"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

Making innovations accessible to the people during pandemic

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THE role of intellectual property (IP) in combating Covid-19, either in facilitative or restrictive way, is a recurrent issue resurfacing nowadays. Needless to say, the extensional aspect of IP- meaning various areas of IP such as patent, trade secret, test data protection, new data or research data protection in general and copyright in part – already have or likely to have huge implications at the context of Covid-19. Most relevantly, patenting of medicines, vaccines, testing kits and other innovations for treating Covid-19 could have serious ramifications on access and affordability to Covid-19 treatments. Like other areas of patent, the monopoly granted by the pharmaceutical patent, typically for twenty years, is justified based on the 'social contract theory' meaning exclusivity granted in exchange of disclosure of knowledge to the society and/or utilitarian aspect of incentivising or encouraging investment in research and development (R&D) for new drugs, medical equipment and other innovations.

The patent regime is designed to ensure a legal climate where investment is secured, recouped and wheel of inventions (including for lifesaving drugs) is kept moving. Arguably in many cases, pharmaceutical companies aim at the market where patients can afford the high price of R&D. In this way, the poor and marginalised segments of the society may deprive of their access to medicine and health. Thus, competing values of corporate profits and public interests might conflict which is incompatible with the 'social policy theory'. Ideally, in such a situation, the private interests should be sacrificed reflecting sociological thoughts on jurisprudence 'attaining maximum benefits with minimum frictions' or even utilitarian idea of 'the greatest good for greatest number'. Indeed, compulsory licensing, government use and other exceptions in international IP regime, notably in TRIPS Agreement, are crafted to restrict the private rights for public interests.

It is clear that moderating or balancing intellectual property regime for public interest consideration is well recognised and embedded within the IP system. Yet, the burning issues and debates on the innovation models, closed innovation versus open innovation, strong patent regime versus open science have remerged at the onslaught of Covid-19. It is argued that science should be open in which the transparency, collaborations and fostering innovations shall be maintained. Putting more clarity, the characteristics of open science have been delineated by Robert K. Merton as CUDOS: meaning, *Communalism* - sharing scientific outcomes without others where scientists give up their IPRs in exchange of social recognition, *Universalism* – scientific knowledge or inventions are of universal criteria and should be reproducible under same conditions, *Disinterestedness* – meaning the researcher's attitude is objectivity not biased and not motivated for profit or lack of profit, *Originality*- research results should be novel contributions and finally, *Skepticism* — all scientific outcomes are subject to rigorous scrutiny which ensures rectification and thus maintains quality of the works. When scientific results are shared, collaborated and made open to all, the 'errors' are quickly detected and fixed, which reflects the dictum – 'with enough eyes, all bugs are shallow'.

Covid-19 has exposed our structural inequality and systematic unfairness. At the outset of Covid-19, some hesitant approaches were visible in pharmaceutical industry. Fortress IP group initially gestured to enforce their two patents against BioFire for technologies which might be useful for Covid-19 tests but later they clarified that law suit is not going to restrict the Covid-19 test. Similarly, the move of Gilead to protect of *remdesivir,* for seven years as orphan drug, has also attracted a lot of criticisms which perhaps forced the pharma giant to retract from original position. The 3M, an American conglomerate corporation, was also criticised for using its monopoly over N95 respirators.

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AbbVie has already made it clear that it is not going to enforce its patent over Kaletra which potentially be used for Covid-19. Likewise, Novartis pledges that it will relax its potential IP, through a non-exclusive licensing or waivers, over any potential drug which may be developed from hydroxychloroquine. Moreover, there are collaborative initiatives where big pharmaceuticals are coming together under the funding of some philanthropic institutions.

The world's renowned academic institutions and universities are also making their pledges that inventions will be available to the people through royalty-free licensing framework to tackle global pandemic. The World Health Organization, in the meantime, initiated 'Voluntary IP Pool' which would create "a repository of information diagnostic tests, devices, medication or vaccines, with free access or licensing on reasonable and affordable terms, in all member countries of the organization". Bangladeshi pharmaceutical companies have taken the advantages of TRIPS flexibilities to produce generics *remdesivir* to meet local and foreign needs. They may also come up with other innovations useful for COVID-19 treatment. However, making innovations and drugs accessible to the people during the COVID-19, particularly in developing countries is a big concern. Thus, debate on redesigning, renovating and/or manoeuvring existing flexibilities of IP regime for public health purpose would unlike to abate if, at least, Covid-19 is not properly dealt with or Covid-19 pledge is not duly performed.

