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LAW VISION

The significance of UN Guiding Principles on Business and Human Rights for Bangladesh

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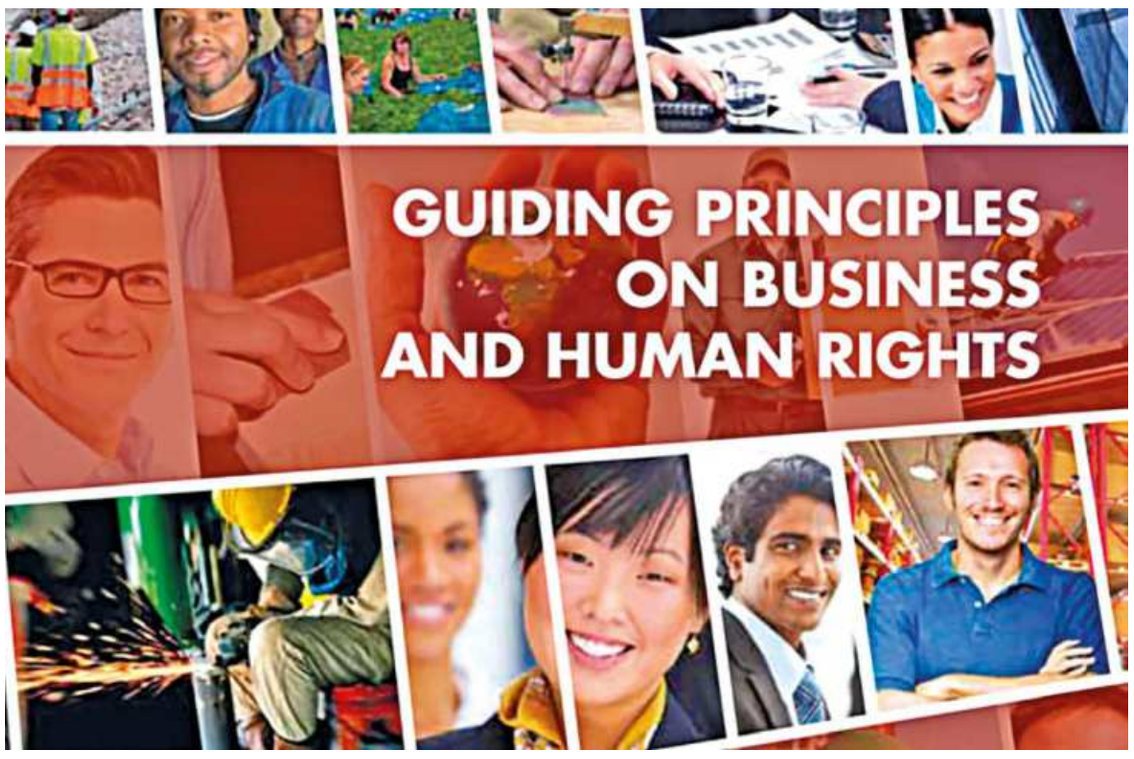
In the era of massive development and huge competition to attract investment, states have been striving to ensure better ambience for foreign investors. One of the core issues of concern in this regard is human rights situation in the business sector. The reason is obvious. Many business initiatives, enterprises and projects have caused immense sufferings to people. This happens when the business sector abuses the rights of different stakeholders which are either directly or indirectly associated with their activities. Bangladesh has been confronting many challenges related to human rights in the business sector. The challenges include unregulated child labour, weak protection against workplace harassment and other forms of discrimination. The Rana Plaza disaster in 2013 which resulted in the death of more than a thousand workers, the Tazreen fire which caused death of hundreds and other similar disasters work as reminders of the need to to formulate policies and regulations ensuring basic human rights of workers and other stakeholders. Ensuring proper human rights compliance in the business sector is crucial to attract foreign investment, particularly from the European Union and North America. This is where the relevance of the UN Guiding Principles on Business and Human Rights lies.



Responsibility of business operations for addressing human rights abuses had been a matter of debate at the international level. The Transnational Corporations Commission was formed in 1973 to formulate code of conduct on TNCs which could not reach to any fruitful conclusion due to the division among nations. Further steps had been attempted but ended with no solution. The appointment of Harvard Professor John Ruggie in July 2005 as the special representative on the issue of human rights and TNCs made the task possible. He formulated the 'protect, respect and remedy' framework which was highly appreciated by international community. This has subsequently been named as the United Nations Guiding Principles on Business and Human Rights' (UNGPs). The UNGPs were unanimously approved by the UN Human Rights Council on June 16, 2011. It is an instrument consisting of 31 principles on the issue of human rights concerning business enterprises around the world regardless of the size, sector, structure, location and ownership of business. The GPs are based on three pillars namely 'Protect', 'Respect', and 'Remedy'.

