

LAW DESK WEBINAR

Towards a consumer rights-based approach to healthcare

THE COVID-19 pandemic is taking a huge toll on the healthcare sector across the globe. The situation is seemingly more unfortunate in a developing country like Bangladesh. The challenges permeating the healthcare sector are innumerable and the same are accounted for by many things – ranging from loopholes in the legal framework to raw realities in the field. Allegations of denial of treatment (of COVID and non-COVID patients alike), sale of counterfeit pharmaceutical and non-pharmaceutical products and services of utmost need for COVID patients, irregularities in the private healthcare sector, are some of the challenges among many others. There are shortcomings in establishing an accountability mechanism in instances of medical negligence and malpractice as well. All these lacunae are making it difficult to ensure a rights-based approach to healthcare services amid the current coronavirus crisis.

In this backdrop, a webinar on 'Rights of Consumers relating to Health Care Services' was organised by 'Law & Our Rights', The Daily Star on 30 June 2020. In the webinar, experts and stakeholders expressed their views on possibilities, challenges and opportunities of consumer rights-based approach to healthcare services within the current legal framework of Bangladesh. Mohammad Golam Sarwar, from Law Desk and also a Lecturer in Law, University of Dhaka moderated the webinar.



Prof. Dr. Md. Ziaul Islam, Head, Department of Community Medicine, National Institute of Preventive and Social Medicine (NIPSOM)

The current pandemic has gone beyond the capacities of developed and developing countries. For Bangladesh in particular, we do not have sufficient resources to provide healthcare to the large number of patients, and as a result, on preventive, promotive or curative levels we face limitations. However, we should work within this capacity and properly utilise our logistical and infrastructural resources. The government is trying to provide necessary resources, but some shortcomings are still noticeable. There should have been a holistic preparedness.

Another important area that needs our focus is of creating a balance between medical malpractice and violence against doctors. Consumers seeking healthcare are fundamentally

different from consumers seeking other services. There are psychological impacts associated with the loss of near and dear ones which may result in tension and violence. A comprehensive protection legislation incorporating the rights of both the doctors and the patients should be enacted. With regard to complaints against doctors, alongside legal routes, the possibility of administrative measures, can be considered. The Consumers Rights Protection Act 2009 is also not adequate to protect rights of the patients. Even there is no representative from health service sector in the National Consumer Rights Protection Council under the Act.

In the age of globalisation, health market is booming. But due to its unique nature, the rights of the consumers are not delineated. Costs differ widely – consumers have little to no idea about the reasonable price of these services. In other markets, consumer and seller are more on par with regard to their knowledge on the costs of goods and services. A collaborative framework involving public health experts, civil societies and government agencies should be ensured.



Prof. Dr. Mohammad Morshed, Director, Holy Family Red Crescent Medical College Hospital

It is now quite evident that a good percentage of COVID-19 patients are dying at home. Even among the ones who are going to the hospitals there have been allegations of denial of treatment. We are not blaming the patients, but the fact is that they should act responsibly also. We often see that they themselves fail to identify between mild and severe symptoms and unnecessarily over-crowd the hospitals – whereas they could have taken some minor treatment-measures at home instead of coming to the hospitals. There is a lack of coordination, information and understanding as to at what moment the patients should take resort to hospital services. Sometimes asymptomatic patients come to the hospital and insist upon getting admitted. They even do not want to understand that they create pressure on the healthcare system and the medical personnel.

The pandemic has shown us that management is an important aspect of the health sectors. A proper

RECOMMENDATIONS

- Hospital management and administration should be brought within a system of central regulation.
- Transparency and accountability should be ensured and patients should be provided with accurate information.
- Digital healthcare systems should be fortified to provide need-based healthcare to peripheral areas.
- Public health institutions should be strengthened so that they can conduct proper research and play an effective role in decision-making.
- A robust monitoring mechanism should be established for proper regulation of private hospitals and clinics.
- Complaint mechanisms under different laws should be publicly accessible.
- Existing schedules laying out charges for medical services should be updated in a time-befitting manner.
- In concrete terms, laws should recognise patients as consumers. Existing laws as well as policies be amended where necessary and rules should be used to spell out the implementation aspects of laws.

coordination between healthcare professionals and the management team is crucial. Often doctors face the wrath of public for managerial decisions. Another important consideration is transparency and accuracy of information that the consumers receive. Also, there remains general crisis of transparency and accountability, in dealings with logistics, equipment, protective clothing, etc. There is lack of management in the private sector mostly and they need to be brought under proper management and into a proper system of regulation.



