



Star LAW analysis

Plight of persons with disabilities

Towards effective legal framework

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PERSONS with disabilities are the most vulnerable and disadvantaged segment of any society and are often subjected to discrimination and negative attitudes and stereotyping. In Bangladesh, the estimated number of persons with disabilities is around 140 million people, which constitutes 10% of its total population.

Most of them are isolated from mainstream society, stigmatised, mistreated and marginalised. Most of persons with disabilities are often deprived of basic needs including access to health services, housing, education, employment, and transportation. Discrimination against them in voting and other opportunities for political participation is also common phenomenon in Bangladesh.

Widespread discrimination against persons with disabilities and their exclusion from mainstream society leads to considerable economic hardship and loss of their productive capacity. In fact, many of them are the poorest of the poor with disabilities are the most vulnerable and disadvantaged segment of any society and are often subjected to discrimination and negative attitudes and stereotyping. In Bangladesh, the estimated number of persons with disabilities is around 140 million people, which constitutes 10% of its total population.

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There are two main approaches regarding treatment of persons with disabilities: welfare approach and human rights approach. Traditional notion of the welfare approach, which is based upon medical model, looks at disability as a medical condition which can be solved through the treatment and social welfare measures. The welfare approach follows a difference or separate-treatment approach, providing for the different needs of disabled persons in segregated settings, such as special schools and accommodation.

Main assumption behind such approach is that rather than making mainstream institutions accessible, the needs of disabled persons are better served in separate facilities that can be constructed to



meet very specialised needs. According to this approach, the exclusion of persons with disabilities is not seen as discriminatory, but as a natural outcome of their medical limitations.

But over the last two decades, the human rights model emerged as predominant approach to replace the welfare model of disability. According to the human rights model, disability itself is a social construct. Accordingly, it is the disabling environment, the attitudes of others as well as institutional structures that need to be changed, not the person's disability.

This model recognises the inherent equalities of all people, regardless of disabilities or differences. Social exclusion is not to be seen as an inevitable consequence of disability rather it is a result of discriminatory attitude and a history of exclusion from institutions that have failed to adapt to the needs of persons with disability. The human rights based approach places specific obligations on the part of the government to remove social barriers that prevent or hamper the full integration of people with disabilities into society in order to ensure that they are accorded rights and opportunities as any other member of society.

The right-based approach has two elements: firstly, it implies conferring disabled people with the enforceable rights to protection against direct and indirect forms of discrimination. Secondly, positive action programmes should be designed to rectify the historical subordination of disabled people to their able-bodied environment.

Human rights based approach can be very powerful tool for legal protection of persons with disabilities. Human rights approach to address the problems of disabilities can confer the following advantages:

Firstly, it can afford greater level of protection to the disabled persons;

Secondly, human rights approach offers a better understanding of structural issues underpinning the problem of disability;

Thirdly, a human rights based approach can inform and guide the policies and laws on disability.

The movement of disability rights got concrete shape when the UN Convention on the Rights of Persons with Disabilities was adopted in 2006. The Convention was adopted in view of the fact that existing standards and mechanisms failed to provide adequate protection to the specific cases of persons with disabilities. This Convention is the first global binding treaty to comprehensively address the rights of persons with disabilities. The Convention outlines the civil, cultural, political, social and economic rights of persons with disabilities.

In essence, it elaborates in considerable detail the rights of persons with disabilities under international law and sets out a code of implementation for governments. The Convention spans a wide range of real-life issues including accessibility, personal mobility, health, education, employment, rehabilitation and participation in political life, equality, and non-discrimination. The Convention represents a 'paradigm shift' away from the medical model of disability, to human rights model, which views per-

sons with disability as rights holders and respective members of our societies. There are several recurring themes throughout the Convention. First theme is inclusiveness in the community, which is a central element. A second theme, closely related to the first, is bringing about a change in attitudes and getting rid of stereotyping. A third theme is accessibility which includes physical accessibility to buildings, as well as accessibility in other ways, and providing accessible information and communication technologies.

