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"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*

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HUMAN RIGHTS *analysis*

Towards realising right to safe motherhood

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EVERYDAY at lest 16000 women die from the complications of pregnancy and childbirth. In addition to these 5,85,000 maternal deaths each year, a further 50 million women suffer acute complications. For 18 millions of these women the result is long term disability. Each year 60 million deliveries take place with only a relative or an untrained birth attendant present. For too many women give birth completely alone. Only 53 per cent of deliveries in developing countries take place with the help of a doctor or midwife and less than one third of women receive postnatal care. Antenatal care is most likely, but still only 65 per cent of women in developing countries receive it.

Women health and motherhood: Bangladesh scenario

The average weight of a Bangladeshi woman is about 40.9 kg, which is less than the mean weight of women in most third world countries. The health status of women in Bangladesh is markedly low. Poverty coupled with social and cultural prejudice, lack of education and lack of access to essential health care services, all contribute to women's poor health in turn can impair their economic capability. Malnutrition is very much common among expectant and lactating mothers. Due to inadequate food and nutrition, nearly 85 per cent of women of reproductive age suffer from iron and protein deficiency. The magnitude of reproductive health problems of Bangladesh women is reflected in high maternal mortality ratio of nearly 5 per 1000 live births. It is noted that the incidence of the grave problem is higher in rural areas than in urban areas. The reason is not far to understand that the rural communities lack all sorts modern medical equipment.

Safe motherhood - social and economic bearings

Safe motherhood is more than just a matter of health issue. Saved lives and healthier women and children mean a more productive society. When a woman dies, her family is often much less well off economically and socially. They lose her contribution to household management and the care she gave to other family members as well as any income she may have had, but finally the children suffer most. If mother dies, surviving children are 3 to 10 times more likely to die within two years than children who live with both parents. Motherless children get less healthcare and less education. Research shows that women who are in good health are less likely to be poor. They are more productive and make a greater contribution to welfare of others. They help their households and communities to breakout of poverty trap. Improving maternal health benefits everyone.

Social justice and human rights

Stopping women from dying and becoming disabled is also a matter of social justice and human rights. Many women, the world over, simply do not have the same chance to be healthy than men have. They usually eat last and least. Some are well nourished than men; they do often do harder work than men. Denying women access to a minimum of well-proven interventions to make motherhood safer is discrimination against half of humanity.

Safe motherhood: Is it a formidable task?

Most maternal deaths and millions of cases of disease and disability could be prevented through basic maternal care and pregnancies. It would also save lives around 1.5 millions babies each year. Providing quality healthcare during and after labour and delivery (by having a skilled health professional present) is the single most important way of saving the lives and preserving the health of mothers and babies. Care during postnatal period, when most maternal deaths occur, offers a chance to check that mother and baby are doing well, and to give them the support they need. And antenatal care helps because it is an opportunity to stop complications early and to give women advice about what to do if they occur. In many developing countries where each pregnancy represents a journey into the unknown from which all too many women never return. This situation can't be allowed to continue. The

Interventions that make motherhood safe are known and the resources needed are obtainable. The necessary services are neither sophisticated nor very expensive, and reducing maternal mortality is one of the most cost-effective strategies available in the area of public health.

Bangladesh: Committed to safe motherhood

Article 18 (1) of the Constitution of the People's Republic of Bangladesh states: "The State shall regard raising of the level of nutrition and improvement of public health as among its primary duties." Therefore, ensuring safe motherhood should be included in the responsibility of the State as per the said article.

Meeting the health and development of women has been recognized as a basic right in recent inter governmental declarations, most notably the Beijing Declaration and Platform for Action adopted at the fourth World Conference on Women held in 1995. Bangladesh, being a signatory, have been bestowed with the responsibility of eradicating all hazards involving reproductive health.

Safe motherhood Asia'97 Workshop, participated by Bangladesh and held in New Delhi, places an obligation on Bangladesh to be committed to safe motherhood.

The Alma-Ata Declaration clearly states, "health is a fundamental human right". Therefore, it obviously incorporates reproductive health and deserves special attention of the Government, as a signatory of the declaration, towards achieving safe motherhood.

