"All citizens are equal before law and are entitled to equal protection of law"-Article 27 of the Constitution of the People's Republic of Bangladesh

The Prison System in Bangladesh

By Md. Nur Khan

ARTICLE 5 of the Universal Declaration of Human Rights and Article 35 (5) of the Constitution of Bangladesh clearly states that *"no person shall be subject to torture or to cruel, inhuman or degrading punishment or treatment....."* It is, however, questionable whether this pronouncement is respected and applied in practice by the state in the case of prisoners. Despite the desperate need for legal reform and amendment, a century-old Jail Code-enacted during the colonial times in an imperialistic manner — still prevails in our statutes.

To those who are and have been prisoners in jails in Bangladesh, Article 35 (5) of the Constitution and Article 5 of the Declaration are merely meaningless words on paper. Prison life here is rife with incidents of violence and torture and some of the worst cases are experienced by those who are under trial and those yet to be tried.

The Creation of Jails in Bangladesh

Bangladesh jail administration dates back to the practices of colonial times during the British rule of the subcontinent. There have been few changes. Bangladesh's introduction to the prison system centres around Dhaka Central Jail, when a Afghan fort was converted to this said stronghold. During Mughal times this structure housed an administrative office. The British rebuilt the structure in the mid 18th century to accommodate a prison, which started functioning as such from 1788.

The Prison Act of 1894 is the only codified document of the English prison system in the Indian subcontinent. The prevailing Jail Code is actually a compilation of internally issued circulars, notices and Orders used by prison administration. This compilation was made in 1863, and the last amendment made to it was in 1937, in keeping with the Prison Act. There are, however, some other guidelines which jail administrative offices follow. They are:

1. The Criminal Procedure Code (Act 5 of 1898)
2. The Penal Code (Act 45 of 1886)
3. The Police Act of 1969
4. The Civil Procedure Code of 1905
5. The Special Powers Act of 1974
6. The Childrens Act of 1974
7. The Lunatics Act 1912

The Life of a Prisoner

Arrest

Section 46 of the Criminal Procedure Code lays down the procedures to be followed during the arrest of a person. The section states that the police or any other person making the arrest is authorised to actually touch or 'confine the body' of the person being arrested, unless the latter submits by word or action. The Section further states that if the person arrested forcibly resists the act or attempts to evade it, the police officers (or any other person) may use "all means necessary to effect the arrest".

The obvious question to spring to mind here is: what is meant by "all means necessary to effect the arrest?" Even though Section 46 does not permit the causing of death, it does seem to interpret that the arresting officer/agent can be given a free hand and that any amount of torture can be affected on the apprehended person, as long as it does not cause his death.

Even though the law requires that a person must be shown a warrant before his arrest, it is not always the case in Bangladesh. Often the person accused is pounched on, manhandled and forced into a police van or made to walk to the police station. Furthermore the law requiring that every arrested person must be presented before a magistrate within 24 hours of his arrest is rarely practiced.

The Accused in Police Custody

The physical conditions of the police station cells are beyond description. In most of the cases any number of arrested persons are crammed in a cell measuring 10 feet by 12 feet, without sanitation or means of relieving themselves.

It is quite a common practice in many police stations to torture an arrested person in custody and to invoke fear into the arrested person and his family either to extract a confession or in order to extort money. Methods of torture can range from beatings to electric shocks on different parts of the body. In 1998, one of the leading news items was the death of a young man called Rubel in police custody. The rape and death of women in police custody are also becoming common experiences, as evident in the cases of Yasmin in Dinajpur and Shima in Chittagong.

The Accused in the Custody of the Court

Accused persons are taken into the custody of the court (*court hajat*: intermediate holding cell) hand-cuffed and crammed inside a police van. Their condition inside the cell of the court is no different than that of the police station. There is the same lack of ventilation and sanitation.

Entering the Prison

A Deputy Jailer superness the identification of the new prisoners. Their clothes are searched and they are kept in an 'import ward' for the first night. It must be noted here that new prisoners are not allocated food on the first night and are therefore left to starve till the following morning.

The Prisoners: Waiting for Justice?

The following morning they are taken to what is known as the 'case table' which consists of benches wide enough for four people. They meet the Jailer there and are then taken to the prison hospital where their physical condition is examined. They then get a haircut from the barber section. Later, they are brought back to the 'import ward'.

