

LAW OPINION

COVID-19 and the dilemma between life and livelihood

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India's official record on COVID-19 human toll is more than a staggering 3,80,000 now, which, according to experts, might be far below the actual number. Though in early March this year, the country's Health Minister declared the country to be 'in the endgame' of the COVID-19 crisis, now an underprepared India is in the grips of public health emergency recording more than 7,000 deaths and almost 100,000 new infections only in a day last week.

Regarding controlling the spread of the virus, WHO believes that large-scale physical distancing measures and movement restrictions, often referred to as 'lockdowns', can be helpful.

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also cautioning that such measures disproportionately affect disadvantaged groups, including people dependent on daily labour for subsistence. Lockdowns are believed to help the States buy time to prepare and plan. Since the beginning of the second wave this year, the Indian government however, does not seem to be in need of 'time', as they dismissed the idea of enforcing lockdown except as a last resort, and as the Indian premier passionately posed, the dilemma is between life and livelihood, and that economic activities and livelihood must remain least impacted.

This piece is not concerned about the efficacy of lockdowns as such (it does not intend to advocate in favour

of lockdowns either), rather about the dilemma superimposed by the State on its people, and its human rights implications, both of which are as relevant for Bangladesh, as they are for India or any other countries.

The dilemma between life and livelihood presupposes loss of life as an inevitable threat, diluting the healthcare obligations that should naturally intervene (inasmuch as the prevention, treatment and control of epidemic, endemic, occupational and other diseases (such as COVID-19) come within the purview of right to health); similarly, it poses loss of livelihood as unavoidable too, bypassing adequate standard of living, characterised by continuous

improvement of living conditions, which is supposed to mitigate the risks even amid drastic measures, such as lockdowns. The dilemma may be equated with what Henry Shue calls the 'subsistence exchange contract' in which individual has to sacrifice one of one's other rights in return for subsistence.

Grand lists of socio-economic rights that many countries, due to economic constraints, cannot realise at once, seem farcical to many. To address the 'farce', understanding that these 'rights' are in fact 'goals' that countries should promote, is significant (says James W. Nickel). Some do disagree and argue that rights are indeed rights and are to be called so, even though they are not

fulfillable in aggregate (opines Jeremy Waldron). The International Covenant on Economic Social and Cultural Rights (ICESCR) 1966, to which many countries are parties, does both and none. It does recognise the socio-economic rights as rights but does not call a State a right-violator or a direct duty-bearer, as it requires the States to achieve progressively the full realisation of the rights by all appropriate means. And true that, as Onora O'Neill says, such duty remains entirely amorphous when adequate infrastructures are missing or weak. Effective responses to COVID-19 and any possible future pandemic require robust public health infrastructure. However, public health remains severely underfunded in

many countries, and that is true for many, if not all, hard-hit developing economies like India as well. Therefore, the ICESCR obligations, minimum core included, remain amorphous in many countries, while they go on to pose a depressing dilemma to the citizens.

For most part, we argue for constitutionalising socio-economic rights coupled with strong judicial review, often forgetting how strong mechanism of judicial review can keep maintaining social inequalities (since people from the higher strata of the society are more likely to access judicial fora), when nothing substantive is done for realising the said rights. Many countries' experiences show something quite similar: they recognise socio-economic rights in their Constitutions, and over the years, invest in crafting ways for judicially enforcing them, quite effectively too. However, amid the current crisis, they hopelessly find that due largely to their low public healthcare budget, over a long period of time, judicial enforcement, however strong, comes in no use. The present crisis only unmasks how countries tend to lack a human-rights based approach to healthcare in general and to the COVID-19 pandemic in particular, despite being parties to the ICESCR and despite constitutionalising the ESC rights.

While judicial enforceability is important and can be a great measuring yard to assess the progress and steps taken by States at large, the idea should be to strengthen the international human rights scheme, especially for its specific role, as opposed to that of constitutional rights scheme. Categorising rights (as belonging to different generations), deepening the schism between civil-political and economic-social rights, and not holding States directly accountable as rights-violators or duty-bearers for the latter rights, are all farcical, if anything is needed to be called out as such.

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LAW VISION

Bangladesh and ILO Violence and Harassment Convention 2019

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In 2020, a report published by the ILO revealed that 61.7 percent of both male and female RMG workers in Bangladesh face violence and harassment in the workplace. Gaps in the legal framework, poor implementation strategies, lack of awareness are the main contributors to this social evil. Despite this, Bangladesh has no comprehensive mechanism to address the issue. However, the ILO Convention 190 can act as a baseline for establishing a policy and legal framework to mitigate violence and harassment in the world of work.

