LAW *opinion*

A LEGAL ANALYSIS WITH CRITICAL APPRECIATION

Establishment and operations of the family courts in Bangladesh

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THE three independent countries of South Asia only emerged as sovereign nation first, due to the division of India and Pakistan in 1947 and second, creation of Bangladesh from Pakistan in 1971. These three

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countries namely India, Pakistan and Bangladesh have a similar cultural, social and legal set up. It is important to note that Bangladesh possesses its legal heritage from its predecessors. A family court is neither a civil, nor a criminal court, but a court of special jurisdiction. It deals with disputes relating to, or arising out of family affairs. The court possesses wide jurisdiction over the matters assigned to it. Justice demands, the administration of courts' functions ought to be in accordance with the due process of law.

Establishment of family courts in Bangladesh

Although after the Muslim family laws ordinance, 1961 (Ordinance No. 8 of 1961) came into force on 15th of July 1961, the legislature of the then West Pakistan enacted the West Pakistan Family Courts Act, 1964 (Act 45 of 1964) in pursuance of the recommendation of the Commission on Marriage and Family Laws which stressed upon setting up of such special courts for the expeditious settlement and disposal of disputes relating to marriage, maintenance, custody of children and for other matters connected therewith. But unfortunately in the then East Pakistan no such law was enacted. Enactment of the family courts ordinance 1985 (Ordinance No. 18 of 1985), which was published in the Bangladesh gazette on the 30th March, 1985 and was given effect from 15th June 1985 by notification by the government is undoubtedly a step in the right direction.

Before establishing the present family courts, there were no separate courts in Bangladesh for adjudicating disputes in relation to family matters. The inherited colonial judicial system of this country is itself an impediment in expeditious trial procedure. In many cases, as a result, the aggrieved persons are being deprived of their right to get judicial relief. They are, sometimes, reluctant to move to courts due to poverty, shame, ignorance of law etc. Although some of them would lodge suit for the realisation of their infringed rights, they would get remedy only after a long period from the date of instituting the suits, the aggrieved person would not, in many cases, enjoy the relief provided by the court, because of their death to avoid this procedural complication, the women of the then Pakistan desired to have a separate court for their own.

Despite the above circumstances, family courts were established only in West Pakistan through passing the West Pakistan Family Courts Act, 1964. The women of this regime continued their movement for the same. After the emergence of Bangladesh as an independent state, the overall position of disposal of cases has been deteriorating and the government set up a law committee for reviewing the recommendations made by the law reforms commission of 1958 and 1967. The committee was to suggest remedies in the light of circumstances prevailing in Bangladesh, so as to meet the judicial needs in this country. The Law Committee practically functioned as a law reforms commission, and submitted its report on 31 October 1976, suggesting amendments to the civil and criminal procedural laws in order to arrest delays in the disposal of cases. It strongly recommended establishment of family courts in Bangladesh for adjudication of family disputes relating to dissolution of marriage, maintenance of wife, restitution of conjugal rights, custody of children and guardianship.

Construction of family courts

No new court building was founded and no fresh judge was appointed separately for the family courts. All courts of munsiffs (Now courts of Assistant Judges) have been empowered to act as the judges of family courts, and all courts of Assistant Judges are family courts for the purpose of family courts ordinance. In this regard the ordinance provides, that:

(1) There shall be as many family courts as there are courts of Assistant Judges.

(2) All courts of Assistant Judges shall be family court for the purpose of the ordinance.

(3) All Assistant Judges shall be the judges of family courts.

Jurisdiction of family courts

The jurisdiction of family courts has been sharply ascertained by its parent law. The ordinance asserts that;

Subject to provision of Muslim Family Laws Ordinance, 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.

All family courts are to exercise their jurisdiction assigned to them under the ordinance within their territorial jurisdiction. Territorial jurisdictions are same as fixed for them as assistant judges. Pecuniary jurisdiction is, however, unlimited. The same person is simultaneously a judge of a court of Assistant Judge and a judge of a family court. When he acts as a judge of the court of Assistant Judge, his pecuniary jurisdiction is limited up to the valuation of the suit Taka 2,00,000 (two lakh). But if he is in the post of a Senior Assistant Judge his jurisdiction is extended up to Taka 4,00,000 (four lakh). However, there is a peculiarity that where their pecuniary jurisdiction differs to a great extent merely because of seniority at the same moment and being seated on the same chair, they enjoy unlimited pecuniary jurisdiction while acting as a judge of a family court. Moreover, it should be mentioned here that, the family courts have been entrusted with the powers of First Class Magistrate and district judge in two separate cases. For example, at least First Class Magistrate were entitled to try and dispose of any case relating to or arising out of all or any of the maintenance under the code of criminal procedure, 1898, section 488(1) of code. On the other hand, suits relating to guardianship and custody of children were under the jurisdiction of the court of district judge.

