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10 COVID-19 and Business Law: Findings and Recommendations

Introduction

This chapter recapitulates the main findings discussed by the authors in their respective chapters. The chapter also provides concise recommendations for governments and other relevant authorities to consider when dealing with legal challenges caused by the COVID-19 pandemic. It needs to be noted, however, that both the findings and recommendations are based on the editor's reading and understanding of the substantive book chapters. While, for the most part, the chapter relates the findings and recommendations as correctly and concisely as possible, it also adds the editor's personal views on the matters in question where it was felt appropriate. This chapter, after all, represents a brief summary and review of the points raised and discussed by the respective authors. To get an unaltered version and full account of the authors' arguments, the readers are encouraged to read the authors' actual chapters in the book.

Relief for Contractual Breaches

COVID-19 has had a profound impact on parties' performance of contractual obligations. The performance might have been impeded by either COVID-19 (the disease) or by mandatory lockdowns imposed by the governments worldwide to contain the spread of the COVID-19. In either case, one would assume that the non-performance of the contract cannot be blamed on the non-performing party. If one party is to be excused from the performance of the contract on the grounds of COVID-19, then the other too should be given a concession. Suppose a landlord is unable to perform his contractual obligation to provide vacant possession of the premises to the shop holder due to the nationwide imposed lockdown. In that case, the lessee, too, should not be expected to perform his contractual obligation to pay for the premises for the duration of the lockdown. However, there have been numerous cases where this balance was either not achieved or was at least questioned. To understand the legal aspects of the issue at hand, in Chapter 2, Vazeer Alam Mydin Meera, Abdul Majid, and MeiYee Lee discussed the impact of COVID-19 on the performance of contractual obligations.

The authors considered the issue primarily in the context of the Malaysian law. However, occasional references to other jurisdictions were also made. They examined the matter mainly with reference to the common law doctrine of frustration

and the contract law concept of force majeure. While Malaysia's Contracts Act 1950 and the Civil Law Act 1956 provide a robust framework for the application of frustration in Malaysia, the doctrine, according to the authors, is not suitable for the contracts affected by the COVID-19. The authors pointed out two main reasons for that. First, the frustration doctrine was only intended to provide relief to individuals and not the who segments of society. Second, perhaps more importantly, the remedy for the frustrated contract, that is, the avoidance, would not be desired by most of the parties whose contracts have been affected by the COVID-19. Therefore, while conceptually, COVID-19 related events, including the lockdown, could be considered the frustrating event warranting the contract's frustration, the outcome of such a frustrated contract, that is, the avoidance, is not suitable for COVID-19 related breaches.

This brings us to the second legal concept discussed by the authors – force majeure. Force majeure is not the common law doctrine. Instead, it is a creation of contract law and can only be enforced if it is incorporated into a contract. The authors cited several judicial decisions where clearly written force majeure clauses were enforced and, as such, they absolved the liability of the parties for the breaches of the contract captured by the clauses. In the context of COVID-19, it is important that the force majeure clause contains a specific reference to a “pandemic”. A general reference to the “Act of God”, which typically includes a breach caused by natural sources that could not have been foreseen and avoided, may not be sufficient to cover the breach caused by COVID-19. The authors illustrated this by reference to a Malaysian case of *Khoo Tham Sui v Chan Chiau Hee*,¹ and concluded that “whether the COVID-19 pandemic is ‘an act of God’ is very much an open question”.

The authors opined that the non-performance of the contractual obligations due to COVID-19 should be remedied through an act of Parliament, which would provide temporary relief measures to the affected parties. The authors pointed that, in 2020, the Malaysian Government introduced the Temporary Measures for Reducing the Impact of Coronavirus Disease (COVID-19) Act 2020. As the name suggests, the COVID-19 Act was passed to reduce the impact of COVID-19 by way of temporary measures. The authors discussed in detail the measures introduced in relation to contractual obligations and identified several weaknesses. They argued that the COVID-19 Act was narrow in scope in limiting itself to mainly business contracts and not providing for employment contracts, residential tenancies, vehicle parking facilities, and small businessmen and sole traders. Also, in comparison with Singapore's COVID-19 (Temporary Measures) Act, which provides relief for contractual breaches caused by the COVID-19 (the disease), Malaysia's COVID-19 Act only covers contractual breaches caused by measures adopted (i.e. the lockdown) to prevent the spread of the disease. Thus, an individual who might have breached his contractual obligation due to his COVID-19 hospitalization (the disease) is not covered by

¹ [1976] 1 MLJ 25.

the COVID-19 Act in Malaysia as the Act is limited to the breaches of contract caused by the lockdown. This limitation is unnecessary and not helpful.

