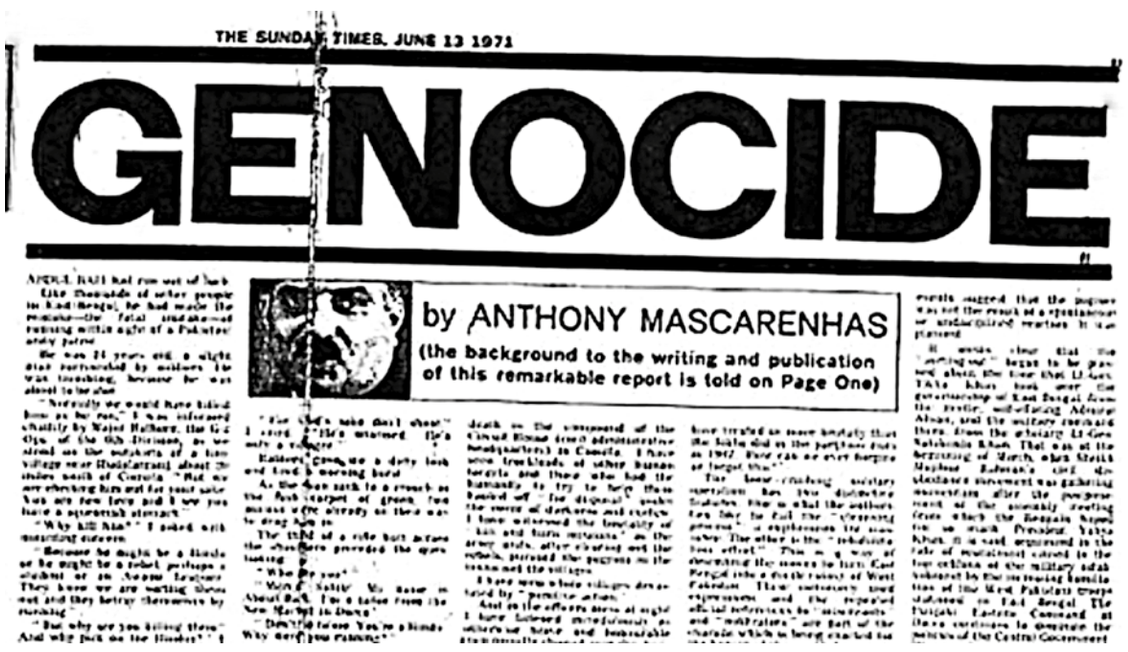
LAW OPINION

Bangladesh should withdraw its reservation on the UN Genocide Convention

QUAZI OMAR FOYSAL

Bangladesh's independence is among the few examples of successful remedial secessions in the narratives of state succession. In essence, the doctrine of remedial secession implies the right of a group of people to secede from a mother state by exercising external self-determination outside colonial dominion following the commission of gross violations of human rights against them by the said state. Bangladesh's Proclamation of Independence 1971 highlights the Pakistani authorities' continuous commission of "numerous acts of genocide and unprecedented tortures, amongst others on the civilian and unarmed people of Bangladesh" as one of the grounds for asserting the independence.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GENOCIDE

by ANTHONY MASCARENHAS

(the background to the writing and publication of this remarkable report is told on Page One)

In the aftermath of its independence, Bangladesh also made exceptional struggles to uphold justice for the victims of atrocities perpetrated against its population during the liberation war. The promulgation of International Crimes (Tribunals) Act 1973 exemplifies one part of such endeavours. However, Bangladesh's silence regarding the use of the Genocide Convention 1948 to strengthen its accountability efforts is contrary to its historical experiences.

Pakistan ratified the Convention on 12 October 1957 without any reservation. It signifies that the people of Bangladesh were under the protection of the Convention throughout the course of the liberation war. Even the obligation to prevent and prosecute the crime of genocide was considered as obligation *erga omnes* at that time (see *Barcelona Traction* case, 1970). In 1973, Pakistan commenced a proceeding against India at the International Court of Justice (ICJ) under the Convention in regarding the Indian proposal to hand over Pakistani prisoners of war to Bangladesh. In this period, Bangladesh's resort to the Convention could advance its accountability mission. Finally, it acceded to the Convention on 5 November 1998, but with a reservation on Article IX thereof.