Recommendations

To ensure right to safe motherhood in Bangladesh, we humbly place the following recommendations to the government, different donor agencies, and human rights organizations for action:

To recognize constitutionally that the right to safe motherhood is a fundamental human right.

To create a National Motherhood Bank to provide the poor pregnant mothers financial support to ensure access to better health services during exigencies.

To establish community based mother and child friendly health center ensuring services through trained and well supervised personnel, infection free services, maintenance of appropriate logistic flow and counseling and information services for clients.

To upgrade all upazila health centers to render Emergency Obstetric Care (EOC) services; provide ambulances for transportation of at risk patients; establish blood banks through community participation.

To develop awareness and sensitize the community to the danger signs of pregnancy and childbirth.

To provide information to the family of women at-risk as well as to the women themselves about delivery options to enable women to make informed decisions about childbirth options.

Conclusion

" .... It must be recognized that the reduction of maternal mortality is not only a matter of effective healthcare but also one Social Justice. The risks that women face in bringing life into the world are not mere misfortunes or unavoidable natural disadvantages but Injustices that societies have a Duty to remedy through their political, health and legal systems" (from the message of WHO's Director General, Dr Hiroshi Nakajima released on the eve of World Health Day 1998).

The government should maintain health accountability that places an obligation on the State to take responsibility for health of its people through healthy public policy, including sectoral development policy and through promoting inter-sectoral action for health. The State must recognize that adequate investment in health is essential for both social and economic development.

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RIGHTS *column*

The casualties of Operation Clean Heart

ASIAN HUMAN RIGHTS COMMISSION

Based on Asia's contemporary history, it appears that this type of military operation without any legal foundation is another attempt to silence the dissenting voices of the opposition, resulting in "state terrorism", even though the authorities insist that the operation is to improve law and order and is not politically motivated.

The Asian Human Rights Commission (AHRC) has been informed that more than 4,000 people have been arrested in a joint operation named "Operation Clean Heart" to crack down on criminals in which nearly 24,000 army troops are taking part. AHRC is extremely concerned that 23 people have died in mysterious circumstances during the ongoing operation. According to the information AHRC have received, checkpoints have been set up in many interdistrict routes where army personnel stop, question and search vehicles and perform body searches. In cities, house-to-house searches have been conducted in some areas, and occupants have been picked up for questioning. Some of them have returned home within hours, but others have not been seen for days. However, there has been no official information and no detail public announcement as to the circumstances under which the government felt compelled to call out the army. Moreover, nothing has been said under what legal framework the army action is taking place.

The government says that the army had to be called in because the civil authorities were failing to cope with rising lawlessness, and thus, the apparent aim of the operation is to improve law and order. Most worrisome is information we have received that the army is picking up people based on a list. However, there is no information about how the list has been prepared and how authentic it is. There have also been allegations that the armed forces are using excessive force during the raids and torturing many people during interrogation. Therefore, local human rights groups say many detainees have been sent to the hospital with severe injuries caused by beatings while in army custody. These serious developments have created a terrifying environment for most ordinary and innocent people. For the last 23 days (the army operation began on Oct. 17), it has been reported that 23 people have died after being taken into custody by troops. Even though the government has claimed that all of the deaths were the result of heart attacks, the relatives of the victims have insisted that the detainees were tortured to death, and witnesses have reported marks on the bodies as they were taken to the hospital. Based on Asia's contemporary history, it appears that this type of military operation without any legal foundation is another attempt to silence the dissenting voices of the opposition, resulting in "state terrorism", even though the authorities insist that the operation is to improve law and order and is not politically motivated. Therefore, AHRC urges the government of Bangladesh to immediately stop its operation of mass arrests by the country's armed forces that are terrorising innocent people and to investigate any reports of torture in army custody through an independent, impartial and competent body.

Asian Human Rights Commission is a Hong Kong based regional human rights organisation.