In Bangladesh, the Disability Welfare Act, 2001 remains main legal framework for ensuring well-being of the persons with disabilities. However, the Act has major deficiencies in terms of lack of accountability, lack of adequate representation of persons with disabilities or their self-organisations in the Committees, immunity from suit, scope of authorities to exercise arbitrary and undue power, and lack of permanent institutional mechanism. The Act clearly takes welfare-based approach and does not recognise the rights of persons with disabilities. While there is no point debating that the government has responsibility to ensure welfare of the persons with disabilities, rights-based approach should be figured prominently in the legal framework considering the evolving jurisprudence and international standards.

According to the Act, the National Coordination Committee appears to be focal point of action for welfare measures for persons with disabilities. The National Coordination Committee lacks an appropriate mechanism of accountability, as it is not responsible to any body for its activities. Tenure of the members of the Committee nominated from NGOs depends upon the sweet will of the government as the Government can relieve or terminate such membership anytime. The District Committees are required to submit annual reports to the Executive Committee, but the Executive Committee is not required to submit Reports to any body, nor is the National Committee required to submit its report anywhere. There is no provision in this Act, which provides for accountability for non-implementation of any scheme or step taken or not taken by any Ministry, any Committee, or any body authorised under the Act to deal with disability issues.

Lack of accountability-mechanism renders these Committees largely ineffective. Moreover, the constitution of the Committees is too bureaucratic and cumbersome to work on a regular and consistent basis. The involvement and participation by the non-governmental actors such as self-help organisations of persons with disabilities is too narrow under the present Act.

The Act contains a clinical model of disability, which tends to be rigid. It does not provide any scope for further elaboration and there is real fear that it will fail to keep pace with the rapid development of medical and other sciences. But the Convention carefully avoids a clinical definition. Rather it adopts social model of definition, which views disability as a social construct dependent upon the environment in which it arises.

Ensuring well-being and protection of rights of persons with disabilities hinges on not only the government, but also private sector and NGOs. In the era of economic liberalisation and privatisation, the private sector has emerged as biggest employer and service provider. Unfortunately, the present statute does not address the issue of obligations of private sector in clear terms. The obligations of the private sector in terms of rights and well-being of disabled persons should be made much more clear and specific.

The present statute does not contain elaborate provisions on offences and punishment for discriminatory practices towards persons with disabilities. But there should be clear provision on how the government employees and private actors can be made more responsible for non-compliance with the law. On the one hand, giving them total immunity as in the present Act results in negation of the very rights for which the Act was designed.

On the other hand, caution should be taken so that the government departments are not flooded with new types of vexatious cases. The Act does not provide for action against those violating or abusing the rights of persons with disabilities. The Act should more clearly set how and to what extent the violators of the rights of the disabled, whether private citizens or government employees, should be made accountable.

The present statute is rendered almost inoperative for the simple reason that the government has not yet framed the Rules. In absence of detailed rules, different committees formed have become ineffective.

The above analysis of Act reveals that the Disability Welfare Act, 2001 is not consistent with standards set out by the Convention and other international instruments on disability rights. A new enactment with a set of bill of rights and new organisational structure is imperative for building a comprehensive right-based legal framework. It should be mentioned that Bangladesh ratified the UN Convention on Rights of Persons with Disabilities on 30 November, 2007. Therefore, Bangladesh is under international legal obligation to enact new legislation to give effect to the Convention and for bringing disability law in conformity with international standards set out in the Convention.

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Star LAW report

US: Should not resume lethal injections

Supreme Court Decision Not a Green Light for Executions

The United States should not resume execution by lethal injection, despite a US Supreme Court decision that upheld its constitutionality, Human Rights Watch said today.

In *Baze v. Rees*, the US Supreme Court ruled on April 16, 2008 that lethal injection as practiced by the state of Kentucky does not violate the US Constitution's prohibition on cruel and unusual punishments. But in an opinion for three members of the court, Chief Justice John Roberts cautioned that if there is a "feasible, readily implemented" alternative to lethal injection that "in fact significantly reduce(s) a substantial risk of severe pain," a state's refusal to adopt such procedures may result in cruel and unusual punishment.