Barrister Rasha Imam, Advocate, Supreme Court of Bangladesh

Various provisions of the Consumers Rights Protection Act 2009 contain penal sanction to protect rights of the consumers. For instance, section 52 provides penalty for doing any act detrimental to life or security of consumers. Section 53 punishes the act of negligence resulting in loss of life or damage to health. Apart from this, section 45 provides punishment for selling or delivering substandard services. Under these provisions, criminal cases can be lodged. However, the consumer in question on his/her own cannot lodge the case. The condition is of complaining to the Director General within thirty days. This is the first inadequacy or loophole in the law. Under the law,

civil claims can also be made for compensation up to five times the loss suffered. However, there is no standard guideline to calculate the quantum of compensation.

Administrative actions can be taken by the Director General when he gets a written complaint. As part of administrative actions, licenses of the service providers may be revoked, and their commercial activities may be closed down. However, the law does not flesh out the detailed procedure of administrative actions or measures that may be taken. This is yet another loophole.

Another issue is of protection of the frontline doctors and medical personnel. Although we do not have any specific legislation for the protection of doctors, they are protected under the constitutional safeguards of right to life and health. For example, not providing protective gears to doctors and sending them to the frontline is like trading one life for another and that is in no way constitutional. Regarding the public sentiment resulting in violence towards doctors, mob justice prevails when there is absence of accountability and when people lose faith in the processes.

Another legal issue comes up with regard to the testing of COVID-19 disease. Earlier, the testing was done under the auspices of the government and was free. Private testing had a price. Recently, the decision has been made on buying government testing services too with a price. Interpreting the constitution and existing laws would indicate that testing should be free and

accessible for all.

In order to address medical malpractice or negligence, we must have a comprehensive law of tort and compensation. Private tort of negligence has not developed in Bangladesh because the civil suits take many years to be resolved, among others. This adds to other procedural matters such as court fees and fees for advocates discourage people from coming forward. Another challenge is the matter of evidence. No laws provide for a record-keeping obligation on the hospitals. Without the records, the court cannot properly scrutinise the case. Often, in cases that involve powerful parties like owners of big hospitals, there is also a concern of witness intimidation. Since we do not have any witness protection scheme, this may lead the party to withdraw the suit. However, public tort law has developed to a certain extent. Some cases are instances of *res ipsa loquitur* where evidence is not as big of a challenge.



Ghulam Rahman, President, Consumers Association of Bangladesh (CAB)

During this pandemic, due to alleged mismanagement and corruption in health sector, there is a huge crisis. Many things are wrong not just with the hospitals but also with equipment and medicine as we can see in the news every day. We need a stringent legal framework and responsible as well as dedicated leadership to ensure a proper healthcare system.

The Consumers Rights Protection Directorate has not filed a single criminal case until now. They have kept their measures limited to administrative fines. Not many complaints regarding the healthcare sector has been raised either – mostly the complaints deal with expired medicine or similar and minor offences. The law should be amended to ensure the aggrieved persons can directly approach the court.

Right to healthcare is one of the recognised rights in the country. Hence, discrepancies in consultation fees and cost of diagnostic tests should be centrally regulated. The government needs to undertake an overseeing role and corruption needs to be properly addressed. Otherwise, despite increasing the budget for the healthcare sector, nothing will change.

FROM LAW DESK.

LAW VISION

The global race to patent a COVID-19 vaccine

MUNIZA KABIR

WHILE people are facing the greatest public health crisis, the world's largest economies are in a fierce competition to be the first to develop a COVID-19 vaccine and ensure its accessibility to their citizens. Quite evidently, the mysterious virus has introduced a whole new global race – the race to win exclusive patent rights to a Covid-19 vaccine.

Patents are a form of intellectual property rights providing creators of new inventions, such as vaccines and medicines, with limited term monopoly over those inventions. During this period, the patent holders own exclusive rights to manufacture and sell their inventions or can choose to licence it to others to do the same. Usually, research and development for a single vaccine, drug or diagnostic test costs billions of dollars, but patents help the inventor to recoup their costs and provide an incentive to invent or innovate. The licences include a specified time limit and geographical area to exploit the patent. In exchange, the patent holder receives royalties and/or licence fees. To sum up, the desperate search to find a COVID-19 cure is not just about saving lives but about owning the patent rights and monopolising the vaccines to make huge profits.

Currently, there is no vaccine to protect against COVID-19 but many pharmaceutical and biotechnology companies in the United States, China and Europe are optimistic about producing successful treatments. Although, Europe has already assured that if they are the first to discover a vaccine, it will be licensed around the world. Contrarily, the

United States and China have been engaged in a trade war since 2018 because of China's lack of enforcement of intellectual property rights to non-chinese citizens. Therefore, both countries have responded to this pandemic with strong nationalist sentiments. The political tension between the two countries has already affected the way their laboratories would have otherwise cooperated to invent a COVID-19 antiviral.