Recommendations

Non-performance of the contractual obligation due to COVID-19 should be remedied through an Act of Parliament. The Act should provide the affected parties temporary relief for the contractual breaches caused by both the COVID-19 (the disease) and consequent measures adopted to contain the spread of the disease (e.g. lockdown). Besides providing the appropriate relief to the affected business contracts, such legislation should also be extended to employment contracts, residential tenancies, vehicle parking facilities, and small businesses and sole traders. The parties who may wish to invoke frustration of the contract should know that it is not suitable due to its non-intended use in the circumstances of the pandemic and inaptness of its remedy of avoidance. Force majeure clause, on the other hand, may absolve liability for contractual breaches caused by the pandemic if the clause contains a clear reference to “pandemic” rather than just a general reference to “Act of God”.

Work-Related Challenges

In Chapter 3, Ashgar Ali Ali Mohamed and Chithra Latha Ramalingam discussed several employment law issues that have been reinvigorated by the COVID-19 pandemic. The second-biggest loss caused by the pandemic, after the loss of lives, has been the loss of jobs and the ability to earn a livelihood. The disruption to labour market around the world in 2020 was on a historically unprecedented scale.² International Labour Organization warned that nearly half of the global workforce could see their livelihoods destroyed due to the pandemic and resulting lockdowns.³ Many companies have been forced to retrench their workers, while some had to shut down. While employment law relationship is often looked at through the lens of “us” and “them”, that is, us being the works and them referring to the employers, the pandemic has taught us that the only way to survive this terrible disease is to work together. This has been the central theme of the authors’ arguments in this chapter. They considered a variety of employment law issues that need to be urgently addressed, but they insisted that all the issues and the proposed solutions should satisfy both legal as well as social justice tests.

For example, the authors explained that the workers are entitled to annual, medical, and other leave types, which is their legal right. However, they should also

² “ILO Monitor: COVID-19 and the World of Work. Seventh Edition,” International Labour Organization, January 25, 2021, https://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/documents/briefingnote/wcms_767028.pdf.

³ “Nearly Half of Global Workforce at Risk as Job Losses Increase due to COVID-19: UN Labour Agency,” UN News, April 28, 2020, <https://news.un.org/en/story/2020/04/1062792>.

be considerate to the employers' needs and try to accommodate them, especially in the time of the pandemic, which has impeded the employers' ability to generate revenue. Likewise, while the employer's unilateral reduction of the worker's salary would amount to a fundamental breach of employment contract, the worker should show understanding and be willing to take the pay cut if that is necessary due to the pandemic. The worker's willingness to sacrifice his legal right for the company's long-term good is consistent with social justice. If, on the other hand, the worker were to insist on his legal right entrenched in the employment contract or implied by the common law, then the employer, in the end, might be forced to retrench the worker. The blind insistence on only legal justice would serve neither the worker nor the employer in the time of the pandemic.

The same level of understanding is expected of the employers. The authors explained that employers should not easily retrench their workers. They should make sure that they have exhausted all the efforts to retain the workers, especially during the pandemic when many of them are vulnerable and when finding an alternative job is not easy. The employers should understand the difference between "redundancy", "retrenchment", and "lay-off" and when each is allowed under the employment law. They also must not use a "voluntary separation scheme", the authors argued, as a means of getting rid of underperforming or undesired workers. The authors also pointed out that employers should not use force majeure clauses to absolve their liability for the breach of the employment contract. The clause should not be used as a blanket defence to retrench workers on the basis that the pandemic has been identified as a force majeure event. The courts adjudicating employment law contracts, especially industrial courts, must show readiness to go beyond the contract law principles and pure legal justice and consider the matter with reference to social justice, equity, and good conscience.

