

LAW

opinion

State of emergency and human rights conventions

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WHILE there is a state of emergency, certain fundamental rights are reserved. Constitution of the People's Republic of Bangladesh though guarantees fundamental rights, reserves the right during emergency. "While a Proclamation of Emergency is in operation, nothing in articles 36, 37, 38, 39, 40 and 42 shall restrict the power of the State to make any law or to take any executive action which the State would, but for the provisions contained in Part III of this Constitution, be competent to make or to take, but any law so made shall, to the extent of the incompetence, cease to have effect as soon as the Proclamation ceases to operate, except as respects things done or omitted to be done before the law so ceases to have effect". However, Bangladesh being a state party in a number of international human rights conventions has accountability towards international communities in ensuring human rights under international legal framework.

Human dignity has got paramount importance in all human rights conventions. Universal Declaration of Human Rights (UDHR) states, "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment". Article 7 of International Covenant on Civil and Political Rights (ICCPR)

reaffirms the right, "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation". Bangladesh became a party to the ICCPR on December 06, 2000, nevertheless.

As there is a state of emergency currently prevailing in Bangladesh, ICCPR sets forth responsibility of the state parties. "In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the State Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin", stated in Article 4 of International Covenant on Civil and Political Rights (ICCPR).

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) entered into force for Bangladesh on 4 November 1998, but the State party has not ratified article 22 of the Convention. The convention has defined torture superbly: "Torture" means any act by which severe pain or suffering, whether

physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. Therefore, public official or other person acting in an official capacity are also subject of this convention.

Furthermore, CAT also deals about the state responsibilities during emergency. The convention asserts in Article 4, "For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights".

People are often deprived of their liberty during emergency and human rights conventions also cover the issue. Article 10 of ICCPR states, "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person". The convention also focuses on the rights of the detained person. It asserts that anyone who is arrested shall

be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him. It further includes that a person arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release.

People of Bangladesh and international agencies hailed the decision when state of emergency was declared by the president on January 11, 2007. However, human rights and fundamental rights must be upheld in all situations and the government must ensure that law-enforcing agencies comply with laws of the land and international laws. Bangladesh as a state party needs to ensure that law enforcement personnel both civil and military are aware of their responsibilities. "Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment", stated in Article 10 of Convention against Torture.

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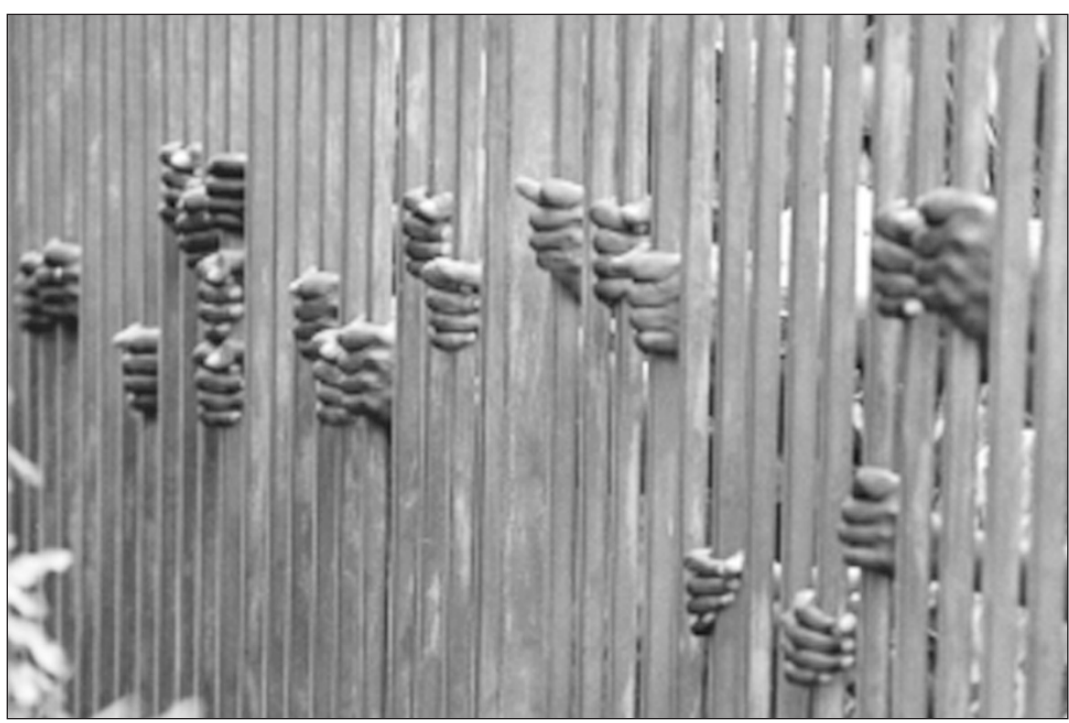
Role of clinical legal education in increasing access to justice

