

HUMAN RIGHTS *advocacy*



Need for a regional victim/witness protection protocol in South Asia

A.F.HASSAN ARIFF

SEVERAL factors, like river erosion, poverty, illiteracy and lack of social awareness, have contributed to making trafficking of persons in Bangladesh a grave social menace. There are several stakeholders involved in combating trafficking, along with commercial exploitation and sexual abuse of



PHOTO: ADB

women and children. Women's rights related NGOs and activists have been working hard at trying to awaken the government and develop social consciousness to respond effectively to combat trafficking.

Laws of Bangladesh deal with kidnapping and abduction of women and children both under general and special provisions, such as the Suppression of Repression against Women and Children Act-1995, Suppression of Repression Against Women and Children Act-2000, the Suppression of Immoral Traffic Act-1933. Though there are laws essentially targeting trafficking in women and children, there are also loopholes and unscrupulous traffickers are taking full advantage of these to traffic women and children to adjoining countries like India and Pakistan.

I have reason to distinguish those who undertake voluntary migration to West Asian countries and end up being exploited, with women and children who are trafficked to India and Pakistan. In the latter situation, the movement is involuntary and/or based on misrepresentation. The object is solely for prostitution or working in near-slavery conditions. Social workers and women rights activists have been working hard to trace, recover and repatriate victims back to Bangladesh from Pakistani and Indian brothels.

In order to make the effort of tracing, recovering and repatriating trafficked persons more effective and result-oriented, a major action plan is necessary. Such action plan calls for regional cooperation, preferably in the SAARC region.

Though there is a SAARC document against trafficking, the same does not address the issue of Victim/Witness protection. Such protection is vital for prosecution as well as for giving support to victims and witnesses to depose and assist prosecution. Though instances of such prosecution is few and far, so far as cross-border trafficking is concerned, the 'South Asian Regional Initiative/Equity Support Program' in collaboration with the human rights and women rights activists of the region, are undertaking the endeavour to hammer out a regional victim witness protection protocol for South Asia. If the protocol is adopted, social workers believe that the inherent weakness in the present prosecution system for traffickers may be reduced to some extent, if not eliminated. The summary of the proposed protocol is stated below for creating public awareness and encouraging discourse.

Regional Victim/ Witness Protection Protocol

Even though official data are lacking in the South Asia context, it appears to be widely accepted that incidents of violence against women and children (including trafficking) have considerably increased in the last decade. Few cases are reported to the law enforcement agencies and even fewer reach the trial stage and that 15 to 20% of the accused are convicted - most cases resulting in acquittals. One of the main reasons for the low rates of complaints and convictions appears to be the reluctance of victims to come forward in filing complaints against those who have violated their rights. Or to testify in court for fear of humiliation and threat to their own life and property or that of their families. Strong legal instruments for the protection of victim witnesses are therefore needed. Women and children who are victims of crime are uniquely vulnerable to threats and intimidation, far more so than the average witness.

Their human rights are violated both in the course of the crimes committed against them and in their subsequent persecution by their assailants when they attempt to do their duty as citizens and testify. Violations of human rights are both a cause and a consequence of violence against and commercial sexual exploitation of women and children. Accordingly, it is essential to place the protection of all human rights at the centre of any measures taken to prevent and combat these crimes.

The testimony of a victim in a crime of violence is often the best and the only evidence that can be obtained against an accused. It is therefore incumbent upon the State, in fulfillment of its duty of meting out justice, to ensure that victims who would be witnesses are protected against the threats and the intimidation, psychological and physical, of the associates of the accused. The victim-witness special status needs to be recognised. The State is best equipped to provide protection and security to victim-witnesses and thereby protect their human rights.

Currently, neither India, Bangladesh, Nepal and Sri Lanka have a distinct law, policy, guide-

lines or programs to protect victim witnesses before, during or after the trial. Though some existing laws (penal codes, criminal procedure codes and constitutions) refer to witness protection, provisions appear to be insufficient to adequately protect women and children victim witnesses who have been trafficked for sexual exploitation.

There is thus a need for a more rights based anti regional protocol to combat violence against and commercial sexual exploitation of women and children in South Asia and to protect and promote certain rights of victims and witnesses of crimes in proceedings where their lives, psychological and physical security and property are endangered due to their contribution to the collection of evidence in order to meet ends of justice.