Article IX of the Convention confers jurisdiction on the ICJ to deal with disputes relating to its interpretation, application, or fulfilment of the said Convention. This provision confronted significant opposition from the USSR and its allies during the negotiation of the Convention and even attracted significant reservations upon its adoption. It eventually led to the question of the legality of such reservations. The international community was divided into two camps, one favouring the integrity of the treaty regime (the prevalent practice of the League of Nations) and the other supporting the universality of the treaty regime. Finally, the ICJ's Advisory Opinion on the *Reservation to the Genocide Convention* (1951) resolved the issue stating that such reservations are valid as long as they are not incompatible with the object and purpose of the Convention. Afterwards, Article 19(c) of the Vienna Convention on the Law of Treaties 1969 incorporated such dictum in the positive international law.

Bangladesh's reservation to Article IX qualified the jurisdiction of the ICJ. It states that "[f]or the submission of any dispute in terms of this [A]rticle to the jurisdiction of the [ICJ], the consent of all parties to the dispute will be required in each case." The language of the reservation is *in verbatim* adoption of that of India made on 27 August 1959. Apart from barring any disputant state from making any claims against Bangladesh at the ICJ, this reservation equally, due to the principle of reciprocity, incapacitates Bangladesh to sue any state, even though the latter has no reservation on Article IX. Myanmar highlighted this issue during the provisional measures hearing of the *Rohingya Genocide* case in December 2019.

The reservation in question runs contrary to Bangladesh's moral and legal commitments. As mentioned earlier, Bangladeshi people suffered serious human rights violations including the crime of genocide during its emancipation. While Bangladesh could not prosecute any Pakistanis for their roles in the commission of genocide till date, the International Crimes Tribunal prosecuted several indictments of genocide. At this juncture, Bangladesh's reservation on the Convention is contrary to its struggle and promises to uphold justice for the crime of genocide committed against its people. It is morally incompatible to claim justice for a crime committed against its people while denying justice for the victims of similar crimes elsewhere.

> *As we draw closer to Bangladesh's 50th victory anniversary, it is important to reflect on Bangladesh's commitments to peace and security throughout the world by ratifying notable human rights treaties, supporting peacekeeping missions, and harbouring one of the largest refugee populations of the world. It is high time Bangladesh reconsidered the withdrawal of the reservation on the Genocide Convention.*

Bangladesh's reservation is also contrary to its constitutional commitment. Article 47(3) of the Constitution of Bangladesh enumerates the special safeguard to the trial of international crimes including genocide before Bangladeshi courts. This provision illustrates Bangladesh's strong standing against the impunity of *génocidaires*. Notably, the 1973 Act does not have any limitation on its temporal jurisdiction. Thus, Article IX of the Convention does not make any extra obligation to Bangladesh. Rather, it reiterates its existing obligation to punish and prosecute the crime of genocide under its existing domestic law.

On the other hand, Article 25 of the Constitution reiterates Bangladesh's fundamental policy to "support oppressed peoples throughout the world waging a just struggle against imperialism, colonialism or racialism." Article IX of the Convention could serve as a potential vehicle to support the oppressed people throughout the world by applying the principle of obligation *erga omnes partes*. The doctrine of *erga omnes partes* obligates any state party to a multilateral treaty to invoke the responsibility of any treaty violations by any other states parties despite being uninjured by such violations. A recent example of the application of this doctrine is exemplified in the case filed by The Gambia against Myanmar before the ICJ, in relation to alleged crimes of genocide against the Rohingyas. Though Bangladesh is supposedly supporting The Gambia by providing funds to maintain the proceedings, the non-reservation on the Convention could enable Bangladesh to make a direct claim before the ICJ for Rohingyas that it is harbouring.