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IN our adversarial legal system, poverty, inordinate delay, high cost of litigation, lack of legal aid mechanism and unavailability of alternative informal justice delivery system are considered the road blocks in the way of access to justice. In most of the cases, access to justice is only available to the resourceful person and powerful elite since in order to have access to justice one must have the means which includes money. The poverty-ridden people in our country are, normally, not aware of the rights and the relief(s) they are entitled to. This is primarily due to lack of education. Even if they are made aware of their rights and the relief(s), because of financial constraints they cannot enter even the gate of justice. In this context, law and the attitude and activities of the personnel involved with the operation and enforcement of law can be used to help the poor and the disadvantaged to exercise greater control over their lives.

The institutions of legal education i.e. law faculties and law departments in the universities, both public and private, and the law colleges of Bangladesh can play a vital role in this regard. These institutions can distinguish themselves by concentrating their resources and efforts in encouraging and enhancing access to justice.

Clinical legal education is basically practical legal training through moot-court, mock-trial, participation of the students in ADR and in public legal education i.e. mass legal awareness programmes, chamber practice with the lawyers, counseling, participating in the conduct of life cases, short of appearing in the courts. Clinical legal education is learning through doing, or by the experience of acting like a lawyer. Hence this is experiential learning. Clinical legal education merits separate treatment, for it is not merely a methodology of teaching or learning, it is also providing service to the people and, hence, more practical and noble. When young students at the formative stage of their career are exposed to community legal services, they get sensitised to the problems and needs specially of the marginalised sections of the people, and feel motivated to



continue to work for them when they enter professional life.

Thus, clinical legal education programme encourages law schools to expand their educational objectives to more completely serve the needs of their students and to provide instruction about the knowledge, skills, and values that will enable their students to become competent legal problem solvers. Successful implementation of clinical legal education programmes in the law faculties and law schools in a country like Bangladesh will not only improve the quality of its legal education, but it can go a long way in meeting the demands of social justice, legal needs of the poor and improving human rights conditions.

Enhancing access to justice

Objectives of clinical legal education can be achieved under the supervision of law faculties or law schools by undertaking massive works in the following areas:

Integration of social values through curriculum: Lack of social relevancy and humanistic approach in the curriculum alienates and suppress various values, ethics, gender perspectives and views of minority etc. Therefore, by way of adding courses to the curriculum that address the issues of

gender, cultural migration, minority and indigenous peoples or allowing students to work with people of other cultures, we can equip law students to revisit their responsibilities to the marginalised section of the society. The law curriculum should be introduced in integration with other disciplines. It is time to appreciate that the subject matter of economics, sociology, anthropology, philosophy, literature and psychology are essential to the education of the future law graduates. As the minimum, the budding lawyers must be taught in the economics of law, lawsuits and lawyering.

Professional practice and skills development: Members of the legal profession need to play the role of educator, planner, and counselor. Therefore, lawyers must be trained in skills that provide for a broader understanding of various facets of legal problems. Fundamental lawyering skills are important to provide social justice. However, any set of skills confined only to traditional methods of problem solving would be manifestly insufficient.

Students would be required to undergo the entire process of lawyering either by exposure to actual cases or in dramatic simulations. In both instances, they are to act as lawyers and learn the details

of lawyering from the experience of being a lawyer, real or simulating. While the students work under the supervision of a practicing lawyer or a clinical teacher, they are expected to face situations, analyse facts and take decisions independently.

Externship: In externships, post-graduate students are required to work with leading NGOs, engaged in para-legal activities in different parts of Bangladesh. This programme proved extremely useful for the students as it provides necessary motivation and sensitises and exposes them to the society and masses at large. Placement with legal services groups will offer Bangladeshi law students valuable opportunities to broaden their perspectives, integrate such services into their careers, and join the community of legal activists.

