

"ALL CITIZENS ARE EQUAL BEFORE LAW AND ARE ENTITLED TO EQUAL PROTECTION OF LAW" - ARTICLE 27 OF THE CONSTITUTION OF THE PEOPLE'S REPUBLIC OF BANGLADESH



# Patterns of judicial activism in Bangladesh: Constitutional cases

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ACCORDING to one U.S. scholar, the terms judicial activism and judicial activist during the 1990s appeared in 3,815 journal and law review articles, not to mention that these terms appeared in another 1,817 articles in the first four years of the 21st century - the average number of articles published per year exceeded 450 (Keenan D. Kmiec, 1994). Despite such popularity, judicial activism has remained little more than a blurred buzzword. The term has been used by many authors on the assumption that the readers will understand what they have intended to mean. In fact, judges, lawyers, scholars, journalists, laypersons everyone has his own conception of judicial activism. Even in the realm of law, the professionals and the academics are at a great deal of variance with the idea of judicial activism. Anyone would hardly resist the temptation to revisit the writings of Edward McWhinney, Justice P. N. Bhagwati and Ronald Dworkin so as to show how differently judicial activism was conceptualized by different authors having different backgrounds in different period of time.

Edward McWhinney is the author who first attempted to make a scholarly exposition of judicial activism in two of his articles [39 MINN. L. REV. 837 (1955) & 33 N.Y.U. L. REV. 775 (1958)] during the 1950s. In his first article, McWhinney discussed judicial activism and judicial restraint respectively in terms of 'presumption of constitutionality' and 'presumption of unconstitutionality' of legislation pointing to the philosophical differences among the then justices of the U.S. Supreme Court. In his subsequent article, McWhinney recognised usefulness of activism-restraint dichotomy for clarifying thinking about judicial thought-ways. He thought that a wise constitutional judge should be able to apply the advantages of both restraint and activism; the judge needs to know when to favour which one. McWhinney conceptualised

activism as a judicial tool/technique. Compared to Edward McWhinney, Ronald Dworkin offers a broader and more objective view of judicial activism. Dworkin's view of judicial activism registers acceptance of vague constitutional provisions in the spirit implying that citizens do have certain moral rights against state. Justice Bhagwati's conception of judicial activism is more functional rather than conceptual. Judicial function, according to him, inevitably behaves a judge to wear the activist's mantle [18 Commw. L. Bull. 1244

Bhagwati, is essentially a goal-oriented task wherein judicial activism is rather an 'ought' than a contingency.

In the light of the foregoing discussion, this article takes the view that judicial activism signifies the approach that approves justifiable (I do not say 'justified') transgression of the limit and extent of judicial authority by the judges in order to recognize and enforce citizens' rights against state. There are two important desiderata of such activist decision making process. First, the judges have to provide justification in support of such decisions. Justification, when appropriate, has the potential to contribute towards development of jurisprudence and expansion of jurisdiction. Furthermore, justification is necessary at least for separation of powers reason. Second, any activist decision should not fly in the face of other sound principles of law and justice. The issue to be dealt with hereafter in this article is to outline (on the basis of the idea of judicial activism mentioned above) the patterns of exercise of judicial authority partaking of activism in the constitutional cases decided by the supreme judiciary of Bangladesh. It deserves to bear in mind that availability of judicial remedy generally depends on the combination of three aspects. First, there should be a violation of a substitutive legal right or breach of a duty giving rise to a legal dispute, or commission of a punishable wrong; second, the right to institute legal proceedings (locus standi) in respect of such violation, breach or commission; and lastly, the right to judicial remedies to be dispensed by the judiciary in accordance with law. The delineation of the patterns of judicial activism in the Bangladesh with regard to constitutional cases will require determining the extent and limit of the judicial authority vested in the supreme judiciary under the constitution in respect of all these aspects.