There two important matters have been put within the jurisdiction of the family courts exclusively because on the matters mentioned earlier, the jurisdiction of a family court is exclusive.

The responsibility of resolving the disputes relating to maintenance has been imposed on the family courts by the family courts ordinance, but till now, section 488 of Cr.PC has not been omitted. In one sense, therefore, a concurrent jurisdiction is prevailing in this respect, by dint of which a magistrate can still entertain an application under Cr.PC. But in Pakistan, the order of magistrate calling upon the husband to pay arrear of maintenance after enforcement of the West Pakistan family courts act is without jurisdiction.

In Pakistan the qualification of family courts' judge has been determined of following manner:

"No person shall be appointed as a judge of family courts unless he is or has been a district judge, an additional district judge."

If the jurisdiction of family courts of Bangladesh is taken into fair consideration, it appears the qualification of judges is not reasonable because he has to act, sometimes as a First Class Magistrate and sometimes as a district judge, issues regarding maintenance, guardianship and custody of children are regarded as most important. That is why, they were being tried and disposed of by at least first class magistrates and district judges, respectively instead of junior magistrates and judges. In our country, courts of assistant judges are lowest in grade of civil courts system.

Appeal against a judgement, decree or order passed by the family courts

An appeal from a judgement and decree of the family courts shall lie to the district judge. No appeal, however, shall lie against the decree of a suit for dissolution of marriage under section 2(8) (d) of the dissolution of Muslim Marriages Act 1939 and a decree of dower not exceeding Tk 5,000/- (five thousand).

Another inconsistency is observed here. The appellate jurisdiction of the court of district judge is not limited if an appeal prefers from family courts, but appeal from the judgement of a joint district judge may lie to the district judge if its valuation is within 5 lakhs.

Courts-fee to be paid for the institution of suit in a family court

The family court or ordinance does not follow rules of the court-fees Act, 1870, which court ascertains fee for a suit. So, irrespective of the poor and the rich litigant, everyone is to pay a fixed amount as court fee to register a suit in the family court. The ordinance provides.

"The court-fees to be paid on any plaint presented to a family court shall be twenty-five taka for any kind of suit."

It cannot be said that all those who seek remedy in the family courts are poor. A rich man may have the cause to file a plaint before a family court. In the cases of the rich, the government is being

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deprived of reasonable court-fees illogically.

Contempt of family courts

Contempt of any court is considered as an offence in all events. A person who commits this offence should be punished reasonably. Family court may forthwith try such person for such contempt and sentence him to a fine not exceeding two hundred taka. This ordinance empowers the family courts to draw contempt proceeding against a person concerned, but penalty shall not be more than two hundred taka. Now-a-days Tk two hundred as a fine considered to be very poor. Moreover there is no alternative punishment if the money is not realised.

Inherent power of the family court

Under the Family Court Ordinance, the family court does not enjoy any inherent power but a civil court does. Our legal system follows the common law system. Equity was emerged in the common law due to the shortcomings of law. "Equity has come not to destroy the law but to fulfill it" as Maitland remarks. The law, it is evident, can not meet the ends of justice in all cases at all times. For this reason, the provisions of the family courts ordinance may not be considered as enough to meet the needs of justice. And its failure may frustrate the subject matter of a suit, and the litigant as well.

Conclusion

The family court has a great importance in Bangladesh, especially for women. An inquiry into the family courts ordinance 1985 reveals that there are some drawbacks in the ordinance, for which the courts are facing multifarious difficulties in running their functions, despite the first amendment in 1989.

To make it more effective, the shortcomings mentioned in this proposal should immediately be removed. The object of the establishing these courts would not be realised. Now a democratically elected government is running the affairs of the country. The government, it is expected, would come forward as soon as possible, to bring the suggested amendments into relating, with a view to fulfilling the hopes and aspirations of the people of Bangladesh in general, and poor and suppressed women of rural areas in particular.

Since the family courts ordinance is the most important code in the field, the seekers of knowledge, the judges, the teachers, the students, the lawyers, the researchers, the advocates, the legislative draftsman's and a host of others connected with the profession of law were may be benefited to study outcome of these research.

I am interested to findout the procedural problem and suggested how to be solved the problem of family courts. I want to remark and necessary amendment in this ordinance in the perspective and reality of the women society of Bangladesh. I would like to mention of the family courts ordinance inconsistency and I will suggest to remove these for the favours of greater women's society of Bangladesh.