Life inside a Prison

Inside the prison, the prisoners are counted a number of times in the span of 24 hours and there is a terrible hue and cry if ever the count falls short.

Overcrowding in Bangladesh prisons is a common phenomenon. In Dhaka Central Jail there is a capacity for 2032 male prisoners. However, there is a total of 5646 male prisoners in that jail. While the jail holds the capacity for accommodating 84 female prisoners, there were 310 female prisoners held there in November 1994.

In such an overcrowded, old and ill equipped prison, the inmate face a life of suffering, humiliation and discrimination. He is detached from his family and becomes vulnerable to all kinds of abuse and to the influence of habitual or life-term convicts.

The size and names of the prison cells vary. Prisoners sentenced to death and those who are considered dangerous are kept in small separate cells called condemned cells. Sometime prison officials send prisoners to these cells as a punishment. Some cells are suitable for two, some for five or more and some can accommodate even a hundred persons at a time. Usually, the large cells are called "wards". In prison parlance 'division' is translated into social standing and esteem. A person's social standing would determine which 'division' he or she would be sent to. Sometimes, when a judgement is pronounced the division in which the prisoner to be sent is also mentioned. Sometimes political, administrative and financial factors also play a role in the determination of divisions. There are mainly two divisions. Divisions I and II. The elite and financially affluent and high-ranking persons are kept in the first division while the rest are kept in the second.

Those who are under trial and are detainees are kept in a separate division.

The only things the prisoners are allowed to keep an aluminum plate and bowl. They have to use these for everything a human being has to perform. General prisoners are not given mosquito nets or pillows. They use their aluminum bowls for pillows. Every cell contains at least two or three times more prisoners than its original capacity. Those who do not have any relatives to fight their cases remain in prison under these poor, inhuman conditions indefinitely.

One such case is that of Falu Mia, who spent 22 years of his life in prison without trial. With the help of a humanitarian organisation he was released on November 14, 1993.

Another prisoner, Nazrul Islam, spent 12 years in prison without trial until he was released on December 15, 1992. There are many other prisoners languishing in prison in hope of a fair trial.

Jails provide employment to prisoners undergoing rigorous sentences but their labour is treated as 'in lieu of punishment', without providing for any savings whereby each prisoner could have a small fund to bank on when his sentence has been served. This employment facility is not extended to under trial prisoners. As a result, the latter, if and when released, finds himself without any savings or means to support his family.

"On call" is a dreaded word in prison. Basically this means that due to non-fixture of a date for a hearing in court, the prisoners will not leave prison until 'called'. Once a prisoner is 'on call' it takes a lot of money and effort to set another date for a hearing. As a result, the prisoner spents months and sometimes year in prison without being heard.

There is a hospital in every central and district jail. These provide special diets for the patients. The atmosphere here does not have the restrictions found in prisons. Many a time, even perfectly sound 'patients' come to hospital for treatment. This of course is arranged through bribery. Thus the general prisoners who are really sick are often neglected as they are unable to pay the required sums of money. Unfortunately, the seriously ill patients die on the way to hospitals out of prison due to lack of proper transportation facilities. They also die due to delay in obtaining permission to avail of treatment in other hospitals.

From the jail gate to the prison kitchen, prisoners who can afford to pay bribes are provided with more facilities than others. They are automatically allowed more visiting days as well. Sometimes if enough money is spent, the prisoner could meet visitors in guise of an 'official-call'. Even though prisoners are not allowed to keep cash with them, they can earn some money if they work as spies for the officials. It is a vicious circle of corruption inside the prison. Even visitors have to bribe the watch man to visit their relatives.

Apart from these acts of corruption, the jail accommodation and administration is also deteriorating day by day. Lack of sanitation and ventilation adds to the suffering of the inmates.