(1992)]. Adducing Plato and Aristotle's view of administration of justice, he holds that law alone is not enough for rendering justice because of the gap that exists between generalities of law and the specifics of life. This gap needs to be constantly filled up by the judges. The application of law has to be associated with and complemented by the human faculty of wisdom. He has defended judicial activism as an integral attribute of judicial function. Judicial function, according to justice

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IN his message for the International Day of Democracy 2011, UN Secretary-General Ban Ki-moon said "On this International Day of Democracy, let us redouble our efforts to support all people, in particular the young the drivers of this year's momentous events in making democracy a working reality. This Day belongs to them. Let us honour their commitment to a lifelong journey in democracy."

Democracy is a universal value based on the freely expressed will of people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives.

While democracies share common features, there is no single model of democracy. Activities carried out by the United Nations in support of efforts of Governments to promote and consolidate democracy are undertaken in accordance with the UN Charter, and only at the specific request of the Member States concerned.

The UN General Assembly, in resolution A/62/7 (2007) encouraged Governments to strengthen national programmes devoted to the promotion and consolidation of democracy, and also decided that 15 September of each year should be observed as the International Day of Democracy.

In addition, the Assembly reaffirmed that democracy is "a universal value based on the freely-expressed will of people to determine their own political, economic, social and cultural systems, and their full participation in all aspects of life."

The theme of the 2011 International Day of Democracy is What do citizens expect from their parliament?. Worldwide, it appears that parliamentarians are struggling to meet the ever growing expectations of citizens. Data suggests that citizens hold parliamentarians to account principally for the services that they are able to deliver outside parliament, not for their law-making role or their ability to oversee the Executive.

Source: UN.ORG.

## LEGAL EDUCATION



# Ambitious Law Dept. at Jahangirnagar University

MD. GOLAM SARWAR

THE law and the lawyers are what the law schools prepare them. In Bangladesh, over the years, there has been a considerable degeneration of academic standards within the existing law departments with little scope for innovation in the design of courses and with absence of critical approach to legal studies. Going beyond such traditional academic standards, the newly established Department of Law and Justice at Jahangirnagar University is going to create a milestone in the arena of legal education after 40 years of its inception in Bangladesh. Jahangirnagar University is the 6th public university which opens law department from the academic year of 2011-2012. It is now a known fact that the curriculum of our legal studies is aged, overburdened with the colonial legacy. The Legal curricula is neither tested nor considered in relation to the demand of people for justice, the social or distributive justice in particular. To come out from this scenario, the Jahangirnagar Law Department would create exception to reach the goal of world class education where students will move towards socially responsive legal education. A well administered and socially responsive legal education is imperative not only to produce skilled law graduates but also to create cultured law abiding citizen who are inculcated with the values of human being, legal ethics and human rights.

The Chairman of this new department - Dr. Mohammad Shahabuddin, a young, energetic and enthusiastic legal professional, shares his inspirational vision with the writer. He started his message with the belief that "law is an effective tool for any social change and our vision is to provide such a critical approach to legal studies through which future protagonists of social change will build a progressive society".

We know our legal curricula is not people friendly and very much traditional, archaic and to

certain extent obsolete. Though in terms of legal education a lot of evolutionary process has been developed but we are still within the four corners of conventional approach. Considering this, we have made our curriculum to such standard which would be very much fitting to the age, addressing the emerging realities of the legal field. Here, it is worth noting that, as a part of our goal of making our curricula in line with the international standard, JU law syllabus will be discussed by prominent jurists in a special session of the Third World Approach to International Law (TWAAIL) Conference to be held in October 2011 at the University of Oregon, USA, the chairman added. The Jahangirnagar Law Department is the sec-

ond public law school

ment is much aware of this need. Law itself is a part of the problem. Only a critical approach to law can solve the problem by understanding what the law is, where the law is, who made the law and what is their interest. For that, we have to create the necessary foundation upon which the system would develop.

About the inculcation of human rights based education in our legal education, he pointed out that the standards of human rights which we are following in our country to protect and ensure our rights are determined by some International bodies like the UN which do not always take into account our social structure, norms, and values. In this context, law students should be nurtured by focusing on parallel methods of teaching human rights.

In this way, they can take the challenge of devising alternative ways of perceiving human rights standards and their relevance for social engineering.