Remdesivir, a nucleoside analogue prodrug, is patented by an American pharmaceutical

similar to those of the Trade Related Aspects of Intellectual Property Rights (TRIPS) to impel a licence, in case their licensing request was denied. Rather unsurprisingly, the Wuhan Institute filed a patent for using Remdesivir, which portrayed nothing but a defensive measure to secure access to Remdesivir in China and lower possible licensing fees they might owe Gilead for using it.

This defensive patent filing will not only initiate a deeper mistrust between America and China but other foreign laboratories like



laboratory named Gilead Sciences. It was first developed to treat Ebola which, after proved to be ineffective for that purpose, was discovered by Gilead that Remdesivir could be effective at mitigating coronaviruses including COVID-19. When Gilead donated Remdesivir to Chinese hospitals in response to covid-19 outbreak to test its effectiveness, the Wuhan Institute of Virology in China ("Wuhan Institute"), filed a competing method of using patent instead, that involves using Remdesivir with Chloroquine (a common malaria antiviral). Gilead deliberated that if the Wuhan Institute wanted, they could have approached them for licensing Remdesivir or, apply their "compulsory licensing" statutes

Johnson & Johnson, CureVac, GlaxoSmithKline, Moderna, Sanofi etc. may become reluctant to test their vaccine in China, thinking that their intellectual property rights will not be protected.

Currently, about 80 groups around the world are researching on COVID-19 vaccines and some are entering clinical trials. How will this new kind of space race to patent a vaccine affect Bangladesh in terms of accessibility and price?

Section 22 of the Patents and Designs Act 1911 allows any person to present a petition to the Government to grant compulsory licence, alleging that demand for a patented drug in Bangladesh is not adequately met and on reasonable

terms. Compulsory licensing is a process by which a government licences companies or individuals besides the patent owner to make, sell or import a product under patent, without the patent owner's permission. However, Article 66 of TRIPS Agreement grants all Least Developed Countries a waiver till 2033, permitting the production of pharmaceutical products which are still on patent. This means, if a COVID-19 vaccine is patented by some other country, it will not enjoy patent protection in Bangladesh. Therefore, Bangladesh can produce a COVID-19 vaccine at a low cost without requiring to invoke compulsory licenses.

China, now in their phase-2 clinical trials, has assured Bangladesh to receive priority in terms of cooperation and support if they can successfully produce a vaccine. Led by the European Union, a virtual summit was held on 4 May, where world leaders from more than 30 countries including the United Nations and the World Health Organisation, called for international efforts to make COVID-19 vaccine a global public good. Conversely, America disassociated itself from such a cause to rather support - Vaccine for Americans first, while the rest can queue up to pay the patented drug.

So, who will win the race? Definitely, not someone who invents first. A true winner will be the one who will view their invention as a public necessity rather than business profiteering. When the inventor of polio vaccine, Jonas Salk, was asked who owned the patent, he responded: "Well, the people, I would say. There is no patent. Could you patent the sun?"

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GLOBAL LAW UPDATES

UNSC adopts resolution supporting a global ceasefire

ON 1 July 2020 the United Nations Security Council unanimously adopted Resolution 2532 (2020) supporting the Secretary General's appeal for global ceasefire. The resolution calls for immediate cessation of hostilities in all situations. The Security Council has called on all parties to armed conflicts to immediately engage in a humanitarian pause for 90 consecutive days at least and enable the safe, unhindered and sustained delivery of humanitarian assistance. It also asked for the provision of related services by impartial humanitarian actors in accordance with the humanitarian principles of humanity, neutrality, impartiality and independence. A cessation would enable medical evacuations as per the principles of international law, international humanitarian law and international refugee law where applicable.

The UNSC also said that military

operations against Islamic State in Iraq and the Levant (ISIL/Da'esh), Al-Qaida and Al-Nusra Front, and all other individuals, groups, undertakings and entities associated with Al-Qaida or ISIL, and other Council-designated terrorist groups will not come under the purview of cessation of hostilities.

The Council called for a coordinated and accelerated response to the COVID-19 pandemic from all relevant organs of the UN system including the country teams and requested the Secretary-General to instruct the peacekeeping forces to assist the host countries in tackling the pandemic. Furthermore, the Council called for concrete actions to minimise the disproportionate impact of the pandemic on women and girls, children, refugees, internally displaced persons, older persons and persons with disabilities.

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