

Star LAW analysis

Victim-friendly judiciary

THE DAYWALKA FOUNDATION

In the past ten years, the legal and judicial system of Bangladesh has made significant strides towards curbing trafficking in persons. First, victims' rights have grown: the Nari-O-Shishu Nirjatan Daman Ain, 2000 expressly defined trafficking as a criminal offense, and in Gafur v. Bangladesh, the Supreme Court established that repatriation of trafficking victims is a fundamental right under the Constitution. However, the time it takes for cases to be completed is still quite long, which diminishes victims' power and rights.

Second, courts have a generally good policy regarding testimony and evidence. Victims' statements are trusted without requiring other evidence, which shifts the burden to the defendant to show his innocence. In 2005, the Supreme Court also protected a victim's right to testify against the accused, refusing to accept the validity of an agreement to the contrary between the accused and the prosecution lawyers.

Community involvement is prevalent in many of the cases in this report. The commitment of police, NGOs, and even individuals to track down traffickers in persons is commendable and encouraging. However, there do not seem to be clear procedures for community involvement which can hurt the prosecution's case by undermining some of the evidence.

Punishment of the convicted still poses problems, however. Many accused do not show up for trial, and although this greatly increases the chance of conviction, it is unclear if the absconding defendants are guilty, or if they will ever serve the sentences imposed. Also, the sentences imposed on convicted persons vary widely and with little apparent pattern based on either the accused or the nature of the crime.

Victims' Rights

The legal rights of trafficking victims have grown stronger over the past decade. In 1997, the Supreme Court established in Gafur v. Bangladesh that repatriation of trafficking victims is a fundamental right under the Constitution. In 2000, the Nari-O-Shishu Nirjatan Daman Ain (the Suppression of

Violence against Women and Children Act) more concretely established trafficking as a criminal offense and provided victims and their families with recourse in the legal system.

However, the 2000 anti-trafficking law has a notable omission: it does not address the trafficking of adult men. Men are trafficked less frequently than women and children; as of June 2007, only 27 of the 586 victims recovered by the police were men. However, because men are trafficked for forced labor or other forms of slavery, the law should recognize their status and allow their cases to be brought to trial under an anti-trafficking law.

The length of time between the filing of a case and the judgment also causes concern. While not all of the judgments expressly state when a First Information Report (FIR) was filed with the police, the cases that do specify dates reveal that cases often do not follow the required timeline of a continuous trial. Instead of ending within one year as required, some judgments in this compilation review cases that began four to six years earlier. Such long trials do not only strain the courts; they also harm the victims by prolonging justice, making evidence and testimony harder to obtain and preserve, and accentuating the victim's status as a victim and thereby keeping them vulnerable to social stigma and pressure.

Trustworthiness of

Testimony and Evidence

Ensuring that judges listen to and trust victims' testimony is critical to the successful prosecution of trafficking cases, because often there is no other witness to the crime and physical evidence can be scarce. Bangladesh's courts have recognized this reality, and in general tend to value the victim's statements. In 2005, the Supreme Court upheld a lower court's refusal to prohibit victims from testifying at the accused's trial. In the courts, judges generally view victims' testimony as trustworthy, and a number of judgments explicitly state that such testimony can be trusted by default unless there is some reason to doubt the victim's claim. In effect, this assumption shifts the burden of proof to the accused to establish a reasonable

doubt of his innocence.

It is troubling to note, however, that at least in some courts, judges look more favorably on cases in which a man files the First Information Report, rather than a woman. In State v. Sadhu Bala, the judge noted that the victim's mother filed the report, not her father, and used this fact as an example of the weaknesses of the case. That case had many other weaknesses that could have justified the court's decision by themselves, and focusing on the identity of the FIR reporter was unnecessary and revealed the biases against women that still can influence courts.

Physical evidence is rarely introduced in court. Because of the limited scope of this report, it is unclear why physical evidence is not presented in court, but it may be simply that physical evidence cannot be obtained because of the nature of the crime and the length of time between the crime itself and its discovery and prosecution in court. However, when physical evidence is available, judges tend to rely heavily upon it. The best example of this is State v. Tamijuddin, in which mobile phone records and even photographs of the victims in India were produced. The defense tried to undermine the trustworthiness of such evidence, but the court disregarded such arguments and decided that the physical evidence clearly established the prosecution's case.