Having considered the need for a common outlook and for common principles to inspire, guide and protect the victim of and witness to a crime in the protection and enhancement of the human environment, and to meet the end of justice

Objectives of the proposed protocol:

- To protect and safeguard the rights of women/children victims and witnesses of trafficking and commercial exploitation and sexual abuse of children and women against intimidation, retaliation and secondary victimisation.
- To amend, review and implement the SAARC Convention on preventing and combating trafficking in women and children for prostitution
- To recommend amendments to national legislations
- To attempt better interpretation and enforcement of laws
- To provide an advocacy tool for organisations and NGOs
- To create an official support system for women and children within the police and court systems
- To facilitate bilateral agreements within the region
- To initiate Public Interest Litigations

Scope and applicability of the protocol

The State parties to provide that in any criminal proceedings relating to trafficking or commercial sexual exploitation or abuse any victim/witness of trafficking or commercial exploitation or sexual abuse may be given protection upon an application filed before the court by the said person or any members of her/his family or any other person associated with the case or the Court on its own motion or suo motu or in those cases in which the Court thinks fit to do so and gives appropriate directions. A risk assessment and decision to be made by the Court on the necessary level of protection in each case.

Responsibilities of the witnesses of trafficking or commercial exploitation or sexual abuse The State parties to provide that the responsibilities of the witnesses include: To testify before and provide information to all designated law enforcement officials in appropriate proceedings in connection with or arising from the activities involved in the offence charged; To cooperate with respect to all reasonable requests of officers

and employees of the Government and be accessible to the law enforcement agencies, who are providing protection under this protocol and to regularly inform the appropriate officials of her/his current activities and address.

Protection to witnesses

The State parties to agree to provide residence facility, special protection, economic support, travel expense, medical treatment, etc. to witnesses of trafficking and commercial exploitation or sexual abuse.

Termination of the witness protection

State parties to ensure that any witness given protection who fails or refuses to testify or to continue to testify without just or reasonable cause, when lawfully obliged to do so, may be prosecuted for contempt. If s/he testifies falsely s/he shall be liable to prosecution for perjury.

Protection of victims of trafficking and commercial exploitation and sexual abuse

The State parties to provide that the special rights and status which should be accorded to trafficking victims must be preserved whether or not they act as witnesses.

Victim Protection during a rescue operation

Crimes of trafficking for commercial exploitation and sexual abuse to be well-documented. Record of the copies of these complaints should be maintained and accessible to the competent authorities. A First Information Report or the first report at the police station, as far as possible and practicable, be comprehensive and must include location of crime, description of offence, victim and accused, chronology of crime preferably from the date the victim was trafficked, surveillance report. Relevant sections of the Penal Code and other local and special laws, pertaining to the peculiar circumstances of the crime to be added to the first information report at the police station, if the victims have given concrete statements against the accused, indicating the applicability of the said sections or laws.

Victim protection - post rescue operations

The State parties shall necessary steps, such as, victims must be separated from the accused, after the rescue operations and should be treated with respect and dignity by the police and other authorities. The concerned/relevant magistrate or judicial officer or the members of the competent authority, as the case may be, to visit and supervise the rescue home, periodically, preferably once in a month to ensure adherence to court orders and directions.

Victim protection during the stage of trial

All victims willing or necessary to testify should be given a full witness protection program. They must be kept in the safe custody of a well-guarded rehabilitative institution. During a trial the victims should be protected at all times and separated at all times from the accused. The Court may provide for the victim/witness to give evidence by means of a live link or recorded videotape or arrange trial in camera if necessary.

Credibility of Victim/Witness

The State parties to provide that in all criminal cases the fact of the entitlement of the victim/witness to the protection and benefits provided shall not be admissible in evidence to

diminish or affect his/her credibility.

Confidentiality of proceedings/actions

The State parties to provide that: all proceedings involving application for securing protection and the action taken thereon by the persons (Court Officials, Police Officers, Technical Support Providers or any person involved with the protection procedure) shall be under obligation to keep all the information and documents confidential. Violation of the confidentiality of the said proceedings/actions to be an offence.

Prevention

The State parties to ensure that the Victim/Witness Protection Protocol covers the following in the area of prevention of trafficking and commercial exploitation or sexual abuse: In consultation with the various agencies of the state and concerned non-governmental organisations, source locations, areas and transit points will be identified, to reduce or eradicate the possibilities of trafficking of women and children. State parties to give support and recognition to women's self help groups at the village level or to the local bodies unit level watch-dog system to prevent trafficking and ensuring safe migration. They must take effective measures to battle those social customs, traditional practices that are fostering and feeding directly into the trade of trafficking of persons. In certain circumstances, the children of prostitutes need to be protected from their own family/guardians.

