LAW OPINION

Ensuring governance in NGOs

ASHIQUL A. KHAN & KHAJA SALAUDDIN AHMED

NGOs or civil society organisations, which initially focused on relief and rehabilitation activities in Bangladesh, have turned out today to be one of the most important contributors in the development activities, irrespective of the argument that their functions should have primarily focused on promoting democratic institutions instead. These days, NGOs or civil society organisations are not only working in the remote areas with the help of foreign donors but also establishing their eminent presence in the capital.

Affiliation of local and multinational conglomerates with such organisations, as part of their corporate social responsibilities, is also noticeable. Such widespread involvement of NGOs attracts attention from stakeholders for ensuring transparency, accountability and efficiency in their 'public service' operations.

The legal framework for NGOs in Bangladesh has been criticised for being narrowly focused on the foreign funding of a handful of NGOs. It does not tend to ensure accountability of a large number of NGOs or civil society organisations that do not receive foreign funds but are capable of affecting public interest equally. The number of Bangladeshi NGOs relying on domestic funding has grown significantly in the recent years and thus the issue of realigning the current regulatory regime has come forward.

This does not mean that there has not been any overseeing authority for such NGOs operating on the basis of contribution from the mass people. Such NGOs generally have to be registered and operated in accordance with the Voluntary Social Welfare Agencies (Regulation and Control) Ordinance 1961; and the Department of Social Services is supposed to oversee, among its other responsibilities, the activities of such NGOs.

The regulatory mechanisms which are in place for NGOs operating on public subscriptions are only concerned with the maintenance and returning of audited accounts and annual reports. The existing system thus narrowly focuses on financial figures. In other words, it is only concerned about the accounting of how money is spent but not with the accountability of it or ensuring governance. The founders and/or the board members of such NGOs, who would be indulging in the unscrupulous trend of gaining excessive benefits for themselves disproportionate to the operation of the NGO, would not be legally culpable so far as they declare their expenses in the audited accounts. But such trend would completely go against the moral claim as well as the legitimate expectation of the subscribers who entrusted their money with NGOs to promote social welfare. It is unfortunate that the promoters of NGOs, who may at the end of the day make a toast to so called 'alleviation of poverty' by making personal profit out of selling poverty, cannot be held legally responsible under the current regulatory framework of the country.

These mechanisms in place are incapable of ensuring and overseeing internal governance and external accountability of such NGOs. The current legal framework in Bangladesh fails to meet international good practice standards as well. There is a necessity for legal rules in the form of statutory regulations or governance code, as opposed to moral claim, for ensuring internal governance of the NGOs or civil society organisations, especially with respect to the composition, duties and powers; independence and accountability; flexibility and allowances of board members - the breach of which should have been redressible by law.

There should be mechanisms, given the fiduciary nature of their obligations, especially to combat conflicts of interest, self-dealing, excessive benefits, and to promote the efficiency and due diligence of the board members of the NGOs at the same time. Furthermore, the tax regime of the NGOs need a overhaul with specific attention to the issues of taxability in respect of their income generating activities and the tax deductibility that the donors or subscribers might be entitled to for their contributions to the NGOs.

Keeping up with the recent trend of founding and operating NGOs or civil society organisations based on subscriptions from the mass people, it is high time a body was formed to reformulate legislative provisions and produce regulations or code of governance with enforceable mechanisms. It is often feared by the civil society that government will invoke restrictive laws and regulations and impose onerous registration and tax requirements in the name of ensuring accountability and transparency.

However, formulation and implementation of such mechanisms should not threaten the sustainability of NGOs or civil society organisations which have the potential of contributing significantly to the welfare of the general mass. Thus it is advisable that a committee should be formed comprised of all the stakeholders for undertaking such essential reform task. Moreover, having a coherent governance code is likely to ensure that the government treats all such organisations equally without having the option of playing favourites by labelling NGOs 'good' or 'bad' for gaining undue political benefits.