Recommendations

In order to improve the condition of the prisoners and ensure their basic human rights of shelter, food and health etc the following recommendations are necessary:

1. To rebuild all the ancient buildings and provide them with sufficient accommodation to avoid overcrowding and poor hygiene and sanitation.
2. The long procedures prescribed in the jail code regarding the shifting of a serious ill prisoners from jail to hospital at the dead night have to be reviewed and amended.
3. Every jail should be provided with tubewells for supplying purified drinking water.
4. The standard of food should be improved and proper supply of food to all the prisoners should be ensured.
5. Ventilation and sanitation facilities should be improved.
6. Education and legal awareness must be imparted to the prisoners so that they are better equipped to face the world on completion of their terms.
7. Jail administration should be handed over to the Social Welfare Department and reformative punishment should be introduced.
8. To ensure free visiting, it should be ensured that no visitor has to pay bribes to visit their close ones.
9. It is necessary to increase the jail production/manufacturing process and to pay a certain amount to the prisoners working so that, they can support their families.
10. Corruption must be monitored, checked and stopped at different points in the prison administrative system.
11. Above all, the recommendation of Jail Reform Report prepared by the Justice Munim Commission in 1978 should be implemented.

The writer is Director, Odihikar, a coalition for human rights. This is an edited version of the paper presented in the British-Bangla Law Weak (29 November-5 December 1998) organised by the British Council, Bangladesh

law watch

Indian Supreme Court on Politics

Constitutionality of Hartal

By Arafat Amin and M. Sayed Ahmed

HARTAL are a legitimate form of political protest against Government inaction, or studied silence or refusal to concede even the just demands of people. In Indian subcontinent Mahatma Gandhi was the first person to use the term Hartal. It was then used to protest against any act or legislation of an alien government. Today they are being used frequently by political parties to meet petty political ends, and often take a violent turn with large scale loss of life and property. In this context, the judgement of the Kerala High Court regarding hartal is of immense importance.

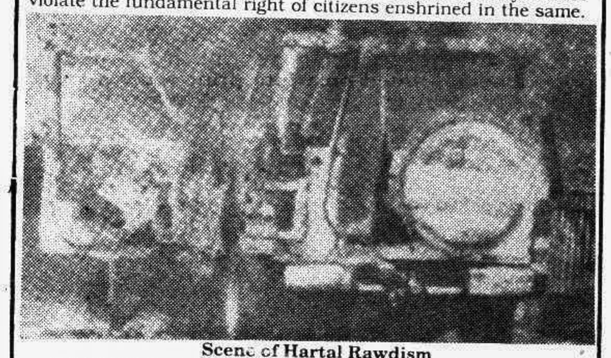
A Brief Summary of Facts

The petitioner in this case were two private citizens and the various chambers of commerce in the State of Kerala, the Director General of police and five registered all India political parties were impleaded as respondents. It was contended that Hartal should be declared unconstitutional as they violate Articles 19 and 21 of the constitution is protection of certain rights regarding freedom and Art. 21 is for protection of life and personal liberty and that they also contravene the directive principles of state police and fundamental duties enumerated in the constitution. The petitioner further prayed that the calling for and holding of hartal should be declared an offense under the Indian Penal code. The High Court of Kerala held that the calling for a Hartal by any association, organization or political party and its enforcement, is illegal and unconstitutional. The court also took the view that the organization which call for such Hartal and enforce them are private citizens. On appeal the Supreme Court upheld the decision of the High Court merely stating that the reasoning of the high court was sound and that no interference of their part was necessary (The Communist Party of India Vs Bharat Kumar and others). The decision was given by a three judge bench presided by the chief justice of India).

Court's Views in this case

The court by declaring that Hartal violates fundamental rights and are hence unconstitutional has apparently accepted the argument that fundamental rights are enforceable not only against the state but also against private citizens. This is in direct contravention of the supreme court ruling in State Vs Subadh Gopal Bose (Air 1956 SC 108), where the court declared that the fundamental rights guaranteed in part 3 of the Indian Constitution to serve as protection only against state action following the development of the concept in the context of royal absolutism where protection form state excesses was required. The constitutional of India governs the relationship between state and civil society, and the fundamental rights enshrined are to ensure that the statements to protect and uphold the rights of the citizens, does not violate them itself. In case of violation of rights by a private individuals, the course of action lies under the ordinary law of the land, i.e. civil, criminal and tort.

It was contention of the petitioners that a hartal called for and enforced by political party violates their fundamental rights enshrined under articles 19 & 21 of Indian Constitution. It was submitted that the High Court, by upholding the contention of the petitioners, has ignored past decisions of the supreme court which have held that the rights guarantees under part 3 of the constitution (fundamental rights) are available only against "State Action" since political parties which consist of private citizens are not "state" for the purposes of Articles 12 of the constitution of India where the courts in various time held the question of what constitutes state for the purpose of part 4 of the constitution has been extensively discussed by a constitutional Bench in Ajay Hasia Vs Khalid Mujib (Air 1981 SC 437), their actions do not constitute "State Action" for the purpose of part 3 of the Indian Constitution and thereby cannot violate the fundamental right of citizens enshrined in the same.



