"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

LAW OPINION

Interpreting Discrimination in the Constitutional context of Bangladesh

KAWSER AHMED

IN Bangladesh, there is a prevalent common perception that unjust or unequal treatment results in discrimination. For example, the High Court Division in the *HRPB v. Jatiyo Sangsad* [67 DLR (2015) 191] held that section 32Ka of the Anti-Corruption Commission Act, 2004 was discriminatory because it created unjust classification (Para 26). The Court explained that the requirement of having prior sanction from the government to prosecute judges, magistrates or public servants for corruption under section 32Ka is inconsistent with article 27 of the Constitution, which provides that all laws should be non-discriminatory and reasonable (Para 30). Noticeably, the Court used the principles of non-discrimination and equality before law synonymously

গণপ্রজাতন্ত্রী বাংলাদেশের সংবিধান

in its reasoning. This essay, however, relying on the textual interpretation of the relevant provisions of Bangladesh Constitution argues that discrimination, in the constitutional context of Bangladesh, occurs when prejudicial distinction is made strictly on the grounds of religion, race, caste, sex and place of birth. Distinction made on any other grounds or criteria does not amount to discrimination.

Article 27 of the Bangladesh Constitution provides that all citizens are equal before law and are entitled to equal protection of law. Article 28(1) of the Constitution provides that state shall not discriminate against any citizen on grounds only of religion, race, caste, sex or place of birth. If the aforesaid provisions are read together, it becomes crystal clear that an act of unjust or unequal treatment has not been envisaged as discrimination unless relatable to distinction made on the grounds of religion, race, caste, sex and place of birth. In other words, an act of discrimination among others should entail aspects of unjust or unequal treatment *per se* is not discrimination. Moreover, benign classifications made on the grounds of religion, race, caste, sex and place of birth may not amount to discrimination if they do not result in any prejudicial consequence.

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Most probably, the reason for treating non-discrimination and equality before law as synonymous concepts could be fairly attributed to the influence of international human rights instruments such as, the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR). For example, article 7 of the UDHR provides: "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination." Similarly, article 26 of the ICCPR provides: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." It deserves mention that both article 7 of the UDHR and article 26 of the ICCPR tried to conflate the principles of non-discrimination and equality before law. These instruments envisage non-discrimination as a means to achieve equal protection of law. However, unlike the UDHR or the ICCPR, non-discrimination as enunciated in article 28(1) of Bangladesh Constitution is a stand-alone concept and has not been linked up with the principle of equality before law. Similarly, the principle of equality before law as set out in article 27 has not been linked up with non-discrimination.

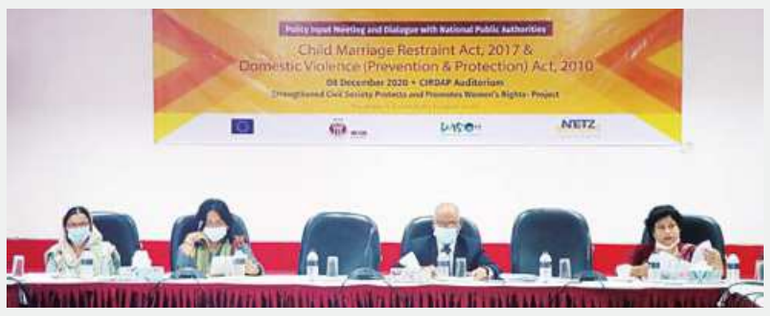
The fact that the Constitution has incorporated non-discrimination and equality before law as discrete concepts in two different provisions should not be without consequences. A moment's reflection will show that the disconnect between non-discrimination and equality before law as enunciated in the Constitution of Bangladesh wields enormous potentials for the judiciary to develop jurisprudence for strengthening rule of law in the country. Given that the grounds of discrimination are few in number, the scope of article 27 i.e., equality before law appears to be far wider than that of article 28(1) and the judiciary can take advantage of this particular feature by devising suitable juridical tools to ensure fair application of the law, procedural transparency and avoidance of arbitrary discretion, etc. It provides the judiciary with wider latitude in judicial policymaking so as to ensure better protection of the law for all.

THE WRITER IS AN ADVOCATE, SUPREME COURT OF BANGLADESH.

LAW NEWS

PREVENTING CHILD MARRIAGE AND DOMESTIC VIOLENCE

Proper implementation of law is needed



LAW DESK

NETZ Partnership for Development and Justice, along with it partner organisations We Can and DASCOH Foundation jointly organised a Policy Dialogue with relevant public authorities on the progress and obstacles of the implementation of law on 08 December at CIRDAP Auditorium, Dhaka under the project titled Strengthened Civil Society Protects and Promotes Women's Rights supported by the European Union. Representatives from the relevant government ministries, local governments and academicians and regional and local CSO members joined the policy dialogue.

