

LAW INTERVIEW

THE ORGAN TRANSPLANTATION ACT 1999

"A judicial intervention had to be sought"

Law Desk (LD): Recently you have filed a Public Interest Litigation (PIL) in the High Court Division challenging some sections of the Organ Transplantation Act 1999. Would you please elaborate on it? What factors basically made you do this?

Rashna Imam (RI): We have challenged the constitutionality of sections 2 (ga), 3 and 6 of the Organ Transplantation Act

estimated to be between 5,000 to 9,000. Unfortunately, only 120 to 130 persons get kidneys for transplant.

The unreasonably restrictive definition of donors in section 2(ga), 3 & 6 of the Act is adding more to the problem and thus is directly causing deaths of many and fuelling the already flourishing illicit kidney trade as well. Therefore, a judicial intervention had to be sought.

the State to improve public health.

Sections 3 read with 2(ga) and 6(1) of the Act provide a very narrow definition of donors. Only "near relatives" can be donors. "Near relative" have been defined to include son, daughter, father, mother, sister, brother, husband, wife and uncles and aunts who are related by blood. This definition has to be expanded to include at least grandfather, grandmother, grandson, granddaughter and first cousins. Further, a provision must be made for exceptional circumstances when a donor can be someone from outside this group. "Exceptional circumstances" must be defined and/or criteria must be laid down for its determination. There is also some room for expanding the age range for donors. In this regard India has amended its laws, rules and regulations to address this issue that can be taken into account.

According to Washington based GFI, many in Bangladesh, particularly the poor and uneducated in the rural areas, are compelled to sell their organs primarily to settle debts or for financial respite. The brokers downplay the risk of future complications and sometimes the doctors even tell potential vendors that their kidneys will grow back. The restrictive Act and the lack of rules and regulations thus is fuelling this already flourishing illegal kidney trade.

LD: Despite receiving an order from the HCD in 2011 for framing rules to enforce the Organ Transplantation Act 1999 more effectively, why is the Government yet to comply with such order?

RI: Only the government is in a position to answer that question. Successive governments have failed to frame rules and regulations to flesh out the Act and ensure its effective implementation. Suffice it to say that the legislature and executive having failed to deliver, a judicial intervention had to be sought in the form of declaration of unconstitutionality of the law and through formulation of guidelines to fill the void till suitable legislative amendments are made.

LD: What do you look forward to this legal battle/PIL?

RI: I would not call it a battle. We expect full co-operation from the AG's office in reaching a common goal which is a comprehensive set of guidelines from the High Court until suitable legislative amendments are made. Indeed the AG's office has been very cooperative till date. It is imperative that the guidelines/legislation will be able to ensure adequate availability of kidneys at the same time will contain enough safeguards for preventing abuse. This will save thousands of life on a yearly basis and significantly minimise the need to go abroad for a simple procedure like kidney transplant.

LD: Thank you for the time.

RI : You are welcome.

*Barrister Rashna Imam is an Advocate, Supreme Court of Bangladesh and also the managing partner of the Akhtar Imam & Associates, one of the leading law firms in Bangladesh. Recently her legal team has filed a PIL in the High Court Division challenging few sections of the Organ Transplantation Act 1999. Law & Our Rights team talks to her on the following issues.*

1999 and the failure of the State to effectively implement the Act, despite the lapse of 17 long years, by framing rules and regulations. We have also sought guidelines from the court for organ donation and transplantation.

In Bangladesh, at least 20 million people suffer from kidney diseases. 35,000 to 45,000 of them die of kidney failure every year. Kidney transplant being a much more superior form of treatment (both, economically and medically) than dialysis, the annual demand for kidney transplant is

LD: Why do you think that the definition of 'donors' in the 1999 Act directly affects the constitutionally guaranteed fundamental right to life?

