LAW ANALYSIS

Legal aid and access to justice

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MANY people of Bangladesh deprived of access to justice due to their poverty. Due to lack of security & protection for women victim & witness women feels threat to file cases, in some cases after filing cases women do not continue the cases due to threat of opposition, sometimes do the compromise with the perpetrator. To provide legal aid to the affected women, poor people and other vulnerable groups government legal aid fund was introduced in 2000. It was an initiative to provide assistance to indigent litigants in the legal matters both inside and outside the courts and providing access to legal aid throughout the country.

To ensure access to justice of the poor people government enacted Legal Aid Services Act 2000, (LASA). Enacting Legal Aid Services Act 2000, LASA is a praiseworthy initiative of government. Funds under this Act is allocated in 61 districts under the custody of District and Session Judge for helping the poor and distressed people, physically challenged, widow, victim of trafficking and acid throwing, deserted women, helpless disable, who have no financial ability to get justice. One of the major observations of Manusher Jonno Foundation (MJF) study on Legal Aid Fund is that fund utilization rate is 90% in eight districts and the same is very low in 16 districts. Underlying cause of high performing district is legal aid committee is pro active, minimum days between applications received and approval decision of DLAC, awareness of mass people, beyond monthly meeting interim meeting is held, reporting and record keeping is updated, NGOs are providing logistics support to the victim and helping victim to access district legal aid .

Shortcomings

Limitations of Legal Aid Services Act 2000 Act and Rules:

- Fees allocated for lawyers are not at all competitive and fee reimbursement process is lengthy.
- Definition of indigent litigant is not time befitting. According to 2001 Rules of the Act, whose yearly income is 3000 may apply for the legal aid fund. It was an obsolete provision in compare to the minimum yearly income /expenditure to lead livelihood of a person.
- Awareness building initiatives both at the national as well as district and grass-root levels are absent.
- District level offices are not available where people will seek this service.
- District committee monthly meeting is not being held regularly in some of the districts.
- Logistics supports for victim are not specifically mentioned in the rules and district judges do not apply their discretionary power to allocate fund as victim's logistics..
- Upazilla and Union committee of govt. legal aid are not functional. This committee could be a good reference point to refer victim to the district committee.
- DNA test or some other similar medical tests of the victim are used as essential evidence in criminal cases, rape cases and family suits etc. There is no provision in LASA or its regulation to bear such expenditure from the legal aid fund.

Recent development

Government legal aid program in the country for the last two years got more effective turn and seem to be functional. Considering pilot program success Government has decided in principle to amend the RTI Rules 2001 and Regulation 2001 which includes:

Increasing lawyer fee

It was one of the common criticisms from lawyer's community that the lawyer fee is very poor in legal aid cases. Considering the situation lawyers fee has been increased. For preparing petition of civil and family matters lawyers fee has been proposed as tk.1500, at present it is 1200. For preparing written statement of civil and family matters lawyers fee has been proposed as tk. 1500, at present it is 1200. Again, for preparing petition of criminal matters fee of assistant public prosecutor has been agreed to taka 800. For preparing admission and revision of application fee has been decided to be fixed as taka 400.

Increasing eligibility range of 'insolvent person'

Considering living standard of common people a gazette was published in 2009 where yearly income eligibility range has been increased to 30000 from 3000. Recently Government has decided in principle that people whose yearly income does not exceed Tk.50000 are entitled to get help from this fund. Shortly gazette will be published.

Increasing eligibility range of Freedom fighters

Freedom fighter whose yearly income is within tk.75000 is entitled to get help from this fund.

Introducing district legal aid offices

Govt. has agreed in principle to set up District legal Aid Offices in 64 districts. Judicial officer whose rank is similar to assistant Judge will be designated as District legal Aid Officer. Office assistant and MLSS will be recruited also and some equipment like computer and photocopier will be provided for the District legal aid office.

Formation of upazila and union committee

Recently NLASO published gazette notification to form Upazila and Union legal aid committee.

Conclusion

We hope that due to these progressive initiatives poor people will be benefited getting Access to Justice. Lawyer will be encouraged to facilitate litigation under Legal Aid Fund. Application form will be available in the permanent District Legal Aid Offices. Barriers on the way of access to justice for common people will be removed soon and poor litigants will be encouraged to get the highest benefit of legal aid. District legal Aid Office will be the center place for the poor litigants in availing government legal Aid fund.

[Information and data source: NLASO, Ministry of Law, Justice and Parliamentary affairs]

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LAW IN-DEPTH

Patterns of judicial activism in Bangladesh: Constitutional cases

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(…. from previous issue)

