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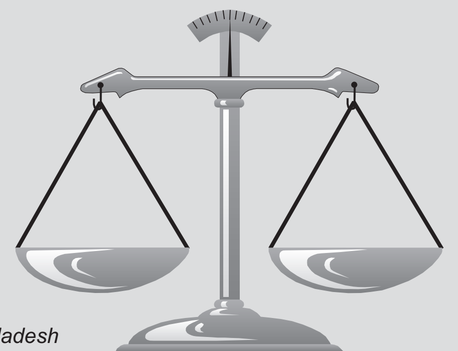
"ALL CITIZENS ARE EQUAL BEFORE LAW AND ARE ENTITLED TO EQUAL PROTECTION OF LAW"-Article 27 of the Constitution of the People's Republic of Bangladesh



Star LAW review

Introducing 'Case Management' system in Bangladesh

MUSHFIQUR RAHMAN

FEW, having association with our formal justice delivery system, will dispute that prevalent case disposal scenario is plagued with three evils i.e. delay, cost and complexity. Yet fewer will argue that this bleak state of affairs has noting to do with our procedural system. Procedural part of our legal system is largely regulated by two century-old laws: Civil Procedure Code 1908 and Criminal Procedure Code 1898. Both these super-voluminous laws are full of niceties and elaborated in minutest details, complete hold of which requires exceptional genius. These laws allow litigants to seek redress of almost every single grievance, whatever small that may stem from the proceedings of the court, by means of appeal and/or revision.

Though envisaged to provide complete justice, these ever-elastic procedural provisions paved the way for serious injustice. As a necessary corollary of this elasticity, which perhaps had some efficacy century ago, it is possible for a notorious pleader to stretch a given case to an agonising length beyond the contemplation of a layman. These laws are good for mechanical disposal of disputes but not for judicious application of human mind. To worsen the situation we belong to the legal family of adversarial system as opposed to its inquisitorial counterpart. This makes our legal system extremely lawyer-mediated so as to render the judge a passive actor in judicial proceedings. Here lawyers virtually direct the course of proceedings, length of the suit, discovery of evidence, examination of witnesses and what not. Thus, more often than not, private interest of a lawyer subdues the public interest of speedy trial.

As an essential result one finds our civil administration of justice unduly costly, inordinately slow and consequently unequal in that it leaves virtually no real chance for an under-resourced litigant against a wealthy barrator. But this awful condition is not unique to Bangladesh rather all the members of adversarial legal family encounter the same problem. The way some of them went to resolve this problem is to opt for some functionally efficacious attributes of inquisitorial system, one of which is popularly known as 'case management'.

For better understanding of general readers it may be mentioned here that adversarial system is generally adhered to by countries that were once colonies of the United Kingdom. On the other hand countries of continental Europe and their former colonies adopted a rationally more sensible method of settling disputes they call inquisitorial system. In adversarial system judicial proceedings are typically controlled by the pleaders of the disputing parties. Judges are supposed to perform merely an umpiring role and are disallowed to intervene the proceedings.

Conversely, judges in the inquisitorial system are more inquisitive in their conduct of cases and empowered to exercise greater control. While the inquisitorial system is solely devoted to unfold the truth, adversarial system place overriding importance on ensuring a level-playing field for contestants so that through rigorous clash between lawyers of both sides the truth can emerge by itself. Being a lawyer controlled system, the outcome of a case in an aversarial system is not so much dependent on the merits of the case as it is on the comparative skills of the concerned lawyers. It implies that you can demand justice under this system only when you can ensure sound supply of cash.

But to be truthful it must be said that both the adversarial and inquisitorial systems have their relative advantages and disadvantages and over the decades there has been a debate to resolve where the balance lies. In today's world the debate gradually loses much of its rigours as somewhat convergence is taking place between these apparently divergent systems to meet practical necessity. Thus in adversarial systems, societal pressure to strike a balance between 'speedy trial' and 'fair trial' made 'jurisprudential purity' to give way to pragmatism. This triumph of functionality over traditional rigidity prompted the conventionally adversarial nations to install 'case management' in their judicial system.

Case management requires the judge to play a more 'active role' and get acquainted with the cases at an early stage. In this mechanism a 'Procedural Judge' receives the suit at the first instance. Suits are then differentiated on the basis of their monetary value, legal complexity, urgency and accordingly they are categorised into different tiers so as to facilitate differential and individualised treatment to each of them. Parties are made aware of the true state of things of the suit at court's disposal at its threshold, as a result of which there remains little scope for clients to be misguided or illusioned about their potential success. A leading objective of case management is to encourage settlement of cases at the earliest appropriate stage. This will be done by:

- enabling both parties to make offers to settle the whole case or individual issues;
- giving the courts a wider power to decide cases or issues at an early stage without full trial;
- suggesting the use of alternative dispute resolution (ADR) where that is likely to be beneficial;
- requiring a more co-operative approach between the parties and avoiding unnecessary combativeness; and
- identifying and reducing issues as a basis for appropriate case preparation.

