HUMAN RIGHTS *analysis*

Shalish: The dynamism of family courts

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FAMILY Courts were established in the country in 1985 to deal with the family affairs relating to dissolution of marriage, restitution of conjugal rights, dower, maintenance, guardianship and custody of children. Earlier these issues were dealt with by the civil courts following the Code of Civil Procedure as well as by the Magistrate Courts following Code of Criminal Procedure. But these courts, overburdened with huge case logs, were unable to dispose of the suits timely. This untimely disposal of suit not only entailed loss of time, money and talent, but also perpetuated the family tension.

Ultimately, a suit for relief turned into a curse for the family. Thus, delay in disposing the suits was eroding the people's trust and confidence in the courts. Hence, the purpose of establishment of Family Courts was to administer quick and effective disposal of disputes in the family affairs and to restore people's trust and reliance on courts. Keeping in view the purpose of the Family Courts, the Family Courts Ordinance 1985 prescribes a special procedure, which, among others, fixes only thirty days for the appearance of the defendant, and provides that if after service of summons, neither party appears to contest the suit the court may dismiss the suit. However, the Ordinance has not, in fact, prescribed for establishment of any special type of court to be presided over by any judge with special qualification, skill or experience.

As a matter of fact, all Courts of Assistant Judges are required to act as Family Courts and all Assistant Judges as Judges of Family Courts. Consequently, it seems that the same judges and same courts are dealing with the same matters but following somewhat upgraded, not wholly different, procedure prescribed by the Family Courts Ordinance 1985. Then what is the dynamism in a Family Court that makes the court different from others? The answer is 'Mediation'. Mediation, which itself is a dispute resolution mode, finds its place in the formal court system for the first time through the Family Courts.

The emphasis on the mediation in the Family Courts is clearly stated at least in two respects of the Family Courts Ordinance 1985. Section 10 provides for Pre-trial Proceeding as: (1) When the written statement is filed, the Family Court shall fix a date ordinarily of not more than thirty days for a pre-trial hearing of the suit. (2) On the date fixed for pre-trial hearing, the Court shall examine the plaint, the written statement (if any) and the summary of evidence and documents filed by the parties and shall also, if it so deems fit, hear the parties. At the pre-trial hearing, the Court shall ascertain the points at issue between the parties and attempt to effect a compromise or reconciliation between the parties.

Such pre-trial proceeding is nothing but mediation-a sophisticated form of our ancient practice of 'Salishi '-which is expected to operate a good negotiation among parties and effect a compromise between the parties. But if such mediation fails to reach a compromise, then the Court shall frame the issues in the suit and fix a date for recording evidence, as is usual in case of any suits in the civil courts. But the door for mediation is not closed herewith. Section 13 of the Ordinance is very clear with its provisions that after the close of evidence of all parties, the Family Court shall make another effort to effect a compromise or reconciliation between the parties. And it is only when this final effort to a compromise or reconciliation becomes ineffective, the Court shall pronounce judgment and, on such judgment, a decree shall follow.

If we go back to the time when the Family Courts Ordinance was promulgated we can easily comprehend why such emphasis on mediation was given in the Family Courts. As it has been mentioned earlier that the backlog and delay problem had reached such a proportion that it effectively denied the rights of the citizens to redress their grievances. In other words, litigation being a primary means of resolving disputes our civil justice system had failed to provide justice in a timely manner to a larger, more diverse, faster paced, economically changing society.

On the other hand, mediation as a traditional alternative dispute resolution mode was turned to another place for exercise of power and domination by the local elite. Rather than considering which was good or bad, the mediator's own opinion became the determining factor in solving conflicts. Even if the opposing parties did not want to accept the solution, they were compelled to do so. And when the disputes were related to family, it was simply like a curse. Family Court Ordinance 1985 not only moderated the procedure of litigation, but also incorporated the traditional mediation process into the Family Courts. Thus it was not just a whimsical remix of customary salish method and modern civil court system, but an outcome of thoughtful response of the legislature to the need of time. As a matter of fact, disposing of disputes through mediation was and is the prime object of establishing the Family Courts.