Effective law enforcement

For effective law enforcement the State parties must ensure that: compensation by exploiters to the victims to be considered. The assets and funds confiscated during anti-trafficking operations and investigations should be used to fund future anti-trafficking programs and operations.

Repatriation



PHOTO: ADB

State will ensure that repatriation should be carried out depending on how safe and nurturing the family environment is for the victim. Repatriation will be done after their stay in a protective home. They will provide adequate financial assistance for meeting the needs of rescued victims during travel while repatriating them to their families or institutions in source areas. Repatriation to be done only with the consent of the victim. The survivor being repatriated should be counselled and prepared to return to the country of origin by way of medico-psychosocial care and basic life-skill empowerment so that the survivor is enabled to be reintegrated in mainstream life. State will also reimburse emergency expenses incurred by the police or other authorised escorts.

Rehabilitation and reintegration

State parties will ensure that the trafficked victims will be equally provided with the access to formal and non-formal educational opportunities, depending on child's need and interest. They also will formulate special schemes like employment guarantee schemes, agricultural subsidies, and medical support to provide assistance to the families of trafficked child victims.

Mutual cooperation and assistance

The State Parties shall grant to each other mutual cooperation and assistance in the areas of investigations, inquiries, trial, extradition, legal help and exchanging databases and any other assistance that may be required in consistency with the objectives of the protocol.

Monitoring of the protocol

The State parties should establish a monitoring body in each country within the region for the purpose of monitoring the implementation of the protocol.

The author is Senior Advocate, Supreme Court of Bangladesh.

RIGHTS *investigation*

SPECTRUM INCIDENT

Rights of garment workers, legal challenges and possible remedies

SOMA ISLAM

IN the wake of the collapse of the building that housed Spectrum Sweater Industries in Savar that has claimed the lives of hundreds of garment workers and left many seriously injured, a lot of thought has gone into reviewing the existing workplace safety laws, rules and regulations as well as to critically look into the special compensation laws. Recurrence of fatal accidents and mishaps in the garment factories of Bangladesh that result in the death and injury of workers indicate the impunity with which the employers tend to evade workplace safety laws and maximise gains while the toiling workers continue to be deprived of their basic human rights.

Paltry and shamefully inadequate amount of compensation which has been offered to the families of the dead and injured workers under the Workmen's Compensation Act, 1923 following the Spectrum Sweater Industries disaster exemplifies the disregard and disrespect for garment workers without whose contribution the garment factory owners could not have earned millions of foreign currency. The situation demands that the State as well as other stakeholders who make sizeable profits from the garments industry address the rights of garment workers with seriousness failing which they should all be held accountable for accidents, which are a direct consequence of gross negligence and breaches of workplace safety laws. Accordingly, civil as well as criminal liabilities should be imposed upon faulty factory owners for not exercising due diligence in ensuring workplace safety.

The Workmen's Compensation Act, 1923 that was legislated during the British rule should be amended and compensation should not be calculated on the basis of loss of earnings capacity alone. It should include amongst others, proper evaluation of the loss of reproductive capacity that is also a vital human function, disruption in family as well as social life, short-term and long-term medical treatment expenses, punitive damages for pain and suffering, post-disability rehabilitation follow-up, alternative employment opportunities for at least one family member of the deceased or permanently disabled worker and assurance of placement for all affected workers. Also, the period for which the worker is remaining injured and is precluded from