Another important aspect of case management is the scheduling of each particular case. Same procedural judge is to prepare a schedule detailing the anticipated progress of that case at different stages along with respective time limit. It will then be referred to the 'Trial Judge' who will be responsible to periodically monitor proper maintenance of the schedule as developed by the 'Procedural Judge' and make necessary modifications in the litigation plan as warranted by circumstances. Pleaders, and in the time of necessity parties, are to be involved all through the process. If any party is found to be in default and guilty for unreasonable delay the court will make him/her pay the price in the shape of compensation payable to the innocent party. This fear of monetary loss certainly minimises the chances of both derelictory and dilatory tactics. The basic idea is to make a fundamental transfer in the responsibility for the management of civil litigation from litigants and their legal advisors to the courts.It is really significant to note that a number of countries including pioneering States of adversarial legal culture like USA, UK, Canada and Australia made almost simultaneous efforts to get purged of the traditional stubbornness of adversarial system by introducing 'case management'. And this strategy to fight the 'delay' factor proved worthy as their primary hard works are now paying off. The USA enacted the Civil Justice Reform Act in the year 1990 to induct 'case management' system in their civil administration of justice. Australia opted for case management in pursuance of a sound background paper called 'Judicial and Case Management' prepared by the Australian Law Reform Commission. But the most remarkable and most publicised headway in this regard is made by a State considered to be the birthplace of adversarial system: the United Kingdom.

The UK owes its reform in civil administration of justice to a report prepared by Lord Woolf. Lord Woolf's report on procedural reform of the civil justice system, titled "Access to Justice", was commissioned by the Lord Chancellor in 1994. Its importance as a complete overhaul of the system can hardly be overestimated. Lord Woolf was entrusted with the responsibility to make an in-depth inquiry into the loopholes in existing system and suggest possible reforms in a comprehensive report featuring clear guideline to follow in implementation of the concluding recommendations. Accordingly Lord Woolf published an interim report in 1995 and submitted his final report in 1996. English people are now cashing in on the famous Woolf's Report.

Being inspired by the advancement in introducing case management in other countries and its consequent impact India took initiatives to work out modalities for implementation of case management formula in their civil procedure. A five-member committee headed by the Chairman of Law Commission of India Shri Justice M. Jagannadha Rao was constituted on 30 October 2002 pursuant to a direction issued by the Supreme Court of India in Salem Advocates Bar Association, Tamil Nadu vs. Union of India. Accordingly the Committee scrutinised relevant documents from foreign jurisdictions and arranged consultations with local stakeholders. The bottom-line drawn by the Committee was emphatically in favour of its introduction in India with some indigenization of the idea considering India's very own legal culture and practice. This report had been wholeheartedly received by the Supreme Court of India and the High Courts were requested to frame rules as per the report.

Except some stray efforts in the form of introducing provisions on 'mediation' and 'arbitration', the vibrant trend around the world to shift the pendulum of case-control from lawyers to judges has hardly gained any interest in our country as yet. But the acceptance of this idea in our neighbouring nation, that shares almost the same legal legacy and culture, suggests that we can well adopt 'case management' to get rid of delay to a considerable measure and thus bring greater sense to our judicial system.

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LAW opinion

Domestic violence legislation

What model should be followed?

MD AL AMIN SAGAR

DOMESTIC violence on women is best described as use of physical or sexual or emotional or verbal or economic abuse perpetrated by their close male or female relatives e.g. husband, son, father-in-law, male partner, daughter, mother-in-law, sister-in-law etc.

Need for special domestic violence legislation

Although 50 percent of total population of Bangladesh is women, domestic violence on them committed by family members or inmate male partners is still considered here as private matter and there is no special law relating to this offence. The mooting point is why special domestic violence preventive legislation is demanded for Bangladesh in spite of having various laws relating to violence against women? Article 2 of UN Declaration on Elimination of Violence Against Women, 1993 divides violence against women into three categories, e.g. physical, sexual and psychological violence occurring-

i. in family by family members, in non-spousal relationship by inmate male partner and violence related to exploitation,

ii. within general community by strangers and

iii. anywhere perpetrated or condoned by State.

Almost all of civil and criminal laws of Bangladesh deal with violence against women committed within general community by strangers with few exceptions e.g. dissolution of marriage, dowry related violence, dower, maintenance, guardianship and custody. Present laws are ignorant about issues of sexual abuse e.g. marital rape, verbal or psychological or economic abuse caused by domestic violence and also fail to provide adequate remedy. High probability of non-conviction of accused under existing laws lowers rate of filing cases comparing total incidents of domestic violence. In physical abuse, existing laws only protect victim of domestic violence, when grievous hurt is inflicted on her. Jatin Chandra Sil v The State 43 DLR (AD) 223 is a glaring example of this where habitual wife abuser accused husband was not content by striking his wife with branch of tree but also reckless enough to kick her in tender part of her body and she bled to death. Whole legal mechanism e.g. judges, lawyers, police, doctors, concerned authorities along with common people are very confused and reluctant to consider it as severe offence for lack of special legislation.