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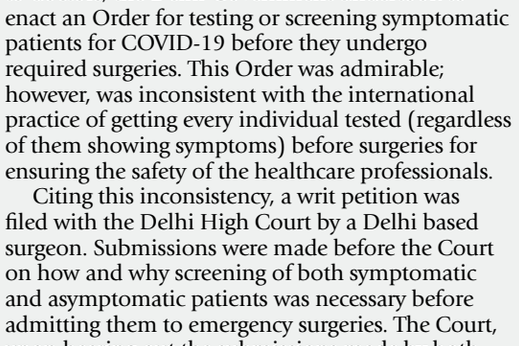
LAW NEWS

Can screening of patients be an option to save healthcare professionals?



A substantial number of healthcare professionals are getting infected with the deadly COVID-19 disease and a significantly alarming number of such professionals are succumbing to death all over the world. Bangladesh is not an exception. According to Bangladesh Doctors Foundation (BDF), the underlying reasons include the concealment of information by the patients before availing treatment or life-saving procedures. As has been time and again mentioned by the World Health Organisation (WHO), there is also the risk for healthcare professionals (like anyone else) of coming into sustained contact of people who are asymptomatic. Therefore, it is not always the knowing concealment of information regarding symptoms, rather the unknowing spread of viruses when the patients themselves are unaware of being infected and not showing symptoms.

This at present is a global crisis and countries all over the world are doing certain things that are replicable as well as admirable. In order to contain transmission of coronavirus from patients to doctors, the Delhi Government undertook to enact an Order for testing or screening symptomatic patients for COVID-19 before they undergo required surgeries. This Order was admirable; however, was inconsistent with the international practice of getting every individual tested (regardless of them showing symptoms) before surgeries for ensuring the safety of the healthcare professionals.

Citing this inconsistency, a writ petition was filed with the Delhi High Court by a Delhi based surgeon. Submissions were made before the Court on how and why screening of both symptomatic and asymptomatic patients was necessary before admitting them to emergency surgeries. The Court, upon hearing out the submissions made by both the parties, concurred with the petitioner and decided in favour of getting every patient tested prior to their being admitted to emergency surgery.

The situation of Bangladesh and India is more or less on par, when it comes to the risks of COVID-19 transmission, given the density of population of both the country, coupled with the unawareness of mass people in general. In this backdrop, if Government could adopt a policy of screening patients before admitting them to surgeries, it could play a significant life-saving role for the healthcare professionals since surgeries result in sustained contact between patients and healthcare professionals and contribute to the transmission of the virus.

FROM LAW DESK.

LAW LETTER

JUSTICE FOR THE VICTIMS OF LIBYA KILLING INCIDENT

MARUF UL ABED

THE economic contribution of high number of migrant workers has been proved to be helpful to overcome job crisis and ensure healthy economy for developing countries like Bangladesh. Despite this positive aspect, the migrant workers from Bangladesh have so many struggles to cope up with difficult challenges including financial, environmental, psychological and so on. Financial challenges mostly arise from their very first step to foreign employment since they very often borrow money for bearing different whole procedural costs including visa fees, plane fare, immigration cost, etc. Getting deceived by the illegal-migrant agents is only a trap for the innocents to experience boundless troubles. As a consequence, workers and their family members plausibly face several unacceptable incidents. One of such incidents we have witnessed in the last month where 26 Bangladeshi migrants have been brutally killed by the human traffickers in Libya.

According to *Arab News*, these 26 killed citizens of Bangladesh were looking forward to immigrating to Europe illegally, but they unfortunately fall under the trap of human traffickers for extra money even after the payment of $8,000-10,000. To save the migrant workers from this kind of undesirable troubles and protecting them in safe mechanism, the Government of Bangladesh enacted the Overseas Employment and Migrants Act 2013. The purpose of this law is to promote opportunities for overseas employment and to establish a safe and fair system of migration. Under section 3(1) of this Act, the Government and its delegated authorities are in control of all activities relating to recruitment and immigration of workers from Bangladesh for the purpose of overseas employment. However, as facts now appear, no authority of the Government was officially involved in the process of recruitment or immigration of said 26 victims. After the incident, the suspected human traffickers have been arrested – the fact of which proves that the migrants and their families had taken resort to the traffickers for illegal migration.

But, section 9 of the 2013 Act provides that no person shall operate any activity relating to recruitment unless a license is obtained under the Act. The Libyan government has already initiated criminal investigation into the matter, and it is hoped that the trial will start very soon. However, question remains as to whether Bangladeshi courts can exercise its criminal jurisdiction over the crime of killing 26 migrant workers under the existing legal framework of Bangladesh.