Currently, Bangladesh has some scattered provisions under various laws, such as Bangladesh Labour Act, 2006 (BLA) and the Penal Code, 1860 to cover the offences related to workplace violence and harassment. These laws do not comprehensively address sexual harassment and are inadequate in terms of mitigating workplace violence and harassment. Section 332 of the BLA provides that, no person of any establishment shall behave unmannerly or repugnant to the modesty or honour of a female worker of that establishment. The terms 'unmannerly' and 'repugnant to the modesty or honour' are vague and provide ample scope of interpretation. Additionally, BLA prescribes no specific punishment for this offence. Under Section 307 of the general penalty, the offender will be punishable with a fine which may extend to BDT 25,000. Moreover, women employed in the informal sector are more vulnerable to violence and harassment but the workers of the sector remain outside of the ambit of the BLA compliance.

Another provision, Section 354 of the Penal Code, criminalises assault or criminal force to a woman with intent to outrage her modesty and prescribes a maximum of two years of imprisonment and a fine. The section is based on an ambiguous concept of outraging a woman's modesty, providing opportunities for victim-blaming on orthodox notions. Also, the offender can get rid of the charges claiming that he did not 'intend' to make the victim feel this way. Other sexual offences that do not involve physical contact are covered under Section 509 of the Code.

In 2009, the High Court Division provided landmark directives in response to a writ petition filed by Bangladesh National Women Lawyers' Association. Though the Court provided a list of acts that constitute sexual harassment, it did not define the offence of sexual harassment itself. It directed to form an internal complaint committee to receive and investigate complaints on sexual harassment in all work places and educational institutions in the public and private sectors. Further, the High Court Division directed the Government to formulate appropriate laws to address harassment but such laws are yet to be formulated. Nevertheless, the court has failed to prescribe a mechanism or assign an agency to monitor and implement the guidelines. Some efforts have been made by



advocacy groups for executing the directives but those are not sufficient for creating large scale impact.

At this juncture, Bangladesh clearly needs a comprehensive mechanism for mitigating violence and harassment in the world of work. Ratification of the ILO Violence and Harassment Convention, 2019 (No. 190) and its supplementary Recommendation (No. 206) would be a significant step towards achieving the goal. The Convention and recommendation acknowledge the right of every individual to a world of work free from violence and harassment, and are grounded on the adoption of an inclusive, integrated and gender-sensitive approach. This approach envisions action on various aspects, such as protection, prevention, enforcement, remedies, guidance, training, and awareness raising. Additionally, the Convention 190 covers issues like rehabilitation and provides legal protection to the victims or complainants of workplace violence and harassment which are absent in BLA. It is apparent that ratification, as well as the incorporation of the Convention requirements to national laws, will certainly cover the gaps in the existing legal framework.

Further, the Convention expands the concept of the world of work beyond the physical workplace and acknowledges virtual workplace. Needless to say, the importance of laws that govern the virtual workplace have increased significantly due to exponential growth of 'work from home' trend during the Covid-19 pandemic.

To date, six countries have ratified the Convention. Representatives from Bangladesh Government and workers' associations have voted in favour of the ratification of the Convention but the employers have opposed it. Ratification and proper implementation of the Convention will help Bangladesh achieve the Decent Work Agenda and Sustainable Development Goals (SDGs) along with reducing workplace violence and harassment. It is critical to bring the employers into confidence that ratification of the Convention will be beneficial for both workers and employers. Different entities, such as national and international agencies, trade unions, donors can play a key role to make the stakeholders aware of the importance of ratifying ILO C190 and can facilitate the subsequent implementation process.

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STUDY REVIEW

Unveiling the socio-economic profiles of death row prisoners in Bangladesh

Bangladesh retains death penalty in law as well as in practice for thirty three offences (twenty-five of which are non-fatal in nature), and has been recording a significant increase in executions since 2000. However, the death penalty regime in Bangladesh has gotten little to no space in academic and public debate. Further, almost nothing is known about the demographics of the death row prisoners, and their lived experiences of interaction with the criminal justice system.

