

LAW INTERVIEW

There is an acute need for independent legislation in relation to data protection

Omar H. Khan is a Barrister-at-Law of Lincoln's Inn and an Advocate of the Supreme Court of Bangladesh. He heads one of the top full-service corporate law chambers in Bangladesh, namely, Legal Counsel. Legal Counsel provides legal services to a large number of corporates from various sectors for over decades and is also known for its legal innovations and pro-bono services. Law Desk, The Daily Star talks to him on the following issues.

Law Desk (LD): How would you evaluate the growth of commercial laws in Bangladesh since Independence?

Omar H. Khan (OHK): Since independence, Bangladesh has taken various initiatives for ensuring sustainable economic growth. In the recent years, the growth has been magnificent. Various laws relating to trade and commerce have been enacted. The Consumer Protection Act, the Competition Act, several amendments to the Companies Act,

treaties etc., give a very positive ray of hope. In pursuit of sustainable achievement, it is aspired that more commercial laws shall be enacted and updated for addressing the ever-increasing demands, particularly in relation to data protection, intellectual property laws, laws related to businesses conducted through digital platforms, CSR etc.

LD: What are the key legal matters a corporate should consider in conducting their business?

OHK: Before starting a venture, the appropriate legal structure of the business and the pros and cons associated therewith needs to be carefully identified. Upon establishment, the necessary licenses need to be procured. Apart from ensuring legal and regulatory compliance in general, one needs to also be mindful of whether any sector specific laws are applicable to them. It is important to consider compliances with the applicable laws and regulations, timely submission of different regulatory returns, full compliance with the income tax and VAT obligations, audit obligations, etc. In fact, large corporates maintain independent departments/divisions to ensure different aspects of compliance and corporate governance. For SMEs, while engaging large manpower may not be viable, they still need to ensure all the compliances in full.

LD: In your opinion what are the three fastest-growing corporate law areas in the world and how effectively the laws of Bangladesh address such growing need?

OHK: There are many legal areas



which are growing rapidly. In my opinion, the following are three of the fastest-growing areas of corporate laws in the world:

i) Digital Security Laws: Bangladesh has recently enacted the Digital Security Act 2018 for ensuring a safe cyber space and it also has an Information and Communication Technology (ICT) Act 2009 which addresses a wide range of information and communication related matters. However, I feel there is still an acute need for independent legislation in relation to data protection.

ii) Mergers & Acquisitions (M&As): M&As are growing all over the world. Bangladesh, even being a fast-growing economy, its M&A environment has still been in an immature stage. Nonetheless, it should also be noted that although public M&As are rare, the Bangladeshi market has been primarily driven by private M&As.

Moreover, Bangladesh has even witnessed one of its biggest cross-border acquisitions in recent times on a tobacco company and mergers of 2 telcos. With regard to the legal environment, it is observed that laws such as the Companies Act 1994, the Competition Act 2012, laws and regulations relating to Securities, etc. are all in place. We shall focus on smooth implementation of these laws with additional attention on easing the foreign exchange regulations in order to avoid unwarranted delay and procedural difficulties in M&A transactions.

iii) Labour and Employment Laws: There has been a continued growth of this particular area of corporate law over the years. Bangladesh Labour Act was enacted in 2006 (repealing 25 pieces of legislation and codifying largely all labour laws in one piece of legislation), along with the Bangladesh Labour Rules in 2015. It should be noted that the BLA has been amended 5 times since 2006. Moreover, recently Bangladesh EPZ Labour Act 2019 has also been enacted. Considering the organic growth in economy and ever-changing employment conditions, such laws need to be constantly updated.

LD: How competitive is the corporate law practice in Bangladesh and what attributes helped you to stand out?

OHK: Corporate law practice in Bangladesh is, indeed, very competitive and it really takes tremendous hard work and determination to stand out in such

a field. Nonetheless, with utmost passion and dedication, we have always aimed at providing the highest possible standard of legal services to each client. I believe and pursue the global business principles of quality, integrity, and unity. Moreover, Legal Counsel is engaged in various social and philanthropic causes, provide pro bono services and also conduct legal practices in the most environmentally friendly way. We have different internal policies and practices in place in the model of top law firms of North American and European jurisdictions. We also maintain our strength in litigations and ADR besides providing advisory services. I certainly feel professionally content to pioneer legal innovations in the country which are replicated not only domestically but also internationally.

