

LAW ANALYSIS

TRIPS to deal with access to medicine

Shuvra DEy

ON 23 January 2017, an amendment to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) entered into force enabling poorer countries to import generic medicines made under compulsory licensing if they are incapable to manufacture the medicine themselves. It was Article 31 (f) of the TRIPS Agreement impeding the poorer countries' access to affordable medicines which stipulates that a compulsory license must be issued predominantly for the supply of the domestic market of the member country granting the license. Consequently, many countries incompetent to manufacture the medicines have not been able to import the medicines made under compulsory licensing provisions of the TRIPS. This was a big challenge for the poor world combating against the contemporary public health crisis.

In November 2001, the WTO Ministerial Conference affirms that the TRIPS Agreement "should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and, in particular, to promote access to medicines for all" (*Doha Declaration on the TRIPS Agreement and Public Health*). Paragraph 6 of the said Declaration recognised that "WTO members with insufficient or no manufacturing capacities in the pharmaceutical sector could face difficulties in making effective use of compulsory licensing under the TRIPS Agreement", and instructed the Council for TRIPS to find an expeditious solution to this problem. Consequently, on 30 August 2003, General Council adopted a waiver



'Decision' that waives countries' obligation under Article 31 (f) of the TRIPS Agreement. The Decision allows WTO members to export pharmaceutical products made under compulsory licenses within the terms set out in the Decision. Therefore, the poorer countries are allowed to import the medicines made under compulsory licensing provision of the TRIPS Agreement. In 2005, WTO members agreed to insert the 2003 waiver Decision into the TRIPS Agreement

permanently ("TRIPS Amendment Decision"), which culminated to the adoption of new Article 31 bis after Article 31 of TRIPS. However, the members adopted the protocol amending the TRIPS Agreement (the "Protocol"), and the amendment was subjected to the acceptance of two-thirds of the WTO members in order to entry into force. Finally, in 2017, the "Protocol" receives satisfactory ratifications that make the amendment effective. Members who are yet to

accept the TRIPS amendment have time until December 2017 to do so. In the meantime, 2003 waiver Decision is dominant for them to secure the access to affordable medicines.

However, it is positive for our citizen that Bangladesh already has accepted the amendment on 15 March 2011. As a least-developed country, Bangladesh is an 'eligible importing member' who can import generic medicines made under compulsory licensing "in the case of national emergency or other circumstances of extreme urgency or in the cases of public non-commercial use". Even the growing development of Bangladesh in export sector will be benefited by this amendment. Bangladesh can also be an "export member" subject to the fulfillment of certain obligation of this Agreement.

Overall, this is one of the most significant amendments the WTO has ever experienced which would certainly ameliorate the sufferings of the backward people. Concerning this amendment, WTO Director-General Roberto Azevêdo commented- "[T]his is an extremely important amendment. It gives legal certainty that generic medicines can be exported at reasonable prices to satisfy the needs of countries with no pharmaceutical production capacity, or those with limited capacity. By doing so, it helps the most vulnerable access the drugs that meet their needs, helping to deal with diseases such as HIV/AIDS, tuberculosis or malaria, as well as other epidemics". It is to expect that a future waits for us where no one will die without medicine.

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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 live in Dhaka with my family. We have a domestic aide who is 15 years old. She used to live in our village with her parents but they suddenly died in 2014 by a road accident. After their death, she lived with her uncle. Last year, my parents brought her to our house. With my persuasion, my parents admitted her to a school run by Jaago Foundation. I have a query to know that whether we are violating any law by engaging her to work. I would also like to know about her legal rights and our responsibilities.

Sabrina
Dhaka

Response

I am very delighted to know that you have arranged for the education of the girl working at your house and want to ensure that she enjoys all the rights that she is legally entitled. You certainly deserve appreciation for that.

