HUMAN RIGHTS MONITOR

Bangladesh can pioneer a workers' rights model

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CHAUMTOLI HUQ

IN 1950, when UN General Assembly proclaimed December 10 as Human Rights Day, to bring attention to the principles of Universal Declaration of Human Rights, it contemplated that the rights will be provided by Members States, and did not apply to corporate actors. The affirmation of human rights by states was critical, as many states were emerging nation-states. The failure to include corporate actors in the human rights mandate was not because globalisation or the global labor supply chain is a recent feature in our global economies. Colonialism and the global slave trade was the most the exploitative, and pernicious form of global trade with East India Company being one corporate actor in South Asia. Given the focus on new nation-states, there was less focus on corporate actors.

Since then, we have seen the rise of the transnational corporations and businesses and witnessed human rights violations by corporate actors, such as Union Carbide in Bhopal in 1984, and Shell in Nigeria. In Bangladesh, the Tazreen Fire and Rana Plaza building collapse revealed the failure of multinational brands to ensure workplace rights leading to the tragic loss of workers' lives. Since then, many businesses have responded to these high profile tragedies with various forms of corporate social responsibility programs (CSR). CSR programs have varied from company to company; from public relations efforts to more engaged efforts at ensuring businesses comply with human rights norms through Codes of Conduct and other compliance mechanisms. The Organisation for Economic Cooperation and Development (OECD) have created guidelines for multinational enterprises advising them to adopt and abide by human rights laws, to ensure that they mitigate adverse human rights impacts linked to their business, even if they do not contribute to those impacts.

After Rana Plaza, the conversation around the role of multinational enterprises in ensuring human rights was re-energised with two distinct solutions to ensure workplace safety in the global supply chain: Accord and Alliance. While both programs seek to conduct rigorous inspections of factories, they do differ in a critical aspect related to business and human rights. Namely, they differ in whether human rights compliance by businesses is best achieved voluntarily or through a legally binding instrument that provides for a remedies provision in the case of disputes.

The Accord is a legally binding instrument providing for a legal mechanism to resolve disputes among the signatories: brands, and unions. Alliance is legally binding among the brands that are signatories, but those brands do not make any legally binding commitments to unions, or the human rights NGOs community in the event of a dispute.

Experienced labor-management arbitrator Professor Arnold Zack of Harvard University, said while in an ideal world, voluntary compliance and self-regulation is ideal, legally binding instruments with a clear remedies provision was preferable. An agreement with a clear remedies provision, such as arbitration, or some other form of an alternative dispute mechanism also provides finality to any dispute. I would add that finality under most countries' principles of jurisprudence is the key, especially where human rights violations are alleged, because it allows the parties to move past the serious harm and move ahead.

International business community, which also benefits from finality and stability in deciding disputes, uses commercial arbitration to resolve inter-national disputes, and it is no reason, not to explore tailored arbitration provisions in the area of human rights. Such provisions are privately negotiated clauses, and the scope of these provisions can be limited to address the specific concerns of the business community that a broad provision would subject them to liability in multiple jurisdictions.

While legal binding instruments with a remedy provision may be preferable, it is harder to prove whether such provisions yield better compliance. However, such remedy provisions provide a level of trust, to unions, suppliers and buyers that are required in redressing disputes that involve transnational stakeholders. Such trust is especially needed here where most of the multinational companies are from the Global North (some former colonial countries) and allegations of human rights abuses of its transnational companies occur in global South. Without binding agreements with a remedy provision, parties in the Global South may feel they do not have equal bargaining power especially where they have found their government unable to adequately protect their rights.

Since 2013, organisations primarily from the Global South have called for a legal binding instrument to hold transnational business legal responsible for human rights violations. Most recently, last year, June 14, United Nations Human Rights Council adopted two resolutions to address this issue: (1) elaborate on a legally binding instrument for Transnational Corporations and Other Business Enterprises; (2) to create a report on the benefits and limitations on legally binding instruments. These mandates will help provide some key research on a long-standing debate often divided along philosophical grounds on how best to ensure human rights compliance.

As the world, and Asian countries look onto Bangladesh, and the progress of Accord/Alliance, there is an opportunity for Bangladesh to play a leading role in this field of business and human rights. Bangladesh and its stakeholders need to see these programs not simply as a factory inspection programs, but the foundation to developing a strong, replicable model on ensuring human rights in an era of globalization.