LD: What advice would you give to aspiring corporate lawyers?

OHK: Legal field is extremely challenging, yet very rewarding. It takes a lot of hard work, passion, dedication, sincerity and patience. Aspiring corporate lawyers should not only be enriched with the knowledge of substantive law, but also be well-aware, and prepared for the practical challenges and hurdles in the legal field. They should be updated on the current legal affairs and global corporate developments at all times, be smart, sincere and prepare themselves to critically analyse legal problems of their clients to provide the best possible legal solution to them, thereby serving their best interests.

LD: Thank you very much
OHK: You are most welcome.

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the BIDA Act, the One-Stop Service Act, regulations in relation to listed companies, laws related to special economic zones, Public-Private Partnership Act, Money Laundering Prevention Act, codification of the labour laws are only to name a few. Enactment of such laws, regulations, policies along with ratification of international trade related agreements,

RIGHTS WATCH

Addressing gender inequality during Covid-19 pandemic

LAW DESK

The 2021 theme for International Women's Day is "Women in Leadership: Achieving an equal future in a COVID-19 world". As the world gradually sets its sight on rebuilding the world after the COVID-19 pandemic, questions of gender equality have become more pertinent than ever. In many ways, the pandemic has brought into focus the existing facets of inequality and has made more prominent the urgency of addressing these inequalities to better prepare for the future. With that in mind, it's important to evaluate the impacts the past year has had on women and girls of the country.

Experts have repeatedly brought to attention the need to view the pandemic-induced crisis through a gendered lens and have brought attention to the increased vulnerability to which women were subjected as a result of not only physical restrictions due to lockdown measures, but also lack of access to income, healthcare and for girls, education. Surveys have noted an increased incidence of child marriage – schools have been shut down since March 2020, creating both social and economic burdens on parents leading them to opt for marrying their daughters off. A significant rise in incidence of domestic violence was reported by rights organisations, the plight of which was exacerbated by limited access to legal and medical support for victims. Thousands of female workers, largely those who worked in the RMG sector and in the informal sector as domestic workers, lost their jobs or faced significant reduction in pay.

In the backdrop of these growing concerns, some legislative and judicial developments having bearing on women's rights have taken place. Although not all have received unanimous support, they require some reflection.

The most notable legislative development in 2020 was perhaps the introduction of death penalty as a punishment for rape. In the face of countrywide protests, an Ordinance was passed (later enacted by the Parliament) amending *Nari O Shishu Nirjatan Daman Ain 2000* which made death penalty the highest punishment for rape. The law previously punished rape with life imprisonment. The quantum of

punishment under the law left no room for sentencing discretion and combined with the shortcomings in the prosecution and trial level meant that convictions under the law were rare. As such, the increase in punishment without any effective improvement to the investigation and trial process is unlikely to result in any significant change. Although it may be too early to evaluate the deterring effect of the higher penalty imposed by the amendment, it is worth noting that according to the survey of *Ain O Salish Kendra*, 160 reported



cases of rapes took place in about the last three months 2020 after the passage of the amendment and 84 cases of rape were recorded in January 2021 alone.

Increased incidence of domestic violence was reported by various surveys and reports of rights organizations. According to the statistics of *Ain O Salish Kendra*, 554 women were victims of domestic violence of which 367 died and 90 committed suicide. 218 women were subjected to violence for dowry of which 89 died as a result of the abuse and 18 committed suicide. Although the National Helpline for Violence against Women remained open during the lockdown, providing effective legal, medical and psychosocial support to victims within the existing constraints proved to be a challenge. The Domestic Violence Act 2010 provides certain remedies for victims of domestic violence; however, the lack of adequate number of government funded safety shelters and trained personnel hinder

proper implementation of this law.

According to the reports of Bangladesh Bureau of Statistics, incidence of child marriage has increased by 13% during the COVID pandemic, making this the highest rate of child marriage in the country in the past 25 years. Child marriage rates significantly increased during May, June, July, August and September. The Child Marriage Restraint Act 2017 penalises the solemnisation of underage marriage. However, the Act creates an exception for underage marriage in 'special circumstance',

thus effectively removing a minimum age of marriage. As per rule 17 of the Child Marriage Restraint Rules 2018, the parties to the marriage or their parents and legal guardians may file an application to the appropriate court along with the necessary legal documents for marriage in special circumstances. Although the Rules seek to clarify the controversial provision of the law, the absence of a minimum age of marriage leaves room for its misuse and creates valid concerns about the wellbeing of girl children with increased vulnerability to child marriage.

