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OPERATION OF VIRTUAL COURTS: IMPACT OF COVID-19 PANDEMIC ON ACCESS TO JUSTICE IN BANGLADESH

Ali Mashraf* and Jalal Uddin Ahmed**

Abstract

The outbreak of the COVID-19 pandemic in Bangladesh in March 2020 forced the judiciary to halt all court activities (both the apex and the subordinate courts) for more than a month. Thereafter, the Use of Information and Communications Technology by Court Ordinance, 2020 (which was later passed as an Act by the Parliament) paved the way for the virtual operation of courts for the first time in the history of Bangladesh. Apart from the Act, the Supreme Court, by exercising its power under Article 107 of the Constitution, has issued numerous practical directions and circulars from time to time for the smooth functioning of courts of all tiers virtually. However, despite virtual courts operating for over a year now, some obvious loopholes in the laws, procedures, and infrastructure still exist, e.g., limited functioning of courts, lack of clarity and conflicting directions in various circulars, accessibility issues, etc. Consequently, these loopholes have created a bar to access justice via the formal court system for our citizens, which violates their fundamental rights. Against this backdrop, this article analyses the impact of COVID-19 on access to justice for Bangladeshi citizens through virtual courts. It elaborates on Bangladesh's mandate of access to justice as enshrined in the Constitution and various international legal instruments, and to what extent the virtual courts have been able to ensure this right for the citizens. The article further identifies the loopholes in the virtual court system that hinder people's access to justice. It concludes with informed recommendations for policymakers and the judiciary based on the best practices of other common law countries in shaping up our virtual court structure to ensure that the courts remain properly functional at all times to dispense justice.

Keywords: *Virtual courts, access to justice, COVID-19, fundamental rights*

Introduction

The coronavirus pandemic brought the entire world to a standstill. Bangladesh was no exception to this. As coronavirus infections started increasing in the country, the Government declared a general holiday (which in effect was a lockdown) from 26 March of last year, shutting down all public transports, markets, shopping malls, and educational institutions.¹ The courts were also affected by this shutdown.² The closure of courts for such a long time was not only affecting the people's right to redress their grievances or gain relief, but also violating the Constitution of the

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¹ Hoque R, 'Bangladesh's Unofficial Emergency: Managing the COVID-19 Crisis by Notifications' (*VerfBlog*, 6 May 2020)

<<https://verfassungsblog.de/bangladeshs-unofficial-emergency-managing-the-covid-19-crisis-by-notifications/>> accessed 3 June 2021.

² See the section C of this paper.

country. Therefore, under such circumstances, an Ordinance³ was promulgated by the President to allow the courts to function using information technology. The Ordinance was later passed by the Parliament as an Act,⁴ with a repeal and savings clause.⁵ This ushered in a new era where court proceedings for the first time in the history of Bangladesh took place virtually.⁶ But certain lacunae remained both in law and in practice. These loopholes created an already existing impediment to access to justice. This article will discuss these loopholes and how they affected people's access to justice during the COVID-19 pandemic.

The discussion will focus on virtual courts and not electronic judiciary (e-judiciary). The virtual court is the operation of court proceedings via virtual means. Conversely, e-judiciary means the entire judicial process, starting from filing the suit/case to the trial proceeding to the judgment, being conducted electronically and the whole judicial system being interconnected digitally. Although e-judiciary and alternative dispute resolution (ADR) processes are mentioned as a part of widening the scope of virtual courts in the recommendations (see section E), the main focus of this article remains on the usage of virtual courts to deal with matters that the current Act⁷ has empowered courts to deal with. The article discusses the existing lacunae in the virtual court system and provides informed recommendations to the relevant stakeholders to improve the system to enhance people's right to access to justice. One must also note that this article has dealt with circulars and notifications issued under the Use of Information Technology by Court Act, 2020 till 01 June 2020.

Access to Justice

Access to justice is a fundamental right that is a part of the broader issue of rule of law and good governance. Basically, access to justice means having the grievances of a victim addressed by a court of law. If considered literally, the term 'access to justice' encompasses access to a system of law from which persons, both legal and natural, are entitled to receive their dues, including rights.⁸

The Constitution of Bangladesh, in consonance with the international human rights regime, emphasizes access to justice. One of the fundamental principles of the state is to provide equality of opportunity to all citizens, as per Article 19(1). Article 27 states that all citizens are equal before the law and are entitled to equal protection of the law. Article 31 enumerates the protection under law and treatment in accordance with law for the citizens as an inalienable fundamental

³ 'Use of Information Technology by Court Ordinance, 2020' (*Legislative and Parliamentary Division, Government of the People's Republic of Bangladesh*, 9 May 2020)

<https://legislative.gov.bd/sites/default/files/files/legislativeportal.gov.bd/notices/7a9060e9_f3b7_40a2_93bc_9dc217848ec5/Ordinance%20No%2001%20of%202020.pdf> accessed 3 June 2021.

⁴ 'Use of Information Technology by Court Act, 2020' (*Legislative and Parliamentary Division, Government of the People's Republic of Bangladesh*, 9 July 2020)

<https://legislativeportal.gov.bd/sites/default/files/files/legislativeportal.gov.bd/page/57b0840c_eeb4_474d_a849_ef04cf288a3b/Act%20No%2011%20of%202020.pdf> accessed 3 June 2021.

⁵ *ibid* s. 6.

⁶ Mashraf A, 'To ensure effective operation of Virtual Courts' *The Daily Star* (Dhaka, 28 May 2020) <<https://www.thedailystar.net/law-our-rights/news/ensure-effective-operation-virtual-courts-1905940>> accessed 3 June 2021.

⁷ See Use of Information Technology by Court Act, 2020 (n 4).

⁸ Tate SS, 'Access to Justice' (1979) 65(6) *American Bar Association Journal*, 904 <<https://www.jstor.org/stable/20746216>> accessed 10 May 2018 as cited in Sultana S, 'Access to Justice, Human Rights and E-Courts in Bangladesh' [2018] *ELCOP Yearbook of Human Rights* 185–186.

right. Article 33 also states the safeguards of law as to arrest and detention that are available to a citizen. Article 35(3), which is the crux of access to justice in the Constitution,⁹ provides that a person shall have the right to a speedy and fair trial by an independent tribunal. Article 44 goes a step further to state that the right to move to the High Court Division as per Article 102(1) to enforce any of the fundamental rights in part III of the Constitution is itself a fundamental right.

The Universal Declaration of Human Rights (UDHR) in Article 7 states every human is entitled to equal protection of the law without any discrimination. Article 8 talks about the right to an effective remedy by competent national tribunals for violation of their rights and to address their grievances. Article 9 states that no one shall be subject to arbitrary arrest and detention, while Article 10 states that everyone is entitled to a full and public hearing by an independent tribunal.

The International Covenant on Civil and Political Rights (ICCPR) also enumerates principles of access to justice. Article 14(1) speaks of the right to free and fair public trial in front of an independent tribunal. Article 14(3) (c) talks about the right to a trial without undue delay.

The idea of ‘access to justice’ in contemporary jurisprudence has transformed to ‘effective access to justice’,¹⁰ which denotes easy accessibility, affordability, and timely and effective access to redress mechanisms.¹¹

Among the sustainable development goals (SDGs) of the United Nations, SDG 16.3 commits the international community to rule of law and ensuring access to justice.¹² Improved access to justice is a clear enabler for many SDGs.¹³ Access to justice is also a pathway for economic growth as well as equity and social justice.¹⁴ Preliminary findings of a project undertaken by the SDG Fund and the universities of Navarre and Pennsylvania presented that unequal or plain lack of access to justice creates impediments to the achievements of SDGs.¹⁵

Initiation of Virtual Courts in Bangladesh: The Legal Framework

The Outbreak of the COVID-19 pandemic in Bangladesh and the closure of all courts

The first traces of COVID-19 were found in Wuhan, China in December 2019.¹⁶ The virus spread across borders within the next few months. The outbreak of the COVID-19 pandemic disrupted the regular life of people across the world. Countries had to close borders and declare nationwide

⁹ See Sultana (n 8)185.

¹⁰ Woldegiorgis GM, ‘Access to Justice under the International Human Rights Framework’ (*Abyssinia law*, 9 June 2018) <<https://www.abysinnialaw.com/blog-ess-to-justice-under-the-international-human-rights-framework>> accessed 18 June 2018; See also Sultana (n 8) 187.

¹¹ Garth B and Cappelletti M, ‘Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective’ (1978), Maurer Faculty Paper 1142 <<https://www.repository.law.indiana.edu/cgi/viewcontent>> accessed 13 May 2018; See also Sultana (n 8) 187.

¹² United Nations, Goal 16 (*Department of Economic and Social Affairs*) <<https://sustainabledevelopment.un.org/sdg16>> accessed 29 May 2021.

¹³ Steven D, ‘SDG Targets for Peaceful, Just and Inclusive Societies’ (NYU CIC, August 2016).

¹⁴ Manuel M and Manuel C, ‘Achieving equal access to justice for all by 2030: Lessons from global funds’ (Working Paper 537, July 2018) ch 1.

¹⁵ SDG Fund, ‘Bringing access to justice at the core of the 2030 Agenda’ (*SDG Fund*, April 16, 2018)

<<https://www.sdgfund.org/bringing-access-justice-core-2030-agenda>> accessed 29 May 2021

¹⁶ See Latifee EH, ‘Fighting the COVID-19 in BD: Public health perspective’ *The Daily Observer* (Dhaka, 3 April 2020) <<https://www.observerbd.com/news.php?id=252248>> accessed 3 June 2021.

lockdowns to contain the spread of coronavirus. In Bangladesh, the first three cases of COVID-19 were officially reported on 8 March 2020.¹⁷ The World Health Organization (WHO) declared COVID-19 as a pandemic on 11 March 2020.¹⁸ The Government of Bangladesh declared a countrywide 'lockdown' in the guise of 'general holiday' for two weeks from 26 March.¹⁹ The general holiday was later extended from time to time via gazette notifications.

Meanwhile, the Supreme Court (SC) of Bangladesh went for a general vacation from 15 March 2020 following its yearly calendar under Order II, rule 3 of the Bangladesh Supreme Court (Appellate Division) Rules. 1988 and chapter II, rule 2 of the Bangladesh Supreme Court (High Court Division) Rules. 1973. Vacation benches in both divisions of the SC heard litigants during the general vacation. The subordinate courts were running at full scale during this time.

The SC was supposed to resume its regular activities from 29 March 2020. However, with the general holiday declared by the government scheduled to begin from 26 March 2020, the Supreme Court circular no. 194 declared vacation for both divisions of the SC as well as all other subordinate courts in Bangladesh from 29 March to 2 April 2020. This vacation was later extended till 9 April 2020 (vide circular No. 197), 13 April 2020 (vide circular No. 198), 23 April 2020 (vide circular No. 199), 5 May 2020 (vide circular No. 203), and 14 May 2020 (vide circular No. 209).

The SC, meanwhile, also issued a memorandum on 4 April 2020 (memorandum no. 2744) extending the limitation period of bails and other interlocutory orders passed by both the SC and the subordinate courts in criminal and civil matters up to two weeks from the date of reopening of the courts.²⁰ Another memorandum issued on 11 April 2020 reiterated the same regarding the extension of the limitation period of bail and other interlocutory orders. This memorandum further stated that judicial magistrates were attending the chief metropolitan magistrate courts and the chief judicial magistrate courts in every district of Bangladesh even during the general holidays to fulfil their constitutional obligation although no trial proceedings were taking place.

Passing the Use of Information Technology by Court Ordinance, 2020 to operate courts virtually

The normal functioning of courts in all levels in Bangladesh remained suspended due to the vacation declared by the SC on 29 March 2020, which was extended from time to time till 14 May 2020. Thereafter, on request from the CJ, the President of Bangladesh exercised his ordinance making power under Article 93(1) of the Constitution of Bangladesh²¹ to pass the 'Use of Information Technology by Court Ordinance, 2020' (the 2020 Ordinance)²² on 9 May.²³ It ushered

¹⁷ *ibid.*

¹⁸ *ibid.*

¹⁹ Hoque, 'Bangladesh's Unofficial Emergency' (n 1).

²⁰ See Mashraf, 'From the Court Corridor: August Edition' (*Dhaka Law Review blog*, 30 September 2020)

<<https://www.dhakalawreview.org/blog/2020/09/from-the-court-corridor-august-edition-4883>> accessed 3 June 2021.

²¹ Section 93 (1) states, 'At any time when Parliament stands dissolved or is not in session, if the President is satisfied that circumstances exist which render immediate action necessary, he may make and promulgate such Ordinances as the circumstances appear to him to require, and any Ordinance so made shall, as from its promulgation have the like force of law as an Act of Parliament: Provided that no Ordinance under this clause shall make any provision – (i) which could not lawfully be made under this Constitution by Act of Parliament; (ii) for altering or repealing any provision of this Constitution; or (iii) continuing in force any provision of an Ordinance previously made.'

²² Use of Information Technology by Court Ordinance, 2020 (n 3).

in a new era in the history of the judiciary of Bangladesh and paved the way for virtual hearings of court proceedings at all levels.²⁴ The Ordinance was later passed as an Act of Parliament (the 2020 Act)²⁵ on 9 July with a repeal and savings clause in section 6 of the Act.²⁶

The preamble of the 2020 Act outlines the purpose behind enacting the legislation. It states that the Act ‘has been promulgated to ensure the virtual presence of the parties while holding trial or inquiry, or hearing application or appeal, or taking evidence, or hearing arguments, or issuing order or judgment by the courts.’²⁷ Section 2(e) defines ‘virtual presence’ as any person’s presence or participation in the trial procedure via audio-video or any other similar electronic media.

Section 3(1) empowers courts²⁸ to conduct proceedings by using information technology.²⁹ Section 3(2) states that except for ensuring the physical presence of the persons mentioned in section 3(1), the Code of Civil Procedure (CPC), and as the cases may be, the Code of Criminal Procedure (CrPC) must be followed in all other matters. Section 4 is the most crucial provision of the 2020 Act. It states that if the virtual presence of any person is confirmed as per section 3, the obligation to appear in person before the court as contained in the CPC, CrPC, or any other law shall be deemed to have been fulfilled. Section 5 empowers the AD, and in certain instances, the HCD to issue practice directions (special or general) from time to time to fulfil the purposes of sections 3 and 4.³⁰ This provision goes in line with the SC’s rule-making power as provided in Article 107 of the Constitution³¹ to regulate the practice and procedure of both divisions of the SC as well as all courts subordinate to it.³²

Issuing practice directions under the 2020 Ordinance/Act

Immediately after the 2020 Ordinance was promulgated, the CJ issued three sets of practice directions to the AD (vide circular no. 407/2020 SC (AD)), the HCD (vide circular no. 213), and the subordinate courts and tribunals (vide circular no. 214). The circulars to the AD and the HCD contained 15 directions, while the circular to all other subordinate courts and tribunals contained 21 directions. The practice directions also contained a provision for separate email addresses for

²³ Mashraf, ‘To ensure effective operation of Virtual Courts’ (n 6).

²⁴ *ibid.*

²⁵ Use of Information Technology by Court Act, 2020 (n 4).

²⁶ *ibid* s 6 (2). The said section states that any act done or any steps taken under the Ordinance shall be deemed to have been done or taken under the provisions of the Act.

²⁷ Mashraf, ‘To ensure effective operation of Virtual Courts’ (n 6).

²⁸ ‘Courts’ is defined as both the Appellate Division (AD) and the High Court Division (HCD) of the Supreme Court, as well as the subordinate courts and tribunals. See Use of Information Technology by Court Ordinance, 2020 (n 3) s 2(1) (b).

²⁹ The above Act says that despite anything contained in the Code of Civil Procedure and the Code of Criminal Procedure, any court, subject to fulfilment of the practice directions (special or general), after ensuring the virtual presence of the parties, or their lawyers, or any concerned person, or the witnesses via audio-video or any other electronic media, can commence the trial, inquiry, or application or appeal hearing, or taking evidence, or hearing arguments, or issuing order or judgment of any case. See Use of Information Technology by Court Ordinance, 2020 (n 3) s 3(1).

³⁰ Section 5 of the Act states that for the purposes of sections 3 and 4, the Appellate Division of the Supreme Court or, as the case may be, the High Court Division may, as required, from time to time, issue practice directions (special or general).

³¹ Article 107 states, ‘(1) Subject to any law made by Parliament the Supreme Court may, with the approval of the President, make rules for regulating the practice and procedure of each division of the Supreme Court and of any court subordinate to it. (2) The Supreme Court may delegate any of its functions under clause (1) and article 113 and 116 to a division of that Court or to one or more judges. (3) Subject to any rules made under this article the Chief Justice shall determine which judges are to constitute any Bench of a division of the Supreme Court and which judges are to sit for any purpose. (4) The Chief Justice may authorise the next most senior judge of either division of the Supreme Court to exercise in that division any of the powers conferred by clause (3) or by rules made under this article.’

³² Mashraf, ‘To ensure effective operation of Virtual Courts’ (n 6).

each court, which would be published later on the SC's website. Besides, a separate portal (<http://mycourt.judiciary.org.bd/>) was launched to file documents for initiating proceedings in subordinate courts and tribunals.

The practice directions to subordinate courts and tribunals clearly stated that only bail matters would be accepted for hearing in virtual courts. Conversely, while constituting three benches of the HCD for virtual hearings initially (vide circular no. 212 – A), the CJ empowered the benches to only hear very urgent writ and civil, criminal and bail, and miscellaneous matters, respectively. The AD's chamber judge was empowered by the CJ (vide circular no. 406/2020 SC (AD)) to hear and dispose of urgent appeals. Both the practice directions to the AD and the HCD required filing lawyers to attest a one-page application stating the urgency of their matters along with the other necessary case documents.

While the practice directions to the AD and the HCD stated that the hearings would take place virtually by using Microsoft Teams or any other video conferencing application (to be notified to the concerned persons), the practice directions to the subordinate courts and tribunals stated that the video conferencing platforms determined by the courts would be Zoom, Google Meet or Microsoft Teams. All the practice directions contained a specific provision for penalties in accordance with the law in case a filing advocate provided a false statement on oath, or false or forged documents or evidence. The practice directions to subordinate courts and tribunals further added that if any person resorted to cheating, or committed any offence defined in the Penal Code (PC), 1860 or the Digital Security Act (DSA), 2018, the court could institute or order for necessary actions to be instituted against such person.

Other practice directions issued from time to time

Virtual courts were underway for the first time in the history of Bangladesh from 11 May 2020. Ever since then, the CJ has issued numerous practice directions through circulars from time to time to regulate the practice and procedure of courts in both tiers of our judiciary. At one point, there arose confusion between conflicting directions regarding the limitation period for filing cases whose limitation periods had already expired or were about to expire after the lockdown.³³ Consequently, the AD in *Md. Fazlul Haque Sarder v Grameen Phone Limited*,³⁴ extended the limitation period until 31 August 2020 for '*filing petitions/applications/suits/appeals/revisions/all other proceedings, civil, criminal or administrative, under general or special laws, which expired*

³³ Memorandum no 2744 issued by the Supreme Court on 4 April 2020 extended the operation of all orders passed by both our subordinate and apex courts in civil and criminal matters up to two weeks following the date of reopening of the courts. Thereafter, memorandum no 2750 issued by the Supreme Court on 11 April 2020 extended the operation of all bail orders, temporary injunctions, status quo orders, stay orders etc. that was granted earlier vide memorandum no 2744 up to two weeks following the date of reopening of the courts. Again, circular no 15 issued by the Supreme Court on 11 August 2020 extended the operation of all the above mentioned court orders till the apex court reopened in full scale. The litigants were unsure whether 'reopening of the courts' in the memoranda meant physical reopening or virtual reopening of the court proceedings; See also Mashraf, 'From the Court Corridor' (n 20).

³⁴ *Md Fazlul Haque Sarder v Grameen Phone Limited* (Civil Appeal No 28 of 2019, 6 August 2020)

<http://supremecourt.gov.bd/resources/documents/1645324_Civil_Appeal_No_28_of_2019.pdf> accessed 3 June 2021.

on or after 26 March 2020.’³⁵ It became an instance of the AD’s power to do ‘complete justice’ as contained in Article 104 of the Constitution and cleared the confusion among the litigants.³⁶

In 2021, when the second wave of the COVID-19 pandemic hit, the Government again ordered for nationwide lockdown from 5 April 2021. Consequently, the CJ declared limited functioning of all chief judicial magistrate/chief metropolitan magistrate courts, closure of all other subordinate courts and tribunals, and extended the period for all bail and interlocutory orders for two weeks on 4 April 2021 (vide circular no. 8/2021). Additionally, the CJ declared limited functioning of the HCD to hear only very urgent writ, civil and criminal, and company and admiralty matters virtually (vide circular no. 124 A). Similarly, the CJ ordered limited functioning of the AD (vide circular no. 05). As the Government extended the lockdown from time to time, the CJ too extended the operation of the orders in the abovementioned circulars issued on 4 April 2021. The last circular dated 30 May 2021 extended the operation of all bail and interlocutory orders for four weeks (vide circular no. 20/2021).

On 28 April 2021, the CJ declared that all subordinate civil and criminal courts and tribunals would operate virtually to hear and dispose of very urgent applications (vide circular no. 17/2021). Lastly, on 1 June 2021, the CJ ordered all subordinate civil and criminal courts and tribunals to hear and dispose of all types of civil and criminal appeals/revisions as well as hear arguments and deliver verdicts in civil suits virtually.

The HCD upholds the legality of the 2020 Act

The constitutionality of the 2020 Act was challenged before the HCD in the Writ Petition No. 4611 of 2020 on the grounds of the inconsistency of its provisions with Article 35, 81(1) (c), 81(1) (e), 81(3) and 82 of the Constitution³⁷. The petitioner challenged the legality of the 2020 Act on five grounds.

Upon hearing, the HCD summarily rejected the petition and upheld the constitutionality of the 2020 Act. In its 27-pages verdict, the HCD elaborated its findings on all five grounds as to why it did not find any provisions of the 2020 Act to be defective, or contrary to the abovementioned constitutional provisions or the Bangladesh Supreme Court (High Court Division) Rules, 1973.³⁸ The HCD further elaborated on four crucial issues (access to the internet, digital literacy, due process, and cyber security and privacy) which needed to be addressed by the Government to overcome the challenges of operating virtual courts to ensure access to justice for the Bangladeshi

³⁵ *ibid* 2–3.

³⁶ Article 104 of the Constitution states, ‘The Appellate Division shall have power to issue such directions, orders, decrees or writs as may be necessary for doing complete justice in any cause or matter pending before it, including orders for the purpose of securing the attendance of any person or the discovery or production of any document.’

³⁷ See *AKM Asiful Haque v Secretary, Law and Justice Division, Ministry of Law, Justice and Parliamentary Affairs* (Writ Petition No 4611 of 2020, 25 November 2020) <http://supremecourt.gov.bd/resources/documents/1792136_WritPetition4611of2020.pdf> accessed 3 June 2021.

³⁸ *ibid* 13–23.

citizens.³⁹ The authors submit that the writ petition was devoid of merit and that the HCD correctly upheld the legality of the 2020 Act.⁴⁰

Operation of Virtual Courts in Bangladesh: Success and Challenges

Cases disposed of by virtual courts during the COVID-19 pandemic

As mentioned previously, virtual courts started operating on 11 May 2020 for the first time in the history of Bangladesh. Earlier in 2020, one of the three organs of the state, i.e. the judiciary had come to a complete halt for over a month due to the lockdown imposed by the government and the subsequent general vacation declared by the CJ.⁴¹ Moreover, it was the first time that the apex court of the country, which is also the constitutional court, was functioning since 26 March 2020. Thereafter, virtual hearings in courts began on 11 May 2020 and the positive result was obvious. With courts empowered to hear urgent bail petitions via videoconferencing, virtual courts across Bangladesh granted a total of 20,938 bails in the first ten days after hearing 33,287 petitions.⁴² From 11 May to 22 June 2020, i.e. in the first 35 working days of the virtual courts, 49,762 people secured bail and 95,523 bail petitions were heard and disposed of.⁴³

While civil and criminal courts and tribunals reopened on 5 August 2020,⁴⁴ the HCD partially resumed physical hearing from 12 August 2020 for the first time since March 2020.⁴⁵ Before that, courts of both tiers of the Bangladesh judiciary disposed of 136,399 bail petitions.⁴⁶ Thereafter, as the second wave of the COVID-19 pandemic hit Bangladesh and the number of daily infections and deaths took a sudden rise, the Government declared a nationwide lockdown again from 5 April 2021,⁴⁷ which was later extended from time to time. Courts again went for a virtual hearing during the lockdown.

Thus, over the span of the two lockdowns and in the one year of the operation of virtual courts, the Bangladesh judiciary disposed of more than 2,15,000 bail petitions.⁴⁸ More than one lac six

³⁹ *ibid* 24–27.

⁴⁰ For a short review of the judgment, see Mashraf, 'From the Court Corridor' (n 20).

⁴¹ See Rahman R, Parveen N and Salim TN, 'The Growing Need of ADR in the Pandemic and Beyond' in Sattar MP (ed), *Access to Justice & Dispute Settlement in New Normal Legal Order: A Compilation of Reflective Essays* (London College of Legal Studies (South) Publishing 2021) ch VI, 141.

⁴² Tribune Desk, 'Virtual court hearings: 20,938 people granted bail in 10 days' *Dhaka Tribune* (Dhaka, 29 May 2020) <<https://www.dhakatribune.com/bangladesh/court/2020/05/29/virtual-court-hearings-20-938-people-granted-bail-in-10-days>> accessed 4 June 2021; See also Sattar MP, 'Quarantined Justice in Corona Lockdown: ADR-ODR Opportunities and Challenges in Global and Bangladesh Contexts' in Sattar MP (ed), *Access to Justice & Dispute Settlement in New Normal Legal Order: A Compilation of Reflective Essays* (London College of Legal Studies (South) Publishing 2021) ch I, 29.

⁴³ Tribune Desk, 'Law Minister: Virtual courts for special situation' *Dhaka Tribune* (Dhaka, 5 July 2020) <<https://www.dhakatribune.com/bangladesh/2020/07/05/law-minister-virtual-courts-for-special-situation>> accessed 4 June 2021; See also Rahman, Parveen and Salim, 'The Growing Need of ADR' (n 41) ch VI, 141).

⁴⁴ Rahman M, 'All courts except SC and HC to reopen from Aug 5' *Dhaka Tribune* (Dhaka, 30 July 2020) <<https://www.dhakatribune.com/bangladesh/court/2020/07/30/courts-to-reopen-from-august-5>> accessed 4 June 2021; See also Rahman, Parveen and Salim, 'The Growing Need of ADR' (n 41) ch VI, 142).

⁴⁵ Rahman M, 'High Court to resume regular benches from Wednesday' *Dhaka Tribune* (Dhaka, 10 August 2020) <<https://www.dhakatribune.com/bangladesh/court/2020/08/10/high-court-to-resume-regular-benches-from-wednesday>> accessed 4 June 2021 (as cited in Mashraf, 'From the Court Corridor' (n 20)).

⁴⁶ *ibid*.

⁴⁷ India.com News Desk, 'Bangladesh Imposes 7-Day Total Lockdown From April 5, Emergency Services Allowed' *India.com* (Mumbai, 3 April 2021) <<https://www.india.com/news/world/bangladesh-imposes-7-day-total-lockdown-from-april-5-emergency-services-allowed-4555044/>> accessed 4 June 2021.

⁴⁸ Rubel S, 'One Year of Virtual Courts during the Coronavirus Pandemic: Two lac 15 thousand Bails' *Daily Amar Sangbad* (Dhaka, 24 May 2021) <<https://www.amarsangbad.com/newspaper/news-180908>> accessed 4 June 2021.

thousand detainees were released from prisons following the virtual hearing of their bail petitions.⁴⁹ The AD disposed of ten thousand cases during this period.⁵⁰ Moreover, several HCD benches are disposing of more than 500 cases every working day through virtual hearings.⁵¹

The figures are impressive and the Bangladesh judiciary has done a tremendous job in keeping the wheels of justice moving albeit slowly during the pandemic. One needs to remember that courts were not operational during the first month of the pandemic. Since then, with the promulgation of the 2020 Ordinance (which was later passed as an Act by the Parliament), the judiciary, with assistance from the legislative and the executive as well as other relevant stakeholders, has reacted swiftly to tackle the crisis.

However, despite the best efforts of everyone involved, some obvious loopholes in the laws and practice as well as technical and infrastructural barriers have stalled the operation of virtual courts in Bangladesh. These loopholes and barriers have shackled virtual courts from flourishing fully during as well as the post-COVID-19 crisis. The next part of the section deals with this issue.

Challenges faced in operating virtual courts during the COVID-19 pandemic *De facto suspension of the operation of fundamental rights of the citizens*

The courts of both tiers in Bangladesh remained on vacation during the general holiday declared by the Government from 26 March 2020. The constitutional court of the nation going on vacation and remaining inoperative for over a month gave rise to concerns regarding citizens' fundamental right to access courts at all times,⁵² as guaranteed by Articles 31⁵³ and 44⁵⁴ of the Constitution. Apart from the violation of other fundamental rights during the lockdown,⁵⁵ an example of a snapshot of one particular crime, i.e. violence against women and children (VAWC) will be enough to establish this claim.

A report of BRAC's Human Rights and Legal Aid Services found a total of 262 reported VAWC cases in 122 police stations in Bangladesh during the early days of the pandemic (from 21 March to 9 April 2020).⁵⁶ While the victims could report the incidents to the police stations, criminal proceedings against the perpetrators could not be instituted during this period since the wheels of the criminal justice system were at a standstill due to the nationwide lockdown.

⁴⁹ *ibid.*

⁵⁰ *ibid.*

⁵¹ *ibid.*

⁵² Hoque R, 'Bangladesh's COVID-19 Year in Review' (*VerfBlog*, 25 March 2021) <<https://verfassungsblog.de/bangladeshs-covid-19-year-in-review/>> accessed 4 June 2021.

⁵³ Article 31 states, 'To enjoy the protection of the law, and to be treated in accordance with law, and only in accordance with law, is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Bangladesh, and in particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law.'

⁵⁴ Article 44 states, '(1) The right to move the High Court Division in accordance with clause (1) of article 102, for the enforcement of the rights conferred by this Part is guaranteed. (2) Without prejudice to the powers of the High Court Division under article 102, Parliament may by law empower any other court, within the local limits of its jurisdiction, to exercise all or any of those powers.'

⁵⁵ See Hoque, 'Bangladesh's COVID-19 Year in Review' (n 52).

⁵⁶ Sadat S, 'The Shadow Pandemic of VAWC: Challenges and Innovations in Bangladesh' in Sattar MP (ed), *Access to Justice & Dispute Settlement in New Normal Legal Order: A Compilation of Reflective Essays* (London College of Legal Studies (South) Publishing 2021) ch II, 46.

Moreover, the criminal courts and tribunals being on vacation and remaining inoperative also violated the fundamental right of protection in respect of trial and punishment of the citizens.⁵⁷ This is evident since even during the lockdown, several returning migrant workers were arrested at the airport, and journalists, dissenters, and critics were arrested and imprisoned on charges of spreading rumours related to the government's handling of the COVID-19 crisis, thereby tarnishing the country's reputation, which classifies as an offence under the controversial DSA.⁵⁸ The accused individuals in these cases were unable to move to the concerned courts for bail or have their cases heard and disposed of due to the closure of courts. As people were unable to enforce their fundamental rights through courts during this period, the question arises whether or not the closure of courts under the guise of a 'vacation' was constitutionally valid.⁵⁹

Another constitutional issue cropped up after the courts and tribunals across the countries were allowed to function virtually in a limited capacity. The HCD and the AD were operating in a limited capacity from 11 May 2020. Meanwhile, the Government decided to lift the lockdown and ease restrictions from 31 May 2020.⁶⁰ However, even after 31 May 2020, the CJ did not constitute regular benches of the AD and the HCD to resume regular court functions virtually. The same number of benches that were hearing cases virtually during the lockdown kept hearing cases after 31 May 2020. As such, some commentators submit that this practice violated Articles 94(3) and 107(3) of the Constitution. They base their argument on the fact that the CJ and his companion judges in the AD and the HCD under Article 94(3) are oath-bound under Article 148 read with the Third Schedule of the Constitution to protect and defend the Constitution and the laws of Bangladesh and to dispense justice. Article 107(3) mandatorily requires the CJ to determine which judges are to constitute any bench of a division of the SC and which judges are to sit for any purpose.⁶¹ Thus, they argue that the contents of Article 107(3) oblige the CJ to include all his companion judges of the SC in the benches to hear cases when there is no vacation.⁶²

However, members of the bench have contested this submission by citing the scarcity of resources and shortage of available space on the internet server of our e-judiciary project. Operating virtual courts in full capacity to cover all courts and tribunals or even upscaling virtual court proceedings

⁵⁷ Constitution of the People's Republic of Bangladesh, 1972, art 35 (3) states, '*Every person accused of a criminal offence shall have the right to a speedy and public trial by an independent and impartial Court or tribunal established by law.*'

⁵⁸ Hoque, 'Bangladesh's COVID-19 Year in Review' (n 52); For a general discussion on the controversial provisions of the DSA, see 'Bangladesh: analysis of the Digital Security Act' (Article 19, 12 November 2019) <<https://www.article19.org/wp-content/uploads/2019/11/Bangladesh-Cyber-Security-act-2018-analysis-FINAL.pdf>> accessed 4 June 2021.

⁵⁹ *ibid.* It needs to be mentioned that the Supreme Court has its own yearly calendar. Annual vacations are declared under Ord II, r 3 of the Bangladesh Supreme Court (Appellate Division) Rules. 1988 and ch II, r 2 of the Bangladesh Supreme Court (High Court Division) Rules. 1973. Before the court goes for a vacation, the Chief Justice constitutes vacation benches for both divisions. These benches hear cases during the vacation. Moreover, the metropolitan magistrate/judicial magistrate courts run proceedings for every day of the calendar year. However, once the vacation was declared vide circular no 194, no vacation benches were constituted for the Supreme Court by the Chief Justice. Moreover, neither could accused individuals in criminal cases surrender to the metropolitan magistrate/judicial magistrate courts, nor could such criminal courts and tribunals hear bail petitions of accused individuals. The judicial system came to a total standstill. Therefore, the authors contend that this general vacation was tantamount to a closure of all courts and tribunals in Bangladesh, leading to the violation of the fundamental rights of the citizens.

⁶⁰ See Islam S, 'Bangladesh leaving lockdown as offices, public transports to reopen from May 31' *bdnews24.com* (Dhaka, 27 May 2020) <<https://bdnews24.com/bangladesh/2020/05/27/bangladesh-leaving-lockdown-as-offices-public-transports-to-reopen-from-may-31>> accessed 4 June 2021.

⁶¹ Constitution of the People's Republic of Bangladesh, 1972, art 107 (3).

⁶² Haque AR, 'Virtual Court, Constitution and Constitutional Obligations – Some Random Thoughts' (2020) 1(2) Legal Voice Magazine 10, 12.

to cover all benches of the SC would be impossible under the current scheme.⁶³ Moreover, the lack of logistical support has forced the CJ to run the operations of the SC in a limited capacity. Even then, the number of virtual court benches has been extended from time to time. Separate HCD benches have been formed to hear civil, criminal, and writ matters respectively. Hence, assigning benches to judges is the prerogative of the CJ. Unfortunately, this limitation of resources has forced the CJ to constitute only a limited number of virtual benches.⁶⁴

Loopholes in the legislation and inconsistencies among various directions in the circulars issued by the SC

Apart from resource constraints, another worrying aspect is the loopholes in the 2020 Act. Firstly, the preamble of the 2020 Act empowered the courts to use information technology only in seven instances.⁶⁵ However, the filing of new cases was not mentioned in the preamble. Thus, litigants could not approach virtual courts for filing new cases initially. Meanwhile, a circular sent by the CJ (circular no. 03) on 7 June 2020 permitted litigants to file cases virtually under the following categories:

- Negotiable Instruments Act, 1882;
- civil suits and criminal cases/appeals that have a specified limitation period under certain laws; and
- civil suits and criminal cases/appeals to which section 5 of the Limitation Act, 1910 does not apply.

This created confusion among litigants which was thankfully solved later by the AD in Civil Appeal No 28 of 2019,⁶⁶ when it extended the limitation period for '*filing petitions/applications/suits/appeals/revisions/all other proceedings, civil, criminal or administrative, under general or special laws, which expired on or after 26.03.2020 until 31.08.2020*'.⁶⁷ This confusion could have been avoided if the Parliament paid heed to the Law Commission's recommendation to include new filing of cases in the preamble of the 2020 Act.⁶⁸

Secondly, experts have questioned the definition of 'virtual presence' in section 2(e) as it does not differentiate between real-time virtual presence and pre-recorded virtual presence via

⁶³ Ali MI, 'Webinar 02 - Virtual Courts: Challenges and Prospects' (02 July 2020) <<https://www.youtube.com/watch?v=h4HOJPz87iI>> accessed 4 June 2021.

⁶⁴ Haider N, 'The Functioning of the Courts during the Pandemic of COVID 19: Issues and Challenges' (25 July 2020) <<https://www.youtube.com/watch?v=jki404zbKs0>> accessed 4 June 2021.

⁶⁵ Mashraf, 'To ensure effective operation of Virtual Courts' (n 6); The preamble states that the Act 'has been promulgated to ensure the virtual presence of the parties while holding trial or inquiry, or hearing application or appeal, or taking evidence, or hearing arguments, or issuing order or judgment by the courts.'

⁶⁶ See *Md Fazlul Haque Sarder* (n 34).

⁶⁷ *ibid* 2–3. See also Mashraf, 'From the Court Corridor' (n 20).

⁶⁸ Law Commission, *Opinion of the Law Commission on the Usage of Information Technology by Courts Bill, 2020* (Ref: Bangladesh House of the Nation Secretariat, Legislative Drafting Wing Memorandum No. 11,00,0000,868,06,003,19-31, Dated: 24.06.2020) 2 <<http://www.lc.gov.bd/reports/154.pdf>> accessed 3 June 2021.

videoconferencing.⁶⁹ They recommend amending the definition to include a real-time presence in the definition of ‘virtual presence’.⁷⁰

Thirdly, while the preamble of the 2020 Act did mention that the Act ‘has been promulgated to ensure the virtual presence of the parties while holding trial or inquiry, or hearing application or appeal, or taking evidence, or hearing arguments, or issuing order or judgment by the courts,’⁷¹ in reality, our courts were only able to hear urgent petitions (bail petitions, temporary injunction applications, urgent interlocutory applications, filing of cases and appeals, admission hearing, etc during virtual proceedings.⁷² This essentially means that trial procedures, taking evidence, hearing arguments, and issuing judgments did not take place virtually. Even the Dhaka District Judges’ Court stopped updating its daily cause list during the continuance of virtual courts.⁷³ This can be attributed principally to the fact that our Evidence Act, 1872 does not have any provision to take evidence via the digital medium. Thus, chief and cross-examination of witnesses, hearing arguments, presenting evidence, etc is impossible via videoconferencing under the existing legal scheme. The 2020 Act also remains silent on this procedural aspect. However, the Law Commission drafted the *Use of Information Technology in Evidentiary and Judicial Proceedings Act* (unofficial translation) in 2019. This draft Act contains remarkable provisions on leveraging technology in various steps of a trial proceeding.⁷⁴ The Government should have passed this legislation at the time of passing the 2020 Act to complement the latter’s provisions. The enforcement of some of the provisions of the draft Act of 2019, which require budgetary allocation and resources, could have been delayed by inserting necessary clause(s).⁷⁵ Not doing so has led to extreme distress for the litigants as their cases remain pending for months.

Fourthly, we have already discussed above and in the earlier section regarding conflicting directions issued by the CJ in various circulars and memoranda.⁷⁶ Surprisingly, this continued even in 2021. The circular no. 17/2021 issued on 28 April 2021 directing all subordinate courts and tribunals to hear and dispose of very urgent matters failed to copy all Chairmen/Members of the Labour Court/Administrative tribunals. Thus, Labour Courts were unwilling to hear and

⁶⁹ Supan QMH, ‘In Search of an Effective e-Judiciary & Virtual Court in Bangladesh’ (07 July 2020)

<https://www.youtube.com/watch?v=_AsSKdSU5uA> accessed 29 May 2021.

⁷⁰ *ibid*.

⁷¹ Mashraf, ‘To ensure effective operation of Virtual Courts’ (n 6).

⁷² The authors verified this information through personal communications with a Supreme Court lawyer, a trial court lawyer of the Dhaka District Judges’ Court and a trial court judge of the Bogura District Judges’ Court.

⁷³ The authors verified this information through personal communication with a trial court lawyer of the Dhaka District Judges’ Court.

⁷⁴ See Law Commission, *Use of Information Technology in Evidentiary and Judicial Proceedings Act, 2019* (First Draft, Dated 25.08.19) <<http://www.lc.gov.bd/reports/PDF%2025.08.19.pdf>> accessed 29 May 2021. Of particular importance are ss 2 (1), (3), (4), (5), (7), (8), (10) and (11), which define audio-video conference, electronic records, electronic forms, data, digital evidence, documents, visual presence, physical presence etc. respectively; 3 (enabling the Act to supplement other relevant substantive and procedural laws); 4 (providing validity to electronic records); 5 (ensuring visual and physical presence in court proceedings); 6 (authorizing extra territorial application of the Act); 7 (empowering courts to direct visual presence of a person via audio-video conference to record their testimony or statement upon application from the concerned parties, witness, accused person, lawyer, expert or authority); 8 (empowering courts to verify the urgency to direct the presence or the recording of the statement of the accused or the witness via audio-video conference); 9 (special jurisdiction of court); 11 (considering the remote end (connected via audio-video conference) as a part of the court proceeding/courtroom); 12 (procedure to prove documents via audio-video conference); 14 (ensuring special right of the accused); 16 (provision for expert opinion); 17 (procedure to identify the accused or the witness via audio-video conference); 18 (procedure to take oath via audio-video conference); 19 (directing to provide and maintain information technology infrastructure in court, prison, other institutions, etc.); and 20 (directing courts to ensure that information technology infrastructure is connected and active in the remote end before commencing proceeding via audio-video conference).

⁷⁵ Supan (n 69).

⁷⁶ See above (n 33), (n 34), (n 66) and (n 67).

dispose of urgent petitions. The error was corrected the following day by issuing an updated version of the circular.

Lastly, experts have also questioned the use of open-sourced platforms such as Zoom and generic Gmail addresses (which were mentioned in the practice directions and in circulars issued from time to time), which pose risks of cyber security attacks including hacking, breach of confidentiality, storage of data by third-party applications, etc.⁷⁷ Even the online portal (<http://mycourt.judiciary.org.bd/>) created for filing documents to commence subordinate court proceedings under the 2020 Act does not contain any data protection policy.⁷⁸ The connection to the website remained insecure in 2020 and presently, one cannot even access the portal.

Increase in the backlog of pending cases

From the discussion above, it is clear that despite the mandate of the law, conducting trials including taking evidence, hearing arguments, and delivering verdicts have not been possible for subordinate courts and tribunals in virtual court proceedings. Moreover, as mentioned previously, the SC has been functioning on a limited scale virtually. This has consequently led to the fear of an increase in the backlog of pending cases in courts of all tiers in Bangladesh. Another decision by the SC that has contributed to an increase in the backlog of cases is ordering not to hear anticipatory bail matters from 29 April 2021 till further notice.⁷⁹ This also interferes with the fundamental rights guaranteed in Articles 27,⁸⁰ 31, 32,⁸¹ 33, and 44 of the Constitution.

Currently, more than 38 lac cases are pending in both tiers of our judiciary.⁸² People involved in the judicial system fear that if the current situation does not improve, the case backlog may rise from 38 lac and even cross 50 lac.⁸³ It is also baffling that the cases filed before the COVID-19 pandemic have not been heard during the continuance of virtual courts. Even cases in which only delivering the judgment is left have not been disposed of virtually till now. One hopes that the circular no. 23/2021 issued by the CJ on 1 June 2021 will finally lead to courts disposing of these cases virtually.

Besides, one needs to mention two of the most common challenges to the virtual court system that persist in Bangladesh, i.e. lack of uninterrupted power and an internet connection, and lack of digital literacy.⁸⁴ Frequent power cuts, poor internet bandwidth, and lack of training for all relevant stakeholders in navigating virtual platforms are stifling virtual courts from flourishing

⁷⁷ Supan (n 69); Hossain A, 'Advocacy in Virtual Court How effective for the litigants' (26 August 2020) <<https://www.youtube.com/watch?v=eTz3PATsWnE>> accessed 28 May 2021; Mashraf, 'To ensure effective operation of Virtual Courts' (n 6).

⁷⁸ Mashraf, 'To ensure effective operation of Virtual Courts' (n 6).

