

SUPPLY CHAIN LABOR PRACTICES: AN UNRESOLVED CONUNDRUM

**ANANYA SINGH
MASTER OF LAW (LL.M.) 2019-2020
CORPORATE AND FINANCIAL LAW AND POLICY
O.P. JINDAL GLOBAL UNIVERSITY, JINDAL GLOBAL LAW SCHOOL**

Abstract

In this paper, using Bangladesh as an example, I discuss the unique economic and socio-political factors that give rise to minimal social auditing and maximum monetary satisfaction for Transnational Companies. I suggest that for improved labor practices to gain momentum, there is a requirement of ideological change relating to the notions of free markets and privity of contracts with help of bilateral treaties between home and host countries to take care of contingencies arising out of the factory supply chain business model.

Introduction

Bangladesh has been garnering international attention as a ‘valued business model’ for decades now. The unskilled ‘demographic dividend’¹ provided by Bangladesh with an added advantage of the low cost of living combined with a high population density makes a perfect recipe for minimal labor costs. Bangladesh’s competitive advantage is its ability to flourish the economy by providing ‘willing’ labor to work below the minimum wage, majority of which are constituted by voiceless women workers.² This is to say, it provides a platform for transnational companies for minimal monitoring in terms of social auditing and maximum monetary satisfaction. Therefore, it would not be farfetched to claim that Bangladesh’s so-called “accidents”—for example, mainly the collapse of eight-story Rana Plaza building (2013) and the factory fire of Tazreen Fashions (2012)—were not unforeseeable.³

With this in mind, in the first part of this paper, I will discuss the nature of Bangladesh’s economy and the reasons for weak legal reforms and implementation; in the second part, I will discuss the issue of subcontracting in Bangladesh Factories that keep perpetuating labor right violations; and

¹ Out of the potential workforce of 150 million, approximately 70% are below the age of 35, presumably available to participate productively in the economy. BEARNOT, E. (2019). Bangladesh: A Labor Paradox. *World Policy Journal*, [online] Vol. 30,(No. 3), pp.pp. 88-97. Available at: <https://www.jstor.org/stable/43290247> [Accessed 24 Aug. 2019].

² Blanch, L. and Haque Amirul, A. (2013). Report: Bangladesh's Garment Industry. *International Union Rights*, [online] 20(20), pp.12-13. Available at: <https://www.jstor.org/stable/10.14213/inteuniorigh.20.2.0012> [Accessed 25 Aug. 2019].

³ The Conversation. 2017. *Five Years After Deadly Factory Fire, Bangladesh's Garment Workers Are Still Vulnerable*. [online] Available at: <https://theconversation.com/five-years-after-deadly-factory-fire-bangladeshs-garment-workers-are-still-vulnerable-88027> [Accessed 19 May 2020].

the in third, part I will suggest few measures to curb labor law violations and increase accountability of transnational companies, followed by a conclusion.

Economic and Legal Factors

While on the one hand, the poor workers suffer, on the other hand, Bangladesh's economy has been booming and its unemployment rates have been on a decline. The numbers speak for itself: Bangladesh has been witnessing a 6% increase in its GDP since early the 2000s and is currently the second-largest exporter of garments.⁴ Interestingly, one-third of the parliamentarians directly benefit from the garment industry, thereby paving way for fruitful labor laws far more challenging.⁵ Another deterring factor for the government is the ample availability of other low wage countries, and favorable regulations with proper implementation may run the risk of international buyers making a transitional shift to those countries.⁶

This paradoxical fear makes Bangladesh government equally complicit and is evident from the poor reforms and even poorer enforcement of laws such as 'the 2006 Bangladeshi labor law'⁷ (as amended in June 2013) -- the police brutality, a leading cause in hampering trade union rights; the practical difficulties in following the conditions like 75% union members consensus to hold a legal strike; and the exemption granted to Export Processing Zones⁸ (EPZs)-- pose serious threats to any meaningful outcomes. Even the legal sanctity of contractual governance mechanisms of the documents: "Accord on Fire and Building Safety in Bangladesh" and "Alliance for Bangladesh Worker Safety" posed significant challenges considering their deliberate controlled liability and limited outreach.⁹ It is pertinent to note that Accord and alliance limited their scope to just worker safety as if it is the only burning issue.

⁴ Bearnot, *supra* note 1.

⁵ Blanch and Haque Amirul, *supra* note 2.

⁶ Blood Garments: The Bangladesh tragedy exposes the callousness of the garment business. (2013). *Economic and Political Weekly*, [online] 48(21), p.9. Available at: <https://www.jstor.org/stable/23527412> [Accessed 24 Aug. 2019].

⁷ Blanch and Haque Amirul, *supra* note 2.

⁸ EPZs are territorial or economic enclaves which benefits companies by granting tax holidays and exemptions from the majority of financial and labor regulations. In Bangladesh there are currently eight EPZ employing over 3,50,000 workers. EPZs relegate workers to this other law called "Worker Association and Industrial Relation Act 2004" (the Act); it strictly prohibits workers from forming trade unions. The Act provides for 'working committee' whose representatives are to be elected by members. However, in reality, these committees are mere puppets of the management and any fair election process is largely unheard of. *Ibid*.

