

LAW WATCH

Effective protection of domestic child workers: implementation awaits

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Incidentally, every few months we come across news reports of abuse of domestic workers in Bangladesh, especially related to children. Over the years, few of these incidents have come under the spotlight, and has accounted for advocacy against child labour - which resulted in significant judicial activism in Bangladesh. Studies conducted by different organisations show that, between January 2020 and June 2021, there were 70 reported incidents involving violence against domestic workers, of which 51 incidents involved workers under the age of 18 and, of that, 22 incidents involved deaths of domestic child workers. However, to this day, many more incidents go unreported without any retribution, and over time, our desensitisation to the recurring incidents has faded the effective implementation of protection of domestic child workers.

The problem relating to the abuse of domestic child workers is real and eminent and, although many noteworthy initiatives have been taken by the Government in this regard, it is felt that more steps are required in practice to stop or reduce such abuse of domestic workers. It is, perhaps, appropriate and timely to revisit the important principles and practical directions set by the Hon'ble High Court Division in the landmark case of *Bangladesh National Women Lawyers Association (BNWLA) v the Cabinet Division, represented by Cabinet Secretary, Bangladesh Secretariat*. In this case, the High Court Division (comprising of Justice Md. Imman Ali and Justice Sheikh Hassan Arif) deliberated on these issues and issued a 10-point directive to the relevant Government authorities with the sincere aim of regulating the employment of children as domestic workers and setting up an elaborate plan to eradicate child labour.

In the case, an application was filed under Article 102 of the Constitution to bring the plight of child domestic workers to the fore, based on an incident of abuse of a child domestic worker, only 10 years of age. The High Court, upon closely scrutinising the facts, stipulated that the Government should take immediate steps to prohibit employment of children up to the age of 12 from any type of employment, including employment in the domestic sector - particularly with the view of ensuring that children up to the age of 12 attend school, which would resultantly make the provision and concept of compulsory primary education more meaningful. The Court also addressed that, as it is impracticable to blatantly ban child labour altogether, education and training of domestic workers aged between 13 and 18 must be ensured by the employers, either by allowing them to attend educational or vocational training institutes, or by alternative domestic arrangements suitable to the concerned worker. In connection thereto, the Court importantly noted that, while the National Child Policy defines 'child' as anyone up to the age of 18, the Bangladesh Labour Act 2006 (BLA) defines a child as anyone below the age of 14 years. The High Court rightfully stressed that the BLA should be amended to bring its definition of child in line with the said policy. It is noteworthy that the Children's Act 2013 also defines 'child' as any person under the age of 18.

The BNWLA case also stressed on the necessity of including domestic workers within the definition



of 'worker' in the BLA - especially due to the long hours that these workers are generally exposed to within the four walls of the employer. 'Domestic servants' are specifically excluded from the purview of the BLA, and as a result, these workers do not enjoy any rights afforded by the BLA and have no redress for non-payment of salary, violation of conditions of work, etc. The Court noted that private homes are closed environments that expose domestic workers to physical, sexual, and emotional abuse, "all of which are well known risk factors or emotional disorders." Inclusion of the domestic workers within the definition of 'worker' in the BLA will ensure that the workers in the domestic sector enjoy all the benefits guaranteed by the laws. The Court stressed that the laws must also ensure proper medical treatment and compensation by the employers for all domestic workers, who suffer any illness, injury, or fatality during the course of their employment or as a result of it.

Apart from the legislative reforms, the BNWLA case also focused on practical steps to curb the spread of domestic worker abuse by suggesting strict monitoring and registration of domestic workers. The Court referred to The Domestic Servants' Registration Ordinance 1961, which required all persons rendering domestic services within certain parts of Dhaka to register with their respective police stations and stressed that the current situation also demands to put in place a system of registration and monitoring of all persons engaged in domestic work - it is only then that the mandate of the Constitution will be fulfilled. On this note, the Court directed the Government to ensure mandatory registration of all child domestic workers by their employers, and to maintain an effective system through the respective local Government units for tracking down each and every change of employment or transfer of all the registered domestic workers from one household to another. The parents must also be required to register the name and address of the person to whom the child is being sent for the purpose of employment. Although the requirement of registration is clearly stipulated in the Domestic Worker Protection and

Welfare Policy, more effective steps need to be taken by the appropriate authorities to ensure its implementation so that it becomes a routine task in every household.