"This is not a green light for executions in Kentucky or any of the 36 lethal injection states," said David Fathi, US Program director at Human Rights Watch. "States that execute prisoners have an obligation under human rights law to do it as humanely as possible, and the lethal injection protocol fails that test."

In a 2006 report, Human Rights Watch found that death penalty states had paid little or no heed to the risk that lethal injection may cause unnecessary pain and suffering. In fact, lethal injection poses a significant risk that the condemned prisoner will suffer excruciating pain, yet be unable to move or cry out because of a paralytic drug that is administered as part of the execution protocol.

"The combination of drugs used in lethal injections is not even approved for veterinary use in many states," said Sarah Tofie, a Human Rights Watch researcher and co-author of the report. "The US takes more care in euthanizing dogs and cats than in putting a human being to death."

Human Rights Watch filed an amicus curiae (friend of the court) brief in *Baze*, arguing that both the US Constitution and international law require death penalty jurisdictions to make every effort to minimize pain and suffering in the execution process.

On April 9, Kentucky released a heavily redacted version of its lethal injection protocol, which was previously not available to the public. The 16-page protocol offers no guarantee that the lethal chemicals will work properly or that the condemned prisoner will not suffer excruciating pain. For example:

If it appears to the warden that the prisoner is not unconscious within 60 seconds after delivery of the first drug, sodium thiopental, the warden is to order a second administration of the drug from a backup intravenous line. It is unclear how prison wardens, who are not required to have medical training, will reliably determine whether the prisoner is unconscious. It is also unclear how the warden will safeguard the second administration of the drug from the problems that occurred in the first administration.

If the prisoner is still alive 10 minutes after all three drugs have been administered, the warden is to order that a second round of drugs be given. The protocol adds, "this process shall continue until death has occurred." The prospect of a prisoner being alive 10 minutes or longer after the lethal chemicals have been administered raises serious concerns that the prisoner may suffer prolonged and excruciating pain.

Methods of execution in the United States have come under increased scrutiny in recent months. In February 2008, the Nebraska Supreme Court ruled that electrocution, the sole method of execution used in that state, violates the Nebraska constitution. "Condemned prisoners must not be tortured to death, regardless of their crimes," the Nebraska court said.

Human Rights Watch urged the US to continue the moratorium on executions that has been in place since the US Supreme Court agreed in September 2007 to hear the *Baze* case.

"The existing stay on executions shows the US can live without the death penalty," Fathi said.

Source: Human Rights Watch.

HUMAN RIGHTS monitor

Improving safety at workplace: Role of 'participation committee'

BIKASH KUMAR BASAK

MANY countries around the world have laws that require an employer to set up safety committees comprising workers and employer's representatives who meet together, and discuss and resolve health and safety concerns at the workplace. There is no universal model for describing the activities of this committee, but the following list provides a common set of activities:

- 1) responds to worker concerns;
- 2) initiates action on the hazards it recognizes;
- 3) educates the workers in health and safety;
- 4) works with worker representatives who are representing workers who have health and safety concerns.

In Bangladesh, the inspectors under the Ministry of Labour and Employment are the sole government body to implement the Occupational Safety and Health (OSH) provisions in different workplaces throughout the country as per the Bangladesh Labour Act, 2006. However, it is shocking to know that there are only twenty inspectors to enforce the laws throughout the whole country (the total figure of the inspectors is in fact 80). It is obviously quite impossible for these twenty inspectors to inspect even a small fraction of the most hazardous factories in Bangladesh.

The new Bangladesh Labour Act, 2006 includes a provision for the establishment of the 'National Council for Industrial Health and Safety' (section 323 of the Bangladesh Labour Act, 2006) for monitoring and developing policy on the OSH issues. The council is a tripartite body involving the government, employers and employees. It is headed by the honourable Minister from the Ministry of Labour and Employment.