Legal aspects of enacting

There are two aspects of enacting special domestic violence legislation e.g. constitutional and international.

Constitutional aspect: Proclamation of Independence, 1971 and preamble of Bangladesh Constitution ensure equality, fundamental human rights, freedom and justice for all citizens. Article 10 provides for taking steps to ensure participation of women in all spheres of national life. Article 11 ensures respect for dignity and worth of human person and Article 19 guarantees equality of opportunity for all citizens. Article 8 provides that fundamental principles of state policy shall be applied in making laws, which is implied constitutional direction to enact domestic violence legislation.

Article 27 guarantees equality before law and equal protection of law for all citizens. Article 28 (1) prohibits to discriminate any citizen on ground only of sex. Article 28 (2) ensures equal rights of women with men in all spheres of State and public life. Article 31 guarantees right to enjoy protection of law, to be treated in accordance with law and prohibition in taking detrimental action to life, liberty, body, reputation or property of any person. Article 32 ensures protection of right to life and personal liberty except in accordance with law. Article 35 (5) says no person shall be subject to torture or to cruel, inhuman or degrading punishment or treatment. Article 26 (2) provides that State has to enact law in conformity with fundamental rights otherwise it would become void. State can make special provisions or laws in favour of women or children under Article 28 (4).

International aspect: There are three doctrines which involve State responsibility to combat domestic violence under international human rights law.

i. Due diligence: Article 4 (c) of UN Declaration on Elimination of Violence Against Women, 1993 provides States should exercise due diligence to prevent, investigate, and in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by State or private persons.

ii. Equal protection of law: Article 2 of Convention on Elimination of All Forms of Discrimination Against Women, 1979 (CEDAW) obliges State parties to take the following steps to prevent discrimination against women and ensure equal protection of law for them: (a) legislative measures to prohibit all discrimination, (b) establishing legal protection of women's rights on equal basis of men and ensuring it through competent national tribunals and other public institutions, (c) to refrain from engaging in act or practice of discrimination, (d) to take measures including legislation to modify or ablish existing laws, regulations, customs and practices constituting discrimination.

iii. Domestic violence as torture: Article 1 of Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 considers domestic violence as torture. Article 5 of Universal Declaration of Human Rights, 1946 (UDHR) and Article 7 of International Covenant on Civil and Political Rights, 1966 (ICCPR) provides that nobody shall be subjected to torture or cruel, inhuman or degrading treatment or punishment.

Suggested models

Following two models may be considered while enacting domestic violence legislation for Bangladesh.

UN model: UN Commission on Human Rights issued a framework for model legislation on domestic violence by a resolution on 2 February 1996 which is purported to serve as drafting to legislatures and organisations committed to lobbying their legislatures for comprehensive legislation on domestic violence.

Laws of other countries: About 53 countries of world have enacted domestic violence legislation. In India, there is Protection of Women from Domestic Violence Act, 2005 and in South Africa there are Domestic Violence Act, 1998 and National Instruction on Domestic Violence, 1999. In USA major laws are Violence Against Women Act (VAWA), 1994 and Family Violence Prevention and Services Act, 1984. In UK civil and criminal remedies for victims are available in Part IV of Family Law Act, 1996, Protection from Harassment Act, 1997, Housing Act, 1996, Children Act, 1989, Adoption and Children Act, 2002 and Domestic Violence, Crime and Victims Act, 2004.

Certain recommendations

The following provisions may be incorporated while drafting domestic violence legislation:

1. Separate family courts to deal family matters exclusively by special judges having civil and criminal jurisdiction.
2. Community police to enquire and investigate family matters having power to enter any place, rescue suspected victim and arrest accused without warrant.
3. Introduction of marriage counsellor, welfare expert, shelter homes and rehabilitation programme e.g. health service worker.
4. Conviction of accused under sole testimony of victim and DNA evidence.
5. Emergency protection order containing date scheduled for first hearing of complaint within seven days of filing it.
6. Disposal of case within 90 days of first hearing and provision of camera proceedings.
7. Injunction order to prohibit accused from further committing or aiding or abetting domestic violence against victim or dependants or her relatives.
8. Residence order requiring removal of accused or his relatives from shared household or alternative separate accommodation for victim and prohibiting alienation of the same.
9. Monetary relief for loss of earnings, medical expenses, damage of property and maintenance for victim and her children even when proceeding continues.
10. Temporary custody order of children during proceedings and compensation order for mental torture to victim.

Concluding remarks

The sooner the legislative initiative is taken to enact domestic violence legislation, the better. I would like to conclude quoting Maud Buquicchio, Deputy Secretary General of Council of Europe, "When love hurts, human rights have failed and when love flourishes, human rights will triumph."

The author is a 4th year, LLB student in Dhaka University.