LAW AND GENDER

(Trans)gender and the Question of Constitutional Membership

A constitution like ours that has been founded upon the values of our Liberation War, in no way should give a nod to the idea that its benefits are only available to those who could assimilate and thus maintain a heteronormative culture with a gender diktat. Turning a blind eye to diversity is anathema to both constitutional as well as democratic values.

ARIFUR RAHMAN

Gender appears to be a hackneyed topic in our country. If not, it is a ghost that necessitates fighting when it comes in conflict with our so-called social and religious values. Recent anti-trans protests to cancel the transgender quota from the admission programme of the University of Dhaka manifest the same impulse to safeguard religious and social mores which, the protesters believe, would be infringed if the trans-quota remains in place. The exclusion of trans woman Hochemin Islam from the North South University's event "Women's Career Carnival" is yet another recent example in this regard. The transgender community certainly threatens our conventional gender norms and both the exclusion of Hochemin and the protests suggest a resistance towards that while attempting to frame the "gender conversation" only between cis men and cis women. However, the idea of gender indeed goes beyond such rigid binary. Asking the gender question involves the ideas of self-governance, choice, and autonomy, thus allowing us to adopt gender norms that we "feel" regardless of our biological sexes. However, in our patriarchal society that commands to maintain and in fact thrives on a rigid gender binary, any person claiming to be any gender other than the one corresponding to biological sex, becomes a social pariah.

Our Constitution however has, since beginning, been an ardent advocate of equality and non-discrimination and accords rights and benefits to its members (e.g., free expression and affirmative measures for marginalised communities). To be a member of the constitution is not however about simply "being" but also about "belonging" (Marcus Llanque). The fact that Hochemin was stripped of her right to freedom of expression simply because of her transgender identity or the demand for withdrawing transgender quota thus gives rise to a broader question: can a transgender person ever get to be a member of the Constitution and thereby enjoy its (core) rights and benefits against the "gendered politics of belonging" (Suruchi Thapar-Björkert)?

Although the Constitution does not embody the term "gender" explicitly, Article 27 of our Constitution speaks of equal protection of laws for every citizen. This is clearly inclusive of people of transgender identities. Our constitutional territory however is marked by a crude gender binary: men and women (as Article 28(2) mandates). As a result, a legal impasse might arise when an attempt is made to include "trans women" within that territory. This rigid gender essentialist identity, on its face, might suggest that transgender persons lack access to our Constitutional membership as rights holders since they do not fit within the constitutionally sanctioned gender binary. This, in turn, perhaps, one could argue, furthers the justification of the exclusion that Hochemin faced for being a trans woman. However, the term "woman" is nowhere defined: neither in the Constitution nor in international laws. Dealing with the same issue, but with regards to "woman" in the Convention on the Elimination of all forms of Discrimination against Women, Elise Meyer suggests that the term "woman" should be expansive to span across sex, gender, sexual orientation or other (intersecting) identities in light of the Convention's broader object and purpose to eliminate discrimination and gender equality. This same identity-inclusive approach could be taken to interpret "woman" in Article 28(2) because our Constitution too aspires to achieve, among others, equality and non-discrimination.

To belong to the Constitution, however, also means that one gets to enjoy all the benefits that the Constitution provides— such as affirmative measures. Affirmative measures which often take the form of quotas is a telling constitutional feature to help the disadvantaged communities, advance. Article 28(4) which requires the State to adopt such special measures is wider in its scope. Although women and children are distinctively recognised as the beneficiaries, the provision asks the State to take actions for the advancement of "any backward section of citizens" thus possibly encompassing all marginalised groups in the society. In so doing, it arguably considers all women a ("timeless") vulnerable category irrespective of the changing socio-economic conditions and privileges within the group. Regardless of this problematic feature, in any case, transgender persons are entitled to benefit from the provision. Trans women, for instance, come within the purview of the provision not only because trans women are women and therefore equally eligible for special measures but also for the fact that trans women are more susceptible to discrimination and disadvantages because of their intersectional vulnerability as trans women. For this very reason, trans women could also be considered a "backward class" requiring special measures for their advancement independent of/along with their deserving position as women. As a result, the objection that transgender quota runs counter to the ideals of Article 28(4), i.e., the advancement of (cis) women, does not sustain. Pertinent to note, such an objection in reality arises more from the concern of protecting entrenched gender binary from non-normative gender ideas regarded as "profane" rather than the concern for the cis women.