The authors also discussed the difficulties surrounding work from home. Even though the flexible working arrangements remain unregulated in the employment law framework of many countries, including Malaysia, employers and governments should encourage it where the nature of the work allows for it. The workers' common law duty of fidelity and to act in the employer's best interest would ensure that flexible working arrangements, which are typically not monitored by the employer, are viable options. The authors also highlighted the employers' duty to provide a safe working environment for the workers. This is particularly important in the pandemic. The employer must make sure that the standard operating procedures mandated by the government authorities to contain the spread of the COVID-19 are fully implemented. They must also not ask the employees to do anything that may expose them or their family to the risk of contracting COVID-19.

Recommendations

When faced with employment law issues caused by the COVID-19 pandemic, particularly those relating to flexible work, deduction of wages, redundancy, retrenchment, lay-off, and occupational stress, employers and workers should try to resolve them amicably. There should not be “us” versus “them”. They both should be prepared to go beyond the contract law principles and pure legal justice and consider the challenges with reference to social justice, equity, and good conscience. Employers and governments should encourage flexible work where the nature of the work allows for it. Governments should also amend the employment legislation to include flexible work arrangement provisions.

Tourism-Related Challenges

In Chapter 4, Joo Ee Gan discussed the implications of the COVID-19 pandemic for the tourism industry. It comes as no surprise that this particular segment of the economy was affected the most by closures of countries’ borders, mandatory quarantines, and restrictions on movement imposed by governments worldwide. All these factors have caused a dramatic decrease in demand for tourism travel. It is estimated that global international tourist arrivals dropped 74% in 2020, making it the worst year on record.⁴ United Nations World Tourism Organization World Tourism Barometer estimated the losses in 2020 to be around USD 1.3 trillion in export revenues.⁵ The worst-hit regions have been Asia and the Pacific, with a drop of 84% in tourists’ arrivals in 2020 (300 million fewer).⁶ These countries have also imposed the highest level of travel restrictions. In absolute terms, the most affected region is Europe, with 500 million fewer international tourists in 2020, a 70% decrease in arrivals.⁷

In line with these figures, there have also been massive and unprecedented cancellations of travel bookings and tour packages due to the pandemic and the resultant restrictions. While some of the affected countries, like those in the European

⁴ “2020: Worst Year in Tourism History with 1 Billion Fewer International Arrivals”, *United Nation World Tourism Organization (UNWTO)*, January 28, 2021, <https://www.unwto.org/news/2020-worst-year-in-tourism-history-with-1-billion-fewer-international-arrivals>.

⁵ “2020: Worst Year in Tourism History with 1 Billion Fewer International Arrivals”, *United Nation World Tourism Organization (UNWTO)*, January 28, 2021, <https://www.unwto.org/news/2020-worst-year-in-tourism-history-with-1-billion-fewer-international-arrivals>.

⁶ “2020: Worst Year in Tourism History with 1 Billion Fewer International Arrivals”, *United Nation World Tourism Organization (UNWTO)*, January 28, 2021, <https://www.unwto.org/news/2020-worst-year-in-tourism-history-with-1-billion-fewer-international-arrivals>.

⁷ “2020: Worst Year in Tourism History with 1 Billion Fewer International Arrivals”, *United Nation World Tourism Organization (UNWTO)*, January 28, 2021, <https://www.unwto.org/news/2020-worst-year-in-tourism-history-with-1-billion-fewer-international-arrivals>.

Union (EU), have a robust regulatory framework to deal with these issues and offer the affected consumers adequate protections, other countries, most notably those in Asia and the Pacific, have struggled to do so. Joo Ee explored the situation in Malaysia, a country whose tourism industry has been hit very hard, and discovered that the current regulatory framework provided under the Tourism Industry Act (Malaysia) 1992 (TIA) and Tourism Industry (Tour Operating Business and Travel Agency Business) Regulations 1992 is inadequate to deal effectively with the ongoing crisis. She pointed out that neither the consumers nor the tour operators are satisfied with the existing legal framework.

Under the TIA and the Regulations 1992, only the outbound travellers are entitled to receive a full refund from tour operators for the cancellations caused by the pandemic and related events. These laws discriminate between outbound and inbound travellers, and this, according to the author, should not be the case. The other cause of action for a refund could be a more traditional contract law route as the COVID-19 pandemic is considered a force majeure event that renders the contract void. In that case, the refund would be deemed a compensation remedy provided under the Malaysian Contracts Act 1950. However, massive cancellations and demands for refunds have put an enormous financial burden on tour companies that are not adequately prepared to deal with this situation. Many of them have already paid third-party providers like airline companies, hotels, and transportation companies for the services which have been cancelled. This is why the Malaysian Association of Tours and Travel Agents had called the Malaysian Government to reconsider this, arguing that consumers should be bound by the airlines' and hotels' policies on cancellations and, as such, be entitled only to partial refunds.

