LAW*vision*

A Lawyer's role in enhancing access to justice

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IT has often been said in the class room lectures, seminars and other discussions that lawyers are social engineers. Engineers build buildings, roads and bridges, machinery, vehicles, airplanes and ships and, therefore, immensely contribute to the advancement of human civilisation. They have made our life easier by many inventions. What are the reasons that lawyers are seen at par with the engineers? Why are they called social engineers? Lawyers are not even social scientists, philanthropists, thinkers or mentors that the entire community should owe them for their societal development. In fact, lawyers represent their client in the court of law and plead in favour of them. In lieu, they take fees and enjoy honour and respect from the clients.

Some lawyers who have foreign degrees and/or professional trainings, like Barristers, Queen's Councillors (in short QCs) and Doctorates (PhDs) charge higher fees from their clients. The profession itself is not a charity and had never been generous to poor, vagabond and insolvent. It is because of the fact that lawyers are not salaried by the government or any other bodies and they have possibly no other source of income within the profession. Clients are the sole source of income for a lawyer; no brief, no work and thus no work, no money. They have to maintain their family with the earnings from the profession. Like all other professions, it is a means of livelihood for them. So it is beyond one's expectation that a lawyer would help a client with no fees.

Again lawyers' fees is not the first and last cost involved in a suit; there are court fees, lawyer's assistant fees, other incidental costs like expenses for collection of documents and materials, buying stamps and other papers etc. So the least expectation that a reasonable man can form is that a lawyer would take the incidental costs of the suit and no or only nominal fees from a poor client. Is this the cause that labels it as a noble profession like medical practice? The answer that swiftly comes in my mind is "no".

There are few notable differences between the two professions: We expect doctors or medical practitioners to be poor-friendly and not to be money seekers for every service they deliver to them. It is because, apart from few private and individual medical practitioners, almost all of them work for government or non-government hospitals, they are salaried and they have other source of income within the profession too. Moreover, their profession is closely connected with life and death, sufferings and happiness, illness and healthiness, pain and pleasure of human body and soul. The pleasure of saving a human life is much more than the pleasure of earning extra amount from a poor patient. But practically speaking, lawyers neither have the extent of enjoying such immense contentment nor enough scope to work for free. To me, lawyering is social engineering and a noble profession because, lawyers work for justice and peace, lawyers make equal the strong and the weak. Lawyers are the social engineers because they are entrusted with the duty to help the court in revealing the truth, upholding the justice and ensuring the equality. It is a noble profession because it does not leave a person merely because he is accused of theft, it stands beside him until he is finally proved in a free, fair and neutral court established by the law.

Society is not a body without feeling, it is an institution of human souls. It develops through many strains and stresses, it breaks and forms, it has ups and downs. Lawyers are the silent engineers in forming the contour of the society, in bringing positive change in it. They work for restoring the faith of the common people in justice and equality, democracy, rule of law and human rights. As an officer of the court, every lawyer must keep in mind the quintessence of upholding truth and revelation of real fact. The ethics and responsibility of the profession is to guide the court in right track, protect the client with the shield of law and vindicate for truth and justice only. That is why, lawyers not only represent the victims, the innocents and the vulnerable, they also stretch their hand to the criminals, the corrupts and other peace-breakers.

By defending a habitual murderer or a notorious criminal in the court, a lawyer serves the society in two ways: Firstly, establishing everyone's right to self defence and secondly, ensuring right to fair treatment from the court and law enforcing agency. The realisation of these two rights ensures the basic human rights, such as right to food, clothing, medicine, pleasure, leisure, freedom from cruel and inhumane punishment, maltreatment etc. for him who is entitled to enjoy those rights irrespective of his conviction or acquittal.

We experienced that people lynched the muggers and hijackers in the street out of desperation. They were frustrated with the existing condition of the administration of justice system. The huge backlog of cases, procrastination in delivering justice, dishonesty of the police administration, influence of the political parties and leaders, existing bad images of the lawyers propelled them to take law in their hand and thereby to cause another extra-judicial killing. Wasn't it an indication of less confidence in our administration of justice system?

Though few eminent lawyers are reported to dub such popularity as unhealthy, they did very little to stop the invisible conspiracy of tarnishing the image of the lawyers, judges and as a whole undermine the efficacy of our judiciary. The 'conspiracy' was not only from outside of the profession, it came from within too. The narrow partisanship, prioritising party interest to professional interest and integrity, exercising unfair means for availing favourable result in the court and not seeing the profession as a noble one but completely a business tool etc. are few of the practices of many of the lawyers that are destabilising the image of the profession.