The lack of physical evidence can also hurt a case. For example, in State v. Sadhu Bala, the prosecution described a letter written by the victim's mother, but failed to produce it in court. The court decided that the absence of such physical evidence hurt the credibility of the prosecution's case. Lack of evidence can also harm the defense. In State v. Md. Nazrul Islam, the defense argued that the accused was insane, but the court pointed out that no evidence had been introduced to support such a claim.

Given this favorable attitude towards corroborating physical evidence, particular attention should be paid to obtaining any evidence that might help solidify a case, such as letters or pictures. In addition, thorough medical attention to a victim may benefit not

only the victim's immediate health and well-being, but subsequently any legal proceedings as well.

Community Participation

These cases also demonstrate how members of the community can contribute to anti-trafficking measures. Although trafficking prosecution generally relies on the victim's family and the police, other organizations or private citizens can also help instigate the investigation. In one of the cases summarized, an NGO rescued the victim and filed the report; the BDR, a paramilitary organization that patrols the country's borders, filed another. Individuals can help in the form of making anonymous tips to the police or to NGOs, as in State v. Md. Yunus Miah. They also sometimes give aid to victims in contacting family or escaping; for example, in State v. Tamijuddin, people provided the victims with mobile phones. Sometimes, citizens even capture and interrogate the suspected trafficker and turn him in to the police, as in State v. Moslem Molla.

While these non-governmental actions are commendable, they vary widely in technique and quality. While the Bangladesh National Women Lawyer Association (BNWLA) is an NGO with thorough and effective protocol that the court specifically congratulated in State v. Md. Yunus Miah, the individuals who captured the accused in State v. Moslem Molla assaulted him, raising questions about the trustworthiness of the confession he made to his attackers. In State v. Md. Nazrul Islam, the BDR gathered witnesses, but at trial several of these witnesses gave conflicting testimony, and some claimed that they had seen nothing at all. While the judgment doesn't indicate why this testimony was flawed, thorough pre-trial protocols for obtaining and preparing witnesses for trial might help such a situation. These varying methods of community involvement might affect the judge's opinion of evidence, and those who regularly participate in prosecution of traffickers should make sure protocols exist to ensure the reliability of evidence and witness testimony.