The problem becomes more prominent when many of these travel companies become insolvent. The consumers are then treated as unsecured creditors and do not have insolvency protection like the consumers in EU countries have. This is precisely why, according to Joo Ee, a statutory priority through safeguards like bonding, guarantee fund, insurance, or trust is important. Joo Ee called on Malaysian authorities to consider the insolvency protection measures adopted in the EU Package Travel Directive 2015 and see if similar provisions could be introduced into the Malaysian regulatory framework. She argued that the UK's 2015 Directive and the Package Travel Regulations 2018, which implemented the EU Directive 2015, could be a useful guide on how to develop laws and insolvency protection system in which both the consumers and tour operators would be adequately protected and prepared for an unprecedented situation like the one we are currently in. The suggested legislative changes are meant to protect the consumers, prevent exploitation of the small service providers, and promote healthy competition.

Recommendations

The legislation governing the tourism industry, like Malaysia's TIA (Malaysia) 1992 and Tourism Industry (Tour Operating Business and Travel Agency Business) Regulations 1992, should not discriminate between inbound and outbound travellers. The insolvency protection measures adopted in the EU Package Travel Directive 2015, which address both consumers' and tour operators' concerns relating to the pandemic, seem reasonable and adequate. The Malaysian Government, and the governments of other countries for that matter, should introduce similar provisions into their regulatory frameworks. The UK's 2015 Directive and the Package Travel Regulations 2018 is a useful guide on how to do that.

Relief for Companies

In Chapter 5, Loganathan Krishnan explored the implications of the COVID-19 pandemic for the companies in Malaysia. After legislating the much anticipated Malaysian Companies Act 2016 (CA), the euphoria and hope quickly disappeared with the emergency of the pandemic. As Loganathan pointed out, it was quickly realized that many of the CA's provisions were not drafted with the worldwide pandemic in mind. The strict compliance with the provisions of the Act, which is typically expected of companies in normal circumstances, was an uphill task for most companies. But, companies that were affected the most perhaps were those that are generally most vulnerable – small and medium-sized enterprises. The pandemic restricted the movement of individuals, goods, and services. This, in turn, affected the companies' revenues. Many faced serious difficulties in paying their monthly rentals for company premises and wages to the employees. Perhaps the most serious threat arose from the debts owed to the creditors who could initiate insolvency proceedings against defaulting companies under the existing CA. The existing law did not take into consideration the pandemic and its impact on companies.

Loganathan explained that some countries like Singapore had offered various temporary reliefs to their companies through their COVID-19 legislation. According to him, this was an efficient and quick way to address some of the most pressing challenges the companies faced to keep them afloat. But, surprisingly, as Loganathan correctly observed, the Malaysian COVID-19 Act 2020 did not make any reference to the CA. In other words, all the strict legal requirements of the CA continued to be applied even during the pandemic. However, Malaysia did make some changes through Companies (Exemption) Order (No. 2) 2020 and the Direction of the Minister of Domestic Trade and Consumer Affairs in which the minimum debt threshold before the creditor could serve a statutory demand was increased from RM10,000 to RM50,000. According to Loganathan, this increase was insufficient, and he cited the example of the neighbouring Singapore, which increased the debt threshold from SGD\$10,000 to SGD\$100,000. The increase in the debt threshold is meant to

help avoid insolvency proceedings due to the pandemic which creditors would otherwise be entitled to initiate. Loganathan also noted that the Minister's Directive, which extended the time period for the company to comply with the statutory demand issued by creditors from 21 days to 6 months, while welcomed in terms of substance, was ultra-virus as the minister did not have the power to do so. According to him, the CA allows such a change only through an Act of Parliament and not through subsidiary legislation. This is a major concern for companies, Loganathan notes, as creditors would be able to challenge this extension in court.