Clinical legal education is a crucial method to link up law with the process of change, progress, development and social transformation. Through Clinical legal education students can develop real world experience, which is the best possible educational experience a law student can have. Considering this, JU law dept. introduced a non-

credit but compulsory clinical legal education courses including legal research methodology and trial advocacy.

The quality and standard of legal education acquired at the law school is becoming a hindrance rather than an opportunity to create a movement towards the delivery of justice. Can the law department at JU create such a movement? If we want to see the answer affirmative, action oriented effort along with commitment and dedication is a must. "Never doubt that a small group of thoughtful people can change the world. Indeed, it's the only thing that ever has."

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ond public law school (Jagannath Law being the first) in the country to adopt the semester system in line with the international standard where students can adopt our mainstream legal syllabus in a smooth way. We will try to set such standard which will develop the skills of students to understand the law and to apply the law in a given situation going beyond the approach of only memorising statutes and rules of law, he notified.

Law school have not only an obligation of preparing law graduates, but also an obligation of investigating the problems of legal and justice system and devising solution to such problems. In this regard the Chairman informed that his depart-

## HUMAN RIGHTS MONITOR



# UNHRC decision on custodial death

THE UN Human Rights Committee has found the government of Kyrgyzstan responsible for the 2004 death of a detainee in police custody, in a case that reinforces continued concerns about the use of torture and violence by police in Kyrgyzstan.

In response to a complaint filed by the Open Society Justice Initiative and local lawyer Tair Asanov, the committee found that Tashkenbaj Moidunov was killed in police custody in the local police station in the town of Bazar-Kurgan in October 2004.

The committee further found that Kyrgyzstan had violated the right to life, protection from torture and the right to effective remedies. It has called for a proper investigation, prosecution and reparations.

"This decision of the authoritative UN body should ring a bell for the Kyrgyz authorities on the systemic failings of the justice system," said James A. Goldston, executive director of the Open Society Justice Initiative. "In addition to providing reparations to Moidunov's family for their suffering and prosecuting those responsible for his torture and death, the authorities must ensure effective control over all places of detention, and create an effective independent mechanism that will promptly investigate allegations of police abuse."

On October 24, 2004 Tashkenbai Moidunov, 46, was taken to a police station in Bazar-Kurgan, Kyrgyzstan. An hour later he was dead. An ambulance doctor who examined him found finger marks around his neck, and asked if he had been strangled. The police said that he had had a heart attack, and then changed their story to say he hung himself.

Despite the evidence, there has never been a proper investigation into his death. The authorities failed to get a detailed description of the crime scene, did not carry out a reconstruction, did not establish the exact sequence of events, and did not request medical records.

The first activist to draw attention to the case was Azimjan Askarov, a human rights defender currently in prison with a life-sentenced delivered after a manifestly unfair trial.

The same police station in Bazar-Kurgan was also the site in August of another death in custody. Usmanjan Khalmyrzaev, a 40 year old man, died in the intensive care department of the local hospital the day after having been sent there after being held at the station for four hours. Before his death, he told his wife that he had been subjected to torture and extortion at the police station.

Nobody went to jail for Moidunov's arbitrary killing. One police officer, Abdukaimov, fled. Another, Mantybaev, was convicted of negligence but then exempted from criminal liability due to an alleged reconciliation with the family. Contributing to the climate of impunity, the Supreme Court decided that a small payment to assist with the funeral was sufficient to let Mantybaev escape any sanctions.

"We could not find justice in our country and appealed to the UN," says Kaydakan Dzhumabaeva, sister of the deceased. "We always knew that our brother was killed by the police. But the investigative bodies and the courts did not properly fulfill their responsibilities and as a result, the police did not get adequate punishment."

The committee concluded that Kyrgyzstan should conduct an impartial, effective, and thorough investigation into the circumstances of the Moidunov's death, prosecute those responsible, and provide full reparation including appropriate compensation. Kyrgyzstan was given 6 months to implement the decision and inform the UN about actions taken.

The Justice Initiative has filed two other death-in-custody complaints against the Kyrgyz authorities at the Human Rights Committee.

Source: Open Society Justice Initiative Press Release.