As we draw closer to Bangladesh's 50th victory anniversary, it is important to reflect on Bangladesh's commitments to peace and security throughout the world by ratifying notable human rights treaties, supporting peacekeeping missions, and harbouring one of the largest refugee populations of the world. It is high time Bangladesh reconsidered the withdrawal of the reservation on the Convention. Such withdrawal of reservation from the Convention will strengthen Bangladesh' commitment to human rights both for its citizens and for the oppressed people throughout the world.

THE WRITER IS LECTURER (ON STUDY LEAVE) AT AMERICAN INTERNATIONAL UNIVERSITY-BANGLADESH AND A STUDENT OF INTERNATIONAL LAW AT UNIVERSITÉ CATHOLIQUE DE LOUVAIN, BELGIUM.

RIGHTS ADVOCACY

The issue of competition law compliance for the e-commerce sector

AZHAR U. BHUIYAN

Businesses are constantly complaining against the anti-competitive behaviours of the e-commerce platforms. The accusations against them are quite templatic: deep-discounting, self-preferencing, manipulation in search ranking, misuse of consumer data. While the allegations may not be true all the time, the e-commerce platforms are always prone to violation of competition law risking massive amount of fine by the Competition Commission of Bangladesh (CCB).

The CCB met the leading e-commerce platforms in Bangladesh: BoomBoom, BabyneedsBD, Aladiner Prodip, Daraz Bangladesh Ltd., Priyoshop.com Ltd., Chaldal Ltd., Redex and many others on 21 September 2021. The aim of the meet was to brief these platforms about different practices ongoing in digital marketplace risking the breach of competition law.

In such situation, it is important for e-commerce platforms to be cautious about anti-competitive behaviours and engage lawyers to vet their offers on the platforms before launching it. This article delineates some of the widely common anti-competitive disruptive behaviours and/or actions of e-commerce platforms under the Bangladeshi competition law regime.

The businesses and e-commerce platforms use cheaper pricing offers to enter and capture a market. Initially cheaper rate of products or services sounds pro-consumer. However, as soon as the businesses drive out all the competitors in the market, they exploit their monopoly in the market by increased price of the products and/or services. This is where the competition law intervenes.

The Competition Act 2012, according to section 16(2)(a), prohibits the sale of goods or provision of services at a price which is below the cost of production of the goods or provision of services that aims at reducing or eliminating competition in the relevant market. Section 20(a)(ii) of the Act also provides that the Commission may penalise an e-commerce platform for predatory pricing with a fine which may extend up to 10% of the average of turnover for the last 03 (three) preceding financial years. Thus, the caveat for e-commerce platforms and business entities therein is to make sure the selling price of products or services is not lower than the production cost.

Notably, the availability of products or services at a cheaper rate cannot always be considered as predatory pricing. Because the cheaper price of products may also result from the exemption of the sellers from the cost of marketing, and a wider market access in the digital platform. However, the giants in e-commerce platforms enjoy such massive amount of sale that they can at times for a limited time offer deep discounts amounting to product price lesser than apparent manufacturing cost. Such deep discounts may amount to predatory pricing when it is aimed at driving competitors away from the market. The Competition Commission of India in their latest study on e-commerce sector titled 'Market Study on E-Commerce in India' found that deep discounting is gravely problematic and needs to be cautiously monitored. The CCB has been sloth in monitoring the e-commerce sector. The recent catastrophe in the e-commerce sector with the 'Evaly scam' is a departure moment

for the CCB. It is expected that with the recent recruitment of staff, the CCB will gear up their energy and extensively monitor the e-commerce platforms to ensure a competitive online marketplace.

The e-commerce platforms may perform the role of both marketplace and a competitor in that marketplace. Such dual characteristics of these platforms provide both benefits and drawbacks. These e-commerce platforms possess control over three important features of a possible sale and procurement of product or service: search result, seller's/service provider's data, and user review. As a result, the products of the platforms might enjoy increased visibility, and the consumers' choice might fail to mirror consumer preference. But a transparent business ecosystem should have facilitated a pro-competitive market for the sellers.