THE WRITERS ARE ASSOCIATES AT LEGACY LEGAL CORPORATE

LAW LETTER

The relevancy of 'rollback clause' for LDCs IPRs regime

The WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), with its 'one-size-fits-all' approach has created serious implications for the developing and least developed countries (LDCs) in the field of public health, agriculture and development. Having recognised the insufficiency in infrastructure and policy regime for enforcing the stringent IPRs standards as envisaged by the TRIPS by many WTO members (especially LDCs), the agreement itself has provided 'special and differentiated treatment' for certain members.

The 'transition period' for LDCs is a part of that differentiated treatment agenda. While the initial 'period of transition' to compliance for LDCs was until 1 January 2006, the TRIPS provided that, the TRIPS Council "shall upon duly motivated request by a least developed country member, accord extensions of this period" (article 66 of the TRIPS Agreement). Accordingly, there have been three subsequent extensions since the commencement of the TRIPS. Two of them were plenary i.e. applicable to all IPRs as included in the Trips Agreement and the other one (para.7 of the Doha Declaration the TRIPS and Public Health, 2001) was applicable for only pharmaceuticals and agricultural chemicals. The objective of the LDC transition arrangement as stated in article 66.1 is to accommodate "the needs and requirements of least developed country Members…and their need for flexibility to create for a viable technological base".

The central concern for and regarding LDCs is promoting creation of the technological base. Like many WTO flexibilities, the primary benefit of an extended transition period lies in the preservation of policy space for LDCs –conserving the autonomy of LDCs to determine appropriate development, innovation, and technological promotion polices, according to local circumstances and priorities. The TRIPS transition period is a strategic advantage for LDCs who has sufficient manufacturing capacity in pharmaceuticals. (Islam, Mohammad Towhidul, TRIPS Agreement of the WTO: Implications and Challenges for Bangladesh, CSP, 2013, 168). This enables the generic producers of the LDCs to freely copy patented medicines for domestic consumption needs and export purposes without having followed the WTO's complex 30 August 2003 decision.

Paragraph 5 of the TRIPS Council decision of 29 November, 2005 provided that, '[l]east-developed country Members will ensure that any changes in their laws, regulations and practice made during the …transition period do not result in a lesser degree of consistency with the provisions of the TRIPS Agreement'. This 'no-rollback' provision has serious implications on LDCs, for many they have existing IPRs regime which impedes them to take the comparative advantage of reverse engineering and many other TRIPS flexibilities. For example, the IPRs regime of Bangladesh, an LDC, allows patents protection for pharmaceuticals and, therefore cannot use the Paragraph 6 of the Doha Declaration on TRIPS and Public Health vis-à-vis another LDC who has no patent protection regime in pharmaceuticals. A clause precluding adoption of IP laws that are less consistent with the TRIPS Agreement than existing laws might lock some LDCs into maintaining stronger IP law than would be adopted "writing on a clean slate".

This 'no rollback' provision seriously affects policy space for LDCs and they cannot prohibit practices like 'ever greening' of patents having serious implications on the public health, if their existing IPRs regime provides for such protection. Accordingly they cannot include some potential areas e.g. geographical indications, traditional knowledge within their IPRs protection regime. Again, the post-TRIPS initiatives (in the Doha Round) for LDCs e.g. 'Waiver Decision' of 2003 would be meaningless if the LDCs cannot incorporate those flexibilities in their policy framework. Further, such 'no rollback' provision might preclude the LDCs from incorporating some innovative policy options e.g. the parallel importation regime, having serious implication from development perspective.