The first pillar bestows upon the duty of the states to protect human rights in business operations. The state is required to pass laws that prevent human rights violations and ensure that these laws are implemented. The second pillar deals with the responsibility of the business sector. It confers a duty on businesses to operate in such a manner that their activities do not infringe the rights of others. It asserts that the government may not always be in the vanguard position to concentrate on protection of human rights in the business sector. Thus, the onus lies upon the corporations to ensure that human rights of the respective workers and relevant others must be taken care of and concrete steps are adopted to address the issue. The third pillar, as the name itself indicates, has been endorsed to safeguard if human rights in business sector is infringed. It includes both the states' responsibility to provide access to remedy through judicial, administrative, and legislative means whereby victims are facilitated to complain, investigation and settlement. Similarly, it refers the businesses' responsibility to prevent and take remedial measures in case of any infringement on the rights of other stakeholders.

> *UN Guiding Principles is a useful tool to ensure human rights implementation in the business sector. It serves as a uniform framework code for developing domestic legal arrangement to curb the challenges. The domestic legal mechanism in Bangladesh, particularly labour laws, need to be revisited to ensure compliance with the guiding principles.*

UN Guiding Principles is a useful tool to ensure human rights implementation in the business sector. It serves as a uniform framework code for developing domestic legal arrangement to curb the challenges. The domestic legal mechanism in Bangladesh, particularly labour laws, need to be revisited to ensure compliance with the guiding principles. The expansion of labour courts should be the prior implementing agenda in order to curb the challenges exist in the practical and procedural barriers to access judicial recourse. Similarly, the robust involvement of National Human Rights Commission would facilitate in non-judicial remedy mechanisms. To sum it up, the attraction of foreign investment as well as fulfillment of state's obligation under international human rights instruments would be substantially achieved by endorsing the content of the guiding principles.

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GLOBAL LAW UPDATES

Addressing the complexities of prosecution in sexual exploitation cases

LAW DESK

A new report of the United Nations Office on Drugs and Crimes (UNODC) sheds light on the complexities involved in prosecuting cases of human-trafficking, particularly with regard to trafficking crimes involving sexual exploitation.

The report found that trafficked and sexually exploited woman and girls often find themselves facing prosecution and conviction for those very same offences. The report shows that traffickers often employ these 'victim-defendants' in low-level roles which expose them to law enforcement authorities. These victim-defendants are more likely to be caught and prosecuted under the existing laws in many countries. Victim-defendants are usually assigned to roles such as recruitment of new victims, collecting proceeds, imposing punishments, or posting advertisements for victims' sexual services.

Zoi Sakelliadou, a UNODC Crime Prevention and Criminal Justice Officer, who coordinated the development of the study, stated, 'We've also seen that the percentage of female perpetrators of trafficking who are at the same time victims of this crime, is steadily high too, especially if compared to female offenders in other crimes. The traffickers not only earned a profit by sexually exploiting the victims, but then made them commit crimes so they could escape liability and prosecution'. These facts and context create complexity in the prosecution of trafficking offence and necessitate that the law enforcement, prosecution and other justice actors are sufficiently aware of the existing mechanisms within the trafficking activities.

The Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (the Trafficking Protocol), in Article 9(1)(b), directs state parties to 'establish comprehensive policies, programmes and other measures' in order to 'protect victims of trafficking in persons, especially women and children, from revictimization'.

Bangladesh recently became a signatory to the Trafficking Protocol and had earlier enacted the Prevention and Suppression of Human Trafficking Act in 2012. The 2012 is largely lauded for its elaborate provisions on victim and witness protection; however, Section 18 of the Act states, 'where any victim of trafficking or any material used for the commission of the offence of trafficking is rescued or recovered from the custody or a place under the direct control of any person and if such person is reasonably doubted to be, or is identified by the victim to be the trafficker, the person may be presumed, unless contrary is proved, to have committed the offence of human trafficking under this Act.' The 2012 Act, understandably so, creates stringent provisions with regard to human trafficking owing to the global acceptance of trafficking offences as a grave and heinous offence. But in light of these recently unveiled complexities, the provision of Section 18 may exacerbate the scope of prosecuting victim-defendants as it creates a legal presumption in favor of trafficking offences.

Furthermore, there is widely prevalent lack of sensitisation among prosecutors, judges and law enforcement actors and minimal efforts have been made in the past to bridge this shortcoming. Recent activities of the UNODC aims to create further awareness among stakeholders ranging from academics to members of the judiciary. In the past, programs such as the Bangladesh Counter Trafficking in Persons Program (BC-TIP) have worked to train stakeholders.

In Bangladesh, prosecution of human trafficking offences remains a pressing concern. Recently, the Government has established seven anti-trafficking tribunals in various districts of the country. While the efforts are appreciable, the Government needs to take effective measures to ensure a holistic, victim-sensitive and rights-based approach to prosecution of human-trafficking.

COMPILED BY LAW DESK (SOURCE:UN.ORG).