Accused's Presence in Court

Absconson is the term given to

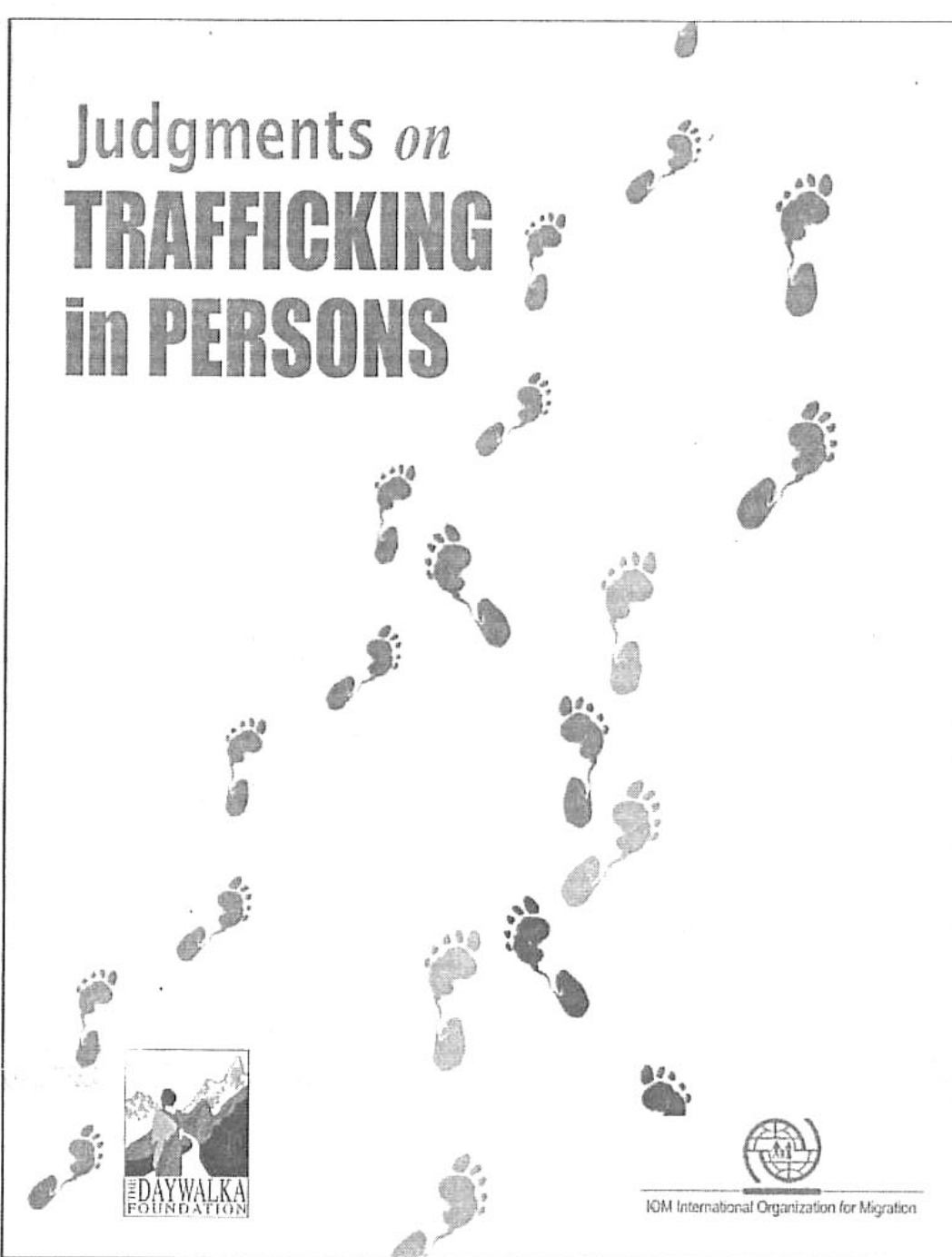
describe when an accused person is not present at trial. This can occur either because the accused person leaves town after posting bail or because he escapes before formal arrest and charging. Regardless of how absconson occurs, it is a widespread problem in trafficking cases; in six of the ten cases studied, at least one defendant was absconding.

Judges strongly construe absconson as implying guilt, and in our limited sample, every absconding defendant was found guilty by the court. However, these judgments do not reveal whether convictions actually result in served sentences. Justice has been determined on paper, but that might not reflect the reality of absconding defendants.

This assumption of guilt also fails to recognize that not all defendants abscond for the same reasons. While those who leave town after posting bail may very well do so because they wish to avoid a trial, those who have not even been arrested might not even know about the charges brought against them. Assuming guilt in those types of cases denies the accused his right to defend himself, and may stop law enforcement agencies from tracking down and bringing the real criminals to justice. There should be a distinction between defendants who have gotten the opportunity to defend themselves and those who have not. When an accused person has never been found or arrested, the case against him should be considered pending until he can be arrested and given the opportunity to clear his name in court.

Judges' Discretion in Sentencing

In judgments that end in conviction, the sentences vary widely and appear to be random. Under the 2000 Act, convicted traffickers in persons might receive either ten to twenty years of imprisonment, or life imprisonment with a fine, or execution. However, there are no guidelines for when one sentence should be imposed rather than another. As a result, sentences are imposed based only on the judge's discretion, which leads to some traffickers being sentenced to death and others receiving only ten years and a fine. While the High Court Division automati-



cally will review the appropriateness of a death sentence, there is little recourse for a convicted person to argue that he should have gotten 20 years instead of life imprisonment.

Ten cases are not enough to determine whether there are unspoken guidelines that a judge uses when sentencing a case, but in several instances, the judge indicates why he imposes a sentence lower than

he might have. For example, convicted persons with children typically get lesser sentences, for example women rarely are sentenced to death.