Lastly, on the health and safety of domestic workers, the BNWLA case stressed that the Government should take steps to promulgate laws making it mandatory for the employers to ensure health check-ups of domestic workers at least once in every 2 months and the legal framework should be strengthened in order to ensure all the benefits of regulated working hours, rest, recreation, salary etc. of domestic workers. The laws should also ensure proper medical treatment and compensation by the employers for all domestic workers who may suffer any illness, injury, or fatality during the course of their employment or as a result of it. Although the existing Domestic Worker Protection and Welfare Policy incorporates most of these points, it is felt that bringing them under a formal statutory instrument would provide better protection for these workers.

The above directions and guidance provided by the Court still makes the BNWLA case a landmark case in this field. From the case (which frames the *modus operandi* towards eradicating child labour), it appears that the Courts are ready and equipped to give the much-deserved protection to domestic workers, especially children. Given that noteworthy policy steps have already been taken by the Government to eradicate domestic worker abuse and child labour, it is concerning that cases of abuse are still on the rise. It is felt that laws and policies remain largely ineffective unless accompanied by stricter enforcement. The enforceability of the relevant instruments must be ensured in order to maximise the effectiveness of the policies concerned. Also, the legal and practical steps suggested by the BNWLA case must be given immediate implementation in the form of a formal statute (if not being done already).

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LAW LETTER

Medical negligence and tortious remedies

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On a regular basis, Bangladesh witnesses numerous instances of medical negligence, some of which make way to newspapers. The victims in most cases are ordinary citizens with no financial or political power, who often do not know how to remedy such violations. A crucial challenge in addressing medical negligence is that the victims often do not even know that their rights are being violated, they simply bear the burnt.

In order to increase public awareness on medical negligence and its legal remedies in Bangladesh, 'iProbono Bangladesh' organised the first ever virtual street law campaign on the tortious remedies of medical negligence. 14 enthusiastic law students conducted sessions throughout February for 70 participants using interactive methods of role playing, open discussion, group presentation, online quiz, and many more. Throughout the campaign, participants came to know about the basics of medical negligence and the remedies under tort law.

During this campaign, the street lawyers discussed how every right has its corresponding duty and how they may avail tortious remedies in case people suffer any loss. The street lawyers also talked about the three elements of tort: a) a pre-existing right of a person, b) the duty of other person(s) to respect that right and c) how the lack of correspondence between right and duty results in loss or damage and thereby becomes a tortious wrong. The participants applied these three elements in every case study during the sessions and tried to identify whether a particular incident was tortious wrong or not.

Legal remedies for torts like medical negligence are still at their nascent stage of development in Bangladesh. Our court structures as well as processes and colonial statutes are difficult for a lay person to follow. The sessions aimed to help the



participants understand the nuances of the legal processes by using interactive visuals. The visuals were on how to file a civil tort suit, where to file the same, suit valuation etc. The related statutes were also discussed, which included the Constitution, the Penal Code 1860, the Consumer Right and Protection Act 2009, the Bangladesh Medical and Dental Council Act 2010, etc. The sessions explained how a victim can choose to either pursue a civil money suit, or in the alternative, request to cancel or postpone the license of the concerned doctor or hospital in question.

The sessions also discussed constitutional tort remedies: when there is no available ordinary statute to ensure a satisfactory remedy for the damage caused to the victim, one can finally file a writ petition with the High Court Division of the Supreme Court under Article 102 of our Constitution. The participants also studied some landmark judgments on constitutional tort in this regard. Moreover, the participants were provided the contacts of Ain O Shalish Kendra (ASK), District Legal Aid Office, BLAST and iProbono in case they face any difficulties while going through the procedures they learnt.

Tort is one of the least practiced laws in the context of Bangladesh. One can also choose to file a tort suit along with a criminal case. But it is only tort which can provide damages to the victims of medical negligence. Therefore, more people should claim their rights against medical negligence via tort law.