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LAW EVENT

To generate legal knowledge

THINK Legal Bangladesh, an online legal resource platform based at www.thinklegalbangladesh.com, held its Inaugural Lecture of the Think Legal Lecture Series last Saturday, 10th January, 2015 at Dhanmondi's EMK Centre. The Hon'ble Mr. Justice Syed Refaat Ahmed, a Judge of the High Court Division of the Supreme Court of Bangladesh, delivered the lecture on "Deconstructing Judicial Independence". Barrister Mustafizur Rahman Khan, an Advocate of the Supreme Court of Bangladesh, moderated the event. Eminent legal practitioners from top law firms of the country, academics, High Court judges and students attended the event.

Since its inception, Think Legal has built up its online pool of legal resources and most notably benefits from many contributors sharing articles on a wide range of legal topics. The Think Legal Lecture Series was founded as part of Think Legal's ambition to create and generate new knowledge and contribute to legal development.

Justice Ahmed's lecture focused on the philosophical foundations of judicial independence, whilst drawing on many historical and contemporary examples from different parts of the world where legal systems have sought to face the challenges and come up with innovative solutions.

A sensitive topic for many stakeholders in the legal profession in a country such as Bangladesh, Justice Ahmed hoped to initiate the debate and get the audience thinking, while Barrister Mustafizur Rahman Khan requested the young lawyers and the Bar in general to be pro-active in participating in the process of preserving and refining judicial independence and contributing to the reform of the justice sector as a whole.

Overwhelmed with the immense interest shown from the guests and a significant turn-out at the inaugural event, team Think Legal aims to continue the lecture series with distinguished speakers speaking on cutting-edge areas of law.

-FROM LAW DESK.

LAW ANALYSIS

Efficacy of the land survey tribunal

MUHAMMAD MAMUNUR RASHID

TO dispose of the suits arising out of the final publication of the last revised record of rights, the Land Survey Tribunals have been established in the country. By the Act no. IX of 2004, chapter XVIIA, Land Survey Tribunal and Land Survey Appellate Tribunal was incorporated in the State Acquisition and Tenancy Act 1950, describing the powers and procedure for these Tribunals.

The Tribunals established under this law are quite incapable of providing the deserving remedies to the litigants due to insufficiency in the provisions described in Chapter XVIIA. As a result, it can in no way carry out the purposes behind this enactment.

Section 145D of this chapter laid down the power and procedure of the Tribunal where it was provided that for the purposes of disposal of suits or appeals, a Land Survey Tribunal or a Land Survey Appellate Tribunal shall exercise the powers and follow the procedure under the Code of Civil Procedure 1908.

Section 145I provides, 'the Government may, by notification in the official Gazette, make rules for carrying out the purposes of this Chapter'. However, this rule is yet to be made by the Government though it is vitally important to continue Tribunals' proceedings smoothly as well as ensure justice in the suits tried by the Tribunals. Despite lack of adequate laws, the Tribunals are continuing judicial proceedings and promulgating final judgements.

The suits to be tried by the Tribunal are civil nature and in every stage of the proceedings the Tribunals are following all the relevant provisions of the Code of Civil Procedure, which are beyond the Chapter XVIIA. However, while for the sake of justice, any petition beyond the provisions described in Chapter XVIIA is submitted by any party in the suit, the Tribunal raises the question of relevant laws.

Under the prevailing provisions, in the event of death of any party in the suit, the Tribunal cannot substitute the successors of the deceased or strike out the name of deceased. It is also unable to add any new party in the suit that may be required for the sake of justice. An 'inherent power', which is exercised by the civil Courts in absence of any specific provision and for the sake of justice, has not been conferred on Tribunals. However, the Tribunals trying the suits related to the vested properties are exercising such powers.

It is often alleged that in many cases, the Sardar Amins as well as the Revenue Officers prepared the record of rights completely with false details by taking unfair means. The influential people got the record of rights prepared as they wanted. Without any local inspection or investigation on the spot, it by no means is possible to ascertain the real truth as well as ensure the justice. But the Chapter XVIIA does not include any provision to appoint any commissioner for investigation or inspection of the suit land.

As per the provision laid down in Section145B(5) of this chapter, any person aggrieved by the decision of the Land Survey Tribunal may prefer an appeal to the Land Survey Appellate Tribunal within three months from the date of such decision. The Section145B(6) further provides that an appeal may also be admitted within next three months even after the expiry of the period specified in sub-section (5), if the Land Survey Appellate Tribunal is satisfied with the reasons for delay shown by the appellant. The Tribunals on a regular basis are passing judgment, decree and order in the suits which they are trying. In accordance with the provision laid down in Section 145B(1), necessary Appellate Tribunals were supposed to be established to hear the appeals arising out of the judgment, decree or order passed by Tribunals. However, there is no Appellate Tribunal, where the party aggrieved will go for remedy.