COURT *corridor*

Introducing ADR in Bangladesh-II

Different forms of ADR and their application

JUSTICE MUSTAFA KAMAL

THE most common type of ADR is mediation. Although the word "conciliation" is also used in ADR terminology, there is virtually no distinction between mediation and conciliation, because mediation includes conciliation. It is generally recognized that when parties come to a stage of litigation when the trial is imminent, alternative dispute resolution is too late a procedure to induce the parties to divert themselves to a different procedure, because by that time the parties had already spent a substantial amount of money, time and energy in the litigation. It is then too late to take an interest in a costsaving or timesaving procedure. Attitudes had also hardened mutually on both sides. It is desirable that after the defendant/s file their written statement/s, the presiding judge should read both the plaint and the written statement/s and call the parties and their lawyers, if any, to impress upon them the desirability of settling their disputes through mediation or non-binding arbitration. If the parties agree the case is adjourned for three months, within which they have to obtain either a settlement or a failure of it from either the mediator or the arbitrator. In the event of failure to settle, the court will proceed to try the case, according to a time-calendar for each case, and the adversarial system will resume.

Court-Directed Mediation Proceedings

Mediation is a completely voluntary and non-binding process of settlement of disputes between parties. It is an informal, flexible, confidential, non-adversarial and consensual procedure in which the Code of Civil Procedure or any law of evidence does not apply. The proceedings are immune from disclosure in any court of law. An impartial, disinterested and neutral person acts as a mediator. Mediation may be 1) Direct or 2) Facilitative. In Direct Mediation, the mediator applies all methods of squeezing into the heads of the parties his/her own idea of a settlement. In Facilitative Mediation the mediator facilitates settlement negotiations, improves communication between the parties, helps the parties to articulate their respective interests and stakes in the litigation and helps each party to understand the interests and stakes of their opponent in the litigation. He/she probes the relative strengths and weaknesses of each party's legal position, identifies areas of agreement and helps to generate options amongst the parties themselves to arrive at a mutually acceptable resolution of their disputes. The lawyers of each party are entitled as of right to take part in the mediation proceedings, but the mediator in an informal and flexible proceedings of this kind, may like to sit alternately with the plaintiff/s or the defendant/s, with or without their lawyers. The parties may disclose many things to the mediator not articulated in the plaint or written statement/s, but the mediator must maintain the confidentiality of these disclosures and tell the other side so much of the disclosures as he/she has been expressly authorized to disclose. He/she must not lean on any side and both sides must have confidence and trust in his/her impartiality and neutrality unto the end, even if there is no settlement. If the decision-makers of a dispute in respect of payment of legal fees to the parties or in respect of execution of the court's decree are operating from behind using the plaintiff/s or the defendant/s as proxies, the mediator has the right to call and listen them too. At a trial the judge's hands are more restrained. It may so happen that the mediator generates so much of a spirit of compromise between the parties that they even agree to withdraw other civil suits pending against each other in other civil courts or compromise compoundable criminal cases pending against each other in various criminal courts. The final settlement is thus not limited to the prayers in the plaint. In a formal trial, a judge cannot go beyond the prayers in the plaint if the suit is decreed. In court-sponsored mediation the terms of settlement may travel beyond the scope of pleadings. When signed by the parties, their lawyers and the mediator, the presiding judge will pass a decree in terms of the settlement.

Benefits of mediation

Please pause and ponder over the beneficial effects of a successful mediation. There is no victor and no vanquished. No party is aggrieved by the outcome, because the settlement is voluntary and is reached after considering the pros and cons of several options generated by the mediator. Both sides are in a win-win situation. There is no bitterness left. there is often a restructuring of relationship. Parties who would not see each other's face may re- establish a working relationship between them after conclusion of a successful mediation. Instead of discord, disharmony and bitter relationship at the end of an adversarial proceeding there is peace, accord and re-established relationship between the parties at the end of a consensual proceedings.

Mediators in developed countries

Judges do not conduct mediation or non-binding arbitration. They are meant for trial of a case. But they have the authority to refer any case, or part of a case for any of the ADR mechanisms, preserving their jurisdiction to try the case if ADR fails. When they do so refer, there is no appeal or revision against the order, because that kind of order is passed only when the parties agree with the judge that it should be so done. ADR begins with an agreement, not with a discord. However, the legal climate that prevails in our country is surcharged with a highly adversarial bent of mind that has been fostered throughout centuries. It would be wise to leave the matter whether a case or part of a case should be referred to mediation or arbitration to the discretion of the trial judge, without leaving the matter entirely to the willing consent of both parties. The discretion will not be amenable to appeal or revision. When ADR gains ground, as experience suggests, the consent of both parties would be forthcoming like an avalanche. The judge will hardly have any discretion in the matter.