Traditionally and institutionally judges in our country occupy the seat of passive listeners of the proceedings before them. The course of civil courts is controlled by lawyers and clients from start to finish. By the Family Courts Ordinance 1985, the Family Court judges are required to occupy the driver's seat and determine the course of the suit in an informal way of mediation.

But it was very unfortunate that in the first one and a half decade since the enactment of the Ordinance, the Family Courts failed to take cognisance or to apply these provisions to mediate disputes in pending suits before them. The reason was just lack of motivation of the concerned judges. Being used to adversarial system the judges presiding over Family Courts were completely ignorant about mediation. And no attempt was made to train the judges in the art of mediation, nor were they directed to use mediation. As a result, these courts had been treating the aforementioned provisions for mediation in the Family Courts Ordinance as superfluous to the Family Courts' proceedings.

However, it was in the month of June 2000 when the mediation was for the first time initiated officially in three Family Courts of Dhaka judgeship under a Pilot Project recommended by Bangladesh Legal Study Group. These three courts then faced the actual problems and challenges in practical implementation of mediation in the Family Courts. In absence of previous experience of mediation in court room, these courts found the task immensely difficult. There was another professional concern of the judges in the Family Courts. Every judge of a judgeship is required to dispose of certain number of cases in the average and for each disposal, he is given credit. In case of failure to obtain certain number of credits, the career of a judge is affected. Since there was no credit fixed for mediation, it was a real concern for the judges in the Family Courts. The authority then fixed two credits for every successful mediation and one credit for every failed one. With the passage of time all other problems were successfully and effectively dealt with.

While writing this article, I talked to a number of Family Courts judges, who informed me that by this time many of them have had training on mediation, many have learnt personally the art of mediation, and all of them have been instructed to make effort to settle the issues through mediation before going on full trial. As a result, nowadays almost all the Family Court judges are conscious about this responsibility. However, these judges opined that the major impediment now to perform more and more mediation in the Family Courts is the lack of motivation of the lawyers. Lack of awareness of the parties in the suits about such a suitable dispute resolution option is the second most important factor that complicates the problem immensely.

It is understandable that the fear of loss of cases and financial hardship discourage the lawyers to make effort for mediation. Usually trials take years and in our country usually lawyer's fees are paid part by part throughout the trials till the end. As mediation provides an opportunity to resolve the disputes rapidly, the lawyers feel that this will close their earnings and cause financial hardship. But these are the lawyers on whose advice litigants rely most. So, to make the mediation effort in the Family Courts successful, it is very much necessary, first, to dispel lawyers' fear of loss of case and financial hardship. They must be convinced that mediation will not adversely affect them financially but will open up new horizons for them. They have to be persuaded that the prospect of receiving lump-sum amount by way of fees for being lawyers in mediations is very much possible, as the people in problems do not want to see procedural niceties in the courts and get a delayed remedy, rather they want to see their problems get solved speedily, whatsoever may be the way to resolve. And no doubt a successful mediation lawyer will always attract new clients wanting to try mediation who would otherwise have shunned the court.

In the same way, advocacy is needed to make people understand the benefits of mediation in the Family Courts. Bangladesh judiciary having four tiers, the final disposal of a suit after going through each tier takes a long time, even years, perpetuating the tensions of the parties in dispute. It is also found that a suit that goes through trial in the lowest tier in most cases goes through the final tier where the losing party is the husband. The husband party's male ego being hurt it takes an uncompromising attitude, determined to take the female party to the highest court knowing well that the female party does neither have the financial means nor has the social support for going to the higher court in the capital Dhaka from their remote villages.

