"ALL CITIZENS ARE EQUAL BEFORE LAW AND ARE ENTITLED TO EQUAL PROTECTION OF LAW"-ARTICLE 27 OF THE CONSTITUTION OF THE PEOPLE'S REPUBLIC OF BANGLADESH ● dslawdesk@yahoo.co.uk

Right to inheritance of the *Hijras* in Bangladesh

LAW OPINION

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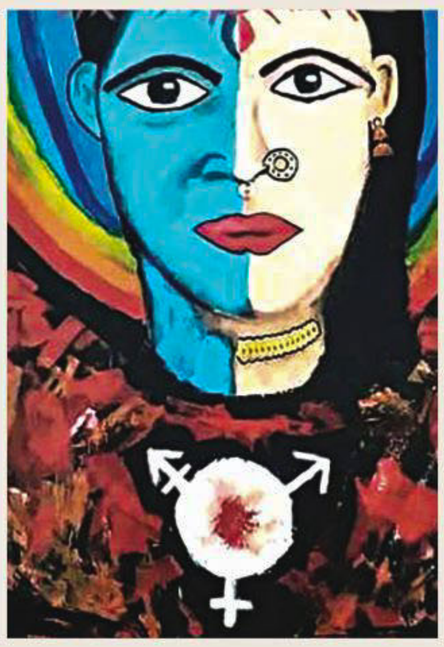
SOMEONE having some or all of the primary characteristics of both genders, male and female, is identified as Hermaphrodite/Khuntha/Intersex person (commonly known as *Hijra* in Bangladesh). In medical perspective, they are such persons whose body does not confirm to 'arbitrarily qualified' criteria either that of male or female physique and thus, confusing only so far their sex is concerned but are human beings. Therefore, being a creation of the Almighty there is no reason of not treating them as human having rights, liabilities and other privileges that naturally come along. Rightly, though from the beginning of the 20th century, countries of the then British-India, Nepal, Pakistan, Bangladesh and India began to recognise them as third gender by the years 2007, 2009, 2013 and 2014 respectively either through Government policy decision or by rulings from the apex court of the country.

The Constitution of Bangladesh, being solemn expression of the peoples' will and the supreme law of the land, recognises and guarantees its citizens the fundamental rights in order to protect their life, liberty and property. In these endeavours, sovereign legislate various municipal laws to ensure 'legal rights' in line with constitutional commitments and pledges. Although, at times they lack behind or could not leave up to common expectations and required need, and this is where the gap exists, which in most cases, are the cause of social discontent and resentment. In the Indian sub-continent, citizens are governed by their own personal laws (unlike western world) in relation to family matters as well as inheritance and succession. There is fallacy that rights of the *Hijras* are not specifically defined, specially the right of inheritance. However, authoritative jurist by construing the teaching of *Sunnah*, *Izma* and *Qiyas* opined that in Islamic jurisprudence, there are provisions to determine the gender of such human beings and once that can be done, inheritance is matter of calculation only (since the laws of inheritance is gender-based under most of the personal laws).

To embrace the issue in *simpliciter*, a *Hijra* will be characterised as a male when he has sexual associations with his male reproductive organ, has capabilities of nocturnal discharge like men, is inclined to woman, produces facial hair and his testimony of his inner-self. On the other hand, when a *Hijra* has sexual affairs with her female reproductive organ, becomes pregnant, practices menstruation, experiences growth of breasts like women along with lactation will be considered as female and thus, once the gender can be determined, the *Hijra* will succeed as male or female accordingly in all cases. However, if nothing or all of the above symptoms occurred, then such person will not be assigned a gender rather be termed as hermaphrodite difficulty/'*khuntha mushkil*' and here exists difference of opinions amongst Islamic jurists as to their share of



inheritance [according to *Hanafi* School, they always would inherit lesser of the male or female share, whichever share is smaller, either as male or female while Abdullah bin Abbas (RA) opined that they will get half of the combined shares (both as male and female), hence making it as average share], but no disagreement on the issue that *Hijras* would have rights of inheritance as discussed above across contemporary Muslim world like in Iran, Iraq, Egypt, Syria, Kuwait etc. and they made provisions to that effect within their national legal regime.