Law clinic: Clinics remained focused on poverty law issues and formulated increasingly sophisticated educational regimes to accompany live client representation. Balancing the twin missions of service and education, the clinical movement became an institutionalised component of legal education. Today, there is little dispute about the merits of clinical legal education. By addressing human rights and social justice concerns, law

clinics and NGOs may help upgrade the quality of the legal profession in general. Dismay at the profession's low ethical and professional standards drove many top law graduates into teaching or business in the past. The clinics and expanding NGO opportunities improved legal training and encouraged high-calibre graduates to practice law.

Legal aid: Law schools can also establish legal aid cells where students and teachers can guide people in identifying their problems and make them aware of the remedies available to them. Students in these cells can also provide paralegal services such as drafting affidavits, assisting in registration of marriages, births and deaths, electoral rolls, and filling out various forms. This type of work gives students ample opportunity to learn key interviewing, counseling, and drafting skills. Another approach is for law schools to adopt a village and encourage students to conduct a survey to identify the problems that the people in that particular village face. After identifying the problems, students can approach the authorities concerned and arrange a public forum. Often, local authorities are not responsive to local citizens' concerns, especially those from disadvantaged communities. The idea here is to inform villagers about the programme and to encourage them to participate in the forum so that they can meet the officers concerned on that particular day and can settle their grievances in public. Students can be instrumental in the smooth functioning of the entire programme, and they can follow up on particular matters with the officers concerned.

Greater emphasis on alternative dispute resolution (ADR): Justice education requires us to place an even greater emphasis on negotiation, dispute resolution and collaborative working relationships. Our students must be taught how to resolve problems before they deteriorate into potential lawsuits. Our young lawyers need to be educated to recognise that even if the outcome of litigation is relatively certain, there is not always just one right answer to a problem. A money judgement may not be an effective solution for all parties, and so lawyers should work to provide for

a lasting solution, one that is worked out through negotiation or appropriate dispute resolution. They need to learn that it is not enough to root out the facts of the problem: they must understand the context in which the problem arose. 'A good lawyer can assist clients in articulating their problems, finding their interests, ordering their objectives, and generating, assuring, and implementing alternative solutions.'

Public legal education: Public legal education can be effected through lectures, discussions, publications and distribution of simplified and adopted versions of constitution and international human rights instruments etc. or adopting any other informal methods like production of street plays that focus on legal issues. As a part of the public legal education programmes the aforesaid lectures, seminars and discussions can be organised in villages, factories, professional unions, educational institutions and amongst particular disadvantaged groups like slum dwellers, garments workers or aborigines. Public legal education should also motivate the people to participate constructively in the creation of law, which has a pervasive influence on our society.

Professional ethics: The whole idea of clinical legal education can go in vain if ethical side of legal profession is overlooked. Objective of clinical legal education is not merely to help students master the skills of lawyering and make them technically sound. In representing a client's case in the court, student lawyer must not resort to any means, which is morally condemnable, must avoid resorting to false witnesses and distortion of facts. While client's interest must guide his actions and efforts, ethical and moral values must also be upheld, for in that lies greater good of the society. In fact, in all the programmes that are linked with clinical legal education emphasis is always on the aspects of justice, protection of rights and progressive development of the society. While execution of these programmes requires moral and ethical motivation, successful implementation of the programmes will itself instill further ethical and moral values in the students.

Community involvement and pro-people practice: Our legal

education have so far been concentrating on the lawyering process and skills learning. To make legal education truly meaningful in the context of our social realities effort must be made without further delay to accommodate the remaining objectives in the clinical curriculum. This, very likely, will necessitate establishment of 'out-reach programmes' where students will have the opportunity to interact with 'real problems', whose resolutions they are expected to come up with. This will allow the students to reflect on whether justice can always be done by litigation.

state to attain, through economic growth, a constant increase of productive forces of the people, with a view to securing to its citizens the provision of the basic necessities of life, including food, clothing shelter, education and medical care. But due to vicious circle of poverty, even after thirty-five years of independence these goals are yet to be achieved. High ideals of our liberation struggle as reflected in the constitution will continue to remain mere promises if we fail to ensure that every individual citizen has access to justice and access to the law- just law -- justly and equitably administered.

In the background of constitutional commitment and the societal needs, legal education must embrace a broad and comprehensive concept.

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