RI: Article 32 of the Constitution provides that no person shall be deprived of life or personal liberty save in accordance with law. Article 15(a) provides that it is a fundamental responsibility of the state to provide for the basic necessities of life, including, among others, medical care. Article 18 provides that it is a primary duty of

LD: Why do you think that the present legal framework concerning organ transplantation is somehow to be blamed for fuelling the present illicit kidney trade?

RI: There is no proper legal framework in Bangladesh to deal with organ donation and transplantation. The Act, though enacted in response to incidents of abuse, contains an unreasonably narrow definition of donors and is fraught with inadequacies which defeat the very purpose for which it was enacted. Furthermore, there are no rules and regulations to ensure its effective implementation.

LAW LETTER

The maintenance of parents Act and Garos

In order to ensure maintenance of aged parents by the sons and daughters, the legislature enacted a law named Pita-Matar Voron-Poshon Ain (The Maintenance of Parents Act) in 1913. This law compels the children, both male and female, to provide maintenance to their parents. Default to provide so shall be an offence and defaulter shall be punished under the Act. Needless to say, Garo people are not the outside of the purview of this enactment.

The entire social arrangement of Garos is grounded on the principle of preservation of property within the motherhood. Kinfolk's property descends through the mother, not through the father. Generally, Garo male cannot inherit the property. In a family, one of the daughters is selected by parents as nokna (heiress). Ordinarily, it is the youngest daughter who is selected as nokna. She possesses the homestead in addition to other properties shared by other daughters. The nokna and her husband are expected and bound to live in the house of the parents of the nokna to look after them and to support them in their old age. If they fail to do so, they lose their rights. This custom was confirmed by the Indian High Court in Monje Mechik v. Janmi Mechik, CR 6(H), 1961 cited in Customary Law and Justice in the Tribal Areas of Meghalaya by Kusum and P. M. Bakshi. If the parents don't have daughter and desire to adopt one as nokna, they must first call the clan to provide one. On failure, the parents can select one at a gathering specially arranged for the purpose and followed by a feast. So, there is obviously a daughter or adopted daughter to look after the parents. If the nokna does not perform her duty, her rights will be forfeited and other daughter or adopted daughter will be chosen in her place. Therefore, the law of 1913 is superfluous to the provision of maintenance of parents under Garo customary law. But there is possibility of abuse of the law in Garo society. This law compels both male and female children to provide maintenance to parents. But Garo males cannot inherit and are not bound to maintain his parents. If therefore, Garo parents file a case against a son for maintenance, what will be the consequence of the conflict between statutory law and customary law in this case? The son will be forced to provide maintenance if the statutory law prevails over the customary law. Will it be just and reasonable to discard the customary law of the citizens who have other means to accomplish the purpose of the law? A provision keeping reservation for customary law terming 'subject to any other laws' could address the issue well.

Mikrak Mrong Shuhel

Assistant Judge, Bangladesh Judicial Service



OLI MD. ABDULLAH CHOWDHURY

THERE was an image of persons carrying dead bodies of Rohingya children appearing in the front page of Prothom Alo on September 1, 2017. Recently, Reuters also published a photo of Rohingya children attempting to cross the Bangladesh-Myanmar border fence. They are desperately trying to enter Bangladesh as it appeared in the photo due to extrajudicial killings in the Rakhine region of Myanmar. Utter sense of desperation reflected in both the images. Myanmar and Bangladesh are, however, state parties to the Convention on the Rights of the Child (CRC) and accountable to international communities to ensure protection and humanitarian assistance for refugee children.

"States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or



humanitarian instruments to which the said States are Parties", says Article 22 of the CRC. However, there are reports on scores of Muslim Rohingyas — including women and children — being killed by Myanmar security forces and Buddhist vigilantes in a surge of ethnic violence.

However, Bangladesh has been extending support to refugees despite facing resource constraint. Bangladesh has been hosting up to 5, 00,000 Rohingyas for three decades and nearly half of them are children and adolescents. Around 33,000 of refugees are registered and they live in two camps in Cox's Bazar. Although there are basic facilities for children from Rohingya communities in these camps, others live in different areas of Cox's Bazar and Chittagong in a miserable condition. Recent influx of Rohingya children have a severe impact on service provisions in the registered camps and outside locations where refugees reside.