⁷⁹ Hossain A, 'No Bail Hearing for Now: Supreme Court' *Somoy News* (Dhaka, 29 April 2021) <<https://tinyurl.com/4djezx2b>> accessed 4 June 2021.

⁸⁰ Article 27 states, 'All citizens are equal before law and are entitled to equal protection of law.'

⁸¹ Article 32 states, 'No person shall be deprived of life or personal liberty save in accordance with law.'

⁸² Rubel S, 'Judiciary Devastated during the Coronavirus Pandemic: Fear of Backlog of 50 lac cases!' *Daily Amar Sangbad* (Dhaka, 26 May 2021) <<https://www.amarsangbad.com/newspaper/news-181205>> accessed 4 June 2021.

⁸³ *ibid*.

⁸⁴ Mashraf, 'To ensure effective operation of Virtual Courts' (n 6).

fully. The judiciary, the executive, and the other relevant stakeholders need to address these technical barriers immediately for smooth functioning and upscaling of virtual courts.

Recommendations

In light of the above discussion, the authors submit that the 2020 Act and its implementation require substantial reforms.

Amending the existing law and enacting a new law

The 2020 Act should be amended in light of the recommendations made by the Law Commission, and it should be complemented by enacting the draft Use of Information Technology in Evidentiary and Judicial Proceedings Act, 2019 prepared by the Law Commission.⁸⁵

A major step to be taken by the judiciary is to start delivering judgments virtually in cases and suits in which all other stages are over and which are pending their verdicts.⁸⁶ A circular by the CJ on 1 June 2021 has finally called for initiating this process.⁸⁷

Undertaking infrastructural changes

Using third-party open-source platforms⁸⁸ for operating virtual courts possesses considerable risks. There is also no uniformity among the subordinate courts and tribunals in using such platforms.⁸⁹ Different courts use different platforms depending on internet availability, access, the convenience of the parties (mostly lawyers and judges), and training.⁹⁰ There are also risks of breaches in security, confidentiality, and privacy in using such platforms.⁹¹ Using premium services could mitigate certain risks related to security and confidentiality. However, budgetary allocations for such services are yet to be made.⁹² To mitigate this problem, indigenous software made uniquely for the courts should be developed. The software should ensure ease of use, accessibility, less internet data consumption, etc while also maintaining security, confidentiality, and privacy for the concerned parties.⁹³

Lack of technological infrastructure is a significant hindrance to fully utilizing virtual court mechanisms. Due to server space shortage in the server, despite accessibility (at the SC), not all benches of the HCD and the AD have been able to operate virtually.⁹⁴ Another infrastructural barrier on a national level is the lack of internet accessibility.⁹⁵ This creates a problem for the subordinate judiciary to operate virtually. More importance should be given to the subordinate

⁸⁵ Law Commission, *Opinion of the Law Commission* (n 68) 7.

⁸⁶ Ali (n 63).

⁸⁷ On 1 June 2021, the Chief Justice issued circular no 23/2021 stating that all civil and criminal appeals/revisions are to be heard and resolved virtually in the subordinate courts and tribunals. The circular also stated that civil courts can start hearing arguments and deliver judgements in civil suits.

⁸⁸ Notification no 215 issued by the High Court Division states that courts will use Gmail for filing purposes.

⁸⁹ Supan (n 69).

⁹⁰ *ibid.*

⁹¹ Hossain (n 77).

⁹² Haider (n 64).

⁹³ Supan (n 69).

⁹⁴ Ali (n 63).

⁹⁵ *ibid.*

judiciary in this regard.⁹⁶ More secure servers with larger space availability should be provided, not just for the SC but also at the district levels for all subordinate courts and tribunals. Internet accessibility needs to be also ensured countrywide. Although the internet penetration rate is at 60.7% in Bangladesh,⁹⁷ the quality of internet service is quite poor.⁹⁸ Without addressing these pressing issues, virtual courts will not be successful in disseminating justice.⁹⁹

Providing training to all stakeholders

Proper training must be given to lawyers, judges, and the court staff on using technology for running virtual courts.¹⁰⁰ Many stakeholders are not yet fully comfortable with virtual courts.¹⁰¹ Hence, a proper coordination plan among all the stakeholders should be initiated and implemented.¹⁰² The Bangladesh Bar Council, in coordination with the district Bar Associations across the country, can provide training to lawyers. They can also provide video conferencing facilities for lawyers without digital devices required for virtual courts.¹⁰³

Increasing budgetary allocations

Budgetary allocations must be increased. The Ministry of Law, Justice, and Parliamentary Affairs must realize it does not stand on the same footing as any other ministry or government office/department.¹⁰⁴ Given the judiciary is closely tied with the workings of the Law Ministry, budgetary allocations should be increased. In the 2020-21 fiscal year, the budgetary allocation for the judiciary was BDT 1739 crore, and that for the SC was BDT 222 crore.¹⁰⁵ Out of BDT 1739 crore for the judiciary, BDT 375 crore and 67 lakh were earmarked as development budget. But no development budget was allocated for the SC.¹⁰⁶ Out of the total budget, only 0.345% was allocated for the judiciary.¹⁰⁷ After analysing the budget of the last five years, we find that the judiciary was not allocated more than 0.5% of the total budget.¹⁰⁸ Although the budget of the last fiscal year mentions an e-judiciary project,¹⁰⁹ such meagre allocation will not make it possible to run the project satisfactorily. Increased budgetary allocations should be ensured and utilized for creating a permanent virtual court platform, indigenous to the judiciary and with optimum cyber security. It can eventually become part of a larger e-judiciary project. Simultaneously, related

⁹⁶ Chandrachud DY, 'Justice DY Chandrachud – Future of Virtual Courts and Access to Justice in India' (24 May 2020) <<https://www.youtube.com/watch?v=15nxZwNJsBM&t=4343s>> accessed 28 May 2021.

⁹⁷ Internet World Stats, 'Bangladesh: Internet usage, broadband and telecommunications report' (2020) <<https://www.internetworldstats.com/asia/bd.htm>> accessed 28 May 2021.

⁹⁸ Opensignal, 'The State of Mobile Network Experience in 2020: One Year into the 5G Era' (May 2020); Ookla, 'Global Speedtest Index' (April 2021).

⁹⁹ Hasan I, 'Well Planned Combination of Normal and Virtual Courts is the Need of the Hour Now' (2020) 1(2) Legal Voice Magazine 27.

¹⁰⁰ Sarkar MKA (n 77).

¹⁰¹ Haider (n 64).

¹⁰² Chandrachud (n 96).

¹⁰³ *ibid.*

¹⁰⁴ Patwary SH (n 69).

¹⁰⁵ Hossain MZ, 'E-Judiciary and an Analysis of Budgetary Allocation for Judiciary' *Daily Sun* (Dhaka, 13 June 2020) <<https://www.daily-sun.com/post/487316/EJudiciary-and-an-Analysis-of-Budgetary-Allocation-for-Judiciary>> accessed 31 May 2021.

¹⁰⁶ *ibid.*

¹⁰⁷ *ibid.*

¹⁰⁸ Editorial, 'Increase budget allocation for judiciary' *Prothom Alo English* (Dhaka 20 April 2021) <<https://en.prothomalo.com/opinion/editorial/increase-budget-allocation-for-judiciary>> accessed 31 May 2021.

¹⁰⁹ Hossain, 'E-Judiciary and an Analysis of Budgetary Allocation for Judiciary' (n 104).

sectors (IT, telecom, fibre optic connectivity, etc) should be given equal importance as they are related to the operation of virtual courts.

Developing a new protocol for virtual courts

A new protocol should also be created for virtual courts.¹¹⁰ The traditional courtroom litigation will be problematic in virtual courts. Judges and lawyers can liaise between themselves for the presentation of documents and evidence. Lawyers can send documents marked with the specific reference they are going to use to the judges beforehand so that during the hearing, the judge can access easily it from his device.¹¹¹

Operating time for virtual courts should be increased. Since all courts are unable to operate simultaneously due to a lack of technology infrastructure, the courts that do operate should increase their operating time to hear and dispose of more cases.¹¹²

Using ADR and ODR to reduce backlogs

ADR can be a good mechanism to reduce case backlogs.¹¹³ ADR through virtual means (ODR – Online Dispute Resolution) should also be given priority.¹¹⁴ As ADR has been made mandatory in pre-trial and appellate stages of civil suits,¹¹⁵ suits in those stages can be resolved through ADR-ODR. Even recently, the HCD, in circular no. 3 J issued on 21 March 2020 (before the current rounds of restrictions), has instructed subordinate courts to mandatorily use ADR to resolve suits under the relevant provisions of the CPC, the Arbitration Act, 2001, the Money Loan Court Act, 2003 and the Labour Act, 2006. Circulars should be issued to undertake ODR measures to solve these disputes.

Adopting best practices from other jurisdictions

The scope of virtual courts should be increased, and this should be the stepping stone towards creating an effective e-judiciary. In India, the virtual courts are operating under the e-judiciary project taken by the e-committee of the Supreme Court in coordination with the state and local courts. Currently, complete e-court proceedings are being operated for petty matters and traffic cases.¹¹⁶ In these cases, from the stage of filing to paying court fees to even paying the fines, a litigant can sue the e-court facilities. In the United States, e-courts have been in place for years, when it came to filing and payment matters. During the pandemic, virtual court proceedings have also taken place. In Texas, even five remote jury trials took place.¹¹⁷ In Australia, the Federal

¹¹⁰ Haider (n 64).

¹¹¹ Hossain (n 77).

¹¹² Patwary (n 69).

¹¹³ Rubel, 'Judiciary Devastated during the Coronavirus Pandemic: Fear of Backlog of 50 lac cases!' (n 82); for a detailed take on ADR-ODR opportunities for dispute resolution during the COVID-19 pandemic, see generally Sattar, 'Quarantined Justice in Corona Lockdown: ADR-ODR Opportunities and Challenges in Global and Bangladesh Contexts' (n 42) ch I; Rahman, Parveen and Salim, 'The Growing Need of ADR' (n 41) ch VI; Hoque ABM, 'Backlog of cases in Bangladesh Courts: Causes and Remedies' in Sattar MP (ed), *Access to Justice & Dispute Settlement in New Normal Legal Order: A Compilation of Reflective Essays* (London College of Legal Studies (South) Publishing 2021) ch IV.

¹¹⁴ Sattar (n 42) ch I, 23–28; Hoque (n 113) ch IV, 99.

¹¹⁵ The Code of Civil Procedure (Amendment) Act, 2012, ss 89A, 89C, 89D and 89 E.

¹¹⁶ Chandrachud (n 96).

¹¹⁷ Raczyński J, 'The current status of the (virtual) courts' (*Legal Executive Institute* 22 July 2020) <<https://www.legalexecutiveinstitute.com/virtual-courts/>> accessed 29 May 2021.

Court under the e-courtroom initiated virtual hearings. They have created their own platform and have initiated a separate protocol for the virtual hearings.¹¹⁸ In the UK, video conferencing facilities between the court room and police custody sites have allowed for virtual hearings. A shared space has also been created for filing and sharing documents.¹¹⁹ In Scotland, cinemas have been turned into jury rooms for virtual trials of criminal cases.¹²⁰ Public access has also been ensured by allowing anyone to log in.¹²¹

Conclusion

The authors, therefore, submit that to ensure the effectiveness of virtual courts and access to justice for litigants, a revamp of the current law and procedure is essential. Similarly, related legislation should also be brought in line through necessary amendments to ensure coherence. Training, budgetary allocations, and coordination between all stakeholders can ensure a well-functioning virtual court system. Best practices from other countries should be observed and if necessary, modified according to local needs. The subordinate judiciary should be given utmost priority. The operations of virtual courts should be the stepping-stone towards implementing e-judiciary, the scope of which is wider than just virtual courts. Access to justice can only be ensured if accessibility, effectiveness, and transparency of the system are available to every citizen across Bangladesh.

¹¹⁸ Federal Court of Australia, 'eCourtroom' (*Federal Court of Australia*) <<https://www.fedcourt.gov.au/online-services/ecourtroom>> accessed 29 May 2021.

¹¹⁹ Peterson G, *Virtual Courts and Real Life Lessons* (UK Ministry of Justice, 2009) <https://www.ccbe.eu/document/E-Justice_Portal/17-18_02_2009/Presentations/22_UK_Virtual_courts-_Graham_Patterson.pdf> accessed 29 May 2021.

¹²⁰ Borland C, 'Opinion Julie Millen: How did our courts adjust to Covid?' (*Clydebank Post*, 17 May 2021) <<https://www.clydebankpost.co.uk/opinion/19309033.opinion-julie-millen-courts-adjust-covid/>> accessed 29 May 2021.

¹²¹ *ibid.*

THE IMPACT OF COVID-19 PANDEMIC ON THE LEGAL PROFESSION OF NEPAL

Susma Giri*

Abstract

The outbreak of coronavirus has impacted the world since November 2019 and Nepal is not an exception. Though it was weakened for a few months, it is alarmingly increasing at present. People had just started their business after the end of a three-month-long nationwide lockdown and several prohibitory orders, but the mushrooming case of the new variant of coronavirus compelled the government to break the chain of the spread of coronavirus. For that purpose, the Government of Nepal has declared prohibitory orders in Kathmandu Valley for 15 days starting from 29 April 2021 and it has already been more than a month since the order. Similarly, other districts are also in lockdown/prohibitory orders depending upon the number of COVID-19 cases. This pandemic has posed a challenge to the health sector directly, however, the curtailment of movement and services due to lockdown has not left any area, including the legal profession, unharmed. Firstly, this article has discussed the scope of the legal profession, 'what does it include' and 'what not' with a special focus in the context of Nepal. Secondly, it explores the impacts of the COVID-19 pandemic on the legal profession of Nepal and the strategies adopted to overcome such impacts. It also aims to relate the effect of such an impact on the personal growth of legal professionals. While doing so, this article also highlights the need to realize the necessity of online/digital services for the proper functioning of the legal profession. As a source of data, interviews are taken with persons having engaged in various areas of the legal profession. A random sampling method is used to approach interviewees. Besides, books, published news, articles, reports, documentaries are also taken as a reference for the study.

Keywords: *Legal profession, COVID-19 pandemic, online hearing, Nepal*

Background

The global pandemic, COVID-19 has narrowed the universe in a single room and especially into a single device, luckily backed with internet services. People are bound to lock themselves in a room to prevent the spread of coronavirus. News sources have reported that only 5.5% of the total population are fully vaccinated in Nepal and some are partially vaccinated whereas the remaining others seem to be nowhere in the priority of the government to be vaccinated soon. The second wave of the COVID-19 pandemic has hit Nepal severely that every day thousands of people are infected and hundreds of people are losing their life. Though people are concerned about their career and the future, they have been crippled in many ways; businesses have been shut down, educational institutions are closed, tourist destinations are quiet, zoos and museums are locked,

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hotels and restaurants stopped providing services, and the government is also providing only essential services, etc. Amidst this situation, the legal sector is also hit by the COVID-19 pandemic. This paper unfolds how Nepal's legal profession, its system, and actors are affected over a couple of years by the COVID-19 pandemic. Meanwhile, the idea of community-based means of dispute settlement does not fall under the aim of this study.

The key objectives of this study are to (i) define the legal profession, especially in terms of Nepal, (ii) assess their way of functioning in the time of the pandemic, and (iii) explore the impact of COVID-19 on the legal profession of Nepal.

The key methods and objectives followed in this research were largely qualitative. The study was conducted with the help of primary and secondary data. Primary data includes interviews and observations; interviews are taken with the Chief Judge, judges of high courts, former secretary of Ministry of Law, Justice and Parliamentary Affairs, former Deputy Attorney General, senior lawyers, fresh lawyers, and law graduates. Few correspondences were made via email too. The deductive disclosure method is used to maintain the confidentiality of the identity of the interviewees. Secondary data includes journal articles, news, reports published by national and international organizations, documentaries, blogs, etc. A descriptive analysis is done from selected data available from different sources.

Introduction

We tend to make an image of a human wearing a black coat and the document in hand, i.e., a litigant lawyer when we listen to somebody who says, 'I am in the legal profession.' No wonder why this happens! The movies and documentaries we watch, different readings we do, and our socio-cultural and life experiences have made us think that the legal profession equals lawyering. Like, 'A' stands for 'Apple' in English Alphabet, 'wa' 'व' stands for 'wakil/वकिल' (lawyer) in these days' Nepali alphabet books. People engaged in the legal profession are those who study and apply the law. They are engaged in the process of thinking, planning, formulating, reasoning, and implementing in different positions including but not limited to policymaking, advisory, advocacy, teaching, justice delivery, etc. The legal profession is one of the noble professions and also one of the world's respected professions.¹

Vladimir Vladimirovich Putin the president of Russia, Barack Obama, former president of the United States of America, Li Keqiang, Premier of the State Council of the People's Republic of China, Bill Clinton, former president of the United States of America, Dmitri Medvedev, former president of Russia, Hilary Clinton, the first lady to be nominated for the President of the United States of America, Christine Lagarde, managing director of International Monetary Fund (IMF)

¹Johny Wood, 'These are the world's most respected professions' 15 Jan 2019 <<https://www.weforum.org/agenda/2019/01/these-are-the-world-s-most-respected-professions>> accessed 7 May 2021

are few renowned faces of the world whose highest degree is earned in law and are also listed in the Forbes' most powerful lawyers of the world.²

Besides, Karl Marx, the advocate of communism, Mahatma Gandhi who was honoured as the father of the nation in India, and Nelson Mandela, the revolutionary former president of South Africa were also lawyers of the contemporary period who passed their whole life in the search of human freedom.³

Legal Profession: An Understanding

Limiting the understanding of the legal profession in one definition is a difficult job than one can ever imagine. Someone who studies and applies the law is said to be in the legal profession; they are, in one way or the other, under the duty to create and develop a legal system. The legal profession is a 'vocation that is based on the expertise on the law and in its application'.⁴ The actors involved in the legal profession ascertain the law, find out gaps and flaws in the law, discover the ways to bridge such gaps, recommend policy to make laws, provide legal opinions, represent parties in the court, offer legal aid to the needy people and deliver justice through judgment.

Thus, the legal profession is an autonomous nature of job oriented towards public service based on specialized knowledge, skills, and systematized through organizations.⁵ This profession includes all the professional roles concerned with the administration and maintenance of the legal system, including judges, lawyers, counselors as well as experts of legal education and scholarship.⁶ Such roles are not performed arbitrarily and in an ad hoc manner rather are regulated and guided by a set of ethical and professional norms and values. For instance, 'International Principles on Conduct for the Legal Profession', 2011 adopted by International Bar Association is a document that comprises principles for regulating the action of lawyers. Similarly, a distinct document guides and regulates the performance of judges.

Legal Profession from Jurisprudential Perspective

The perceptions and foundation of law, if viewed from different schools of thought, have changed over time. The natural school of thought claims that the legal profession has its base on reason, morality, and intrinsic human values. The positive school believes that the legal professionals are responsible to enforce the command of authority articulated in the form of law. The historical school of law views that the past events, history, custom, tradition, and elements that add to the legal content are the priority of the legal profession. The sociological school of law, on a different

²Staci Zaretsky, 'The World's Most Powerful Lawyers and Law School Graduates' 31 Oct 2013 <<https://abovethelaw.com/2013/10/the-worlds-most-powerful-lawyers-and-law-school-graduates/>> accessed 7 May 2021

³Amrit Kharel, 'The Concept of Legal Profession' (2018), SSRN Electronic Journal, <https://www.researchgate.net/publication/323327937_The_Concept_of_Legal_Profession> accessed 7 May 2021

⁴'The Legal Profession' (Lawteacher.net, June 2019) <https://www.lawteacher.net/free-law-essays/administrative-law/the-legal-profession.php> accessed 8 May 2021

⁵Amrit Kharel, 'The Concept of Legal Profession' (2018), SSRN Electronic Journal, <https://www.researchgate.net/publication/323327937_The_Concept_of_Legal_Profession> accessed 9 May 2021

⁶Herbert M. Kritzer, *The Justice Broker: Lawyers And Ordinary Litigation*, (Oxford University Press, 1990)

tone, says that legal professionals are social engineers and are supposed to regulate human conduct through law for shaping society. Socialist school pronounces that legal professionals serve the interests of the ruling class and assist in oppressing the ruled class. Whereas realism believes that law is not certain as its predictability rests on factors including the role of judges, their understanding of the law and the impact of their psychology on judgment.

Nepali law and the legal system do not have a precise definition of the legal profession. However, Nepal Bar Council Act, 2050 (1993) defines 'legal practitioner' as an advocate, senior advocate, and other law practitioners as mentioned in the Act.⁷ This definition excludes persons who are engaged in different areas of law in various positions. Since, there is no precision about who falls under the umbrella term 'legal professionals', the reference of the prevailing Constitution of Nepal is taken to limit the scope of this paper. The Constitution of Nepal, 2072 (2015) has counted judges, senior advocates/advocates, judicial officers, law teachers, and researchers in the field of law with prescribed qualification and experience, eligible to appear in the examination for judge of the district court or to be appointed as a judge in high courts and the Supreme Court.⁸ Thus, the professionals mentioned above are the subjects of the legal profession that this paper aims to study about.

The Scenario of the COVID-19 Pandemic in Nepal

The virus, SARS-CoV-2 has made the world stagnant since its breakout in late 2019 in China. From February 2020, COVID-19 cases skyrocketed across most of Europe, the United States, Australia, Asia, and on to Africa.⁹ Until now, the novel coronavirus has reached around the globe, affecting 222 countries, infecting 173,332,025 people, and killed 3,727,759 people.¹⁰ This virus is impacting the globe in the first, second, and third waves over different time frames and does not seem to be over soon. Nepal is hit by the second wave of coronavirus more than the first one. Until this article was prepared (5 June 2021), 581,560 people were infected and 7,731 people have died in Nepal and overall, all 77 districts have been affected by the coronavirus.¹¹

During the first wave of COVID-19, a nationwide lockdown was declared starting from 24th March 2020 for three long months, extending by a week or a fortnight. The Kathmandu valley was under prohibitory order for three weeks starting from late August 2020. Later, the movement was started with a few restrictions for certain months. It had just been a few months that restrictions were loosened to all sectors, unfortunately, the second wave of coronavirus started to hit brutally and the prohibitory order is in effect in Kathmandu valley since 29 April 2021. Considering the risk of coronavirus transmission, the government started to confine other areas depending upon the number of infected cases. At present, the whole nation is locked inside the corners and four walls

⁷ Nepal Bar Council Act, 2050 (1993), s (2) (c)

⁸ The Constitution of Nepal, 2072 (2015) art (129), (140) and (149)

⁹ Kritika Paudel and Pramod Subedi, 'The Impact of COVID-19 Pandemic on Socioeconomic and Mental Health Aspects in Nepal' (2020) 66 (8) International Journal of Social Psychiatry, 748

¹⁰ 'COVID-19 Coronavirus Pandemic' <<https://www.worldometers.info/coronavirus/>> accessed 5 June 2021

¹¹ 'Last 24-hour Update' <<https://covid19.mohp.gov.np/>> accessed 5 June 2021

of buildings. Schools, private offices, public places, markets, temples, mosques, churches, museums, zoos, parks, movie halls, libraries, and other places where people gather were closed then and now too. Transportation services are banned; government offices are only providing the essential services and people are bound to stay within their homes unless to buy vegetables and medicine. Once, even the groceries shop and departmental stores were closed.

The government has initiated to adopt various preventive measures including establishing quarantine at different places, announcing the specific treatment hospitals in case of COVID-19. The stoppage of the vaccination campaign and the huge influx of severely infected persons in hospitals began at the same time that every day thousands of people started being infected and hundreds of people faced an end to their life. With the rise in corona-infected cases, hospitals of Nepal ran out of beds and oxygens.¹² The Ministry of Health and Population warned people by publishing a press release that mentioned, the hospitals are running out of beds and patients cannot be given good care: the situation is out of control and is unmanageable.¹³

The COVID-19 has impacted most sectors tremendously around the globe. Amidst this situation, the legal profession cannot remain perfect in Nepal. It is severely impacted due to the outburst of coronavirus and lockdown to contain its spread. Since the major duty of the Ministry of Law, Justice and Parliamentary Affairs (MOLJPA) are to formulate bill, ordinance, rules and formation order, to provide legal opinions as required by the Government of Nepal, to contribute to the unification and codification of laws, research, review, and reform law, contribute in developing international law, judicial system and administration of justice¹⁴, it does not seem to be impacted in terms of its functioning. The basic functions are carried via online platforms or with limited human resources in the ministry. Meanwhile, the Attorney General defends the public right in the court, its functioning is also limited with the announcement to limit the service of the court. Herewith, we will only discuss the impact of COVID-19 and measures taken to fight against the virus in the legal profession that is more concerned with court-related issues.

COVID-19 and the Legal Profession in Nepal

The COVID-19 has brought a fundamental change in the legal order and its functioning. Legal professionals are facing new challenges in this highly unsettled situation and speedily changing atmosphere; they are experiencing a transformation in the management of the practice, performance of duties, and delivery of services. The impacts of COVID-19 on the legal profession are numerous, including the closure of courts and law firms, limitation in the services, shortage of manpower as a result of death, isolation and illness, difficulty in holding formal events, programs,

¹² Roshan Sedai and Samik Kharel, 'As COVID Wave Rages in Nepal, Hospitals Run Out of Beds, Oxygen' Aljazeera, (21 May 2021) <<https://www.aljazeera.com/news/2021/5/21/nepal-struggles-to-cope-with-surging-covid-crisis>> accessed 25 May 2021

¹³ Arjun Poudel, 'Nepal Health Ministry says Situation Unmanageable as Hospitals Run out of Beds' The Kathmandu (30 April 2021) <<https://kathmandupost.com/health/2021/04/30/nepal-health-ministry-says-situation-unmanageable-as-hospitals-run-out-beds>> accessed 25 May 2021

¹⁴ <<http://www.moljpa.gov.np/en/about-us/>> accessed 26 May 2021

and services. With this result at hand, it can be assumed that the legal profession will never be the same.

Irreparable Loss of Human Resources

COVID-19 has put an end to the life of some lawyers, judicial officers, and judges. The gap of human resources caused by the loss of such personalities is not possible to be filled by any available means and resources. Numbers of legal professionals are under treatment in the hospitals and many have kept themselves isolated due to the infection. Many legal personalities are appealing to hospitals and ministries to get their family members and relatives cared for and treated. On the one hand, we have lost great legal personalities and on the other hand, many are battling against the coronavirus. This has caused a situation of disturbance in providing legal service to those who are in the dire need of it. They are fighting for their lives and the lives of their family members and relatives, those, physically well share that they cannot fully concentrate on work.

Uncertainty in Accessing Justice

Along with the humanitarian crisis, the upsurge of COVID-19 has triggered multiple aspects of people including social, economic, political, cultural, psychological, legal, and environmental, etc. The consequences of the crisis were not only unforeseen but are unpredictable about the end and have directly impacted the justice system. During the period of lockdown, the Supreme Court and almost all high courts and district courts are hearing only limited cases including the cases of habeas corpus, cases concerning COVID-19 pandemic, and public health issues.¹⁵ While the Constitution of Nepal, 2072 (2015), in Part 3, has protected more than thirty fundamental rights of the citizen, justice at present, has narrowed down to only the aforementioned cases. There are other legal rights protected by various laws but the mandatory social distancing and limited resources of courts have undermined the capacity to maintain even the minimum levels of access to justice during the pandemic. Neither the court knows when the piles of cases will be reduced nor do the parties of the case know when will their case be disposed of. This way, as shared by one of the respondents, 'equal access to timely and equitable justice is affected' and this uncertainty has made justice a far cry.

Postponement in Attaining the Strategic Goals of Judicial Reformation

Since the COVID-19 and lockdown, a vast disruption has been caused to the entirety of justice. The judiciary of Nepal had started to draft and implement its periodical strategic plan to reform the judiciary and justice delivery system since 2004/2005.¹⁶ The prevailing fourth five-year strategic plan (2019/20- 2023/24) was just introduced when the pandemic started to risk the lives of people. The judiciary, as opined by a respondent is paralyzed at this moment. Courts, these days are facing a significant amount of unforeseen challenges, many of which are not addressed even while an

¹⁵ 'Supreme Court decides to hear only Urgent Matters from April 28 to May 14' *myRepublica*, (28 April 2021) <<https://myrepublica.nagariknetwork.com/news/supreme-court-decides-to-hear-only-urgent-matters-from-april-28-to-may-14/>> accessed 30 April 2021

¹⁶ 'Fourth Five Year Strategic Plan of Judiciary' The Supreme Court of Nepal, 1, 2020

attempt to maintain the availability and continuity of service is made. Because of such uncertainty, the time to achieve expected goals¹⁷ of the current plan, i.e. Differentiated Case Management (DCM) in district courts and high courts, reduction of backlogged cases, speedy justice delivery, timely execution of judgment, promotion of alternatives means of dispute settlement, use of information technology in dispute management, judicial good governance, advancement of legal aid services, improvement of the overall management of courts, encouraging victim-friendly justice system and development of judicial study and research has been postponed too. Stakeholders are busy saving the lives of people which shadows the target of achieving the presupposed goals of judicial reformation.

In addition, the Nepal Budget for 2021/22 has allocated a budget for regular performance of duties and on constructing the under-construction buildings of various courts.¹⁸ No specific focus has been given to address the impacts made by the pandemic on justice delivery.

Struggle for Sustaining the Law Firms and Career Growth

Lawyers throughout the country are navigating the work during the lockdown, but juniors and those who have employees in law firms are posed with particular difficulties. The shrinks in the job of law firms are apparent with the limitation in nature of cases that the courts hear, resulting in the low amount of income. Law firms with numbers of employees and limited jobs for months are facing/ will shortly face sustaining the employees and the firm itself. A respondent said that “the number of clients and workload has reduced with the announcement of lockdown across the country”. Other than sustaining employees and law firms, as opined by another respondent, ‘a group of lawyers are facing the subsistence issues and have started using their savings and selling shares and debentures to maintain the livelihood’.

According to fresh graduates and those who have recently passed the examination of Nepal Bar Council, they do not get hired easily because of the tendency to hire experienced lawyers. One of the respondents observed that this situation has ‘completely sabotaged the financial life and obstructed the young lawyers’ introduction to experience at the profession of law’. A lawyer discoursed that such circumstances may distract them from their profession. Nonetheless, many are found to utilize this time to enrich themselves with knowledge by reading journal articles, commentaries, and collections of precedents. In addition, conducting the interaction of students with existing or former judges and experienced legal professionals can also be a beneficial way¹⁹ to maintain the psychological stability of aspiring legal professionals amongst the frustrating surrounding.

Besides, there is a different cluster of people; one, who are waiting for the result of the Public Service Commission, another who is waiting for the examination of Public Service Commission to

¹⁷ Ibid

¹⁸ Public Information Statement of Expected Income Expenditure of Fiscal Year 2021/22’ Ministry of Finance, Government of Nepal, (29 May 2021) 82

¹⁹ Sushila Karki, ‘Nyaya’, 164, 1st Edition, Book Hill Publication, Kathmandu, Nepal (2018)

appear exam, pass it and see themselves in a higher position of judicial service and other who are applying for the abroad study but stalled in visa processing and other arrangements. This shows that the pandemic has halted the career growth of legal professionals, coupled with the uncertainty of its termination.

Persons working as in-house legal counsel in development organizations and big companies shared that they are working from home and not troubled with jobs and income. But, as shared by one of the respondents, “small companies have deduced the salary or put the job on hold with a promise to hire back”.

Interrupt Progress on Sustainable Development Goals

The status quo of a human being no longer exists after the COVID-19 pandemic. People around the globe are experiencing unexpected misery and suffering as the virus overwhelms their lives. The years of progress have been disrupted with an increase in the number of people who are thrown into poverty, unemployment, hunger, and malnutrition. Pandemic has forced us to redefine the way we live. UNDP has estimated that global human development could fall because of coronavirus for the first time since 1990.²⁰

An unexpected rise in domestic violence was reported during the first lockdown in Nepal.²¹ The risk was multiplied due to the compulsion to stay at home, confinement with the abusers, detachment with supporters and advisors, limited availability of resources, inaccessibility or limited accessibility to services, and global/national shift of priority to address the consequences of the COVID-19 pandemic. The vulnerable groups like women, children, old aged people, differently-abled persons, and LGBTQI are also at higher risk of victimization. Various kinds of challenges are posed to ensure protection and justice for the victims, suspects, accused persons, witnesses, and prisoners. All these chaotic situations are followed by unequal access to wealth, health, resources, and subsistence facilities. Prisoners and detainees are bound to live in a confined and overly crowded space with poor hygiene and sanitation, increasing the rate of infection. In addition to it, they have less access to lawyers to consult about their cases due to the distancing measures and restricted movement. On the testimony of a respondent, ‘limited hearing in the court results in longer pre-trial and during the trial detention or longer imprisonment for those who were eligible for a timely release’.

The issues discussed above are the factors that threaten the timely achievement of Goal 16 of the Sustainable Development Goals, on peace, justice, and strong institutions. Thus, this state of emergency has, in multiple ways, impeded the attainment of SDGs too.

²⁰ ‘COVID-19 and the SDGs’ <<https://feature.undp.org/covid-19-and-the-sdgs/>> accessed 1 May 2021

²¹ Namrata Sharma, ‘In Nepal Lockdown, a Domestic Violence Spike’ Nepali Times (5 May 2020) <<https://www.nepalitimes.com/latest/in-nepal-lockdown-a-domestic-violence-spike/>> accessed 10 May 2021

Reshaped Learning

With the declaration of restrictive movement, the schools, colleges, and other learning spaces had to deviate from the traditional educational practices. Face-to-face teaching was transformed into digital learning through online spaces. The online space and digital learning played a significant role in facilitating learning during the closure of academic institutions. However, a paradigm shift was realized with this adaptation strategy; both the teachers and students find it difficult to adapt and adjust to this pedagogical system.

Besides the formal education system, the training, conferences, and seminar for legal professionals also moved to the online platforms. Lawyers started to hold meetings with the client via zoom, google meet, skype, and other applications. Those working from home expressed that they are struggling to maintain a balance between the working mindset and the homely environment, especially the one having offspring. Most importantly, every legal professional opined that the personal interactions with other legal professionals, also an opportunity to build a network and learn soft skills are missed though things seem to run in a satisfiable manner.

Opportunities Amidst the Challenges

It is undoubted fact that society and law run in parallel to each other, sometimes one moves ahead and sometimes another. This time, the law is under the responsibility to address the changes brought by the coronavirus in society. Despite the order to temporarily close the non-essential business, the court cannot remain stagnant as it is the ultimate guardian for the protection of the rights of citizens. Office for Democratic Institutions and Human Rights reports that the court, in the time of the pandemic, finds out the ways to scrutinize the emergency legislation and to afford an effective remedy against extreme emergency cases.²² Likewise, lawyers have to remain vigorous in providing the services to the needy people, to make the government focus on the priority and warns for its non-legal action, ultimately to act as the social engineer. Considering these aspects, the judiciary of Nepal has mapped out the opportunities from present challenges for future reforms in judiciary and court procedure.

Pronouncement of Pandemic Jurisprudence

The Supreme Court of Nepal is the court of record and it has the final power to interpret the constitution and law.²³ While performing this function, the Court can also establish legal principles²⁴ required to be followed by subordinate courts and other quasi-judicial bodies. The novel coronavirus imposed a substantial effect on the Nepali legal system. Keeping a note of it, the Supreme Court is taking the initiative to fill this legal vacuum with the formation and development of pandemic jurisprudence. So far now, 58 petitions of different cases relating to and caused by the coronavirus are heard and orders are issued.²⁵

²² OSCE, *The Functioning of the Courts in the COVID-19 Pandemic* (4, 2020)

²³ Constitution of Nepal, (n,8) art 128 (2)

²⁴ Ibid art 128 (4)

²⁵ <https://www.supremecourt.gov.np/web/> accessed 27April 2021

The Supreme Court has issued one of the most remarkable orders on the petition issued to seek resolution of the confusion regarding the statute of limitation, time limit, and date for appearance, etc. during the period of lockdown. It was issued by the larger full bench composing the Chief Justice and other judges of the court. The court announced to call the period from when the regular services were provided by the court till the date of removal of the lockdown as Zero Period.²⁶ Consequently, it is stated that the statute of limitation; time-limit, the date for appearances, filing of plaint, rejoinder, charge-sheet, appeal, the petition having prescribed period or time-limit for submission, written response, application for execution of judgment, etc. which were required to be presented before any judicial or quasi-judicial bodies will not exceed when the court actions and service delivery are at a halt.²⁷

Besides ensuring access to justice, the Supreme court has issued dozens of orders²⁸ relating to guarantee Polymerase Chain Reaction (PCR) test and treatment of COVID-19 patients, ensure stability in access to health services for all citizens, make arrangements to bring home citizens residing abroad, provide adequate quarantine and isolation facilities, motivate health workers, enhance the capacity of ICU, ventilators, and hospitals, reduce the crowd in prisons by issuing the order of habeas corpus, to enforce the provision of payment of money in lieu of punishment²⁹, entrust children to parents, execute the alternative measures of prison and to address the legal hurdles created during the lockdown.³⁰ In addition to these, orders were issued to regulate the movement in and out of Nepal, ensure the availability of foods and medicines, provide relief materials to the needy people, carry out necessary actions to promote agricultural activities, and others to protect the civil and political rights and economic, social and cultural rights of people.

Through such exemplary initiatives, the Supreme court not only safeguarded the concept of the independent, impartial, and competent judiciary but also the right of the service-seeker to access to justice and fair trial³¹, the right to live with dignity³², the right to equality³³, the right relating to health care³⁴, the right of children³⁵ and the right to constitutional remedies.³⁶ All governmental actions demand strict adherence to the principle of legality, necessity, proportionality, and non-discrimination³⁷ and the Supreme Court keeps an eagle eye view to examine if such principles are followed. The individual rights of citizens and the interests of larger populations are also considered while rendering judgments.

²⁶ Supreme Court Case and Writ Division 'Seeking Resolution During the Period of Lockdown' (076-RE-0392) (39, 2020)

²⁷ Supreme Court Case and Writ Division 'Seeking Resolution During the Period of Lockdown' (076-RE-0392) (39, 2020); 'Supreme Court decides to hear only Urgent Matters from April 28 to May 14' myRepublica, (28 April 2021)

<<https://myrepublica.nagariknetwork.com/news/supreme-court-decides-to-hear-only-urgent-matters-from-april-28-to-may-14/>> accessed 30 April

²⁸ <https://www.supremecourt.gov.np/web/> accessed 29 April 2021

²⁹ National Criminal Procedural Code, 2074 (2015), s 155

³⁰ Poudel MS 'COVID-19 and Human Rights' (2020, 17) Human Rights Journal 1

³¹ Constitution of Nepal (n,8) art 20 (9)

³² Ibid art 16

³³ Ibid art 18

³⁴ Ibid art 35

³⁵ Ibid art 39

³⁶ Ibid, 2072 (2015) art 46

³⁷ Poudel (n 30)

Enhancement in the Use of Information Technologies (ITs) and Other Devices

Like other sectors, the judiciary also grabbed the opportunity to enjoy the privilege of the internet and Information Technology during the COVID-19 pandemic. The Supreme Court of Nepal also started an online case hearing in the second wave of coronavirus.³⁸ As of now, the cases relating to the interpretation of provisions of Constitutions, public health, sensitive issues concerned with fundamental rights, and public concerns are heard.³⁹ It seems like the restricted movement, mandatory social distancing measures, and limited court services have motivated both the bar and the bench to invest in the use of technology to ensure access to justice and also prevent physical presence in the court.⁴⁰ The commencement of online hearings has, no doubt, ensured easy access to justice and saved the time and cost of the concerned. The advocates are appearing on the screen from their home and law firms, as an outcome the cases have been heard. IT has guaranteed the functioning of the judicial system by maintaining the balance between social distancing and the administration of justice. Above and beyond, as pointed by a lawyer, it is difficult to plead online if one has to plead more than one case being heard at the same time. Also, the online hearing, cannot ensure justice for all as only 36.7% of the total population has access to the internet in Nepal.⁴¹ This data, so far, does not include those who use mobile data for their business.

Conclusion

The gigantic influx of coronavirus patients, lack of kits for PCR test, oxygen, Intensive Care Unit (ICU) beds, ventilator, months of lockdown, etc. are the facts that represent the humanitarian crisis created by the second wave of coronavirus in Nepal. The reality is that a total of 1.35 million old age people are waiting for the second dose of vaccine, while only 5.5% of people have been fully vaccinated during the period of writing this article. Among others, it is advisable for the people to be aware of the situation, its consequences, and the preventive measures. Everyone has to stick to some health instructions, such as maintaining social distancing, using of mask and sanitizer, etc. Perceivably, these are widely adopted and most effective tools for controlling the spread of coronavirus.

The court is the hub of judges, judicial officers, public prosecutors, lawyers, attorneys, police, judicial journalists, security personnel and carries a high potential to transmit coronavirus from person to person. Unless every stakeholder cannot visit the court and all cases are resumed to be heard, justice cannot be realized to the fullest. We are in a situation where we cannot afford to ignore the series of the effect of historic milestones, the COVID-19 pandemic. The end of COVID-19 is uncertain, whereas the economy of the nation and the lives of people cannot be

³⁸ 'Supreme Court also Begins Online Hearing' (18 May 2021) <<https://english.onlinekhabar.com/supreme-court-also-begins-online-hearing.html>> accessed 25 May 2021

³⁹ 'Supreme Court Begin Virtual Hearing Amid Coronavirus Pandemic' (14 May 2021) <<http://english.ratopati.com/story/19264>> accessed 25 May 2021

⁴⁰ 'Impacts of COVID-19- The Global Access to Justice Survey (24 May 2021) <<https://verfassungsblog.de/impacts-of-covid-19-the-global-access-to-justice-survey/>> accessed 29 May 2021

⁴¹ Simon Kemp 'Digital 2021: Nepal' (12 February 2021) <<https://datareportal.com/reports/digital-2021-nepal>> accessed 31 May 2021

managed by only resorting to nationwide lockdown. At this point, vaccination followed by the stern application of preventive measures has appeared to be one of the best and primary conditions to loosen all kinds of restrictions. Providing insurance against the coronavirus to legal service providers also adds in confirming access to justice.

Online hearing/video conferencing can be a part of the government's plan to go paperless and reform the traditional judiciary. However, the bitter reality that limited persons have access to the internet and limited courts are conducting online hearings does not cover the concept of justice in totality. It is equally threatening to the integrity of court proceedings if the reliability is questioned. There will also be a high chance of overlooking evidence and compromising the full representation of the parties of the case. Circumstances like these demands serious concerns as it is linked with the life, liberty, and property of the people.

Political instability created by the repeated dissolution of the House of Representatives and the call for fresh election has burdened people together with the tremendous pressure of coronavirus. The Supreme Court is shouldering on several cases raised due to political reasons. While the concern had to be on treating the patient well, ensuring health services, motivating health professionals, campaigning the vaccination, promoting economic activities, and loosening the restriction by adopting the preventive measures, the leaders have rather piled up cases questioning the greatly installed and praised constitution in the Supreme Court.

Besides, the judiciary has an ample opportunity to revisit its performance and opt for better functioning. First, it could be the greatest time to shift from the traditional system to modernize with the huge technological advances. Second, the frustration of fresh graduates and lawyers in terms of being jobless shows that private practising of law is equivalent to working in law firms and less to working as in-house counsel; the need to promote the practice of hiring in-house counsel in different companies to handle a range of legal issues including employment, tax, insurance, policy, and regulatory matters is pointed. Third, it is the right time to promote alternatives to the prison system, a human rights argument. In countries lacking financial and physical resources for prison systems like ours, it is justifiable to consider the need for prison reforms within the limitations prescribed by the law. Fourth, the judiciary can initiate to arrange the discussion with stakeholders and recommend a law that ensures access to justice for citizens in the time of pandemic and the likely situation.

ENTRY REGULATION AND BORDER CLOSURES: ARE STATES IN VIOLATION OF INTERNATIONAL LAW UNDER THE MANDATE OF ‘RESPONDING TO THE COVID-19 CRISIS’?

Ahmed Ragib Chowdhury*

Abstract

To tackle the COVID-19 pandemic, states around the world have taken a variety of measures including entry restrictions and border enclosures. Travel restrictions became the norm in terms of state practice irrespective of the WHO recommendations. States cannot ignore the implications of the travel restrictions imposed by them. This research article, by utilizing a doctrinal and comparative framework, aims to assess the measures taken by states in the past in response to similar outbreaks. This article will focus on the legality of travel restrictions within the framework of International Health Regulations (2005), while assessing the legality and impact of the said travel restrictions on human rights within the ambit of permissible derogations. Finally, this article will draw a contrast with state measures under regional human rights treaties. Travel restrictions imposed by states can be argued to not be in contravention of the International Health Regulations (2005) subject to justifications of scientific basis for such measures. The principle concern remains whether the measures taken by the states fall within the ambit of permissible derogation from the concerned international human rights obligations. Assessment of unilateral decision-making by states such as travel restrictions in contrast with an established and effective legal framework is required now more than ever to structure a uniform response to future global crises of similar nature and establish proper protocols.

