JUDGMENT REVIEW

The ICJ Judgment (Preliminary Objections) of the Rohingya Genocide Case

All the judges including the Myanmar-nominated Judge *ad hoc* Claus Kress were against Myanmar's positions in respect of Myanmar's first, third and fourth objections. Judge Xue voted in favour of Myanmar in respect of the second objection and overall position of the Judgment. Interestingly, Judge Xue took a similar position in respect of the obligation *erga omnes partes* in the *Belgium* v *Senegal* case.

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Though an application raising preliminary objections is classified as an "incidental proceeding" before the International Court of Justice (ICJ), its outcome is very crucial in determining the prospects of a case before it. A positive outcome of the preliminary objections leads to the termination of a case. In international adjudication, an allegation of international law violations is not sufficient. The existence of jurisdiction between the disputant States, and the admissibility of such litigation are the points of departure. Thus, the ICJ's decision of the preliminary objection bears the title of "Judgment", not "Order".

The preliminary objections stage of *The Gambia* v *Myanmar* case (or the Rohingya Genocide case) was very crucial. In this case, The Gambia was not an "affected" State. Most importantly, The Gambia relied on Article IX of the Genocide Convention

The fourth preliminary objection was related to the existence of a dispute. The ICJ cannot exercise its jurisdiction over a proceeding unless there exists a dispute at the date of the institution of such a case. Myanmar claimed that The Gambia failed to meet two requirements of a dispute: a certain degree of certainty and mutual awareness.

1948 as a jurisdictional basis and claimed that the Convention contains an obligation *erga omnes partes*. The obligation *erga omnes partes* denotes "an obligation under a multilateral treaty that a State party to the treaty owes in any given case to all the other States parties to the same treaty, in view of their common values and concern for compliance, so that a breach of that obligation enables all these States to take action." (Article I, The Institute of International Law Resolution on Obligations Erga Omnes in International Law, 2005 Krakow Session). Though the *Belgium* v *Senegal* case relied on this principle in respect of the UN Convention against Torture 1984, its application in respect of the Genocide Convention was not judicially confirmed in earlier instances. Thus, the outcome of this Judgment was paramount to advancing justice for the Rohingya before the ICJ.

In this case, Myanmar raised four preliminary objections. Most of the objections were not unexpected. In the hearing of the application for provisional measures, Myanmar raised similar objections. First, it claimed that The Gambia is acting as a proxy of the OIC, an international organisation, and since the ICJ's contentious jurisdiction is restricted to the States, there is no jurisdiction. The Court held that the support from an intergovernmental organisation to a State in order to institute a proceeding does not deprive that State of the status of a litigant. Alternatively, Myanmar claimed that The Gambia is abusing the process. The ICJ rejected such a claim on the ground of lack of evidence. Second, Myanmar claimed that a "non-injured" State cannot institute a proceeding under Article IX of the Genocide Convention. It argued that such a State must be "specially affected", and the case must be brought according to the rule of nationality. It further argued that Bangladesh's reservation to Article IX bars all the non-injured States to institute a proceeding. In rejecting such objection, the Court held that such a State does not require to be "specially affected". It also found that the rule relating to nationality is irrelevant in respect of a case under the Genocide Convention. Furthermore, it held that it does not need to address Myanmar's argument on Bangladesh's reservation to Article IX.

Third, Myanmar argued that its reservation on Article VIII of the Genocide Convention bars the ICJ from exercising its jurisdiction in this case. Myanmar submitted that "the competent UN organs" mentioned in Article VIII include the ICJ and a reservation on it deprives the Court of the jurisdiction. However, the Court held that Article VIII of the Genocide Convention deals with the political organs of the UN, while Article IX deals with its judicial organ.

The fourth preliminary objection was related to the existence of a dispute. The ICJ cannot exercise its jurisdiction over a proceeding unless there exists a dispute at the date of the institution of such a case. Myanmar claimed that The Gambia failed to meet two requirements of a dispute: a certain degree of certainty and mutual awareness. In response, The Gambia argued that though Myanmar set a high standard for establishing a dispute, it met both of such requirements. In its decision, the ICJ found that a dispute has been crystallised between the disputants.

This decision is remarkable from another aspect. It attracted a virtual unanimity of the Bench. It is a very rear incident before the ICJ. All the judges including the Myanmar-nominated Judge *ad hoc* Claus Kress were against Myanmar's positions in respect of Myanmar's first, third and fourth objections. Judge Xue voted in favour of Myanmar in respect of the second objection and overall position of the Judgment. Interestingly, Judge Xue took a similar position in respect of the obligation *erga omnes partes* in the *Belgium* v *Senegal* case.