In any case, insolvency should not be the first option for every financially distressed company in the pandemic. There are other options, Loganathan explains, worth considering. For example, companies should consider "corporate voluntary arrangement" (CVA), a restructuring arrangement with creditors with minimal involvement from the court to see if the company could be saved from insolvency. However, CVA is only available to private companies with no secured debt. This is, as Loganathan noted, a serious limitation as most of the companies have loans with charges over their property. Another option to consider is "judicial management" (JM), a mechanism supervised by the court. The Judicial Manager appointed by the court is responsible for preparing a restructuring scheme for the company. The serious limitation for JM, however, is that it is not applicable to public listed companies. Loganathan also pointed out that strict wrongful trading provisions with regard to company directors under the CA must be relaxed during the pandemic. Otherwise, the company directors would be tempted to enter the insolvency process too quickly in the pandemic to avoid incurring personal liability. There should be relief offered to the directors for debts incurred in the ordinary course of company business. The pandemic has also brought about some corporate governance challenges for the companies pertaining to annual general meetings, written resolutions, board meetings, and lodgement of statutory documents. For the most part, the regulators and companies have managed these challenges well through the use of the internet and related technologies.

Recommendations

Company legislation, like Malaysia's CA 2016, should include provisions that would provide relief to companies during public health emergencies like the COVID-19 pandemic. In the absence of such provisions, the COVID-19 legislation, like Malaysia's COVID-19 Act 2020, should provide temporary relief to companies affected by the pandemic. Financially distressed companies should consider appropriate restructuring arrangements, such as CVA and JM before they file for insolvency proceedings. Wrongful trading provisions regarding company directors should be relaxed during the pandemic to offer directors relief for debts incurred in the ordinary course of company business.

Businesses – Cooperation and Dominance

In Chapter 6, Sunitha S Sivakumaran discussed the extent of competition law's application during the COVID-19 pandemic. While strict compliance with the competition law might not have been the priority for many businesses struggling to keep afloat during the pandemic, the law still exists, and businesses must adhere to it. Perhaps its relevance is even more important during the pandemic as businesses may be tempted to engage in anti-competitive conduct to remain viable. That said, like all other laws, competition law is not devoid of reality, and its application must take into consideration the interest of both the public and businesses.

The Malaysian Competition Act 2010 (CA 2010), as explained by Sunitha, is wide enough to allow for flexibility in the application of the law. The fact that the Act prohibits anti-competitive agreements, both horizontal and vertical, does not mean that businesses cannot cooperate. What is prohibited are the collusive agreements that significantly prevent, restrict, or distort the competition in the market, and not agreements that are in the public's interest and which help the businesses stay afloat and save jobs. In fact, as Sunitha clarified, the competition law and regulators worldwide have allowed businesses to cooperate and share information and resources, which otherwise would not have been allowed but for the COVID-19 pandemic. In this way, they helped businesses reduce their cost and risk exposure and, at the same time, ensured a steady supply of essential items that are in high demand to the public.

Another major problem that has been addressed by Sunitha is the abuse of the dominant position by some unscrupulous businesses during the pandemic. The excessive price increase for an essential item like facemasks during the pandemic could be indicative of the abuse of the dominant position that the business enjoys in a particular market. Malaysia's CA 2010, like the competition laws of many other countries, prohibits the abuse of the dominant position. Sunitha emphasized that regulators like the Malaysian Competition Commission should ensure that businesses do not abuse their dominance. One possible defence provided for in the CA 2010 for the accusation of dominant position is that that conduct has reasonable commercial justification or represents a reasonable commercial response to the market entry or market conduct of a competitor (the so-called meeting the competition defence). However, that does not mean, as Sunitha suggested, that businesses can simply rely on COVID-19 or the resulting events to justify their anti-competitive behaviour.

Despite the flexible nature of competition law and the pandemic challenges, Sunitha cautioned that businesses need to be reminded that competition law still applies during the pandemic and that temporary relief measures provided by regulators in some jurisdictions should not be seen as a condonation of the anti-competitive behaviour. Rather, the measures and exceptions under the competition laws are meant to help businesses navigate difficulties during the pandemic and ensure no shortage in the supply of the essential items to the public at reasonable pricing.