Scene of Hartal Rawdism

What the Court Could Have Said

The Supreme court of India has on a number of occasions recognized that, if an individual is unable to enjoy his guaranteed rights as a result of state inaction, it can be considered to be a violation of the individual's fundamental rights (this principle has evolved through a host of environmental pollution Cases). In the present case, by pointing out that the failure of the state to take action under the maintenance of public order and tranquillity provisions of Code of Criminal Procedure and the Indian Penal Code relevant provisions.

It is submitted that it is neither desirable to ban hartal entirely, nor leave them entirely unregulated. The economic loss caused and the hardship suffered by the calling of a hartal is too great to be ignored. The Court must try to strike a balance between the freedoms guaranteed by the constitution, and the degree of social control permissible. It efforts to grant relief to those affected by hartal however, the court has gone too far, its judgement guided by emotion rather then by sound legal reasoning. Drawing an analogy form the Industrial Dispute Act of 1947 and its heading of strikes, differentiating Between legal illegal, justified and unjustified strikes (Chapter 5 of the ID Act dealing with strike and lockouts in India) the court should have attempted to classify hartal as legal or illegal, instead of imposing a blanket ban an all hartal. This would allow for peaceful expressions of protest, and at the same time prevent undue hardship to the public. By declaring all hartal as unconstitutional, the court has, in effect, violated the very rights it has sought to uphold and has deprived the working class of a very strong bargaining weapon.

Arafat Amin is a student of Law, University of Dhaka.
MS Ahmed is a student of National Law School of India University.

A Century Goes by for Lord Denning

By Khaled Hamid Chowdury

Denning also inherently disliked the idea of inserting exemption clauses, mainly in small prints by the sellers or suppliers of goods in commercial contracts thereby relieving them from almost all types of liability for breaches of contract. The consumer, being in a weaker bargaining position, could do very little about it. Moreover, statutory intervention to protect the consumers only developed in the English law during the 70s. Denning adopted ingenious methods to attack such clauses giving relief to the consumer.

ALFRED Thompson Denning, better known as Lord Denning, probably the most celebrated, brilliant but controversial English judge of the present century achieved another milestone on 23 January when senior judges, lawyers, academics joined him to celebrate his 100th birthday. He has had an extraordinary legal career, at the bar, judicially and extra-judicially. He served as a Lieutenant in the Royal Engineers from 1917 to 1919 before coming up to Magdalen College, Oxford as a Prize Scholar to read mathematics and then law, winning a first class degree in each. Denning qualified as a Lincoln's Inn Barrister in 1923 and became a King's Counsel in 1938. He was appointed as a Judge of the English High Court in 1944 and as a Lord Justice of Appeal in 1948. He sat at the House of Lords (HL) for six years from 1957 before returning to the Court of Appeal (CA) to take up his best-known judicial appointment as Master of the Rolls in 1962. He served in this position until his retirement in 1982. Because he had been appointed to the office in 1962 before compulsory retirement at 75 was introduced, he was able to remain on the bench until he became 83.

Denning's singular gift to English law was his ability to view the law as a means to an end, never unnecessarily allowing precedent or legal technicality to obscure what he believed to be the interests of justice. He was a truly great judge who upheld the rule of law and made enormous contribution to the changes of the last 100 years. Denning, it was said, opened the door to the law above the law. However, there are some who thought that he exaggerated the role of the judge in the English society. Often at the centre of political and legal controversy, he was famous for his bold pronouncements and clear judgments.

Denning always desired to protect the citizen against the powers-that-be. In the case of Star vs Minister of Pensions he ruled that if a man was fit when he joined the armed services and unfit when he left, he should not have to prove that his disability was due to service. It was up to the previously, the burden had always been placed upon an applicant for a pension to prove that his disability or injury was due to war service. Discontent was remarkable as claimants failed to discharge the burden.