However, there is no specific provision to set up an OSH committee at workplace level. Yet, the implementation of occupational safety and health provisions at workplace level can be conducted by what is known as the 'Participation Committee'. Section 205 of the Bangladesh Labour Act, 2006 lays out the structure of the participation committee and section 206 specifies its different functions, one of which is the improvement of OSH. So, until new legislation is enacted setting up OSH committees, the participation committee can serve the purpose at different workplaces of Bangladesh of improving the OSH conditions.

Structure of the Participation Committee: Each employer of an establishment in which fifty or more workers are employed is under a legal obligation to constitute a Participation Committee for his workplace (section 205 (1) of the Bangladesh Labour Act, 2006).

The Committee will be formed by:

- the representative of the workers
- the representative of the employers.

The number of representatives of the workers shall not be less than the number of representatives of the employers. The representative of the workers will be nominated by the trade unions in the establishment but if there is no such trade union in the establishment, the representative of the workers shall be chosen from amongst the workers engaged on that particular establishment in a prescribed manner (the type of manner will be defined in the rules though still it has not come in force). In addition, if there is a collective bargaining agent in the establishment, it can also nominate representatives to the committee. In such a case, the number of the representatives nominated by the collective bargaining agent will be one more than the total number of representatives nominated by the other trade unions.

Further more, similar type of participation committee may also be formed for a unit within a larger organization where at least fifty workers work as "Unit Participation Committee".

Functions of the Participation Committee: The Law states that functions of the participation committee shall be to inculcate and develop sense of belonging and workers commitment and in particular-

- (i) to endeavour to promote mutual trust, understanding and co-operation between the employer and the workers;
- (ii) to ensure application of labour laws;
- (iii) to foster a sense of discipline and to improve and maintain safety, occupational health and working condition;
- (iv) to encourage vocational training, workers' education and family welfare training;
- (v) to adopt measures for improvement of welfare services for the workers and their families;
- (vi) to fulfil production target, improve productivity, reduce production cost and wastes and raise quality of products.

As per section 208 of the Bangladesh Labour Act, 2006 the employer and the registered trade union shall take necessary action to implement the specific recommendations of the participation committee within the period defined by the committee. Where there are any difficulties in implementing those recommendations the employer or the trade union shall inform the committee and make every effort to implement them as early as possible.

Recommendations: As in Bangladesh we don't have the provision to constitute an OSH committee at workplace; we can shift some major obligations relating to occupational health and safety on the participation committee which is required to be formed under the current provision of the Bangladesh Labour Act, 2006.



The objective of the participation committee should aim to foster cooperation and consultation between management and workers in identifying, evaluating and controlling hazards at workplaces. It is also an effective channel of communication to exchange ideas to solve problems relating to occupational safety and health. Feedback from workers will greatly assist employers to promote and provide a safe and healthy work environment.

For the better performance, the participation committee, with regards to OSH issues, can include the following tasks in its agenda:

- The committee will be responsible for the health and safety of the workers and must function in close cooperation with the union. The committee should keep members

informed about actions planned and/or implemented in the workplace.

- An effective participation committee may improve the morale of workers, particularly when workers see positive changes achieved through the efforts of the committee.
- Another function of a participation committee will be to come to agreement on health and safety policy and its implementation.
- The committee should circulate all the written notices of all meetings, with agendas to all of its members in advance as well as send written reports to workers who have raised concerns.
- The participation committee should take effective steps to establish procedures for reviewing reports of all safety incidents, including injury accidents, illness and deaths so that recommendations can be made in further for appropriate corrective action to prevent recurrence.
- The committee should keep under review the measures taken to ensure the safety and health of workers at the workplace.
- The committee should investigate any matters at the workplace that is considered not safe or a risk to health and which has been brought to the attention of the employer.

Finally, it is very interesting that if the employer does not constitute such a participation committee in his workplace, then it can be taken as a breach of the provisions of law according to section 307 of the Bangladesh Labour Act, 2006 and can result in 1000 (one thousand) taka fine or up to three months imprisonment or both.

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