Recommendations

Businesses should be mindful of competition laws and the relief they provide to businesses during the COVID-19 pandemic. While anti-competitive, collusive agreements that significantly prevent, restrict, or distort the competition in the market are prohibited by competition laws in most countries, cooperation and sharing of information and resources between businesses during the public health emergency like the COVID-19 pandemic and which is in the public interest, is not only allowed but somewhat encouraged. The regulators should also look for signs of possible abuse of dominance by businesses like sudden price hikes of essential items and take stern actions against such abuse.

Human Rights and the Rule of Law

In Chapter 7, Shanthi Thuraisingham and Danusha Rachagan have discussed the impact of the COVID-19 pandemic on human rights and the rule of law. Countries worldwide have been taking extraordinary measures to contain the spread of the disease. Many of these measures have been extreme such as countrywide lockdowns, intensified policing and checkpoints, and strict quarantines. The governments argue that extreme circumstances like the pandemic require extreme measures. There is no doubt, the authors contended, that the COVID-19 pandemic is a genuine emergency that requires immediate and robust measures to be introduced by the governments to contain the spread of the virus. The authors explained that even under international law, human rights such as freedom of movement, freedom of assembly, and freedom of association could be derogated if there is sufficient justification for that. In other words, individual human rights may be temporarily suspended if that is in the interest of the collective or the nation. However, the authors emphasized that derogation of human rights should be the last resort, and it should not be taken lightly.

When introducing measures to contain the spread of the coronavirus, the governments must ensure, the authors empathized, that those measures are in line with the international law principles of proportionality, legality, necessity, and timelines. The authors have mentioned examples of countries that might have been too quick to impose some of the measures that completely suspended some of the basic human rights when they could have achieved the same or similar results by limiting those rights. Therefore, the limitation should be preferred over derogation if possible.

The authors have also discussed the proclamation of emergency by some countries to deal with the pandemic. They cautioned that countries should be careful when proclaiming the state of emergency as it suspends checks and balances, which are necessary for an accountable and transparent democratic society. The emergency proclamation suspends the operation of parliament, which is supposed to oversee the work of the executive branch of government, and it gives an officer within the executive branch of government, normally prime minister or president,

very broad regulatory making powers to do anything that he deems necessary in response to an emergency. The authors have suggested that some emergency powers may indeed be necessary in times of emergency like the pandemic, but those powers should be given by parliament for a specific period of time, and parliament should scrutinize the exercise of those powers by the executive. They mentioned examples of the UK Parliament, which introduced legislation allowing additional emergency powers to the Cabinet, but those powers must be renewed after six months and will automatically expire after two years. Likewise, in Spain, the proclaimed state of emergency expired after 30 days but was renewable for another 30 days.

The authors have also discussed the impact of the pandemic on individual privacy rights. This area deserves a special mention as people worldwide have expressed concerns relating to the private information that they are required to reveal to their governments because of COVID-19 tracing and containing measures. There have been many types of COVID-19 tracing apps like Australia's COVIDSafe app and Singapore's TraceTogether app, temperature sensing drones, and phone apps to monitor the location and social distancing, which have been collecting vast amounts of private data and invading peoples' privacy. The authors have referenced studies that observed that people of some countries have expressed that they do not mind sharing their private information and location if that is in the interest of everyone's health. This goes back to the earlier point that collective rights override individual rights. The question is, as the authors argued, the extent of the information that governments need to contain the spread of the disease and the purpose for which such gathered information is going to be used. They cited an example of a minister in Singapore who reportedly said in parliament that information collected through Singapore's TraceTogether app could be used by police for criminal investigations. The extent of gathering private information and its use by the governments will likely remain one of the widely debated issues even after the pandemic.

Recommendations

Derogation of human rights by governments due to genuine health emergencies, like the COVID-19 pandemic, must not be taken lightly and should be the last resort. Measures introduced by governments to contain the spread of the coronavirus must be consistent with the international law principles of proportionality, legality, necessity, and timelines. The executive's emergency powers, if necessary, should be given by parliament for a specific period of time, and parliament should oversee the exercise of those powers. The private data of individuals collected by governments through COVID-19 tracing apps and containing measures should only be used for the purpose of preventing the spread of the virus.

