necessary monopoly created by IPRs in plant varieties would go to the seed giants and would leave the farmers with limited rights to sell or exchange seeds on non-commercial basis resulting in dysfunctional food security.

LD: How do you evaluate the significance of TRIPS transition period flexibility?

MTI: Having recognised the insufficiency in infrastructure and policy regime for enforcing the stringent IPRs standards, the TRIPS itself has provided 'special and differentiated treatment' for the LDCs. These differentiated agenda provides various flexibilities including transition period.

While the initial 'period of transition' to compliance for the LDCs was until 1 January 2006, the TRIPS provided that, the TRIPS Council "shall upon duly motivated request by a least developed country member, accord extensions of this period" (article 66 of the TRIPS Agreement). Accordingly, there have been three subsequent extensions since the commencement of the TRIPS. Two of them were plenary i.e. applicable to all IPRs as included in the TRIPS Agreement and the other one (para.7 of the Doha Declaration 2001) was applicable for only pharmaceuticals and agricultural chemicals. The 2005 extension of "transition period" for the LDCs was up to July 2013. On the eve of the deadline, the TRIPS Council extended the transition period until 2021 starting from 1 July 2013 in pursuance of a proposal sponsored by the LDC Group. The decision of 11 June 2013 has removed the condition introduced in the earlier 2005 decision that LDCs cannot roll-back the level of implementation of the TRIPS that they have already undertaken in their national legislation. Further, the special transition period for pharmaceuticals is further extended until 2033 starting from 1January 2016 at the request of the LDC Group with Bangladesh in the chair.

LD: What is the objective of the LDC transition arrangement?

MTI: The objective as stated in article 66.1 is to accommodate "the needs and requirements of least developed country Members…and their need for flexibility to create for a viable technological base". This strategic advantage enables the generic producers of the LDCs to freely copy medicines patented elsewhere for domestic consumption needs and export purposes. Like many WTO flexibilities, the primary benefit of an extended transition period lies in the preservation of policy space for the LDCs – conserving the autonomy of the LDCs to determine appropriate development, innovation, and technological promotion polices pursuant to local circumstances and priorities.

LD: Has Bangladesh been successful in utilising the TRIPS-flexibilities?

MTI: Production and export of generic pharmaceuticals is not a proof for successful utilisation of the TRIPS transition period. To do this, we have to update our age-old Patents and Designs Act by prohibiting patent ever-greening, inserting the provisions of waiver decision, and parallel imports. Further, we have not yet enacted laws in the areas of PVP, traditional knowledge (TK) and traditional cultural expressions (TCEs).

LD: What could be the legal challenges for Bangladesh at the end of transition period?

MTI: Once the transition period is over, Bangladesh would have to face the reality of the TRIPS in complying with the TRIPS minimum standards for patents, trademarks and other forms of IPRs. The current practices like reverse engineering of drugs patented elsewhere would be penalised. The seed giants would claim patents or PBRs for plant varieties curbing the traditional farming practices of our farmers for saving and re-sowing seeds. Bangladesh may also face challenges in accessing to foreign market if it is not TRIPS compliant during the post-TRIPS era.

LD: Are we ready to face the post-TRIPS transition period?

MTI: I think, Bangladesh's legal and technological base is not ready to face the harsh realities of post-transition period since the Patents and Designs Act has not prohibited patent-ever greening; no sui generis PVP legislation is enacted recognising farmers as breeders and upholding their right to access to benefit sharing and prior informed consent while using their germplasm.

LD: What is your suggestion to improve our IPRs enforcement system?

MTI: For effective IPRs enforcement, the Government should focus on IPRs education for raising awareness, establish an appellate tribunal comprising of experts, create a special unit of law enforcing agencies, and appoint special judges for disposing of IPRs disputes.

LD: Thank you, sir for you addressing the queries.

MTI: It was pleasure to talk to you.

REVIEWING THE VIEWS

Defining rape as gender neutral

FARZANA HUSSAIN

UNDER section 375 of the Penal Code of Bangladesh, 1860; rape occurs when a man has sexual intercourse with a woman under one of the circumstances like, against her will, without her consent, when her consent has been obtained by putting her in fear of death, or of hurt. The rape also occurs in the situation like when a man approaches with her consent and he knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married, with or without her consent, when she is under fourteen years of age.

An explanation of what qualifies as rape is provided at the end of the definition, which states: "penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape."