In divorce law he asserted the right of a deserted wife to go on occupying the matrimonial home inventing the doctrine of 'deserted wife's equity' (Bendall vs McWhirther) Thus he gave protection to a wife who had been deserted by her husband with no proprietory interest in the matrimonial home. This mitigated injustice as there was no statutory protection for such wives at that time. The decision, however, created uproar in the property market and in 1965, HL ruled that this "deserted wife's equity" did not exist. (National Provincial Bank vs Ainsworth) Denning was proved wrong but the Parliament then hastily passed legislation offering statutory protection to such persons thereby vindicating Denning's views. (Matrimonial Homes Act 1967). In another series of cases, Denning held that where both the husband and wife directly or indirectly contributed to its purchase or maintenance of family asset, albeit in unequal shares, but the asset was legally owned by one of them, it continued to belong to them in equal shares in equity. (Cobb vs Cobb) Once again the House intervened in 1970 to rule that ordinary rules applied in determining the ownership of matrimonial home. (Pettit vs Pettit)

He claimed to have invented the phrase "freedom under the law" and believed his highest achievement was building up administrative law to control the powers of government. He was the first English judge to use the term 'legitimate expectation' in administrative law widening the scope of the courts to review the decisions of the government and other public bodies. (Schmidt vs Home Minister) Denning's crisply written report on the Profumo scandals of 1963 turned into a bestseller and made him ever more famous.

Sitting in HL, he set out an authoritative statement of the defence of automatism in the criminal law. (Bratty vs A-G) In relation to ascertaining the state of mind, i.e. intention of a company for establishing legal liability (corporate mens rea) he stated, "a company in many ways be likened to a human body. It has a brain and nerve which controls what it does. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by law as such." (Boston vs Graham)

He was not spoiled but he was petted. Tom Denning, aged about four

Lord Denning in 1938

Before 1964, no remedy lay in English law for a negligent misstatement in the law of tort. But in Candler v Crane [1951], Denning, while dissenting, allowed recovery which was regarded by lawyers almost without exception, as a brilliant advancement of the law. The House 13 years later agreed with Denning thereby vindicating it in the Hedley Byrne case. Denning also inherently disliked the idea of inserting exemption clauses, mainly in small prints by the sellers or suppliers of goods in commercial contracts thereby relieving them from almost all types of liability for breaches of contract. The consumer, being in a weaker bargaining position, could do very little about it. Moreover, statutory intervention to protect the consumers only developed in the English law during the 70s. Denning adopted ingenious methods to attack such clauses giving relief to the consumer. In 1956, in one such cases he formulated the famous "red ink..... with a red hand pointing to it" test for providing notice of exclusion clauses by the seller to the consumer without which, he held, the consumer was not bound. (Spurling vs Bradshaw)

Denning's one of the most remarkable achievements has been to develop the doctrine of promissory estoppel. Since his earlier years, Denning had been attracted to the idea of an estoppel based on a promise given by one party to another. Thus if X promises to Y which affect legal relations between them and Y acts upon it altering his position to his detriment, X will not be permitted to act inconsistently with it. In 1946, in the famous High Trees case he held, "the time has now come for the validity of such a promise to be recognised.... A promise to accept a smaller sum in discharge of a larger sum, if acted upon, is binding notwithstanding the absence of consideration." The impact of the decision was enormous as it became the subject of leading article in the legal magazines and comment and criticism in the text-books.

Denning provided damages for mental sufferings in the law of contract and held that in certain circumstances damages can be recovered for the loss suffered by a third party defying the privity rule (Jackson vs Horizon Holidays) which although discredited by HL subsequently, (Woodar vs Wimpey) has now been given a new lease of life by the House itself in a recent pronouncement (Linden Gardens vs Lenesta [1994]).

Being the Master of Rolls, Denning presided over the English Court of Appeal, which, by the doctrine of precedent, is bound by the rulings of the House of Lords, the highest English appellate Court. Denning with his cause for justice and progressive mind, as has been seen above, sought to reform the common law whenever he found it to be deficient which inevitably led to clashes with the more conservative minded HL during his tenure. Time and time again Denning was rebuked by the House for his challenge to their authority but on most occasions the House could not but upheld his pronouncements.