Therefore, the trial on appeal continues indefinitely to the great disadvantage and hardships of the female litigants. Similarly, the mediations in traditional way known as salish which village elders have been doing from time immemorial, though can bring quick relief, do not have any legal force behind them and as such not binding upon either party. Therefore, a dispute settled through salish remains dormant and can be revived at any time. There is no such problem in mediation in Family Courts. Disputes settled through mediation in Family Courts reach finality with the compromise decree. And unlike a trial or a salish there is no possibility of a dispute, settled through mediation in Family Courts, being revived. Again, most of the family suits involve financial or property settlements for which mediation in Family Courts has proven to be the best solution. These things must be made clear to the common people.

At the same time, it must be noted that with the disposal of the main suit through mediation, counter-suits, mainly criminal, arising out of the same family disputes, are also settled. Our experience shows that for each family court suit, there are other cases arising out of the main dispute. For example, against a suit for dower generally criminal cases for theft or unlawful confinement are filed, whereas a case for dowry encourages filing of a suit for defamation or libel. Against a case under the Women And Children Repression Prevention Act, 2000, the other party will invariably file a suit for restoration of conjugal rights. Therefore, mediation encompasses not only the settlement of the main suit but other related suits or cases arising out of the same disputes and with the final disposal of the main suit all others are also disposed of. Thus, the cumulative effect of mediation is much larger than disputes settled in trial or by private salish. And the object of the Family Courts is to gain this effect.

Finally, we must think of the fact that mediation is a very serious job that requires a much practical skill and techniques as theoretical knowledge. To understand both parties' perspectives on a conflict situation requires a keen, intuitive sense of human psychology, and to gain the trust of both requires an equal degree of compassion, empathy, humour and sensitivity. Few individuals possess all of these indispensable skills, and even fewer are able to calmly maintain them in heated conflict situation. These skills relate experience and leanings.

So, adequate training should be imparted to all judges of the Family Courts as well as the lawyers dealing with the suits in the same courts. It is also very much necessary to reconsider the appointment of judges in Family Courts. At present, all Assistant Judges do act as the Judges of the Family Courts. There are no other or additional criteria. In India, for being appointed as a Judge of a Family Court a person is required to have at least seven-year experience in judicial office or in practising law; and in selecting persons for appoint of judges every endeavour is made to ensure that persons committed to the need to protect and preserve the institution of marriage and to promote the welfare of children and qualified by reason of their experience and expertise to promote the settlement of disputes by conciliation and counselling are selected. It may be a guideline for us.

The writer is a law and governance researcher currently working for Bangladesh Legal Aid and Services Trust (BLAST). While writing the article he consulted the paper on 'Mediation in the Family Courts: Bangladesh Experience' by former Chief Justice of Bangladesh K. M. Hasan.

FACT *file*

Hmong refugees are suffering in Laos/Thailand

The Thai government must permanently call off the deportation to Laos of 153 refugees from the Hmong minority, said Amnesty International today. Immigration officials dragged women and girls crying and screaming out of their cell in the Nong Khai immigration centre and used tear gas against the men and boys, who have been barricading themselves in the men's cell for hours.

"These men, women and children have been recognised as refugees by the UN and would be at risk of serious human rights abuses if they were returned to Laos," said Brittis Edman, South East Asia researcher at Amnesty International. "The Thai government must call off their deportation and allow them to be resettled in a third country."

The women and girls were loaded onto buses earlier today and driven to the border. Two of the women are eight months pregnant and one has a baby who had been born weeks earlier in the detention centre. Two men were also put into the buses, having been taken from their hospital beds where they had been receiving care for a serious liver condition and a bullet wound to the face.

For unknown reasons, the women and girls were later taken back to the immigration centre at Nong Khai in north-east Thailand.

Immigration officials have called on the police to force the men and boys out of their barricaded cell. The police have used tear gas and tried to saw through the bars but were unable to gain access. Witnesses reported that police used tear gas three times, despite the fact that 20 children, all boys, were in the cell.

The Hmong people are an ethnic minority, some of whom fought alongside US forces in the Vietnam war and have since been persecuted by the Laos authorities. All 153 Hmong people in the Nong Khai immigration detention centre have been recognised as refugees by the UN refugee agency. Under international law, no government may forcibly return people to a country where they risk serious human rights abuses.