Keywords: COVID-19, international law, travel restrictions, human rights, derogation.

When famine, plague or war break out of our control, we set up a commission of enquiry and promise ourselves that next time we will do better. –Yuval Noah Harrari.¹

Introduction

The COVID-19 pandemic is a complex emergency, a biological and sanitary disaster that has impacted the entire world. Its multidimensionality is also present in the responses to it (health, security, economic, and political aspects).² It is a catastrophe for human rights and a foundational challenge to international human rights law. The disease itself, and responses to it, together threaten nearly every human right guaranteed by international law nearly everywhere.³ From China's lockdown of the city of Wuhan to US restrictions on travellers from Europe, to border closures across a widening range of countries, governments are increasingly encroaching on rights in response to the COVID-19. These travel restrictions had all but halted the spread of the

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¹ Harrari YN, *Homo Deus: A Brief History of Tomorrow* (Penguin Random House 2016) 9.

² Liliana Lyra Jubilut and Christina Cerna, 'Opinion – Impacts and Restrictions to Human Rights during COVID-19' (2020) E-International Relations.

³ Bennoune K, "'Lest We Should Sleep": Covid-19 And Human Rights' (2020) 114 (4) AJIL.

pandemic. However, the necessity and benefits of this public health response are outweighed by its violation of international law.⁴ Some countries, such as Australia, Colombia and Ecuador, completely barred all incoming arrivals, including their nationals. In other cases, travellers were unable to return home because key transit countries' borders were closed, or due to domestic travel restrictions in their home country.⁵

This article will focus on state justification for border closures, whether the measures fall within the International Health Regulations (IHR) (2005) framework, within the permissible limits of derogations granted to state parties under various international treaties, the impact of the measures on human rights of nationals and non-nationals and what can be done to ensure a unified global response for future similar events.

State Justification for Border Closure

States have effectively resorted to entry restrictions and border enclosures as their responses to the COVID-19 pandemic. While they may appear as states being diligent to public health and safety, these restrictions have far-reaching consequences. This segment will focus on state justification for the border closures.

In the event of the emergence of a new contagious condition, governments worldwide try to reduce its impact through the adoption of different containment strategies. Among the few available non-pharmaceutical measures, the most common is travel restrictions, e.g., closing international (or even local) borders. The *rationale* for this is as clear as water; totally isolating a territory (in this case a country) from outside will essentially block the disease from being imported.⁶ Travel restrictions have been previously used and are still being used as a non-pharmaceutical measure to limit the spread of infection in a given territory to attain a disease-free quotient. Nevertheless, these measures not only have a massive negative impact economically but also has been consistently challenged through theoretical and numerical arguments.⁷

The distinction between “travel bans” and “travel restrictions” has been at the heart of the recommendations adopted by the World Health Organization (WHO) to address the current pandemic. WHO has opined that travel bans are not usually extensively effective in preventing the importation of cases and cause a significant economic and social impact.⁸ Moreover, travel restrictions are justifiable during the early stages of an outbreak as these measures buy states some time to better prepare effective measures to tackle the outbreak. Even these restrictions must be

⁴ Meier BM, Habibi R, and Yang T, ‘Travel Restrictions Violate International Law’ (2020) 367 (6485) Science.

⁵ Farbenblum B and Berg L, “‘We might not be citizens but we are still people’: Australia’s Disregard for the Human Rights of International Students during COVID-19’ (2021) AJHR.

⁶ Massimiliano Zanin and David Papo, ‘Travel Restrictions during Pandemics: A Useful Strategy?’ Chaos 30, 111103 (2020).

⁷ *ibid*.

⁸ Chetail V, ‘Crisis Without Borders: What Does International Law Say About Border in the Context of COVID-19?’ (2020); WHO, Updated WHO Recommendations for International Traffic In Relation To COVID-19 Outbreak’ (29 February 2020) <<https://www.who.int/news-room/articles-detail/updated-who-recommendations-for-international-traffic-in-relation-to-covid-19-outbreak>> accessed 4 June 2021.

based on rigorous risk assessment, proportional to the public health risk intended to be tackled, short and updated regularly subject to the developing circumstances.⁹

A powerful expression of the state's sovereignty, immigration control provides a typical avenue for governments to reassure their citizens and bolster a national sense of belonging. The COVID-19 pandemic is no exception.¹⁰ Access to a territory does not operate in a legal vacuum even though states have a broad margin of discretion in controlling their borders. The movement of persons across borders is governed by international legal norms, whether grounded on universal and regional conventions or enshrined in customary international law. Most of these norms and instruments may be subjected to lawful restrictions and/or derogations whereas others are absolute in any circumstances, including in times of health emergency.¹¹ Because of globalization, governments must turn increasingly to international cooperation to attain national public health objectives.¹² Blanket entry restrictions in complete disregard of its far-reaching consequences and implications on international and human rights law are not desirable and fail to effectively tackle the ensuing crisis.

Undoubtedly, the risk of contagion within a country may endanger the security of the state as a whole, but it cannot be the sole basis of imposing blanket entry restrictions. The causal link between the dangers to the security of the state on account of the contagion outbreak has to be effectively established. The mere risk of an outbreak does not entitle a state to take unilateral actions. The threat to national security must be 'serious,' in the sense that it must be grounded on objectively reasonable suspicion based on evidence and in the sense that the threatened harm must be substantial rather than negligible.¹³

Gostin, Habibi, and Mason Meier have argued regarding the definition of a health emergency given in the WHO's regulations that it requires only the "potential" for international spread.¹⁴ In line with that, it can be argued that the states acted proactively to protect their citizens, but states cannot do so in disregard of their international obligations. Border closures are not initial response measures, and they are the last resort after less severe measures have been taken to tackle the spread of infectious diseases.¹⁵

COVID-19 cannot be an excuse to close borders at the expense of the most basic rights. International human rights law draws a clear-cut dividing line between what states can do and what they must do to protect public health at their borders. Blanket entry bans on the ground of

⁹ *ibid.*

¹⁰ *ibid.*

¹¹ *ibid.*

¹² Taylor A, 'Global Governance, International Health Law and WHO: Looking Towards the Future' (2002) Bulletin of the World Health Organization 975-980.

¹³ *Suresh v Canada (Minister of Citizenship and Immigration)* (2002) 1 SCR 3 [90]; *Attorney General v Zaoui* (2004) Decision No CA20/04 [133],[140]; *NSH v Secretary of State for the Home Department* (1988) Imm AR 410; Chetail, 'Crisis Without Borders' (n 9).

¹⁴ Lawrence Gostin, Roojin Habibi, and Benjamin Mason Meier, 'Has Global Health Law Risen to Meet the COVID-19 Challenge? Revisiting the International Health Regulations to Prepare for Future Threats' (2020) JLME.

¹⁵ *Enhorn v Sweden* App No 56529/00 (ECtHR, 25 January 2005) [44].

public health are irreconcilable with the core rights at borders.¹⁶ Accordingly, in some circumstances, mitigating the contagion COVID-19 may justify lawful limitations to human rights, if they are necessary, proportionate, and non-discriminatory and in accordance with the law.¹⁷ Exclusion of persons based on the passport carried by them due to the pandemic situation in their country only contributes to stigmatization and discrimination. The IHR (2005) and other laws require states to respect human rights and avoid discrimination. Any type of restriction that targets specific countries becomes increasingly difficult to justify once other countries begin reporting similar or larger numbers of cases.¹⁸

Regrettably, as part of their response to the COVID-19 pandemic, states have on a broad stroke adopted wholesale travel restrictions which have failed to be proportionate since travel restrictions are only effective in early responses (cases were already being reported elsewhere while states have proceeded with territory-specific bans); non-discriminatory as the bans have targeted specific passport holders and to be in accordance with the law.

Protection of Rights of Citizens

Actions need to be taken to fight the pandemic, but human rights need to be taken into consideration and be respected.¹⁹ States are under an obligation to take measures to prevent, or at least to mitigate the deep negative impacts of the pandemic on human rights. However, if States do not act within a human rights framework, a clear risk exists that the measures taken might violate human rights and increase the suffering of the already imperilled population.²⁰

The rule of law does not stop at the border or in times of pandemics. It provides an authoritative and flexible legal framework to protect public health without undermining the most fundamental rights.²¹ From a policy angle, border closure is counterproductive and even dangerous in addressing the pandemic for it encourages irregular migration without any health assessment and follow-up.²²

In the current context of the pandemic, states have the right and indeed the duty to protect public health. Yet border control does not mean border closure. The former regulates and monitors admission to the territory through immigration processing, whereas the latter is a categorical ban of entry against any non-nationals or those coming from specific countries. Although the distinction between controlling and closing borders is frequently blurred in political discourse, it has key implications at both the policy and normative levels.²³ Following this stance, border controls can and must be carried out with the twofold purpose of protecting public health and individual rights. However, border closures are unable to do so because banning entry to any

¹⁶ Chetail, 'Crisis Without Borders' (n 9).

¹⁷ *ibid.*

¹⁸ Tigerstrom B von and Wilson K, 'COVID-19 Travel Restrictions and the International Health Regulations (2005)' (2020) BMJGH.

¹⁹ Jubilut and Cerna, 'Opinion' (n 3).

²⁰ Committee on Economic, Social and Cultural Rights (CESCR), 'Statement on the Covid-19 Pandemic and Economic, Social and Cultural Rights' (2020) 9 IHRLR 135-142.

²¹ Chetail, 'Crisis Without Borders' (n 9).

²² *ibid.*

²³ *ibid.*

foreigners or those of a particular nationality is, by definition, a collective and automatic denial of admission without any other form of process.²⁴

Surely, states should protect and preserve the rights of their citizens, but they cannot do so by completely ignoring their existing international obligations extending beyond their borders. There are also vital prohibitions that disallow using one's own rights as a sword "aimed at the destruction of any of the rights and freedoms" of others.²⁵

Domestic Legal Framework

The 56 United Nations special procedures, 10 UN human rights treaty bodies, three principal regional human rights systems have collectively put out more than 150 statements on respecting human rights during the pandemic.²⁶ Under international law, states have to cooperate with other states and to protect other states against harmful acts by individuals from within their jurisdiction.²⁷

Rather, the state-specific domestic legal framework regulating countrywide lockdowns have only added to the existing complications concerning the same. In the UK, the Civil Contingencies Act 2004 allows making regulations by Order in Council or by ministers themselves if Order in Council cannot be resorted to. The Public Health (Control of Diseases) Act 1984 gives the government powers to ensue quarantine, detention, compulsory medical examinations amongst others.²⁸

In the US, the Public Health Services Act²⁹ grants the authority to make and enforce such regulations as are deemed necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession.³⁰ Australia has recently criminalized return to its territory for both its citizens and non-citizens under the Biosafety Act of 2015. The ban which had been challenged in court was upheld.³¹

Democratic societies need to be judged against internationally accepted human rights principles for evaluating the ethical acceptability of public health interventions that limit individual freedom, just as human rights provide the foundation for other pandemic-related policies.³² Moreover, nations must march with the international community and the municipal law must respect rules of

²⁴ *ibid.*

²⁵ Bennouna, "Lest We Should Sleep" (n 4) 666-676.

²⁶ Lisa Reinsberg, Mapping the Proliferation of Human Rights Bodies' Guidance on COVID-19 Mitigation, Just Security (*JustSecurity*, May 22, 2020) <<https://www.justsecurity.org/70170/mapping-the-proliferation-of-human-rights-bodies-guidance-oncovid-19-mitigation/>> accessed 17 May 2021.

²⁷ *Trail Smelter Case (United States v Canada)* (1941) 3 RIAA 1905-98.

²⁸ Nyamutata C, 'Do Civil Liberties Really Matter During Pandemics? Approaches to Coronavirus Disease (Covid-19)' (2020) IHRLR 62-98.

²⁹ The Public Health Services Act 1994, s 361; Nyamutata, 'Do Civil Liberties Really Matter' (n 29).

³⁰ Nyamutata, 'Do Civil Liberties Really Matter' (n 29).

³¹ 'Australia Court Upholds Ban on Pandemic Travel' (*APNews*, 1 June 2021) <<https://apnews.com/article/australia-coronavirus-pandemic-government-and-politics-business-health-193a58be5c4710f2e7da254bb4f987a3>> accessed 4 June 2021.

³² WHO, 'Ethical Considerations In Developing A Public Health Response To Pandemic Influenza: General Ethical Considerations' (2007).

international law even as nations respect international opinion.³³ The comity of nations requires that rules of international law be accommodated in the municipal law even without express legislative sanction.³⁴ Therefore, states should seek for harmonizing their international obligations while taking measures under their domestic legislation. Under customary international law, using the existence and application of domestic law to justify the violation of international obligation is no longer tenable.³⁵

Where does Border Closure fit into the IHR (2005) Framework?

IHR or International Health Regulations (2005) mete out a framework to deal with biological cataclysmic events. Sadly, however, states have taken unilateral actions based on the security and protection of their citizens. This segment will examine the standpoint of border closures in the IHR framework and to what extent states have acted in contravention of it. In addition, as to the whether the measures taken by states stand fast in under the auspices of additional measures of the IHR.

The aim of the IHR (2005) is to ‘prevent, protect against, control and provide a public health response to the international spread of disease’, while avoiding ‘unnecessary interference with international traffic and trade’.³⁶ The glaring mismatch between WHO recommendations and the widespread use of travel restrictions also raises red flags, but not all restrictions violate the IHR (2005) just because they were not recommended by WHO. The IHR (2005) does not say that states must always follow WHO recommendations.³⁷ However, states did commit to basing their decisions on available information from the WHO or other organisations, and ‘any available specific guidance or advice from WHO. They are also required to base their decisions on scientific principles and available scientific evidence or information, and to use measures that are not more restrictive than reasonably available alternatives that would provide an appropriate level of protection’.³⁸

Even if the contention that ‘travel restrictions are of no value’ were to be accepted, the imposition such travel restrictions as response to the pandemic is problematic due to their economic and human rights consequences. Given the uncertainty as to which is the better course of action, it is difficult to conclude that all of the current restrictions violate states’ international obligations. One issue is the non-compliance by states to notify the WHO of measures taken as the travel

³³ *Gramophone Company of India Ltd v Birendra Bahadur Pandey* (1984) 2 SCC [534].

³⁴ *Hussain Mohammad Ershad v Bangladesh* (2001) 21 BLD (AD) [69]; *Government of the People's Republic of Bangladesh v Abdul Quader Molla* Criminal Appeal Nos 24-25 of 2013; *Bangladesh v Sheikh Hasina* (2008) 60 DLR (AD) [90]; *Union of India v Agricas LLP* (2020) 373 ELT 752 (SC); *Aminur Rahman Khan v Trade Aris Insurance* (2001) 9 BLT (HCD) [206].

³⁵ Vienna Convention on the Law of Treaties (came into force 27 January 1980) 1155 UNTS 331 art 27; International Law Commission (ILC), ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts’ (2001) A/RES/56/83 art 32; *Anchugov v Russia* App No 11157/04 (ECtHR, 4 July 2013) [37]; *Ituango Massacres v Colombia* IACtHR Series C No 148 (1 July 2006) [27]; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* (Judgment) [2015] ICJ Rep 3 [128].

³⁶ Tigerstrom and Wilson, ‘COVID-19 Travel Restrictions’ (n 19).

³⁷ WHA, International Health Regulation 2005, arts 1, 15.

³⁸ *ibid*, arts 17, 43; Tigerstrom and Wilson, ‘COVID-19 Travel Restrictions’ (n 19)..

restrictions have mostly been reported by media outlets and not by the states themselves, such a failure is a violation of their legal obligations to do so.³⁹

WHO has some fault to bear in this case as well, as it hesitated to issue restrictions on international travel in an early stage, even though it is scientifically the best period to prevent spread at the inception of the curve, which went against the objective of IHR (2005). Similar to the 2014 Ebola outbreak, states have implemented travel restrictions in contravention of the WHO recommendations.⁴⁰ Under the IHR (2005), they are therefore considered ‘additional measures’ and carry certain specific obligations, set out in article 43.⁴¹

Additional Measures

Under the IHR (2005), when quarantine policies or other national health measures exceed WHO recommendations, those measures must not be “more restrictive of international traffic and not more invasive or intrusive than reasonably available alternatives that would achieve the appropriate level of health protection.”⁴² Per article 43 of the IHR (2005), WHO does not prohibit additional health measures but states are required to report and justify them. IHR (2005) also allows state parties to implement health measures according to national law and international obligations while responding to public health crises.⁴³ WHO recommends how to address health threats under article 23 of its Constitution that are legally relevant although ‘legally non-binding’.⁴⁴

In determining these additional health measures, parties ‘shall’ base their determinations upon (1) scientific principles; (2) available scientific evidence of a risk to human health, or where such evidence is insufficient, the available information including from World Health Organization and other relevant intergovernmental organizations and international bodies; and (3) any available specific guidance or advice from WHO.⁴⁵ A three-part test is pertinent here. An additional measure:

- (a) is available reasonably after taking into account technical and economic feasibility;
- (b) achieves the parties’ appropriate level of sanitary or phytosanitary protection, and
- (c) is significantly less restrictive to trade than the additional measure contested.⁴⁶

³⁹ *ibid*; Tigerstrom and Wilson, ‘COVID-19 Travel Restrictions’ and the International Health Regulations (2005)’ (2020) BMJGH.

⁴⁰ Tejpar A and Hoffman S, ‘Canada’s Violation of International Law during the 2014–16 Ebola Outbreak’ (2016) 54 CYIL 366-383.

⁴¹ Barbara von Tigerstrom, Sam Halabi, and Kumanan Wilson, ‘The International Health Regulations (2005) and The Re-Establishment of International Travel Amidst the COVID-19 Pandemic’ (2020) 1 (4) JTM.

⁴² Arato J, Claussen K, and Heath B, ‘The Perils of Pandemic Exceptionalism’ (2020) 114(4) AJIL 627-636; Lawrence Gostin, *Global Health Law* (HUP 2016) 296–97.

⁴³ Bogdandy A von, and Villarreal P, ‘International Law on Pandemic Response: A First Stocktaking In Light of the Coronavirus Crisis’ MPIL Research Paper No 2020-07; Eyal Benvenisti, ‘The WHO – Destined to Fail? Political Cooperation and the COVID-19 Pandemic’ (2020) Paper No 24/2020 University of Cambridge.

⁴⁴ Bogdandy, and Villarreal, ‘Critical Features of International Authority’ (n 44).; WHA, International Health Regulation 2005, art 1.

⁴⁵ WHA, International Health Regulations 2005, art 43.

⁴⁶ WTO, Australia — Measures Affecting Importation of Salmon (20 October 1998) WT/DS18/AB/R, 194.

Given the effectiveness of community-based public health measures such as social distancing and contact tracing, the necessity of travel bans must be weighed against less restrictive alternatives.⁴⁷ Countries could take other more effective measures to protect their citizens even if travel restrictions did work.⁴⁸ In particular, responses to the pandemic should be based on the “best available” scientific evidence to protect public health.⁴⁹

Some early analyses have suggested that travel restrictions—if implemented in an evidence-based and timely way—could be justifiable public health measures.⁵⁰ Regardless, public health researchers have argued that travel restrictions are not effective in preventing the spread of disease finding little supporting evidence, because at best, they delay the introduction of a novel pathogen rather than preventing it. However, even the WHO has acknowledged, there may be situations in which this delay could have value.⁵¹ It has been argued that since the WHO had provided alternatives, including “surveillance, patient management, and screening at ports of entry and exit,” travel bans violated the regulations’ instruction that health measures do not restrict international traffic more than “reasonably available alternatives.”⁵²

Hong Kong and Taiwan succeeded in keeping infection rates low by using travel and other control measures. Even without denying entry to travellers, there was no spike in local cases suggesting that arrival quarantines and effective local control measures are enough to prevent community spread.⁵³ This exhibits that travel restrictions are only effective in curbing infection when combined with other measures. Furthermore, studies have suggested that 99.9% air travel suspension would only delay infection spread for ≤ 4 months (around 4 months) when used as a singular measure and for ≤ 10 -months (around 10 months) when combined with other methods for any particular country. Other studies have suggested that travel restrictions have a limited effect within a specific geographic area and only limit the national, global spread and peak of the curve.⁵⁴ This should be taken with a grain of salt since a major limitation of mathematical models

⁴⁷ Meier, Habibi and Yang, ‘Travel Restrictions’ 367..

⁴⁸ *ibid.*

⁴⁹ CESCR, ‘Statement on the Covid-19 Pandemic’ (n 21).

⁵⁰ Costantino, Heslop, and MacIntyre, ‘The Effectiveness of Full And Partial Travel Bans Against COVID-19 Spread In Australia For Travellers From China During And After The Epidemic Peak In China’ (2020) JTM.

⁵¹ Tigerstrom and Wilson, ‘COVID-19 Travel Restrictions’ (n 19); Habibi R, ‘Do Not Violate the International Health Regulations during the COVID-19 Outbreak’ (2020) 395 (10225) *The Lancet*.

⁵² Oona Hathaway and Alasdair Phillips-Robins, ‘COVID-19 and International Law Series: WHO’s Pandemic Response and the International Health Regulations’ (*JustSecurity*, 8 December 2020) <<https://www.justsecurity.org/73753/covid-19-and-international-law-series-whos-pandemic-response-and-the-international-health-regulations/>> last accessed 4 May 2021; Habibi, ‘Do not violate the International Health Regulations’ (n 52).

⁵³ Wang, Ng, and Brook, ‘RH Response to COVID-19 in Taiwan: Big Data Analytics, New Technology, and Proactive Testing’ (2020) *JAMA* 323, 1341- 1342; Wei Gwee, Xian Wang, Ee Yong, Pearleen Chua, and Junxiong Pang ‘Impact of Travel Ban Implementation on COVID-19 Spread in Singapore Taiwan, Hong Kong and South Korea During the Early Phase of the Pandemic: a Comparative Study’ (2020) *ResearchSquare*.

⁵⁴ Cooper, Pitman, Edmunds, and Gay, ‘Delaying The International Spread Of Pandemic Influenza’ (2006) 3 *PLoS Med*; Chong, and Zee, ‘Modeling The Impact Of Air, Sea, And Land Travel Restrictions Supplemented By Other Interventions On The Emergence Of A New Influenza Pandemic Virus’ (2012) 12 *BMCID* 309; Mateus, Otete, Beck, GP, and Nguyen-VanTam, ‘Effectiveness of Travel Restrictions In The Rapid Containment Of Human Influenza: A Systematic Review’ (2014) 92 *BWHO* 868; William Xue , Cynthia Lam, HH Yeung, CS Wong, LY Chan, and YS Wong, ‘Travel Restrictions in the Rising COVID-19 Pandemic’ (2020) *HKMJ*.

is that they cannot perfectly replicate real-life scenarios. Simulations can also be subject to bias in terms of study design and assumptions, as well as the credibility of the input data.⁵⁵

What this establishes is that the imposition of travel bans as a response to the pandemic was not in accordance with the best available scientific evidence. Even then, it cannot be said that states violate IHR (2005) since their obligations under ICCPR⁵⁶ and ICESCR⁵⁷ supersede IHR obligations.⁵⁸ Moreover, hindsight analyses by Courts regarding state actions in times of exigent circumstances have been greatly discouraged.⁵⁹

Do Border Closures Fall within the Ambit of Derogations?

Derogations are described as a ‘necessary evil’ in international human rights law.⁶⁰ Scholars have argued that COVID-19 is an “ideal state of emergency”—precisely the sort of crisis that human rights derogations were intended to address.⁶¹ The COVID-19 pandemic has required States to implement exceptional measures to curb the spread of the virus and to protect public health. While border restrictions or closure may be justified, exceptions are needed to safeguard basic rights,⁶² and justifying measures only through exceptions implies that similar measures would likely violate those same rules under less extreme circumstances.⁶³

The Siracusa Principles⁶⁴, a set of legal principles on derogation from ICCPR, also recognise the principal obligations of the state as protectors of societies while recognizing that in extraordinary circumstances, certain human rights guarantees need to be suspended within defined confines.⁶⁵ Restrictions of liberty should be legal, proportionate, necessary, and accomplished by the least restrictive means that are reasonably available and not arbitrary, unreasonable, or discriminatory.⁶⁶ Article 25 of the Siracusa Principles states that public health may be invoked as a ground for limiting certain rights in order to allow a state to take measures dealing with a serious threat to the health of the population or individual members of the population.⁶⁷ The European Court of Human

⁵⁵ Xue, Lam, Yeung, Wong, Chan, and Wong, ‘Travel Restrictions in the Rising COVID-19 Pandemic’ (n 55).

⁵⁶ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

⁵⁷ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entry into force 3 January 1976) 993 UNTS 3 (ICESCR).

⁵⁸ WHA, International Health Regulations (n 46), art 57.

⁵⁹ *Tagayeva v Russia* App No 26562/07 (ECtHR, 18 September 2017) [481]; Lawrence Early (ed), *The Right to Life under Article 2 of the European Convention on Human Rights* (Wolf Legal Publishers 2016).

⁶⁰ Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (3rd edn, OUP 2013) 623.

⁶¹ Alan Greene, ‘States should Declare a State of Emergency using Article 15 ECHR to Confront the Coronavirus Pandemic’ (*Strasbourg Observers* 1 April 2020) <<https://strasbourgobservers.com/2020/04/01/states-should-declare-a-state-of-emergency-using-article-15-echr-to-confront-the-coronavirus-pandemic/>> last accessed 3 June 2021.

⁶² UNHCR and IOM, COVID-19: Access Challenges and the Implications of Border Restrictions (2020).

⁶³ Arato, Claussen, and Heath, ‘The Perils of Pandemic Exceptionalism’ (n 43).

⁶⁴ Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights (1984) E/CN.4/1984/4.

⁶⁵ R Burchill, ‘When does an Emergency Threaten the Life of the Nation? Derogations from Human Rights Obligations and the War on International Terrorism’ (2005) 9 YNZJ 95–114.

⁶⁶ Nyamutata, ‘Do Civil Liberties Really Matter’ (n 29).

⁶⁷ *ibid*; Siracusa Principles on the Limitation and Derogation (n 65) art 25.

Rights (ECtHR) noted if the reason for interfering with a human right is legitimate, it must correspond to a pressing social need and it must be proportionate to the aim.⁶⁸

Emergencies threatening the life of a nation may include natural catastrophes.⁶⁹ States have to justify derogation from ICCPR rights during a natural catastrophe by showing that the situation constitutes a threat to the life of the nation and the derogation is required due to the existing exigent circumstances.⁷⁰ In the *Belmarsh* case⁷¹, it was noted that an assessment of the threat to the life of the nation is, or should be, within the expertise of the Government. According to the ECtHR,⁷² four characteristics must exist for a public emergency to be considered as ‘threatening the life of the nation’:

- a) it must be actual or imminent; the effects of emergency must involve the whole nation;
- b) the continuance of the organised life of the community must be threatened and
- c) the crisis or danger must be exceptional meaning that the normal or conventional measures or restrictions, for the maintenance of public safety, health and order, are inadequate.

A measure is only justified as long as it furthers the pursued aim and is appropriate for attaining the objectives pursued not going beyond what is required.⁷³ Various governments including stable democracies such as Germany and South Korea succeeded in curbing the loss of millions of lives during the pandemic partly due to the effective limitation of certain rights in accordance with international law.⁷⁴

Conversely, if countries claim the state of necessity which is recognized by CIL precluding the wrongfulness of an act not in conformity with an international obligation.⁷⁵ To plead this defence, a state must fulfil that: (i) there must be a grave and imminent peril; (ii) this peril must threaten an essential interest; (iii) the State’s act must not seriously impair another essential interest; (iv) the State’s act was the ‘only way’ to safeguard the interest from that peril.⁷⁶ The pandemic may be argued to be a scenario fulfilling the requirements as mentioned above, but that is clearly not the

⁶⁸ *The Sunday Times v United Kingdom* (1979) 2 EHRR 245.

⁶⁹ *Greek case (Denmark v Greece, Norway v Greece, Sweden v Greece, Netherlands v Greece)* App Nos 3321/67, 3322/67, 3323/67, 3344/67 (1969) Yearbook of ECHR [152]–[154]; Nyamutata, ‘Do Civil Liberties Really Matter’ (n 29); *Khlyustov v Russia* App No 28975/05 (ECtHR, 11 July 2013) [84]; Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (3rd edn, OUP 2013) 911.

⁷⁰ United Nations Human Rights Committee (UNHRC), ‘General Comment 29: States of Emergency’ (2001) CCPR/C/21/Rev1/Add11, 5.

⁷¹ *A v Secretary for the Home Department* [2004] UKHL 56.

⁷² ECtHR, ‘Factsheet- Derogations in Times of Emergency’ (2021); *Lawless v Ireland (No 3)* App No 332/57 (ECtHR, 1 July 1961); *Brannigan v United Kingdom* App Nos 14553/89 and 14554/89 (ECtHR, 25 May 1993).

⁷³ *Battista v Italy* App No 43978/09 (ECtHR, 2 December 2014) [41].

⁷⁴ Bennouna, “Lest We Should Sleep” (n 4) 666–676.

⁷⁵ *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* [1997] ICJ Rep 7 [51], [52].

⁷⁶ International Law Commission (ILC), ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts’ (2001) A/RES/56/83 art 25.

case as the requirements are cumulative and the travel bans imposed by states were not the only way to safeguard interest from the peril.⁷⁷

Travel bans imposed by states were the first course of action for a great number of them in absolute disregard of WHO recommendations.⁷⁸ In *Williamson*,⁷⁹ a US Court found that sealing off an entire section of San Francisco to prevent the spread of the bubonic plague was unreasonable, unjust, and oppressive. As discussed in the previous segment, travel restrictions do not stop infection rather merely delay it alongside other measures. Even if states do claim the state of necessity or emergency to justify their derogations they are unlikely to get the benefit of the same as the travel bans were imposed on most occasions before the fulfilment of any requirement of such a scenario.

Impact of Border Closures on Human Rights

Human rights treaties create obligations not only for the benefit of natural persons⁸⁰ but also create rights and obligations between state parties.⁸¹ All states have a legal interest in the protection of basic rights.⁸² Under ICCPR,⁸³ every State has a legal interest in the performance of every other State of its obligations.⁸⁴ This follows from the fact that the rules concerning the human's basic rights are *erga omnes* obligations.⁸⁵ Human rights law recognizes that both state action and inaction are equally dangerous human rights.⁸⁶ Although article 9 of the Montevideo Convention⁸⁷ contemplates that under state jurisdiction, nationals and non-nationals both enjoy equal protection of the law; this has not been the case in this pandemic. There has been a dent and divergence in terms of protection of law afforded to citizens (of own and particular other countries) and those afforded to non-nationals (including persons on the move) by virtue of extraterritorial application.

States have a level of extraterritorial responsibility under ICCPR.⁸⁸ What this means is that state obligation for ensuring human rights is not limited to ensuring them within their territory only. Therefore, state response or action has to be in accordance with its international obligation giving due consideration to human rights optics. Regrettably, states have swayed from this pathway in dealing with the pandemic.⁸⁹ For example, Australia in the height of the pandemic has completely

⁷⁷ Federica Paddeu and Freya Jephcott, 'COVID-19 and Defences in the Law of State Responsibility: Part II' (*EJIL: Talk!*, 2020) <<https://www.ejiltalk.org/covid-19-and-defences-in-the-law-of-state-responsibility-part-ii/>> last accessed 4 June 2021.

⁷⁸ Tejpar and Hoffman, 'Canada's Violation of International Law' (n 41).

⁷⁹ *Jew Ho v Williamson* 103 F 10 (CCD Cal 1900) [26].

⁸⁰ UNHRC, 'General Comment No 31: The nature of the general legal obligation imported on States Parties' (2004) CPPR/C/21/Rev1/Add13, 9.

⁸¹ Bruno Simma, 'From Bilateralism to Community Interest in International Law' (1994) 250 *Recueil des Cours* 221, 370.

⁸² *Barcelona Traction Light and Power Company Limited (New Application: 1962) (Belgium v Spain)* (Second Phase) [1970] ICJ Rep 3 [34].

⁸³ ICCPR, (n 57) art 2.

⁸⁴ UNHRC, 'General Comment No 31' (n 81).

⁸⁵ *ibid.*

⁸⁶ Bennouna, "Lest We Should Sleep" (n 4) 666- 676.

⁸⁷ The Montevideo Convention 1933 165 UNTS 19 art 9.

⁸⁸ Joseph S and Castan M, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (3rd edn, OUP 2013) 96.

⁸⁹ Tejpar and Hoffman, 'Canada's Violation of International Law' (n 41).

closed off the country for a considerable period leaving both citizens and non-citizens stranded.⁹⁰ This segment will focus on a few key rights, which have potentially been violated by states in consequence of their entry regulations.

Right to Life

Right to life is enshrined in Article 6 of the ICCPR. The duty to protect life implies that states parties should take appropriate measures to address the general conditions in society that may give rise to direct threats to life including “the prevalence of life-threatening diseases.”⁹¹

In *Toussaint*,⁹² it was held that Canada’s exclusion of undocumented migrants from a federal health care program violated the right to life amongst other rights as the right to life extends to reasonably foreseeable threats and life-threatening situations that can result in loss of life. The ECtHR made similar observations regarding a state putting an individual’s life at risk through the denial of health care that they have undertaken to provide to the population generally.⁹³ In *Powell*,⁹⁴ the ECtHR held that it cannot be excluded that the acts and omissions of state authorities in the field of health care policy may in certain circumstances engage their responsibility. The right to life has “crucial importance both for individuals and for society as a whole” and “constitutes a fundamental right, the effective protection of which is the prerequisite for the enjoyment of all other human rights,” is gravely at risk around the world due to the pandemic.⁹⁵

Right to life is non-derogatory in nature.⁹⁶ States’ acts and omissions concerning health care policy may well constitute violations of the right to life.⁹⁷ States’ duty to protect life requires them to adopt appropriate measures to address society’s general conditions that may give rise to direct threats to life, including life-threatening diseases.⁹⁸ The positive duty to protect human life includes advanced planning and immediate responses to prevent, stop, or mitigate the spread of life-threatening diseases like COVID-19.⁹⁹ While states are to follow through with their obligation as abovementioned, they are also required to channel the obligations in line with human rights law, something that has been grossly overlooked and disregarded.

Right to Health

The Right to the highest attainable standard of health is enshrined in article 12 of the ICESCR. Under Article 12 (1) of the ICESCR, States parties recognize “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”, while article 12(2)

⁹⁰ Farbenbluma and Berg, “We Might Not Be Citizens” (n 6); UNHRC, ‘General Comment 19: The Right to Social Security (art 9)’ (2008) E/C12/GC/19.

⁹¹ UNHRC, ‘General Comment No 36: Right to Life’ (2019) CCPR/C/GC/36.2.

⁹² *Toussaint v Canada* (2018) Communication No 2348/2014, CCPR/C/123/D/2348/2014.

⁹³ *Cyprus v Turkey* App No 25781/94 (ECtHR, 12 May 2014).

⁹⁴ *Powell v UK* (2000) 30 EHRR CD 152.

⁹⁵ UNHRC, ‘General Comment No 36’ (n 92).

⁹⁶ ICCPR, (n 57) art 4.

⁹⁷ *Hristozov v Bulgaria* App No 5115/18 (ECtHR, 29 April 2013) [106].

⁹⁸ UNHRC, ‘General Comment No 6: Right to Life’ (1982).

⁹⁹ Antonio Coco and Talita de Souza Dias, ‘Part I: Due Diligence and COVID-19: States’ Duties to Prevent and Halt the Coronavirus Outbreak’ (*EJIL: Talk!* 2020) <<https://www.ejiltalk.org/part-i-due-diligence-and-covid-19-states-duties-to-prevent-and-halt-the-coronavirus-outbreak/>> accessed 4 June 2021.

provides some “steps to be taken by the States parties to achieve the full realization of this right”. Several regional human rights instruments also recognize the right to health, such as the European Social Charter of 1961 as revised (art 11), the African Charter on Human and Peoples’ Rights of 1981 (art 16) and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights of 1988 (art 10).¹⁰⁰

It is well accepted in contemporary human rights law that civil, political, social, economic, and cultural rights are equal in principle.¹⁰¹ The duties to safeguard liberties and protect against pandemic events are both equally a human rights matter. As recognised in the ICESCR, the right to health requires that states take steps for the “prevention, treatment and control of epidemic, endemic, occupational and other diseases” and to assure “medical service and medical attention in the event of sickness”. The right to health requires that health goods, services, and facilities are available in adequate numbers; accessible on a financial, geographical, and non-discriminatory basis; acceptable, including culturally appropriate and respectful of gender and medical ethics; and of good quality.¹⁰²

The permissible limitations which may be imposed on the rights protected under article 12 must not nullify the principle of liberty of movement and are governed by the requirement of necessity and consistency with the other rights.¹⁰³ Restrictions are required to be both permissible and necessary; must conform to the principle of proportionality; must be appropriate to achieve their protective function; must be the least intrusive instrument to achieve the desired result, and they must be proportionate.¹⁰⁴

The CESCR underscores that, as with the right to life, “health is a fundamental human right indispensable for the exercise of other human rights.”¹⁰⁵ In adopting laws providing for restrictions permitted by article 12 (2). States should always be guided by the principle that the restrictions must not impair the essence of the right.¹⁰⁶

State parties are under an obligation to devote their maximum available resources for the full realization of all ESCRs, including the right to health. The progressive realization of the right to health over a period of time means that States parties have a specific and continuing obligation to move as expeditiously and effectively as possible towards the full realization of article 12.¹⁰⁷ States must make all efforts to mobilize the necessary resources to combat COVID-19 in the most equitable manner, in order to avoid imposing a further economic burden on these marginalized groups.¹⁰⁸

¹⁰⁰ UNHRC, ‘General Comment No 14: The Right to the Highest Attainable Standard of Health’ (2000) E/C12/2000/4, 2.

¹⁰¹ Philip Alston and Ryan Goodman, *International Human Rights* (OUP 2013), 310.

¹⁰² Dainius Pūras, ‘The Right to Health must Guide Responses to COVID-19’ (2020) 395 *The Lancet*.

¹⁰³ UNHRC, ‘General Comment No 27: Freedom of movement’ (1999) CCPR/C/21/Rev1/Add9,2.

¹⁰⁴ *ibid*, 14.

¹⁰⁵ CESCR, ‘General Comment No 14: The Right to the Highest Attainable Standard of Health (Art 12)’ (2000) E/C12/2000/4, 1.

¹⁰⁶ UNHRC, ‘General Comment 29: States of Emergency’ (2001) CCPR/C/21/Rev1/Add11, 13.

¹⁰⁷ UNHRC, ‘General Comment No 14: The Right to the Highest Attainable Standard of Health (Art 12)’ (2000) E/C12/2000/4, 31.

¹⁰⁸ CESCR, ‘Statement on the Covid-19 Pandemic’ (n 21)..

In particular, States are under the obligation to respect the right to health by refraining from denying or limiting equal access for all persons to preventive, curative and palliative health services; abstaining from enforcing discriminatory practices as a State policy, and abstaining from imposing discriminatory practices relating to women's health status and needs.¹⁰⁹

The wording of Article 12 (4) does not distinguish between nationals and aliens ('no one'). Thus, it would be a clear violation of the ICESCR if the rights enshrined in article 12, were restricted by making distinctions of any kind, such as race, colour, sex, language, religion, political or other opinions, national or social origin, property, birth or another status.¹¹⁰ Violation can occur through both acts and omissions of the states.¹¹¹

Right to Repatriation & Family Reunification

The right of a person to enter his or her own country recognizes the special relationship of a person to that country. The right has various facets. It implies the right to remain in one's own country. It includes not only the right to return after having left one's own country; it may also entitle a person to come to the country for the first time if he or she was born outside the country (e.g. if that country is the person's state of nationality). The right to return is of the utmost importance for refugees seeking voluntary repatriation. It also implies the prohibition of enforced population transfers or mass expulsions to other countries.¹¹²

The wording of Article 12(4) of ICCPR does not distinguish between nationals and aliens.¹¹³ The scope of "his own country" is broader than the concept of 'country of his nationality.'¹¹⁴ It is not limited to nationality acquired at birth or by conferral.¹¹⁵ It embraces an individual who, because of his or her specialities to or claims concerning a given country, cannot be considered a mere alien.¹¹⁶ This right also includes long-term residents.¹¹⁷ States entry regulations violate article 12(4) of ICCPR.¹¹⁸ The question of whether an alien is "lawfully" within the territory of a State is a matter governed by domestic law, which may subject the entry of an alien to the territory of a State to restrictions, provided they comply with the State's international obligations. Once a person is lawfully within a State, any restrictions on his or her rights guaranteed by Article 12 (1) and (2) as well as any treatment different from that accorded to nationals, have to be justified under the rules provided for by Article 12 (3).¹¹⁹

¹⁰⁹ UNHRC, 'General Comment No 14: The Right to the Highest Attainable Standard of Health (Art 12)' (2000) E/C12/2000/4, 34.

¹¹⁰ UNHRC, 'General Comment No 27' (n 104) 18.

¹¹¹ UNHRC, 'General Comment No 14: The Right to the Highest Attainable Standard of Health (Art 12)' (2000) E/C12/2000/4, 48-49.

¹¹² *Ibid.*, 19.

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*

¹¹⁸ *Stewart v Canada* (1996) Communication No 538/1993, CCPR/C/58/D/538/1993; *Nystrom v Australia* (2011) Communication No 1557/2007, CCPR/C/102/D/1557/2007.

¹¹⁹ UNHRC, 'General Comment No 27' (n 104) 4.

Article 23(1) codifies that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State. The term ‘family’ must be interpreted broadly.¹²⁰ Each State is ‘obligated’ to cooperate with relevant states to ensure families’ unification, including citizens of different countries.¹²¹ Even if states claim sovereignty in response to WHO’s request to reconsider entry regulations. In its traditional sense, sovereignty was absolute.¹²² However, states nowadays are bound by various treaties and sovereignty is no longer absolute.¹²³

First, these obligations are legally binding for all states under customary international law and reinforced by a broad range of widely ratified conventions. *Second*, they apply to any migrants regardless of their documentation status and nationality. *Third*, they are applicable both within the territory—including at the border—and outside the territory when migrants are under the effective control of a state. *Fourth*, they are absolute and cannot suffer from any exception or derogation under any circumstances, including in times of emergency. Against this normative background, border closure is inherently in contradiction with the most elementary rights of persons on the move. No public health consideration can justify a denial of access to territory without proper safeguards. Whether it applies to all foreigners or targets those of a particular nationality, border closure is by essence an automatic and collective entry ban and cannot be reconciled with these core individual rights of migrants.¹²⁴

Blanket entry bans and pushbacks *vis-à-vis* refugees breach international law and could lead to further spread of COVID-19. Those who are faced with border closures and pushback policies could be tempted to seek the help of people smugglers and as such would not be monitored by health authorities upon their arrival.¹²⁵ The general prohibition of collective expulsion requires that any rejection at the frontier, interception or removal be taken based on a reasonable and objective examination of the particular case of each migrant. Because of its collective nature, border closure is *ipso facto* incompatible with such an individual assessment.¹²⁶

A State Party cannot lawfully deprive an individual of the right to enter his or her own country based on article 12(4) where there are less draconian alternatives than denial of entry. At least, an individual can be screened on entry, monitored closely for 14 days after arrival and, if necessary, isolated and quarantined for a while. Such reasonable and proportionate measures do not interfere with the right of an individual to enter his or her own country and, simultaneously, allow the relevant State Party to contain the transmission of COVID-19 within its borders.¹²⁷ Irrespective of

¹²⁰ *Hendricks v Netherlands* (1988) Communication No 201/1985, CCPR/C/33/D/201/1985; UNHRC, ‘General Comment No 16: The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation’ (1988).

¹²¹ Guofu Liu, ‘Covid-19 and the Human Rights of Nationals Abroad’ (2020) 114 AJIL 317.

¹²² S K Kapoor, *International Law & Human Rights* (19th edn, Central Law Agency 2017) 127.

¹²³ Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (OUP 2013) 330; Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012) 480; *Union of India v Sukumar Sengupta* [1990] AIR (SC) 1701.

¹²⁴ Chetail, ‘Crisis Without Borders’ (n 9).

¹²⁵ Bríd Ní Ghráinne, ‘Covid-19, Border Closures, and International Law’ (2020) IIRP.

¹²⁶ Chetail, ‘Crisis Without Borders’ (n 9); *Nadege Dorzema v Dominican Republic* IACtHR Series C No 251 (2012) [172]; *Hirsi Jamaa, v Italy* App No 27765/09 (ECtHR, 2012) [184]; *Khlaifia, v Italy* App No 16483/12 (ECtHR, 2016), [238].