In this backdrop, in 2019-20, the Department of Law at the University of Dhaka, in collaboration with Bangladesh Legal Aid and Services Trust (BLAST) and the Death Penalty Project, UK conducted a rigorous pilot study to investigate socio-economic characteristics of death row prisoners in Bangladesh, and to explore their experiences and perspectives on the criminal justice system. A virtual launch of the study report titled 'Living under sentence of death: A study on the profiles, experiences, and perspectives of death row prisoners in Bangladesh' was organised by the Department of Law on June 17, 2021. This study brings the death penalty regime of Bangladesh into conversation and makes a modest attempt to fill the existing knowledge gap.

The study has been led by Dr Muhammad Mahbubur Rahman, Professor, Department of Law, University of Dhaka, who previously undertook a thorough examination and comparison of all murder cases reported in major law reports during the period 1972-2010 in his book, *Criminal Sentencing in Bangladesh: From Colonial Legacies to Modernity* (Brill Nijhoff, 2017).

The present study concentrates on data relating to 39 death sentenced prisoners, hailing from 17 out of 64 districts in Bangladesh. To collect socio-economic information on the prisoners, it primarily relies on relevant case records. Additionally, it uses interviews of the family members of the prisoners and followed up progresses of relevant Death Reference Cases in the HCD (up to February 2019).

The study report proceeds in five substantive parts. The first part introduces the background and objectives of the study and discusses the method of data collection and limitations. The second part provides information on the legal background and administration of the death penalty regime in Bangladesh, providing tools to interpret the findings. The third part, as the crux of the study, describes the socio-economic profiles of the death row prisoners: their age, gender, religion, education, economic, criminal, and family backgrounds. Part

four underscores the prisoners' experiences of the criminal justice system. Finally, the report concludes by articulating the implications of the findings.

The study reveals some significant findings, most of which are largely consistent with the findings of studies from other countries that convincingly demonstrate that the death penalty has a disproportionate impact on vulnerable and marginalised sections of society along the lines of economic status, racial identity and levels of educational attainment.

It finds that the judicial sentencing appears not to be significantly influenced by the growing legislative trend of prescribing the death penalty for non-fatal offences. In practice, the courts, by and large, do not impose death sentences unless someone dies as a result of the offence. The study suggests that most death sentenced prisoners (74%) within this study were below 30 years of age at the time of the offence, with the largest proportion being 20-30



years of age; the death sentenced prisoners were overwhelmingly male (97%); most death sentenced prisoners in this study had low educational attainments; the majority had not been educated beyond secondary school, primarily because of family poverty; more than half of the death sentenced prisoners were low-paid salaried employees or unemployed, with almost three-quarters of them being economically vulnerable; almost a quarter were the sole earners within their families; there was no prior criminal or delinquent records reported for three-quarters of the prisoners; none of them were earlier convicted for any other offence. The socio-economic profiles of death sentenced prisoners in the

present study, to a great extent, reinforce the popular belief in Bangladesh that the death penalty is imposed mostly upon the poorest, most powerless, and marginalised people. None of the prisoners under the study belonged to the upper or upper-middle classes of socio-economic strata.

Most interview respondents were not satisfied with the quality of the legal investigation, primarily because of the alleged use of torture as an investigation tool, with at least a third of the families claiming that prisoners were tortured in custody. Most interview respondents (60% of those responding) were not satisfied with the trial process. Most felt that the trial courts failed to properly appreciate the evidence and wrongly relied on false evidence adduced by the prosecution. Some were also dissatisfied with the sentencing process and outcome.

On the quality of legal representation, two-thirds of interviewees who responded appeared to be satisfied, while one-third had negative impressions, particularly regarding the quality of state defence lawyers. Delay in proceedings was underscored as yet another predicament in the criminal justice process, which tends to be largely responsible for prolonged detention of prisoners and their protracted isolation on death row. The cases in the present study took, on average, four and a half years for adjudication by the trial courts (from the date of registration of case) and, thereafter, another five and a half years for disposal by the High Court Division (HCD). From filing of the cases to their disposal by the HCD took more than 10 years in almost half of the cases.

Almost all families suffered huge economic losses and other problems as a result of legal proceedings against prisoners. The families of just more than half of the prisoners were subjected to harassment by local people, forcing four families to relocate.

Because of the relatively small sample size, the study report time and again cautions against generalising from the quantitative data to the situation of all death sentenced prisoners in Bangladesh. It does not make any claim from these statistical findings beyond the sample. However, the findings of this study provide indications of the socio-economic profiles of death sentenced prisoners in Bangladesh more generally and, therefore, provide an impetus for future research. Furthermore, though the numbers are relatively low, the qualitative findings are rigorous and they expose sobering details about the experiences of justice and the debilitating impact of the death penalty regime in Bangladesh.

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