Employments in Bangladesh are largely regulated by the Bangladesh Labour Act 2006. But, this Act excludes domestic aids from its scope and application. In the absence of any formal recognition, domestic aids suffer from different types of exploitation, e.g. longer working hours, verbal and physical abuse, etc. With regard to the absence of a uniform law for domestic workers, Bangladesh is not an exception. International Labour Organisation (ILO) conducted a study in 2013 and finds that only 10% of domestic aids in the world receive protection from general labour laws, while another 30% are excluded

from the scope of any labour laws. The government has realised the importance of enacting a law for them and thus, adopted a policy titled the Domestic Aide Protection and Welfare Policy 2015 to safeguard their rights. A Policy is not binding on the citizens of a country as a Parliamentary Act is. However, we need to follow the principles



laid down in the Policy until an Act is passed for the protection of the domestic aids.

For your reference, I would like to give you a brief overview of the Policy and I believe you will get a clear picture of your responsibility towards her.

The Policy highlights in details the recognition of the domestic aids' jobs as

'labour' ensuring their protection, welfare, leisure, entertainment, leaves and congenial and decent working environment.

Minimum age of the domestic aide is 14 years for light works and a domestic aide only above 18 years would be eligible for heavy works. The employers have to ensure a full-time/part-time

domestic aide's salaries and other allowances. Any clothing or other forms of support have to be excluded from the salary arrangement. The salaries of domestic aids would be determined upon mutual agreement between the employer and the domestic aide.

To appoint a domestic aide below 18 years old, the employer shall negotiate

the terms with legal guardian of the domestic aide. The employer shall negotiate with the presence of a third party witness if the contract is an oral one. The arrangement shall include responsibilities, date of appointment, preoccupation, leaves and breaks, accommodation, diet and clothing allowance. If the domestic aide is an adult, it is reasonable to discuss with him/her before appointment.

Any kind of indecent behaviour, physical, sexual or mental torture is strictly prohibited. The government will take full responsibility for any cases filed over harassment and/or violence under the existing penal laws.

The employer can terminate the contract and take legal action if the domestic aide causes harassment, physical or mental violence on children, ill or old people of the employer's family. The employer can now file general diary with local police if the domestic aide leaves without any notice and can also take legal measures if he/she flees after stealing money or properties.

As per the Policy, the government will introduce a 'helpline' for domestic aids and also an awareness campaign. The Ministry of Labour and Employment is creating a monitoring cell to implement the Policy. You can also read the full Policy from the link provided here: <http://www.mole.gov.bd/site/view/policies>. I would be very glad if my above reply could assist you to meet your queries.

FOR DETAILED QUERY CONTACT: OMAR@LEGALCOUNSELBD.COM.

LAW LETTER

Supporting farmers in the north-east

Flash flood of the north-east was the prime news published in The Daily Star on 14 March 2017. Front-page news titled 'Havoc in haor' revealed a complete destruction of paddies in over one lakh hectares of land located in some wetland areas of Bangladesh. Corruption added to the miseries of farmers and there was corruption allegation against the affiliates of Water Development Board in reconstructing and repairing the dams. According to an earlier news published in *The Daily Star* (13 April 2017), contractors who got the job of building embankments from Bangladesh Water Development Board (BWDB) did not complete their work in due time and, in most cases, they were involved in corruption. Flash flood could have been prevented or better managed, if the dams intended to protect farm land from flood was constructed in scheduled time.

"The State shall adopt effective measures to bring about a radical transformation in the rural areas through the promotion of an agricultural revolution, the provision of rural electrification, the development of cottage and other industries, and the improvement of education, communications and public health, in those areas, so as progressively to remove the disparity in the standards of living between the urban and the rural areas" - said in Article 16 of the Constitution of Bangladesh. There was a call from a roundtable organised by Association for Land Reform and Development (ALRD) and Water Rights Forum in



Dhaka urging government to declare the areas surrounding haors (a type of wetland) in the north-east as "affected areas".

Apart from terrorism, corruption would remain as one of the biggest challenges for Bangladesh in achieving Sustainable Development Goals (SDGs) and there were allegation of corruption in reconstructing and repairing the dams over the years. There are two specific targets of SDG No. 16 regarding curbing corruption and developing institutions: (a) substantially reduce corruption and bribery in all their forms; and (b) develop effective, accountable and transparent institutions at all levels.