¹²⁷ Rutsel Martha, and Stephen Bailey, ‘The Right to Enter His or Her Own Country’ (*EJIL: Talk!*, 23 June 2020) <<https://www.ejiltalk.org/the-right-to-enter-his-or-her-own-country/>> accessed 3 June 2021.

these methods, countries have adopted wholesale bans like Australia has done as mentioned before.

Even though states have multilateral obligations under international law and their actions in tackling the pandemic surely infringes on individuals human rights (national and otherwise), ICCPR and ICESCR supersede IHR when there is an irreconcilable difference between them and IHR.¹²⁸ Therefore, states are bound to fulfil their positive international human rights obligations concerning their nationals.¹²⁹ However, as mentioned previously, they cannot use such obligations towards their nationals as a precursor to violate rights and obligations towards non-nationals.

The Path Forward

Germes do not recognize borders, but, in a world where borders define the exercise of political power, international cooperation is critical to combatting pathogenic threats. Effective cooperation under international law can produce political herd immunity within and between states to political behaviour that disrupts measures needed to protect nations and individuals from infectious diseases.¹³⁰

This author agrees with Allyn Taylor that WHO with its leadership could theoretically foster the development of a more effective, collective and rational-legal regime by coordinating the codification and implementation measures in the lawmaking of global health law.¹³¹ WHO can do so by actively participating, where appropriate, in the increasing array of treaty efforts with important implications for global public health initiated in multiple forums.¹³² To ensure greater collaboration and effective handling of future pandemics, WHO needs to play an effective role in cementing a proper, uniform and functioning framework.

Conclusion

Despite the magnitude of the crisis, states have disregarded the IHR framework and endangered human rights and international obligations. The international spread of infectious diseases is not a new phenomenon, but the need for international cooperation to safeguard global health is becoming increasingly important due to factors such as increased population movements, environmental changes and growth in international trade in food.¹³³ Outbreaks from cholera epidemics to Ebola crises in Africa in this century have demonstrated again the necessity for countries to prioritize science and public health strategies in order to sustain political discipline within and across borders to prevail over common microbial threats.¹³⁴ Unfortunately, history will

¹²⁸ WHA, International Health Regulations (n 46), art 57.

¹²⁹ Joseph and Castan, *The International Covenant on Civil and Political Rights* (n 70) 39.

¹³⁰ Fidler D, 'To Fight a New Coronavirus: The COVID-19 Pandemic, Political Herd Immunity, and Global Health Jurisprudence' (2020) CJIL.

¹³¹ Taylor, 'Global Governance' (n 13).

¹³² *ibid.*

¹³³ Samantha Vanderslott and Tatjana Marks, 'Travel Restrictions as A Disease Control Measure: Lessons from Yellow Fever' (2021) 16 (3) GPH 340-353.

¹³⁴ Tejpar and Hoffman, 'Canada's Violation of International Law' (n 41)..

not record the COVID-19 pandemic as a high-water moment for international cooperation and international law.¹³⁵

Acknowledging our achievements sends a positive message to make greater efforts. Given our 20th century accomplishments, it is within our power to prosper and reduce suffering.¹³⁶ If states are to effectively and conclusively tackle future pandemics and viral outbreaks, they will have to ensure a proper framework keeping in mind scientific evidence and public health tactics to ensure that there is no repetition of the events of the COVID-19 pandemic. No one can guarantee that plagues will not make a comeback, but in the arms race between doctors and germs, doctors run faster.¹³⁷

¹³⁵ Fidler, 'To Fight a New Coronavirus' (n 131).

¹³⁶ Harrari, *Homo Deus*(n 2) 23.

¹³⁷ *ibid* 9, 17.

THE DOCTRINE OF FAIR USE IN THE ASPECT OF COVID-19 PANDEMIC: PERSPECTIVE OF COPYRIGHT LAWS IN BANGLADESH

Fahad Bin Siddique*

Abstract

The doctrine of fair use or fair dealing indicates exceptions to the author's exclusive right under copyright law. This doctrine permits making copies or using copyrighted work in such a way that does not consider copyright infringement. The primary objective behind the doctrine is the benefit of society, which could be through educational institutions, for instance, by allowing photocopies of a book for teaching, which does not amount to infringement of copyright. COVID-19 pandemic and the consequential lockdown worldwide have changed people's lifestyles, and even educational institutions are now serving their students online. Even though people are adjusting to this new normal situation, issues concerning the uncertainty of how the doctrine of fair use or fair dealing under copyright law will apply to online education have emerged. Does this doctrine of fair use extend to the online education system? This article will scrutinize the position and scope under Bangladeshi law on fair use concerning questions that have arisen in the aftermath of online teaching. Therefore, this article aims to study the status of the doctrine of fair use in the aspect of this pandemic and discover the applicability of this doctrine in terms of the online education system to observe the position and practice of the other jurisdictions in this regard.

Keywords: Copyright law, COVID-19, Fair use, Fair dealing, Online education.

Introduction

The whole world is now in the middle of the deadly pandemic named COVID-19, which ultimately brought somenew culture to the world. The entire world is now doing regular lockdown depending upon the infection rate and maintaining strict social distance norms in different ways. However, lockdown and social distance norms have left entire populations, especially those who live in vulnerable situations without in-person access to educational institutions and libraries.

There is no doubt that this situation has brought out some matters under the spotlight, and one of them is digital or online access to educational resources. Furthermore, copyright law, especially the doctrine of fair use, is directly related to the digital or online education system.¹ It is not surprising that some teachers are not well trained in copyrights matters, and they may get it intricate to completely abide by the copyright rules when taking online classes and do not know how the laws regarding fair use or fair dealing work.²

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¹ Millison Smith, 'Fair Use and Distance Learning in the Digital Age' (2000) 5(4) Journal of Electronic Publishing <<https://quod.lib.umich.edu/j/jep/3336451.0005.405?view=text;rgn=main>> accessed 3 June 2021.

² Martine Courant Rife, *Invention, Copyright, and Digital Writing* (SIU Press 2013).

This article will discuss the basic idea of the fair use or fair dealing doctrine. This chapter will explain the doctrine with definition and information regarding using this doctrine in other jurisdictions. The history of initiating the structure of this doctrine will be explained as well as the connection with related international treaties. After elucidation of the international treaty connection, this (article) will describe how the copyright law of Bangladesh enshrined this doctrine.

This article will try to draw the picture of how the COVID-19 pandemic affected the educational system of Bangladesh as this country was not prepared to shift the whole education system to an online or digital manner. This chapter will also try to establish or illustrate the connection between the doctrine of fair use and the COVID-19 pandemic. Several issues have been raised in this pandemic regarding the fair use doctrine under copyright law; however, this article sheds light on some fundamental emerging issues in chapter three.

It also dedicatedly analyzes the adequacy of fair use doctrine on the issues raised in the previous chapter and scrutinizes the position of the copyright law of Bangladesh. In this chapter, the analysis has been conducted in accordance with the practice of judiciary of other jurisdictions. This study will explain how the concerned provisions work in this harsh situation and the requirements.

This article is not intended to focus on the recommendation and solution; instead, it is more focused on analyzing some existing provisions of copyright law, especially the fair use doctrine in Bangladesh. However, analysis and discussion are the starting point of every change. This article concludes with the expectation of change or modification, which required harmonizing with the latest technological innovation and digitalization.

The Idea of the Doctrine of Fair Use

Fair use or fair dealing is a judicially created doctrine that is generally treated as an exception to the infringement of copyright.³ In simple language, this is a doctrine that allows someone other than the copyright holder to reproduce or use a copyrighted material according to some conditions without taking any sort of permission. Under copyright law, there are three types of traditions in determining exceptions and limitations of copyright infringement, which is eventually the doctrine of fair use. The first one is relatively narrow and comprehensive, followed by civil law countries, the second one is a somewhat broader and more flexible doctrine of 'fair dealing' limitations followed by most of the common law countries, and the third one is sufficient broader and highly flexible doctrine of 'fair use' that applied solely in the United States (hereinafter 'US'); however, this has now reached to the common law world also.⁴

³ Marshall A. Leaffer, *Understanding copyright law* (17th edn, Carolina Academic Press 2019).

⁴ Paul Goldstein and P. Bernt Hugenholtz, *International copyright: principles, law, and practice* (4th edn, Oxford University Press 2019).

The court first recognized this doctrine as ‘fair abridgment’, which was not long after the conception of the ‘copyright’ by the Statute of Anne 1709.⁵ However, the term ‘fair abridgment’ later transformed with ‘fair use’ or ‘fair dealing’. How to approach a question of fair use first articulated in the case of *Folsom v Marsh* [1841], where Justice Joseph Story put forward the criteria to be assessed in deciding any question concerning fair use,

“The value of the original is sensibly diminished, or the labors of the original author are substantially to an injurious extent appropriated by another. [. . .] In short, we must often... look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work....”⁶

This judgment influences even British judges, and in the case of *Scott v Stanford* [1867], the court quoted Justice Story’s famous formulation.⁷ A study of the judgment made by Justice Joseph Story could help to identify three features for finding out fair use. First is the ‘nature’ of the copyright infringement, second is the ‘quantity and value’ of the appropriation, and third is ‘the degree in which the exercise may cause harm to the marketing of the copyrighted work’.⁸

These features identified by Justice Joseph Story are reflected on the legislation named Copyright Act of 1976 of US as Congress codified the fair use with Story’s standard in the Act.⁹ This concept was codified far before in the United Kingdom (hereinafter ‘UK’) than in the US. The UK named this concept ‘fair dealing’, and it was embodied in the 1911 UK Copyright Act in brief and then elucidated further entirely in the 1956 Copyright Act.¹⁰

It is significant to note since this article is focused upon some particular issue, as far as a country’s education area is matters, the doctrine of fair use indisputably makes it reasonable and logical for an educator to cite a small passage to demonstrate or elucidate someone’s interpretation. Furthermore, when an educator uses copyrighted material or works for educational purposes, that generally would not be considered an infringement of doctrine fair use. Even if an educator does the photocopy of copyrighted material with the intention of conducting a class, then it is reasonable under the doctrine.

⁵*Gyles v Wilcox* [1740] 26 ER 489.

⁶*Folsom v Marsh* [1841] 9 F. Cas. 342

⁷*Scott v Stanford* [1867] L.R. 3 Eq. 718, 722

⁸Sohui Lee, ‘Fair Use and the Vulnerability of Criticism on the Internet’ in Steve Westbrook (ed), *Composition and copyright: perspectives on teaching, text-making, and fair use* (State University of New York Press 2009).

⁹Marshall A. Leaffer (n 3)

¹⁰Lynette Owen, ‘Fair dealing: a concept in UK copyright law’ (2015) 28(3) *Learned Publishing* 229.

Connection Between International Treaties and Fair Use

The doctrine of fair use is generally treated as the exception in copyright law.¹¹ Important international treaties concerning copyright law enshrined the doctrine of fair use in their provisions. Though, ‘Berne Convention for the Protection of Literary and Artistic Works’ (hereinafter, ‘Berne Convention’) does not explicitly mention the term ‘fair use’ or ‘fair dealing’. However, ‘fair use’ could be interpreted through the three-step test of this convention, and there is an acceptable scope of exceptions in the domestic law under article 9(2) of Berne Convention (Paris Text), which states,

“It shall be a matter for legislation in the countries of the Union to permit the reproduction of [literary and artistic] works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.”¹²

‘Agreement on Trade-Related Aspects of Intellectual Property Rights’ (hereinafter, ‘TRIPS agreement’) which was incorporated by the ‘World Trade Organization’ (hereinafter, ‘WTO’), also preserved the doctrine of fair use in article 13,

“Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.”¹³

It is well established that the TRIPS agreement first and foremost serves the benefits of the holders or owners of intellectual property rights. Therefore the TRIPS agreement is quite restrictive in nature, as it demands that the member countries should apply the exceptions such as fair use or fair dealing in a restrictive way.¹⁴

How Does Bangladesh’s Copyright Law Deal With Fair Use?

As mentioned above, the doctrine of fair use or fair dealing is generally considered as the exception of copyright infringement. Moreover, exceptions of copyright infringement, i.e., fair use, are enacted and understood differently in all countries by their domestic laws. In Bangladesh, a set of exceptions to copyright infringement are cited in section 72 of the Copyright Act, 2000. This section of fair use makes it more certain that, which kind of usage is to be considered as ‘fair’ in the eyes of the copyright law, the reasons need to fall within the statutorily recognized functions including criticism or review, private use including research, reporting current events.¹⁵

¹¹ Ayush Sharma, ‘Indian Perspective of Fair Dealing Under Copyright Law: Lex Lata or Lex Ferenda?’ (2009) 14 Journal of Intellectual Property Rights 523

¹² Berne Convention for the Protection of Literary and Artistic Works (adopted 9 September 1886, entered into force 5 December 1887) art 9 (2)

¹³ Agreement on Trade Related Aspects of Intellectual Property Rights (adopted 15 April 1994, entered into force 1 January 1995) art 13

¹⁴ Paul Goldstein and P. Bernt Hugenholtz (n 4)

¹⁵ Copyright Act 2000, s 72.

It is essential to mention that the Copyright Act of Bangladesh does not define or provide any definition of the term "fair use". However, in this sub-continent, especially Indian court profoundly follow the definition given by Lord Denning in an English case of *Hubbard v Vosper*, and he defined 'fair dealing' as,

"It is impossible to define what is "fair dealing". It must be a question of degree. You must first consider the number and extent of the quotations and extracts.... then you must consider the use made of them....Next, you must consider the proportions...other considerations may come into mind also. But, after all is said and done, it is a matter of impression."¹⁶

A good study on the copyright laws of Bangladesh linked to 'fair use' will make it believe that it should be considered as a rigid and conventional provision since it offers a comprehensive list. Moreover, this list makes the scope narrow; indicating that any use falling out of this exhaustive list could be measured as a copyright infringement.

COVID-19 Situation and Doctrine of Fair Use

The COVID-19 pandemic and the consequential lockdowns all over the world have utterly twisted the everyday lives of the people upside down. UNICEF press release confirms that worldwide because of continuous lockdowns and considering the risk, schools, colleges, universities, libraries, and other educational institutions have closed by order of the government.¹⁷ Most of these institutions shift their in-person classes to the online system.

This kind of online class system is not new for the countries that are economically well established, and usually, everyone called them first-world countries. On the other hand, countries with limited resources like Bangladesh struggle to implement an effective online education system.¹⁸ Despite the limited resources, educational institutions of Bangladesh are trying to continue their schooling online all over the country.¹⁹

The pandemic situation around the world forced the education system to begin social distancing and conduct online classes, which are currently treated as norms. The objective behind the online class system is the continuity of acquiring skills and knowledge.²⁰ Nevertheless, it is also true that there are some points of distinction between the in-person class and online class. One of the primary issues is the communication concern. In online classes, there are ways to interact with

¹⁶*Hubbard v Vosper* [1972] 1 All ER 1023.

¹⁷UNICEF Press Release, 'COVID-19: Schools for more than 168 million children globally have been completely closed for almost a full year, says UNICEF' (2 March 2021) <<https://www.unicef.org/press-releases/schools-more-168-million-children-globally-have-been-completely-closed>> accessed 3 June 2021.

¹⁸Nilima Jahan, 'The inequalities in online education' *The Daily Star* (Dhaka, 9 January 2021) <<https://www.thedailystar.net/city/news/the-inequalities-online-education-2024677>> accessed 2 June 2021.

¹⁹Nehreen Majed, G. R. Ahmed Jamal and M. R. Kabir, 'Online Education: Bangladesh Perspective, Challenges and Way Forward' *The Daily Star* (Dhaka, 28 July 2020) <<https://www.thedailystar.net/online/news/online-education-bangladesh-perspective-challenges-and-way-forward-1937625>> accessed 2 June 2021.

²⁰ ibid

other classmates or students as well as teachers. There is no doubt that communication is a primary aspect of gaining knowledge and skills. This communication happens through e-mail, learning management software, social media, and online chat in the online education system.²¹

Another critical point of distinction is the learning approach. The students receive knowledge and skills practically from teachers, and it is a teacher-centric approach in the traditional or in-person class. However, in the online class, teachers motivate or guide students for learning and achieving team activities; therefore, it is a student-centric approach.²²

Nevertheless, with the swift migration of offline content to the online system, some crucial questions have occurred concerning the function of fair use, as the classroom books and other materials that are now being shared and distributed through virtual platforms. There is no doubt that among the numerous logistical and hi-tech considerations associated with this migration to online education systems, there are some significant issues regarding the legality of demonstrating copyrighted materials in online classrooms.²³

The utilization of copyrighted work for teaching and research reasons usually attracts one of copyright law's fundamental doctrines, named the doctrine of fair use. As it has been known and mentioned above, this doctrine permits the use of others' copyrighted work as an exception of copyright infringement. In the absence of this doctrine, it possibly will count as an infringement of copyright.

This article will try to scrutinize the situation of Bangladeshi law on the copyright questions significantly the scope of educational fair use that has occurred in the wake of the virtual education system. At this moment, several issues have arisen regarding the online education system along with the fair use doctrine; which are:

- (a) The educational institution could be the beneficiary of the doctrine of fair use, which is well established in the world, even in Bangladesh, now as the whole world is in a pandemic situation and educational institutions are using the online platforms for teaching. Then, does fair use extend to the online education system to protect the teachers-students from copyright infringement?
- (b) Educators or teachers generally use copyrighted materials in their lectures. The lecture is typically recorded and uploaded to the public platform for further exercise in the online education system. Do these recorded versions of the lecture get the same protection from the fair use doctrine under Bangladesh's copyright laws?

²¹ Amber Dickinson, 'Communicating with the Online Student: The Impact of E-Mail Tone on Student Performance and Teacher Evaluations' (2017) 14 Journal of Educators Online <<https://eric.ed.gov/?id=EJ1150571>> accessed 2 June 2021.

²² Ratan Singh Solanki, 'Web based Learning: How fair is 'Fair use'?' (2019) 8(10) International Journal of Innovative Technology and Exploring Engineering 1485.

²³ *ibid*

- (c) For the students and researchers, the significance of the library cannot be explained in simple words. In this Covid-19 situation, students and researchers are helpless and suffer a lot because they cannot access the physical library. However, this country does not have a digital library facility. Suppose the library lends digital copies of the books available in the physical library for research and studies to help the students. However, will that digital sharing be under the protection of fair use?

Testing Adequacy of the Doctrine of Fair Use

Education in this pandemic is entirely conducted in a digital or online way, with the exercise of various platforms and electronic devices, such as computers, laptops, smart devices, smartphones, television, and the internet, to meet the objectives of learning.²⁴ Nevertheless, it would necessitate the support of the law.

In particular, for the complete utilization of these platforms and devices in digital or online education, the copyright law of Bangladesh must need to support not only reproduction of copyrighted materials but also in some particular tasks; for example, producing recordings of a textbook could be audio or video, adaption into an animated or graphic film, translation of the textbook exclusively for the reason of education.

Does Fair Use Under Copyright Law Apply to Online Teaching?

In the Bangladesh context, the question is whether the educational exceptions or fair use under Copyright Act, 2000 extend to the virtual/online education system. It is important to note that the language of the exceptions in the Copyright Act, 2000 does not expressly mention virtual or online education. However, it can be assumed that the applicable provision on this behalf is section 72 (8) of the same legislation as the provision provides rights to the teachers and students in aspects of reproduction or adaptation of a literary, dramatic, musical, or artistic work,

“the reproduction or adaptation of a literary, dramatic, musical or artistic work by a teacher or a pupil in the course and for the sole purpose of instruction; or as part of the questions to be answered in an examination; or in answer to such question”²⁵

The phrase ‘in the course and for the sole purpose of instruction’ has set the scope of this provision which is comprehensive and not limited to the in-person classroom process but also the entire process that includes the online system observably. Please note that section 52(1)(i) of the Copyright Act, 1957 in India is a provision analogous to section 72 (8) of the Copyright Act, 2000 in Bangladesh. In this context, in the case of *The Chancellor, Masters and Scholars of the University of Oxford and Others v Rameshwari Photocopy Services and Others* [2016], the Delhi

²⁴ Deedra Vargo, Lin Zhu, Briana Benwell and Zheng Yan, ‘Digital technology use during COVID-19 pandemic: A rapid review’ (2020) 3 Human Behavior and Emerging Technologies 13.

²⁵ Copyright Act 2000, s 72(8)

high court explained the phrase 'in the course of instruction' written in section 52(1)(i) of the Indian Copyright Act, 1957 where the court says,

“Is the phrase 'in the course of instruction', a phrasal verb or is it a phrasal noun.... The end result would be, irrespective of the word 'course' being treated as a verb or a noun, the entire process of education as in a semester or the entire programme of education as in a semester.”²⁶

Though it can be said the online teaching or class is in the ambit of this provision of copyright law (section 72(8) of Copyright Act, 2000), it is hard to articulate that the section is compatible or balanced for the online education system. Because this provision is explicitly mentioned about a literary, dramatic, musical, or artistic work, which makes this provision narrower. Because this provision could include works such as sound recording and cinematographic work, which are also momentous in the virtual or online education system.

Recorded Versions of Lecture Uploaded in a Public Platform: Will Copyright Law Allow It?

As mentioned above, Bangladesh does not have enough resources such as high-speed internet and uninterrupted connection, and this massive issue affects online education in terms of effectiveness.²⁷ However, teachers usually record their class and upload it on a virtual platform. Sometimes they upload it on a public platform for easy access of the students. As referred to earlier, teachers usually use some copyrighted materials in their lectures. With that copyrighted material, if they uploaded their lecture on a public platform, it could be a much-complicated matter under the copyright law of Bangladesh.

Section 72(7) of the Copyright Act, 2000 could provide the answer to this critical issue. Uploading recorded video of the lecture on a public platform would be considered as publication under the given definition in Copyright Act, 2000.²⁸ And section 72(7) of the same legislation allows the publication of short passages from copyrighted literary and dramatic works in a collection, which incorporates mainly non-copyright material, for the use of educational institutions,

“the publication in a collection, mainly composed of non-copyright matter, bona fide intended for the use of educational institutions and so described in the title and in any advertisement issued by or on behalf of the publisher, of short passages from published literary or dramatic works, not themselves published for the use of educational institutions, in which copyright subsists:

Provided that not more than two such passages from works by the same author are published by the same publisher during any period of five years.”²⁹

²⁶*The Chancellor, Masters and Scholars of the University of Oxford and Others vRameshwari Photocopy Services and Others* [2016] 160 DRJ (SN) 678.

²⁷ Nilima Jahan (n 18).

²⁸ Copyright Act 2000, s 3

²⁹ *ibid*, s 72(7)

One of the interesting facts of this provision is that this provision mentions limitations on the quantum of work use or reproduction. There is a key term used in this provision ‘for the use of educational institutions’ which is characteristically not defined by the Copyright Act, 2000 and could be regarded as the same as the term ‘utilization for teaching purposes’ as employed in the ‘TRIPS Agreement’, and the ‘Berne Convention’.

To interpret this term, it is needed to apply article 31(1) of the ‘Vienna Convention on the Law of Treaties’ which said, “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and the light of its object and purpose”. In ordinary sagacity, teaching prescribes ‘the imparting of knowledge’.³⁰ This meaning or explanation in no way puts any sort of limitation on where imparting of knowledge is occurring. Therefore, the meaning of teaching includes the online education system and is not possible to exclude from the scope and purpose of section 72(7) of the Copyright Act, 2000.

Lending Digital Copy of the Books by the Library: Under the Protection of Fair Use?

Making digitization and allocation of copyrighted works, especially books, has, predictably, produced debate and controversy under the copyright law. According to the Copyright Act, 2000, there is no direct provision that can explain this issue. Even this Act has not referred to anything as regards storing the non-digital copy of the work in the digital or electronic version by a library. However, in this crisis moment, if a library could able to provide digital copy of the books, then the question of copyright infringement would raise. For explaining this issue library would rely on two defences under the copyright law of Bangladesh though the first one is not related to the fair use doctrine.

First, as Copyright Act, 2000 follows the ‘doctrine of fair sale’ according to section 14; thus words of the legislation allow copies legally sold to be resold by an endorsed buyer or owner. Furthermore, this kind of resale by an authorized owner of a copy would not be considered as an infringement of copyright under the copyright law of Bangladesh. As well as, lending of physical books which are owned by the library (endorsed owner) is authorized according to this doctrine. Then why can the library not lend the digital copy of the book held by them?

In this situation, the Court of Justice of the European Union (hereinafter, ‘CJEU’) held that or permit a Dutch library in a case (*Vereniging Openbare Bibliotheken v Stichting Leenrecht*) to maintain their ‘e-book lending’ program.³¹ In the same case of *Vereniging Openbare Bibliotheken v Stichting Leenrecht* [2016], the court gave the permission with directives that includes library could provide only one authentically purchased copy to one subscribed library user. A critical notion has been established as the court held that the process of lending a digital copy of a book would maintain the same standard as the lending of a physical copy of a book.³² Nevertheless, the

³⁰ Donald E. Lomax, *European Perspectives in Teacher Education* (Wiley 1976).

³¹ C-174/15 *Vereniging Openbare Bibliotheken v Stichting Leenrecht* ECLI:EU:C:2016:856.

³² *ibid*.

court took this decision from the perspective of specific legislation commenced in the European Union, the ‘Rental and Lending Directive’.

However, in the case of *Capitol Records, LLC v ReDigi, Inc.* [2013], the Second Circuit Court of Appeals discarded the digital-first sale concept. In the judgment, the court held that a music store through an online/virtual service could not make resale digital music equivalent to the physical store used to resale the music albums. The court said the reason behind this is that such type of resale engages illegally reproducing copyrighted works.³³

Second, the fair use provision could play a role here as a defence. Libraries create the digital versions of their physical books, and sharing those e-books with their students and teachers constitutes ‘private or personal use, for research’. Moreover, this is free from infringement of copyright under section 72(1)(i) of the Copyright Act, 2000. Canadian Supreme Court conferred a predominantly broad interpretation of that country’s ‘private study and research’ exception in the case of *CCH Canadian Ltd. v Law Society of Upper Canada* [2004]. In that case, the Supreme Court articulated that that fair dealing or use is not merely an exception of copyright law but a user right,

“Procedurally, a defendant is required to prove that his or her dealing with a work has been fair; however, the fair dealing exception is perhaps more properly understood as an integral part of the Copyright Act than simply a defence. Any act falling within the fair dealing exception will not be an infringement of copyright. The fair dealing exception, like other exceptions in the Copyright Act, is a user’s right. In order to maintain the proper balance between the rights of a copyright owner and users’ interests, it must not be interpreted restrictively.”³⁴

Intellectual property scholar Professor Maurizio Borghi has given his observation on the judgment and said, “It must be construed as a right, in turn, namely a users’ right which is balanced against the rights of the copyright owner.”³⁵

Conclusion

With the massive amount of death, the whole world is suffering and searching for a cure for the COVID-19 pandemic. Thus, it is distrustful that the questions of copyright law are maintainable as a priority concern. Regardless of this vulnerable situation, since the online education process has started, the darker side of this learning platform may not be overlooked. This online education system is not free from challenges due to some difficulties in both the planning and execution of the online learning atmospheres.

³³ *Capitol Records, LLC v ReDigi, Inc.* [2013] 934 F. Supp. 2d 640.

³⁴ *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339.

³⁵ Maurizio Borghi, ‘Exceptions as users’ rights?’ in Eleonora Rosati (ed), *The Routledge Handbook of EU Copyright* (1st edn, Routledge 2021).

However, this pandemic has helped legal researchers and lawyers to think advanced regarding copyright law as the migration to the online education system, and the requirement of planning within the copyright laws of Bangladesh. After analysing the fair use provisions of the Copyright Act of Bangladesh, it can be carefully said that existing provisions are not only inadequate to take care of the expectations of online education or distance learning program. Hence, most of the countries are now leaning towards flexible fair use doctrine in the course of amendments and judicial interpretation.³⁶ Accordingly, Bangladesh should consider shifting towards factor-based fair use provision, making the domestic copyright regime more comprehensive and flexible. This modification or migration has to be completed very scrupulously without a legislative incongruity.

³⁶ Jonathan Band and Jonathan Gerafi, *The Fair Use/Fair Dealing Handbook* (2013) available at <<http://infojustice.org/wp-content/uploads/2013/03/band-and-gerafi-2013.pdf>> accessed 2 June 2021.

IMPACT OF COVID-19 ON THE RIGHT TO FOOD OF SOUTH ASIAN PEOPLE AND THE ROLE OF REGIONAL ORGANIZATION LIKE SAARC FOR REGIONAL FOOD SECURITY

Miss Padma Rijal*

Abstract

The COVID-19 pandemic, a global health emergency threatening the right to health of people has multifaceted impacts on other human rights as well. This unprecedented event has crippled our food system thereby affecting the right to food of South Asian people. Supply chain disruptions, loss of income, degrading nutrition, unaffordable food prices, unemployment, missed school meals, etc. have a long-term impact on regional food security. All the four pillars of food security namely availability, access, utilisation, and stability have been weakened. Amid this situation, South Asian Association for Regional Cooperation (SAARC) has been organising virtual meetings with a willingness to stand together in solidarity and also to create the emergency fund. This article advocates the need for regional cooperation for resilience and sustainable recovery by making use of mechanisms like SAARC Food Bank, Seed Bank, Agriculture Center to ensure the right to food of South Asian people and address the existing challenges.

Keywords: *The right to food, food security, COVID-19, South Asia, regional cooperation, SAARC, recovery, food system.*

Introduction

The legal discourse of the right to food extends from survival to dignified life. The effects of the COVID-19 pandemic on right to food of people have made everyone feel the loss of dignity because we are losing control and power over fundamental aspects of survival. The immediate and roundabout effects of this continuous pandemic have grabbed away the meals of the most vulnerable. Our key to survival is beyond our affordability and actual physical reach. This paper highlights the impact of the COVID -19 pandemic on one of the fundamental human rights i.e. the right to food. The far-reaching consequences of global recession, loss of income, intensified malnutrition caused by this pandemic have sabotaged the already crippled situation of South Asia. Since all human rights are interdependent, the right to food has been affected by compromise on other rights such as the right to health, education, employment, etc. South Asian countries need to address the bigger problems of poverty alleviation, agrarian reform, rural revitalization, gaping the inequalities, social protection schemes for the vulnerable, retaining the migrant workers, and mobilizing them in agriculture inter alia to ensure the right to food. Admitting the significance of regional cooperation for the common problem of threat to regional security (food security), this article recommends that the existing diplomatic and institutional capital that is created by the regional organization such as SAARC (South Asian Association for Regional Cooperation) should be mobilized.

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Regional cooperation regarding regional food and nutritional security, agriculture research centre, sharing of seeds, food bank which is already in place should be taken advantage of. However, there are some challenges. Respect, protection, and fulfilment of the right to food will have a ripple effect on the resolution of the aforementioned bigger problems as well. Well-nourished people are the key to prosperity and development.

Our quantitative and qualitative knowledge on the actual impact of the pandemic on the right to food and various dimensions of food security is poor because of lockdowns and immobility. The actual impact of the pandemic on food is yet to take a definitive shape on various dimensions, as lockdowns and immobility are persistent. Nevertheless, we can rely on reports and estimations published regularly by international organizations. The qualitative analysis research methodology is used by using secondary sources of data.

Right to Food and Food Security

The right to food is not limited to freedom from hunger and fulfilment of minimum calories. It also refers to the need of a person to have stable physical and economic access to nutritional, safe, and quality food to live a dignified life. ICESCR 1976 is one of the main binding international legal instruments that provide the right to food is. Article 11 of this convention provisions for obligations of state parties regarding the Right to Food.

Furthermore, the concept of the right to food has been expanded by the Committee on ESCR through a liberal interpretation in general comment number 12 on article 11.¹ It has included availability of food as well as physical and economic access, to satisfy the dietary needs as the extension of the concept of the right to food.

United Nations' Committee on World Food Security also agrees that adequate, stable physical, social and economic access to food refers to food security for an active and healthy lifestyle.

Therefore, food availability, access, adequacy, and stability are the generally accepted prerequisites of food security. As it is acknowledged by the interpretation of the committee, hence there is no doubt that food security encompasses the concept of food-related rights. However, if any of those prerequisites are compromised it will obstruct the realization of all sorts of rights related to food.

Repercussions of the Pandemic Upon All the Prerequisites

Repercussions on Availability

Food availability is ensured when there is a sufficient quantity of high-quality food. Needless to say that it depends on domestic production, import, food assistance, emergency reserves, etc.

¹ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant)*, 12 May 1999, E/C.12/1999/5<<https://www.refworld.org/docid/4538838c11.html>> accessed 20 May 2021.

Disruptions to the food supply in the wake of lockdown measures have affected the availability. Restaurants and other foodservice facilities are closing down in a manner that has affected the demand for certain perishable foods, including dairy products, potatoes, and fresh fruits. There were widespread media reports of food items being dumped into the fields because of either collapsed demand or lack of access to markets.²

Labour-intensive food production systems reliant on migrant farmworkers had cramped conditions in food production facilities, some of which had to close temporarily to control outbreaks.³ Labour shortages due to the COVID-19 crisis have caused a severe impact on labour-intensive sectors thus affecting food production. Lockdowns, immobility, and trade disruptions have affected the availability in import-dependent countries.

Repercussions on Access

Access necessarily does not only mean physical reach but it also means the economic and social capacity of people to have access to the available food. Market and trade affect physical access, price fluctuation and income affects affordability while inequalities in distribution can affect social access to food.

Disruptions on all stages of the food chain have impeded physical access to food on the backdrop of lockdowns. Panic buying and hoarding of food have increased the price of food subsequently affecting the disposable income and accessibility of consumers.

According to the World Bank, the COVID-19 pandemic triggered a global economic recession which has resulted in a dramatic loss of livelihoods and income on a global scale. Global remittances, a major source of income in developing countries, are expected to fall by around 20 per cent. An additional 71 to 100 million people are likely to fall into extreme poverty as a consequence of the pandemic by the end of 2020.⁴ As a result of the slow recovery, 2021 is expected to see a continued loss of working hours worldwide in comparison to the last quarter of 2019, estimated at approximately – 3 per cent (equivalent to 90 million jobs).⁵

The unexpected reduction of income has had repercussions on different aspects of households' food security and nutrition. The resulting decline in purchasing power among those who lost their jobs has had a significant impact on food security and nutrition, particularly for the already vulnerable segments of society, notably migrant workers and women.

² Michael Corkery and David Yaffe-Bellany, 'Dumped Milk, Smashed Eggs, Plowed Vegetables: The Food Waste of the Pandemic' *New York Times*, (April 11 2020) <<https://www.nytimes.com/2020/04/11/business/coronavirus-destroying-food.html>> accessed 3 June 2021.

³ Ella Haley and others, 'Migrant Farmworkers Face Heightened Vulnerabilities During COVID-19' (2020) 9(3), 35-39 *Journal of Agriculture, Food Systems, and Community Development* <<https://doi.org/10.5304/jafscd.2020.093.016>> accessed 15 May 2021.

⁴ World Bank, *Global Economic Prospects, June 2020a* (Washington, DC, World Bank 2020) <<https://www.worldbank.org/en/publication/global-economicprospects#overview>> accessed 29 May 2021.

⁵ International Labour Organization (ILO), *ILO Monitor: COVID-19 and the world of work. No. 7* (Geneva, ILO 2021) <https://www.ilo.org/global/topics/coronavirus/impacts-and-responses/WCMS_767028/lang-en/index.htm> accessed 29 May 2021.

Many food system workers are working in precarious and dangerous conditions, which have been exacerbated by the COVID-19 crisis. These workers are mostly underpaid and lack protective equipment.⁶ and in some regions, such as in sub-Saharan Africa, South and South-East Asia, and some countries in Latin America, the majority work under informal arrangements.⁷ Many countries rely on migrant workers in agriculture, many of whom work under casual employment arrangements with few rights and are vulnerable to exploitation.⁸

As such, migrant labourers are the vulnerable section of society whose right to food is compromised and frequently face poverty and food insecurity as well as have little access to healthcare and social safety nets.

As reported by FAO, the agricultural activities of rural women have been affected as well.⁹ This gender dimension is significant because women who are responsible to care sick ones are more likely to be exposed to various risks, which has implications for food production, processing, nutrition, and trade.¹⁰ The social status and gender role of women have affected their social and economic access to food. Thus, COVID-19 has affected access to food on all levels.

Repercussions on Utilization

The need for nutritional fulfilment depends on the actual consumption pattern. Factors like, nutrition education, food safety, sanitation, clean drinking water affects the utilization of accessed food.

The pandemic has significantly changed the utilization pattern which has affected food diversity and nutrition. Studies guesstimate that as a direct result of the pandemic, poor households are likely to compromise their spending patterns, less nutritious food will replace the fresh fruits and vegetables with high micronutrient content.¹¹ As a result, the tendency to consume processed unhealthy food has increased. Nonetheless, people are now enthusiastic about in-home and community gardening for growing their food which is even more healthy, organic, and nutritious.¹² These changes to food environments had variable impacts on food diversity and the nutrition aspect of utilization.

⁶ Susanna Klassena and Sophia Murphy, 'Equity as Both a Means and an End: Lessons for Resilient Food Systems from COVID-19' (2020), 136: 105104, World Development <<https://www.sciencedirect.com/science/article/abs/pii/S0305750X2030231X?via%3Dihub>> accessed 30 May 2021.

⁷ ILO, *ILO Monitor* (n 5).

⁸ Food and Agriculture Organization (FAO), *Migrant Workers and the COVID-19 Pandemic* (2020a Rome, FAO 2020) <<http://www.fao.org/3/ca8559en/CA8559EN.pdf>> accessed 20 May 2021.

⁹ Food and Agriculture Organization of the United Nations (FAO), *Gendered impacts of COVID-19 and equitable policy responses in agriculture, food security and nutrition. Policy brief* (2020b, FAO, Rome 2020)

<<http://www.fao.org/policy-support/toolsand-publications/resources-details/en/c/1276740/>> accessed 15 May 2021.

¹⁰ William G. Moseley, 'The Geography of COVID-19 and a Vulnerable Global Food System' *World Politics Review* <<http://www.worldpoliticsreview.com/articles/28754/the-geography-of-Covid-19-and-avulnerable-global-food-system>> accessed 20 May 2021

¹¹ David Laborde and others, 'COVID-19 Risks to Global Food Security' (2020), 369(6503) *Science* <<https://science.sciencemag.org/content/369/6503/500>> accessed 26 May 2021

¹² Rattan Lal, 'Home gardening and urban agriculture for advancing food and nutritional security in response to the COVID-19 pandemic' (2020) 12(871–876) *Food Security* <<https://doi.org/10.1007/s12571-020-01058-3>> accessed 15 May 2021

The nutrition community predicts that the risk of all forms of malnutrition will be rising in near future.¹³ However, primary data are not yet available. Based on macro and micro level simulations, some studies predict that due to projected losses in gross domestic income per capita there will be a significant increase in the prevalence of malnutrition among children under the age of five¹⁴. If these projections are correct, an additional 6.7 million children will be malnourished in 2020, compared to projections for 2020 without Covid-19.¹⁵

Repercussions on Stability

The stability of the food system is ensured when all three pillars are reliable, stable and consistent even at times of political changes, economic recession, disasters, and pandemics. The ongoing pandemic has shaken the architect of our food system by weakening all the pillars of food security.

The Situation in South Asia

“In the rich world, the impact of COVID-19 is not famine but inconvenience” (The Economist, May 9, 2020).

Low and Middle-Income Countries (LMICs) of the global south are facing significant impact on their right to food than the higher income countries because a large majority of households affected were already living just above the poverty line, many of them lacked a sufficient financial cushion or personal savings to protect or maintain their food security, and their governments do not necessarily have financial resources as well as the preparedness to provide social security schemes targeting the right to food.¹⁶

South Asia is home to over 1.8 billion people, with one in ten living below the international poverty line of \$1.90 per day and accounting for one-third of the world's income poor.¹⁷ The region has also been struggling with poor healthcare, educational infrastructure, and social welfare schemes.

The Joint Child Malnutrition Estimates of 2021 by UNICEF, WHO, and World Bank group based on data collected before the pandemic shows that most children with malnutrition live in Africa and Asia. According to the report in 2020, almost 53% of Asian children (under the age of five) were stunted. The pandemic is also expected to exacerbate all forms of malnutrition due to declines in household wealth, constraints in the availability and affordability of nutritious food,

¹³ Food Security Information Network (FSIN) and Global Network Against Food Crises (GNAFS), *Global Report on Food Crises 2020 September update: in times of COVID-19* (Rome 2020) <https://www.fsinplatform.org/sites/default/files/resources/files/GRFC2020_September%20Update_0.pdf> accessed 18 May 2021.

¹⁴ Derek D. Headey and Marie T. Ruel, *The impact of economic recessions on child acute malnutrition: implications for the COVID-19 crisis, IFPRI discussion paper 01941*, (Washington, DC: International Food Policy Research Institute 2020) <https://www.ifpri.org/publication/economic-shocks-and-child-wasting> accessed 18 May 2021.

¹⁵ Derek Headey and others, ‘Impacts of COVID-19 on childhood malnutrition and nutrition-related mortality’ (2020) 396 (10250) *The Lancet* <[https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(20\)31647-0/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)31647-0/fulltext)> accessed 16 May 2021.

¹⁶ Christophe Béné, Deborah Bakker, Mónica Juliana Chavarro, Brice Even, Jenny Melo, and Anne Sonneveld, *Impacts of COVID-19 on People's Food Security: Foundations for a more Resilient Food System* (CGIAR COVID-19 Hub, Research Program on Agriculture for Nutrition And Health 2021) 35. <<https://ebrary.ifpri.org/digital/collection/p15738coll2/id/134295>> accessed 30 May 2021.

¹⁷ World Bank Blog, <<https://blogs.worldbank.org/opendata/monitoring-poverty-us320-and-us550-lines-differences-and-similarities-extreme-poverty>> accessed 1 June 2021.

disruptions in essential nutrition services, and limited opportunities for physical activity, according to the report.¹⁸ At the start of the crisis, an estimated 10.5 million Asian children under the age of five were malnourished, 78 million were stunted, and 17 million were overweight, and 400 million women were anaemic.

Most of the South Asian countries (especially SAARC countries) were already far from achieving zero hunger (Goal 2 of SDGs) which is worsening. The Covid-19 pandemic has exposed the vulnerability of existing food systems, with the effects of disruptions being disproportionately felt by the most vulnerable.¹⁹ In March 2021, UNICEF, UNFPA, and WHO²⁰ published data that shows the rise in food insecurity of South Asia the reason behind it seems to be poverty and job losses.

Similarly, the way schools are closing worldwide closure will have a negative impact.²¹ April 2020 was pointed out as the peak time for school closure when 369 million children from 199 countries were deprived of school meals. As of today (May 31, 2021) 154 million children from 79 countries with school closure are missing their school meals.²²

FAO estimates that the number of undernourished people in the world could rise by 132 million if global GDP falls by 10% as a result of the economic recession caused by Covid-19.²³ According to the World Food Program, by the end of 2020, the number of people in Asia and the Pacific experiencing acute food insecurity will nearly double to 265 million. According to the estimates, there are an additional 6.7 million children with wasting in the world, with an estimated 57.6 per cent of these children living in Southern Asia. Inaction in response to Covid-19 will have far-reaching consequences for early life nutrition, with potential intergenerational consequences for child growth and development, life-long effects on education, chronic disease risks, and overall

¹⁸ United Nations Children's Emergency Fund (UNICEF), World Health Organization (WHO), The World Bank Group, *Joint child malnutrition estimates: levels and trends in child malnutrition: key findings of the 2021 edition* (2021) <<https://www.who.int/publications/i/item/9789240025257>> accessed 25th May 2021.

¹⁹ FAO, High-Level Panel of Experts on Food Security and nutrition (HLPE), *Impact of COVID-19 on Food Security and Nutrition (FSN)* (Rome 2020) <http://www.fao.org/fileadmin/templates/cfs/Docs/1920/Chair/HLPE_English.pdf> accessed 23 May 2021.

²⁰ United Nations Children's Emergency Fund (UNICEF), United Nations Population Fund (UNFPA), World Health Organization (WHO), *Direct and indirect effects of the COVID-19 pandemic and response in South Asia*, (Full report version 2021) 30 <<https://www.unicef.org/rosa/media/13066/file/Main%20Report.pdf>> accessed 25 May 2021.

²¹ Food and Agriculture Organization (FAO), United Nations Children's Emergency Fund (UNICEF), World Food Programme (WFP), *Mitigating the effects of the COVID-19 pandemic on food and nutrition of schoolchildren* (March 2020) <<http://www.fao.org/documents/card/en/c/ca8434en>> accessed 25th May 2021.

²² World Food Programme (WFP), 'Global Monitoring of School Meals During COVID-19 School Closures' <https://cdn.wfp.org/2020/school-feedingmap/?_ga=2.63572263.982488836.15913735471890028486.1585930400> accessed 31 May 2021.

