LAW OPINION

On law, language and gender

A gendered interpretation of any legal norm will not only help inquire into the inherited masculine bias and ideas of law but also identify how such bias, if any, could lead to the silencing and alienation of gender diversity.

ARIFUR RAHMAN

The interrelationship between law and language is manifestly powerful. Once it touches the sacrosanct body of law, even an ordinary word used by a lay person may have the potential of offering varied legal interpretations, and at times, legal dictations. Being a powerful tool, the language of law is expected to give voice to the oppressed and marginalised. Along with empowerment, the language of law, is, therefore, also a matter of universality, neutrality and objectivity. However, law – both as a discipline and as a device regulating societal relations – has been subject to the question of bias and prejudice for the expressions it uses to communicate with its subjects. Claiming to be neutral, law has, in fact, been accused of a discourse infused with expressions that are full of masculine bias and partiality.

The dominance of male perceptions in the language of law can be observed, for instance, in the most famous "reasonable man" concept. An imaginary person employed for setting a standard of care mostly in negligence law, "reasonable man", as it suggests, actually necessitates the male standards and measures for the assessment. The concept that clearly possesses a gender identity determines what amounts to the ordinary or reasonable act of a person through the way a "man" would act. Masculine views and ideas are consequently the yardsticks to examine if the act in question would possibly pass the "reasonableness test".

In *Commonwealth* v *Welosky,* the court, in this regard, affirmed the masculine nature of "reasonable man" by deciding that the meaning of the concept is only limited to men. Although in *United States* v *Ciammitti,* "reasonable woman" emerged as a plausible concept in the dissenting opinion, the majority marked "reasonable woman" as "an unnatural construction of legal writing" (Mary Ellen, 1988). As a consequence, what women experience and how women perceive has not had a place in the construction of "reasonable man" standard which tends to uphold what is stereotypically masculine.

Equally, the pronoun of law is masculine, despite its gender-neutral appearance. Resorting to masculine pronouns, that is, *he*, to refer to women in any legal instrument is a complacent practice. Generally, it is accepted that the pronoun *he* is inclusive of both men and women. A good example of the propensity of generic *he* in the language of law might be the Constitution of Bangladesh. The Constitution, while refraining itself from the use of feminine pronouns such as *she*, makes *he* a salient semantic feature that should be utilised as an accessory to include women.

In the same vein, the Penal Code 1860 (section 8) asks for a non-specific gender use of *he* to interpret the provisions of the Code. Another particular aspect of law is that it uses lexical items that are conspicuously gendered specially in the area of rape and sexual harassment. This involves inhabiting legal language with stereotypes and often patriarchal psyche. For example, section 354 of the Penal Code while proscribing sexual assault strikingly focuses on the modesty of a woman instead of the nature of the crime itself. The provision criminalises sexual assault as long as the perpetrator does such an act with the intention (or knowledge) to outrage the modesty of a woman. As elusive as phrases like "outraging modesty" are, embodying such within a law specially to define a gender-based crime reveals the ulterior motive of a law in relying on stereotypes and upholding the patriarchal belief that the modesty of a woman matters more than her bodily autonomy or security.

Also, what the wording of the law suggests is that to get legal redress for the violation of her bodily integrity, it is pertinent that the victim must have a lifestyle that would not make her a "bad victim" in the eyes of law so as to construe that she is a modest woman, and therefore, deserves legal protection. As a result, to prove the "modesty", the law can go on questioning, say, for instance, the dress sense of the victim; and whether or not it is too provocative. Conversely, making "modesty" the epicenter of proving an act of sexual assault in a way also implies that the victims who are "immodest" would be deprived of a legal remedy, even if they suffer harm.

The world of law is complex and so is the language it nurtures. Engendering legal norms might appear as somewhat of an addition to the complexity that the language already possesses. But a gendered interpretation of any legal norm will not only help inquire into the inherited masculine bias and ideas of law but also identify how such bias, if any, could lead to the silencing and alienation of gender diversity.