The 2005 extension of "transition period" for LDC was up to July 2013. On the eve of the deadline, the TRIPS Council extended the transition period for a further period of eight years starting from 1 July 2013 in pursuance of a proposal sponsored by the LDC Group. The decision of 11 June 2013 has removed the condition introduced in the earlier 2005 decision that LDCs cannot roll-back the level of implementation of the TRIPS agreement that they have already undertaken in their national legislation. LDCs have argued that the —non-rollback clause is an undue restriction of their policy space and contrary to the letter and spirit of the extension, as stipulated in the TRIPS Agreement. Under the new wording, LDC members have expressed —their determination to preserve and continue the progress towards implementation of the TRIPS Agreement.

The new extension manifestly does not establish an enforceable WTO legal obligation on LDCs that precludes rollback of existing intellectual property legislation and rules (except with respect to national treatment and most favoured nations). However, a debate has arisen as to whether the extension of 11 June 2013 is a general or piecemeal approach i.e. whether it applies to pharmaceuticals and regulatory data protection. The Developed countries have interpreted the extension in a restricted manner and argued that, the LDCs will have to give pharmaceutical patent in 2016 and they will not be able to roll-back from the existing IPRs regime (if any). Professor Abbott has categorically said echoing the voice of LDCs "the June 11, 2013 decision includes patents within its subject matter scope, so it is rather difficult to understand why LDCs would be required to provide patent protection for pharmaceutical products (or any other products) in 2016 since the general extension runs to July 1, 2021". He further said "[b]ecause the June 11, 2013 decision allows LDCs to roll back existing levels of protection, they can elect to reduce existing levels of patent protection up until July 1, 2021, including for pharmaceutical subject matter.

In this scenario the 'TRIPS-Plus regime' has appeared as a great threat for LDCs for an effective utilisation of the 'transition period'. This regime mainly takes place in the form of Bilateral Investment Agreement (BIA) and Free Trade Agreement (FTA) with alluring market accessibility packages. These Agreements always try to curb the TRIPS flexibilities including the concession of 'transition period', since most of them (TRIPS-Plus) prohibits the LDCs in transition to 'rollback' from the existing IPRs regime. However, it may be argued that, under the 'Most Favoured Nation' (MFN) principle LDCs obligation under TRIPS-Plus regime is only limited to the party of the respective Agreement, for these 'TRIPS-Plus' Agreements are Preferential Trade Agreements (PTAs) (Article 4 of the TRIPS Agreement)

Ahsan Habib Leon
Student of LLM
University of Dhaka

Promoting Child Rights

DRAFT CHILD MARRIAGE RESTRAINT ACT 2014

A toothless law to combat child marriage

MOHAMMAD GOLAM SARWAR

DESPITE the existence of legal provisions against child marriage, it is prevalent in many parts of Bangladesh which compromises the advancement of larger portions of adolescents. By virtue of religious dichotomy following by orthodox interpretation of religious texts, early marriage still subsists in the modern society. While the Child Marriage Restraint Act 1929 fails to combat child marriage in Bangladesh, recently the government of Bangladesh has drafted a new law titled as Child Marriage Restraint Act 2014. But this draft Act suffers from efficiency crisis which needs to be revisited with sensible drafting.

If we read together child and marriage it would provide a clear sense that these two words cannot go together. The reason is very apparent that child marriages disregard and destroy the values and ethos of the institution of marriage. In 1929 there might have good reasons to name the Act as Child Marriage 'Restraint' Act, but in 2014 the term 'restraint' is not tenable because the term not only make the issue less vibrant but also provide us the sense of colonial legacy to address the issue. Prohibition or prevention of child marriage is imperative because it not only threatens the constitutional norms professing gender equality but also ignore the provisions of International Human Rights instruments dealing with equal rights and dignity. Interestingly, we made a law regarding prevention of domestic violence, but in terms of child marriage we are using the word 'restraint' though it is apparent that child marriage is one of the important sources of domestic violence.

Age dilemma: Under the draft Act minor means a person who, if a male, is under twenty one years of age, and if a female, is under eighteen years of age which clearly contradicts with the Majority Act 1875. According to the Majority Act, 18 years is the age of majority in general. This anomaly will certainly create disruption in terms of the implementation of the Act.