I have said earlier that it is the combined efforts of lawyers and judges in developed countries for over three or four decades that ADR has come to be accepted as a widely used handmaid of justice. It is the lawyers who convinced the litigant public that if all cases were too be disposed of by trial and trial only, then in all jurisdictions all over the world, backlogs would heap upon backlogs, choking the entire justice delivery system. Because of the pioneering role and involvement of lawyers from the very beginning, it is the lawyers who perform almost 90% of court-directed mediation, non-binding arbitration and early neutral evaluation (of which I shall speak later). Each court maintains a list of senior lawyers who earned their financial security, reputation and standing in the society by practicing in the Bar. They owe it to the Bar and the Bench to repay a part of their debt by giving a bit of their precious time, energy and intellect in the ADR mechanism voluntarily and without payment of any charges or fees. Because a system of rotation is in place, each senior lawyer is required to mediate, arbitrate or make an early neutral evaluation once every three months or six months.

Suggested mediation in Bangladesh

Given the position that in Bangladesh no awareness or movement of senior lawyers of any significance has grown up yet, willing to take up the major load of ADR upon them, it will not be wise, in my view, to start the program with sole dependence upon public-spirited lawyers. It will be prudent, at least at this stage, to keep in the statute a wide option of mediators and arbitrators to avoid the vagary of availability or non-availability of senior lawyers. Presiding judges of the disputes in question and other available judges of co-equal jurisdiction not in session of the disputes in question should be kept as options for the choice of mediator or arbitrator. Senior lawyers as per list maintained and constantly updated by the District Judge should be available for mediation and arbitration free of cost and charges. Private mediation firms, having experienced judges or retired judges and/or qualified non-practicing lawyers on their staff, recommended by the District Judge and approved by the Chief Justice of Bangladesh, may also be included for mediation or non-binding arbitration on payment of equal fees by the parties. Gradually, as the idea spreads and the ADR procedure gains ground, judges may be eliminated from the list altogether. This may take some time, but nothing can be achieved without patience and perseverance. USA, Australia and Canada have not achieved their present position without sustained efforts for three or four decades. 85 to 90 per cent of cases filed are now disposed of by ADR method and only 10 to 15 per cent cases filed are disposed of by trial now in those countries. But Rome was not built in a day.

Training of mediators and arbitrators

Mediation or arbitration does not come easily to anyone, whatever height he/she attains in legal knowledge and experience. Mediation especially involves the use of a facilitator trained in conflict resolution. The mediator must know the techniques of encouraging the parties to discuss their positions with greater candor and he/she must also know how to foster compromise. Mediation involves a thorough training for a few days. Training literature is available in the Internet and a few trainers in Bangladesh are available as well. The first implementation task will be to train up a large number of trainers in mediation, arbitration and early neutral evaluation. These trainers will then spread out throughout the nook and corner of the country to train up judges, lawyers and other interested persons in the art and science of mediation, arbitration and early neutral evaluation. Without such intensive training it will be a folly to introduce ADR wholesale in our lower courts. India tried to introduce ADR in 1999 by an amendment to the Code of Civil Procedure, known as the Code of Civil Procedure (Amendment) Act, 1999 (Act 46 of 1999). It ended in a fiasco. There was widespread resistance to it by lawyers that forced the Government of India to postpone its implementation. The lesson is that when you introduce any matter of legal reform or innovation, do not try to impose it from above. Do some intensive work at the grassroots level, build up a large following, try the reform on a trial and error basis by setting up pilot courts and then proceed with caution by examining its results. Learn from the pilot courts and the lawyers involved in mediation and other methods what practical problems they are encountering with, adjust and re-adjust your program accordingly, so that what finally emerges is not a foreign model, but an indigenous Bangladeshi model, suited to the legal culture, ethos, and traditions of this country. The second implementation task will be to continue the training for all time to come for the new entrants to the Judicial Service through the Judicial Administration Training Institute (JATI). JATI will have to develop a curriculum especially for ADR and also will have to keep and maintain one or more regular instructor on its pay roll to teach the mechanisms of ADR to the trainee-judges. Outsiders interested to pursue a career of mediation and arbitration may also receive instructions and certificate from JATI, on payment of fees and charges, as and when JATI is ready enough to render this service.