⁹ Salminen, J. (2018). The Accord on Fire and Building Safety in Bangladesh: A New Paradigm for Limiting Buyers' Liability in Global Supply Chains?. *The American Journal of Comparative Law*, 66(2), pp.411-451.

The Unresolved Issue of Sub-contracting

Another crucial aspect is “sub-contracting”¹⁰, it is like a chain wherein the main contract is between the transnational companies and main supplier (owner of Tier 1 Factory) who further sub contract with other suppliers (Tier 2 and Tier 3 factories) who have no direct or indirect link to transnational companies in terms of legal rights and remedies. Sub-Contracting is used to meet the excessive demands of international buyers as the fear of non-fulfillment may lead to loss of the deal altogether. Notably, both Rana Plaza and Tazreen Factory were on a sub-contracting basis.¹¹ The diabolical standards followed by international buyers in “officially” prohibiting the main factories sub-contract helps them escape legal liability in case of a mishap. It is an open industry secret that the prevailing practice of sub-contracting is widely understood by the global giants.¹²

Nike and Levi- Strauss serve as great examples.¹³ Their policy on complete factory supply chain information disclosure revolves around the idea that increased transparency encourages better management and thereby leading to sound work conditions for factory workers. However, there is no law that requires transnational companies to disclose the identity of the factories within the global supply chain.¹⁴ In the absence of concrete laws, the resistance to supplier transparency finds easy defense in “valuable proprietary information” which allegedly gives companies a competitive advantage over others. It is believed that this claim is rather disingenuous as it reeks of a desire to impede private oversight of supply chain factory conditions as it comes with an operational cost with zero returns.¹⁵ Nike and Levis suffered no financial or reputational damage on account of disclosures.¹⁶ On the contrary, they benefitted from the gradual incremental steps they kept taking towards transparency and disclosures.¹⁷ In both the companies, the perceived benefit of making disclosures reduced costs attached to duplication of monitoring. Since supply chain factories

¹⁰ Bearnot, *supra* note 1.

¹¹ Somo.nl. 2013. *Unsafe Garment Factory Buildings*. Available at: <<https://www.somo.nl/wp-content/uploads/2013/07/Unsafe-Garment-Factory-Buildings.pdf>> [Accessed 19 May 2020].

¹² *Id.*

¹³ After a decade-old resistance, they voluntarily disclosed complete information about their supply chain factories in 2005, although partly because of pressures from private actors (NGOs, unions, journalists and academics), and also as a part of strategic CSR on the realization that it can serve as a great marketing tool. J. Doorey, D. (2011). The Transparent Supply Chain: from Resistance to Implementation at Nike and Levi-Strauss. *Journal of Business Ethics*, 103(4), pp.587-603. Available at: <https://www.jstor.org/stable/41476046> [Accessed 22 Aug. 2019].

¹⁴ *Id.* p. 588.

¹⁵ GAP (CSR website) is a great example of this controversial claim. *Ibid.* p. 599.

¹⁶ *Id.* p. 601.

¹⁷ *Id.* pp. 595-598.

generally cater to multiple international brands, it was conceived that instead of individually investing in monitoring and reporting, results can be far better through ‘collaborations’ on joint remediation plans, and to reduce the cost of duplication of audits.¹⁸

Notably, in spite of all the positive corporate governance developments, ensuring the authenticity of factory lists still serves as a practical challenge. In fact, no credible study suggests that there is a correlation between full supply chain factory disclosures and improved working conditions for labors.¹⁹ This acknowledged social responsibility seems to have only benefitted the reputations of these companies rather than their stakeholders working in weak economies. It could be because their social auditing is only limited to direct suppliers which is an extremely small chunk. They conveniently chose to leave behind the chain of sub-contracting factories behind their main suppliers. Moreover, not all brands have the resources to scale up to Nike’s and Levis’s level, and the low-profile nature of many brands acts as a solid demotivation as it considerably reduces their chances of being targeted by labor activists. However, the lack of resources cannot be a valid excuse when there is always an option of collaboration on monitoring and reporting mechanisms with other brands.

Suggestive Measures and Conclusion

The only way forward to mitigate harsh working conditions is to officially acknowledge the presence of sub-contracting by suppliers of international firms so that the social responsibility can be traced back to the top. This requires an ideological change when it comes to the notions of free market and privity of contracts because of unequal bargaining powers with the suppliers in countries like Bangladesh. International law can play a lead role in this regard when it comes to fixing liability. However, this requires a massive overhaul: overcoming economic and legal challenges of transnational litigation can be a daunting task. It is believed that the first step in this direction could be signing a bilateral treaty between the home country and host country which take care of contingencies arising out the factory supply chain business model. The foundation of these treaties must be based on the doctrines of fairness or unconscionability. This will help in striking down liability limiting clauses present in transnational contracts and Accord.²⁰ These treaties must

¹⁸ *Id.* p. 600.

¹⁹ *Id.* p. 601.

²⁰ Salminen, *supra* note 8.

mandate monetary compensation, including but not limited to accidents and infringement of rights, by home country. A dedicated sub organ of the International Court of Justice must be established to specifically adjudicate on labor law violations arising out of such contracts. This may instill a renewed sense of accountability in transnational companies.