The author is a reader of The Daily Star.

LAW *alter views*

Land Righs of the Indigenous Peoples

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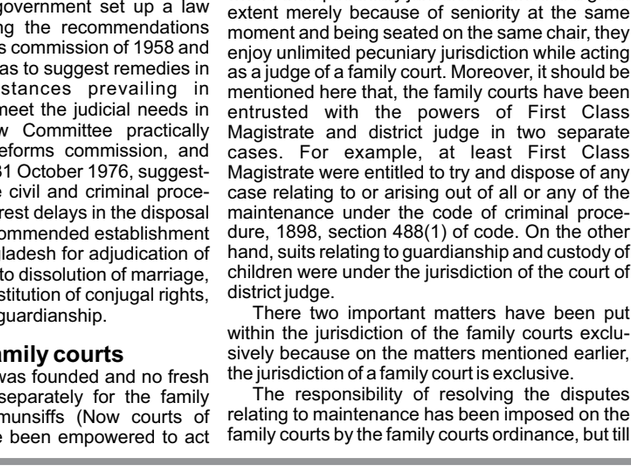
THIS article is written as a sequel to my earlier article entitled "Between Empire and Nationalism: The marginalisation of the indigenous people in Bangladesh" published in Law and our rights page wherein I have tried to demonstrate that changing dimension of mainstream politics, i.e. from a secularist tradition to reintroduction of Islam based nationalism, is one of the prominent reasons for marginalisation of the indigenous peoples in Bangladesh. In that article I have also maintained that the political trend in Bangladesh should be set in a secular way in order that a wholesome congenial political and social atmosphere may come along for the protection and promotion of the rights of the indigenous peoples. Along with this, I have advisedly made an observation that there are some problems pertaining to the indigenous peoples which are not soluble except for some legal mechanism. The problem relating to land rights of the indigenous peoples is of such nature.

Presently, the rubric concerning the idea of land rights of the indigenous peoples owes directly to international law. In international law, a number of recent prescripts like the Indigenous and Tribal Peoples Convention 1989, the Indigenous and Tribal Populations Convention 1957 and the UN Draft Declaration on the Rights of the Indigenous Peoples have advocated for the land rights of the indigenous peoples. Here it begs some pertinent questions: why did international law take so much time to recognise the rights of the indigenous people, especially land rights; why the European and North American states are so reluctant to sign any convention on the rights of the indigenous peoples? The answer to this question will take us to the heart of the matter in question to be addressed in this article. To deal with it very concisely from a theoretical standpoint, it is suffice to sayhistorically the indigenous peoples are missing factors in modern sate-making process for a variety of reasons. Since state is the most prominent actor in both national and international law making process and there was lack of effective participation in the state mechanism by the indigenous peoples, states have never espoused indigenous cause, which has engendered their legal deprivation in national and international law.

The statement made above appears to be more evident in those cases where European settlers or colonisers had occupied and made settlement in the regions inhabited by the indigenous peoples. Throughout the period of late middle age down to 19th century, the eurocentricism in both legal scholarship and military power had given European nations an unrivalled opportunity to interpret international law from their own respective standpoint, and in defining the legal status of the indigenous peoples they have taken full opportunity of it to legitimise their activities by some unjust doctrines like terra nullius, just war or other methods like conquests, unequal treaties etc. Though scholars like Grotius, Vittoria, Pufendorf and vattel considered them to be "political entities with territorial rights, we see that



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this status was played down later during the nineteenth century. In early decades of the twentieth century, the indigenous peoples were thrown outside the purview of international law. Such as, in the Island of Palmas case, the Permanent Court of International Justice declared that agreements with native princes or chiefs of indigenous peoples did not create rights and obligations such as may, in international law arise out of treaties. A few years later the Permanent Court of International Justice went as far as in the Legal Status of Eastern Greenland case, 1933 that the indigenous peoples of Greenland could not acquire sovereignty by conquest.

In the second phase, when settler communities in those colonies became large enough to establish their own states and did so eventually, the colonialist attitude of the ruling class to the indigenous people in the newly emergent states did not change overnight. The establishment of modern states by the colonialist settlers in the indigenous populated territories paved the way for a far better legal interference in the land rights of the indigenous peoples because it is an axiom of modern political science that state has sovereign power over its territory. Here we are not going to make a critical analysis of jus imperium power of state because it is not pertinent in the present discussion, yet it is true that the doctrine of jus imperium has always come handy for the ruling class to eject the indigenous people from their land.

