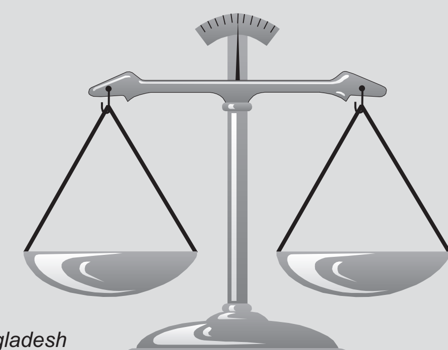
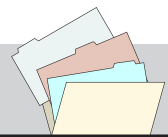


LAW report



UNPRECEDENTED DECISION

Inter-American Court on Human Rights condemns Brazil

On the 17th of August 2006, the Inter-American Court on Human Rights condemned Brazil for the death of Damião Ximenes Lopes, which occurred on the 4th of October 1999 in the Clínica de Repouso Guararapes, a psychiatric clinic, in Sobral, in the state of Ceará. This is the first time the Inter-American Court makes a decision on Brazil, and this is also the first ever pronouncement of the Court on a human rights violation related to people with mental disabilities. Damião Ximenes Lopes, who was suffering from a psychiatric disorder, was placed in the care of the Clínica de Repouso Guarapes by his mother in October 1999. Three days after his admission, he died after being subjected to ill-treatment and violent attacks from the clinic personnel. His family tried to obtain justice, denouncing the events to the responsible authorities. However, the case was not opened before March 28, 2000 only, and the investigation procedure was marred with numerous irregularities: the autopsy protocol was not adequately followed, the investigation was not immediately initiated, there has been no inspection in the Clínica de Repouso Guararapes, etc. The criminal lawsuit against members of the clinic personnel is still being processed in the 3ª Circuit of the district of Sobral, Ceará, and the civil lawsuit is only in the fact-finding phase of the procedure.

The case was brought to the Inter-American Commission on Human Rights by Ximenes Lopes' sister in November 1999. The Commission identified Brazil as responsible for violating the right to life and physical integrity, access to justice and due legal process, and forwarded the case to the Court for consideration. Subsequently, FIDH's member organisation in Brazil, Justiça Global, teamed up as co-petitioner with Ximenes' sister on the case before the Inter-American System.

The Court decided in its sentence that, according to Articles 1, 4, 5, 8 and 25 of the American Convention on Human Rights, Brazil was guilty of violating the rights to physical integrity and to life of Damião Ximenes, and the rights to access to justice and due process of his family.

The Court stated that Brazil "has an international responsibility to fulfill, in this case, its requirement to look after and prevent the vulnerability of life and personal integrity, as well as its requirement to regulate and monitor medical healthcare». The Court also concluded that, «the State did not provide the family members of Ximenes Lopes effective recourse to guarantee access to justice, determination to the truth of the facts, investigation, identification, due process and [...] punishment of those responsible for the violation of due process and to judicial protection." As a reparatory measure, the Court ordered Brazil to pay compensation to the family.

The Court's judges also decided unanimously that the State should guarantee the swiftness of the Brazilian justice system in investigating and sanctioning those responsible for the torture and death of Damião Ximenes Lopes.

FIDH, jointly with its member organisations in Brazil, the National Movement of Human Rights (MNDH) and Justiça Global, welcomes this unprecedented ruling of the Inter-American Court against Brazil which is an important step for public policy on mental health in Brazil where, despite advances over many years, cases of violence continue to be registered against psychiatric patients and investigation mechanisms are insufficient.

FIDH recalls that Brazil, having voluntarily recognised the competence of the Court in 1998, has a legal obligation to comply with this decision. FIDH therefore calls upon Brazil to put into practice the necessary mechanisms to receive and investigate accusations of ill-treatment and violations of the rights of people with mental disabilities and to fulfil its legal obligations to permanently regulate and monitor the provision of quality public healthcare.

Source: fidh.org.

Star LAW analysis

Familiarising family courts

ZAHIDUL ISLAM

Any person professing any faith has a right to bring a suit for settlement and disposal of disputes relating to dissolution of marriage, restitution of conjugal rights, dower, maintenance, guardianship and custody of children. And so, a Hindu wife is entitled to bring a suit for maintenance against her husband in a Family Court.