Like Islamic jurisprudence, under the Dayabhaga School (prevailing law in Bangladesh) of Hindu jurisprudence the inheritance rule is also gender-based, and accordingly the same conceive that as *Hijras* are not categorised either as male or female, they remain excluded from inheriting their ancestral property. But, such rational does not stands in as much as the modern medical science is quite capable of determining the gender by applying medical test on *Hijras* through 'Chromosome Analysis', thus a human is either a male or female (even if they born with congenital disorder). Moreover, the orthodox jurists of Hindu law are also to some extent more conservative or rather rigid in the sense that they even opine and are eager to consider some congenital and incurable defect of a human (i.e., blindness, deafness, dumbness, absence of a limb/organ and impotency) as enough to exclude them from inheriting property. Other minority religious communities of Bangladesh, i.e. Christians and Buddhists used to follow the Succession Act, 1925 (not having personal laws of their own) and surprisingly here too the share of inheritance is based on gender.

In the preceding discussion, I have categorically showed that it is possible to identify *Hijra* either as a male or female, except in rare cases of '*khuntha mushkil*' when gender may be ambiguous in terms of physique, but that also can be determined easily through medical test of 'Chromosome Analysis' of a human being. Therefore, there seems no problem to determine inheritance of the *Hijras* in Bangladesh or elsewhere (within British-India) whatever be their religion, cast or creed, unless there is lack of political will of the State which often seems to be the real cause.

Out of dissatisfaction, mistrust and social stigma, the *Hijras* often consider themselves as outcaste and at times feel lonely due to the agony that they used to bear with them in their up-bearing stages of life not having the opportunity to attend schools, mix with children of the same age and socialise generally in the community like others around them. Be that as it may, can we deny that they are not a part of our humanity and deserve usual treatment like others and thus lead normal livelihood and enjoy minimum social respect? I wonder whether law and for that matter, sovereign political will be enough without social empathy?

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LAW IN-DEPTH

Legal implication of Myanmar's claim over St. Martin

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AFTER Myanmar's circulation of a false picture (which claimed to show insurgents training while it was actually a photograph of Bangladeshi freedom fighters during the Liberation War), the Government of Myanmar has yet again come up with another false claim showing Bangladesh's St. Martin's Island as part of its territory. On 6 October 2018, the Government of Myanmar updated its 2015-2018 map of Myanmar Information Management Unit showing St. Martin as a part of their sovereign territory and spread the maps in two global websites (www.dop.gov.mm & www.themimu.info). In the map, similar color has been used for both Myanmar and the Saint Martin's Island. The Bangladesh territories were projected in black. When one looks at the map from the surface level, this false claim is not visible, however, when the map is zoomed in, the difference comes to sight.

Following the event, the Myanmar Ambassador in Dhaka was summoned by the Government of Bangladesh on 6 October 2018. Rear Admiral (retd) M Khurshed Alam, maritime affairs secretary at the Ministry of Foreign Affairs, Government of Bangladesh handed over a strongly worded protest note to him. The Myanmar envoy said it was a "mistake" to show the St. Martin's Island as part of his country's territory. However, we can sense an "ulterior motive" behind drawing and sharing the map of Myanmar on Government approved websites after their dawdle with the repatriation of the displaced Rohingya population.

Website of Myanmar's Department of Population which shows St Marin's Island is included in the country's territory.