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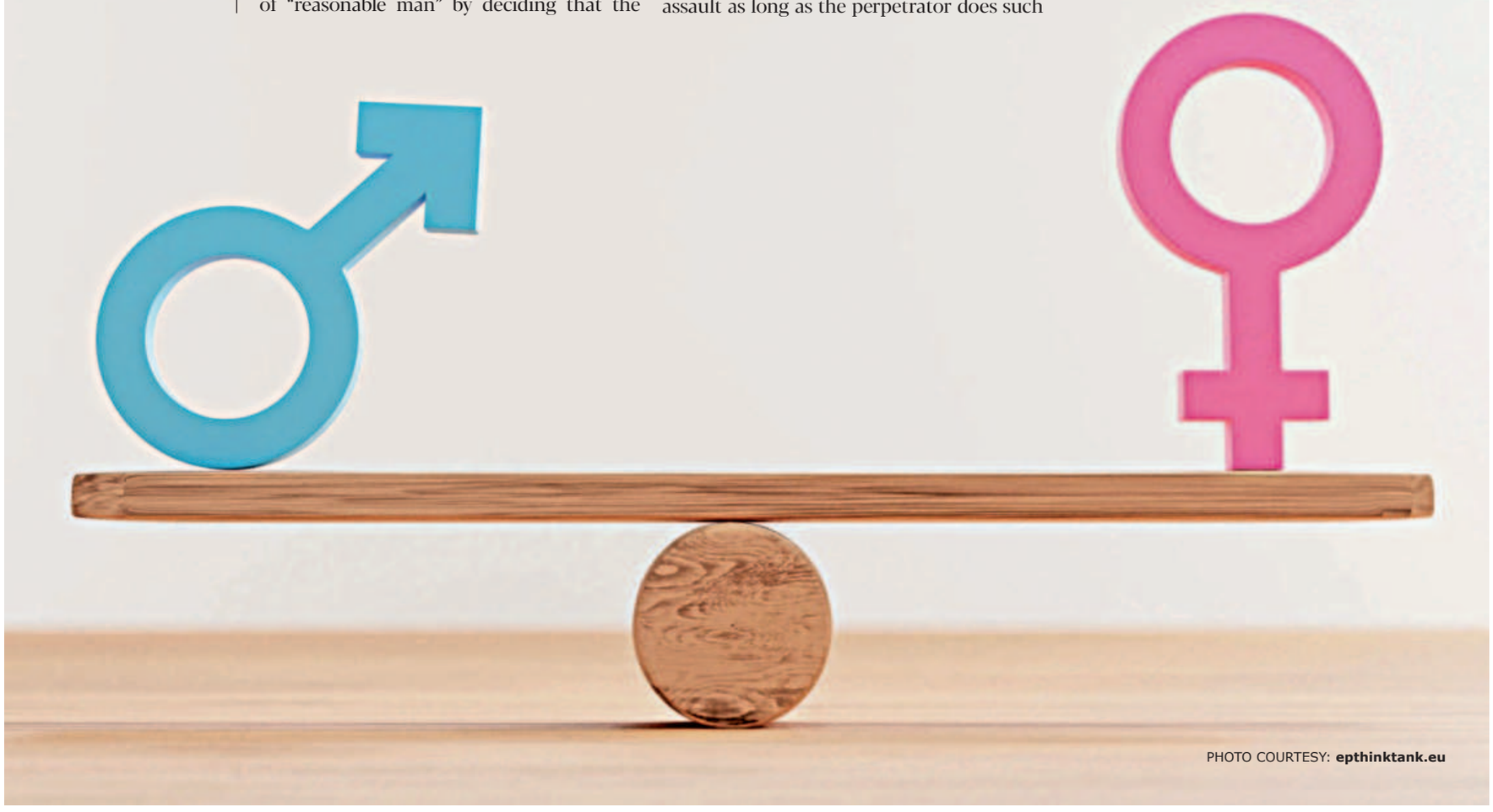

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LEGAL EDUCATION

How is 'Attorney-Client Privilege' governed in Bangladesh

ASIF HASAN

In general terms, attorney-client privilege refers to a form of privilege that protects confidential communications between an attorney and a client that are made for the purpose of obtaining or providing legal advice from disclosure to third parties. In Bangladesh, rules for privileged communication are mostly encapsulated in Evidence Act, 1872. To be precise, sections 126-129 of the Evidence Act, 1872 deal with professional communications between the legal adviser and the client, which are protected from disclosure. Neither legal adviser or attorney nor his interpreter, clerk or even servant could be permitted to disclose any communications made to him in the course and for the purpose of professional employment of such legal adviser or to state the contents or condition of any documents with which any such person has become conversant in the course and for the purpose of such employment.

The aforementioned section 126 is not restricted to oral communications only but extends to facts observed by the pleader in the course of and for the purpose of his employment and that he is not bound to disclose them without the consent of the client. However, the privilege mandated by the Evidence Act, 1872 is not absolute. There are two specific restrictions when the client would not be covered by the attorney-client privilege. The first is when any such communication made in furtherance of any illegal purpose and the second is when any fact observed by the advocate in the course of his employment shows that a crime or fraud has been committed since the commencement of his employment. In these cases, the advocate would not need to obtain consent from the client prior to making any disclosure.