United States, Canada and Australia can be regarded as very good case in points to exemplify this situation. These countries still assert or previously asserted jus imperium power to "extinguish" the land titles and rights of the indigenous peoples within their borders, without the consent of the indigenous peoples by means of enactments or judicial and administrative orders. The process of 'extinguishment' includes voluntary purchase and sale of title, outright taking or expropriation, without just compensation. One clear example of the problem of extinguishment is manifested in the case of the *Tee-Hit-Ton Indians v. United States,* 348 U.S. 272 (1995). "In this case the Supreme Court decided that the United States may (with limited exceptions) take or confiscate the land or property of an Indian tribe without due process of law and without paying just compensation, this despite the fact that the United States Constitution explicitly provides that the Government may not take property without due process of law and just compensation. The Supreme Court found that property held by aboriginal title, as most Indian land is, is not entitled to the constitutional protection that is accorded all other property". [UN Doc. E/CN.4/Sub.2/2001/21]. In the final working paper on the Prevention of Discrimination and Protection of Indigenous Peoples and Minorities, the special rapporteur Mrs. Erica-Irene A. Daes has noted about it as follows:

"The legal doctrine created by this case continues to be the governing law on this matter in the United States today. The racially discriminatory character of the decision has not prevented this doctrine from being freely used by the courts and by the United States Congress in legislation, even in recent years. Indeed the Congress relied on this doctrine in 1971 when it extinguished all the land rights and claims of practically every one of the 226 indigenous nations and tribes in Alaska by adopting the Alaska Native Claims Settlement Act." [UN Doc. E/CN.4/Sub.2/2001/21].

Another clear example is *Mabo v. Queensland*, 1992 wherein the High Court of Australia ruled that though the doctrine of terra nullius is not applicable to deny rights of the indigenous peoples to land, the Crown is vested with sovereign power of to extinguish native title. Nonetheless the Court held that native title may be extinguished by legislation, by alienation of land by the Crown or by appropriation of land by the Crown in a manner inconsistent with the continuation of native title. The Native Title Amendment Act, 1998 has provided a number of means by which indigenous title can be extinguished and preference of rights of non-native title holders over those of native title holders. The Committee on the Elimination of Racial Discrimination has found various provisions of the Act discriminatory [Decision (2) 54 on Australia, 18 March 1999 (A/54/18, Para. 21)].

The position of Canadian law seems less harsh in regard to indigenous people's right to land. Although the Constitution Act of 1982 does not allow government to "extinguish" aboriginal rights over land, it may be encroached on by the "justified" needs of the larger society. Chief Justice Lamer of the Supreme Court of Canada in a case has mentioned some grounds on which he has held infringement on aboriginal title is justified. Needless to say, the grounds are not at all commensurate with values and purpose of indigenous peoples. [*Delgamuukw vs. The Queen*, paragraph 165 of the Chief Justice's opinion, unpublished decision, 11 December 1997. Also see UN Doc. E/CN.4/Sub.2/2001/21].

Now let us turn our attention to situation prevailing in Bangladesh. Shortly speaking, the traditional land rights of the indigenous peoples came under attack by British colonisation and subsequent implementation of imperial laws regarding land and revenue management. The general landlord-tenant relationship created by the British law did not feature any special indigenous rights as such. In 1950, the State Acquisition and Tenancy Act also did not recognise any special rights of the indigenous peoples attached to land. However the legal regime regarding indigenous people based on land entitlement is clearly divisible into two categories: 1. legal regime created under CHT Peace Accord signed on December 2, 1997 between the National Committee on Chittagong Hill Tracts and the Parbattya Chattagram Janasanghati Samity, and 2. legal regime in which the State Acquisition and Tenancy Act 1950 and other laws are applicable.

An important feature of the CHT Peace Accord is that by virtue of section 26 of part "B" management of land excluding reserved forest, Kaptai Hydroelectricity Project area, Betbunia Satellite Station area, state-owned industrial enterprises and lands recorded in the name of the government has been vested in the Parbatya Zilla Parishad. Furthermore the government has been debarred from right to acquire or transfer any lands, hills and forests under the jurisdictions of the Hill District Parishad without prior discussion and approval of the Parishad. Yet the Peace Accord has some weakness like non-recognition by the Constitution, or delay in establishing land-commission etc.

Elsewhere in the country other than CHT, the indigenous peoples do not have as much rights as is guaranteed under the CHT Peace Accord. In those places their land tenures are regulated by general laws which have shoved them to a greater magnitude of vulnerability. Because, alongside state's intervention, there are threats of eviction from land grabbers, influential figures and tea-estates. So what should be done right now is to chart out the areas heavily inhabited by the indigenous peoples, and give confirmation of their land rights by making special laws. Otherwise we are going to exterminate the descendants of the first human beings on earth.

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