"It is particularly concerning to hear of the violence used against these refugees, some of whom are teenage boys and girls," said Brittis Edman. "These are people who have fled persecution and abuse in their own country -- the Thai authorities have a duty to protect them, not add to their suffering."

Source: Amnesty International.

FOR YOUR *information*

Structure of international human rights law

BARRISTER HARUN UR RASHID

IF the position of individuals in the international legal system in the pre-1945 world (before the setting of the UN) is compared with their post-1945 position, there would be very few that would not admit that there had been a sea-change.

From a status of rightlessness within the system, the position of individual had been transformed into one of the system's focal point.

To what can this change be attributed?

First, there is no doubt that the horrors of the Hitler's holocaust of Jews made a decisive impact on world opinion that a nation's leader could do away certain basic human rights, right to life, to its citizens. That means sovereignty over individuals is not unlimited.

Second, individuals have become subjects of international law because the Nuremberg trial for war criminals demonstrated that individuals had responsibility not to obey order if it was repugnant to basic human rights and contrary to international law. War criminals could not hide under the defence of superior orders.

Third, no longer one can argue that violation of human rights within its borders is simply a matter of domestic jurisdiction. No longer can states legitimately claim that matters concerning human rights are entirely within their purview.

Fourth, the dramatic increase in the number of international human rights instruments has played a major role in protecting human rights of individuals. This has led to a weakening of the exclusivity of state sovereignty in the human rights field.

Importance of natural law

In all this, one should not forget the role played by theory. The resurgence of natural law to provide an objective measure against which the positive laws of states might be judged is evident in the writings of such jurists as Sir Hersch Lauterpacht and in international instruments such as the UN Charter, and the 1948 Universal Declaration of Human Rights.

Natural law dominated in ancient Greek and Roman times. The principle of order, harmony and reason were inherent in nature and jurists thought that they could derive specific rules of international law from natural laws.

Advocates of natural law do not consider positive law (state-made law) invested with a true legal force as is in the law of nature. Law of nature is universal based upon reason.

The UN Charter in particular recognised that stable world conditions might only be achieved by paying due attention to the central role of human rights in maintaining peace among states.

Development of jus cogens

Jus cogens is a peremptory norm of general international law, accepted and recognised by international community as a whole, from which no derogation is permitted. The development of peremptory norms of international law (jus cogens) and the acknowledgement of such norms in the field of human rights has an impact on traditional international law on human rights.

In terms of Article 53 of the Vienna Convention on the Law of Treaties of 1969 (jus cogens), a strong argument is easily advanced that non-derogable norms of human rights law (such as torture) is deeply rooted in the substructure of the international legal order that they represent a kind of international public policy.

Characteristics of human rights treaties

The Inter-American Court of Human Rights and eminent commentators such as Lillich and Buergenthal have argued that human rights treaties are not of the conventional multilateral variety producing reciprocal rights and obligations, rather they are unilateral commitments made by states through the medium of multilateral devices.

The effect of this, once again, is to reinforce the view that just as in the past certain basic principles of international law, such as state sovereignty and non intervention, were modified to accommodate international society's concern with the protection of human rights.

Rights of individuals

Under the UN system and procedure, individuals may lodge complaints of abuse of human rights against their own states. They are investigated and explanations are called from states in the meeting of the Sub-Committee of Human Rights Commission, although secretly. Once they are heard, the Commission may publicly ask the state to rectify the abuses.

Conclusion

Human rights are political as well as legal phenomena. The liberal democratic state with its emphasis on the rule of law, the principle of democratic legitimacy and individual liberty possesses both the institutions (National Human Right Commission and the judiciary) and the culture of respect that enable basic human rights protected.

The concept of human rights is universal and it possesses a validity which is good for all places and for all times. Given the democratisation of society, it appears that all states have currently committed to protection of human rights. Human rights will continue to be a central part of the international agenda in the 21st century, especially in gender discrimination.

The author is former Bangladesh Ambassador to the UN, Geneva.