²³ Food and Agriculture Organization (FAO), International Fund for Agricultural Development (IFAD), United Nations Children's Emergency Fund (UNICEF), World Food Programme (WFP) & World Health Organization (WHO), *The State of Food Security and Nutrition in the World 2020: Transforming food systems for affordable healthy diets* (Rome 2020) <<https://doi.org/10.4060/ca9692en>> accessed 19 May 2021.

human development.²⁴ Agricultural workers had the highest incidence of working poverty and food insecurity even before Covid-19; the pandemic has exacerbated their situation.²⁵

Conflict, refugees, economic shocks, weather extremes, desert locust attacks, and other factors have already harmed food security in South Asian countries. The main drivers of food insecurity in the Asia-Pacific region are the socioeconomic consequences of COVID-19-related measures, conflict, extreme weather events, and natural disasters.

In Afghanistan, additional 2.2 million people were categorized under critical levels of acute food insecurity within a year, resulting in 5.5 million expected to be in Emergency (IPC Phase 4) as of March 2021. Escalating conflict, a weak economic environment, and dry conditions for key harvests are expected to continue increasing food insecurity and reducing access to humanitarian aid.²⁶ Armed conflict and economic recession, including unemployment are probably going to be the probable cause of food uncertainty in Afghanistan, with the impact of COVID-19 related restrictions as an intensifying variable.

In 2020, approximately 1.2 million people were food insecure. Over 70 per cent of them were Rohingya refugees and the remainder were members of the Bangladeshi host community in Cox's Bazar, Bangladesh.²⁷ In Ukhiya and Teknaf Upazilas in Cox's Bazar around 889 400 Rohingya refugees are living in 34 extremely congested camps and continued depending entirely on food assistance. (JRP, November 2020²⁸).

In March 2020 (pre- COVID-19 time) more than 1.2 million people in Pakistan's Merged Areas of Khyber Pakhtunkhwa bordering Afghanistan were in Crisis or worse (IPC Phase 3 or above)²⁹.

While the climate crisis rages on, biodiversity in food and agriculture is dwindling as the global diet becomes increasingly homogenized around a small number of crops, including a marked shift toward heavily processed foods.³⁰ There may be a shift toward non-diversified diets and a decrease in nutritious food. Market disruption may also compel people to eat less nutritious,

²⁴ Food and Agriculture Organization (FAO), United Nations Children's Emergency Fund (UNICEF), World Food Programme (WFP) and World Health Organization (WHO), *Asia and the Pacific Regional Overview of Food Security and Nutrition 2020*, (Bangkok, Thailand 2021) <<http://www.fao.org/documents/card/en/c/cb2895en/>> accessed May 26, 2021.

²⁵ International Labour Organization (ILO), *COVID-19 and the impact on agriculture and food security*, (ILO Sectoral Brief, 17 April 2020) <https://www.ilo.org/sector/Resources/publications/WCMS_742023/lang--en/index.htm> accessed 18 May 2021.

²⁶ World Food Programme (WFP) and Food and Agriculture Organization (FAO), *Hunger Hotspots. FAO-WFP early warnings on acute food insecurity: March to July 2021 outlook* (2021 Rome) 13.

²⁷ United Nations High Commissioner for Refugees (UNHCR), *2021 Joint Response Plan, Rohingya Humanitarian Crisis*, (Bangladesh, 18 May 2021) 20 <<https://reporting.unhcr.org/sites/default/files/2021%20JRP.pdf>> accessed 2 June 2021.

²⁸ Inter Sector Coordination Group – Bangladesh, 'Situation Report Rohingya Refugee Crisis -Cox's Bazar' (ISCG Situation Report November 2020)<<https://www.humanitarianresponse.info/en/operations/bangladesh/document/situation-report-rohingya-crisis-coxs-bazar-november-2020>> accessed 15 May 2021.

²⁹ Food Security Information Network (FSIN) and Global Network Against Food Crises, *Global Report on Food Crises 2021* (Rome 5 May 2021) 84.

³⁰ Julie Bélanger and Dafydd Pilling, *The State of the World's Biodiversity for Food and Agriculture* (Rome, FAO Commission on Genetic Resources for Food and Agriculture, 2019).

highly processed, and convenient foods.³¹ Trade restrictions and immobility are threatening the regular supply of high-value perishable commodities, like fruits and vegetables, meat, fish, and dairy in import-dependent landlocked countries like Nepal and Bhutan.

Though the data paints a bleak picture of South Asia's right to food situation, there is still hope for harnessing the synergy of existing regional organizations such as SAARC for resilience and long-term recovery.

Opportunities in SAARC Mechanisms

Cooperation in Agriculture among the South Asian countries predates the establishment of SAARC. The Study Group on Agriculture first began in 1981 which later came to be known as Technical Committee on Agriculture. Technical Committee Agriculture and Rural Development (TCARD) was formed in 2001 which finalized the works related to the establishment of SAARC Food Bank and Regional Seed Bank.

The Thimphu Statement on Agriculture and Rural Development 2019 was adopted to enhance food, nutrition, and livelihood security. The meeting agreed to, among others, promote multi-sectoral approaches to attain a higher level of food safety and nutrition security; promote climate-resilient agricultural strategies and technologies; expand agro-processing and building competitive agricultural value chains; facilitate gender mainstreaming and attracting youth and women to agriculture; intensify agricultural research, development, and innovation through higher public investment and public-private partnership; and adopt appropriate measures for addressing the issues related to transboundary animal diseases.³²

Recent Meetings of SAARC

The Leaders of the Member States of the SAARC held a Video Conference on 15 March 2020 to discuss measures to contain the spread of COVID-19 in the region. The Prime Minister of India also proposed the creation of a COVID-19 Emergency Fund with voluntary contributions from all Member States and pledged an amount of US \$10 million as an initial contribution from India. They also recognized the need to analyze and address the long-term economic consequences of the COVID-19 pandemic in the region.³³

SAARC Health Ministers' Video Conference to address the COVID-19 pandemic was held on 23 April 2020. As a follow-up to the Conference of the SAARC Leaders, meetings of Health Professionals and Trade Officials of the SAARC countries have also been held.³⁴

³¹ Food and Agriculture Organization (FAO), United Nations Children's Emergency Fund (UNICEF), World Health Organization (WHO), *Joint statement on nutrition in the context of the COVID-19 pandemic in Asia and the Pacific*, (2020) <<https://www.unicef.org/rosa/press-releases/joint-statement-nutrition-context-Covid-19-pandemic-asia-and-pacific>> accessed 25th May 2021.

³² <<https://www.saarc-sec.org/index.php/areas-of-cooperation/agriculture-rural-development>> accessed 14 May 2021.

³³ <<https://www.saarc-sec.org/index.php/press-release/283-pres-release-the-leaders-of-the-member-states-of-the-south-asian-association-for-regional-cooperation-saarc-held-a-video-conference-on-15-march-2020-to-discuss-measures-to-contain-the-spread-of-Covid-19-in-the-region>> accessed 14 May 2021.

³⁴ <<https://www.saarc-sec.org/index.php/press-release/284-press-release-saarc-health-ministers-video-conference-to-address-the-Covid-19-pandemic-23-april-2020>> accessed 14 May 2021.

In November 2020, the SAARC Planning Ministers held their first virtual meeting. Revitalization of regional approaches to achieve the SDGs, particularly in the areas of poverty, food security, hunger, health, education, inequality, and financing were agreed upon.³⁵

The SAARC Food Bank

The Agreement establishing the SAARC Food Bank, which was signed during the Fourteenth SAARC Summit (New Delhi, 3-4 April 2007), entered into force on 7 January 2013.

The Food Bank's objectives are to serve as a regional food security reserve for SAARC Member Countries during normal and emergency food shortages; to provide regional support to national food security efforts; to foster inter-country partnerships and regional integration, and to solve regional food shortages through collective action. Food Bank Board has decided to update operational modalities and the quantum of the food grains has also been doubled.³⁶

As of late, in May 2020, to manage the episode of the COVID-19 circumstance, Bhutan finished drawing food grains from the SAARC Food Bank Reserve maintained by India. This is the first time the reserved food grains stored under the SAARC Food Bank Reserve have been used since its foundation and this prompted the operationalization of the institution. SAARC Food Bank Information System (SFBIS) has been updated on the SAARC Agriculture Centre (SAC)'s website. Also "A Guide to the SAARC Food Bank" has been published collating all relevant information and references.

The SAARC Secretariat has commissioned a study to operationalize the food bank in collaboration with the United Nations Economic and Social Commission for Asia and the Pacific (UN-ESCAP). Later, the World Food Programme (WFP) also conducted a study on the subject. The Tenth Meeting of the SAARC Food Bank Board 2019 considered the recommendations of both the UNESCAP and WFP studies for the operationalization of the Food Bank.

The SAARC Seed Bank

The SAARC Seed Bank Agreement was signed on 11 November 2011 during the Seventeenth SAARC Summit, which entered into force on 15 June 2016. The Seed Bank's objectives are to provide regional support to national seed security efforts; address regional seed shortages through collective actions and foster inter-country partnerships; promote the increase of Seed Replacement Rate (SRR) with appropriate varieties as quickly as possible so that crop production can be assured by using quality seed, and to act as a regional seed security reserve for the Member States.³⁷

³⁵ <<https://www.saarc-sec.org/index.php/press-release/306-first-meeting-of-the-saarc-planning-ministers-in-virtual-mode> > accessed 14 May 2021.

³⁶ <<https://www.saarc-sec.org/index.php/areas-of-cooperation/agriculture-rural-development>> accessed 14 May 2021.

³⁷ <<https://www.saarc-sec.org/index.php/areas-of-cooperation/agriculture-rural-development>> accessed 14 May 2021.

SAARC Agricultural Centre (SAC)

The SAARC Agricultural Information Centre (SAIC) started its journey in 1989 as the first-ever Regional Centre under SAARC to establish a network among relevant agricultural research and information agencies and disseminate regionally generated technical information to strengthen agricultural research, development, and innovations.³⁸

From 2016 to April 2019, around 55 time-bound, and action-oriented need-based programs related to consultation, training, adaptive trail, germplasms exchange, and meeting/workshop were implemented by the SAARC Agriculture Centre. The programs included identification of rice varieties, high yielding dairy buffalo, germplasm exchange, animal biotechnology, agro-processing, climate change impact on coastal fisheries, fish diversity, conservation agriculture, technology sharing, backyard poultry production, Integrated plant nutrient management system, risk management for small farmers, proven technology sharing, good agricultural practices, integrated pest management training, women in agriculture, climate-smart agriculture, ICT in agriculture, small scale fisheries, aquaculture of commercially important fish, value chain development, etc.³⁹

In recent years SAC has significantly expanded its research and capacity development profile in partnership with various UN and International Specialized Organizations/Bodies. The SAARC-FAO project on “Strengthening the Capacity of SAARC in the Development, Coordination, and Monitoring of a Regional Food Security and Nutrition Framework, Strategies and Programs” ended on 31 December 2017. Under the project, SAARC Food and Nutrition Security Framework (SFNSF) and Strategic Plan of Action (SPA) and a project outline on Strengthening Regional Food and Nutrition Security Information System in South Asia have been drafted.⁴⁰

Key Challenges to Achieving Regional Food Security Through SAARC

The COVID-19 pandemic has multifold repercussions on right to food of South Asian people. This common threat must be addressed through the synergy of regional cooperation. The countries of South Asia should utilize regional cooperation for collective food security and the right to food. Since these countries share similar climate zones, climate change vulnerabilities and threats, market structure, food culture, labour-intensive technology, irrigation through shared transboundary water, common agrarian structure, and interconnected economy it is better for them to succeed on shared solutions and achieve regional food security.

The challenge is more than just eradicating hunger and malnutrition. All humans and future generations owe it to change food systems in such a way that everyone on the planet can live with dignity. If we look into the matter from the human rights perspective there will be no real solutions provided that, the emphasis is solely on science and technology, money and markets,

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Ibid.

without addressing fundamental issues of inequality, accountability, and governance.⁴¹ To address the COVID-19 crisis, it is necessary to have cross-sectoral collaboration to reshape food systems and support healthy diets. The international community should address the root structural causes of poverty in the developing world.⁴²

Furthermore, Policy reforms should focus on removing barriers to the right to food, expanding opportunities for civil society to participate in food system governance, and enacting legal safeguards that eliminate inequality and exclusion because hunger and malnutrition may become more prevalent in South Asia.⁴³

Some of the key challenges to be addressed are:

- (a) Dietary diversity, expansion of food basket, health education and nutritional awareness, conservation of biodiversity, climate change concerns, access to clean drinking water, and gender equality in the utilization stage of the food cycle are some pressing issues that are overshadowed by the mainstream discourse on mere food grain abundance.
- (b) The global food crisis of 2007-08 demonstrated that relying solely on market mechanisms is insufficient to ensure regional food security in times of crisis. Inclusive food security policies with social safety nets are difficult to implement. Social protection mechanisms for vulnerable groups, such as children, poor farmers, and women are failing.
- (c) Engagement of youth and migrant workers in agriculture, as well as nutrition education, can be a viable option for South Asia as a bottom-up approach of ensuring the right to food. However, creating an enabling environment for returnee migrant workers to engage in agriculture is difficult.
- (d) To meet the ambitious targets of SDG (Sustainable Development Goals) 2: Zero Hunger and aim of “leave no one behind” developing rural revitalization based on agriculture may be the best opportunity to be utilized by South Asia to eliminate the root cause of poverty and achieve shared prosperity. Unfortunately, the irreversible liberalization of trade and related policies in these countries are detrimental to local farmers and small producers. Reliance upon international trade for food supply despite having opportunities in agriculture is heart-pitching. Connecting rural farmers with urban consumers is also challenging.
- (e) Operationalization of SAARC food bank to assure food availability in case of emergencies is problematic. Procedural and structural flaws on misleading triggers, insufficient capacity, and unsettled pricing mechanisms are major problems. There is ambiguity about transportation of withdrawn grain, distribution system, information exchange, and poor intra-regional trade.

⁴¹ United Nations General Assembly (UNGA), ‘Report of the Special Rapporteur on the right to food, Michael Fakhri’ (A/HRC/46/33, 2020) 10.

⁴² Carmen Gonzales, ‘International economic law and the right to food’ in Nadia C.S. Lambek and others (eds), *Rethinking Food Systems* (Springer, 2014).

⁴³ Food and Agriculture Organization (FAO), *Impacts of coronavirus on food security and nutrition in Asia and the Pacific: building more resilient food systems*, (Bangkok 2020) <<https://doi.org/10.4060/ca9473en>> accessed 10 May 2021.

- (f) The SAARC Agriculture Centre can be entrusted to maintain regional food security data. Observing the inefficiency of SAARC it would be unrealistic for us to entrust the SAARC Secretariat to create a regional food security policy and maintain food security data to achieve synergies in national actions for food security.
- (g) Improved varieties of crops with high yield, quality, and resistance to the harsh climate, etc. should be circulated. The SAARC Member States must have a strong will and commitment to implement the “Seeds Without Borders” protocol and reap mutual benefits by sharing popular seed varieties.
- (h) International trade is of particular importance to ensure the full realization of the right to food. Although regional cooperation for smooth trade has been a major agenda of SAARC food supply chains were interrupted during the pandemic. Scholars (M. Rahman, E. Bari, et al)⁴⁴ claim that on the infrastructural front of intra-regional trade the top goal is to guarantee that land customs posts are ready to handle food products properly. Initiatives at SARSO (South Asian Regional Standards Organization) for efficient and transparent regional standards can have a significant impact on food trade in the sub-region. Meanwhile, the trading partners of SAARC countries for food items are countries outside of the region. Intra-regional trade is yet to be mature.
- (i) Areas like technology transfer for agriculture, productivity, knowledge sharing, an early warning system for farmers, common coping up mechanisms for transboundary risks of environment and climate change on agriculture such as Locust attacks, unpredictable weather patterns, water security, irrigation, sea-level rise, salinization of agricultural lands, natural disasters and soil erosions are other challenges for SAARC countries to ensure sustainability and stability in the food system. Cooperation in those areas is promised but they are yet to be implemented.

In the long run, poverty reduction is an indirect but important policy response to achieving zero hunger because the major impact of the pandemic on food security of South Asia is on economic affordability and nutrition. Investment in agriculture and human resources who are working in all stages of the food cycle can have multifold advantages. It can improve availability, ensure economic access through raised income and address nutritional deficiencies through a raised standard of living. Therefore, in the coming days, South Asian countries should strategize agriculture for sustainable recovery. The agenda of SAARC in the coming days should be directed towards creating a stable availability, access, and utilization of food through the formulation of agro policies and social protection schemes to improve regional food security and mitigate the impact on food-related rights of people.

⁴⁴ Mustafi zur Rahman, Estiaque Bari and Sherajum Monira Farin, ‘SAARC Food Bank: raising operational efficacy’, in Nagesh Kumar and Joseph George (eds.), *Regional Cooperation For Sustainable Food Security In South Asia* (Routledge 2020).

Conclusion

The COVID-19 pandemic has far-reaching impacts on the right to food of people. It has affected all the prerequisites of food security like availability, physical and economic access, nutritional aspects of utilization, and stability in the South Asian region. However, this pandemic has brought us closer than ever, and the current activities of SAARC country leaders and their cooperative attitude have given a positive signal to the international community. SAARC should make effective use of the existing institutional frameworks to achieve regional food security thereby ensuring the right to food of people and head towards resilience and sustainable recovery through the human rights approach. Legal, diplomatic, and framework assets created until now through cooperation should be institutionalized in a way that is human rights sensitive.

Regional arrangements are sought in the case of a collective threat to regional security. By respecting, protecting and fulfilling regional obligations, people of the SAARC region can eliminate the threats of regional food security. Humans can live a dignified and unthreatened life only when a stable food system is in place. Such stability on availability, access, and utilisation of food can protect our food system from a future pandemic. The universal nature of human rights calls for supranational cooperation for which South Asian countries should invest their political will and trust setting aside their political differences.

ACCESS TO INFORMATION AS A HUMAN RIGHT AMID THE PANDEMIC

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Abstract

With the outbreak of coronavirus in late December 2019, people around the world were forced to stay indoors. The lockdown had moved all the works to go online or virtual. With this, a virtual world has expanded and people have been easy to reach out on the internet. On the dark side, there are rampant misinformation and disinformation throughout the online world. This paper is an attempt to attract attention towards the ensuing infodemic which has been running havoc in connivance with the pandemic. This infodemic has increased the duty of the state to prevent from creating further havoc in an already wrecked system fighting the health crisis, especially in South Asia. The objective of this article is to explore the attempts made by the government in South Asia to cope up with yet another crisis particularly in the context of the law. It aims to analyse the right to freedom of speech and expression coupled with the fundamental right of the citizen to access information. The article further discovers the relevance of the interdependence of both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) more during the pandemic. However, this article does not attempt to provide a blueprint for implementation of the policy to combat the infodemic due to the diversity of situations faced by different countries to varying degrees rather would highlight the best practices of states and would explore the institutional mechanism coping with this situation. This is doctrinal legal research, where primary data was obtained from legislation and case law, whereas secondary data was obtained from various hard copy and soft copy books, journals, articles, reports as well as literature reviews. Both quantitative and qualitative data were employed to both the provisions of access to information in South Asian countries.

Keywords: Access to information, freedom of speech, pandemic
Background

"To live effectively is to live with information"

-Norbert Wiener as quoted by McGarry¹

"The use of propaganda is ancient, but never before has there been the technology to so effectively disseminate it"².

- Guardian columnist

(The two quotations are relevant in light of this research paper)

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¹ McGarry Kevin, *The changing context of information: an introductory analysis* (2nd edn, LA Publishing, 1993).

² Nougayrède N, 'In This Age of Propaganda, We Must Defend Ourselves.' *The Guardian* (Moscow, 31 Jan 2018)

<<https://www.theguardian.com/commentisfree/2018/jan/31/propaganda-defend-russia-technology>> accessed 14 June 2020.

There are various forms of information that have evolved for a very long time without the means of modern Media. It can be agreeable that modes of knowledge distribution have contributed to the spread of various information, without the presence of modern mass media (print,³ electronic⁴ or social). In the present sense, however, the developers of information have the advantage of transmitting the knowledge at a much faster pace through the applications of social media that allow people to communicate and share information on the internet using a computer or mobile phone,⁵ without going through filtration. As a result, the spread of various types of information including misleading, 'fake'⁶ or inaccurate ones is rampant, thereby, creating information disorder.

While fake news is the beginning of disinformation, it does not cover all facets of it. On the other hand, 'information disorder' refers to a wider scope of contamination of our knowledge setting. According to a Council of Europe report,⁷ there are three forms of 'information disorder', namely: misinformation, disinformation and mal-information.⁸ According to Guy Berger⁹, "The motives for spreading disinformation are many and include political aims, self-promotion, and attracting attention as part of a business model." Those who do so, play on emotions, fears, prejudices, ignorance, and claim to bring certainty and meaning to a reality that is fast-changing complex, and challenging.¹⁰

The advent of the COVID-19 pandemic¹¹ has led to the rise of 'Information Disorder', 'Information Pandemic', or in the simple term 'Infodemic',¹² a pandemic of incorrect information presenting serious risks to global health. World Health Organization (WHO) describes the infodemic as "an overabundance of information, may be accurate or not, that makes it hard for people to find trustworthy sources and reliable guidance when they need it".¹³ The limited

³ It includes hard copy information including newspaper, journal and other hard copy information.

⁴ It includes internet as e-paper, e-book, e-journal or any other websites. See 'Electronic Media' Cambridge English Dictionary (*Dictionary.cambridge.org*, 2020) <<https://dictionary.cambridge.org/dictionary/english/electronic-media>> accessed 15 June 2020.

⁵ See 'Social Media' Cambridge English Dictionary (*Dictionary.cambridge.org*, 2020)

<<https://dictionary.cambridge.org/dictionary/english/social-media>> accessed 15 June 2020.

⁶ The Oxford Dictionary defines "fake" as an adjective that means "not genuine; imitation or counterfeit"⁶. In another meaning, the term "fake" is often used interchangeably with words such as copy, forgery, counterfeit, and inauthentic⁶. However, the Ethical Journalism Network defines and describes fake news and false information as: "Fake news is information deliberately fabricated and published with the intention to deceive and mislead others into believing falsehoods or doubting verifiable facts."⁶ That means fake news or false information is that parent that intensifies all modes of information disorder.

⁷ Claire Wardle & Hossein Derakhshan, *Information Disorder: Toward an interdisciplinary framework for research and policy making*, (Council of Report, DGI (2017) 09, 2017) 20 <<https://rm.coe.int/information-disorder-report-november-2017/1680764666>> accessed 31 July 2021.

⁸ Misinformation refers to false or inaccurate information, deliberately created to deceive others. Disinformation is also about false information, deliberately created to harm a person, social group, organization or country. On the other hand, mal-information is based on reality, but used to inflict harm on a person or an organization; Expression F, and Disorder I, 'Information Disorder' (*Freedom of Expression*, 2020) <<https://www.coe.int/en/web/freedom-expression/information-disorder>> accessed 18 June 2020.

⁹ Director for Policies and Strategies regarding Communication and Information at UNESCO.

¹⁰ "During this coronavirus pandemic, 'fake news' is putting lives at risk: UNESCO" (*UN News*, 13 April 2020) <<https://news.un.org/en/story/2020/04/1061592>> accessed 16 July 2020.

¹¹ A pandemic is a condition occurring worldwide, or over a very wide area, crossing international boundaries and usually affecting a large number of people; 'A Dictionary of Epidemiology' (*Oxford Reference*, 2020) <<https://www.oxfordreference.com/view/10.1093/acref/9780195314496.001.0001/acref-9780195314496>> accessed 18 June 2020.

¹² "We are not just fighting an epidemic; we are fighting an infodemic. Fake news spreads faster and more easily than this virus, and is just as dangerous."; COVID-19 Response, 'UN tackles 'infodemic' of misinformation and cybercrimes in covid crisis' (*UNODC*, 31 March 2020) <<https://www.un.org/en/un-coronavirus-communications-team/un-tackling-%E2%80%98infodemic%E2%80%99-misinformation-and-cybercrime-covid-19>> accessed 1 June 2021.

¹³ WHO, 'Countering Misinformation About COVID-19' (*Who.int*, 2020) <<https://www.who.int/news-room/feature-stories/detail/countering-misinformation-about-covid-19>> accessed 18 June 2020.

information about the virus has added fuel to the fire, leaving people desperately searching for it, thus, being vulnerable to countless conspiracy theories and fake news regarding the origin, the way the virus spread and its preventive measures.¹⁴

It is very pertinent to look at fake news especially in times of a pandemic since the nature of the pandemic by itself, makes the requirement of information quintessential.¹⁵ It is with the information that is the primary bone of contention when it comes to a pandemic like situation. It must be noted that the world has remained a skewed place where information asymmetry has existed since time immemorial. It is to be understood from the standpoint of accessibility asymmetry that exists blatantly in terms of information availability. This tension further manifolds in the situation of a pandemic, where the owners of information want to retain the information and set a very high standard to share the information with other stakeholders. This lack of information often creates panic within the larger infrastructure of information dissemination, thereby, creating fake and fictitious news feeding off from the persistent anxiety.

The primary focus in such situations should always be to maintain a semblance of information symmetry where it is made easily available and accessible to the masses at large. The disparity in having information must be curtailed down. However, there are often larger reasons behind the spread of such fake news and its propagation. At times, it is carried out with the zeal to destabilize the machinery of a state and create an atmosphere of tension in a state whereas, on the other hand, it is carried out to create a false narrative for the benefit of miscreants in the society. Several such factors often work in tandem or in isolation to create the bubble of fake news.

Introduction

With the advent of the COVID-19 pandemic and its subsequent crisis, the importance of Article 12 of ICESCR can be realized. It obliges states parties to uphold the right to the enjoyment of the highest attainable standard of physical and mental health through the 'prevention, treatment, and control of epidemic, endemic, occupational and other diseases'.¹⁶ Moreover, State should create conditions that would assure its citizens of all medical services and medical attention in the event of sickness.¹⁷ Concerning the nature of the same, states parties shall act in conformity to the International Health Regulations (IHR). The regulations ensure that states must respect the dignity, human rights and fundamental freedoms of persons with the goals of protecting all people from the international spread of diseases.¹⁸ The obligation includes all the approaches of prevention, protection, cure and public health response to the disease in ways that are

¹⁴ WHO, '1st WHO Infodemiology Conference' (WHO, 2021) <<https://www.who.int/teams/risk-communication/infodemic-management/1st-who-infodemiology-conference>> accessed 8 May 2021.

¹⁵ Marko Milanovic & Michael N. Schmitt, 'Cyber Attacks and Cyber (Mis)Information Operations during a Pandemic' (2020) 11 J Nat'l Sec L. & Pol'y 247.

¹⁶ International Covenant on Economic, Social and Cultural Rights [1976] 999 UNTS 171 [16 December 1966] art 12. [ICCPR]

¹⁷ Ibid.

¹⁸ International Health Regulations [2007] 999 UNTS 171 [16 December 1966] arts 3, 12, 32.

proportionate with public health risks without causing unnecessary hardship in cross-border activities.¹⁹ This can be ensured with the best use of advanced technologies.²⁰

With the WHO emergencies director, Dr Mike Ryan warning that COVID-19 may never vanish completely,²¹ the Authors believe that the use of technology could, in the future, aid in the mitigation and cope with the outbreak during the post-pandemic era. This can be illustrated in two instances:

Firstly, technologies can assist the government and possibly health experts to foresee, learn, and anticipate the conceivable outbreak of an infectious disease in the future.²² For example, it took four (4) months to identify the SARS virus during its 2002-2004 outbreak,²³ as compared to several hours to detect the emergence of COVID-19. It was possible for the Canadian company ‘Blue Dot’ by using Big Data analysis with the aid of advanced technologies in hand.²⁴ These sorts of capabilities can be repeated to detect another disease outbreak if it occurs in the future.²⁵ Moreover, this demonstrates that authorities are able to surveil with the aid of AI effectively as compared to manually which require more manpower.²⁶ This proves that technologies can enhance the degree of preparedness by states provided they are employed effectively and appropriately.

Secondly, the impact of the virus upon the citizens’ quality of life can be mitigated through the aid of technology, especially in populated urban settlements like major cities. To illustrate, the South Korean government launched ‘City Data Hub’, a technology to detect the spread of the virus through contact tracing.²⁷ With such technology, the government succeeded in holding national elections physically without escalating infections during the peak of the pandemic.²⁸ This initiative is crucial in unravelling how the use of technology can maintain a sustainable and safe city amid disease outbreaks. Further, the state is obliged to ‘make cities and human settlements inclusive, safe, resilient and sustainable’,²⁹ as stated under Goal 11 of the UN Sustainable Development Goals (SDGs).³⁰ Provided that the hard measures like city-wide quarantine would be ineffective in the long run, using technology to swiftly identify and detect, and prompt action by the authorities

¹⁹ Ibid.

²⁰ Ershad Murtadho, ‘Lessons from the Pandemic: Technology an Protection for Human Rights in the New Normal Era’ (2021) 8(2) Kathmandu School of Law Review 102.

²¹ Christopher Brito, ‘Coronavirus may never go away, World Health Organization warns’, *CBS News* (New York City, 14 May 2020) <<https://www.cbsnews.com/news/coronavirus-may-never-go-away-world-health-organization-endemic-virus/>> accessed 6 July 2020.

²² Joseph Cannataci, ‘Special Rapporteur of the Human Rights Council on the right to privacy’ (2020) UN Doc A/75/147, para 37.

²³ Zaheer Allam, Gourav Dey and David S. Jones, ‘Artificial Intelligence (AI) Provided Early Detection of the Coronavirus (COVID-19) in China and Will Influence Future Urban Health Policy Internationally’ (AI 2020) 1(2)156, 157 <<https://www.mdpi.com/2673-2688/1/2/9>> accessed 8 July 2020.

²⁴ Nicola Luigi Bragazzi et al., ‘How Big Data and Artificial Intelligence Can Help Better Manage the COVID-19 Pandemic’ (2020) 17(19) Int. J. Environ. Res. Public Health 2 <<https://www.mdpi.com/1660-4601/17/9/3176>> accessed 2 August 2020.

²⁵ Michelle Roberts, ‘Flu virus with ‘pandemic potential’ found in China’ *BBC News* (London, 30 June 2020)

<<https://www.bbc.com/news/health-53218704>> accessed 15 July 2020.

²⁶ Ministry of Land, Infrastructure and Transportation, ‘Smart city technology makes corona19 procure movements faster and more accurate’ (Ministry of Land, Infrastructure and Transportation Press Release, South Korea, 25 March 2020)

<http://www.molit.go.kr/USR/NEWS/m_71/dtl.jsp?id=95083710> accessed 29 July 2020.

²⁷ South Korea Minister of Land, Infrastructure and Transport, ‘Korean Smart City’ *Smart City Korea* (South Korea, August 2019)

<<https://smartcity.go.kr/wp-content/uploads/2019/08/Smart-city-broschureENGLISH.pdf>> accessed 19 July 2020.

²⁸ Lessa Lin and Zhiyuan Hou, ‘Combat COVID-19 with artificial intelligence and big data’, (2020) 27(5) *Journal of Travel Medicine* <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7313798/>> accessed 20 July 2020.

²⁹ Ibid.

³⁰ United Nations, ‘Goal 11: Make cities inclusive, safe, resilient and sustainable’, (*United Nations*, 2015) <<https://www.un.org/sustainabledevelopment/cities/>> accessed 15 July 2020.

is imperative. It is necessary to act in conformity with health protocols and maintain public order without severely restricting the liberty rights of the citizen.

These are some illustrations that technologies could aid in the disease outbreak in pre and post-pandemic times. *Firstly*, in an account of the urgency of the time, citizens would receive timely updates that would raise their awareness on any developments of disease; and *secondly*, advanced technological features are crucial in deterring misleading information, thereby, maintaining public order and protecting public health interests without restrictions on freedom of expression.

Thirdly, Access to Information through technology can aid significantly in times of pandemics. The fundamental rights of the citizens to RTI can be effectively ensured at this time to make the citizens aware of the virus and make an informed choice on their own. Regarding issues concerning public health surveillance, governments must ensure that technologies are used in the least intrusive manner with respect to one's right to privacy.³¹ Such can be realized by not only revisiting how these technologies were invented to meet such goals but also through stimulating participation from the public as well as non-governmental organizations. Along the lines, Access to Information can play an essential interplay between governments and general peoples to connect the two.

Access to Information

Whenever the idea of Access to Information comes into our mind, there is a visualization of the right of every individual to seek and receive information held by public entities (except those concerning national security).³² Looking into the genus of the right, it can be drawn back to Resolution 59 of the UN General Assembly (adopted in 1946) and Article 19 of the Universal Declaration of Human Rights (UDHR) where the freedom to seek, receive, and impart information was compressed as part of the fundamental right of freedom of expression. Furthermore, RTI has been enshrined in the International Covenant on Civil and Political Rights (ICCPR).³³ According to Article 19 of ICCPR, the right to freedom of expression or speech encompasses the right to be able to communicate and receive information and ideas freely through different forms, including any kind of media.³⁴

Almost all countries of South Asia guarantee freedom of speech and expression.³⁵ The freedom of speech and expression extends to all sorts of mediums, not just traditional media but also modern media, and is a cornerstone of democracy.³⁶ Furthermore, there is a jurisprudence that the extent

³¹ F.H. Cate, *Privacy in the Information Age* (Brookings Institution Press, 1997).

³² Hossain Supti, 'Right to access Information' *The Daily Star* (Bangladesh, 10 November 2020).

³³ ICCPR (n 18); Rehman Javid, *International Human Rights Law ICCPR 1966* (2nd edition, 2010) 106.

³⁴ Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd edn, NP Engel, 2005) p 445.

³⁵ Constitution of Bangladesh (Bangladesh), art 39(2); Constitution of Nepal (Nepal), art 17(2)(a); The Constitution of India (India), art 19; The Constitution of the Islamic Republic of Pakistan (Pakistan), art 19; Afghanistan's Constitution of 2004 (Afghanistan), art 34; Bhutan's Constitution of 2008 (Bhutan), art 7(2); Maldives's Constitution of 2008 (Maldives), art 27; The Constitution of the Democratic Socialist Republic of Sri Lanka (Sri Lanka), art 14.

³⁶ *Maneka Gandhi v Union of India* [1978] AIR 597 (Supreme Court of India); Democracy is based essentially on free debate and open discussion, for that is the only corrective of government action in a democratic set-up. If democracy means the government of the people by

of the right to speech and expression was even wide to include the right to as well as the right to be educated, informed and entertained.³⁷

Though having the fundamental right to express an individual's views, such right cannot be contravened with the express provision entrusted under Articles³⁸ of the Constitution and laws enacted by individual countries³⁹ of South Asia. Therefore, the spread of information can fall within the ambit of freedom of speech and expression but is subject to certain reasonable restrictions on the curtailing of the same.⁴⁰ At this point, the question of access to information or RTI comes into play.

As stated earlier, the RTI has also been recognised as part and parcel of freedom of speech and expression under the relevant fundamental right category under the constitution of most of the SAARC nations.⁴¹ To be compliant with the constitutional mandate, various individual RTI act has been enacted.⁴² This right has been treated on a higher pedestal as compared to other statutory and constitutional rights because of its significance in promoting other rights. As regards RTI, it mostly deals with the duties of the public bodies to disclose necessary information to the public, however, this paper focuses more on the public's right to get true trustful information proactively from the public bodies in times of this pandemic.

Proactive Disclosure of Information

The RTI laws/bills in the SAARC nations contain comprehensive provisions on voluntary or proactive disclosure of information.⁴³ This includes disclosure of information related to the

the people, it is obvious that every citizen must be entitled to participate in the democratic process and in order to enable him to intelligently exercise his rights of making a choice, free & general discussion of public matters is absolutely essential.

³⁷ *The Secretary, Ministry of Information and Broadcasting vs. Cricket Association of Bengal* [1995] SCC 161 (Supreme Court of India).

³⁸ Constitution of Bangladesh (Bangladesh), art 19(2); Constitution of Nepal 2015 (Nepal), art 17(2)(f) explanatory clause (1)(2)(3)(4)(5)(6); Constitution of India (India), art 19(2).

³⁹ The Penal Code of respective countries; The Digital Security Act 2018 (Bangladesh), the Communicable Diseases (Prevention, Control and Eradication) Act 2018 (Bangladesh) and the Disaster Management Act 2012 (Bangladesh).

⁴⁰ M.J. Selgelid et.al. (eds), *Infectious Disease Ethics: Limiting Liberty in Contexts of Contagion* (Springer, 2011).

⁴¹ For instance, the right to information is constitutionally protected by Article 27 of the Constitution of Nepal, 2015 in Nepal and by Article 19A of the Constitution, it is inserted *via* the 18th Amendment in 2010 in Pakistan. The Apex Court of India in a catena of its judgments has also recognised the right to information as an integral part of Article 19(1)(a) and Article 21 of the Constitution of India, 1950. In the Constitution Bench of the Apex Court of India in *State of Uttar Pradesh v. Raj Narain*, Justice Mathew has recognised the necessity of the right to know for good governance and freedom of speech and expression. The Apex Court of India held: "The people of this country have a right to know every public act, everything, that is done in a public way, by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearing. The right to know, which is derived from the concept of freedom of speech, though not absolute, is a factor which should make one wary, when secrecy is claimed for transactions which can, at any rate, have no repercussion on public security." In Bangladesh, the right to information is considered to be a part of freedom of thought, conscience, and speech guaranteed by Article 39(1) of the Constitution. The Afghan Constitution, 2004 under Article 50 has recognised access to information as an integral part of good governance. Afghanistan has also enacted the Access to Information Law in 2014 in consonance with Article 50 of the Constitution. The 19th Amendment to the Constitution of Sri Lanka, 2015 under Article 14A has recognised the right to information as a fundamental right of citizens with effect from May 15, 2015. The Constitution of Maldives, 2008 under Article 61(d) also stipulates that every citizen has the right to obtain all information possessed by the government. Article 7(3) of Bhutan's Constitution of 2008 provides that a Bhutanese citizen shall have the right to information.

⁴² The Right to Information Act 2005 (India); the RTI Act 2014 (Maldives); the RTI Act 2016 (Sri Lanka); the RTI Act 2007 (Nepal); the RTI Act 2009 (Bangladesh); the Access to Information Law 2014 (Afghanistan); the Pakistan RTI Ordinance 2002 (Pakistan) and various provincial RTI laws; and the RTI Bill 2013 (Bhutan) have been some of the initiatives in empowering citizens and other specified parties to secure the right to access information in the public governance.

⁴³ RTI Act 2009 (Bangladesh), s 6; the Right to Information Act 2005 (India), s 4; the RTI Act 2007 (Nepal), ss 3 and 5; the Pakistan RTI Ordinance 2002 (Pakistan), ss 5; Sri Lanka's Right to Information Act 2016 (Sri Lanka) (CI 7-9 deal with the proactive disclosure of public information in the public domain); Afghanistan's Access to Information Law 2014 (Afghanistan) (Arts 4 and 14 provide for *suo moto*

functions of an organization, powers and duties of officials, decision-making procedures, and norms, policies and schemes implemented. These laws specify how this information should be made public (including through their websites) and require that the information should be updated periodically (annually, quarterly, monthly etc.)

If pro-active or *suo-moto* disclosure of the information is implemented meticulously, then 70% workload/burden of public information officers and information commission would be reduced and people would have entered into the matter and refer the government sites and get informed. This could be highly relevant to this pandemic where there is a dearth of information regards to the virus and the subsequent steps of the government.

However, there are various hurdles in realizing the obligations and subsequently the fundamental right to information.

Firstly, there is no sanction in any of the RTI Laws/ Bills of the SAARC Nations for providing penalty or punishment for the breach of the pro-active disclosure scheme. It is to be noted that the strict compliance of the scheme on proactive disclosure is even in the interests of public authorities as it would undoubtedly reduce their workload related to RTI laws and its fulfilment of obligations arising out of legitimate expectation.

Secondly, the implementation mechanism like Information Commissions and Commissioners in almost all the SAARC nations do not have any power to enforce their order in case of disciplinary actions, or penalty or award of compensation, and also to recommend disciplinary actions against public officers in case of any violation of the respective RTI laws/bills.

Thirdly, there is no political will to bring about more remarkable changes in the powers statutorily granted to these bodies as even political parties in powers may have to comply with it.

Fourthly, the credibility-crisis of the government is another problem in South Asia that could be mitigated through the collaborative efforts with the international agencies like WHO with the government and joint efforts from experts of related fields.

Fifthly, general peoples are not aware of the proactive disclosure schemes. There are mainly 3 categories of stakeholders of RTI, viz., Information Seekers (demand-side peoples), Information Holders (supply-side public bodies) and RTI Promoters (facilitators like Information Commission). Without the proper functioning of one, the other cannot work smoothly. To highlight the awareness of people, it is important to emphasize the socio-economic condition of peoples of these regions.

disclosure), Maldives RTI Act 2014 (Maldives) (s 37 provides for pro-active disclosure), Bhutan's Right to Information Bill 2013 (Bhutan) (Cl 10-17 provides for proactive disclosure of information in the public domain); The Provincial Laws of Pakistan such as the Punjab RTI Act 2013 (Pakistan), s 4; the Baluchistan and Sindh Freedom of Information Laws 2006 (Pakistan), s 5.

The Social Situation of SAARC and the Realization of RTI in South Asia

As the coronavirus COVID-19 is affecting 220 countries and territories around the world and 2 international conveyances,⁴⁴ humankind is now facing a disastrous and fearful situation where it is uncertain when it will end. In South Asia alone, around 23,705,911⁴⁵ people are affected and 271,678⁴⁶ are dead due to this pandemic and which is increasing day by day. About 23%⁴⁷ of the population are in South Asia with only 3.5% (1,729,738 sq. mi.) of the world's land surface area.⁴⁸

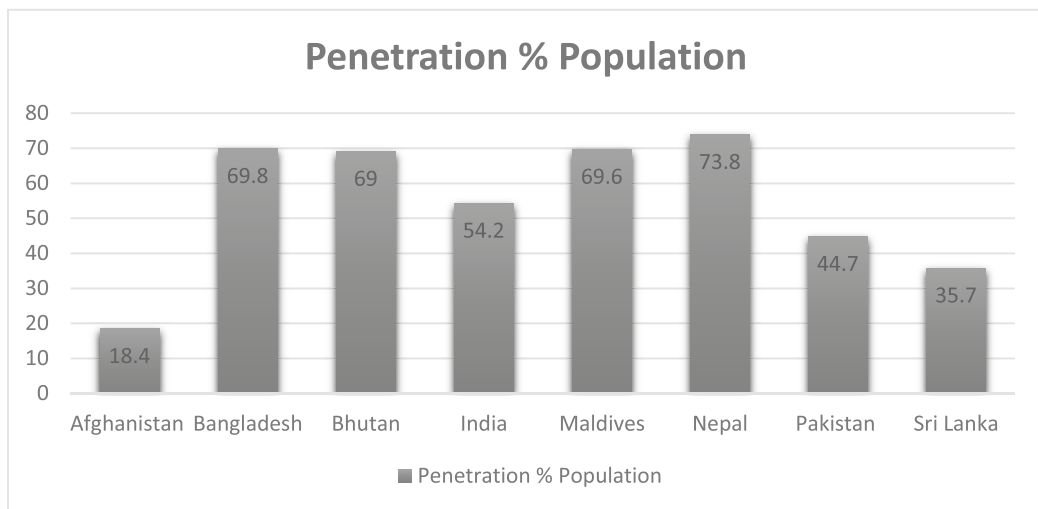


Figure 1: Internet Users in South Asia (31 Dec 2020)⁴⁹

There has been a steady growth of technologies in the South Asian region. The total number of internet users in South Asia are 9.75 million⁵⁰ with 51.96%⁵¹ of internet penetration in the region. The Asia Pacific has the world's largest number of internet users worldwide over 2.3 billion in the year 2019. An individual in Asia pacific spends 150 minutes per day on the internet⁵². The largest population on Facebook is from India with over 270 million users while monthly active users from

⁴⁴ 'Coronavirus Update (Live): 17,319,801 Cases And 672,760 Deaths From COVID-19 Virus Pandemic Worldometer', (*Worldometers.info*, 2020) <<https://www.worldometers.info/coronavirus/#countries>> accessed 7 May 2021.

⁴⁵ Ibid. The country-wise affected people were: India (21,491,598), Pakistan (850,131), Bangladesh (770,842), Nepal (377,603), Sri Lanka (119,424), Afghanistan (61,755), Maldives (33,368), Bhutan (1,190).

⁴⁶ Ibid. The country-wise dead people were: India (234,083), Pakistan (18,677), Bangladesh (11,833), Nepal (3,579), Sri Lanka (745), Afghanistan (2,683), Maldives (77), Bhutan (1).