LAW ANALYSIS

An analysis on the Mental Health Act 2018

MEHADI HASAN

In developing countries like Bangladesh, mental health issues are frequently ignored. In Bangladesh, 3.4-22.9% children and 6.5-31% adults suffer from mental health issues. However, 92.3% of them do not seek medical attention, as per National Mental Health Survey. Mental disorders are viewed by a large group of the population as a result of being possessed by evil spirits rather than as illnesses that can be treated. As a result, most of the victims of mental illnesses either do not get proper medical treatment at all or there is unfortunate delay in getting such treatment. Many suicides occur every year due to mental health issue. In order to protect the rights of mentally ill people. *Manoshik Shashtho Ain*, 2018 (Mental Health Act, 2018) has been passed replacing the 106 years old controversial Lunacy Act, 1912. It aims at taking necessary steps for overall welfare of the mental patients around the country, protecting their rights to property, ensuring caring services and rehabilitation.

Section 23 of the Act imposes strict punishments for medical practitioner, imprisonment for 3 years or fine up to TK 5 lakh or both, for purposefully issuing false certificates of mental health and for carelessness or mismanagement during the treatment of patients. In Bangladesh, there are only 0.49 psychiatrists for per 1,00,000 population. This small workforce has to provide a formal diagnosis and subsequent care in all cases of mental illness.

There is a fear that the strict penal provision against false metal health certificates can create panic among the existing small number of mental health practitioners. Thus, this strict provision of punishment might create a wall to adoptable and practical mental health-care delivery rather than increasing access to the services. Undoubtedly issuing a false mental health certificate is a serious criminal offence and such unethical acts do happen sometimes. In the legal system, a mental illness certificate has many consequences, such as affecting rights regarding inheritance to property, divorce, custody of children, and trials for criminal offences. Thus, reducing punishment against false certificates is not a reasonable solution. Sometimes, the untrue mental illness certificate may not be given by the doctor with mala fide intention but sometimes may be given on the basis of wrong diagnosis. Such unintentional wrong diagnosis maybe due to human mistake or technical default. So, before penalising a doctor accused of giving false mental health certificate, the court should scrutinise whether the certificate was given with *mala fide* intention or due to unintentional wrong diagnosis.

One of the strong points of the Act is that it provides for separation of children and adolescents from adults in the mental hospitals. However, this provision is largely unimplemented. Moreover, the mental health sector is underfunded and has small human resources. The service quality is very low in this understaffed governmental hospital.

Furthermore, the Mental Health Act does not provide for the establishment of more area-specific mental hospitals. As a result, most of the practitioners are concentrated in major urban areas like the capital city of Dhaka. The private hospitals provide comparatively better service and environment. But the excessive cost of the private hospitals is beyond the reach of low-income people. As a result, patients face the possibility of maltreatment.

Section 6 of the Act mentions that the patient's right to health, property, dignity, education etc. should be ensured and this shall be done through the enactment of Rules. In the absence of any such Rules, significant concerns such as confidentiality and accountability as well as the fundamental human rights of a mentally disabled person have not been elaborated. Even the WHO- AIMS report on the mental health system in Bangladesh stated there is no human rights review commission in Bangladesh to check the routine violation of people's human rights with mental illness. It would not be wrong to say that persons dealing with mental illness have to face discrimination in every sphere of life, including food, shelter, healthcare and education. Besides, while community support and rehabilitation are mentioned in the Act, strong review process for long periods and communal allowance are absent in the Act.

Especially in rural areas, people do not consider mental health as a real thing. They still believe in superstition. When they see any person with mental illness, they think that person is possessed with evil spirit. Hence, instead of taking the sufferer to the mental hospital, they take the sufferer to the village witchdoctors. The witchdoctors 'treat' the patients inhumanely e.g. by beating or chaining the patient. Unfortunately, the Act does not provide any provision to punish these offenders for this inhuman practice and to stop this practice. The Act should be amended so as to include penal provisions against inhumane practices by witchdoctors.

The Mental Health Act, 2018 needs to be supported by a strong and inclusive mental health policy, which will make up for the flaws and loopholes of the Mental Health Act, and thereby will strengthen the whole legal regime on mental health. The policy should provide for the following matters:

First, the Government needs to strengthen the existing mental healthcare system and build a strong workforce of mental health care professionals. Specialised hospitals for mental treatment should be established with sufficient psychiatrists in every district immediately. Such hospitals must have adequate medical facilities and human resource.

Second, mental health helplines should to be established from where people can easily get emergency mental health assistance and primary information on available mental health services.

Third, Special education service needs to be provided for mentally ill people. This way we can remove the existing discrimination against them.

While considering improvements to the Act, some reference may be made to the Mental Health Act of India. The Indian Mental Health Act puts great emphasis on the human rights of mental health patients, such as right to access mental healthcare, right to community living, right to protection from cruelty, inhumane and degrading treatment, right to equality and non-discrimination, right to information, right to confidentiality. The Indian Act contains restrictions on release of information relating to mental illness, and access to medical records and personal contacts of mental health patients. The said Act also contains provisions regarding legal aid and how to make complaints about any shortcomings in the mental health services.

Aside from legal measures, the Government may carry out campaigns to increase public awareness about mental health. In addition to the rigorous punitive provisions, policies, and initiatives, every conscious individual has moral responsibility to work for removing the social stigma about mental illness, and safeguarding the rights of mental health patients. Together we can make a difference.

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