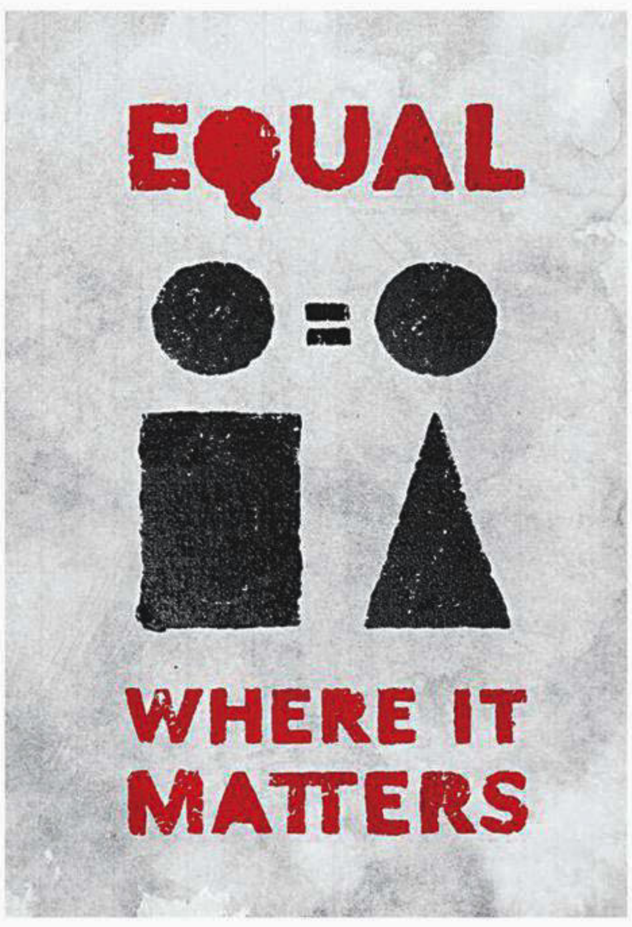
The statutory definition of rape in Bangladesh makes it clear that rape is a gender based offence which can only be carried out by a male through penetration and the victim can only be a female. Our criminal justice system only accepts penile-vaginal non-consensual intercourse as the offence of rape, a male perpetrator and a female victim. Anal or oral penetration by the penis or any penetrations by other objects are not included in the definition of such offence.

Though, under the section 375 of the Penal Code, a female cannot face the criminal trial as offender of rape. Interestingly enough, the same punishment for rape, i.e. capital punishment or life imprisonment, can be imposed on her for instigation or abetment of such offence. Section 30 of the Prevention of Oppression against Women and Children Act of 2000 confirms that the punishment for instigation or abetment of offence, under this Act, shall be the punishment provided for the commission of the offence or for the attempt to commit the offence.

It is needless to say, our archaic criminal law on rape is not gender neutral. Gender neutrality within rape statute is the concept that the criminal law should recognise that both men and women can be rape victims as well as perpetrators. Many scholars have criticised traditional rape laws that only prescribe penile-vaginal non-consensual intercourses, arguing that these laws exclude "a great deal of behaviour which is remarkably similar to the act legally distinguished as rape and...such exclusion appears to rest on no logical or justifiable grounds."

Some argued that penile-vaginal intercourse is distinguished from other forms of penetration on the ground that penile-vaginal rape risk pregnancy. In response to such arguments Jenifer Temkin had noted, " the fact that pre-pubertal, menopausal, sterilised, and infertile women as well as those practice contraception are all covered by the law of rape suggests that the risk of pregnancy is not of overriding significance in the definition of rape. "

Jurisdictions that have adopted gender-neutral laws include: Canada, all Australian states, the Republic of Ireland, Finland, England and Wales, and the vast majority of states within the United States. Gender neutrality, however, are not uniform in nature.



Though Rape is as an offence since ancient Roman time, across dozens of jurisdictions, gender neutral reforms have been adopted as part of a wider law reform agenda in an attempt to reflect a more modern understanding of the purpose of rape law.

For an instance, male rape was first recognised under English law in 1994 when the definition of rape was revised so as to include non-consensual, penile-anal intercourse of a woman and man. A further extension to the definition of rape resulted from the report of the Home office Review of Sex Offences, to include penetration of the mouth, is implemented into law by the Sexual Offences Act 2003. The Review recommended this change based on the trauma that can be caused by such assault. Whereas, in Bangladesh, regarding the offense of sexual assault, the Penal Code offers section 354 addressing "assault or criminal force to woman with intent to outrage her modesty", neither acknowledged the bodily harm of the victim or the physical or psychological trauma that a victim may go through in consequence of that assault.