There are other good numbers of reasons also that encumber the development of good relation between lawyers and clients, lawyers and lawyers, lawyers and judges. In Great Britain from where we inherited our legal system, lawyers don't bargain with the clients for their fees, don't personally attack their opponent friends, don't humiliate the persons in dock. The one and only weapon to win a case is to master one's skill and knowledge in legal technique. Therefore in Britain the profession is a symbol of politeness, generosity, courtesy as well as excellence of legal knowledge. Bangladesh stands far behind Great Britain and therefore no such comparison can usher us a possible solution to rid the existing drawbacks of our legal practice.

However, this write-up is not an endeavour to spotlight the slips of the legal practice in Bangladesh; it is just a small effort to ask the lawyers for few definite acts to ensure access to justice of the poor, the marginalised and the have-nots. It is not the duty of the government or judiciary alone to work for ensuring access to justice for everybody, the task is very much due to the lawyers too. We must want infrastructural changes and pro-people reformation from the government, judicial activism from the Bench, but the ultimate result that we are looking for rests in the hand of the Bar. Because lawyers are directly associated with the poor litigants. They could assure them, sit beside them and make them known about the court proceedings. It is for sure that few lawyers, chambers and human rights organisations headed and administered by the lawyers are already engaged in the activities that realise the right to access to justice. Nevertheless this general call intends to echo that once again in their minds.

Even after 35 years of our independence, there are thousands of poor and marginalised people, particularly women, children and elders who do not know their constitutional and statutory rights, who do not enjoy right to appear before a court, right to legal representation. There are thousands of under trial prisoners who are languishing in the jail without any legal help from the government and non-governmental side. There are religious, linguistic and racial minorities, economically downtrodden, who do not enjoy minimum protection of law. The concept of "equality before law", "equal protection of law", "equal opportunity of law" and "due process of law" appear very futile to further the cause of their social, cultural and economical as well as political safety and advancement. They hardly consider themselves safe, defended and protected by the laws of the land. In fact, they have not been enjoying the constitutional safeguards which are as sacred as the entity of the state itself. Under this setting, lawyers have the scope to come up for enhancing their access to justice leading to their empowerment and poverty reduction by doing the following:

Social and Human Rights Advocacy: Lawyers can do social and human rights advocacy by ensuring the participation of the poor and the marginalised in making decisions that affect their life. They can advocate for pro-people changes in enactments, strict observation of the provisions of the enactments by the government officials and law enforcing agencies. They can make forum for asserting the rights of the poor and sketch out the possible measures for their realisation. An example of it can be given as follows: the workers of Ready Made Garment (RMG) sector have the right to safe working environment by both domestic and international laws. But the garments workers and the owners are not aware of it; factory inspectors are also not giving it priority. Lawyers can definitely address the issue with high importance as such it relates with the safety of the workers and their family.

Legal Awareness Building: The majority of our population is illiterate and ignorant about their right. They are even not aware about their civic duties. One of the popular maxims goes as: "ignorance of law is no excuse". It means nobody can defend himself that he or she does not know about the law. Lawyers can choose a particular field, e.g. family law or fundamental rights guaranteed by the constitution, and therefore can make them aware about their rights, relief in case of their violation, steps to be taken for their enforcement etc. Legal awareness building can be an effective tool for unshackling the country from legal illiteracy.

Providing Legal Aid and Services: We have a Legal Aid Act passed in 2000 and it was amended with few changes in 2005. It provides for legal aid to the poor and the distressed who cannot afford lawyers' fees and other incidental costs. The said Act establishes a Legal Aid Institution governed by a National Legal Aid Board and provides for District Legal Aid Committee, Upazilla Committee and Union Committee. Six years have passed but the Legal Aid Institution is yet to be institutionalised. Research has shown that a large number of lawyers are not aware about the Act and activities of the National and District Legal Aid Committees. Lawyers must equip themselves with this rapidly growing branch of jurisprudence. They can render legal help and support to the poor litigant without or with nominal cost. If not possible, at least they should channel them to the government legal aid fund or refer them to other human rights organisations which has offices in regions and/or districts and also close networking and coalition with local

NGOs and other legal organisations.

Applying the modes of ADR: There are various modes of Alternative Dispute Resolution (ADR), e.g. negotiation, mediation, arbitration and conciliation. Mediation and arbitration are addressed in our legal system. Section 89A, 89B, 89C of the Code of Civil Procedure (C.P.C) and section 10 and 13 of the Family Court Ordinance are notable provisions that call for mediation and arbitration by the court. Section 6, 7 and 9 of the Muslim Family Law Ordinance also talk about Arbitration Council in Union Parishad. Apart from these legal swathes, rural Bangladesh has a long tradition of doing Shalish in family matters or in minor disputes. Lawyers must note that shalish is still the most effective procedure for quick and useful legal redress. Shalish provides a win-win situation for both the parties and entails less sufferings and cost. Shalish as an informal mode should not be perceived as gratis. Lawyers can be mediators and can earn money and respect from both the parties. Like family matters and all other civil matters lawyers can try with the ADR and if it fails then they can take recourse to the court of law. Lawyers can popularise ADR in Bangladesh and make sure access to justice is gained by the poor and the distressed.