The meeting shared the findings and recommendations of a study entitled 'Domestic Violence and Child Marriage: An Inter-locked Tragedy in Women and Girl's Life in Bangladesh' conducted by Rabeya Rawshan, Senior Consultant and Mohammad Golam Sarwar, Lecturer, Department of Law, University of Dhaka. The study consulted local and regional civil society organizations (CSOs) and documented their policy inputs in relation to implementation of Domestic Violence (Prevention and Protection) Act (DVA) 2010 and Child Marriages Restraint Act (CMRA) 2017 and existing gaps in the implementation process.

The study shows that the societal structure influenced by embedded traditions and culture creates impediments towards the implementation of CMRA. The malpractice by lawyers facilitates child marriages through affidavits that have been treated as an accepted norm though they have no legal effect. These irregularities not only bypass the actual implementation of law but also create an extra-legal culture which seriously hampers the social fabric. The in-depth analysis of the CMRA shows that considering the social context of Bangladesh where the awareness against child marriage is still under-developed, the special provision under CMRA may be used to justify child marriage.)

Researchers also presented the frustrating findings regarding the DVA. The study reveals that the Act is rarely exercised by the common people.

Dr. Abul Hossain, Project Director, Multi-Sectoral Programme of Violence Against Women of Ministry of Women and Children Affairs;Laila Jesmin Banu, Programme Manager of European Union (Bangladesh); Irfat Ara Iva, Programme Analyst of UN Women; Zobaida Nasreen, Associate Professor, Department of Anthropology, University of Dhaka; Sabina Sultana, Senior Program Officer, Multi-Sectoral Programme of Violence Against Women of Ministry of Women and Children Affairs; Akramul Haque, CEO, DASCOH shared their valuable insights. The following recommendations were made:

The implementing stakeholders should be made accountable.

The provision of keeping separate register for domestic violence cases must be implemented.

The provision on effectuating the penalty within two years of child marriage should be brought within the jurisdiction of the mobile courts.

The government should direct the District Bar Associations to cancel the registration of notary advocates who are engaged with the commission of child marriage.

The Union and Upazila Women Affairs Officer must take proper steps for the establishment of Child Marriage Prevention Committees.

LAW WATCH

SUNSET CLAUSE: THE DEATH OF A LEGISLATION

SUPTI HOSSAIN & MD. MASFUKUR RAHMAN

SUNSET clause is a legal provision which provides for automatic disposition of any law or agency or government programme unless extended. It is considered as an important part of temporary legislation. It delineates the expiration of any law or provision on a fixed date when no extension or renewal of that law is executed. Sunset provision determines the destiny of legislative provisions and acts as a mirror for the evolution of society, economic and political conditions. Sunset clauses permit the coordination of the provisions for changing social and political circumstances and determining the expiration date of unnecessary acts.

There are some elements which need to be fulfilled to include sunset clause in any statute. At first, a determined reason should be considered for attaching this clause into the statute. Secondly, it is necessary to consider that the statute might not be perpetual. Finally, the effects of the sunset provision should be evaluated by legislators with a view to verifying the purposes for containing this clause.

However, in case of renewal or extension of the sunset clause, the burden of proof is shifted to the legislators claiming that sunset clause should be extended and this extension is compulsory. However, before that, an evaluation process is essential for analysing the effects of the sunset clause and its dispositions. The objects of this evaluation process are to justify whether the aim for which this clause was included has been achieved or whether the clause should be extended for a specified period or this extension is obligatory for legal purposes.

As sunset provision is a specific clause for automatic termination of statute or provision, this clause can be useful as a precautionary instrument to access new statutes for appropriate generation and society. Since this provision is the indication of temporary legislation, this clause may be required in case of war, economic crisis, or other extraordinary emergency circumstances. In the United States, the USA Patriot Act enacted a number of sunset clauses in the emergency situation of the 9/11 terrorist attack in 2001. Even in Germany and in Netherlands, sunset clauses were used to prevent excessive bureaucracy and regulatory burdens. Therefore, it can be seen by the practice that sunset clauses are the means to reduce regulatory problems and prevent uncertainty.

There are some shortcomings of sunset provision, particularly on investments and tax credits. For example, in United States, once this provision was included in the regulations on production tax credits to fuel investment in renewable energy and innovation. This provision was imposed on these tax credits for three years but it appeared to be insufficient and at least three to seven years were required for that project of energy.