The privileges mentioned in the Evidence Act, 1872 are designed to secure the clients' confidence in the secrecy of their communication, in absence of which, providing legal services would become unfeasible. Legal provisions in most of the jurisdictions around the world typically provide for strict protection to clients in terms of confidentiality. In Bangladesh, section 126 uses strong language in imposing the prohibition, 'No Advocate shall... unless with the client's express consent'. Hence, the burden to keep information confidential is on the advocate, and there is no need for the client to expressly or impliedly claim the privilege.

A common follow up question in this discussion is whether attorney-client privilege may be extended to in-house counsel. Apparently, the above provisions of law are applicable on the advocates of Bangladesh. An advocate means an advocate entered in the roll under the provisions of the Bangladesh Legal Practitioner's and Bar Council Order, 1972. Pertinently, the Canons of Professional Conduct and Etiquette for lawyers in Bangladesh does not permit any advocate to engage in any other profession or business. Theoretically, if an advocate joins in the capacity of in-house counsel, he/she then must give up his/her enrolment with Bar Council and thus, the aforesaid provisions will no longer be applicable on him/her.

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LAW IN-DEPTH

Legal challenges of ADR in India and Bangladesh: A Comparison

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As an alternative to traditional judicial processes, Alternative Dispute Resolution (ADR) is quickly rising in popularity in both Bangladesh and India. The two South Asian nations have been working to enhance their ADR frameworks and facilitate citizens' access to justice. This is the result of several factors, including the demand for more efficient and cost-effective methods of resolving disputes as well as recognising the limitations of traditional litigation.

ADR has been accepted as a valid method of settling conflicts in India for more than two decades after the passing of the Arbitration and Conciliation Act, 1996. The Commercial Courts Act of 2015, which allows for the formation of commercial courts and business divisions of high courts for the swift resolution of commercial disputes, was one of many actions the Indian government took to facilitate ADR. Additionally, to resolve conflicts quickly and affordably, the Indian judiciary has been advocating the use of ADR processes including arbitration and conciliation.

Bangladesh, on the other hand, has a relatively young ADR system. The nation has, nevertheless, made major recent efforts to encourage ADR. The Bangladeshi government has passed several laws that regulate ADR procedures, including the 2013 Mediation Act and the 2001 Arbitration Act. These laws enable the creation of arbitration centres and the appointment of mediators to settle disputes. The Supreme Court of Bangladesh has encouraged the use of arbitration to settle disputes, and other courts in Bangladesh have also supported the use of ADR processes at different times.

Despite these improvements, there are still many issues with the ADR systems in Bangladesh and India. The write-up contrasts the ADR systems in the two countries, highlighting their pros and cons.

Legal framework

The legislative foundation for ADR in India is still developing and is frequently criticised for being slow and ineffective. Concerns have also been raised concerning the ADR system's lack of accountability and transparency. Although Bangladesh's legal system for ADR is still developing, the government has taken attempts to regulate it by passing legislation like the 2001 Arbitration Act and the 2013 Mediation Act.

Categories of issues eligible for ADR

ADR may be used in India to settle a variety of issues, including ones involving business, family, and employment. But in Bangladesh, the major emphasis has been on using ADR to settle business conflicts. This has been ascribed to the fact that resolving commercial issues through the regular judicial system is frequently more difficult and time-consuming.

Degree of judicial support

The courts in India have aggressively recognised and promoted the use of ADR as a method of conflict resolution. For instance, the Indian Supreme Court has handed down several significant rulings that have contributed to the legitimacy of ADR in India. The judiciary in Bangladesh has not yet shown the same degree of support for ADR as the courts in India.

Functions of arbitrators and mediators

In India, mediators and arbitrators are chosen by the disputing parties, and their duties include assisting in negotiations and rendering legally obligatory rulings. The practice of mediators and arbitrators is still in its youth in Bangladesh. There are not enough skilled and certified mediators and arbitrators, and the selection procedure for these people is still developing.

Governmental and institutional promotion

The presence of reputable institutions that promote ADR is one of the benefits of the ADR system in India. To promote and impose rules on ADR, the Indian government established many organisations, including the Mumbai Centre for International Arbitration and the Indian Council of Arbitration. These organisations assist in developing effective ADR procedures by offering support and training to mediators and arbitrators. Further investment is required to increase the capability of the ADR system in Bangladesh, where the establishment of comparable institutions is still in its early stages.

In conclusion, the ADR systems in India and Bangladesh have both strengths and weaknesses. India has a more established ADR system, with a well-developed legal framework and supportive judiciary. However, the system faces challenges such as inefficiency and lack of transparency. Bangladesh has a relatively new ADR system, but the country has taken steps to enhance its legal framework and develop the capability of its ADR system. Both countries have the opportunity to share their experiences and collaborate to further the use of ADR as a method of dispute resolution in South Asia.

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