⁴⁷ By 2021, India (1,380,004,385), Pakistan (220,892,340), Bangladesh (164,689,383), Afghanistan (38,928,346), Nepal (29,136,808), Sri Lanka (21,413,249), Bhutan (771,608), Maldives (540,544), Total South Asian Population: 1,856,376,663; Total World Population: 7,864,253,650 <<https://www.worldometers.info/>> accessed 8 May 2021, 9:50; 'Countries in the world by population (2021)', *worldometer*, <<https://www.worldometers.info/world-population/population-by-country/>> accessed 8 May 2021.

⁴⁸ Way Back Machine, 'South Asia Regional Overview' (21 November 2008)

<<https://web.archive.org/web/20081121043924/http://www.sardeg.org/marketana.asp>> accessed 1 June 2021.

⁴⁹ Stats IW, "Internet 2021 Usage in Asia" <<https://www.internetworldstats.com/stats3.htm>> accessed May 8, 2021.

⁵⁰ Afghanistan 7,337,489 (18.4%), Bangladesh 111,875,000 (67.3%), Bhutan 537,300 (68.9%), India 749,342,381 (53.8%), Maldives 375,100 (69%), Nepal 21,900,000 (73.8%), Pakistan 76,380,000 (33.9%), Sri Lanka 7,613,000 (35.4%) 'Internet 2021 Usage in Asia' (Internet World Stats) <<https://www.internetworldstats.com/stats3.htm>> accessed 1 June 2021.

⁵¹ Total Population is 1,877,243,646 and total internet users is 975,360,270;

⁵² Molly Moore, 'Daily time spent on using the internet in APAC 2011-2021' (*Statista*, 5 July 2019)

<<https://www.statista.com/statistics/1024330/apac-daily-minutes-of-internet-consumption/>> accessed 22 July 2020.

Asia are 1,013,000⁵³. It is important to highlight the data on internet users (Figure 1) so that we can navigate the flow of information through social media. With a single click of a button, a single piece of news and stories can be shared with this large population.

With this comparatively better side inflow of information, on the dark side, the entire population is vulnerable to misinformation. As this misinformation and fake news on COVID-19 are being accessed by many users, it is giving rise to several appraise infections, increased anxiety, rise in racial and religious discrimination, and is creating terrors among people. It is further amplified by the present socio-economic like the literacy rate of the people.

The average low level of literacy rates (as shown in figure 2 below) could be attributed to the abundance of rural areas present in the country. The overall scenario of the study indicates that rural people and young minds are highly influenced by the application of social and electronic media where they can be easily manipulated just by amplifying with click baits.

Perhaps the rate of literacy and consciousness from the public has fuelled the spread of misinformation, but that does not excuse oneself from self-consciousness, self-education and self-ignorance, considering the increased number of internet users in South Asia increased by 18 (+%) between 2019 and 2021.⁵⁴ Taking the advantage of this critical situation, some scammers, addressing themselves as health experts or medical healers are making profits from rural people by treating them with fake corona medicines or health tips.

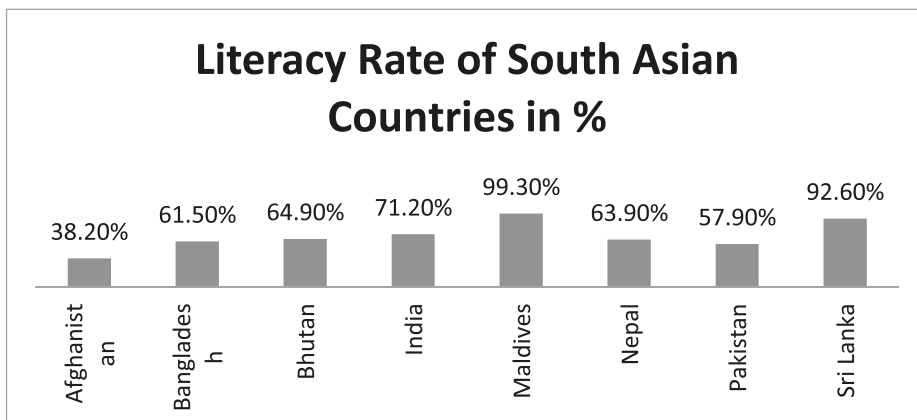


Figure 2: Literacy Rate of South Asian Countries in % (2021).⁵⁵

⁵³ 'Facebook by the Numbers: Stats, Demographics & Fun Facts' (*Omnicores*, 22 April 2020)

<<https://www.omnicoreagency.com/facebookstatistics/#:-:text=The%20largest%20population%20on%20Facebook,has%20387%20million%20Facebook%20users>> accessed 18 July 2020.

⁵⁴ Internet World Stats (n 51). Also see Mobile Internet Connectivity 2019' (*GSMA*, 2019)

<<https://www.gsma.com/mobilefordevelopment/wp-content/uploads/2019/09/Mobile-Internet-Connectivity-SouthAsia-Fact-Sheet.pdf>> accessed 1 June 2021.

⁵⁵ Review WP, "Literacy Rate by Country 2021" available at <<https://worldpopulationreview.com/country-rankings/literacy-rate-by-country>> accessed on May 8, 2021.

Those kinds of people are more vulnerable than urban livings and educated people as they do not or a little have any knowledge about technologies, social media, and electronic media and how to distinguish between authentic and fake news. For that, they cannot identify the validity of any information about this pandemic and they can be easily misguided.

The unprecedented level of transmission of novel coronavirus (COVID-19) has brought the world to its knees where the world is struggling to survive, but a different picture took place for South Asia, combating both the impact of the pandemic as well as infodemic. With the application of social and electronic media, a sea full of misinformation is spreading at a much faster rate than the virus itself, which has now become a national concern of every South Asian country.

Mechanism to Cope with the Infodemic

Realizing the yet another rampant spread of fake information, SAARC countries have taken some steps to cope with the situation. In Afghanistan, the program called Targeting the ultra-poor (TUR) has come to light with the growing misinformation.⁵⁶ Bhutan has formed a national COVID-19 media team to distribute hourly updates in the hope to prevent the rumours from circulating on social media platforms.⁵⁷ The Indian government, adding 8 more local languages, linked any search relating to coronavirus directly to the reliable source of WHO, CDC and others. Further, the government designed a helpline known as MyGov⁵⁸ that cuts a platform of any misinformation dedicating users to an official channel to receive reliable news articles. The Government of Nepal with the help of UNICEF and WHO is running myth busters. The Press Council Nepal ordered the close of 25 unregistered websites after finding out that they had breached the council's code of conduct and were involved in the spread of misinformation.⁵⁹

The National Command and Operation Centre (NCOC)⁶⁰ in Pakistan has been providing detailed information on myths and real news. Dawn.com is one of the largest media of Pakistan, which has dedicated itself to providing information about COVID.⁶¹ The Health Protection Agency in the Maldives disseminates information in multiple languages through mass text messaging on local carriers as well as on social media platforms such as Twitter and Facebook.⁶² The national health agencies in Sri Lanka, including the Health Ministry, Health Promotion Bureau (HPB), and the Epidemiology Unit have issued a set of national guidelines to be followed to minimize COVID-19

⁵⁶ Guadalupe Bedoya, Aidan Coville, Johannes Haushofer, Mohammad Isaqzadeh and Jeremy Shapiro, 'No Household Left Behind' (2019) Policy Research Working Paper World Bank Group, p 8877

<<https://openknowledge.worldbank.org/bitstream/handle/10986/31867/WPS8877.pdf?sequence=6&isAllowed=y>> accessed 1 June 2021.

⁵⁷ Sonam Yangchen, 'Bhutan's preparedness and response to COVID-19' (*Observer Research Foundation*, 16 April 2020)

<<https://www.orfonline.org/expert-speak/bhutans-preparedness-and-response-to-covid19-64711/>> accessed 1 June 2021.

⁵⁸ Anumeha Chaturvedi, 'WhatsApp launches 'check it before you share it' campaign to stem misinformation' *The Economic Times* (India, 15 May 2020) <<https://economictimes.indiatimes.com/news/politics-and-nation/whatsapp-launches-check-it-before-you-share-it-campaign-to-stem-misinformation/articleshow/75762404.cms?from=mdr>> accessed 1 June 2021.

⁵⁹ Prasun Sangroula, 'Fake News Can Have Grave Impact In Pandemic' *The Rising Nepal* (Nepal, 20 May 2020)

<<https://risingnepaldaily.com/opinion/fake-news-can-have-grave-impact-in-pandemic>> accessed 23 July 2020.

⁶⁰ National Command and Operation Centre, Government of Islamic Republic of Pakistan <<https://ncoc.gov.pk>> accessed on 1 June 2021.

⁶¹ Ramsha Jahangir, 'Govt finalises policy to check Covid-19 misinformation' (*Dawn*, 17 July 2020) <<https://www.dawn.com/news/1569442>> accessed 28 July 2020.

⁶² Ahmed Aiham, 'COVID-19: US Ambassador dubs Maldives "model" in war against fake news' (*The edition*, 2 April 2020) <<https://edition.mv/news/15894>> accessed 3 August 2020.

infection risk and have also urged the public to strictly adhere to them instead of resorting to following misinformed sources⁶³. The government has also collaborated with fact-checkers such as 'WatchDog Sri Lanka' that shows which of the news is true or fake.⁶⁴

In Bangladesh, an anti-misinformation campaign like *Asol Chini* (Lers Know the Truth) includes COVID-19 information hubs like National Corona Portal, corona chatbots like COVID Response Bangladesh, a mobile app like Corona Trackers BD and fact-checkers like Rumor Scanner has been established.⁶⁵ The country is also coordinating with Facebook to close down more than a hundred of pages that were actively spreading COVID-19 misinformation. As an example, Facebook also uses fact checkers⁶⁶ to correct or verify any misinformation posted on it, the AI-enhanced algorithms allow it to censor inappropriate content⁶⁷.

Conclusion

Information has played a key role to maintain the semblance of power among the countries in a fragmented and divided world. Before, the rise of bipartisanship in the cold-war era further promoted the necessity to spread propaganda to attract neutral countries towards either of the powerful political alliances. The spread of propaganda brought to light the requirement to spread information at that time. However, now, information became a very crucial tool for communication as well as maintaining data over certain key aspects. Each system functions on the backdrop of information flow within its components and from its surrounding environment. Today, the information is what keeps the system smoothly functioning.

Likewise, technologies can be one aspect that can aid the flow of information to the general people at this pandemic. However, it is to be noted that the information disorder could be rampant that could result from fake or inaccurate news. This situation could be more relevant to South Asia provided the social, economic and political aspects of this region. For the same, there should be reasonable and proportional restrictions of those free flow in line with the International Human Rights Law (IHRL) standards as well as constitutional and statutory provision of individual countries in the region.

Moreover, the Right to Information (RTI) can be an effective tool to make them an informed choice. At this stage, media literacy is a must for everyone. Awareness to people via radio, telecommunication medium, and advertisements are some of the methods that the South Asian

⁶³ False social media posts purport to share coronavirus guidelines from Sri Lankan hospital' (*AFP Fact Check*, 15 July 2020) <<https://factcheck.afp.com/false-social-media-posts-purport-share-coronavirus-guidelines-sri-lankan-hospital>> accessed 29 July 2020.

⁶⁴ Archana Atmakuri and Chulanee Attanayake, 'Sri Lanka's Online Battle Against COVID' (*ResearchGate*, 29 July 2020) <https://www.researchgate.net/publication/343279330_Sri_Lanka's_Online_Battle_Against_COVID> accessed 4 August 2020.

⁶⁵ Md. Sayeed AL-Zaman, 'COVIS-19 related online misinformation in Bangladesh', (2021) 35(4) *Journal of Health Research* <<https://www.emerald.com/insight/content/doi/10.1108/JHR-09-2020-0414/full/pdf?title=covid-19-related-online-misinformation-in-bangladesh>> accessed 22 January 2021.

⁶⁶ Billy Perrigo, 'Facebook is Notifying Users Who Have Shared Coronavirus Misinformation. Could It Do the Same for Politics?' *Time* (New York City, 16 April 2020) <<https://time.com/5822372/facebook-coronavirus-misinformation/>> accessed 24 July 2020.

⁶⁷ Chris Marsden and Trisha Meyer, 'Regulating disinformation with artificial intelligence: effects of disinformation initiatives on freedom of expression and media pluralism' (*European Parliamentary Research Service*, 2019) 17 <<https://op.europa.eu/en/publication-detail/-/publication/b8722bec-81bc-11e9-9f05-01aa75ed71a1>> accessed 20 July 2020.

governments can implement to ensure awareness to every people of the country in considering their literacy levels. On the other hand, public entities or governments should ensure the effective implementation of their RTI regime by proactively disseminating necessary information amid this pandemic. In addition, different stakeholders like Information Commission and organizations like WHO should facilitate the interplay between the two. In this way, all the three concerned stakeholders of RTI can contribute to a smoothly functioning of a state structure through information to make a better place to live.

HUMAN RIGHTS AND POLICY PERPLEX: COVID 19 IN CONTEXT

Zarin Tasnim Rahman*

Abstract

The article examines the implementation of human rights in Bangladesh under COVID-19, spurred under the shadow of effective control and management of the pandemic. Although the impact of the pandemic remains pervasive in almost every aspect of our society, the focus of the analysis of the paper pivots around three central human rights issues: the right to life, freedom of movement, and access to works affected people in every sphere. Through a content analysis of circulars from relevant Ministries of Bangladesh during the pandemic, it is argued that the lack of proper coordination among the Ministries in some cases and delayed or inappropriate responses in others have impaired the human rights condition for mass people in Bangladesh. The Constitution of the People's Republic of Bangladesh declares a suspension of fundamental rights as valid during an emergency. However, as the lockdown under the COVID-19 pandemic was not declared as an emergency, analysis of human rights conditions under this paper was deemed under a normal state of affairs. Relevant editorials from various national dailies, a couple of expert interviews from policy-makers and civil society leaders available through online video streaming were also analysed to triangulate for strengthening the arguments of this paper. Finally, the article concludes with several recommendations on required legal and policy changes that would enhance the long-term preparedness of the government and build its capacity to manage such pandemics with minimal or no harm to human rights in future.

Keywords: Human Rights, COVID-19, Fundamental Rights.

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Introduction

COVID-19 is an ongoing pandemic that has been declared a Public Health Emergency of International Concern.¹ Gradually, it is becoming one of the deadliest pandemics of history. As no accurate and certain remedy is available yet, different nations are implementing various preventive measures including lockdown and social distancing to control the situation and minimize the rates of infected people. Like many other countries, the government of Bangladesh has also declared lockdown for a certain period in several times.² However, lack of proper planning, monitoring and coordination among the ministries of the government in many cases, are causing severe suffering to the public. Within this context, this article examines the impact of lockdown on the general people of Bangladesh to find out whether the system ensures meaningful restrictions and, if not, what factors are responsible for that failure. To begin with, the next section sets a scene for the lockdown condition observed during the current COVID-19 pandemic.

Lockdown Scenario under COVID-19 in Bangladesh

From 26 March 2020, episodic lockdowns continued in 2021 with many restrictions that can be summarized as follows:

- I. During the lockdown, public transportation nearly remained closed except emergency medical services, basic needs etc. and limited access to public transport in 11 City Corporations.³ Although the inter-district carriers were kept open. During the lockdown, different studies found that proper hygiene was not maintained.⁴ Although the administration was presupposed to implement and supervise the directives imposed by the Government, there was a lack of proper supervision. The administrative works were defective.

1. World Health Organization, 'COVID-19 Public Health Emergency of International Concern (PHEIC) Global research and innovation forum' <[https://www.who.int/publications/m/item/covid-19-public-health-emergency-of-international-concern-\(pheic\)-global-research-and-innovation-forum](https://www.who.int/publications/m/item/covid-19-public-health-emergency-of-international-concern-(pheic)-global-research-and-innovation-forum)> accessed 12 May 2021.

2. UNB, 'Bangladesh sees first lockdown in Madaripur' *UNB News* (Madaripur, 20 March 2020)

<<https://unb.com.bd/category/Bangladesh/bangladesh-sees-first-lockdown-in-madaripur/47542>> accessed on 10 May 2021.

3. Tribune Desk, 'Covid-19: Bangladesh restricts all kinds of gatherings' *Dhaka Tribune* (Dhaka, 19 March 2020)

<<https://www.dhakatribune.com/current-affairs/2020/03/19/covid-19-bangladesh-restricts-all-kinds-of-gatherings>> accessed 22 May 2021

4. Ibid; BBC, 'Coronavirus: Bangladesh mass prayer event prompts alarm' *BBC News* (19 March 2020) <<https://www.bbc.com/news/world-asia-51956510>> , accessed 24 May 2021

- I. Although the extent of infection varied over time, all governmental, semi-governmental and autonomous offices were kept open to a limited extent and respective offices were required to provide transportation for the employees. However, the reality was different. Because of lack of proper planning and coordination, the transport was not available to the employees. They had to continue their works bearing sufferings, which also affected the right to movement.⁵
- II. All types of industrial plants and construction works were kept open, including the garment factories.⁶ Although proper hygiene was required to be maintained, there was a lack of proper care and supervision. In reality, apart from the nominal arrangement of hand sanitiser and negligent mounting of nose masks with open noses, no other mentionable procedures were adopted by the Government.

Moreover, the Government had directed BGMEA and BKMEA to start field hospitals for the employees of the factories. Nonetheless, no mentionable initiatives were taken in this regard. About 70% of the country's foreign currency comes from these industries, but, unfortunately, that their health and safety were overlooked.⁷
- III. Although markets and shopping malls were closed for a limited time, those were opened after a short period. And, proper hygiene was overlooked in this instance also.
- IV. Without proper planning of distributing relief goods to the needy, they (especially the rickshaw pullers) were being deprived of earning. Again, in distributing reliefs, corruption and lack of proper management were found which should have been monitored properly to avoid.

5. Anwar Saeed, Nasrullah Mohammad and Hosen Mohammad Jakir, 'COVID-19 and Bangladesh: Challenges and How to Address Them' (2020) 8 (154) *Frontiers in Public Health* <<https://www.frontiersin.org/articles/10.3389/fpubh.2020.00154/full>> accessed 20 May 2021

6. Humayun Kabir, Myfanwy Maple and Kim Usher, 'The impact of COVID-19 on Bangladeshi readymade garment (RMG) workers' 2020 *Journal of Public Health* <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7454782/pdf/fdaa126.pdf>> accessed 25 May 2021

7. Asif Saleh, 'In Bangladesh, COVID-19 Threatens to Cause a Humanitarian Crisis' *World Economic Forum* (6 April 2020) <<https://www.weforum.org/agenda/2020/04/in-bangladesh-covid-19-could-cause-a-humanitarian-crisis/>> accessed 25 May 2021.

How Rights are Violated During Lockdowns

a. Right To Work

According to the Constitution of the People's Republic of Bangladesh, every citizen shall have the right to enter upon any lawful profession or conduct trade.⁸ Again, the constitution also ensures work as a right and duty as a fundamental principle.⁹

During these lockdowns, although the government employees received their salary, the poor people, especially the rickshaw pullers were being deprived of working without getting relief. To lead life, they had to come out but they were brutally treated. As labouring people live from hand to mouth, they barely have any savings to fulfil the daily necessities without working a day.

Although the Constitution declares suspension of enforcement of fundamental rights during emergencies as valid,¹⁰ the poor people should not be deprived of working without a proper scheme of helping them by providing food, medicine etc. During the lockdowns, these problems arose because of a lack of proper planning and coordination among the ministries of the Government. A proper scheme should be adopted for poor people before declaring lockdown.

Fazlur Rahman, a poor rickshaw puller, had bought a rickshaw taking a loan of 80,000 taka. To feed himself and the family, he had no other way left than to go out with the rickshaw. Unfortunately, DSCC authority broke his rickshaw. He was completely shattered as he had no food at his house, at the top of that he had to repay the loan.¹¹

8. The Constitution of the People's Republic of Bangladesh, 1972, P.O. No. 76, art 40.

9. Ibid, art 20.

10. Ibid, art 141C.

11. Golam Mortoza, 'No place for an ordinary man!' *Daily Star* (Dhaka, 9 october 2020) <<https://www.thedailystar.net/opinion/news/no-place-ordinary-man-1974745>> accessed on 20 May 2021

b. Right To Movement

According to the constitution, every citizen shall have the right to move freely throughout the country, subject to reasonable restrictions imposed by law in the interest of the public.¹²

During the lockdowns, people were being restricted to move to another city, sometimes in cases of necessity also. Again, when public transportation was kept closed, private vehicles were allowed to travel. This created discrimination which is a violation of the provisions of the constitution.¹³ Moreover, when public transportation was reopened, the fare was unproportionately increased up to 60%, which added to the sufferings of the general people.

c. Right To Health

The lockdowns seriously affected the right to health. The measures taken by the Government were not proper and effective to provide medical care to marginalized people.

Again, the right to health is also connected with the right to movement. Though proper transportation needed to be available for the medical sector, it was not the true scenario. Many of the people could not go to the city for better treatment.

A poor father of Thakurgaon had to pull a rickshaw for nine hours and travel 110 kilometres to save his ailing daughter. He took his daughter to Rangpur Medical College with a hired rickshaw as he had not enough money for ambulance fare and public transportation was also closed.¹⁴

Prospect of Reform

During the pandemic, the problems arising from lockdown in most cases could be avoided, at least be minimized by taking proper steps. Some have been suggested below:

12. The Constitution of the People's Republic of Bangladesh, 1972, P.O. No. 76, art 36.

13. Ibid, art 27 and art 28.

14. Star Digital Report, 'Father pedals own rickshaw for 110km to take baby to hospital' *Daily Star* (Dhaka, 18 April 2021) <<https://www.thedailystar.net/bangladesh/news/father-paddles-own-rickshaw-110km-take-baby-hospital-2079565>>

a. Proper Planning and Management

A proper scheme should have been taken before announcing lockdown. Different ministries of the Government should work with proper coordination. Proper planning of granting relief to the needy people in each area should be made with due cautiousness. The basic necessities should be made available as much as they can be.

b. Proper Monitoring and Supervision

The necessary arrangement should be made to monitor the activities of the public as well as the executive. For violation of rules of the lockdown directed by the Government, the individuals, as well as the officer-in-charge should be punished proportionately. Effective steps must be taken against corruption and disobedience of the executive.

Conclusion

Due to the lack of proper measures and coordination among the Ministries of the Government, human rights were violated during the lockdown in operation. Even sometimes, some measures had been irrelevant and extremely painstaking for the ordinary people. Some of the measures were responsible of creating inequality, discrimination, and caused greater harm to public life than the pandemic situation itself. Hence, it is advisable to initiate proper scheme, planning, and monitoring of disaster management for reducing the sufferings of the people to a certain extent.

DOMESTIC VIOLENCE AGAINST WOMEN IN RURAL AREAS IN THE TIME OF COVID-19 PANDEMIC: BANGLADESH IN CONTEXT

Shahriar Islam Shovon*

Abstract

Domestic violence against women in Bangladesh manifests itself in various ways, ranging from overt physical violence to dowry-related violence, maltreatment via underage marriage, and marital rape etc. Among others, physical aggressiveness or threats include, sexual assault, emotional abuse, stalking, and passive/covert abuse, other including economic hardship early marriage. Although domestic violence against women has always been a concern in rural Bangladesh, the COVID-19 pandemic (the pandemic) has heightened the violence in to more degree than the normal situation. According to a United Nations Population Fund (UNFPA) research, domestic violence increased around 20% during the pandemic among the Member Nations of the United Nations, including Bangladesh. Specifically, married women in rural areas in Bangladesh face a higher frequency and severity of physical and mental torture at the hands of their husbands, husbands' relatives, and family members than urban women. While significant attention has been paid to domestic violence in metropolitan regions, there have been few studies examining the effects of the epidemic on rural communities. This article will examine the state of domestic violence in rural Bangladesh during the outbreak in this background. It will attempt to ascertain the factors contributing to the abrupt surge in domestic violence in rural regions. Additionally, it will review the current legal and policy frameworks to assess whether the present legal and policy frameworks adequately safeguard rural women's interests. Finally, it will provide some concrete recommendations to help ease the deteriorating situation of domestic violence in rural Bangladesh.

Introduction

Domestic violence is a prime example of hostile conduct performed by one confederate to damage another partner. The rural Bangladeshi population has suffered because of domestic violence.¹ A victim of domestic abuse is returned to his or her family as even domestic violence affects the family's reputation. Families that place the family's standing above the well-being of their members do not deserve to have that person living in their home. Domestic violence is a huge problem with something we're familiar with, which means that not all victims have been served well by our efforts to resolve it. Violence directed at a family member is increasingly seen as a matter of human rights and a critical public health problem. Domestic violence against women in communities is a concern in Bangladesh since it is the country's entrenchment and instability rate, and the fact that it is increasing so dramatically. While there may be still many unknowns ahead, it

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¹ Anuseh Ali, 'Socio Legal Analysis on Domestic Violence Abuse' *The Daily Star* (2020) <<https://www.thedailystar.net/law-our-rights/news/socio-legal-analysis-domestic-violence-abuse-1899505>> accessed 13 May 2021.

is possible to deduce that perhaps the Corona epidemic would substantially impact individuals navigating these unconventional settings while trapped indefinitely in unstable dwellings².

Domestic violence is prevalent in Bangladesh, but it is rising as a result of the epidemic. Women are assaulted in rural places for a variety of reasons. They do not get the bare minimum of respect and are subjected to free domestic abuse. In rural regions, most families live below the poverty line, their education level is poor, and as a result, they are unaware of their rights and responsibilities. Institutional impediments and societal restraints are frequent occurrences. In this sense, victim women are unable to communicate it with others and cannot seek compensation. Bangladesh's Domestic Violence Act, 2010, was enacted to curb domestic violence. The Act is both preventative and educative. When we do a categorical analysis of the Act of 2010, we discover that the Act's introduction reveals how the authorities approved it. It is noted in the Act's introduction. More precisely, sexual violence has been stopped, and DVAW has been safeguarded.

During COVID-19 in rural Bangladesh, I will use this article to investigate the causes of violence against women during a pandemic. During this period, I will concentrate mainly on women who are mistreated in their homes. Domestic violence is the most visible expression of gender-specific human rights violations and a kind of gender violence. This situation is particularly problematic amid Bangladesh's rural lockdown. At least 157 people were slain, and 64 others were abused by domestic violence in the last three months of the country's economic crisis. For country's worst the crisis, people are losing their jobs, industries are suffering losses, and individuals are spending their days at home, contributing to DVAW³.

Violence increased 10% during the lockdown, the statistics were noted by the report of Dhaka University's Centre for Genocide Studies. According to the authorities, domestic violence documented 194 incidents of domestic violence throughout this period. As per a study by the Centre for Genocide Studies, the frequency of accidents was significantly high in the Rajshahi and Chattogram Divisions.⁴ If domestic violence were on the rise due to mental illness provoked by the financial crisis, the problem might be increased awareness. This research is both qualitative and quantitative approach, and the needed info is obtained from both primary and secondary sources. The secondary source is obtained from books, papers, journals, websites, case laws, etc. This study details the most recent work of the Bangladeshi government to further its goal of improving domestic abuse. the concluding portion of the analysis would present numerous suggestions to help put an end to domestic violence against Bangladeshi women.

² Yasmin B. Kofman and Dana Rose Garfin, 'Home Is Not Always A Haven: The Domestic Violence Crisis Amid The COVID-19 Pandemic.' (2020) 12 Psychological Trauma: Theory, Research, Practice, and Policy <<https://psycenet.apa.org/psycarticles/2020-37317-001.pdf>> accessed 26 July 2021.

³ Khandaker Farzana Rahman, 'Focus of Domestic Violence: A Study from Criminological Perspective' [2019] Journal of International Women Studies, Vol.20 > iss 3 (2019)

⁴ *ibid*

Conceptual Analysis

Violence Against Women

My findings concluded that violence against women could be understood as any gender-based violence that produces or is probably going to bring about physical, sexual, or severe mental harm. It includes possible instances of such violence, compulsion, or prejudice in forcing people into service, regardless of where it takes place.

Domestic Violence

Domestic violence cases were previously referred to as marital violence. As per the definition, victims of domestic violence may also include husbands, dating partners, intimate and intimate partners, and family members. It is not unusual for any person of any ethnicity, age, sexual region, religion, or sex to experience domestic violence⁵. However, this is relevant to marital relationships, including married people, couples who live jointly, including married couples⁶. Domestic abuse is defined as wife-beating and mental torment, according to my research. Human rights would check this analytic hypothesis.

Rural Area

When I conducted research, a rural region was defined as an open stretch of land with few dwellings and a minimal population. The population in the rural zones is tiny. Due to the greater population density in rural areas, the homes and workplaces are often spaced further apart in rural areas. Most rural communities have an agricultural economy that is the cornerstone of the local economy. The maximum number of persons may work on farms or homesteads.

Domestic Violence Situation in the Rural Area During COVID-19

In some instances, domestic violence is defined as the presence of actual aggression, such as relocating, confining, slapping, or being vulnerable to assault, as well as sexual maltreatment and psychological abuse (WHO). According to the research conducted by Manusher Jonno Foundation (MJF) in partnership with the Pink Cross Organization, nearly 11,000 women suffered various kinds of domestic violence during the countrywide lockdown in May when COVID-19 was introduced. Three thousand five hundred and eighty-nine incidents saw women who could not get money due to others losing their employment due to the lockdown.⁷

For instances of domestic violence at home, in the events of which victims experienced sexual assault, attempted or threatened assault, or death, 179 of them were the target of the attack; 48 of them experienced assault but were not the primary target 17 of them were killed. Additionally, throughout COVID-19, there were anticipated to be 170 documented cases of child marriage. Though the principal purpose of the research is to study violence against women during the Corona epidemic, it also incorporates data on victims of domestic and sexual abuse throughout the prior year of the pendency. Bangladesh was recently ranked 18th on that whole list. The 23%

⁵ The Domestic Violence (Prevention and Protection) Act, 2010 (Act 58), s 3

⁶ Ibid, s3

⁷ Manusher Jonno Foundation (MJF) 'Overview Report on Domestic violence during covid-19'

<http://www.manusherjonno.org/latest_stories/amid-lockdown-4249-women-and-456-children-became-victims-of-domestic-violence-in-april-mjf/> accessed 9 May 2021

percent of women tortured in the country during the coronation era was identical to the percentage of males troubled.

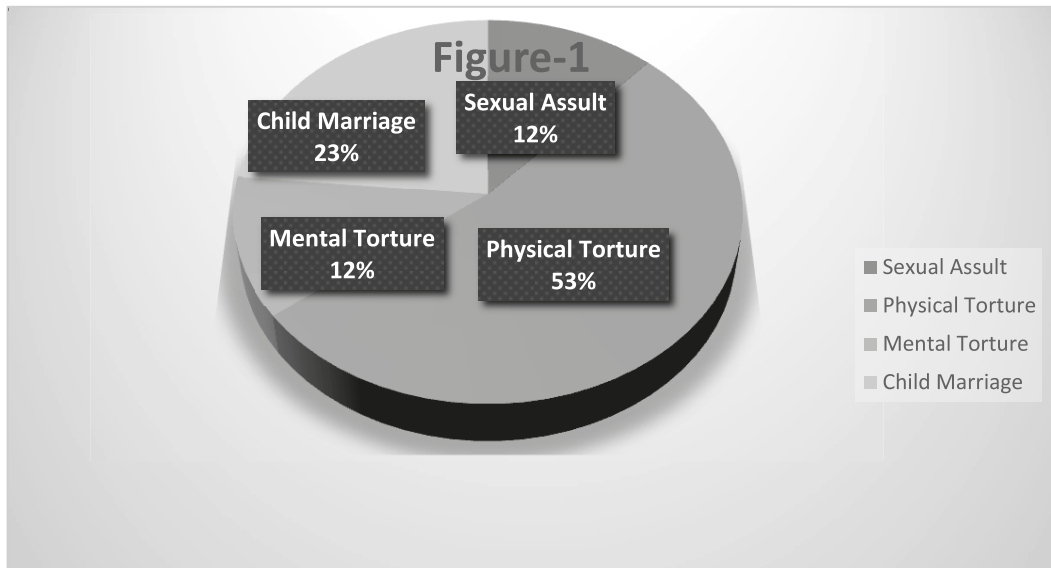


Figure 1: Overview of data survey on Domestic violence in the rural area⁸

36% of detainees reportedly suffered coronal torture. Ministry of Women and Children's "Multisectoral Program for the Prevention of Violence against Women" project leader Abul Hossain said that the number of tourists from outside the city has fallen during the summer coronation season. While some guys have shown violent behavior due to considerable anxieties they may have had while at home for a long time. There have also been cases of guys exhibiting aggression owing to specific concerns they've experienced. When people see violence, it tends to seem like an injured or tormented woman or child. Of the women who experienced domestic abuse, roughly 47% reported mental anguish. In June 2020, among women, 33% were victims of financial abuse, 18% were victims of physical abuse, and 2% were victims of sexual assault.⁹ According to the beginning of March reports, the city of Bogra, the nearby villages of Jamalpur and Cox's Bazar, and many other villages all had over 300 violent occurrences in one month. Of the roughly 4,249 women in 28 locations in the country subjected to domestic abuse during the April lockdown, the majority lived in rural regions. One-fifth of the people represented by the Foundation for People were teens, said the non-governmental organization.¹⁰ However, of the 648

⁸ I have collected the primary data by taking help from Sub-Inspector (SI) at Dumki Thana (Patuakhali), City Corporation Mayar (Barisal Sadar), Member of Parliament (Barisal-5), UP Chairman at East Angaria union (Patuakhali) and covered the area of East Angaria- Ward no-1 (Patuakhali), Satani (ward No-4) (Patuakhali), Labukhali (Ward No-2) (Patuakhali), Rajapur (Barisal-4), Bakergonj (Barisal), Uzirpur (Barisal), Chitalmari (Bagherhat), Rangpur, Bhairab (Kishorgonj).

⁹ "Violence Against Women and Children: COVID-19 A Telephone Survey: An Initiative of Manusher Jonno Foundation" <http://www.manusherjonno.org/wpcontent/uploads/2020/10/Report_of_Telephone_Survey_on_VAW_July_2020.pdf> accessed 12 May 2021.

¹⁰ Manusher Jonno Foundation, 'MJF | Corona Situation Increases Violence Against Women in The Country MJF Urges the Government to Take Effective Measures' (*Manusherjonno.org*, 2020) <http://www.manusherjonno.org/latest_stories/corona-situation-increases-violence-against-women-in-the-country-mjf-urges-the-government-to-take-effective-measures/> accessed 12 May 2021.

women who were the victims of various violent circumstances, including kidnapping, female murder, and sexual assault, only 86% are the wives of the males responsible for their mistreatment. For May, the proportion of individuals who were tortured increased by 31% over the month before¹¹.

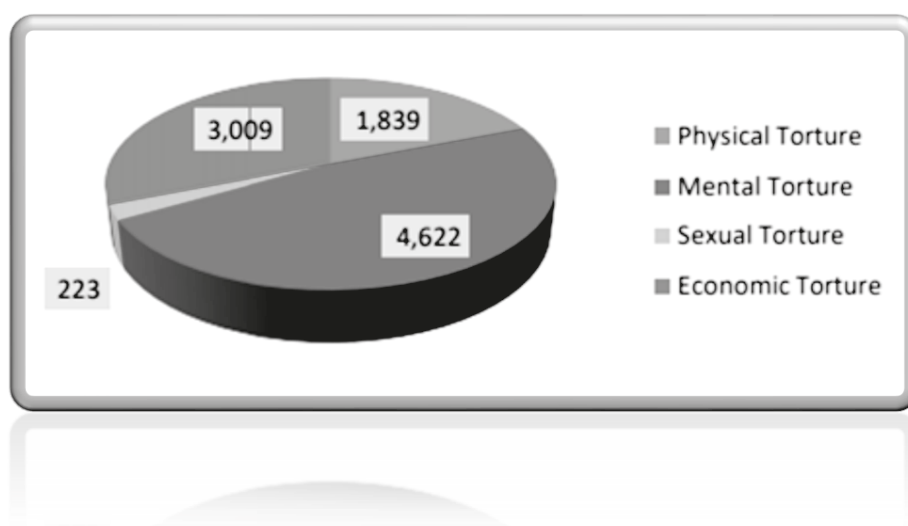


Figure: 2

Additionally, the research study reveals that women are at more risk of being exploited during the COVID-19 issue. In Barisal (Patuakhali, Labukhali, East Angaria, Satani, Bakergonj, Jhalokhati, Uzirpur, Agailjhara), I attempted to paint a picture of rural villages of many different types, such as those in Khulna (Satkhira, Chitalmari), Rangpur (Damodorpur, Hat-Bamuni, Keshalidanga), and Dhaka (Damodorpur, Hat-Bamuni, Keshalidanga) (Madaripur, Rajor Upazilla). This was a shameful display of poor quality. Work ultimately has been the primary experience for the majority of families. According to my survey, around 39% of the inhabitants in the area shown above had their employment lost epidemic.

¹¹ Kohinur Khyum Tithila, 'MJF: 13,494 Women, Children Faced DOMESTIC VIOLENCE During Covid-19 Lockdown' *Dhaka Tribune* (2020) <<https://www.dhakatribune.com/health/coronavirus/2020/06/10/mjf-13-494-women-children-faced-domestic-violence-during-covid-19-lockdown>> accessed 16 May 2021.

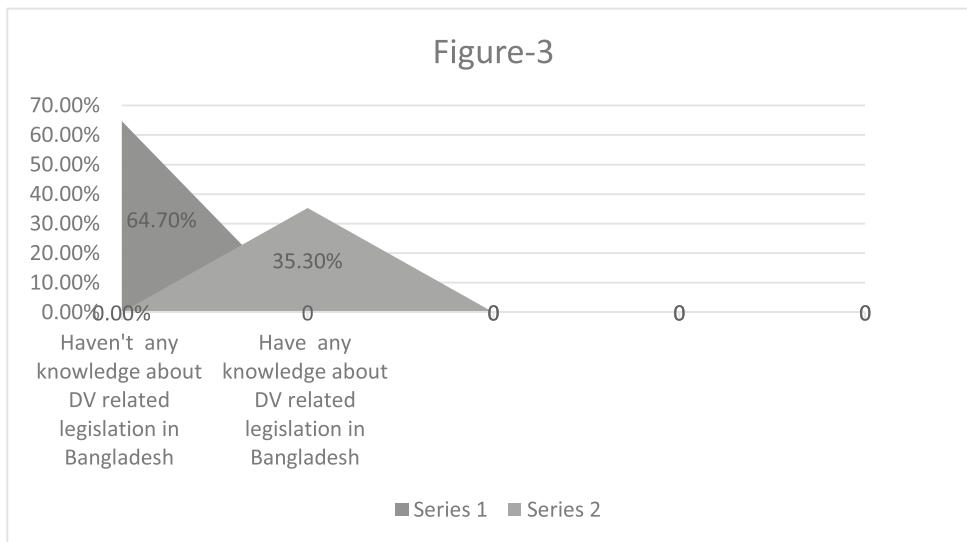


Figure:3 Knowledge about Domestic violence related legislation

In Rangpur division's Domestic violence Fodorpur village, a lock-out incident occurred, and I got the incident when I have collected my survey data on DVAW. On lockdown, the victim's spouse falls into a financial crisis. Without income, it was hard to support the home. Unemployment negatively affected his emotional health, and he tormented her while still employed as a school teacher. They know not how to get their rights back. 64.3% of the population in Bangladesh is uninformed of domestic violence legislation. Act unawareness provides no defence.

The Reasons for Domestic Violence in Rural Areas in the Time of the COVID-19 Situation

As some of the preceding has shown, a few motives exist for encouraging an increase in abusive conduct at home even during the COVID-19 situation. they are concentrating on one area:

Men's Frustration:

Many individuals are concerned about the loss of their jobs or positions due to the COVID-19 closure. Others let their frustrations take them in undesirable directions, engaging in abusive relationships. Research on this matter was done jointly by the Asian Development Bank and the International Labor Organization. They discovered that the two deadlines for contamination onset begin around one quarter of the last year after that. A study forecasts that eleven and a half million Bangladeshi workers might lose their employment if a short-term guideline is imposed. Even if the number of people with this illness takes the government half a year to discover, it is expected to climb to 16.75 lakh.¹²

¹² "Targeted Responses Needed To Combat Youth Unemployment Crisis — ADB-ILO Report" (*Asian Development Bank*, 2021) <<https://www.adb.org/news/targeted-responses-needed-combat-youth-unemployment-crisis-adb-ilo-report>> accessed 11 May 2021.

Child Marriage:

While schooling is challenging for rural families, educators have been instrumental in laying the framework for family instability for an extended time. Previously migratory employees who chose to return to their native country landed in their native country. Social reality places a premium on a young guy who lives and works overseas as a 'pot.' However, the parents and family continue to pursue marriage, despite their current predicament. On the other hand, law enforcement officials' monitoring is decreasing these days. Specific individuals are profiting from this opportunity. The parents of the country seek to find a husband to increase their income. Until population mobility drops, family payments to the area have decreased even further. As a consequence, you do not need to entertain a large number of people.

Other families received daughters to assist in alleviating the financial burden. These families have been placed in a difficult position as a result of the COVID closure. To help some of the load, a few guardians gave their young daughters as concubines. Child marriage is prohibited in Bangladesh under the 2017 Child Marriage Restraint Act.¹³ This is irrelevant to other factors, such as the fact that law enforcement agencies and authorities are busy dealing with COVID in the current climate. A few families see the idea of arranged marriages as a positive development.

Restrictions on the ability to make a complaint:

If your options for filing a complaint are limited, you will be unable to do so. Restricting women's choices limits their capacity to assist during the lockdown. The law enforcement agency does not know this present circumstance. Due to the absence of normality, the court has remained in place. Women have a great deal to worry about in this area. When a woman is intimidated or harassed at home, legal action may be taken. Despite this, a significant proportion of persons are unable to testify regarding abuse in court.¹⁴

The financial crises:

Financial crisis occurred due to shutdown, resulting in several issues for many women. Criminals feel that committing these acts is acceptable because of their anger. Many women have been unable to contribute to their families owing to travel limitations financially. In Barisal, Bangladesh, a girl died at the age of 17, making her the first person to perish from the epidemic. The gang continuously shoved her body to the ground, and after that, they put poison into her mouth. To help the sufferer, the officers had to go a great distance. Police officers had been seen in that faraway place utilizing domestic violence. Additionally, the lockdown situation has made it more difficult for citizens to develop a relationship with the police, increasing the likelihood that the police will assist more children¹⁵.

¹³ The Child Marriage Restraint Act, 2017, s 5

¹⁴ The Domestic violence (Prevention & Protection) Act, 2010, s 16

¹⁵ Kohinur, 'MJF: 13,494 Women, Children Faced DOMESTIC VIOLENCE, (n 12).

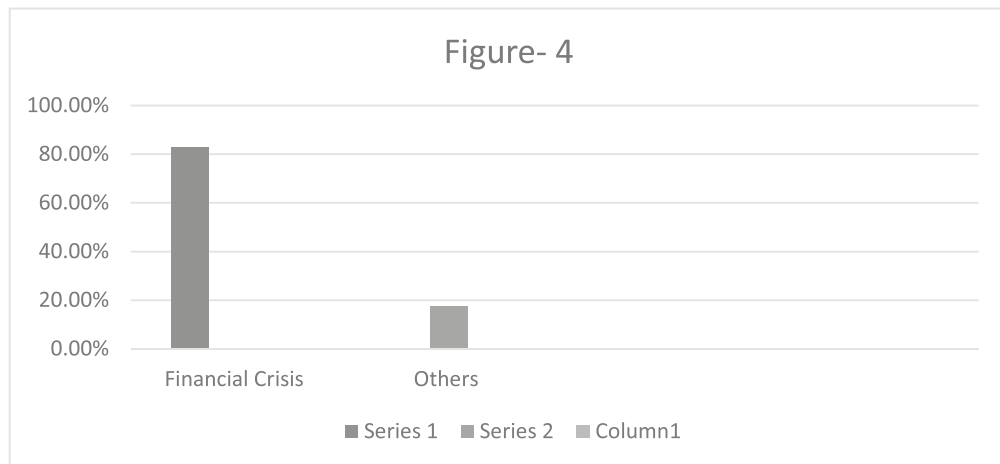


Figure-4

A significant epidemic led to an 84.6% unemployment rate, a severe economic crisis. In Patuakhali, Piara Begum lives with her husband and two boys. Her husband's loss of work happened when COVID-19 was underway. because he couldn't pay both the family's expenses and his children's education.

Existing Law in Bangladesh

The Bangladeshi government puts outlaws to protect women from abuse and to ensure their rights and security. There are times when the criminal laws are revised to benefit the victims better. In written form, the initial impression one may get of the extent of legal protection for women in Bangladesh is that it is 'adequate'. The Constitution assures a secular, socialist society free from exploitation. People may be free from fear of exploitation to the extent that the rule of law, fundamental human rights, and equal and fair societies are all preserved¹⁶. The document includes a provision for the concept of non-discrimination based on sex¹⁷, along with sections describing women's rights similar to those of males in all aspects of state and public.