Children from Rohingya communities who are still living in Myanmar are in a shamble state. According to a recent survey conducted by WFP, there are more than 80,000 children in Rakhine State of Myanmar who require support. These children will badly be in need of treatment for acute malnutrition, also known as "wasting," over the next

Shamble state of Rohingya children

12 months, the WFP said. Acute malnutrition develops as a result of recent rapid weight loss or failure to gain weight. If left unaddressed, thousands could be at risk of advancing to a more dangerous stage of malnutrition, which compromises the body's vital processes, and leads to starvation followed by death. According to UNICEF, there are gaps in educational provisions affecting all communities in Rakhine State and it clearly demonstrates lack of investment in basic services.

Furthermore, children are coming in contact with law in a region affected by communal violence. Children as young as 10 years old are among hundreds of Rohingya Muslims detained on charges of consorting with insurgents. According to Reuters, Thirteen juveniles are among more than 400 people arrested since Oct. 9, 2016 when insurgents attacked three police border posts in northern Rakhine State near the frontier with Bangladesh.

"States Parties recognise the right of every child alleged as, accused of, or recognised as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the



child's reintegration and the child's assuming a constructive role in society" says Article 40 of the CRC. Although Myanmar ratified international conventions that require additional protections for children accused of crimes, there are compliance issues for children coming in contact with law. It is not clear whether all provisions, such as whether juveniles have been able to communicate with their families or to have legal representation, were being followed.

To sum up, best interest of the children from Rohingya communities must be considered not only by authorities of Bangladesh and Myanmar, but international community as well. "States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members" Article 2(2) of CRC categorically says. International community must come forward and act promptly so that children from Rohingya community don't suffer due to activities, expressed opinions, or beliefs of their parents.

THE WRITER IS A HUMAN RIGHTS WORKER.



UN Day for south-south cooperation 2017



T HE world has undergone a major economic and political transformation in the last two decades. The changes, particularly in the South, have been more rapid than at any time during a similar span in world history. Many countries in the South have built up significant financial and technical capacities. They have begun to transfer some of these resources, on specific terms, to other countries in the South in the context of an inclusive approach to the management of various global problems.

South-South cooperation signifies cooperation and harmony among peoples and countries of the South that contributes to their national and collective well-being, self-reliance and to the attainment of internationally agreed development goals, including the 2030 Agenda for Sustainable Development. That cooperation is realised through a broad framework of collaboration among countries of the South in the political, economic, social, cultural, environmental and technical domains.

The United Nations Day for South-South Cooperation celebrates the economic, social and political developments made in recent years by regions and countries in the south and also highlights UN's efforts to work on technical cooperation among developing countries.

Through a resolution adopted in 23 December, 2003 by the UN General Assembly, initially 19th December was decided to be celebrated as United Nations Day for South-South Cooperation. Later it was changed to 12th September.

The history of the South-South cooperation starts in 1949 with the establishment of the first UN technical aid programme by the Economic and Social Council and the creation of the United Nations Development Programme (UNDP) in 1969. 1978 denotes another important year for South-South Cooperation. In this year, the conference of the Global South was held in Buenos Aires, resulting in the adoption of the Buenos Aires Plan of Action for Promoting and Implementing Technical Cooperation (BAPA) among Developing Countries, one of the main pillars for the South-South cooperation.

2018 is going to mark the 40th anniversary of the adoption of BAPA in 1978. Therefore, the theme of the Global South-South Development Expo 2017 will be "South-South Cooperation in the Era of Economic, Social and Environmental Transformation: Road to the 40th Anniversary of the Adoption of the Buenos Aires Plan of Action". The Expo this year will be hosted by the Republic of Turkey and will take place in Antalya from 27 to 30 November 2017.

COMPILED BY LAW DESK (SOURCE: UN.ORG)