Non-Binding Arbitration

In the ADR vocabulary, arbitration is preceded by the word 'non-binding' because of two reasons. First, it is necessary to emphasize that it is not arbitration under the respective Arbitration Act of any country. Arbitration Act, 2001 of Bangladesh contains so much of a lengthy procedure and it is so much amenable to interference at various stages by the local court having jurisdiction over it and by both Divisions of the Supreme Court that the total purpose of ADR will be frustrated if the Arbitration Act is made applicable to ADR arbitration. The second reason is that ADR proceedings the jurisdiction of the trial court to try the case, if ADR fails, is always preserved ADR is not a substituted method of dispute resolution following a separate statutory procedure, but an alternative, informal and confidential procedure to cut down delay and expenses. An arbitrator's award under ADR procedure is non-binding on both parties. The application of Arbitration Act will take away the trial court's basic jurisdiction to try the case. This will then be a case of abandonment of judicial function in favor of an Arbitrator.

Non-binding arbitration is an adjudicative process in which an arbitrator or a panel of arbitrators issues a non-binding award on the merits of the disputes in question after an expeditious, time-bound and adversarial hearing. Lawyers of each party will face each other in these proceedings as in any other adversarial proceeding. The arbitrator has no role as a mediator. He/she has a passive role to play. He/she will hear the evidence and peruse the oral and documentary evidence, hear arguments of both sides and give his/her award according to his/her best judgment. Each party has the option to reject the award. If both parties accept the award both of them will sign the award or put their thumb impressions on it, as the case may be, and their respective lawyers, if any, and the arbitrator/s will also sign the award before the trial court makes it a decree of the court. Parties have been given the option to reject the award because if the award has not been satisfactory to either or both of them, they have the right to fall back upon the trial court for a decision on merit. Like mediation this is also a confidential proceeding that is immune from disclosure in any court of law. Arbitrators are nominated in the same manner as mediators.

Early Neutral Evaluation (ENE)

In the words of Robert A Goodin, "Early neutral evaluation is a technique used in American litigation to provide early focus to complex commercial litigation, and based on that focus, to provide a basis for sensible case management or offer resolution of the entire case, in the very early stages."

A senior lawyer with expertise and experience in the subject matter of litigation and in case management conducts ENE, when called upon to do so by a trial court. He/she is called the evaluator or neutral. Prior to a session lawyers of both sides provide to the evaluator a written brief summarizing the facts, the legal arguments and authorities in support of each party's case as well as the documents considered by each side necessary for the evaluator's understanding of each party's case. The first session is attended by the evaluator, the lawyers of each party, and the principal decision-makers of each party. Suppose a case is instituted for or against a Bank or Insurance Company. Some officers of the Bank or Insurance Company may have been impleaded as defendants but the decision-making lies with the Managing Director or the Board of Directors. In that case the Managing Director or the Board of Directors will be asked by the Evaluator to be present at the first meeting. To achieve maximum effectiveness, it is essential that the actual decision-makers on behalf of each party, i.e., the people who will be ultimately responsible for the payment of legal fees and who have final authority for settlement, be present at the session to observe at firsthand the arguments and the evaluation. Further, to be effective, the session should be held in the first three to six months of the pendency of a case.