The Prevention and Suppression of Human Trafficking Act, 2012 provides provisions not only for preventing and suppressing human trafficking, but also for protecting victims and their right to safe migration. Persons who were illegally involved in deporting and transferring of victims can be punished under the said Act. Section 3 of the 2012 Act defines human trafficking as "deporting, transferring, sending or confining, or harbouring inside or outside the territory of Bangladesh." The victims in Libya incident could not go there without the help of someone/some individuals from Bangladesh. It would be no wonder to find that some Bangladeshi persons were involved in sending those to Libya. It can be said that the suspected traffickers can be punished under the 2012 Act – for the commission of human trafficking to Libya, if not for the alleged killing in Libya. Moreover, the already arrested individuals from Libya can also be punished under the same Act, despite that the crime was committed outside Bangladesh. Because section 5(1) of the Act provides that our domestic criminal courts have statutory jurisdiction to try criminals who have committed crimes against the Bangladeshi citizens within or outside of the territorial limits of Bangladesh. Hence, there will not be any legal bar to take action against the offenders.

False promises and fraudulent actions by the illegal migrant agents must be suppressed by the strict application of the existing laws in order to combat human trafficking. Otherwise, the tale of economic development by the migrant workers will remain a mirage as well as a curse for the whole nation.

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LAW WATCH

State's liability in cases of custodial torture and death

ARAFAT IBNUL BASHAR

RECENTLY, the Supreme Court of Sri Lanka in the case of *Rathnayake Tharanga Lakmali* v *Niroshan Abeykoon, Suraweera Arachchige Wasantha and others*, ordered the police inspectors liable for a fake encounter and custodial death and also the State to pay compensation to the widow of the deceased victim of the encounter. Although right to life is not explicitly mentioned in the Constitution of Sri Lanka, the Court concluded that the prohibition on torture or cruel, inhuman or degrading treatment or punishment under article 11 of the constitution and the requirement for an order of a competent court to impose punishment of death or imprisonment under article 13(4), read in light of international conventions ratified by Sri Lanka, such as the UDHR, the ICCPR, etc. affirm the notion of right to life. The Court alongside imposing fines on the culprits, also ordered the State to pay Rs. 1 million as compensation to the wife of the deceased as it was the State's responsibility to protect every citizen of the country and having failed its responsibility in that instance, the State has violated the fundamental rights of the deceased victims.

The Prevention of Torture and Custodial Death Act 2013 was enacted by the Government of Bangladesh in order to adhere to the commitments of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 and to implement article 35(5) of the Constitution that prohibits torture or cruel, inhuman, degrading punishment or treatment. Under section 15 of the Act, a person who tortures another person and as a result causes the death of the latter, may be imprisoned for life and fined up to Tk. 1 lakh, and in addition he/she may have to pay Tk. 2 lakh to the aggrieved person (victim/family members of the victim). The Act does not explicitly provide penalty for public officers and law enforcement agencies responsible for the death of any individual in custody.

However, the decision of the Supreme Court of Sri Lanka in *Rathnayake Tharanga Lakmali*, though it being a foreign judgment, clearly illustrates that both the State along with the police officers are responsible for death of any individual in police custody. In fact, it is not the first instance that a court in South Asia has held that the State can also be liable for custodial death along with its law enforcing agents. In *SAHELI* v *Commissioner of Police* (1990), a case regarding the death of a child in police custody, the Supreme Court of India stated that the State is liable for the tortious liability of its agents. The fact that the State was vicariously liable for the acts of public servants was also stated in the case of *D.K. Basu* v *State of West Bengal*. Thus, it can be inferred that the State must also pay compensation to the family of the victim of a custodial death.

The reasoning for compelling the State to pay compensation for custodial death does not stem from the necessity to pay more money to the victim's family members. But it is rather necessitated in order to create a nexus between the custodial death and the State's failure to protect an individual – since the State is constitutionally and legally obligated to protect its citizens. As stated by the Supreme Court of USA in *DeShaney* v *Winnebago County Department of Social Services* (1989), it is the duty of the State to protect a person in its custody; as such person does not have any ability to protect himself. When a person is in the custody of a law enforcement agency, it becomes the positive duty of the State to assure his right to life. Making the law enforcement agencies only liable to pay compensation and serve imprisonment, does not do complete justice to the victims. In *Supreme Court Legal Aid Committee* v *State of Bihar*, it was held that the omissions of the public servants vested with a duty as cast by law would make it implicit for the master to answer the lapse. Thus, the State is not absolved from its liability, even when the culprits have been apprehended. And when it comes to violation of fundamental rights, the excuse of sovereign immunity is inapplicable.

Payment of compensation by the Government alongside that of the culprits, even when the law does not stipulate that, is not unlawful. The Indian Supreme Court observed in *Rahul Singh* v *State of Punjab,* that the court can pass an order for payment of money as compensation for deprivation fundamental right to life and liberty. As stated in *Byrne* v *Ireland* (1972), if there is a failure to discharge the constitutional obligations, the remedy must be sought from the State itself.

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