Because there are no explicit guidelines, sentences may be particularly subject to unfair biases. While there are not enough data in this report to conclude if biases exist, it is intriguing to note that one of the two death sentences studied

here was imposed on an Indian man, which might indicate a bias against foreign defendants. Further studies would be necessary to see if such prejudices do actually exist, but the lack of clear sentencing guidelines means that such problems might exist.

This is the abridged version of the study. Readers who are interested on the findings can email to daywalka.dhaka@gmail.com for the full text.

LAW campaign

The Clients' Charter of Rights of Bangladesh

In Bangladesh, almost 50% of the total population lives under the poverty line. Most people are deprived from receiving basic services including health. The poor do not avail health services due to a number of barriers to access including fees and other associated costs. Although it is mainly the responsibility of the government to ensure adequate health services for its citizens, and ensure favourable environment for properly exercising their rights to healthcare, such an objective would need concerted efforts from the entire range of stakeholders. Some initiatives that have been taken so far are not adequate to establish the health rights of the citizens and a lot of works need to be done in this regard.

Existing regulatory framework

The existing regulatory framework for monitoring health service delivery either in the public or private sector remains weak. There are 45 laws related to various aspects of health. For example, laws related to specific diseases/health situations such as Epidemic Disease Act (1897), Prevention of Malaria Ordinance (1978), Eye Surgery (Restriction) Ordinance (1960); laws related to breast milk substitute, quality of food, quality of drugs, use of narcotic, women and children's health, health of labourers, environmental pollution and so on. None of these laws deal directly with patients'/health consumers' rights.

The country adopted a National Health Policy in 2000 with fifteen aims and objectives. These objec-



tives include: development of nutrition and public health, accessible health services for the poor and rural population, primary healthcare for the Upazila and Union Council, reduction of maternal mortality, development of reproductive health, up-gradation and modernisation of health services, introduction of family planning methods for the ultra poor, special provision for the mentally and physically handicapped population etc.

Formulation of CCR

Health is a basic need and it is protected in the constitution of the government of the People's Republic of Bangladesh. Ministry of Health and Family Welfare (MoHFW) formulated the Clients' Charter of Rights (CCR) in 1998. The promulgated CCR is only a first step in emphasising the individuals right to health. The charter was developed by MoHFW without the broad participation of civil society, other

government departments or other stakeholders. The result was a CCR without the institutional and legal mechanisms in place for it to be used as a tool by clients or the Government and it is limited only in displaying the messages of the charter.

Basic features of CCR

- Right to information about what are the services available from providers
- Right to safe and continuous services
- Right to choose the form of treatment and family planning methods
- Right to receive services on priority basis in emergency situation
- Right to confidentiality
- Right to be informed about the services received
- Right to be respected, express opinion and feel at ease
- Right to receive client's own copies of treatment/health related reports
- Right to inform relevant authorities and get redress, if the clients' rights are hindered or compromised for any reason.

Recommendation for furthering Clients' Charter of Rights

Right to receive client's own copies of treatment/health related reports
The client has the right to receive her/his own copies of treatment materials/documents in case of necessity. The defective medical record may mislead further treatment of the patient and thus

aggravated to have redressed, therefore, the patient should have the right to take recourse at law.

Rights to ensure participation on decision-making level, including development of health related policy, strategy, project implementation and evaluation

It is important to ensure the voices of the users in developing policy, strategy and guidelines on health related issues with the healthcare providers and other stakeholders. Such practice would provide opportunities to take into account the different perspectives of different stakeholders, specially the end users/health consumers and ensure transparency and to build the legitimacy of the policy for the people.

Right to make complain and get redress for denying the rights of the client

Making complain and redress in case of wrong treatment or neglect infringing the rights of the service recipients.

Rights to get compensation in case of wrong treatments

Patients should have their rights to be compensated for negligence or wrong treatment. One mistake may cause nothing to the physicians or other concerned persons, however it can be a massive disaster for the patient and his/her family. Therefore, the physicians and all others concerned have to share the responsibility for the consequence of the wrong treatment.