FAMILY courts, which have been established in the country more than twenty years ago, need not be made familiar once again. If you are not a lawyer you may not have to learn the procedure of trial in the courts. It may even not be necessary for everyone to know the jurisdiction of the courts. But you must know your rights to be exercised through family courts. Hence, this write-up aims to make you informed about your dealings with a family court.

By the Family Courts Ordinance 1985 the Family Courts get hold of exclusive jurisdiction for expeditious settlement and disposal of disputes only in suits relating to dissolution of marriage, restitution of conjugal rights, dower, maintenance, guardianship and custody of children. The courts began working all over the country except in the hill districts of Rangamati, Bandarban and Khagrachhari. Soon after the court began functioning, questions were raised about whether the Family Courts would deal only with the family matters of Muslim community or of all communities. The uncertainty lasted for a long time until in 1998 a special High Court bench of the Supreme Court in a path finding judgment removed all the questions regarding family court's jurisdiction. Every lawyer and judge dealing with Family Courts are supposed to be aware of the judgment. But the common people for whose benefit the courts have been constituted seem still uninformed about the great decision relieving the justice-seekers in the Family Courts of a harming uncertainty.

Section 5 of the Family Court Ordinance, 1985 speaks about the jurisdiction of the Family Courts which reads as: "Subject to the provisions of the Muslim Family Laws Ordinance, 1961 (VII of 1961), a Family Court shall have exclusive jurisdiction to entertain, try and dispose of any suit relating to, or arising out of, all or any of the following matters, namely:-

(a)dissolution of marriage
(b)restitution of conjugal rights
(c)dower
(d)maintenance
(e)guardianship and custody of children

Just after coming into force, the family court comes under confusion, as mentioned above, about its jurisdiction that whether a Family Court is a court for Muslim Community only. In *Krishnapada Talukder Vs Geetasree Talukder [14 (1994) BLD 415]* the question was whether a woman, Hindu by faith, could file a suit in a Family Court for maintenance against her husband. The honourable judge of the High Court Division held that "As per the provisions of the present Ordinance, all the sections of the 27 section statute have been made available for the litigants who are Muslim by faith only."

The said judgment came on 5th June 1994, and just a few days later on 25th July 1994 in *Nirmal Kanti Das Vs Sreemati Biva Rani [14 (1994) BLD (HCD) 413]*, the High Court Division expressed diametrically opposite view. The learned judge of the High Court Division referring section 3 of the Ordinance held that the provisions of Family Courts Ordinance shall have effect notwithstanding anything contained in 'any other laws' for the time being in force. From the expression 'other laws', it appears that the Family Court Ordinance controls the Muslim Family Laws Ordinance, 1961, and not vice versa. Thus, any person professing any faith has a right to bring a suit for settlement and disposal of disputes relating to dissolution of marriage, restitution of conjugal rights, dower, maintenance, guardianship and custody of children. And so, a Hindu wife is entitled to bring a suit for maintenance against her husband in a Family Court.

In *Meher Nigar Vs Md Mujibur Rahman [14 (1994) BLD (HCD) 467]* the High Court Division corroborated the abovementioned view by holding that the Muslim Family Laws Ordinance 1961 introduced some changes in the orthodox Muslim personal laws relating to polygamy, *talaq* and inheritance and in order to keep those reformative provisions of the Ordinance of 1961 effective it has been provided that the provisions of Muslim Family Laws Ordinance of 1961 shall not be affected by the provisions of the Family Courts Ordinance of 1985; and section 23 of the Family Courts has specified the area not to be affected. It otherwise indicates that the provisions of the Family Courts Ordinance are applicable to other communities which constitute the populace of Bangladesh.

Following such dissimilar views and decisions, the confusion regarding jurisdiction of the Family Court was natural. And such confusion continued until 1997 when a larger bench of the High Court Division of the Supreme Court in its path-finding judgment in *Pochon Rikssi Das Vs Khuku Rani Dasi and others [50 (1998) DLR (AD) 47]* removed all the confusions. The special bench of the High Court Division comprised of three Judges upheld that "the Family Court Ordinance has not taken away any personal right of any litigant of any faith. It has just provided the forum for the enforcement of some of the rights as is evident from section 4 of the Ordinance, which provides that there shall be as many Family Courts as there are Courts of Assistant Judge and the latter courts shall be the Family Courts for the purpose of this Ordinance.

Moreover, the court also declared that 'Family Courts Ordinance applies to all citizens irrespective of religion'.