If anyone looks back at the history since 1937, one can find that the Island had never been a part of Myanmar. St. Martin's Island was part of British-India when Myanmar got separated in 1937. A clear line was drawn that this Island forms part of British India. After the partition of the British India in 1947, it became part of Pakistan and later on a part of independent Bangladesh after the Liberation War of 1971. In 1974, it was clearly stated through a signed agreement between the two states that this Island is part of the territory of Bangladesh. Moreover, even when Bangladesh won the maritime boundary dispute against Myanmar in the International Tribunal for the Law of the Sea (ITLOS) in March 2012, it was clearly mentioned that the Island belong to Bangladesh. The Ministry of Foreign Affairs of Bangladesh is of the view that publication of this map is a deliberate attempt to destroy bilateral relation and regional peace. It has to be noted that there has been no dispute over the ownership of St. Martin till date. The only dispute that Bangladesh had with Myanmar, regarding the delimitation of the maritime boundary, was settled in the ITLOS a few years back.

In the International Courts and Tribunals, parties to boundary and territory disputes often rely on maps favourable to their claims. Traditional international law restricts the evidentiary value of maps so that they provide only collateral, rather than probative evidence of title. In the eye of International Law, maps do not constitute titles. The principle that emerges from international jurisprudence and doctrinal discussions is that cartographic materials do not by themselves have any legal value. Such position of law has been specifically observed whenever the map describes territory of which the authors have had little knowledge, is geographically inaccurate, or is sketched in order to promote a country's claim. Even official maps, that is, those issued or approved by a governmental agency, have been treated with considerable reserve. With regard to maps as such, the popular approach, arising from their inherent limitations, is not to treat them as conclusive, but of relative value. The leading case on this point is Frontier Dispute (Burkina Faso/Republic of Mali). In its 1986 judgment, the International Court of Justice (ICJ) stated that in frontier delimitations "maps merely constitute information" and that "of themselves, and by virtue solely of their existence, they cannot constitute a territorial title."

This rule is deeply rooted in public international law adjudication and has been confirmed in the context of sovereignty disputes over islands. Max Huber, sole arbitrator in the famous Island of Palma case, already stated in 1928 that 'only with the greatest caution can account be taken of maps in deciding a question of sovereignty'. Under international law a map per se does not constitute a territorial title or legal document to establish territorial rights. For maps in international law, most of the maps are just information.

Subsequent to the strong protest on the part of Bangladesh, Myanmar was bound to remove the information that showed St. Martin as part of its own territory. The Parliamentary Committee of Bangladesh dealing with foreign affairs has asked the ministry to take steps to monitor if such information was published on any other website. After their visible acts of bad faith in the entire Rohingya humanitarian crisis, the mere explanation of 'unintentional mistake' is not credible. The government of Bangladesh has to cautiously face and overcome all the diplomatic acts of Myanmar.

THE WRITER WORKS WITH LAW DESK, *THE DAILY STAR*.

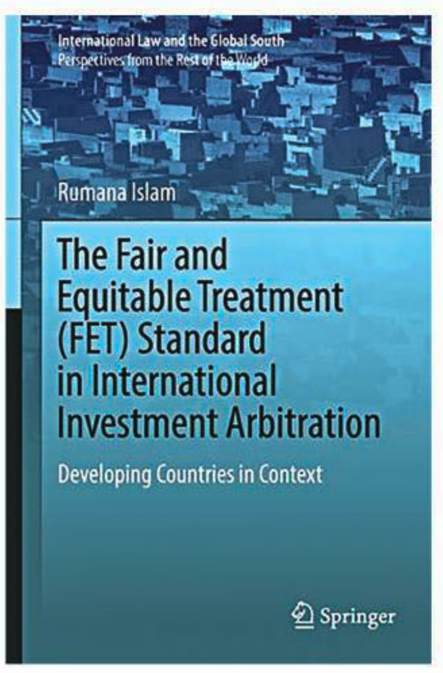
BOOK REVIEW

Reconceptualising FET standard in international investment arbitration

IN the realm of international investment treaties, Fair and Equitable Treatment (hereinafter, FET) has over the years been considered as a core investment protection standard. In the same breath, FET has also been considered as the most debated and controversial protection standard considering its 'catch-all' scope and the wide discretionary power that it provides the arbitrators with. The high volume of disputes against host developing countries and the significant economic impact of these disputes upon the same raise serious concerns regarding the invocation and enforcement of this catch-all provision by the foreign investors and the arbitrators respectively to combat virtually any adverse treatment by the host developing countries.