Human Trafficking of Migrant Workers for Forced Labour

In Chapter 8, Priya Sharma discussed the exacerbated problem of trafficking in migrant workers for the exploitative purpose of forced labour during the COVID-19 pandemic. Trafficking in persons, also known as human trafficking, is one of the most detested violations of basic human rights where individual fellow beings are being trafficked for exploitative purposes, such as forced labour, sexual exploitation, forced begging, forced marriage, removal of organs, child soldiers, and selling children.⁸ Priya limited her discussion in the chapter to the trafficking in migrant workers for forced labour, which has been a major issue worldwide even before the pandemic. The situation, however, has deteriorated during the pandemic as the elusive traffickers, which normally operate in disguise and under the radar of the enforcement officers, became even more difficult to detect and prosecute during the pandemic. One of the reasons for that is that police, and other enforcement agencies have been quite understandably more preoccupied with the public health emergency to contain the spread of the deadly virus.⁹ However, the traffickers also have made use of this situation and the lack of police oversight over their activities to exert even more oppression on already oppressed victims by threatening and forcing them to work without adequate pay even in the conditions where their health could be compromised.

The trafficking in persons, as explained by Priya, has been sanctioned under the Palermo Protocol.¹⁰ The protocol is based on the so-called 3P paradigm framework (prosecution, protection, and prevention) to deal with the trafficking in persons offence, and countries are expected to adopt the framework into their own national legislations. Priya examined the extent to which protocol has been adopted in Malaysia's Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 (ATIPASMA). Initially, trafficking and smuggling of persons offences used to be treated under separate legislations. But, in 2010, Anti-Trafficking in Persons Act 2007 was amended to add smuggling of migrants offences to it. Priya questioned the need to have the smuggling of migrants offences treated together with trafficking in persons offences. This amendment, according to Priya, is not helpful as it may cause

⁸ "Impact of the Covid-19 Pandemic on Trafficking in Persons," United Nations Office on Drugs and Crime (UNODC), accessed February 21, 2021, <https://www.un.org/ruleoflaw/wp-content/uploads/2020/05/Thematic-Brief-on-COVID-19-EN-ver.21.pdf>.

⁹ Christopher Johnson, "How Are Human Traffickers Taking Advantage of the Pandemic?," Reuters, October 18, 2020, <https://www.reuters.com/article/us-global-trafficking-expertview/idUSKBN27300T>.

¹⁰ A United Nations (UN) Protocol to Prevent, Suppress, and Punish Trafficking in Persons Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, accessed February 21, 2021, <https://www.ohchr.org/EN/ProfessionalInterest/Pages/ProtocolTraffickingInPersons.aspx>.

the two crimes to be conflated, especially by the police and enforcement agencies which may have difficulties understanding the difference between the victims of trafficking and smuggled persons. The difference between the two is important. The former do not consent to be trafficked while the latter consent to be smuggled and, as such, would be prosecuted under the country's immigration laws. If the victims of human trafficking are mistaken for smuggled persons, they too would be prosecuted by the state, which, instead of prosecuting, should treat them as victims and offer them the needed protection.

Another problem, highlighted by Priya, lies in the definition of “coercion” element under the trafficking in persons offence. Priya disagreed with the narrow approach to coercing adopted by the court in some cases where they took the position that the coercion is limited to the physical use of threat or force, thereby excluding mental, emotional, and psychological coercion. She argued that this narrow approach to coercion was inconsistent with the broader approach adopted in the Palermo Protocol, which serves as a core reference to ATIPASMA and informs its objectives. The forced labour problem faced by many migrant workers has been compounded by the lack of proper legal protection under other domestic labour laws. The contract for labour, in particular, has presented workers with many challenges in the past. Priya noted that the Malaysian Government made some progress, but the situation is still far from perfect. The domestic laws still, according to Priya, fail to indicate clearly the “employer obligations of the supplier” and the “employer obligations of the actual employer”. Likewise, the “supplied employees” still tend to be discriminated against in comparison with the “employees of the workplace”. Therefore, the only solution to this, Priya argued, is the abolition of the contract for labour system. All employees must be treated as employees of the workplace.

Recommendations

“Trafficking in persons” and “smuggling of migrants” offences should not be treated in the same legislation, as is currently done in Malaysia's ATIPASMA, for the fear of conflating the victims of trafficking with smuggled persons. The ATIPASMA should be amended to include mental, emotional, and psychological coercion under the trafficking in persons offences in addition to the physical use of threat or force. Governments should make the necessary legislative amendments to abolish the contract for labour system. As such, “supplied employees” should be considered “employees of the workplace”.