Apprehension of misuse of power by the Nikah registrar: As the draft Act is applicable irrespective of any communities, so term Nikah is not appropriate since it bears special connotation with Muslim personal law. Moreover, section 8 of the draft Act

Child bride in Rayer Bazar, Dhaka, Bangladesh. Images courtesy of MH Kawsar...

provides a wide discretionary power to the Nikah registrar in terms of cancellation of the registration of marriage. Under this section the nikah registrar has to reach in a belief followed by reasonable logic that there was no child marriage, only then he can cancel the registration of marriage. The term 'belief' and 'reasonable logic involve' many vague factors and the practical evidence suggests that there might have possibility of malpractice by the nikah registrar in the absence of concrete grounds for cancellation of child marriage.

Duration of taking cognizance of the offence: Under section 12 of the draft Act no court shall take cognizance of an offence after one year of the commission of an offence. It is ashamed to mention that, the imposition of limitation period in terms of an offence which indicates criminal law is nothing but reflect the insensible drafting of a law.

Unspecified ADR procedure: Section 19 of the draft Act states that, the representatives from union parishad or municipality are assigned to follow Alternative Dispute Resolution to settle the disputes regarding child marriage. But this Act is silent about which law or directives would be followed in terms of applying ADR method. In this situation the local representatives can easily engaged in malpractice in the absence of proper guidelines to follow.

Cancellation of marriage: The draft Act contains provision for cancellation/ dissolution of marriage on certain grounds including child marriage occasioned by forgery, coercion or deceptive means or against will through trafficking, forceful rape etc. The incorporation of the term 'forceful rape rather than rape only' not only undermine the human rights values but also shows tremendous reluctance from the drafters in terms of signifying the grievance of rape victims.

Absence of interim order: Further there is no provision for interim order in this regard till the decision of the court which we see in the Prohibition of Child Marriage Act in India. The necessity of interim order for maintenance or other services is significantly essential in the context of Bangladesh because it is an evident truth that our court system takes an indefinite longer period to settle disputes.

The Draft Act also does not contain any provision regarding the status of marriage when the parties of the marriage would attain majority. In India the prohibition of child marriage Act 2006 contains provision which make child marriage voidable at the option of the contracting party who was a child at the time of the marriage. This provision to large extent signifies the practical aspects of engaging in child marriage. But our Act fails to address the practical aspect which is instrumental to make an Act people friendly.

Recommendations:

- The word child and minor should be distinctively defined as it found in Indian Prohibition of child marriage Act : 'child' means a person who, if a male, has not completed twenty-one years and 'minor' means a person who, under the provisions of the Majority Act, 1875 is to be deemed not to have attained his majority.
- Marriage registrar should follow certain guidelines in terms of cancellation of marriage and it should not left upon the discretion of his 'belief'.
- To reduce extra burden of cases, the ADR procedure prescribed under Village Court Act 2006 applicable in the local area and The Conciliation of Disputes (Municipal) Board Act, 2004 applicable in the municipal area can be taken into account for the smooth functioning of alternative procedures of dispute resolution.
- As child marriage is more concerned with domestic affairs so the family court can be given jurisdiction for better adjudication of cases relating to child marriage.
- Provisions should be made regarding shelter home for the victims of child marriage and they should be attended with proper care and attention considering the best interest of the child.
- Special measures and developmental schemes need to be equipped to enrich the capability of people particularly the poor people and they should be made aware about the disastrous impact of child marriage.

Laws in Bangladesh have been traditionally made in line with the male dominion disregarding the voice of women. The day to day experiences of girls being the victims of child marriage often remain ignored and excluded in the landscape of law. In this backdrop a people friendly law along with sophisticated understanding of practical factors can stimulate the fighting of prevention of child marriage.

THE WRITER IS LECTURER OF LAW, EASTERN UNIVERSITY.