Freedom of expression is another core right enshrined in our Constitution. In the question of gender identity, freedom of expression comes into play in a twofold manner. First, gender identity itself could be a form of expression starting from dress, and manner of speaking to gender transition more broadly. Second, the discussion or conversation on gender identity itself, e.g., transgenderism. Now, freedom of expression is a guaranteed right in our Constitution. However, it is a right with some "reasonable restrictions" meaning it could be limited on grounds like public morality or order. In turn, such limitations accord States some flexibility to restrict the right since there is no clear-cut answer to define these grounds which are often context specific. That does not mean that such restrictions could be arbitrary, rather should be imposed by law. The law restricting any form of expression must pass constitutional muster by demonstrating that the means taken to curb the right are proportionate to the goals sought to be achieved. In so doing, we should be reminded of the value of freedom of expression including dissent, disagreement as well as opinion often challenging our usual conceptions. Indeed, not allowing one to speak on transgenderism (this is hypothetical; Hochemin in our case, was not about to speak on transgenderism) or simply because she is a trans woman runs afoul of the goals of reasonable restrictions because it undermines her equal standing as a moral person by directly restricting what is so fundamental to herself.

What is important to bear in mind is that our Constitution should not be a home for homogenous identity or gender orthodoxy. As much as it is for cis men and cis women, it is also for trans men and trans women. Our Constitution should take up difference in the same way it embraces sameness. A constitution like ours that has been founded upon the values of our Liberation War, in no way should give a nod to the idea that its benefits are only available to those who could assimilate and thus maintain a heteronormative culture with a gender diktat. Turning a blind eye to diversity is anathema to both constitutional as well as democratic values.

The writer is reading for the LLM in Human Rights at NYU School of Law as Arthur T. Vanderbilt Scholar.

LAW REVIEW

Confusions Stemming from the Bank Company (Amendment) Act 2023

It is to be noted that no judicial interpretation has come out after the new amendments to the definition of defaulter borrower. The clarification of these definitions can be made through judicial interference. However, it would have been certainly better had the legislators not left any ambiguity or confusion within the Act.

SYEDA NASRIN

Taking a loan with the intention of repaying through installments as per the loan agreement is an integral part of modern economy. However, some take loans with prior intentions to default and then go on to misappropriate the borrowed money. This phenomenon has now become widely common in our country. In this backdrop, a recent amendment of the Bank Company Act 1991, has introduced a new category of defaulter *i.e.,* 'willful defaulter borrower' by Act no 13 of 2023.

After amendment, section 5(KaKaKaKa) of the 1991 Act provides that 'intentional defaulter borrower' means any defaulter borrower person, institution, or company who (1) in personal capacity, in favour of family member, interested person, institution, or company, obtains loans, advances, investment, or any other financial benefits from any bank-company or financial institution but does not repay the same or any part of it or interest or profit thereof despite having the ability to do so, or (2) obtains loans, advances, investments, or other financial benefits from any bank-company or financial institution by using forgery, fraud, or giving false information in their names or in favor of family member, interested persons, institute or company, or (3) uses the loan amount, advance, investment, or financial benefit or part of it after something otherwise than the purposes for which the money is obtained for, or (4) transfers or delivers the collateral without taking prior permission from the bank-company or financial institution which provided the loan or advance. Besides, Bangladesh Bank can formulate necessary directives from time to time to accomplish the purpose of the aforesaid definition.

This definition does not change the earlier definition provided under section 5(GaGa) of the Act of 'defaulter borrower'. Defaulter borrower means any debtor individual, institute, or company who personally or on behalf of interested persons, obtains loans, advances, or other financial benefits but does not pay the same, any part of it, or any interest or profit thereof even after the expiry of six months of overdue. Therefore, under the existing legal framework, there are two kinds of defaulter borrowers: *defaulter borrower* and *willful defaulter borrower*. To be a willful defaulter borrower, one must be a defaulter borrower first.

Section 5(GaGa) includes the borrower, guarantor, and interested concerns within the scope of defaulter borrower; but Section 5(KaKaKaKa) canvasses a wider scope compared to the former. Section 5(KaKaKaKa) also states that any person falls within the definition of willful defaulter borrower if they fail to repay a loan obtained *in favour of* or *in the name of* a family member. The definition of family is provided under Section 5(JhaJha) which is added to the said Act by the amendment. It provides that "family" or "family member" means wife, husband, father, mother, son, daughter, brother, sister, or any other person dependent. The amendment does not categorically clarify the liability of the family members in whose *favour* or *name*, the loan is obtained. On many occasions in practice, family members are harassed for loans obtained in their names, even when they are unaware of the same. The amendment should have made it clear that the family members who do not give out any personal guarantee, mortgage or otherwise furnish any security against the loan obtained by one of their family members, would not be held responsible.

Moreover, this definition does not make it clear as to what is to be understood from the words "they do not repay though they have the capacity to do so". There are no determining criteria of this qualification anywhere in the Act. As a result, it can lead to widespread confusion and misapplication of the Act as this can be interpreted in many ways.

It is to be noted that no judicial interpretation has come out after the new amendments to the definition of defaulter borrower. The clarification of these definitions can be made through judicial interference. However, it would have been certainly better had the legislators not left any ambiguity or confusion within the Act.

The writer is advocate, Supreme Court of Bangladesh.