To recapitulate, this is the high time for redefining rape as to adopting an expanded gender-neutral definition of rape and thus reshaping the obsolete British colonial hangover on Bangladesh Penal Code. A gender neutral law would certainly mark the beginning of a gender democratisation era in Bangladesh.

THE WRITER IS A LAWYER AT DHAKA JUDGE COURT.

LAW ANALYSIS

Reducing congestion of cases

KHANDOKER M. S KAWSAR

THE judiciary found it beneath the dignity to dillydallying inaugurating digitisation. Hon'ble Chief Justice of Bangladesh inaugurated epoch making digitisation in judicial process on 2 March 2016 in Sylhet. "A journey of a thousand miles begins with a single step." He inducted 'digitalised witness deposition system' by which the courts will not require to write down the testimony and cross-examination of witnesses manually, rather will be taken and stored in computer straight way. This is a promising step of our judicial system towards full digitisation. Digitalisation will contribute reducing cases' congestion in courts. Another big step for reducing cases' congestion is to bring the cases out of court and to solve the cases alternatively.

The Supreme Court's recent survey shows that about 1051 cases are unresolved from the cases filed in courts every day, the number of unresolved cases was about 31 lac. If no single case is filed from that day, it would take two and a half years to resolve the outstanding cases. One of the reasons of the backlog of cases is the shortage of judges. In the United States, one judge is for about 10,000 people, in India one for 67,000 people, whereas in Bangladesh one judge for more than 1 lac.

Furthermore, our judges and their offices are not furnished with modern technologies. Besides, our laws are not modern, which are contributing in congestion. The most important reason of congestion of cases is delay in resolving the cases. If our current judicial system is fully automated, it will reduce backlog of cases. Our judicial system should take steps to bring all the steps of a case under operation by software which should maintain and operate all steps from filing of the case till the end. We need to focus on e-filing procedures, along with 'Summary Disposal', to make paperless and less burdened court. Better case management also includes, efficient data entry and recovery, more effective data retrieval, fewer data errors, better case management tools, public access to case information and so on.

The day is not far off when the judges will draft their judgments through software. Judges will input the factual provisions in accordance with the pre-set legal principles and also will apply their own sense of equity and common sense, the judgments will automatically come out. The judges will have the chance to amend or modify the judgment. The lawyer's contribution in the congestion cannot be denied. The famous American lawyer John Davies said about lawyers: "True, we build no bridges. We raise no towers. We construct no pictures ... .But we smooth out difficulties; we relieve stress; we correct mistakes; we take up other men's burdens and by our efforts we make possible the peaceful life of men in a peaceful state." If this is so, why should our negligence or willful delay will complicate the litigation?

There are ways to eradicate procrastination. The judges can draft the important national or constitutional judgments before going to retirement, less important judgments following the retirement may not hurt too much. We can import 'docket system' which Australia has taken in early 1990 where each judge was responsible for its own docket of cases in which they were conducting their cases properly. Criminal cases such as, petty theft cases, drug cases can be solved summarily by the system of 'Guilty Plea' giving fine or minor punishment. A survey of Washington in America shows that about seventy percent of the cases sent in 'Early Case Resolution (ECR) Program' can be resolved in two weeks' time. In Australia ADR method is applicable even in criminal matters. In our country in criminal matters if the police submit investigation reports rightly, promptly, with integrity and devotion, the number of cases could be reduced immensely. Civil suits are also engulfed in delay. Moreover, in relieving the courts from such backlog of cases, the ADR system should be encouraged. A good number of ADR Centres should be constructed in PPP basis.

It is not possible for any of the organs alone to reduce backlog. Judges, lawyers, court officers and clerks, the parties of the case together can reduce this backlog. The government can form a committee comprising the present Chief Justice and former Chief Justices to study on how to reduce cases congestion and to recommend a wayout. We need to initiate the process of reducing cases' congestion now.

THE WRITER IS A BARRISTER-AT-LAW.

Dear reader,

You may send us your daily life legal problems, queries, write ups, opinions to: Law Desk, 64-65, Kazi Nazrul Islam Avenue, Dhaka-1215; Tel: 9144330,8124944, Fax : 9144332; email: dslawdesk@yahoo.co.uk