

LAW INTERVIEW

Business and Human Rights: The Pathway for Bangladesh

Surya Deva is a Professor at the Macquarie Law School and a founding Editor-in-Chief of Business and Human Rights Journal. He served as a member of the UN Working Group on Business and Human Rights (2016-22) and has advised the UN agencies, governments, national human rights institutions, multinational corporations, trade unions and civil society organisations on issues related to business and human rights. Mohammad Golam Sarwar, Consultant, Law Desk, talks to him on the following issues.

Law Desk (LD): Bangladesh will soon be graduating from its LDC status. How will its compliance with human rights and international labour law standards impact its trade relationships with EU countries and other major investing nations?

Surya Deva (SD): International standards concerning human rights, labour rights and the environment are increasingly becoming an integral part of trade and investment regimes. After the unanimous endorsement of the UN Guiding Principles on Business and Human Rights (UNGPs) by the Human Rights Council in June 2011, neither states nor companies could afford to ignore the interface of human rights and business.

In this context, Bangladesh should see compliance with human and labour rights as a pre-condition for successful and sustainable trade relation with other states, specially the European Union. Instead of perceiving human rights as a compliance issue or a cost-increasing measure, Bangladesh should consider effective implementation of the UNGPs as a competitive advantage issue in the long run. Moreover, if businesses respect both people and the planet, this would create a more sustainable, inclusive and equal society in line with the Sustainable Development Goals (SDGs).

In my view, the government of Bangladesh should take a holistic and long-term approach to economic development. It should introduce a range of incentives and disincentives for responsible business conduct. Moreover, the government should facilitate collaboration among companies, industry associations, trade unions and civil society organisations to achieve various national goals and overcome global challenges such as climate change.

LD: How has the pandemic impacted the performance of businesses' human rights and labour law compliance around the world?

SD: The Covid-19 pandemic has impacted the business and human agenda in paradoxical ways. On the one hand, many governments and companies started focusing on short-term recovery, economy revival and market survival, thus putting respect for human rights, labour rights and the environment on the back burner. On the

other hand, the pandemic also exposed many inequalities and vulnerabilities in our current economic model – we all saw the plight of many children, women, migrants and workers part of the informal economy.

We should see the pandemic as a wake-up call. Building a more inclusive and sustainable society would require businesses pursuing the path of “profit with principles”. Respect for human rights and the environment should not be seen as an afterthought or merely a tick box exercise. Rather, achieving sustainability – which would require respecting all human rights and planetary boundaries – should be integrated as a cross-cutting goal for all government ministries and all business actors.

LD: Considering the emerging economy of Bangladesh, how do you see the challenges for localising business and human rights framework?

SD: Promoting responsible businesses conduct and holding companies accountable for abusing human rights or polluting the environment is proving to be a challenging task for all states. Bangladesh is no exception. However, given that the UNGPs are here to stay, the government should take a proactive approach in implementing the UNGPs and other business and human rights standards such as the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy. This would entail, among others, localising international standards to local conditions and circumstances in Bangladesh.

In my view, the government of Bangladesh should take several steps to operationalise the UNGPs in the local context. First of all, the government should make a public commitment to implement the UNGPs and start the process of developing a national action plan on business and human rights in meaningful consultation with all stakeholders. Such a plan should identify priorities for Bangladesh in short, medium and long terms.

Second, it should raise awareness and build capacity of companies (specially SMEs), workers, trade unions, consumers and civil society organisations in relation to international business and human rights standards. The National Human



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Rights Commission of Bangladesh and universities could play a key role in accomplishing this task.

Third, the government should strengthen its governance institutions at all levels and enhance transparency. Doing so will also assist in improving access to remedy for business-related human rights abuses. After all, the business and rights agenda is a sub-set of the wider discourse about respect for human rights, democracy and good governance.

Finally, government agencies and state-owned enterprises should lead from the front in respecting human rights, labour rights and the environment. By doing so, the government of Bangladesh would set a good example for private business actors.

LD: What are some of the ways in which Bangladesh can improve its performance concerning business and human rights? Is there any scope of regional and international cooperation?

SD: The government could learn from good practices elsewhere to move the business and human rights agenda in Bangladesh. For example, developing policy coherence among various

government ministries will be essential. Equally important will be to break silos between agenda concerning business and human rights, the SDGs and climate change. Moreover, the government should link public procurement with responsible business conduct. It may also offer tax incentives and preferential loans for companies with a track record of respecting both people and the planet. At the same time, companies which do not get swayed by incentives should be held accountable to discourage free riding.