However, the proceeding now moves to the merit stage. Now, the ICJ will adjudicate The Gambia's claims of the alleged violations of the Genocide Convention and uphold the reparations claimed by The Gambia in case of its positive findings. This case bears a certain novelty in comparison with earlier genocide cases. In its earlier two cases against Serbia brought by Bosnia and Herzegovina (2007) and Croatia (2015), there was an UN-mandated international tribunal and the victims were litigating States' nationals. As a result, the Court was relieved from examining many other issues. But in the present case, there are no instances of proper genocide prosecution at both national and international levels. And the alleged victims are the nationals of the Respondent. It will allow the ICJ to revisit many issues from a different perspective.

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RIGHTS WATCH

In quest of justice friendly family courts

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The cabinet approved the draft Family Court Law, 2022 on July 3 with the view to implementing a Supreme Court judgment that declared all martial law regulations and orders promulgated during General Ershad's regime as void. The present Family Court Ordinance (FCO), 1985 was enacted at that time and the draft family court law aims to repeal the earlier. According to the press, the cabinet secretary confirmed that the proposed law proposes nominal changes to the current law. There are only couple of mentionable amendments in the draft law; other than these, it is merely a conversion of previous texts from English to Bangla. The new law provides a bigger forum for appeal entailing that all judges having the status of district judge would be able to dispose of the appeal arising out of family courts now; and that court fees shall be increased from taka 50 to taka 200.

These minor changes exasperate rights activists and legal experts as they demand rigorous alteration of the current provisions of the FCO. The existing FCO clearly fails to ensure complete justice rather creates complexity and multiplicity of suits.

The draft law does not define family or family matters; it only determines the jurisdictions of the court in divorce, dower, maintenance, restitution of conjugal rights, and guardianship and custody. However, other family matters like validation of marriage, adoption, repression of women, domestic violence, maintenance of parents, legitimacy of children, property distribution, adultery etc. are neglected in our law. Family court is not like any

other traditional judicial forum; rather it deals with personal, familial, matters relating to well-being of children and emotions of the parties. Thus, it must have some unique characteristics than regular courts. People should not go to different places for other family matters. In the context of Bangladesh, we have seen that the justice seekers are instituting multiple suits and cases in family matters in multiple courts i.e. one for divorce, dower and maintenance of wife and children in family court and another for dowry in criminal court. Again, the Parents Maintenance Act fixes the court of Magistrate of First Class to resolve the matter there. Often some are going to the *Nari O Shishu Nirjatan Daman* Tribunal who does not get justice in family court. Again, occasionally husband files a declaratory suit in the civil court to declare the *Nikahnama* non-binding upon him as it is allegedly obtained by coercion from him. If we could create a court having concurrent civil and criminal jurisdictions and power to try all the family matters, the litigants will be able to get one stop service from one single court quickly.

Earlier there was a debate about whether the FCO is only for Muslims while the *Pochon Rikssi Das* v *Khuku Rani Dasi and others*, 50 DLR (HCD) 47 (1998) clarified that all citizens can seek remedy in family court irrespective of their religious faith, so far it is applicable for them. However, it is not clearly stated in the new law too. This confusion can be removed by insertion of subject matters of other faiths like adoption, right to separate residence etc. In addition, the new law should have provisions to settle family disputes of indigenous people considering their own culture, tradition and values as well.

The draft law proposes for the continuation of current trend, i.e. appointing Assistant Judges as the judges of the family court. Assistant Judges are primarily the fresh law graduates and arguably they have less maturity and experience to handle family matters. Henceforth, the legislators may consider this point to make more experienced judges as the family court judges. In India, one must have seven years of experience to deal with family matters as a judge. Moreover, under the present system, usually family court does not have separate room and the same assistant judge try other civil matters and family disputes as well, and this puts extra work load on the processes and thereby causes delay. Considering the nuances of family disputes, the judges need intensive and special training in order to perform better delivery of justice.

This proposed law has provision of double Alternative Dispute Resolution (ADR) which requires additional training for the judges to make compromises among family members. Thus, the appointment of expert court officers like counsellors is urgent in all family courts to deal with psychological matters with more care and caution. The new law may also make ADR mandatory before initiating any family proceeding and in case of failure of ADR only, the party concerned can come to the court for further relief. As custody of the child is a major concern of the family court, therefore the court must have arrangements to hear the child exclusively in a fear-free environment. Moreover, the presence of the parties should be made mandatory at the pre-trial and post-trial hearings as family matters require amicable settlement between the parties which is impossible without the presence of the parties.

Despite these shortcomings, there is a lot of scope to develop the family court system to make it truly effective for the litigants. And, this is high time we created a justice friendly family court in this country by doing necessary amendments to the new proposed law.

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