To work towards the goal of an "equal future in a post-COVID world", it is imperative that laws are properly amended to reflect the country's commitment to international standards of equality and non-discrimination. It is equally important that a holistic and coordinated effort is led by all stakeholders in the effective implementation of the laws.

LAW OPINION

Judiciary participating in law-making An analysis on the Southern Solar Power Ltd Case

NAFIZ AHMED

In the 2019 case, *Southern Solar Power Ltd and another v Bangladesh Power Development Board and others* [(2019) 2 LNJ] the High Court Division of the Supreme Court of Bangladesh (HCD) held, "the Constitution of Bangladesh empowers the High Court Division to declare any law to be void, this Court is competent to make observations about any law, including what ought to be in the Act." To justify its position, the HCD went on to hold that as the framers of the Constitution intended the Supreme Court to be the guardian of the Constitution, it is the duty of the Court to assist the Parliament by pointing out the loopholes in the law. To its credit, the Court went on to note that the Court's view is not binding upon the Parliament. The Court does not provide any detailed justification for taking this position in this judgment. The Court seems to believe that since it has the jurisdiction to decide the constitutionality of a law, it also possesses the power to make observations as to what the content of a particular law ought to be. This would then mean that the power of judicial review arms the Court with suggesting contents of the law. This position is different from what judiciaries in most liberal democracies take.

The principle of separation of powers has been at the center of legal and political debate ever since its inception. Although many credit its modern form to Montesquieu's writings, traces of its existence can be found long before his writings. The principle is adopted to reduce the possibility of one organ of the state holding all governmental power and becoming a tyrant. If one wants to simplify this complex principle, one may say that it requires the distribution of governmental authority to different organs of the state in a manner that allows each organ to check on the actions of the other. In most liberal democracies, the governmental authority is divided into the legislature, executive, and judiciary. Different versions of this principle have been adopted in different legal systems. It varies from Constitution to Constitution. For instance, separation of power in the US is very strict, whereas, the UK follows a relaxed version of it (if any at all).

In *Anwar Hossain Chowdhury v Government of the People's Republic of Bangladesh* [41 DLR (AD) 165], separation of powers has been held by the Appellate Division of the Supreme Court of Bangladesh, to be a fundamental feature of the Constitution, which is beyond the scope of amendment power of the Parliament. As illustrated by the Supreme Court on several occasions, the Constitution of Bangladesh provides for a partial version of separation of powers. This means that there can be no watertight compartmentalisation and there in



fact are certain overlaps of powers among the three organs of the state. Despite there being some overlaps, the principle of separation of powers lays down certain barriers for each organ which they cannot cross. For instance, the AD in *Abdul Mannan Khan v Government of Bangladesh and others* [64 DLR (AD) 169] notes that the question of violation of the principle of separation of powers may arise if a Court or its presiding officer goes for judicial legislation.

The people, through the Constitution, entrust the law-making power to the Parliament. It grants the power of judicial review to the HCD which allows the HCD to strike down any law that contradicts the Constitution. It is generally accepted that ordinarily, in a judicial review of legislation, a Court will look at whether it contradicts a superior law. The Court can also look into the reasonableness of a legislation while exercising its judicial review power. However, the Court should not enter the realm of policy-making. When a particular law is challenged before a Court exercising the power of judicial review, it is expected that the Court will look into its constitutionality, not suggest amendments to the law that may make it more constitutional.

The Court's position in *Southern Solar Power Ltd* case may be considered to be in a way extending the power of judicial review. If a law is not unconstitutional, deference should be given to the policy choice of the legislature. Upon reading the HCD's *dictum* one may be tempted to ask, should a judgment be the place to express a Judge's view on how a certain provision should be amended to be more efficient? It is noted that the HCD carefully stated that it does not hold that the suggestions are binding. The Court's benevolent intention while suggesting the amendment is not doubted by any means. However, if it is accepted that the HCD is competent to make observations regarding what ought to be enacted, it would introduce a new dimension to judicial review. Such action may make the HCD a direct participant in the law-making process since it is suggesting the content of the law.

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