Rights to learn about the clients' charter of rights

Consumers have the rights to be educated about their rights. The

government should take initiatives and actions to disseminate the clients' charter of rights among the consumers about their rights and responsibilities.

There has a need to design a client/patient centred healthcare mechanism in order to ensure health consumers' rights in Bangladesh. 'Patient Centredness' can be defined as a state where everything is converged around the patient, the focal point of the whole system. Although the term is widely used, it is poorly understood in the medical practice. The process for developing such mechanism and implementation among the mass would depend on political commitment and accountability and transparency to the consumers, which is their constitutional right. The political commitment should be based on popular opinion so that it is not impeded with the change of the government. The local government framework has to be effectively integrated in this respect.

There are considerable commonalities as well as differences among the nationally and internationally introduced documents on clients' charter of rights. The Health Consumers' Rights Forum (HCRF) had taken different initiatives along with member organisations and individuals to formulate a comprehensive document on clients' charter of rights in the context of Bangladesh.

Some of the changes/additions recommended in the existing charter to transform it to a more wholesome national document, are as follows: Rights to non-discriminatory

health services

Every citizen has the rights to receive health services irrespective of their sex, religion, economic and social status. The marginalised peripheral and transgender should not be excluded from national health services as the citizens of the country. Rights to receive accessible, affordable and appropriate health services

This is the responsibility of the State to ensure optimal accessible and appropriate health services for all citizens. People should not be barred from receiving services due to location of the service facilities and costs of treatments.

Rights to information about where, how and which services are available

The information pertaining to the services offered, respective costs and other facilities should be displayed and made available for health consumers. Relevant charts have to be prepared about what a patient has to do, what kind of services a patient can suppose to buy and other minimum to be done for treatment after admission of a patient.

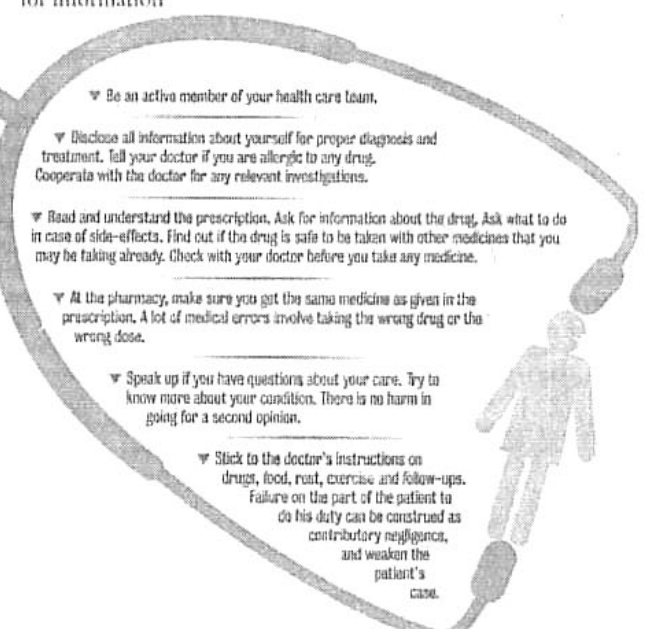
Right to choose types, family planning methods and health service providers

A patient should have the right to choose a convenient health services provider in terms of type, method and individual. They can choose services from any government recognised healthcare system i.e. allopathic, ayurvedic/unqni or homeopathy.

Rights to give consent on information presented for health services

Better be safe

A few tips on how a patient can protect himself by asking for information



Practitioners in our country usually neither take consent of the client nor provide sufficient information about her/his treatment. The patient has right to learn about diagnosis, treatment options and the potential risks involved in the treatment.

Rights to respect, confidentiality and privacy

The client has the right to receive respectful behaviour from the service provider. The health and medical reports should be treated as

confidential and are subject to disclose with prior permission of the client or legal reasons to divulge the information to a court. Rights to receive pathological tests in fair price

There is no government control over the prices for pathological tests in Bangladesh. There should be a standard price list developed by the government, which would be affordable to the customers.

Source: Mario Stopes, Dhaka.