Dr. Rumana Islam has seen the FET standard through critical legal specs in her book "The Fair and Equitable Treatment (FET) Standard in International Investment Arbitration: Developing Countries in Context". Commonwealth scholar Dr. Islam is Associate Professor of law at University of Dhaka and Assistant Director of Research (Law) (part-time) at the Bangladesh Institute of Law and International Affairs (BILIA). In the foreword of the book, Professor M. Sornarajah, Faculty of Law, National University of Singapore has lauded the approach adopted by Dr. Islam as a refreshing one on the subject.

Upon introducing the readers with the background and context of the endeavour, the author in second chapter of the book sheds light upon the historical development of the FET standard which



encompassed the emergence of the standard through multinational treaties and the development of the same by the developed countries by making a room for it in multilateral agreements as well as in numerous Bilateral Investment Treaty(ies) with their developing country counterpart(s).

The third chapter focuses on the variant interpretation of the FET standard in different investment treaties at bilateral, multilateral and regional levels which have generated complexity, controversy and debate over the issue. The fourth chapter contextualises the entire discussion by taking recourse to the diverse classifications of countries that different international organisations and academic scholarship have adopted, in order to set a premise in the book for the developing host countries participating in international investment arbitration.

The fifth and sixth chapter critically examine some selected arbitral awards which go on to demonstrate how the issues of political stability and particular political, socio-political circumstances of the host developing countries form a significant contextual background for the enforcement and invocation of the FET standard in respect of investor-state dispute against these countries. These two chapters show how FET standard prioritises the interests of foreign investors and neglects the perspectives of host developing countries.

Chapter seven investigates the loopholes as well as the key cross-cutting problems associated with the interpretations of the FET standard adopted by the arbitral tribunals over the years.

In conclusion, the book argues for the pressing need of reconceptualising the interpretation of the FET standard and for considering the different perspectives of the host developing countries in an investment dispute context. The book is a part of the series 'International Law and the Global South: Perspectives from the Rest of the World' and is an immensely scholarly contribution made to the realm of existing knowledge dedicated thereto.

FROM LAW DESK.

LAW NEWS

Sexism treated as crime in Belgium

THE law criminalising sexist behaviour arose out of a widespread social debate in Belgium in 2012. It showed a woman being insulted and receiving unsolicited proposals and hisses as she walked in Brussels. Under the law, any behaviour expressing "contempt towards a person, because of their sexuality" or treating a person as "inferior or as reduced essentially to their sexual dimension", which entails a serious attack on their dignity is punishable by up to a year in prison and/or a fine.

Since 2012, there was an idea in the minds of many that this law (even though was progressive in nature) was there in place only in order to condemn sexism in black and white and it was widely thought that it will not be possible to treat sexism as a crime for practical purposes.

Disproving all the (mis)conceptions, a man has been convicted of sexism in a public place for the first time. A court in Brussels fined him €3,000 for insulting a police officer because of her gender. The

case involved a driver who was stopped for breaking the highway code. The young man – who has not been identified – insulted the police officer because of her gender, the court heard. He was reported to have said she would be better off doing a job "adapted to women", in a scene witnessed by several other people.

Professional women and women from all walks of life often face degrading behaviour and treatment only on account of their sex and the same is condemnable. The new law in Belgium and the application of the same widen a new domain in the persisting gender based legal discourse and narratives.

COMPILED BY LAW DESK (SOURCE: INDEPENDENT.CO.UK).