1. Domestic violence (Prevention and Protection) Act, 2010¹⁸.
- 2.The Dowry Prohibition Act, 2018¹⁹
3. Repression against Women and Children (Special provision) Act 1995²⁰
4. The Prevention of Oppression against Women and Children Act of 2000²¹
5. Penal Code,1860²²

¹⁶ The Constitution of the People's Republic of Bangladesh, 1972, P.O. No 76

¹⁷ ibid art 28(1)

¹⁸ The Domestic Violence (Prevention and Protection) Act, 2010 (Act 58)

¹⁹ The Dowry Prohibition Act, 2018 (Act No 39)

²⁰ The Repression against Women and Children (Special provision) Act 1995, (Act No. 18)

²¹ The Prevention of Oppression against Women and Children Act of 2000 (Act No 8)

6. Declaration of the Elimination of Violence Against Women (1993)²³***Declaration of the Elimination of Violence Against Women (1993)***

Some types of abuse include physical, sexual, emotional, financial, or psychological, including abuse and harassment. Domestic violence may consist of any or all of the following: threats, actual physical abuse, and such like, as well as some unjust imprisonment and abduction.²⁴ Article 2 of the Declaration on the Elimination of Violence Against Women prohibits violence against women and defines domestic violence.

a) Acts of physical, sexual, and physical hostility, physical violence, familial sexual abuse, dowry-related violence, marital assault, violence against women, and other cultural traditions injurious to women are often encountered in conjunction with violence.

b) Assault, sexual harassment, harassment at work, educational institutions, or elsewhere in the workplace, and resistance to prostitution regulations are all examples of physical, sexual, and psychological violence.

c) physical, sexual, and emotional violence, regardless of the perpetrator; prevention and protection for women victims of domestic abuse in Bangladesh²⁵:

1. Physical

2. Psychological

3. Sexual

4. Economical

Corona infection is often prevented worldwide through the use of a lockdown. As a result of the coronavirus outbreak (CROV) in Bangladesh, there have been some other lockdowns in the surrounding regions, much as there were when coronavirus (CROV) frequency was high elsewhere. Corona is on her way, and as a result, all men and females will be captured. We understand that different genders will not be affected equally by a disaster. Due to the cultural norms of Bangladesh, women's experiences are dependent on the availability of free domestic violence. Women account for one-third of the global population, and approximately being one woman has experienced domestic abuse in ordinary times. In light of these new facts, it seems that this number has steadily increased throughout the years in the Corona period. Covid-19, the secret epidemic of escalating violence against women in Corona, is now recognized by the United Nations. A study has shown approximately 360 cases of domestic violence and 36 incidents of rape reported in the three districts of Bogra, Jamalpur, and Cox's Bazar during March alone.

²² The Penal Code, 1860 (Act No 45)

²³ The Declaration of the Elimination of Violence Against Women (1993)

²⁴ Nazia Wahab and Vishaka Suriyavandara, 'Eradicating of Domestic Violence Against Women: A Comparative Study on Legal Framework Between Sri Lanka And Bangladesh' (2020) 26 <<http://www.gjstx-e.cn/>> accessed 16 May 2021.

²⁵ The Domestic violence (Protection & Prevention) Act, 2010 (Act 58)

The Penal Code, 1860

All crimes against women are included in the Penal Code 1860 under sections 359-368, 339-344, 370-374, 312-318, 319-326, 328, 349-352, 354-358. Other crimes against women are covered by the Penal Code 1860.²⁶

Dowry Prohibition Act, 2008

As per the Dowry Prohibition Act, dowry is unlawful²⁷, and the violation is penalized under sections 3 and 4 of the Act.²⁸ The discussion is concerned with dowry demands made and paid by the husband before the wedding and dowry direction made and produced by the husband before the wedding. In 2014, the appellate division of the Supreme Court of Bangladesh upheld the conviction of Abul Basher Howlader for demanding dowry marriage and for permitting his wife to do the same.²⁹

The Cruelty to Women (Deterrent Punishment) Ordinance, 1983

The governing body adopted the following deterrent penalties for Violence and cruelty against women under the 1983 Cruelty to Women (Deterrent Punishment) Ordinance.³⁰ Most of the punishments for violating the act had previously been tried unsuccessfully when the statute under the Special Tribunals for Powers of the Special Powers Act of 1974 was still in place.³¹ It is dedicated to serving as a tool to deliver extreme penalties for criminals that have been convicted of crimes. It includes kidnapping or abduction of women, human trafficking, rape, death threats because of dowry demands (for dowry claims or demands), and convictions for committing rape or making threats to kill a woman (section 7 & 8). For the time being, there is no data available to verify if this kind of penalty serves as a deterrence, making it challenging to validate if it decreased criminal behavior against women

Criminal Offenses Relating to Marriage

However, adultery is relatively frequent in marriages. Adultery, however maybe strange, does exist under Penal Code section 497. Section 497 outlaw's adultery as a crime committed by a man against a woman. Husband loves his wife; he may talk to her in a way that doesn't upset her. She would be ineligible also to be convicted. He seemed to have no personal relationship with anybody and therefore wasn't married, and therefore victim had nothing to fear.

Inadequate Execution of Laws

A year after introducing the Domestic Violence (Prevention and Protection) Act, Bangladesh issued the Domestic Violence (Prevention and Protection) Act. It helped advance efforts to recognize domestic violence as external dowry violence and establish physical, mental, sexual, and monetary abuse as components of this maltreatment. Victims who were found guilty and those

²⁶ Nusrat Ameen, 'Law and the State's Response Towards Violence against Women' (2000)' (*Biliabd.org*, 2000) <<http://www.biliabd.org/article%20law/Vol-04/Nusrat%20Ameen.pdf>> accessed 17 June 2021.

²⁷ The Dowry Prohibition Act, 2018, (n 20) s 2

²⁸ *ibid* s 3 & 4

²⁹ 46 (1994) DLR (AD) 169

³⁰ The Cruelty to Women (Deterrent Punishment) Ordinance 1983

³¹ *ibid*

who took part in the march were protected by domestic violence in rural regions, which also challenged insurance guidelines.

The law does not apply to divorced women. It makes no mention of the penalty if an offender breaches the law. When it comes to the issue of divorced parents' children, they, too, are not protected by the law. As a result, it is often a double whammy for victims' moms when the children fall on their shoulders after separation.

Bangladesh believes that the findings on the Nari-o-Shishu Nirjatan Daman Ain, which was completed in 2000, and the ten-year commemoration of the enactment of the Domestic Violence Act are, to some extent, linked to the fact that no data has been collected on the topic. as one of the country's most prominent women's rights groups, an organization that has earned national acclaim is well-known as one of the country's preferred options. The level of success in the country's national activities plan has caused much confusion. When one examines the country, there is little to be found.

To implement this multi-sectoral initiative, the Bangladeshi government began to lower violence against women and girls and lay the framework for a more expansive, comprehensive strategy to eliminate DVAW³² Instead of the protest, Daman Ain Nari-o-Shishu Nirjatan was carried out in 1995. (Women and Children Repression Prevention Act). The aim includes violence that adversely affects women and children. Despite the best of intentions, it is merely a matter of lousy execution.

Findings

Violence against women is a very controversial subject in Bangladesh, but the country looks to be seeing an alarming rate of COVID-19 during this event. Domestic violence rates have grown in remote rural areas due to various circumstances, including men's frustration, job loss, financial crisis, institutional hurdles, fewer possibilities to file complaints, disturbing society's deviant behavior, mental incapacity, and child marriage. Most critically, the great majority are unfamiliar with the Domestic Violence Act or other applicable legislation. Decentralization is an issue when it comes to the spread of domestic violence. Local governments are unable to take adequate action due to a budget shortfall. Their household may not have the funds to cover the expense of covid-19. Their spouse was unemployed at the time. And they lack the financial resources necessary to sustain him and his family via underage marriage and dowry. Numerous members of the family are experiencing psychological hardship as a consequence of the lockout. Throughout the Covid crisis, the government proclaimed a state of emergency. At the time, their husband and children were confined in their homes. It caused them emotional turmoil, which impacted his family connections negatively. Additionally, the defendants initiated torturous behavior against their wife and little children.

³²The Multi-Sectoral Program on Violence against Women (MSPVAW) <<http://mspvaw.gov.bd/contain/17>> accessed 13 May 2021

It is yet unknown if domestic abuse victims will get rehabilitation, legal assistance, or social support. Additionally, resource scarcity is the lack of collaboration among those involved in keeping the survivor from receiving aid. There is still a financial shortage that shortage must fill to put in place laws on this matter. In addition, during the COVID-19 crisis in the rural region, Law is enforcing determined that no specific mechanisms to oversee law enforcement had been in place. In this study, the author showed that victims are unaware of any laws about domestic abuse. In terms of the 25 individuals interviewed, 23 said that they had never known of the rules.

Recommendations

As previously stated, the various law enforcement organizations with mobile capabilities, such as state police, bylaw enforcement offices, and Explosives, all have much more tactical equipment for usage in certain situations. Consumers must first be given internet browsers with numbers and websites for crisis hotlines already installed. For the sake of administration, administrative offices should be labeled "basic," and that personnel carrying out reinforcing tasks should be dubbed "primary" personnel. To maximize the potential of government-sponsored psychological services, such as phone or video therapy, non-governmental organizations (NGOs), and commercial companies, governments, may begin offering free telephone or video treatment to the needy. Domestic abuse affects all genders, sexual orientations, ages, socioeconomic backgrounds, races, and religions. Everyone in our network of friends, family members, or neighbors is someone who has been a victim. The Coronavirus, which is present in Bangladesh, has yet to have wide-reaching implications since it only remains active for a short time.

On the other hand, domestic violence occurring on lockdown days may have lasting ramifications for those who have experienced it. To ensure the security of the most vulnerable women in rural locations, they needed to expand their safety net to women in the area, the government and other non-governmental organizations must support safety net initiatives in the rural areas.

We may also go beyond supporting the neediest individuals in society and assist local communities. The government and non-governmental organizations (NGOs) should greatly enhance assistance to local communities. It is in the government's best interest to ensure that both the police and PP have adequate training in criminal investigations of domestic abuse against women. For addressing the rising issues with domestic violence incidents against women, the program has enabled the development of an online centralized recording system for all incidents, which provides access to information such as case data and records. If appropriate, makes this information accessible to everyone.

All the concerned-UP member and chairman need to come forward, they must collaborate to combat domestic abuse in rural communities. When trying to prevent someone from injuring the people they care about, you must get all of the relevant information on both the person they are harming and the perpetrator. So, you see, it is your role and duty, and it is also in the best interest of people threatened by your actions.

On the other hand, while many abuse survivors choose to keep their tales private, the majority want to prevail secret because they are concerned about what others would think and how society would handle them. In the instance of a crime, the victim's privacy must respect the victim's privacy. A new code number is required for the law enforcement agency with whom victims may discuss confidential material.

As a result of the lockdown, all domestic violence cases originating across the country will be subject to the jurisdiction of the virtual court designed in advance. Once they did all that was possible to help the victims of COVID 19, they then began to pursue providing a defense for the cases, even though government and non-government emergency shelters are barred from housing COVID 19 victims owing to the risk of contamination. To help ensure that victims get assistance and safety, the government should institute protocols to make sure they are evaluated and kept secure in the shelter places. A "women's desk" is proposed in rural regions of Bangladesh where police officers would maintain a general daily log of activity to enable the public to access this information via an Internet-based system.

While printed and electronic media are essential, the two most critical media will use print and electronic means. Bangladesh Betar and BTV will increase the knowledge and comprehension of family violence implications and provide educational materials that will help in the sensitization and growing consciousness of people. In this approach, the media will assist the police in linking hotlines with crisis centers, thereby allowing the people in trouble. Individuals who live in rural areas should be extra vigilant of the police. It is incumbent upon government entities to ensure that harassment reports are not neglected. A harassment report will show this information on the scroll for the TV broadcasters. While there are ways to promote the knowledge of organizations and mosques that focus on empowering the public's voice.

Social networking services should ensure that any posts of this sort are immediately filtered away when identifying the victim. For as long as anybody can remember, women have had to put up with abuse from their own families. However, in 2005, the state legislature passed, the Protection of Women from Domestic Violence Act but some provisions need to amend. Additionally, instances of legislative abuse have recently occurred, which means strict controls and inspections are now required to guarantee natural justice is adhered to.

Conclusion

As has been shown previously, the rate of domestic violence in rural areas is increasing in the months before COVID-19. Current laws have been applied in such a way that the rate of development is unfathomable. The poll showed among those impacted by the lockdown, about 40.21% lost their employment and were in financial hardship. In rural regions, 25 women out of every 50 are beaten or otherwise abused by their spouses, relatives, or family members. In a rural location, the typical person earns less than the poverty level, and being unemployed is a tremendous strain. In one case, they pushed their daughter to marry an adolescent who had mental health issues and used violence against women for dowry or any other purpose. Because of their anxiety and social barriers, the victim is unable to report the crime to the local police station. The

victim accepts their outrageous conduct without attempting to defend themselves. The primary data I used shows that 31.8% of the victims did not report the crime to the authorities.

Local Government Division (LGD) should step up and be more vocal, but they never say anything. Once domestic violence happens, they tend to seek to solve the situation, but this is not a permanent solution. Eventually, the victims usually face the same difficulties again and again. Among others, decentralized decision-making might be an essential tool to resolve some cases.

Even though there are two specific laws, such as the Domestic Violence Act of 2010 and the Preventing Oppression Against Women and Children Act of 2000, to address women's sufferings in different spheres of life, sometimes these laws appear useless. Both laws become futile in some cases due to, among other things, ambiguity, vague, and conflicting terms and provisions. Hence, the policymakers of Bangladesh should initiate legislative reforms by amending the existing laws and introducing new laws as required.

LABOUR LAW IN BANGLADESH AND INDIA DURING COVID-19: A CRITICAL ANALYSIS

Bushra Haque*

Abstract

The COVID-19 crisis has the potential to be catastrophic for the millions of employees already in precarious situations. The shock wave it has sent down has its reverberation in shaping the globalised socio-economic condition. The vulnerable workers are among the hardest hit by the economic cataclysm of the pandemic. This article mainly focuses on the impact of COVID-19 on the exposed workers in two neighbouring countries- Bangladesh and India. Firstly, the article seeks to show the competency of the existing provisions in the legislature to deal with the pandemic. The objective is to assess whether and to what degree the existing body of laws is capable of addressing the issues that have emerged as a result of the ongoing uncontrollable situation. Secondly, it intends to provide a short but comprehensive review of the initiatives proposed by legislators in Bangladesh and India in response to the effect of the COVID-19 emergency on working conditions and business operations. Thirdly, the article deals with the responses of the state and the employers in maintaining workers' due diligence whilst ensuring the growth of the economic activities in a country. The responses of global brands and the subsequent effects on workers in the immediate aftermath are also captured. The aforementioned responses attempt to apprehend the extent of applicability of the existing legal provisions. The article further proposes to bring changes to Acts, policies, guidelines and practices that can lead to long-term changes in order to safeguard and extend the fundamental rights of the employers and workers. The views expressed in this paper are based mostly on secondary sources. The views are critical analysis in order to understand the impact of the pandemic on the labour law regime.

Keywords: *COVID-19, Labour Law, due diligence, worker's right, socio-economic development.*

Background

The COVID-19, a disease caused by a virus known as Severe Acute Respiratory Syndrome Corona Virus 2 (SARS-nCoV-2) has shaken the world since its appearance in the city of Wuhan in China in December 2019. The disease, the cure to which is yet to be discovered has already cost 3.54 million lives across the world with the number increasing with each passing day. World Health Organization (WHO) has declared COVID-19 as a world health emergency on 30 January 2020 and subsequently a global pandemic on 11 March 2020.

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Bangladesh and India both acted swiftly to address this rapidly evolving problem with varying degrees of success or failure in managing the crisis. Bangladesh is fastening its economic growth. India was one of the first to implement the initial lockdown. Despite India undertaking many strategies and stimulus packages to combat the pandemic within a few months, India was among the hardest-hit countries by the disease. The failure is not the outcome of the crisis but the result of ongoing negligence towards the workers. There is no doubt that both countries have taken quick steps to alleviate the situation, even though the two countries resulted in two different outcomes. Analysis on both countries points out that amidst the development, it is the workers who have suffered the most. Their lives remain unalterable due to the negligence to nurture towards them to ameliorate workers' lives.

Methodology and Objective

This paper aims to describe essential factors affecting the vulnerability of workers both in Bangladesh and India. It intends to highlight the impact of existing legislation in regulating workers' lives. Based on secondary materials, the paper also gives a reality check of the different initiatives taken by the government. It further proposes a few recommendations on upgrading the existing elements to help the countries mitigate the economic fall-out of COVID-19. The two neighbouring countries Bangladesh and India have been selected as they share similarities in culture and heritage. The analysis in this paper is based predominantly on secondary data and available literature reviews and datasets on both countries.

Limitation

This paper lacks the level of detail required for comprehensive analysis on the impact of COVID-19 on the Labour regime. Since the pandemic is still ongoing, the outcome of COVID-19 on the labour regime can't be spelt out yet.

Introduction

COVID-19 has wreaked havoc across the world, causing deaths and dislocations on a scale very few could have anticipated. The crisis has canvassed the inconsistent balance between workers' rights and the socio-economic development of the country. This pandemic is having a devastating effect on the socio-economic condition of the country. Millions are losing lives, shelters and jobs making the whole labour system at sixes and sevens. Legislations are being scrutinized to measure the aptitude to govern the current holocaust. New policies are being issued to synchronize workers' socio-economic development. Global response to the pandemic is both being appreciated and criticized. The national, as well as local authorities are baffled at this unexpected occurrence. The haunting image of people's sufferings and concomitantly the Government of Bangladesh and India's various plans to uphold the growth of the country's economy raises the question of whether the countries' socio-economic growth is at the cost of their workers' rights. However, amid the

global chaos, India and Bangladesh have taken manoeuvres to sustain during the calamity as well as during the post COVID period.

Laws and Regulations: Labour Guide

All relevant stakeholders in the labour regime are responsible by national legislatures and international perspectives to fulfil their duties and obligations. The UN Guiding Principles for Business and Human Rights (UNGPs)¹ notes that states must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. The UNGPs guideline further shows that all companies have an independent responsibility to respect human rights. Respect for human dignity can be upheld by applying due diligence in the workplace. The employers are also under legal obligations to offer sick leave and pay access to Medicare and safe return to work when the workers recover from sickness.² International Labour Organization (ILO) has created and passed several policies so far. A total of eight conventions are core to dealing with the Workers' fundamental rights.³ Out of those Bangladesh has ratified 7 and India 6 conventions.⁴

Labour Law and COVID-19 in Bangladesh

The constitution of the People's Republic of Bangladesh has upheld the dignity and rights of the workers. As per the constitution, workers should have equal opportunities.⁵ They mustn't be subject to any discrimination.⁶ The right to life⁷ of the workers should be recognized. Forced Labour should be strictly prohibited⁸. Article 14 requires the workers to be free from exploitation; Article 15 requires the state to ensure basic necessities of life, right to work, reasonable rest, recreation and leisure and social security; Article 20(1) of the Constitution of Bangladesh talks about applying due diligence while paying the workers remuneration.⁹

WHO has mentioned physical distancing, wearing a mask, being in well-ventilated rooms, cleanliness, etc. as safety measures to minimize the escalation of COVID-19. The Bangladesh labour law, 2006 is well-ordered for cleanliness and hygiene. OSH guideline too requires the owner of the establishment to keep its enterprises clean. Section 51 of the act ensures the cleanliness of every establishment, section 57(2) mandates glass windows, section 59 toilets, and

¹ The United Nations, "*Protect, Respect and Remedy*" framework for human rights and transnational corporations and other business enterprises. The UN Guiding Principles for Business and Human Rights (UNGPs) are a set of guidelines consisting of 31 principles implementing the United Nations'.

² Sanchita Banerjee Saxena, Banerjee Saxena, Nancy Reyes Mullins and Salil Tripathy, 'The weakest link in the global supply chain: how the pandemic is affecting Bangladesh's garment workers' (Institute for Human Rights and Business 2021) <<https://www.ihrb.org/focus-areas/COVID-19/Bangladesh-garment-workers>> accessed 31 May 2021.

³ International Labor Organization, "*Dignity and Rights of Migrant Workers in an Irregular Situation*" (2020, July 25).

⁴ India hasn't ratified the core/fundamental Conventions, namely Freedom of Association and Protection of the Right to organize Convention, 1948 (No. 87) and right to Organize and Collective Bargaining Convention, 1949 (No. 98).

⁵ The Constitution of the People's Republic of Bangladesh, 1972, P.O. No. 76, art 27.

⁶ *ibid*, art 28.

⁷ *ibid*, art 32.

⁸ *ibid*, art 34.

⁹ Work is a right, a duty and a matter of honor for every citizen who is capable of working, and everyone shall be paid for his work on the basis of the principle 'from each according to his abilities, to each according to his work'.

washrooms, section 60 Dustbin and Spittoons, section 72 floors, stairs and passages, section 91 washing facilities to be cleaned. To put these provisions in the context of COVID-19, we can say that the provisions on cleanliness are adequate. BLA also ensures proper ventilation under section 52. As per WHO guidelines, the minimum distance between two individuals should be 6 feet. Section 56 of BLA prevents the room from being overcrowded. It implies 6 feet distance around every individual for protection from the disease. Under BLA a worker can utilize the two weeks paid leave articulated in section 116 to diagnose or to recover if infected from the disease. BLA has eased the procedures for the employees too. Section 12 gives the employers the right to stoppage of work in case of an epidemic¹⁰ to be read with section 16¹¹ which identifies the amount of compensation in case of lay-off.¹²

The existing legislatures also impose a sanction in case of violations of orders issued to prevent the further spread of the disease. Executive magistrates under the Mobile Court Act 2009 are given the power to impose fines under section 269¹³ of The Penal Code, 1860. Fines not being specific is subjected to section 63¹⁴ of the same code. The court can also impose imprisonment up to 6 months and a fine not exceeding USD 11.78 for endangering human life by disobedience to order duly promulgated by public servants.¹⁵

Labour Laws in India

The constitution of India is well equipped to protect the workers. The workers are treated equally before the law.¹⁶ The law provides protection to life, personal liberty¹⁷, equal opportunity¹⁸ to all workers. The Constitution prohibits subjecting the workers to any sort of discrimination¹⁹, all sorts of trafficking and forced labour²⁰ and child labour²¹. The Constitution of India provides that the state should strive to promote the welfare of the people by securing and protecting social order for the promotion of the welfare of the people²², minimizing income inequalities in the country²³, ensuring equal pay for equal work for both men and women²⁴; ensure the right to work for its citizens,²⁵ provide secure, just and humane working conditions and for maternity assuagement²⁶;

¹⁰ The Bangladesh Labour Act, 2006, Act No...., s 12(1).

¹¹ *ibid*.

¹² Section 16(2) of the Bangladesh Labour Act, 2006, in case of lay-off a worker is to be compensated and the amount of compensation shall be equal to half of the total of the basic wages and dearness allowance and ad-hoc or interim wages, if any, and equal to the full amount of housing allowance that would have been payable to him if he had not been so laid-off.

¹³ Section 269 Of Bangladesh Penal Code, 1980, "Negligent act likely to spread infection of disease dangerous to life."

¹⁴ Section 63 of Bangladesh Penal Code, 1980, "Where no sum is expressed to which a fine may extend, the amount of fine to which the offender is liable is unlimited, but shall not be excessive."

¹⁵ the Penal Code, 1860, Act No. 45, s 188.

¹⁶ The Constitution of India, year, art 14.

¹⁷ *ibid*, art 21.

¹⁸ *ibid*, art 21.

¹⁹ *ibid*, art 15.

²⁰ *ibid*, art 23.

²¹ The Constitution of India (n 16), art 24.

²² *ibid*, art 38(1).

²³ *ibid*, art 38(2).

²⁴ *ibid*, art 39(d).

²⁵ *ibid*, art 41.

ascertain that workers are having the right to a living wage and good working conditions²⁷; work on legislation that would secure the participation of workers in the management of undertakings, establishments or other organizations engaged in any industry.²⁸ Labour Laws in India are enacted both by the central and state government. The Indian government has merged 29 labour laws and compiled them to be four major labour law acts: The Code on Wages, 2019, The Industrial Relation Code, 2020, The Occupational Safety, Health and Working conditions code, 2020; the code on social security, 2020. However, the new laws have received their appreciation as well as criticism on regulating the life of the workers.

Bangladesh and India's Policy Responses

When the pandemic hit hard, many governments had introduced guidelines, rules and regulations to lessen the impact of the deadly virus (SARS-CoV-2). 188 Countries have taken drastic steps to curb the pandemic's spread while also upholding the growth of the economy and labour market regardless of the negative impact of the pandemic.²⁹ The countries are initiating policies based on four pillars of actions³⁰ defined by the ILO to lessen the repercussion of COVID-19 on businesses, jobs and the most vulnerable members of society. However, India has taken initiatives more or less to address every section specifying it has a more comprehensive plan to address the pandemic than Bangladesh.

Pillar 1: Stimulating the Economy and Employment

This pillar calls for stimulus packages to mitigate the impact of the crisis on economies and labour markets. In Bangladesh, among the 23 stimulus packages of a total USD 1,24,0530 million so far, the RGM sector received USD 1,765,482,000 to pay workers' four months' wages. USD 588,494,000 allocated for export-oriented- industries, USD 3.5 million is issued for the importation of manufacturing raw materials. Four fresh stimulus worth packages USD 797.41 were allocated for covering public expenditure, stimulus packages, social safety net coverages, and increased monetary supply. Bangladesh Government has sought USD 1 billion in support from the IMF and World Bank for mitigating the impact of COVID-19 fallout. The World Bank

²⁶ *ibid*, art 42.

²⁷ *ibid*, art 43

²⁸ *ibid*, art 43-A.

²⁹ 'Regional And Country Impact And Policies (COVID-19 And The World Of Work)' (ILO.org, 2021)

<<https://www.ilo.org/global/topics/coronavirus/regional-country/lang--en/index.htm>> accessed 22 December 2021.

³⁰ Pillar 1: Stimulating the economy and jobs. a) Active fiscal policy b) Accommodative monetary policy c) Lending and financial support to specific sectors including the health sector; Pillar 2: Supporting enterprises, employment, and incomes. a) Extend social protection for all b) Implement employment retention measures. c) Provide financial/tax and other relief for enterprises

Pillar 3: Protecting workers in the workplace. a) Strengthen OSH measures. b) Adapt work arrangements (e.g., teleworking).c) Prevent discrimination and exclusion. d) Provide health access for all. e) Expand access to paid leave

Pillar 4: Using social dialogue between government, workers, and employers to find solutions. a) Strengthen the capacity and resilience of employers' and workers' organizations. b) Strengthen the capacity of governments .c) Strengthen social dialogue, collective bargaining and labour relations institutions, and processes. 'Regional And Country Impact And Policies (COVID-19 And The World Of Work)' (ILO.org, 2021) <<https://www.ilo.org/global/topics/coronavirus/regional-country/lang--en/index.htm>>

and the government of Bangladesh signed a USD 250 million loan agreement to help Bangladesh recover quickly in the job sector for safeguarding a resilient future.³¹

In India stimulus package includes a total of USD 20,97,0530 million out of which for workers an economic package of USD 21.9 billion, Aatma Nirbhar Bharat Abhiyan of USD 265 billion,³² USD 400 million for the poor and the vulnerable. USD 1.96 billion for paramedic stuff, USD 39 billion for MSMEs, 8 billion to support agriculture are issued.

Pillar 2: Supporting Enterprises, Job, and Income

COVID-19 has created a tremendous negative impact in the job sector. Already in Bangladesh, more than 350,000 lost their jobs in 2020.³³ More than 26,000 workers were retrenched from 87 RMG factories³⁴, 20 million people who solely rely on the informal sector jobs have already lost their jobs.³⁵ 16.5 million people- largely rickshaw-pullers, transport workers, day labourers, street vendors, hawkers, construction labourers, and the employees of hotels, motels, and restaurants have been thrust into poverty.³⁶ 95,000 migrants have returned to the country after losing their jobs. An estimated 20.25 GDP contributor as in the SME sector has lost around 2.5 million SMEs. The ongoing crisis will be on the rise in Bangladesh till the invention of a proper cure for COVID-19.

The timely issuance of different packages displays the commitment of the authority to mitigate the impact. However, the stimulus packages for maintaining income sectors are not many. Only USD 2.3 billion stands allocated for SMEs, USD 82,389,160 fund at 4% interest is introduced for Migrant workers. The fewer stimulus packages for job sectors deprived many informal workers whereas 80% of total workers are informal. The mismanagement in providing relief gives the signal that it is high time for the Government to take efficient legislative actions to secure the income sector for the post covid world.

In India, likewise, Government has many programs like Pradhan Mantri Garib Kalyan Anna Yojana to distribute free ration to the poor; PM Krishan Yojana to benefit 8.6 million farmers, Prime Minister's Garib Kalyan Rozgar Yojana has USD 1.3 million for house scheming, USD 13

³¹ The World Bank, "World Bank Helps Bangladesh Create Better Jobs And Ensure Resilient Recovery From The COVID-19 Pandemic" (2021) <<https://www.worldbank.org/en/news/press-release/2021/04/22/world-bank-helps-bangladesh-create-better-jobs-and-ensure-resilient-recovery-from-the-COVID-19-pandemic>> accessed 1 June 2021.

³² It includes measures for relief and credit support to businesses, especially MSMEs; the poor, including migrants, farmers, and street vendors; measures to strengthen agriculture infrastructure logistics and; structural reforms across key sectors such as coal, airspace and power and others. See, Jamila K. Hassan and Leonard W.T. Fweja, 'Food Hygienic Practices And Safety Measures Among Street Food Vendors In Zanzibar Urban District' (2020) 1 eFood.

³³ 'Centre Of Policy Dialogue (CPD),' *Vulnerability, resilience and recovery in the rmg sector in view of covid pandemic*, (2020) <<https://cpd.org.bd/resilience-and-recovery-capacity-of-rmg-enterprises/>>

³⁴ International Labor Organization, 'The Supply Chain Ripple Effect: How COVID-19 Is Affecting Garment Workers and Factories in Asia And The Pacific' (2020). <https://www.ilo.org/asia/publications/issue-briefs/WCMS_758626/lang--en/index.htm>

³⁵ Ali Riaz, 'Bangladesh's COVID-19 Stimulus: Leaving the Most Vulnerable Behind' <<https://www.atlanticcouncil.org/Blogs/New-Atlanticist/Bangladeshs-COVID-19-Stimulus-Leaving-The-Most-Vulnerable-Behind/>> accessed 2 June 2021.

³⁶ Arti Yadav and Badar Alam Iqbal, 'Socio-Economic Scenario of South Asia: An Overview of Impacts Of COVID-19' (2021) 28 South Asian Survey.

million for poor pensioners, widows and disabled and USD 19.6 for 200 million for instalments, increased wages under the employment guarantee scheme (MGNREGS), distributed fund for construction workers. There are initiatives to give adequate food supply for migrant workers, reduce house rent, extend employment provident fund, reduce EPF contribution, and many others. Besides, there is stimulus issued to compensate those who succumbed while at operation, for instance, a compensation of USD 13,479.90 is allocated to all postal employees. The Ministry of labour and employment has set up 20 Control Rooms to resolve wage-related concerns and minimize migrant worker concerns. The Government of India's initiative to secure the income sector is way more detailed than the initiatives of Bangladesh.

Pillar 3: Protecting Workers in the Workplace

The Ministry of Labour and Employment of Bangladesh issued A 'Guideline on Occupational Safety and Health (OSH) to Prevent and Mitigate COVID-19' in the Workplace. The guideline outlines efficient business continuity plans that will protect workers while also ensuring the long-term viability of businesses and jobs. For health workers, 'National Guidelines on Clinical Management of Coronavirus Disease 2019 (COVID-19)' has been issued. India has issued guidelines on preventive measures to contain the spread of COVID-19 in workplace settings. India's IEC materials have been developed and disseminated on 'How to communicate with COVID-19 suspected and confirmed cases for looking after the mental health of the workers. India arranged training for Front Line Health workers on addressing rumours and actual facts around, launched helpline on behavioural and socio-psychopath health.

Pillar 4: Relying on Social Dialogues for Solution

Pillar 4 is on using social dialogue between government, workers, and employers to find solutions and to strengthen the capacity and resilience of employers' and workers' organizations and the capacity of the governments. To implement pillar 4 Bangladesh can take a resort to the universally recognized rights, the freedom of association, the right to organize, and the right to collective bargaining which are enshrined in article 37 of the constitution and section 176 of the BLA and ILO convention no.87.³⁷ In India, this right is enshrined in article 19(1) of its constitution. In practice, several high-end discussions and deliberations on the continuation of factories had been conducted to tackle the problem.

Government Initiatives and Reality Check

Across the South Asia region, governments' mixed response to the crisis has let workers suffer wage theft, leave without pay, non-implementation of labour laws, loss of livelihood, and in many

³⁷ Freedom of Association and Protection of the Right to Organize Convention, 1948, International Labour Organization (No. 87)

cases cynical retrenchment of precarious workers with no hope for the future.³⁸ Bangladesh and India are too no exception to the non-cooperative, haphazard decision of the authorities. Bangladesh Government and different authorities have claimed to properly maintain the labour system of the country. The rights of the workers are ensured while economic development is also being focused on. Even though the authorities have claimed to ensure due diligence of the workers' different field reports tends to show otherwise.

The mismanagement of the factory owners and their initiative to handle factories at this time of crisis were shown in several decisions they took since the lockdown began. BGMEA issued a directive for Factory and kept the factories closed for a fixed time only to reopen it on sudden notice³⁹ and again closed it on another sudden notice. The union leader expressed concerns as several workers started their journeys on bus, feet and in any other mode of transport they could find to reach their workplace thus increasing the risk of the spread of COVID-19.

BGMEA official said that the association has a field-level monitoring system to do surprise visits zone wise other than constant monitoring. The monitoring report claims to visit 27 factories and reported 25 of them in good conditions. However, many workers from different factories in Savar, Ashulia and Mirpur said the health and safety measures were inadequate and barely anything had changed in the way they worked.⁴⁰ Protests were reported by local media. Garments workers of many factories⁴¹ from Gazipur, Savar, Ashulia, Narayanganj, Chittagong, Bhogratook to the street demanding the reopening of closed factories, payment of their arrears, wages and provision of adequate safety measures.⁴²

According to the central bank, the government provided USD 588,494,000 as three months' salary allowance for garment workers, which benefitted about 38 lakhs people. Different media reports showed the protest of the garment workers.⁴³ Reports have shown us how the garment workers aren't getting their due wages or their rightful provident fund let alone any kind of relief from the governments. The conclusion from different reports can be deducted as there is no equal distribution of the relief work. The employers have to suffer along with the workers. Bangladesh alone has estimated that six billion US dollars' worth of orders have been suspended or cancelled

³⁸ Industrial Union Organization, "Who Are Twe" <<http://Www.IndustrialUnion.Org/Alarming-Attacks-On-Labour-Laws-During-COVID-19-In-South-Asia>> (2021).

³⁹ Star Report, 'Factories Keep Reopening Amid Virus Fear' *The Daily Star* (2020) <<https://www.thedailystar.net/Frontpage/News/Factories-Keep-Reopening-Amid-Virus-Fear-1897501>> accessed 6 May 2021.

⁴⁰ Covid-19 Impact and Responses: Bangladesh' <<https://www.fairwear.org/covid-19-dossier/worker-engagement-and-monitoring/country-specific-guidance/covid19-bangladesh/>> accessed 6 June 2021.

⁴¹ Star Report, "Garment workers take to the street demanding wages in Saver." *The Daily Star* (April 12, 2020). <<https://www.thedailystar.net/country/garment-workers-take-the-streets-demanding-wages-in-savar-1892191>>

⁴² Ibid.

⁴³ Dhaka Tribune, '1.24C people beneficiaries of 12 stimulus packages.' *Dhaka Tribune* (May 31st, 2021) <<https://www.dhakatribune.com/business/banks/2021/05/31/bb-1-24c-people-beneficiaries-of-12-stimulus-packages>>.

since the pandemic began.⁴⁴ International brands are cancelling orders with the excuse of force majeure mentioned in section 56 of the Contract Act, 1872. However, manufacturers in Bangladesh have threatened to litigate for payment of finished goods that were shipped and stored at US ports.⁴⁵ Loss in production due to this uncertain event has put the employers in a tough condition to maintain the workers. Employers are now laying off the workers. BGMEA President mentioned the possibility of a 55% job cut during the month of June due to lack of orders but later announced that there was no announcement on job cuts or lay-offs when protest and widespread criticism took place. Amirul Haque Amin, president of the National Garment Workers Federation, retorted that laying off a worker during such a critical moment is illegal and unjust. The reason is- workers will not get their full remuneration, but 53 per cent of their gross salary.⁴⁶ In India when the pandemic took its tolls on economic sectors the hardest hit were the labourers. At the initial stage of the pandemic, the UN reported that after the economic stoppage 400 million people are likely to be drowned in poverty.⁴⁷ As the second wave hit over on average 4000+ people are dying in 24 hours.⁴⁸

The stimulus package is supposed to be for those who need it the most but mismanagement in the administrative department often leave out most workers from the benefits. The conditions required for getting stimulus is primarily responsible for workers to be left out. The stimulus packages are to be distributed amongst the registered workers only but 94% of the workers in BOCWA are unregistered.⁴⁹ Only 6% of the informal workers are estimated to have registered under the Unorganized Workers Social Security Act 2008.⁵⁰ When the Ministry of Home Affairs issued an order directing employers to pay wages without any deduction for the period of the lockdown is being widely flouted, media reports highlighted the real scenario that workers, especially contract workers, have either not been paid at all or been paid only a part of the wages.⁵¹ Further, the

⁴⁴ R Paul, "Garment exporter Bangladesh faces \$6 billion hit as top retailers cancel," *Reuters* (31 March 2020) <www.reuters.com/article/health-coronavirusbangladesh-exports/garment-exporter-bangladeshfaces-6-billion-hit-as-top-retailers-cancelidUKKBN2112R9>.

⁴⁵ B Matthews, "Suppliers threaten Sears with US\$40m legal action," *Apparel Insider* (5 June 2020) <https://media.business-humanrights.org/media/documents/ECCHR_PP_FORCE_MAJEURE3.pdf>.

⁴⁶ 'Covid-19 Impact and Responses: Bangladesh' <<https://www.fairwear.org/covid-19-dossier/worker-engagement-and-monitoring/country-specific-guidance/covid19-bangladesh/>> accessed 6 June 2021.

⁴⁷ "About 400 Million Workers in India May Sink into Poverty" *The Economic Times* <<https://economictimes.indiatimes.com/news/economy/indicators/about-400-million-workers-in-india-may-sink-into-poverty-un-report/articleshow/75041922.cms?from=mdr>>.

⁴⁸ 'Covid-19 In India: Why Second Coronavirus Wave Is Devastating' (BBC News, 2021) <<https://www.bbc.com/news/world-asia-india-56811315>>.

⁴⁹ Seema Chishti, 'Survey shows 42% have no ration left for the day, let alone duration of lockdown', *Indian Express* (6 April 2020) <<https://indianexpress.com/article/coronavirus/survey-shows-42-have-no-ration-left-for-the-day-COVID-19-india-updates-6335558/>>.

⁵⁰ Kathyayini Chamaraj, "Will the SS Code ensure universal social security?" *India Together* (9 September 2019) <<http://www.indiatogether.org/universal-ss-human-rights>> accessed 19 April 2020.

⁵¹ Vijaya Lalwani, "'We are trapped': Hunger is on the rise in Haryana's industrial belt" *Scroll.in* (12 April 2020) <<https://scroll.in/article/958838/we-are-trapped-hunger-is-on-the-rise-in-haryanas-industrial-belt>> accessed 20 April, 2020; Niharika Sharma, 'Coronavirus crisis triggers layoffs, pay cuts, and hiring freeze across Indian industries' *Quartz India* (17 April 2020) <<https://qz.com/india/1837566/coronavirus-triggers-layoffs-across-indian-istartup-aviation/>> accessed 19 April, 2020.

implementation of the relief plan is criticized to be bureaucratic. Lack of social dialogues with the union leader is reported even though they were meeting with the business heads.⁵²

Abandonment of orders by foreign brands added more misery to the country's economy. Due to the second COVID-19 wave and lockdown, which is affecting thousands of garment manufacturers in Delhi, Mumbai and Kolkata, export contracts with garment factories are being cancelled and buyers are asking factories for discounts. As a result of cancelled orders, production has been cut out. Economic loss to the owners is likely to increase the misery of the workers. India has a greater number of acts to regulate the workers but to tackle the economy there were suggestions to reform the labours law to boost the country's economy. Now the purpose is to examine the grip of the legal legislatures on the labour regime

Analyzing Government's Strategy on Development During COVID-19

The present pandemic is not likely to be terminated in the immediate future. Governments can't put the labour-intensive establishment under lockdown till the development of a definitive cure. The only possible basis for a long-term response to such pandemics considers the underlying worker's conditions under which they arise. The labour regime has its segment cracked at multiple spots. The intensity of the crack hasn't manifested too much to become irretrievable. The process is finding the flaws also both the deep-rooted and superficial cause of the limitations.

Legal legislation of a country regulates the rights and obligations of a worker. Bangladesh Labour Act, 2006, section 2(65) defines all persons working in any establishment or industry, other than those working in a managerial or administrative capacity. Hence the section stipulates two types to be not a worker under the act. A person who doesn't work for an establishment or industry or who works in a managerial or administrative sector.⁵³

The guideline issued by the government to control the impact of the COVID 19 in the workplace also covers those workers who fall under the ambit of the act.⁵⁴ Likewise, India too is yet to develop a uniform definition for several critical concepts like workers, wages, organized-unorganized or formal-informal sectors, small and medium enterprises etc.⁵⁵ This lack of conceptual clarity leaves a large number of vulnerable workers out of the government safety net.

⁵² Chitra Narayanan, COVID-19 impact: PM must consult with trade unions for workers' revival package, says labour economist "The Hindu Business Line" (8 April 2020) <<https://www.thehindubusinessline.com/specials/people-at-work/COVID-19-impact-pm-must-consult-with-trade-unions-for-workers-revival-package-says-labour-economist/article31291005.ece>>.

⁵³ The definition of worker is a general definition and it covers any person employed in any managerial and administrative capacity. See *Sonali Bank v Chandon Kumar Nandi* 48 DLR(AD) 62.

⁵⁴ Star Business Report, "Stimulus Funds barely benefit the employed workforce" *The Daily Star* (Dhaka, 4 July, 2021) <<https://www.thedailystar.net/business/news/stimulus-funds-barely-benefit-the-employed-workforce-1990265>> accessed 5 June 2021.

⁵⁵ Prasanta Mohanty "Labour Law reforms: Nobody knows who's a 'worker' under Indian laws! Do you?". *Business Today* (India, 12 July 2019) <<https://www.businesstoday.in/current/economy-politics/labour-law-reforms-nobody-knows-who-worker-under-indian-laws/story/363592.html>>.

The Government's failure to reach stimulus packages to all workers is a direct example of the consequences of vague articulation of laws. There is no specific stimulus package for the workers in Bangladesh when 87% are employed in informal sectors.⁵⁶ Similarly, in India, no fund for migrant workers thinking self-reliant India and sector-specific thrust could directly benefit migrants are the reality checks. Negligence towards the workers can be further estimated from the vaccination strategy. Statistics of WHO dashboard shows only 2.2% of Bangladesh population and 3.4% of India's population to be vaccinated. BGMEA had to lobby on behalf of its factory owner-members to make sure workers get a shot at the COVID-19 vaccine.⁵⁷ In India, migrant workers are also at risk of being left out of the vaccine drive. According to activists and experts, workers whose livelihood is affected should be considered foremost for COVID-19 immunization.⁵⁸

World 2020 GDP ranking shows Bangladesh's per capita income climbed by \$163 in the outgrowing fiscal year whereas India's GDP is going downhill. The negative GDP further too reveals the income inequality of the country. India's inadequacy of implementation plan resulted in its GDP degrade. India was developing faster than Bangladesh but, in this crisis, Bangladesh has superseded the GDP growth. An analysis of the above paper shows India is more enriched in legislatures and issuance of relief funds than Bangladesh. But then again, Indian experts' suggestion to revoke labour laws for boosting the economy displays the countries weak labour system.⁵⁹ For, Bangladesh Economists think this proves the existing income equality which has intensified in the pandemic. The fact that the poor are becoming poorer; people are losing a job but the country's GDP is increasing supports the Economists opinions. It is high time Bangladesh needs to understand that growth-oriented policy measures are not sufficient to reconstruct the economy in the post-COVID era. Adoption of employment-oriented economic policies is what Bangladesh needs to create more jobs and reduce poverty and inequality.⁶⁰

Implications of the Way Forward

The present COVID-19 pandemic emergency represents a serious threat to supply chain continuity and any disruption at any time could harm those who are most vulnerable especially the workforce who have lost their jobs or failed to fall under the safety net of the government. The government and the workforce need to accept the new normal in order to maintain the balance between the workers' fundamental rights and the socio-economic development of the country. Below are a few

⁵⁶ Maligalig, D. S., Cuevas, S., Rosario, A., 'Informal Employment in Bangladesh' Asian Development Bank (2009)

<<https://www.econstor.eu/bitstream/10419/109339/1/ewp-155.pdf>>.