In Bangladesh, there is a law named *Druto Bichar Tribunal Ain 2002* which also contained sunset clause of seventeen years. However, the Government of Bangladesh decided to extend the period of sunset provision of *Druto Bichar Tribunal Ain 2002* in 2019. The interesting fact is that the law was already expired on 9th April of 2019, about 2 months ago before the amendment took place. It was argued that if such law amended after expiry, that would conflict with article 35 of the Constitution of Bangladesh in respect of trial and punishment. However, it at least opened a door to come out from obsolete laws in Bangladesh.

THE WRITERS ARE MEMBERS OF RESEARCH WING AT A.S & ASSOCIATES.

REVIEWING THE VIEWS

Moral Policing in Bangladesh: legal implications

ARPEETA SHAMS MIZAN

MORAL policing is when someone imposes their subjective standards and ideas of ethics and morality on other people and prevents them from exercising their civil liberty. For example, X thinks women should not be out after sunset. If X approaches a random female pedestrian on the street and starts questioning her why she is outside at an odd time, that is moral policing.

Moral policing is not lawful. Moral policing is done by people who are socially, culturally and politically powerful by abusing their power and privilege without any lawful authority. Moral policing is when a man uses his male privilege to tell a woman she should not be wearing trousers. It is when a local businessman disciplines a poor female worker because she dared ask for sick leave. It can even be a woman rebuking other women for leaving their babies at home for joining office after maternity leave. None of the grounds that sparked the outrage: wearing trousers, asking for leave or resuming work after pregnancy are backed by legal sanctions. But these moral police believe that it is a moral responsibility to surveil women to keep them at the right place.

Moral policing does not fall under freedom of speech. Free speech does not excuse hate speech or misogyny. Thus, any abuse directed at humiliating a person or group of persons is not protected by free speech as per national and international legal standards.

Why does it happen?

Moral policing is a manifestation of extra-legal mob justice. In most cases, it is the men who do moral policing whenever they feel that women are getting out of control, that women are not preserving the traditional ethos and culture. But because their concerns cannot be enforced through legal means (e.g. X cannot make a complaint to the police that a woman is smoking at a public place) they take the matter in their own hands.

In the Indo-Bangla-Pak sub-continent, moral policing is rampant. It is a widely

practised patriarchal norm to make women guilty. women are demanding their legal rights? shameless! women are demanding their due wages? Characterless! women are refusing early marriage? Prostitutes! These are rooted in conservative patriarchal norms which with public sanctions often go unchecked.

What makes the matter worse is that more often than not, even the law enforcement agency engage in moral policing, by abusing their authoritative positions. It is not uncommon in Bangladesh to see police raiding restaurants and parks in towns to arrest couples sitting together. It is a basic civil liberty for citizens to freely and peacefully intermingle in public places. But police arrest couples for simply sitting closely or holding hands under the pretext of obscenity because according to those particular police officers, unmarried couples holding hands constitute immoral activity. These police officers may turn a blind eye to the local loan defaulter or drug dealer, but young lovers never escape their attention.

Moral policing has other manifestations in Bangladesh, and it does not only happen in open spaces or roads. In 2017, a faculty member of Dhaka University Gender Studies department was temporarily dismissed on accusations of displaying obscene content in class; in fact, what the faculty member showed in class were reading materials on human sexuality. It was the Gender Studies department after all! This shows what a scary level moral policing has reached in Bangladesh. Even this year we have seen two instances where government officials by transgressing their authority, ordered women employees in their office to wear hijab and Islamic dress, because they felt by being the head of the office, they can dictate how their subordinates should behave.

Why is moral policing bad?

Moral policing constitutes violation of constitutionally guaranteed civil rights, privacy rights and facilitates violence against women. the most common justification for moral policing is "protecting women's safety and security.

Moral policing has been on the rise in recent times in Bangladesh. Last week when random men walked up to an adult woman, demanding justification for her smoking, the bystanders justified it by protecting the social values. Nobody seems to notice the men freely smoking which affects children and common people through passive smoking.

The Constitution of Bangladesh guarantees freedom of movement, freedom of association and privacy. Moral policing violates all these rights, especially for women. Article 28 of the Constitution guaranteed equal access to women in all public places and institution.

Can we prosecute moral policing?

Unfortunately, there is no offence called moral policing under Bangladeshi law, however, we can prosecute people engaging in moral policing under other grounds. For example, if couples are harassed by the police, they can file a case under section 166 of Penal Code 1860 (PC) for Public servant disobeying law, with intent to cause injury to any person. We can also file cases on grounds of criminal intimidation (u/s 503 of PC) outraging the modesty of a woman (u/s 354 of PC), unlawful confinement (u/s 340 of PC), Assault or criminal force with intent to dishonour person, otherwise than on grave provocation (u/s 355 of PC), extortion (u/ss 383, 385, 386 of PC) and sexual assault against women under Nari O Shishu Nirjaton Domon Ain.

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