Access to Legal and Judicial Services

In Chapter 9, Ridoan Karim talked about the importance of legal services during the COVID-19 pandemic. Legal services are not considered essential in many countries and, thus, have not been allowed to operate during the lockdowns. Ridoan pointed

to the relevant legislative provisions in India, Malaysia, Singapore, and the UK and found that they all excluded legal services from the list of essential services. Should legal services be included in the list of essential services, Ridoan tried to answer by considering several factors.

In essence, if law firms are not allowed to operate, there will be serious economic repercussions for those firms and their employees. Lawyers cannot proceed with their client's instructions, which will affect their ability to generate revenue. If they cannot generate income, they would not be able to pay the rent or employees' salaries. As a result, many law firms would be forced to retrench their employees or, in some cases, to shut down. In this respect, it could be said that the law firms are not different from other business entities that faced similar cash flow problems due to the pandemic. But, there is another consequence of shutting the legal practice – the inability of an ordinary business transaction by individuals, businesses, and even governments to be conducted without legal help from relevant legal professionals. Furthermore, what would happen with the rule of law and judicial system if the lawyers cannot represent their clients in courts both in commercial and criminal cases.

Ridoan reiterated that the rule of law must not be suspended even in emergencies and mandatory lockdowns like those countries have experienced during the COVID-19 pandemic. Access to justice must never be halted. This is why Ridoan argues that the courts in many countries have embraced the digitalization of court proceedings, allowing the court proceedings to be conducted remotely via various video conferencing platforms like Zoom, Microsoft Teams, and the like. He mentioned the examples of the courts in the UK and Malaysia making history in March and April 2020, respectively, when they conducted for the first time entirely virtual court proceedings that were open to the public to watch. Online court proceedings are seen as more effective and less time-consuming. They also tend to be less costly as lawyers do not need to fly from other parts of the country to present their arguments in person before a judge for a few minutes. In some countries, Ridoan explains, the courts have worked with bar associations to introduce the guidelines detailing the conduct of online court proceedings.

It is not a surprise that the law profession has begun to embrace online technology more holistically. This is necessary, especially during a pandemic. The argument that lawyers should not be allowed to operate in person as essential service providers is also understandable given the contagious and deadly nature of the COVID-19. This, however, must not mean the suspension of the legal and judicial services. They must proceed to operate through an online environment. That said, they also must be aware of the dangers associated with the online environment. Ridoan raised concerns regarding cybersecurity and data protection. He also pointed that in-person witness testimony tends to be more compelling and authentic than the one given online and cited several court decisions to this effect. Indeed, these are

genuine concerns that must be borne in mind by the parties involved in the online legal process.

Recommendations

Access to legal and judicial services should not be denied even during the pandemic. Both the courts and lawyers should embrace online technology. The courts particularly should allow the court proceedings to be conducted remotely via various video conferencing platforms like Zoom, Microsoft Teams, and the like. The practice of online court proceedings should remain even after the pandemic in cases where it is deemed effective and appropriate by the court and the parties.

Conclusion

It is highly unlikely that anyone would dispute the seriousness of the COVID-19 pandemic and its colossal impacts on individuals and businesses. The COVID-19 pandemic is a genuine global health emergency, and as such, it requires an understanding and cooperation from all the stakeholders to overcome its challenges. The affected parties, in particular, must realize that if they manage the effects of the pandemic in a collegial and collaborative manner, they will collectively be able to make it through and become even more resilient. This is best demonstrated in employment relationships. Employers and workers should be sensitive to each other's problems. They should not only insist on their strict contractual rights at all costs. Doing so may bring them short-term benefits, but the approach may not be sustainable for a long time. For example, the employee who refuses to accept a pay cut, which may be necessary to save the employer whose source of revenue is affected by the pandemic and whose reserves are not sufficient to cushion its effects, may end up being retrenched. Likewise, the retrenchment of the workers by the employers should only be considered as the last resort. Therefore, both workers and employers must work together to save jobs and livelihoods for their mutual long-term benefits. Governments also have a major role to play in mitigating the impacts of the pandemic. Most of the governments have introduced various temporary relief measures for the affected parties. Some of these measures may need to be more robust and encompassing. This book has pointed to a number of areas that COVID-19 legislation needs to address. We sincerely hope that the recommendations made by the authors in this book would be found helpful.