⁵⁷ Kate Nishimura, 'BGMEA Lobbies For Covid Vaccines For Bangladesh RMG Workers' *Sourcing Journal* (2021) <<https://sourcingjournal.com/topics/labor/bgmea-bangladesh-garment-workers-covid-19-vaccine-coronavirus-258495/>> accessed 6 April 2021.

⁵⁸ 'Indian Migrant Workers at Risk of being Left out of Vaccine Drive; *Aljazeera* (2021) <<https://www.aljazeera.com/news/2021/5/24/india-migrant-workers-at-risk-of-being-left-out-of-vaccine-drive>>.

⁵⁹ Between April and May 2020, over 10 States sought to extend working hours to between 10 and 12 h a day and/or increase the employment threshold for payment of retrenchment, closure, or lay-off compensation, and, in some cases, to revoke most labour laws. See: Kamala Sankaran, 'Emerging Perspectives in labour regulation in the wake of COVID-19' (2020) 63 *Indian Journal of Labour Economics*.

⁶⁰ Mohammad Imran Hossain, 'COVID-19 Impacts on employment and livelihood of marginal people in Bangladesh: lessons learned and way forward' (2021) 28 *South Asian Survey*.

recommendations provided the country can adopt to survive the pandemic, its echoes and reverberations.

Laws and Regulations

The countries need legislation with a clear definition of workers and the relevant terms linked to the workers. Pandemic is an indication of the urgent need to reset economic, industrial relations, rights and obligations of the employers and employees. Scholars have identified pandemics as market forces that invariably determine and shape employment conditions and the rules that govern the employment relationship.⁶¹ Laws should be enacted to cope up with the present situation to shape the regime as per the new normal.

Awareness on COVID-19

Fear and concern over the epidemic have left people especially the bread earner stressed -out. COVID-19 has taken its toll on the people at large magnitudes. Suicide cases have become everyday's news both in Bangladesh and India.⁶² Depression, extreme poverty, unemployment, uncertainty with no access to up-to-date information and a few other causes are mainly responsible for the increased number of suicides. Social activists, television and print media, social workers and religious and political leaders should come forward to help in the dissemination of scientifically factual information on nCoV-2 and COVID-19 among the mass population⁶³. Receiving contradictory messages adds to the stress, but expressing the truth and knowing the true risk decreases it.⁶⁴

Increased Stimulus Packages

Relief measures are imposed without a consultative process, and their scope is piecemeal and sector-specific. As a result, these policies benefit only a small proportion of the country's workforce and do not effectively guarantee all workers' fundamental right to social security. The government needs to enhance the number of stimulus packages and ensure that most benefits are reaching the workforce that needs it most.

Employment of the Unemployed

⁶¹ Stewart J. Schwab, 'Predicting the future of employment law: reflecting or refracting market forces?' (2001) Cornell Law Faculty Publications.

⁶² A. K. M. Israfil Bhuiyan and others, 'COVID-19-related suicides in bangladesh due to lockdown and economic factors: case study evidence from media reports' (2020) International Journal of Mental Health and Addiction. See also Ravi Philip Rajkumar, 'Suicides related to the covid-19 outbreak in india: a pilot study of media reports' (2020) 53 Asian Journal of Psychiatry.

⁶³ Saeed Anwar, Mohammad Nasrullah and Mohammad Jakir Hosen, 'COVID-19 and Bangladesh: challenges and how to address them' (2020) 8 Frontiers in Public Health.

⁶⁴ Ibid.

A huge number of job-holders had lost their job in the crisis. The Government of Bangladesh has encouraged them to be self-employed. Government can introduce funds on small scale, training programs for this skilled labour to earn their livelihoods. Furthermore, for those unskilled, jobs in the labour-intensive public work scheme or other short-term activities prioritized by crisis-affected communities can be introduced.⁶⁵

Social Distancing When an Absurd Idea

COVID-19's nature is such that it poses a threat to those who are forced to live in close quarters with one another. Calls for "social distancing" are met with varying degrees of success. In overpopulated countries like Bangladesh and India with population densities of 1.26 thousand per square km and 464 per square kilometre respectively, social distance is an oxymoron idea. The further constant change of decision from concerned authorities adds a layer of impossible coating on this idea. India's declaration of lockdown in 4 hours and Bangladesh opening and closing of factories in 2020 are just one of many examples which shows the lack of cooperation among the authorities. Authorities can't make the population density like that of China, which is 153 per sq. km in a year but what it can do is work cooperatively and work as per an efficient plan. Strict observations of the guidelines should be made mandatory in the workplace.

Fight with Limited Resources

Countries like Spain and Italy have taken measures like total lockdown for an undeclared time under the precept that lives should be saved first.⁶⁶ In Bangladesh and India, a certain measure is not possible as most of their populations live hand to mouth and they have no savings. In this scenario, the government has to play the main role by providing adequate safety measures like handwashes, soaps, masks, face shields etc. to those with financial constraints. Time to time awareness programs, dissemination of updated information needs to be done on regular basis in order to prevent the spread of the disease.

Collective Actions

We must identify the epidemic as a watershed moment that necessitates states and enterprises modifying their strategy in order to establish a new fair society in which growth and human rights coexist. The Government, international brands, local suppliers, consumers should work in solidarity. The Government has the primary responsibility to protect human rights. It should take instant and effective steps to ensure that the impact of the COVID-19 crisis is minimal on the workers. The international brands may not be directly responsible for the welfare of the workers like the local suppliers but they can indirectly work for the welfare of the workers by undertaking human rights due diligence, taking steps to mitigate the harm caused by their own conduct

⁶⁵ The needs assessment working group (nawg), 'Covid-19: Bangladesh multi-sectoral anticipatory impact and needs analysis' (2020).

⁶⁶ Keeley G, 'Spain Imposes Italy-Style Lockdown in Bid to Contain Coronavirus' *Aljazeera* (2020).

<<https://www.aljazeera.com/news/2020/03/spainimposes-italy-style-lockdown-bid-coronavirus-200314233749980.html>>.

causes.⁶⁷ Moreover, immediate steps should be taken to implement the existing legal provisions. Databases on every worker should be ensured in every enterprise. Steps should be taken for the immediate registration of all workers.

Conclusion and Observation

The spotlight on the labour regime in this pandemic has made the anatomy of the system transparent to the world. The pandemic has called many long-held practices into question, necessitating new thinking and changes. But this whole scenario, the emergence of any pandemic, and the adaptation to the aftermath by changes in the country's rules and policies isn't something that made its first appearance in the 21st century. Pandemics have appeared from time to time, leaving their impacts on the global landscape. COVID-19, the most recent pandemic has widely proclaimed its gravity. Its impact has shown us how the country's labour system needs to be repaired. The present crisis has exposed mismanagement in the administrative sectors and the authority's failure to uphold workers' dignity and negligence towards their fundamental rights. It further shows government dilemmas in making the right choice for workers' protection and the country's development. To ride this storm along with the government, workers, union leaders, consumers and all other relevant stakeholders need to act together to maintain a balance between workers and the socio-economic development of the country.

⁶⁷ Sanchita and others, Banerjee Saxena, Banerjee Saxena, Nancy Reyes Mullins and Salil Tripathy, 'The weakest link' (n 2).

A SOCIO-LEGAL STUDY ON LABOUR LAW AND IMPACT OF COVID-19 IN BANGLADESH

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Abstract

The authors analyse the current scenario and the main challenges posed by COVID-19 to effectively implement the existing legal framework for labour rights and relations in Bangladesh. The non-enforcement of national regulations in relation with labour laws were present even before the pandemic stroke hard on the labour sector. Furthermore, the contributors draw attention towards the existing rights given to the labours in the Labour Act, 2006 with the recent amendments. The current circumstances are incompatible for ensuring the labour rights such as, termination, lay off, wages, compensation, group insurance, death due to COVID-19, and health and hygiene as prescribed by the law. In compliance with the current situation, the writers scrutinise the policies and guidelines prescribed by the International Labour Organisation to protect and safeguard the interest of the workers during this pandemic. The labour laws and policies are generally in harmony with the labour rights and relations as set by the core labour fundamentals of International Labour Organisation (ILO) conventions. However, lack of implementation of such policies in the labour market passes a signal of dismay which has become worse after the pandemic. Finally, the authors end with the remarks on the poor implementation of national labour laws, regulations, and policies that cause innumerable losses to the labour sector and the national economy.

Introduction

Once Joseph Joubert¹ was a French essayist and moralist who stated that “*Genius begins great works; labour alone finishes them*”. However, the existence of today’s labour is at risk now due to the massive pandemic. The economic wheel of the country got stuck for a while. According to the survey of Bangladesh Institute of Development Studies (BIDS), 13% of people became unemployed during this COVID-19² and the income ratio reduced at an alarming rate³. His unemployment rate caused many derogatives for society and the country as a whole. Nonetheless,

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¹ Joseph Joubert was a French moralist and essayist, remembered today largely for his *Pensées*, which were published posthumously.

² UNB, ‘13pc people lost jobs due to Covid-19 pandemic: BIDS survey’ *The Daily Star* (Dhaka, 25 June 2020) <<https://www.thedailystar.net/business/13pc-people-lost-jobs-in-bangladesh-due-covid-19-pandemic-1920309>> accessed 15 May 2021.

³ Nawaz Farhin Antara, ‘Covid-19 impacts 95% households’ income’ *Dhaka Tribune* (Dhaka, 20 June 2020) <<https://www.dhakatribune.com/health/coronavirus/2020/06/20/covid-19-impacts-95-households-income>> accessed 15 May 2021.

many institutions took initiatives like from homes that are merely working for the garments worker. Furthermore, the government provided incentives at a low interest⁴ in different categories yet the wages or salaries of the workers are still unpaid⁵.

The government took initiatives to mitigate the crisis that was raised due to COVID-19 but sometimes it was suicidal.⁶ Furthermore, the current labour law (Bangladesh Labour Act, 2006) (hereinafter referred to as BLA, 2006) was promulgated after repealing 25 labour-related different laws in Bangladesh.⁷ The main reason for the repeal of those acts was to promulgate a new combined act which should ensure the ultimate rights of the labours.⁸ Yet, the consistency and enforceability of BLA, 2006 is in question now due to Coronavirus. On the other hand, COVID-19 showed how important it is to maintain proper hygiene to have good health. Health and hygiene are some of the important factors for creating a working environment in a factory because it affects productivity⁹ but the condition is not satisfactory¹⁰. Then the question raises when the BLA, 2006 has specific provisions to maintain health and hygiene, then why is it properly not being enforced after 15 years of its enactments?

Moreover, Bangladesh should maintain international standards to uphold the rights of the labours as guided under the International Labour Organisation (ILO) Conventions¹¹. Again, the enforceability of ILO Conventions is in question during this pandemic. The government¹² along with the international organisations¹³ are providing monetary assistance to the poor that is barely enough to manage their day-to-day livelihood. The bottom line is the labours in Bangladesh are in great danger because of the non-enforceability and non-compliance with the existing laws and COVID-19 makes it worsen.

⁴ FE Online Report, 'Govt releases Tk 4.0-billion cash incentive for exporters' *The Financial Express* (12 May 2020) <<https://www.thefinancialexpress.com.bd/economy/bangladesh/govt-releases-tk-40-billion-cash-incentive-for-exporters-1589268575>> accessed 19 May 2021.

⁵ Md. Kamruzzaman, 'Bangladesh garment workers demand payment of salaries' (Asia-Pacific, 13 April 2020) <<https://www.aa.com.tr/en/asia-pacific/bangladesh-garment-workers-demand-payment-of-salaries/1803143>> accessed 16 May 2021.

⁶ Hannah Ellis-Peterson and Redwan Ahmed, 'Bangladesh garment factories reopen despite coronavirus threat to workers' *The Guardian* (Dhaka, 11 May 2020) <<https://www.theguardian.com/global-development/2020/may/11/bangladesh-garment-factories-reopen-despite-coronavirus-threat-to-workers>> accessed 17 May 2021.

⁷ The Bangladesh Labour Act, 2006 (Act No. 42).

⁸ Ibid.

⁹ Md. Moinuddin Chowdhury, 'Health and Hygiene Conditions of Small Industries in Bangladesh: An Empirical Study' (2018) 6(3) *International Journal of Entrepreneurship and Development Studies* <<http://ijeds.org/index.php?journal=ijeds&page=article&op=view&path%5B%5D=210>> accessed 17 May 2021.

¹⁰ Ibid.

¹¹ International Labour Organization, 'ILO Conventions' (Eastern Europe and Central Asia) <https://www.ilo.org/moscow/areas-of-work/gender-equality/WCMS_249143/lang--en/index.htm#:~:text=>> accessed 17 May 2021.

¹² Star Business Desk, 'PM readies Tk 880cr cash assistance for the poor' *The Daily Star* (Dhaka, 30 April 2021) <<https://www.thedailystar.net/business/news/pm-readies-tk-880cr-cash-assistance-the-poor-2086141>> accessed 15 May 2021.

¹³ The World Bank, 'World Bank Provides Bangladesh Over \$1 billion to Create Quality Jobs and Respond to COVID 19 Pandemic' (Washington, 19 June 2020) <<https://www.worldbank.org/en/news/press-release/2020/06/19/world-bank-provides-bangladesh-over-1-billion-to-create-quality-jobs-and-respond-to-covid-19-pandemic>> accessed 17 May 2021.

Employment Status During COVID-19

The impact of COVID- 19 on the labour sector in Bangladesh as well as all over the world is immeasurable and devastating. Because of complying with strict lockdown rules and shutting down factories and establishments, the companies and employers were overburdened with the cost of establishments compared with their zero income, which eventually affected the wages and jobs of labours. The results from a report suggest substantial drops in per capita household consumption and poverty connected with the pandemic crisis. Temporary absence and losses of jobs were widely reported, especially, when officially the COVID-19 lockdown was announced, 23% of adults had stopped going to work after March 25.¹⁴ Job and monetary losses are supplemented by extensive hesitation and uncertainty about running businesses running keeping jobs.¹⁵ The reason, 9 out of 10 employees mentioned stopping work and losing their job most was the change that attributed to COVID-19-related disruption.¹⁶

Wages

According to S. 2 (45) of BLA, ‘wages’ means all remuneration capable of being expressed in terms of money which is payable to a worker if the terms of the contract of employment are fulfilled,¹⁷ which also includes economic benefits like salary, any bonus and remuneration for overtime work, leave or holiday, termination of employment or other additional remuneration payable under the term of employment.¹⁸ The wage period shall not exceed one month¹⁹ which must be paid before the expiry of the seventh working day after the last day of the wage period.²⁰ If the employment of a worker is terminated by retirement or by the employer through the retrenchment, discharge, removal, dismissal or otherwise, the wages payable to him must be paid before the expiry of the thirtieth working day from the day on which his employment is so terminated,²¹ must be paid on a working day.²² No deducting can be made from the wages of a worker except those authorized by the BLA.²³ Minimum wage rates are declared by the Government on an industry basis²⁴ following recommendations by the Minimum Wages Board,²⁵

¹⁴ Maria Eugenia Genoni and others, ‘Losing Livelihoods: The Labor Market Impacts of COVID-19 in Bangladesh’ (2021, World Bank Group) <<https://documents1.worldbank.org/curated/en/475551600152674960/pdf/Losing-Livelihoods-The-Labor-Market-Impacts-of-COVID-19-in-Bangladesh.pdf>> accessed 1 June 2021.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ The Bangladesh Labour Act (n 7) s 2(45).

¹⁸ Ibid, s 120.

¹⁹ Ibid, s 122.

²⁰ Ibid, s 123(1).

²¹ Ibid, s 123 (2).

²² Ibid, s 123 (3).

²³ Ibid, s 125.

²⁴ Ibid, s 140.

²⁵ Ibid, s 139.

a specialist tripartite both established under the BLA.²⁶ Declared minimum wage rates are final,²⁷ neither be questioned by any person in any manner in any court or authority²⁸ nor any employer can pay wages lower than those notified by the Government.²⁹ The Minimum Wages Board (MWB) is obliged to revise its recommendations if any of the aforementioned criteria change (within one to three years).³⁰ The minimum rates of wages for any industry may be re-fixed after every five years as may be directed by the Government.³¹

Even after re-fixing the minimum wage in 2018, according to a survey report of the Japan External Trade Organisation, the \$95 monthly minimum wage in Bangladesh is the lowest in global standard, which was conducted between December 2017 and March 2018. The survey also revealed that the average monthly wage is just \$101 which indicates that the labour in Bangladesh is still cheap, compared with \$135 for Myanmar, \$170 for Cambodia, \$234 for Vietnam and \$518 for China.³² However, the vulnerability of labours got worse after the outbreak of COVID-19, the wages for daily and salaried workers declined by about 37% compared to earnings before the outbreak.³³ The decline was higher in slum areas (43%) than non-slum areas (33%). Dhaka as of 42% than Chittagong as of 33%. The scenario is similar to Dhaka compared to Chittagong respectively 42% and 33%³⁴, which includes wage declines of Dhaka larger than Chittagong's for both genders.³⁵ The research by the Subir and Malini Chowdhury Centre for Bangladesh Studies, UC Berkeley in collaboration with the Institute for Human Rights and Business with support from UNDP Bangladesh and the Government of Sweden finds while the industry suffered from the closure of markets, suspended shipments, delayed payments, and a liquidity crisis, Bangladeshi workers suffered what was in effect a 35% pay cut during the lockdown month.³⁶

²⁶ Ibid, s 138.

²⁷ Ibid, s 142 (7).

²⁸ Ibid.

²⁹ Ibid, s 149.

³⁰ Ibid, s 142.

³¹ Ibid, s 139 (6).

³² Wageindicator.org, 'Work and Wages' <<https://wageindicator.org/labour-laws/labour-law-around-the-world/minimum-wages-regulations/minimum-wages-regulations-bangladesh>> accessed 29 May 2021.

³³ Ibrahim Hossain Ovi, 'Apparel workers in Bangladesh still the lowest paid by global standards' *Dhaka Tribune* (Dhaka, 12 November 2018) <<https://www.dhakatribune.com/business/2018/11/12/apparel-workers-in-bangladesh-still-the-lowest-paid-by-global-standards>> accessed 30 May 2021.

³⁴ Ibid.

³⁵ Maria Eugenia Genoni and others, 'Losing Livelihoods'n (14).

³⁶ Institute for Human Rights and Business (IHRB) and the Subir and Malini Chowdhury Center for Bangladesh Studies at the University of California Berkeley, with the support of UNDP Bangladesh and the Government of Sweden. See 'The Weakest Link in The Global Supply Change: How the Pandemic is Affecting Bangladesh's Garment Workers' (April 2021) <https://www.ihrb.org/uploads/reports/IHRB_Chowdhury_Center_-_How_the_Pandemic_is_Affecting_Bangladesh_Garment_Workers_-_Apr_2021.pdf> accessed 2 June 2021; Patrick Scott, 'Bangladesh workers most vulnerable to Covid-19 fallout' (*Just Style*, 7 May 2021) <<https://www.just-style.com/news/bangladesh-workers-most-vulnerable-to-covid-19-fallout>> accessed 3 June 2021; Zisan Bin Liaquat, 'Report: RMG workers lost \$500m in wages during the pandemic' *Dhaka Tribune* (Dhaka, 29 April 2021) <<https://www.dhakatribune.com/business/2021/04/29/report-rmg-workers-had-35-pay-cut-deprived-of-502m-in-wages-during-the>>

If an employer cannot ensure minimum wages for his workers, there is an option to bring him to justice. If a worker remains unpaid of due wages, the worker can seek proper remedy to the labour court.³⁷ In addition, if an employer fails to implement the award of the labour court to pay the wages of any worker that employer may be punished with imprisonment or fine or with both under several provisions of BLA.³⁸

However, in Bangladesh, there is no major incident of an employer facing any punishment for not implementing minimum wages. The low-productivity is the main plea of employers in support of non-payment of minimum wages. Even though BGMEA and the immediate past interim government declared a drastic action programme against the defaulting employers, no action is seen to be taken against them. This can be termed as a basic weakness for establishing sound industrial relations in Bangladesh.

Layoff and Termination Policy

“Lay-off” means the failure, refusal or inability of an employer to give employment to a worker on account of the shortage of coal, power or raw material or the accumulation of stock or the break-down of machinery.³⁹ Though the definition did not consider the pandemic like COVID- 19 as a ground to lay-off, an employer may, at any time, if necessary in the event of epidemics or any other cause beyond his control, stop any section or sections of his establishment.⁴⁰ In addition, if the period of stoppage of work exceeds three working days, the workers concerned shall be laid off in accordance with the provisions of law.⁴¹

Upon laying off any worker, the employer must pay the compensation for those, whose name is on the muster rolls of an establishment and who has completed at least 1 (one) year of service under the employer.⁴² The amount of compensation shall be equal to half of the total of the basic wages and dearness allowance and ad-hoc or interim wages if any, and equal to the full amount of housing allowance.⁴³ During a calendar year, no worker shall be entitled to the payment of compensation for more than 45 days unless there is an agreement to the contrary between the

pandemic> accessed 4 June 2021; Staff Desk, ‘Garment workers suffered 35pc pay cut during lockdown: study finds’ *The Daily Star* (Dhaka 29 April 2021) <<https://www.thedailystar.net/business/news/garment-workers-suffered-35pc-pay-cut-during-lockdown-study-finds-2085853>> accessed 4 June 2021.

³⁷ The Bangladesh Labour Act (n 7) s132.

³⁸ Ibid,ss 289,307, 308, 309 & 310.

³⁹ Ibid,s 2 (58).

⁴⁰ Ibid,s 12.

⁴¹ Ibid,ss 12 (8) & S 16.

⁴² Ibid,s 16 (3).

⁴³ Ibid,s 16 (2).

worker and the employer.⁴⁴ After the expiry of such 45 days, the period of lay-off can be extended for further 15 days or more.⁴⁵ During this extended layoff period, the amount of compensation shall be equal to one-fourth of the total of the basic wages and dearness allowance and ad-hoc or interim wages of the worker, if any, and equal to the full amount of housing allowance.⁴⁶ However, during a calendar year, if a worker is to be laid-off after the first 45 days as aforesaid, for any continuous period of 15 days or more, the employer may, instead of laying off such worker, retrench him under the provision of Labour Law.⁴⁷

The employer can terminate a worker under the ground of retrenchment⁴⁸ if only where a worker has given one month's notice in writing indicating the reason of retrenchment or the worker has been paid in lieu of such notice wages for the notice period,⁴⁹ a copy of the notice in respect of retrenchment has been sent to chief inspector⁵⁰ and the worker has been paid at the time of retrenchment compensation or gratuity whatever is required.⁵¹ Though it is for the employer to decide which of the employees should be retrenched, the employer cannot depart from the rule without sufficient and valid reason.⁵²

In the current labour law, receiving financial benefits after termination is quite lengthy.⁵³ Moreover, a worker must have evidence to show a minimum of one-year service for retrenchment and discharge and workers who take resignation to leave their jobs are entitled to certain benefits.⁵⁴ However, it is a very inflexible and lengthy system to receive these benefits. The BLA also allows termination without prior notice for serious misconduct which deprives a worker of both his compensation and right to be heard.⁵⁵ The BLA already has some gaps, which are used against the labours, and the pandemic worsened the situation.⁵⁶ The pandemic has caused temporary lockdown-induced job loss and permanent impact job loss.⁵⁷ Firstly, temporary job loss

⁴⁴ Ibid, s 16 (4).

⁴⁵ Ibid, s 16 (5).

⁴⁶ Ibid, s 16 (6).

⁴⁷ Ibid, ss 16 (7) & S 20.

⁴⁸ Ibid, s 20(1).

⁴⁹ Ibid, s 20(2) (a).

⁵⁰ Ibid, s 20(2) (b).

⁵¹ Ibid, s 20(2) (c).

⁵² Md. Hafizur Rahaman Khan, 'COVID- 19 and Lay Off and Retrenchment under Labour Law in Bangladesh' <<https://www.hg.org/legal-articles/covid-19-and-lay-off-and-retrenchment-under-labour-law-in-bangladesh-5533>> accessed 31 May 2021.

⁵³ Jakir Hossain, Mostafiz Ahmed and Afroza Akter, 'Bangladesh Labour Law: Reform Directions' (November 2010, BILS Research and Advisory Team) <<http://bilsbd.org/wp-content/uploads/2016/03/STATE-OF-BANGLADESHS-RMG-SECTOR-TRIPARTISM-AND.pdf>> accessed 1 May 2021.

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ Mohammad Imran Hossain, 'COVID-19 Impacts on Employment and Livelihood of Marginal People in Bangladesh: Lessons Learned and Way Forward' (March 2021, South Asian Survey) <<https://journals.sagepub.com/doi/full/10.1177/0971523121995072>> accessed 1 May 2021.

due to continuous temporary lockdown and shutdowns in the country, for the first two months of lockdown is estimated to cause unemployment to be in between 12 and 17 million people.⁵⁸ Seven million jobs in the micro, small and medium enterprises (MSME) sector, three million jobs in the construction sector, five million jobs in the transport sector and more than three million jobs in the manufacturing sector were disappeared temporarily.⁵⁹

Furthermore, 68% of workers seem to have experienced losing a job which is higher in Dhaka 76% than Chittagong respectively, 76% and 59%. Slum areas also show higher termination as 71% than non-slum areas as 61%.⁶⁰ The research report also reveals a huge number of labours were terminated or laid off, without their consent or compensation.⁶¹ Moreover, the report shows any Bangladeshi factories supplying international brands consolidated their business and some went under which led many workers to lose their jobs without having a safety net to fall back on.⁶² The outbreak of the pandemic caused great misery to the workers as they were terminated from their jobs in this dire situation.

Safety Measures During COVID-19

Chapter V of the BLA, 2006 briefly discussed how to maintain health and hygiene in a workplace⁶³. This chapter talked about cleanliness⁶⁴, ventilation and temperature⁶⁵, dust and fume⁶⁶, disposal of waste and effluents⁶⁷, artificial humidification⁶⁸, over-crowding⁶⁹, lighting⁷⁰, drinking water⁷¹, latrines and urinals⁷², dust bean and spittoon⁷³.

All the necessary measures have been prescribed in the BLA, 2006 except personal protection equipment includes mask and gloves. Another thing to add with the BLA is to maintain social distance as per the guideline of the World Health Organisation (WHO)⁷⁴. However, as per

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ Maria Eugenia Genoni and others, 'Losing Livelihoods'n (14)

⁶¹ Ibid.

⁶² Ibid.

⁶³ The Bangladesh Labour Act (n 7) ch V.

⁶⁴ Ibid.

⁶⁵ Ibid, s 52.

⁶⁶ Ibid, s 53.

⁶⁷ Ibid, s 54.

⁶⁸ Ibid, s 55.

⁶⁹ Ibid, s 56.

⁷⁰ Ibid, s 57.

⁷¹ Ibid, s 58.

⁷² Ibid, s 59.

⁷³ Ibid, s 60.

⁷⁴ World Health Organizer, 'Coronavirus disease (Covid-19). <https://www.who.int/emergencies/diseases/novel-coronavirus-2019?gclid=Cj0KCQjwnueFBhChARIsAPu3YkQ4BjYjI8i8BLh2f84rAh2Nemz9Nb-l69k-rguA9aaxdc7kjiJWpu4aAniyEALw_wcB> accessed 20 May 2021.

provision 56 of the BLA, 2006 “no room for work in any establishment shall be overcrowded to extend that injurious to the health of the workers employed to them⁷⁵ and the allocated space for a workroom is at least 9.5 centimetre⁷⁶” Nonetheless, all the establishments do not comply with this provision. On the other hand, the inspector general has the discretion to exempt the rules if the inspector general has a reason to believe⁷⁷. That is a matter of debate but not on this platform. However, social distancing is one of the most effective ways to stop spreading coronavirus⁷⁸ e rules if the inspector general has a reason to believe that is a matter of debate but not on this platform. However, social distancing is one of the most effective ways to stop spreading coronavirus, and WHO suggest keeping a 3-meter distance from each other and so does the Bangladesh government. Since the current situation is a new one, the whole world is troubling to tackle Covid-19 and so does the Bangladesh government. Hence, for the time being, the new rules and policies against the pandemic will prevail over the BLA, 2006.

Another aspect of any establishment is a day care centre. According to the Bangladesh Garments Manufacturers and Exporter Association (BGMEA), around 3.2 million are women among 4 million (8 per cent) workers employed in BGMEA’s member factories⁷⁹. Therefore, it is obvious that women take their children with them at their workplace. According to the provision of 94 of the BLA, 2006, where at least 40 workers are employed in any establishment, there shall be a suitable for the care of the children who are under the age of 6 (six) years of such women⁸⁰. The time is very crucial and the government asked to keep open the factories even in strict lockdown in operation.⁸¹ Children need due care and support whatever the situation remains.

People often say that doctors are the frontline fighters against COVID-19 but labours are one of the major sources to run the economic wheel of the country. If they stop working, the country's economy will fall apart. Personal Protection Equipment (PPE) is also necessary for them. The

⁷⁵ The Bangladesh Labour Act (n 7) s 56(1).

⁷⁶ Ibid, s 56(2).

⁷⁷ Ibid, s (4).

⁷⁸ Refayet Ullah Mirdha, ‘Social distancing in garment factories out of the question’ *The Daily Star* (Dhaka, 20 April 2020) <<https://www.thedailystar.net/business/news/social-distancing-garment-factories-out-the-question-1893697>> accessed 21 May 2021.

⁷⁹ International Labour Organization, Understanding the Gender Composition and Experience of Ready-Made Garment (RMG) Workers in Bangladesh (2021) <https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-dhaka/documents/publication/wcms_754669.pdf> accessed 22 May 2021.

⁸⁰ The Bangladesh Labour Act (n 7) s 94.

⁸¹ Partha Pratim Bhattacharjee and Tuhin Shubhra Adhikary, ‘Strict lockdown’: Factories to stay open; offices to close; transports, flights to be suspended’ *The Daily Star* (Dhaka, 11 April 2021) <<https://www.thedailystar.net/bangladesh/news/strict-lockdown-factories-stay-open-offices-close-transports-flights-suspended-2076089>> accessed 23 May 2021.

garment workers are producing PPE but are they using it? Or are they able to use it? This question can be asked in another way, are workers allowed to use PPE while producing them for others?

Safety measures for the workers and the family come first before they produce. If their safety cannot be ensured, no more PPE will ever be produced and the economy will fall apart. Therefore, before thinking about the profit, people should care for those who earn profit.

Critical Analysis on Policies and Regulations Taken During COVID-19 that Affects the Labour Sector

The very first case of COVID-19 was reported on 8th March 2020 in Bangladesh⁸². Since then till date (4th June 4, 2021) in total, reported cases are 8, 05,980,⁸³ where 7, 46,035⁸⁴ people recovered and 12,724⁸⁵. From the very beginning, the government is trying to mitigate the crisis that occurred due to this pandemic. Lockdown, strict lockdown, no musk, no service policy, the travel ban, a partial ban on travel, and many steps have been taken. Moreover, the government provided assistance door to door for the poor and established a new medical setup to tackle coronavirus. Yet, those measures were not adequate to control this situation. According to Asian Development Bank (ADB), the population living below the national poverty line reduced to 20.5% in 2019 from 24.3% in 2016⁸⁶. However, on 4th June 4, 2021, the Daily Star reported that COVID-19 creates 2.45cr new poor⁸⁷. The increasing rate of COVID-19 patients and comparison of the data of ADB with the report of Daily Star indicates that the prescribed measures taken during this pandemic are not adequate.

The very first measure started with general holidays and close all educational institutions⁸⁸ and later on imposed a ban on travel and lockdown from late march, 2020⁸⁹. That was very timeliness and much-required decisions taken by the government but with the continuation of lockdown, people started to become jobless. The main reason for imposing lockdown several times is to stop

⁸² Institute of Epidemiology, 'Disease Control and Research. COVID-19'

<https://www.iedcr.org/index.php?option=com_content&view=article&id=25&Itemid=78> accessed 10 July 2020.

⁸³ Government of Bangladesh, Corona Information

<https://corona.gov.bd/?gclid=Cj0KCQjwnueFBhChARIsAPu3YkSZyAhVZ3viZz5hlITLSLlugX9KWdCsLiIvA_1X3jS-0oMNHcQH4kaArGwEALw_wc_> accessed 5 June 2021.

⁸⁴ Ibid.

⁸⁵ Ibid.

⁸⁶ Asian Development Bank, 'Poverty Data: Bangladesh' (2021) <<https://www.adb.org/countries/bangladesh/poverty>> accessed on 19 May 2021..

⁸⁷ Staff Correspondent, 'Pandemic creates 2.45cr new poor' *The Daily Star* (Dhaka, 21 April 2021) <<https://www.thedailystar.net/frontpage/news/pandemic-creates-245cr-new-poor-2080873>> accessed 21 May 2021.

⁸⁸ Mamun Abdulah, 'Bangladesh decides to keep all educational institutions closed till Dec 19' *Dhaka Tribune* (Dhaka, 12 November 2020) <<https://www.dhakatribune.com/bangladesh/2020/11/12/all-educational-institutions-to-remain-closed-till-december-19>> accessed 24 May 2021.

⁸⁹ Md. Kamruzzaman and SM Najmus Sakib, 'Water, rail and air travel suspended while public transport on roads will be banned from March 26' (25 March 2020)

<<https://www.aa.com.tr/en/asia-pacific/bangladesh-imposes-total-lockdown-over-covid-19/1778272>> accessed 24 May 2021.

spreading Corona Virus. However, Bangladesh is a densely populated country where approximately 1.26 thousand people live per square kilometre⁹⁰. Again, there are more than 5000 slums in Dhaka city where more than 4 million people live⁹¹. Furthermore, the assistance provided by the government was so limited. Hence, people need to earn livelihoods for their survival. Considering the population and their earnings how could lockdown works? In a face-to-face conversation with a rickshaw puller named Md. Abed Hasan (pseudo name) who has 7 family members including his elderly parent, wife, and children said that “if we could not get help from the neighbours, either coronavirus or starvation killed us”. This dialogue has become very common nowadays and that is the harsh reality.

The government provided financial aid to the poor through mobile phones at different stages⁹² and announced various schemes for different classes of people⁹³ to recover from this situation. However, about the financial help through mobile phone- the local leaders of the ruling party have to enlist those numbers and submit them with national identity cards to the district administration office. The political leaders took only those numbers who aligned with the government. A bus driver name Md. Jashim (Pseudo name) does not support the ruling party did not get any funding. However, within this shortest period, it is merely possible to crosscheck all the enlisted numbers whether they are poor or not.

Fundamental Rights and Human Rights of Labourers During Pandemic

The impact of the pandemic on workers' rights must be assessed under fundamental and human rights. The Constitution of Bangladesh visualizes a display of welfare measures for workers including protection from all forms of exploitation,⁹⁴ wages, recreation, reasonable rest and leisure⁹⁵, rights of forming a union⁹⁶, protection from all forms of forced labour⁹⁷ and. Moreover, Bangladesh has ratified seven (7) of the eight (8) core conventions and several other conventions of the International Labour Organisation. In spite of the constitutional and international commitment and obligations, the human rights of the workers are being constantly violated.

⁹⁰ Statista, 'Population density of Bangladesh 2005-2018' <<https://www.statista.com/statistics/778381/bangladesh-population-density/>> accessed 22 May 2021.

⁹¹ UNICEF, 'Children in cities: Bangladesh among 10 nations that top the list for rapid urbanisation' UNICEF Bangladesh <<https://www.unicef.org/bangladesh/en/children-cities%C2%A0>> accessed 27 May 2021.

⁹² Rejaul Karim Byron and Wasim Bin Habib, '35 lakh families to get cash aid' *The Daily Star* (Dhaka, 16 April 2021) <<https://www.thedailystar.net/frontpage/news/35-lakh-families-get-cash-assistance-2078153>> accessed on 16 May 2021.

⁹³ *Ibid.*

⁹⁴ The Constitution of People's Republic of Bangladesh, 1972 (P.O. N. 76) art 14.

⁹⁵ *Ibid.*, art 15.

⁹⁶ *Ibid.*, art 38.

⁹⁷ *Ibid.*, art 34.

Clear directions are given by the Universal Declaration of Human Rights (UDHR)⁹⁸ and ILO Conventions⁹⁹ for payment of practical and reasonable wages to the employees which must be ensured by law as well as actions have to be taken against those who fail to implement the law. In addition, according to UDHR, a worker to ensure an existence worthy of human dignity for him/herself and his/her family, has the right to *just and favourable* remuneration.¹⁰⁰ Therefore, it cannot be left in the hands of anybody's discretion¹⁰¹ It also adds that everyone, for him/herself and of his/her family, has the right to a standard of living adequate including food, clothing, housing and medical care and necessary social services. This also includes the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.¹⁰²

UN Guiding Principles for Business and Human Rights (UNGPs), provides comprehensive guidelines that business policies and practices need to integrate human rights perspectives.¹⁰³ The UNGPs requires States to guarantee remedies to human rights abuses by establishing effective mechanisms including administrative and judicial means. The UNGPs recognizes the fundamental right of individuals to access effective remedies when their rights get adversely impacted by business activities.¹⁰⁴

The Labour Act 2006, being the core enabling law, has failed to integrate human rights perspectives comprehensively within its approach. The Act provides unfettered power to the employers in many cases while making the workers immensely vulnerable and dependent. Though its latest amendments of BLA prohibits child labour, the number of child workers is skyrocketing in numbers due to the COVID-19 induced economic crisis and nationwide closure of educational institutions.

International Standards Towards Labourers During Pandemic

The International Labour Organisation follows International Labour Standards (hereinafter as 'ILS' because it has grounded the use of a cohesive approach for responding to the COVID-19 crisis aiming at alleviating the socio-economic effects of the pandemic and assisting countries to recover from it. ILS contains precise direction for responding to the crisis, which is causing an

⁹⁸ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A (III) (UDHR), arts 23 and 25.

⁹⁹ ILO Conventions no. 26, 95, 99 and 131.

¹⁰⁰ UDHR, art 23(3).

¹⁰¹ Ibid.

¹⁰² Ibid.

¹⁰³ United Nation Guiding Principles for Business and Human Rights (UNGPs).

¹⁰⁴ Ibid.

unprecedented decrease in economic activities, including management that can be supportive during the COVID-19 outbreak. The promotion of complete and productive employment needs to include careful and selective measures to economies stable and represent employment complications, including financial and monetary actions aimed at stabilising livelihoods and income as well as preserving business continuity.¹⁰⁵ Sustaining minimum wage is appropriate in an economic downturn as minimum wages can safeguard labours in a defenceless condition and decrease poverty, increase demand and contribute to economic stability.¹⁰⁶ In addition, the termination of a contract of employment, a final settlement of all wages due shall be stimulated and received by the workers, within a reasonable period if no specific time is prescribed.¹⁰⁷

A labour should be allowed severance pay or other benefits, insurance benefits of unemployment or compensation for the loss of income and other damages if the employment is terminated because of health and safety reasons or the economic impact of COVID-19.¹⁰⁸ However, a worker shall not be terminated in case of momentary nonattendance from work due to illness or family responsibilities;¹⁰⁹ it has to be related to the capability or conduct of the employee, based on the functioning requirements of the job.¹¹⁰

An employer who is intending terminations for collective dismissals because of financial reasons shall deliver representatives of workers with relevant information which must include the reasons and details for the terminations considered, the quantity and types of workers expected to be affected and the period over which the terminations are planned to be approved.¹¹¹

Moreover, all parties should seek to avert or minimize termination of employment for causes of an economic, structural or parallel nature, impartial to the effectual operation of the task, establishment or service, and to mitigate the adversative effects of any termination. It also

¹⁰⁵ The Employment Policy Recommendation, 1964 (No. 122), para 8 and the Annex; the Employment Policy (Supplementary Provisions) Recommendation, 1984 (No. 169); paras. 1, 6 and 10.

¹⁰⁶ The Minimum Wage Fixing Convention, 1970 (No. 131); Recommendation (No. 135); *Recovering from the crisis: A Global Jobs Pact*, adopted by the 98th Session of the International Labour Conference, Geneva, 19 June 2009, para 23.

¹⁰⁷ The Employment Policy Recommendation, 1964 (No. 122), and the Annex; the Employment Policy (Supplementary Provisions) Recommendation, 1984 (No. 169), Art. 12.

¹⁰⁸ Termination of Employment Convention, 1982 (No. 158), Art 12.

¹⁰⁹ The 1995 General Survey concerning Unjustified Dismissal, paras. 136-142; the Workers with Family Responsibilities Convention, 1981 (No. 156); Art. 8.

¹¹⁰ Ibid, Art 4.

¹¹¹ Termination of Employment Convention, 1982 (No. 158), Art 12.

provides that, the competent authority should support and assist the parties in search of solutions of the terminations contemplated when it is appropriate.¹¹²

Furthermore, the unemployment benefits are delivered for workers whose earnings are suspended due to the absence of suitable employment under certain conditions.¹¹³ In addition, the payment of unemployment benefits includes earnings of workers which have been reduced due to a temporary reduction in their working hours. Workers who incur a suspension or a decrease of earnings because of a temporary suspension of work, without any break in the employment relationship for reasons of, in particular, an economic, technological, structural or similar nature.¹¹⁴

Employers have the full responsibility of undertaking all practicable preventive and protective methods to minimize occupational risks.¹¹⁵ They are also responsible for providing appropriate training as well as adequate information on OSH.¹¹⁶ Moreover, consulting workers on OSH aspects associated with their job¹¹⁷, providing measures to deal with emergencies¹¹⁸ and notifying the labour inspectorate of cases of occupational diseases.¹¹⁹ Labourers should be informed about the health hazards involved in their work appropriately and adequately.¹²⁰ The workplace must mandate the workers to report to their immediate supervisor in any state in which they have reasonable justification to be certain of imminent and serious danger to their life or health. The employer cannot require workers to return to work when there is continuing imminent and serious danger to life or health.¹²¹

All ILO legal instruments lay down the basic minimum social standards in the global economy which states may implement with higher levels of protection and enhanced measures to better mitigate the impact of the crisis.

¹¹² Termination of Employment Recommendation, 1982 (No. 166); para 19.

¹¹³ The Social Security (Minimum Standards) Convention, 1952 (No.102), pt IV.

¹¹⁴ Employment Promotion and Promotion against Unemployment Convention, 1988 (No. 168), art 10.

¹¹⁵ The Occupational Safety and Health Convention, 1981 (No. 155), art 16.

¹¹⁶ Ibid, art 19(c) and (d).

¹¹⁷ Ibid, art 19(e).

¹¹⁸ Ibid, art 18.

¹¹⁹ The Labour Inspection Convention, 1947 (No. 81), art 14; art 4 of the Protocol of 2002 to the Occupational Safety and Health Convention, 1981, art 4.

¹²⁰ The Occupational Health Services Recommendation, 1985 (No. 171), para 22.

¹²¹ The Occupational Safety and Health Convention, 1981 (No. 155), art. 19(f).

Conclusion

COVID-19 has caused serious problems to the existence of the labours and their family's life. Many people have lost their jobs. The equation of losing a job is very simple, as most factories experienced lack of orders, which turned into a lack of production. Ultimately, the factories were not producing enough to pay their workers off. Taking owner's perspective into consideration, it was found that sometimes, the buyers rejected most of the orders due to the pandemic.¹²² This eventually made the owner-labours relation worsen.

However, the factory owners should take care of their workers/ employees, since these workers earned profits for factory owners all the year round. To avoid any financial hardship, the companies should have collective insurance policies so that the workers can feel safe. Moreover, to ensure the fundamental human rights of the labour, appropriate national programmes, actions, and measures will have to be taken. National laws, policies, and regulations will have to be designed in light of the international standards as ensured in international legal and human rights instruments.

¹²² Annie Kelly, 'Primark and Matalan among retailers allegedly cancelling £2.4bn orders in 'catastrophic' move for Bangladesh' *The Guardian* (2 April 2020) <<https://www.theguardian.com/global-development/2020/apr/02/fashion-brands-cancellations-of-24bn-orders-catastrophic-for-bangladesh>> accessed 3 June 2021.

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