Filing Public Interest Litigation (PIL): Public Interest Litigation, popularly known as PIL cases, is one of the effective modes of enhancing access to justice. There are cases where infringement of the rights of a large population remains disregarded and their common interest deprived of due to lack of policy, proper supervision, and guidelines by a government authority. Such a situation can be challenged by the emerging concept of PIL. These PIL cases have to be instituted in the High Court Division of the Supreme Court under article 102 of the Constitution. Lawyers are the right protectors, so they have opportunity to bring such violation of the rights of a large community to the Court. We have already seen some laudable initiative from the lawyers and human rights organisations in instituting PIL cases including challenging the Section 54 and 167 of the Cr.P.C, the validity of the Gram Sarker Ain 2003. Every Lawyer could be a light-house of our nation by keeping things in proper projection by instituting PIL cases.

Conclusion

In order to ensure access to justice of the poor, following must be done regarding the profession itself:

(i) The professional etiquette and responsibility of the lawyers must be upheld,

(ii) The overall qualities of the honourable members of the Bar must be developed.

Bangladesh Bar Council has taken many initiatives to train the lawyers. However, these have not been well responded and found ignored by many of them. It is praiseworthy that the conducting of Bar Vocational Course (BVC) is essentially included as a precondition of availing licence for legal practice.

Similarly Bar Council can also play key role in providing legal aid, legal awareness building and conducting social and human rights advocacy:

(i) It can encourage Public Interest Litigation (PIL) on local issues from members of the local Bars.

(ii It can require an advocate to provide free legal aid service in at least five cases in a year and conduct such number of awareness building meetings, advocacy as it thinks fit.

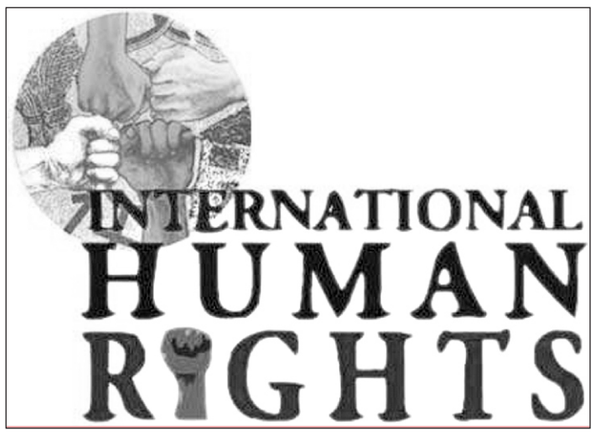
(iii) It can enhance its monitoring and evaluation programme and can coordinate and supervise those activities with the help of local or concerned Bar Association.

Like all other professionals, lawyers should also be accountable and their accountability should not be ensured by themselves. Lawyers are not only certified for representing the rich, the strong and the privileged in the court of law; their certification also require them to think about the poor and the marginalised. We must bear that lawyering for poor is lawyering for justice.

The writers are legal researchers and rights activists.

HUMAN RIGHT*advocacy*

The concern is humanity



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INTERNATIONAL humanitarian law is a branch of the law of nations, or international law. That law governs relations between members of the international community, namely States. International law is supranational, and its fundamental rules are binding on all States. Its goals are to maintain peace, to protect the human being in a just order, and to promote social progress in freedom.

International humanitarian law (IHL), also called the law of armed conflict and previously known as the law of war, is a special branch of law governing situations of armed conflict -- in a word, war. International humanitarian law seeks to mitigate the effects of war, first, in that it limits the choice of means and methods of conducting military operations and secondly, in that it obliges the belligerents to spare persons who do not or no longer participate in hostile actions. Fundamental rules of IHL are -- ensure humane treatment of persons not taking part in hostilities, do not kill or injure protected persons, collect and care for the wounded and sick, respect the lives and dignity of captured combatants and civilians, respect fundamental judicial guarantees during trials and proceedings, the choice of means and methods of warfare is not unlimited, distinguish between combatants and civilians at all times -- attack only military objectives.

International humanitarian law and international human rights law

Resemblance

Both share a common purpose -- protecting human dignity; guarantee respect for life -- physical and mental well being. Both technically apply in armed conflict but they are designed to apply to different kinds of situations. IHL offers more protection in armed conflict than general non-derogable human rights.