Many business and human rights challenges involve a cross-border or transnational element. Exploitation of migrant workers, environmental pollution, climate change and adverse impacts of new technologies are illustrative of this reality. Therefore, cooperation and collaboration with other states in South Asia and beyond will be essential. Collective action by states and business organisations should also help in accelerating the progress in implementing the UNGPs. We should also see the constant demand for an international treaty on business and human rights in this context.

LD: How do you evaluate the future of human rights and environmental compliance by businesses in a post-pandemic world?

SD: I feel that there is no turning back on increasing social and legal expectations from businesses to respect human rights and the environment. Because of various “push and pull” factors (including the mandatory human rights due diligence regulations emerging out of the European Union), most companies will feel encouraged or forced to take their human rights responsibilities seriously. In such a context, companies might be better off by adopting a proactive approach in moving towards socially responsible and sustainable business models. All stakeholders – from governments to investors, industry associations, trade unions, consumers, academia, lawyers and the media – have a role to play in ensuring that such a shift about the role and purpose of companies in society does take place.

LD: Many thanks for your time.
SD: You are welcome.

LAW LETTER

Is arbitration becoming more expensive than litigation?



AIMAN R KHAN

Alternative Dispute Resolution methods, particularly arbitration has become increasingly popular in Bangladesh over the last two decades, so much so that a separate law on arbitration was enacted to accommodate it. An entire arbitration proceeding can be completed within less than a year or six months. This is faster

than the time it takes to prepare and file a case in a court, which is why arbitration is getting increasingly popular. Moreover, parties to a dispute often want their case to be settled at a private setting to keep things confidential.

While it is true that arbitration is viewed as a secure option, there is no guarantee that it is less expensive than court proceedings. This frequent

According to section 7 of the Arbitration Act 2001, unless otherwise agreed by the parties, the costs of an arbitration shall be fixed by the Arbitral Tribunal. It also states that the Arbitral Tribunal shall specify the party entitled to costs, the party who shall pay the costs, the amount of costs or method determining that amount and the manner in which the costs shall be paid.

assumption of ‘low cost’ is what gives arbitration its leverage over traditional court litigation. Surprisingly no research or study has been conducted to support this assumption.

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The Arbitration Act does not specify any particular range or standard of the costs but mentions ‘reasonable costs’ relating to the fees and expenses of the “arbitrators and witnesses, legal fees and expenses, any administration fees of the institution supervising the arbitration and any other expenses incurred in connection with the arbitral proceedings and the arbitral award.”

In reality, the provision on ‘reasonable costs’ leaves room for arbitrators to set their own standards in terms of fees. The fees’ range largely depends on the valuation of the dispute but sometimes it goes ridiculously beyond the reach of the parties.

Arbitrators have the liberty to claim fees as per their own standard per sitting or sometimes even charge by the hour. While our traditional law practice does not allow billable hours, arbitrators take this opportunity to set hourly rates for their professional time, be it hearing the parties or for a simple task such as going

through a document. For example, in any typical arbitration proceeding consisting of two arbitrators and one Chairman, the standard fees can go up to BDT 15 lacs per arbitrator with the Chairman’s remuneration alone sometimes standing at BDT 25 lacs for an average of ten days’ sitting. This is farcical in comparison to an average civil suit filing cost that ranges from 20,000tk to 1,00,000 BDT. On many occasions, parties who agreed to arbitration earlier are compelled to back out due to not having enough funds.

It can be argued that the costs related to traditional litigation is no less than arbitration. The only difference is that in litigation, costs paid here and there sum up to just the same amount as arbitration but unlike the latter, it is evenly divided in instalments over a period of several years. The idea of having to pay large chunks of money within short intervals is what makes arbitration look expensive. However, that largely varies from one case to another.

A simple issue regarding fees should not undermine its capabilities and preclude litigants from reaping its benefits. With the above problem being addressed, the benefits of arbitration can never be underestimated. This ambitious mechanism still has the potential to get back its lost glory with regulating the standard of fees, training of arbitrators, setting standard rules of procedure, drafting clauses, and disposing of cases in an expeditious manner.

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