It seems quite pertinent to refer some of the submissions which the Court relied on. It was submitted that:

If Family Court Ordinance is intended to apply only to the Muslim community then there was no reason for not providing it accordingly as has been done in case of Muslim Filmily Laws Ordinance, 1961. The Family Courts Ordinance should have been named as Muslim Family Courts Ordinance. ....in the Family Courts Ordinance there was no exclusive exclusion of any community and unless there is specific exclusion the law will have general application, that is, it will apply to the citizens of all faiths. ..... if sections 3, 5, and 24 of the Family Courts Ordinance are read together it will be evident that guardianship and custody of children were made exclusively triable in the Family Courts and unless the law is applicable to all how a non-Muslim can get a relief in the said matters. ...... 5 matters enumerated in section 5 of the Family Courts Ordinance are matters of personal laws of the citizens of different faiths who follow different rules in matters enumerated in the section or do not have any rule at all as in the case of Dower and Dissolution of Marriage in case of Hindus. All citizens may not be concerned in all matters but that cannot be a ground to hold that the Ordinance applies only to the Muslims. ......Family Courts Ordinance has not encroached upon the personal laws of the citizen of any faith. This Ordinance provided that Family Courts will have jurisdiction to entertain and decide suits on the matters enumerated in section 5 subject to the provisions of the Muslim Family Laws Ordinance meaning thereby that while disposing of a matter amongst the Muslim the provisions of Muslim Family Laws Ordinance shall have to be kept in mind. .....had there been no exclusive jurisdiction of Family Courts there may be complications in cases filed by husband and wife professing different faiths. ....not all the personal laws of the Muslim have been included in section 5. Some provisions of Muslim personal laws such as Waqf, Gift, parentage etc. have been kept out of the provisions of the Family Courts Ordinance. So it cannot be said that this is only for the Muslim.

Accordingly, there should not remain any confusion regarding the jurisdictions of the Family Courts. Henceforth, it seems needless to mention that a Family Court can try suits under *The Hindu Married Women's Right to Separate Residence and Maintenance Act 1946*, the law that has given a right to the Hindu wives to live in separate houses and to get the maintenance, but has not provided any forum to go to enforce the rights.

Another matter needs to be clarified that the Family Courts Ordinance does not extend to the hill districts of Rangamati, Bandarban and Khagrachhari. The fact is that initially the hill districts used to be governed by Hill Districts Regulation of 1900 and it was repealed in 1983 but as no new law has been introduced for administering the area, as per provisions of General Clauses Act, the repealed law is still in force and the Hill Districts Regulation is still continuing, resulting in exclusion of Family Courts there. This does not mean that tribal people cannot take recourse to a Family Court. The suits among aboriginal or *adivasi* or tribal people can be tried by a Family Court if they reside within the local limits, that is, territorial jurisdiction of the Family Court.

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FINANCIAL MARKET regulation

SECURITIES MARKETS IN BANGLADESH

Regulatory development between 1947 and 1971

BARRISTER TUREEN AFROZ

IN the previous article (DS 5 August 2006) securities regulation up until 1947 was discussed. In 1947, the end of British colonialism brought a different dimension to the political and legal trajectory of the region. The Capital Issues (Continuance of Control) Act of the undivided Indian sub-continent continued in the new state of Pakistan after its birth in 1947.

It is noticed that even after independence, the East Pakistanis continued their trading at Kolkata (earlier Calcutta) Stock Exchange of the independent India. In 1952, the Government of Pakistan stopped the trading of Pakistani companies in the Kolkata Stock Exchange. As a result, there emerged a need for establishing a separate stock exchange in the East Pakistan region. Therefore, on April 28, 1954 the 'East Pakistan Stock Exchange Association Limited' was incorporated. However, the formal trading in securities in the East Pakistan Stock Exchange began in 1956.

On May 14, 1964 the East Pakistan Stock Exchange was renamed as the Dhaka (earlier Dacca) Stock Exchange Limited. The Dhaka Stock Exchange is registered as a public limited company and its activities are regulated by its Articles of Association and its own rules, regulations and by-laws along with other regulations the government would enact time to time to regulate the market.

It was only in 1969, for the first time in Pakistan, that a comprehensive securities market legislation came into force

when the Securities and Exchange Ordinance of Pakistan 1969 was enacted. The Ordinance was published on June 28, 1969 and came into force on November 1, 1970. Securities and Exchange Ordinance 1969 was enacted for the purposes of (a) providing protection to the investors of both East and West Pakistan; (b) regulating the capital markets; and (c) regulating the issues and dealings in securities.