Difference

International Human Rights Law	International Humanitarian Law
Human rights law is designed to govern in peacetime	IHL only applies in situations of armed conflict
Lex generic	Lex specialis
Human rights can be derogated from in certain circumstances	Protections under IHL can NEVER be derogated from and apply equally to all parties to the conflict, if protected persons
Injured party institutes legal proceedings -- against government officials and agencies	Protection by the ICRC or protecting powers
Reports to international committees	Enforced by domestic courts or an international tribunal/court by prosecution (as War Crimes)
Serious violations can be prosecuted (as Crimes Against Humanity)	All individuals (government officials and/or private citizens) may be held responsible for violations

ICRC and IHL

The International Committee of the Red Cross (ICRC) was founded nearly a century and a half ago. It seeks to preserve a measure of humanity in the midst of war. Its guiding principle is that even in war there are limits: limits on how warfare is conducted and limits on how combatants behave. The set of rules that were established with this in mind and endorsed by nearly every nation in world is known as international humanitarian law, of which the Geneva Conventions are the bedrock. Generally this new branch of international law is introduced through ICRC for the first time. Under the statutes of the International Red Cross and Red Crescent movement, one of the ICRC tasks is to prepare possible developments in international humanitarian law. So, ICRC is playing as a promoter of humanitarian law. The ICRC's special role was assigned to it by States through the various instruments of humanitarian law. However, while it maintains constant dialogue with States, it insists at all times on its independence. For, only if it is free to act independently of any government or other authority, can the ICRC serve the true interest of the victims' of conflict, which lies at the heart of its humanitarian mission.

The ICRC is a neutral, impartial and independent humanitarian organization. Its mandate to protect and assist the victims of armed conflict has been conferred on it by States through the four Geneva Conventions of 1949 and their Additional Protocols of 1977, worthy successors to the First Geneva Convention of 1864. The ICRC's mandate and legal status set it apart both from intergovernmental agencies, such as United Nations Organization and from Non Governmental Organizations (NGOs). Through agreements which are subject to international law, the ICRC enjoys the privileges and immunities usually only granted to intergovernmental organizations. ICRC is an impartial, neutral and independent organization whose exclusively humanitarian mission is to protect the lives and dignity of victims of war and internal violence and to provide them the assistance. ICRC visits don't affect the legal status of the detainee, ICRC does not question the legitimacy of detention, ICRC does not ask for the release of detainees except on humanitarian grounds. ICRC has 7 fundamental principles -- humanity, impartiality, neutrality, independence, voluntary service, unity and universality.

ICRC has delegations and missions in some 80 countries around the world. From December 2005 ICRC has three emblems, Red Cross, Red Crescent and Red Crystal.

Chronological development of IHL

1864: Geneva Convention for the amelioration of the condition of the wounded in armies in the field

1899: The Hague Conventions respecting the laws and customs of war on land and the adoption to maritime warfare of the principles of the 1864 Geneva Convention

1906: Review and development of the 1864 Geneva Convention

1907: Review of the Hague Conventions of 1899 and adoption of new Conventions

1929: Two Geneva Conventions:

· Review and development of the 1906 Geneva Convention

· Geneva Convention relating to the treatment of prisoners of war (new)

1949: Four Geneva Conventions:

i Amelioration of the condition of the wounded and sick in armed forces in the field

ii Amelioration of the condition of the wounded, sick and shipwrecked members of armed forces at sea

iii Treatment of prisoners of war

iv Protection of civilian persons in time of war (new)

1954: The Hague Convention for the protection of cultural property in the event of armed conflict

1977: Two Protocols additional to the four 1949 Geneva Conventions, which strengthen the protection of victims of international (Protocol I) and non-international (Protocol- II) armed conflicts

1997: Convention on the prohibition of the use, stocking, production and transfer of anti-personnel mines and on their destruction

1998: Rome Statute of the International Criminal Court

2000: Optional protocol to the Convention on the rights of the child on the involvement of children in armed conflict

2005: Protocol addition to the Geneva Convention of 12 August 1949, and relating to the adoption of an additional distinctive emblem

Bond between ICRC and South Asian Teaching Sessions (SATS)

The ICRC has been conducting an annual South Asian Teaching Session (SATS) on International Humanitarian Law since 1998. The SATS is an eight days intensive training course on IHL, designed for academicians and mid level legal professionals who are working in the areas of IHL, human rights and related fields of International Law. Commencing in 2007 the ICRC will conduct two SATS each year, in cooperation with local academic institutes and international law organizations. The first SATS in 2007 was held in cooperation with NALSAR (National Academy for Legal Studies and Research) University at Hyderabad, India from 11-18 April 2007. The first SATS in 2007 included 45 participants from nine countries (Afghanistan, Bangladesh, Bhutan, India, Iran, Maldives, Nepal, Pakistan and Sri Lanka). Actually, this was not a teaching session in general. The participants from multi culture shaped a coloured gathering and gave themselves the opportunity to share. It twisted a knot among the participants from various ethnicities. This eight days teaching session offered the participants a vast knowledge on international humanitarian law.

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