E-commerce platforms generate huge revenue with their listing services by placing some products of specific companies higher in the search results. The big companies do not mind paying for such subscription fees to list their product above everyone else. In practice, it is found that the big corporations purchase all the top positions for all products and the small and medium enterprises are left dry. Therefore, these small and medium enterprises fail to competitively perform in the marketplace. This is where the CCB is authorised to intervene and regulate the business ecosystem by ensuring transparency in the system by occasional directives and guidelines. The Competition Act empowered the CCB to prevent e-commerce platforms from distorting market by abuse of dominant position in the market under section 16(2).

The e-commerce platforms in their contracts with the suppliers often include a price parity clause. A price parity clause demands from the supplier not to offer products or services at a cheaper rate or better terms in other e-commerce platforms or at times even on their own websites. Instances of such clauses are usually found in the online travel agency markets, online food ordering apps and delivery markets. These parity clauses may come under the scrutiny of the CCB if they have adverse effect on competition.

From a business perspective, the sellers might have different incentives to receive from different platforms for supplying products in different rates. An established e-commerce platform might not be willing to charge lower than a newly established e-commerce platform and thus the supplier might like to enjoy the fruits of scale economies and network effects. In consequence of a wide parity clause, the end-users might need to pay higher prices. Again, section 15(1) of the Competition Act prohibits such exclusive supply and distribution agreements when they have adverse effect on competition. If the e-commerce platform is dominant in the market, then such clause may be prosecuted under section 16 of the Competition Act as well.

THE WRITER IS LECTURER, DEPARTMENT OF LAW, BANGLADESH UNIVERSITY OF PROFESSIONALS, AND CONSULTANT, A.S & ASSOCIATES.

LAW LETTER

Musings on the condition of women and children

The pandemic has opened our eyes to the actual condition of human rights in Bangladesh. Occasionally the images of human rights protection seemed positive in the pre-Covid-19 context; however, the pandemic-induced lockdown exacerbated the human rights condition of the country, particularly with regard to rights of women and children.

Very often we see that a man provides maintenance and financial support to his wife, but he also physically tortures her. It cannot be said that the man is ensuring his wife's rights. On the other hand, if the man maintains all the comforts for living toward his wife but her right to freedom of movement is curtailed, it will also be considered as a violation of human rights. The maintenance of human rights means preservation of all the fundamental rights. Therefore, absence of any particular right may constitutes an infringement.

It is observable that the right to live with liberty and dignity of women has declined in multifarious ways during the lockdown period in Bangladesh. Many women were increasingly exposed to physical and mental abuse by intimate family members, sometimes to unprecedented degrees. Health experts suggested that all the citizens stay at home in order to maintain social distance that can help to save the country from the deadly effect of Covid-19. Unfortunately, the home appeared as the most unsafe place for many women and girls. Rising incidents of rape and harassment are worth highlighting. It is true that women are contributing a lot in various sectors including garments, health care, politics, social service but they are also becoming victims of harassment. All the workplaces cannot be considered safe for female employees and women are increasingly discouraged from pursuing work outside homes. Moreover, public roads and transports are also unsafe for travel. Only the opportunity of employment cannot be viewed as improvement of rights unless safe working condition and secure commute to and from work is also ensured.

The matter of violation of children's rights cannot be ignored either. Girl children have been facing excessive pressure of household duties while continuing home quarantine. It can

be stated that domestic violence and rights of children are sometimes connected to each other. Furthermore, home quarantine may include staying with distant relatives which may expose children to increased risks of sexual and other kinds of abuse. The prolonged restriction upon in-person education has also had notable impact on mental health of students which adds to the growing tension of the home environment.

The current human rights scenario of Bangladesh reflects that the mindset of the society towards protection of human rights has not improved at the expected rate. Human rights organisations in the country should come forward to discuss how to bring substantive and meaningful shift in people's attitude.

NAZIA AMIN, ADVOCATE OF THE JUDGE COURT, DHAKA.