In the legal history of securities market regulation in Bangladesh (the then East Pakistan), Securities and Exchange Ordinance 1969 is an important landmark. This Ordinance for the first time emphasised the need for 'investor protection' in the securities market regulatory regime of the region. This Ordinance also introduces a comprehensive and comparatively modern method of securities regulation in the region. In addition, it provided for the first time a comprehensive definition of the term 'securities', including both governmental and non-governmental instruments.

After Securities and Exchange Ordinance 1969, no stock exchange in Pakistan was allowed to operate or to carry on its functions without registration. The Ordinance specified certain conditions or requirements for stock exchanges as eligibility for registration. This was mainly to ensure fair dealings and to protect investors. However, the stock exchanges continued to remain as self-regulatory bodies and with prior approval of the Central Government of Pakistan, could frame their own regulations not being inconsistent with Securities and Exchange Ordinance 1969. The stock exchanges were required to maintain such book of accounts and documents, which could be made subject to the inspection by the Central Government of Pakistan as and when necessary. If satisfied, the Central Government of Pakistan could also enjoy a variety of power over the stock exchanges such as, cancellation of registration, suspension of transaction, superseding the stock exchange governing body and/or removal of key personnel from the stock exchange.

After the 1969 Ordinance, the business of investment advisers and the investment companies were also brought under the Central Government regulation. However, Order 32 of the Securities and Exchange Ordinance 1969 was silent about any further directions in this regard. Later, the Central Government of Pakistan framed the Investment Companies and Investment Advisers' Rules 1971. These Rules made it compulsory for any company to commence business as an 'investment company' (Rule 3) and for any person to commence business as an 'investment adviser' (Rule 18), to be duly registered beforehand.

Under the 1969 Ordinance, the companies were required to fill up a standard application form for initial listing of securities and to submit the same to the stock exchanges, where the listing was intended, as well as to the Central Government of Pakistan. However, the reference to the standard form of application can only be found at Rule 11 of the Securities and Exchange Rules 1971 which reads: "An application for listing a security on a stock exchange shall be made to the stock exchange in Form III."

Order 10 of the 1969 Ordinance created a provision whereby compulsory listing of securities could take place, even if the issuer does not make an application for listing. There was a specific regulatory reason to do so. It was found that in Pakistan there were some large public companies whose controlling shares were held in a few hands and were making huge profits. It was feared that if the securities of these large companies remained unlisted, regulation of the overall capital market might be prone to danger. Therefore, in the public interest such securities could be compelled for listing. However, the Central Government of Pakistan was required to consult the stock exchange and gave the issuer of such security an opportunity of being heard, before directing such security to be listed.

Also the 1969 Ordinance, for the first time, imposed a mandatory 'periodic disclosure' mechanism upon the corporate issuers. The issuers were made subject to submission of "annual returns", "half-yearly accounts" and "monthly returns". In addition, the 1969 Ordinance for the first time explicitly prohibited certain activities in the securities markets, such as, short selling (short selling is the selling of securities without having them and delivery of which effected at a later date in the hope of future decline in price when the same can be acquired and delivered.), fraudulent acts, making of false statements etc.

1969 Ordinance for the first time empowered the regulatory body to make a "prohibitory order" against any possibility of potential contravention of securities market regulation. However, this power could only be exercised by the Central Government of Pakistan and not by the stock exchanges. Refusal or failure to comply with "prohibitory order" would of course entail penalty under Order 22 of the Securities and Exchange Ordinance 1969. It is stated that the ultimate purpose of such regulatory provision for the securities market was to enhance market confidence.

In summary, Securities and Exchange Ordinance 1969 empowered the Central Government of Pakistan with more power than the powers exercised by the Office of the Controller of Capital Issues under the Capital Issues (Continuance of Control) Act 1947. Securities and Exchange Ordinance 1969 elaborated the enquiries and the penalty provisions under the ordinance in quite details (Orders 21-24). The Ordinance also gave the Central Government adjudicatory power regarding any mischief in the securities markets, which could be subject to a further revision and review by the Central Government itself. It is to be noted that the rights and remedies provided by Securities and Exchange Ordinance 1969 were in addition to any other rights and remedies available under any other law of the land.

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