In Broome vs Cassell Ltd., for example, CA led by Denning, unanimously refused to follow the decision of HL in Rookes vs Barnard on the principles of award of exemplary damages in tort. When Broome reached the House, CA was castigated for its "disloyalty". But that was not enough to deter Denning. In 1975, in express defiance of an earlier HL decision, he held that an English Court had power to award damages for breach of contract in a foreign currency which was the currency of the contract. (Schrosch Meier case) This case did not reach HL, but in another case on the same point, the House approved Denning's judgment overruling their earlier decision which Denning did not follow but scathingly criticised the CA's refusal to be bound. (Miliangos as George Frank Ltd.)

Denning also asserted that the C.A. may depart from its own earlier decision as could HL in the interest of justice as a general rule and should not be able to do so only exceptionally. (Gaillie vs Lee), In Davis vs Johnson [1979], he took a similar view, and when the case reached the House, although Denning's judgement was affirmed, once again he was put in his place. The House refused to accept his 'one man crusade' to break the shackles from the doctrine of precedent. This decision was described by Denning as his 'most humiliating defeat' and a 'crushing rebuff' in his book The Discipline of Law.

On the question of statutory interpretation, Denning, in preference to literal, golden and mischief rules adopted a purposive approach. He believed that when interpreting ambiguous words of the statute, to determine the intention of the Parliament, Courts should not restrict themselves and may take the help of extrinsic aids such as the reports of the Law Commissions, other reform committees and that of Hansard, i.e. the book in which the proceedings and debates of the Parliament are kept. In Davise vs Johnson he looked at Hansard which the House disapproved. HL at that time believed that it is not the duty of the judges to look at what was said in the Parliament and they ought only to confine themselves to the strict words of the statue. Denning afterwards found an indirect way to refer to Hansard, i.e. by reading text-books, articles in which debates were printed. Some twelve years after his retirement, HL in 1993 finally opened the door and decided that Hansard could be referred to in certain circumstances for statutory interpretation. (Pepper v Hart) Once more they followed Denning's lead.

Extra-judicially Denning has published many books to keep the readers aware of his remarkable legal career. These include Freedom under the Law 1949, The Changing Law 1953, The Road to Justice 1955, The Discipline of Law 1979, The Due Process of Law 1980, The Family Story 1981, What Next in the Law 1982, The Closing Chapter 1983, Landmarks in the Law 1984 and Leaves from my Library 1986. He has been awarded no fewer than 18 honourary degrees.

Launching his book, What Next in the Law?, Denning had boldly quoted Tennyson: "For men may come and men may go, but I go on for ever." For now that he has reached the 100 mark, perhaps he will have to think about getting ready for the next millennium.

The writer, a Barrister-at-Law, is an advocate of Bangladesh Suprime Coart.

Is Abortion a Right?

ABOUT 500 clinics sprouted in the Dhaka City areas to perform Menstruation Regularisation (MR) with many unauthorised. A news of the United News of Bangladesh (UNB) suggests that these clinics which often do not even have graduated doctors and/or necessary equipment's charge high amount of money from the patients for doing MR and in the process at least 200 fetus are being killed every day in different clinics. A Clinic in Mohammadpur area in the City alone performed 6,375 MRs last year. The main clients of these clinic were troubled women, young students and house wives willing to terminate a pregnancy for being pre-marital or for some other reasons.

MR is done to regularise the Menstruation cycle of a women through some minor operation in case there is any disorder. MR is increasingly being performed to women within six-week of their pregnancy which ultimately brings an end to the child-bearing state.

However, the acceptability of MR as a method of abortion is legally questionable. The Penal Code, 1860 aim to protect unborn child and in Sections 312, 313 & 315 prescribe punishment for doing harm to such child. The life of the women undertaking such operation can also be at risk if those offering the medical treatment do not have proper expertise. Newspapers report accidents to the extent of death allegedly caused by negligence during MR and few years back the owner of a busy clinic alongwith his team was arrested for falsely claiming himself a doctor and performing MRs. The number of such clinics operating without trained doctors and necessary equipment is apprehended to be very high which is a sure threat to the constitutional right to protection of health.

The clinics through leading dailies and other public displays advertise for their service and in some cases specifically mention the period of pregnancy within which MR can be done. The law on practices by the medical professionals do not allow such advertisement but the practitioners care the least for legality of their actions. Such advertisements attract general people but fail to attract the statutory authorities who tend to evade their legal obligation of initiating measures against such illegalities. The authorities who plead lack of specific information for not initiating measures could perhaps treat such advertisements as basis for intervention.

Courtesy : BELA Newsletter