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LAW VISION

Inability to repatriate export proceeds and legal remedies for exporters

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In Bangladesh, most of the exporters have to rely on bank loan for procuring the raw materials essential for the production of the goods/articles to be exported. To that end, the exporters have to open BTB LC for procuring raw materials either from local or foreign suppliers. Additionally, for facilitating the export, the exporters may have to avail several credit facilities from the banks. After exporting and repatriating the foreign proceeds, the liabilities are adjusted against the said foreign proceeds. This repatriation is not only essential to generate revenue for the exporters but also to satisfy the overdue bills against the BTB LCs and other credit facilities availed for export purposes. As per the provisions of the Foreign Exchange Regulation Act, 1947 (FERA), the exporters are under a legal obligation to repatriate the foreign proceeds against the exported goods. The details of repatriating the said foreign proceeds against export are enumerated in Foreign Exchange Guidelines vol 1 [as of 31 May, 2009], Foreign exchange guideline vol 2 [as of July 31, 2010]- both issued by Bangladesh Bank.

However, over the past few years especially during the world recession and recently for the ongoing pandemic, many Bangladeshi exporters have not been able to repatriate foreign proceeds against export due to insolvency/bankruptcy of the foreign importers or refusal to accept exported goods and make payment by the foreign importers, or for any other



situations beyond control. Many exporters have suffered immense loss by failing to repatriate export proceeds. Finding no other alternative and to minimise their losses, many of such exporters were forced to part with considerable amount of export value by receiving discount payment or nominal amount. A total of 32 Bangladeshi garments exporters filed suit against the renowned American brand 'Sears' for unjust cancellation of huge volumes of orders. The Court allowed the suit but the affected exporters have received only \$6.3 million against the cancelled orders of \$40 million where the exporters had already shipped the products worth \$22.7 million.

If the foreign proceeds from export

are not repatriated in due time or the repatriated amount is less than export value, the issuing banks, in order to discharge their obligations, make the payment against the said BTB LCs and adjust other credit facilities, if any, by creating forced loans against such exporters. These derive the exporters towards unrecoverable losses i.e. on the one hand they lose the export proceeds and on the other hand they have to repay the forced loans along with interests created by the banks.

Under Section 23 of the FERA, non-repatriation or partial repatriation is also a punishable offence. At the same time, the lender bank in order to recover

the loan amount (created for export purposes) may take several legal actions against such exporters i.e. selling or taking control and possession of the mortgaged and hypothecated properties, shares etc., listing the name of the exporter along with guarantors as defaulters in the CIB list of Bangladesh Bank, filing Artha Rin Suit under Artha Rin Adalat Ain, 2003, cheque dishonour case under Negotiable Instruments Act, 1881, and more aggressively criminal cases under Penal Code, 1860 for breach of trust, cheating, and others.

Now the question is what legal remedies are available to the affected exporters in case of non-repatriation of foreign proceeds as such. Bangladesh Bank has the legal authority to exempt the affected exporters from the liability to repatriate the foreign proceeds by exercising the powers under Section 12 (2) (b) of the FERA. In recent times, due largely to the pandemic, it is often seen that the foreign buyers refuse to accept the exported goods after the same reach the port of the buyer. In that case, the BB, exercising the power under section 12 (3) of the FERA, may permit the affected exporters to sell the exported goods from the port of the buyer's country and procure the sale proceeds accordingly. In this way, the affected exporter may have the opportunity to sell his exported goods to some persons or entities other than the original buyer by way of 'offshore selling' or through any other convenient way. Even after that, if the affected exporters fail to sell the exported goods, upon request of the

exporters, the BB has the authority under Section 12 (3) of the FERA, to direct that the goods be assigned to the Government. If any such assignment is made to the Government by BB, the Government is under a legal obligation to pay such amount to the affected exporters after selling the assigned goods under Section 12 (4) of the FERA. BB also has the legal authority to take protective and facilitative initiatives to protect the lender bank, Authorised Dealer (AD) bank and affected exporters by exercising its regulatory powers under Sections 45 and 49 of the Bank Companies Act, 1991.

Moreover, an affected exporter who has not managed to repatriate the export proceeds, has other available legal recourses too. If the 'Sale Contract' contains any provision empowering either of the parties to invoke the jurisdiction of any court to appoint arbitrator and enforce the arbitral award, then the affected exporter can file an application before the empowered court to appoint an arbitrator and to enforce the arbitral award, if any. Such affected exporter may also file civil suit for realisation of export value along with compensation and interests as well as criminal case for criminal breach of trust against the local agency of the buyers, if any, in exporter's country. The exporters may also file lawsuit against the buyers to recover the overdue export amount in the courts of buyer's country.

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