It was expectation of the people that the Court would be their last resort for justice. The Government has also established the Land Survey Tribunals with a view to ensuring justice. But the lack of necessary laws results into the miscarriage of justice. The purposes behind the enactment of Chapter XVIIA can in no way be carried out, unless the necessary rules are made.

THE WRITER IS AN ADVOCATE, JUDGE COURT, SYLHET.

YOUR ADVOCATE

*This week Your Advocate is **Barrister Omar Khan** Joy, Advocate, Supreme Court of Bangladesh. He is the head of the chambers of a renowned law firm, namely, 'Legal Counsel', which has expertise mainly in commercial law, corporate law, family law, employment and labor law, land law, banking law, constitutional law, criminal law, IPR and in conducting litigations before courts of different hierarchies.*

Query

I worked for one of the reputed companies of Bangladesh for 6 years. Due to some personal difficulties, I decided to resign from my post and so did I, by handing over my resignation last month as per my employment agreement. As per the company's policy, I should have been paid out my separation entitlements within 15 days of my separation. However, I was sent an email by the manager of the company, whereby, he mentioned in the email that my resignation has not been accepted. In the email it has also been mentioned that the company has lost substantial monetary loss and they are holding me responsible for such, which is not true. They have rather attached a letter on to the mail saying that I have been dismissed and my entitlements have been squared off with the monetary loss of the company. Please advice as to whether the company can do these things to me.

Anonymous.

Response

Thank you for soliciting my advice. The governing law in relation to all employment issues in private sector is the Bangladesh Labour Act 2006 as amended from time to time (hereinafter referred to as the BLA). However, it shall be clarified at the outset that the provisions of the BLA hereinafter detailed, are applicable to employees considered to be 'workers' in an establishment. Section 2(lxv) of the Act provides the definition of worker, which means any person employed in any establishment or industry but does not include a person employed mainly in managerial, supervisory or administrative capacity.

In other terms, as per the BLA, any employee having managerial, supervisory or administrative capacity in an establishment shall be considered to be a non-worker and all other employees having responsibilities other than the aforesaid shall be regarded as workers.

When the governing law for workers is BLA, please note that in case of non-workers the terms and conditions prescribed in the employment agreement and the internal policies or manual, if any, would apply as the binding law as there is no statutory provisions governing the employment of non-workers. However, the companies may adopt a policy, which applies for all types of employees and which is also in compliance with the BLA.

Your query does not give a clear picture as to your nature of service and your job description. However, I base my advice as to your query assuming that BLA applies in your case.

You mentioned that you have resigned from your post as per the term in your employment agreement. As per law, your employment agreement was terminated when you have resigned from your post and it shall be borne in mind that resignation is not subject to any approval from the employer. You have formally and legally separated yourself on the day the resignation has been served with the effective date as mentioned. Acceptance of resignation is a mere formality. The employer can only reject/withheld resignation when there is a pending disciplinary action against the employee.

Therefore, under the eyes of law your claim for separation pay is completely legal. The company cannot withheld your severance pay because according to section 27 of the Act where a worker, who has served the establishment for 5 continuous years, resigns from his service such shall be paid compensation by the employer, (i) if five years or more of continuous service but less than ten years – at a rate of fourteen days' wages for completed year of service, or (ii) if ten years or more of continuous service – at a rate of 30 days' wages for every completed year of service or gratuity, if any, whichever is higher, in addition to any other benefit to which he may be entitled under this Act: otherwise would be in breach of the law. You are entitled to your final pay settlement within a month of separation.

Although you did not provide us any information as to your job or as to what sort of monetary losses the company has suffered etc., assuming your contentions as to such are true, the company also cannot simply square up their financial losses against your entitlements.

Further, the alleged dismissal of you from your service can also be questioned as illegal because to dismiss an employee from his service an employer shall carry out the procedure prescribed under the law. The dismissal procedure has been described under S.23 of BLA, whereby it has been stated that a worker may be dismissed without prior notice or pay in lieu, if he is – (a) convicted for any criminal offence, or (b) he is found guilty of 'misconduct' following the statutorily prescribed disciplinary action.

From your given facts it appears that the procedure of dismissal has not at all being followed and you have known about the process only when you were served with the sanction of dismissal. The dismissal order can, therefore, be questioned as illegal and it is very likely that such order would not hold any substantial ground when challenged.

I would advise you to try and resolve the matter amicably with your former employer and then pursue for legal course of action, if be required. You may first serve a letter as soon as possible and then a legal notice before actually starting any litigation. I hope the aforementioned information and advice answers your queries.

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