At the session, the lawyer of each party makes a concise, but thorough, oral presentation of the parties' position, including the evidentiary support and the citation of legal authorities for that position. The presentations are followed by questions by the evaluator directed not only towards the parties' lawyers, but also the actual decision makers of the parties. At the conclusion of the first session a break is taken and the evaluator retires to prepare an outline of what he/she believes to be the central issues in this case, and what, based on the presentations, he/she believes the likely outcome on each will be. The evaluator also estimates the likely cost in legal fees to each side if the matter is fully litigated. That evaluation is then shared with the parties either at a join session, or more frequently, in private sessions (called caucuses). The reason why the private caucuses are more often used is that it somewhat allows more candor, more frankness and more practical realization of each party's factual and legal strengths and weaknesses that frequently leads to a mediation offer to the evaluator who then shuttles between "caucus" to "caucus" to help parties come to a settlement based on the evaluation session. The entire exercise may take a few days.

If settlement is not possible or the parties do not desire, it, the evaluation session becomes the basis for a case management planning effort. ENE almost invariably results in a much better understanding by both parties of what the central and decisive issues in the case are. They can rationally plan a case development process making it is less time-consuming and less expensive. The evaluator assists the parties in drawing up a written case management plan. The proceedings are confidential and not admissible in the litigation itself. The evaluator's evaluation is not transmitted to the trial judge in any fashion. Nearly one-third of the cases filed in the federal courts of USA are resolved during the ENA stage.

ENE Procedure in Bangladesh

In Bangladesh, I do not recommend the ENE procedure in all kinds of litigations. Money loan recovery cases under the Artha Rin Adalat Ain, applications before District Judges in house building loan recovery matters, special loan recovery applications preferred before the District Judges by the Bangladesh Shilpa Rin Shangstha and Bangladesh Shilpa Bank and cases under the Insolvency Act that are all governed separately by separate and special procedural rules may have an amendment in their respective special legislations containing an option to take recourse to this particular method of ADR. The Code of Civil Procedure may be amended so as to include only mediation and non-binding arbitration for application to civil suits generally. ENE and the next method, namely Settlement Conference, will only confuse the general legal practitioners, judges and the average litigants and may generate widespread resistance to these hitherto unknown multiple choices, if all the methods of ADR are included as options in the amendment of the Code of Civil Procedure. The type of cases and applications mentioned above are regulated by special legislations. Special procedures govern these cases and applications. Only a limited number of lawyers deal with these specialized litigations. It will not be difficult for these specialized lawyers to come to terms with ENE and Settlement Conference. Also, in my opinion, mediation or non-binding arbitration will not be an effective method of early and less expensive consensual disposal of such types of cases and applications where policy decisions are involved often on the part of the government, autonomous, semi-autonomous or government-controlled bodies that are often either plaintiffs/applicants or defendants/respondents in such cases and applications.

Settlement conference or judicial conference

Settlement Conference or Judicial Conference may be held at any time during the life of a civil case upon request of a party or recommendation of a trial judge. The judge who is assigned to adjudicate the dispute in question is not involved in this method of ADR. Another judge of co-equal jurisdiction is requested to involve him/herself in this method. The settlement judge acts as a mediator or facilitator at the Conference, promoting communication among the parties, holding one-on-one sessions with each side, offering an objective assessment of the case and suggesting settlement options. The settlement judge has not the power to enforce settlement and does not communicate any information about the case to the trial judge. If settlement is reached, the parties sign an agreement, thereby avoiding the cost of trial or other litigation. If no settlement is reached, the case proceeds to trial before the previously appointed trial judge.

The success of this process is attributable to two factors. First, the parties get the advantage of utilizing for free judicial experience in evaluating the settlement value of a civil claim and secondly, they have the opportunity to separate their private and confidential negotiations from public adjudicatory trials. I do not recommend Settlement Conference or Judicial Conference for general use in cases tried under the Code of Civil Procedure. The users of this method will confuse it with "mediation." It may be incorporated by way of amendment as an option in the special legislations covering the type of cases and applications mentioned under the heading "Early Neutral Evaluation" for the same reasons described therein.

Justice Mustafa Kamal was the former Chief Justice of Bangladesh Supreme Court. The article was based on a keynote paper presented on 31 October 2002 in a National Workshop on 'Introducing ADR. in Bangladesh' organised by Legal & Judicial Capacity Building Project of the Ministry of Law, Justice & Parliamentary Affairs' Government of Bangladesh.

To be continued