However, farmers in the north-east are not only worried about food security, but continuing education of their children. Rights activist Advocate Sultana Kamal lamented in the roundtable that farmers are being harassed for defaulting loans while defaulters who steal crores from banks are being established in the society.

To recapitulate, farmers have become increasingly vulnerable due to climatic shocks and hazards. Farmers affected by the recent flood must be supported so that they can feed family members and continue education for their children. At the same time, corruption allegation during dam construction and repair work must be investigated.

Will perpetrators responsible for miseries of the farmers be brought to book soon?
Oli Md. Abdullah Chowdhury
Human Rights worker

RIGHTS ADVOCACY

Legal framework for Samaritans

Alfred Christopher D'Silva

ON 30 March 2016, the Supreme Court of India presided over by the Hon'ble Justice V. Gopala Gowda and Hon'ble Justice Arun Mishra entertained a unique case titled *Save Life Foundation and Others v Union of India and Others* concerning the protection of "Good Samaritans", i.e. people who come forward to provide much needed first aid and attendance to a person who has sustained injuries during an accident or as a victim of an offence, from undue harassment from authorities like the police. The case was brought before

seeking life-saving treatment. In this case, the Ministry of Road Transport and Highways had issued lists of guidelines and standard operating procedures on 12 May 2015 and 21 January 2016 with regards to the protection from harassment of Good Samaritans who had come forward in times crisis to help a person in crucial need. The guidelines stipulated among others that a bystander or Good Samaritan including an eyewitness to a road accident may take an injured person to the nearest hospital without any undue level of questioning, and is to be free from criminal liability. Guideline No. 11 expressly stated



that "Lack of response by a doctor in an emergency situation ... where he is expected to provide care shall constitute 'Professional Misconduct' under Chapter 7 of the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulation 2002."

The Standards of Procedure that were issued in January of 2016 provided guidelines into how the police and all related personnel should behave in relation to Good Samaritans and eye witnesses to ensure, prompt help and an absence of harassment of the people coming forward to

help. However, the Ministry had expressed concern that in the absence of any statutory backing, it would be difficult to enforce these guidelines and procedures on the ground. The Save Life Foundation PIL was therefore a constitution petition to the Court to declare the guidelines and standard operating procedures binding and enforceable by the Court on all States and Union territories until the Union Government enacted a specific law. Save Life Foundation and the Ministry of Road Transport and Highways urged the Court to do so by reading articles 32 and 142 of the Constitution of India.

A number of cases were cited as illustrative examples including *Vishaka and Others v The State of Rajasthan and Others* (1997) 6 SCC 241 where in the absence of enacted law to provide for effective enforcement of basic right to gender equality and guarantee against sexual harassment and abuse, more particularly in the workplaces, the Court had laid down guidelines and norms for due observance at all work places or institutions to be binding on all and enforceable.

A legal framework through legislative action and judicial pronouncement is long overdue in Bangladesh. It is a time we do our homework and see where the rest of the world stands in relation to Good Samaritan law. The UK Parliament has enacted the Social Action, Responsibility and Heroism Act in 2015. Section 51D of the Civil Law (Miscellaneous Provisions) Act 2011 enacted in Ireland provides that a Good Samaritan will not be liable in negligence for any act done in emergency to help persons in serious and imminent danger.

Our neighbour, as illustrated earlier has taken a profound step in using the provisions of fundamental rights protection enshrined within its Constitution and its stalwart dedication to the rule of law to ensure that the guidelines and standards of practice issued by the Ministry of Road Transport and Highways are given the sacred force of law, pending any legislative action.

Our Constitution is by no means inadequate; it makes ample provision for the protection of fundamental rights of the people within its borders and also empowers the people with the power to uphold it. It is high time that a concrete legal framework be set in place to protect and encourage Good Samaritan activity in Bangladesh.

THE WRITER IS AN INTERN AT THE LEGAL CIRCLE.