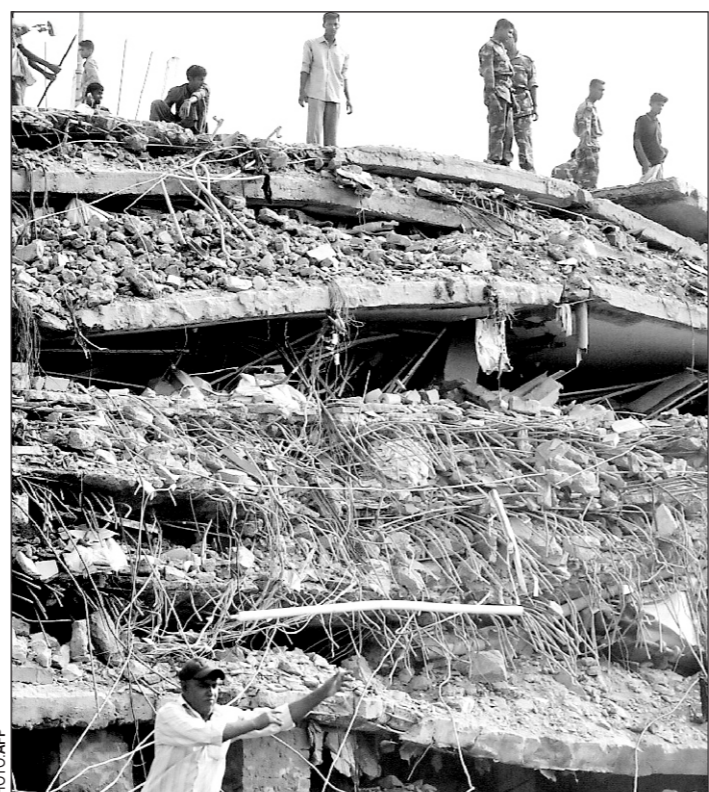


PHOTO: AFP

joining work and ability of the injured workman to go back into the same occupation needs to be looked into while working out compensation. The law should be framed in such a manner so that garment factory owners would be compelled to adopt preventive mechanism and implement workplace safety laws failing which they would be liable to pay exemplary damages in the event that death and injury ensues as a result of negligence on their part.

It may be noted that under the Workmen's Compensation (Amendment) Act, 2000 the compensation payable in the event of death has been enhanced to Rs 4, 57,000 and Rs 5,48,496 for permanent total disablement in India. It is suggested that similar amendments be effected in Bangladesh. However, bearing in mind that such enhancement will again become inadequate and turn into a sham with the rise in price, it is suggested that the law should provide for a minimum amount of compensation payable and leave the maximum limit open-ended. Compensation should be determined after taking into consideration the facts and circumstances in each case.

A stringent policy for ensuring that garment factory owners comply with workplace safety measures should be devised to prevent recurrence of such incidents. The State should establish a monitoring unit with representatives from the human rights organisations, workers, BGMEA and concerned government officials with a view to check and verify whether the existing garments factories are in compliance with workplace safety laws and immediate corrective measures should be introduced to prevent loss of life and injury to workers. The Factories Act, 1965 and the Factories Rules, 1979 should be amended in such a manner so as to create an incentive for factory owners to comply with workplace safety laws by significantly increasing the penalty for non-compliance. Also, necessary steps should be taken by the Labor Directorate for effective implementation of the existing provisions of the workplace safety laws, rules and regulations.

The State and human rights groups should work in tandem to ensure that appointment letters are issued to garment workers and employees list is updated and made available to the Chief Inspector of Factories as a precondition to issuing license for setting up an industrial establishment or factory. Appointment letters would facilitate the employees to establish their

claims for compensation as bonafide workers in the event of accidents and prevent the employers from escaping liability.

Given that the cost of living and wages of workmen have increased over the years, it is suggested that there should be no ceiling on the monthly wages of the workmen for calculating the amount of compensation. It should be based on the prevailing minimum wage or the wages earned by the workman per month whichever is higher. Alternatively, the ceiling should be periodically revised keeping in view the changes in price index. In the event of delay in paying out compensation by the employer, an interest rate on the amount of compensation due for payment under the existing bank rate should accrue and the law should incorporate such provision.

Regular publicity campaigns about remedies available under the Workmen's Compensation Act should be launched by the government media with a view to raising awareness of workers on legal redresses available under the law. Last but not the least, there is merit in imposing corporate criminal responsibility on faulty factories and industries those are registered as companies and whose corporate policy should be equated with human intention. Criminal liability should be imposed on the company for its failure to take appropriate measures to prevent manslaughter by violating workplace safety laws and acting in a sloppy manner causing serious accidents in workplace. The burden of proving due diligence should rest on the company's shoulders since it is best informed as to the preventive measures adopted by it.

The advantages of this proposed model is that it would enable companies that have taken compliance systems seriously to evade liability by exercising the defense of due diligence and to impose criminal sanctions on negligent companies for failure to take their responsibilities seriously. Given the legislative ambivalence with regard to crimes committed by companies that operate under the 'protective umbrellas' of the law, it may be argued that organizational blameworthiness is justified, for corporations have moral obligations and public interests responsibilities to the community.

The author is working as an Assistant Director (PIL & Advocacy), BLAST.