BANGLADESH is a unitary parliamentary democracy with a written and not-so-rigid constitution. Separation of powers supposedly exists among the legislature, the executive and the judiciary. The supreme judiciary is invested with the authority to issue directions or orders to any person or authority as may be appropriate for the enforcement of any of the fundamental rights [Article 102(1)]. The supreme judiciary, under the constitution, wields not only the authority to enforce fundamental rights but also the power of judicial review to declare so much of a law unconstitutional as is inconsistent with the fundamental rights or other judicially enforceable provisions of the constitution. The constitution endorses the power of the supreme judiciary to declare laws and makes them binding on the subordinate courts [Article 111]. In addition, the supreme judiciary has been accorded the power to do complete justice in any cause or matter pending before it in the most befitting manner [Article 104]. However, the authority of the supreme judiciary to grant remedy in legal causes does not go uncontrolled. For instance, the constitution does not accord to the supreme judiciary the authority to go beyond the letters of the constitution so as to construe a cause as violation of substantive provisions of fundamental rights which however have not been expressly spelled out in the constitution as fundamental rights. Presumably, such authority to transgress the letters of the constitution would have the risk of rendering the constitution itself meaningless. Another important hold-back is the exercise of judicial review has not been extended to certain matters which come under the constitutional provisions known as the fundamental principles of state policy. In effect, the constitution provides for deference of these matters to the other organs of state for implementation. The authority of the supreme judiciary to enforce fundamental rights does not extend to invalidating any disciplinary laws relating to members of a disciplined force limited to ensuring discharge of their duties [Article 45], any laws providing for detention, prosecution or punishment of a member of armed, defence or auxiliary forces [Article 47(3)]. The jurisdiction of the supreme judiciary to enforce fundamental rights does not extend to invalidating certain laws passed with the intention of giving effect to the provisions of fundamental principles of state policy [Article 47(1)]. The constitution debars supreme judiciary from calling into question certain laws specified in the First schedule on the ground of inconsistency with the fundamental rights [Article 47(2)]. During the operation of Proclamation of Emergency, the right move the supreme judiciary for enforcement of fundamental rights including all such pending proceedings may be suspended by the executive [Article 141C(1)]. Rules relating to locus standi and forms of remedies constitute important hold on the jurisdiction of the supreme judiciary. Only an aggrieved person is entitled to seek constitutional remedy upon presentation of application before the supreme judiciary. A member of armed, defence or auxiliary forces can resort to the supreme judiciary for enforcement of fundamental rights relating to detention, prosecution or punishment [Article 47A (1)]. The supreme judiciary cannot grant such types or quantity of remedy as are not stipulated in the constitution. Judicial remedy is not available against causes or authorities in respect of whom no remedy has been provided in the constitution. [Article 102(5)]. In delineating the patterns of judicial activism in the constitutional cases, one has to be mindful of this paradox- on the one hand the supreme judiciary of Bangladesh is invested with an immense authority to defend the constitution, enforce fundamental rights of the citizens against state, but on the other, the supreme judiciary is either debarred from or under restriction in respect of exercising its jurisdiction over certain matters. As has been argued, the scope of the supreme judiciary to externalize activism lies in justifiable overcoming of the above-mentioned restraints set down by the constitution in order to recognize and enforce citizens' rights against state.

Having regard to the above analysis, judicial activism in Bangladesh should assume the following patterns as regards disputes relating to fundamental rights or substantive provisions of the constitution:

(I) The supreme judiciary may adjudge situations as violation of fundamental rights which however have not been expressly spelled out in the constitution as fundamental rights. *Dr. Mohiuddin Farooque* v *Bangladesh* [55 DLR 69] sets an example of this pattern. In this case, the supreme judiciary has construed the right to healthy environment as a fundamental right although a grammatical or literal interpretation would not support such view. The supreme judiciary has argued that right to life means a qualitative life free from environmental hazards (para-53). Noticeable is the effort of the supreme judiciary to give a literal façade to such construction by making reference to 'right to life' enshrined in Article 32 of the constitution.

(II) The supreme judiciary may adjudge situations as violation of substantive provisions/stipulations (other than fundamental rights) which however have not been expressly spelled out in the constitution. *Anwar Hossain Chowdhury* v *Bangladesh* [1989 BLD (Spl) 1] constitutes the most relevant example of activism of such pattern. Although the supreme judiciary invalidated a constitutional amendment for being incompatible with one or more of the basic features of the constitution, there was no stipulation to this effect in the then constitution.

(III) The supreme judiciary may adjudge to enforce constitutional provisions which have been expressly declared to be not enforceable. Examples would include enforcement of fundamental principles of state policy. The High Court Division of the supreme judiciary made such an effort, though indirectly, in *Winifred Rubie* v *Bangladesh* [1981 BLD 30] which the Appellate Division later reversed *Bangladesh* v *Winifred Rubie* [1982 BLD (AD) 34]) BLD 30] relying on literal interpretation of the constitution.

(IV) The supreme judiciary may adjudge to enforce substantive constitutional provisions respecting matters, persons or authorities to whom the jurisdiction of the supreme judiciary has not been extended to. In the case of *Jamil Huq* v *Bangladesh* [34 DLR (AD) 125], the supreme judiciary has affirmed that it may exercise jurisdiction over a court martial established under the Army Act, 1952 on grounds such as coram non judice or mala fide although the constitution provides that a court or tribunal established under a law relating to defence remains outside the ambit of authority of the supreme judiciary.

As regards procedure, the supreme judiciary may externalize activism in the following ways. (I.) The supreme judiciary may relax procedural restrictions pertaining to institution of judicial proceedings. The case of *Dr. Mohiuddin Farooque* v *Bangladesh* [49 DLR (AD) 1] typifies this pattern. In this case the supreme judiciary gave a broader meaning to the concept of 'aggrieved person' making way for persons to institute proceedings who even may not have been actually suffering from the cause. Understandably, this case marks the beginning of public interest litigation in Bangladesh. (II.) The supreme judiciary may disregard procedural formalities of judicial proceedings and move on her own. Suo motu proceedings constitute examples of this pattern. Suo motu proceedings are initiated by the court on its own motion when it comes to court's knowledge about situations concerning violation of citizen's fundamental rights or others. Therefore, in suo motu proceedings, the supreme judiciary disregards the formalities of presentation of application from the litigator for moving the supreme judiciary. *State* v *Deputy Commissioner*, Satkhira [45 DLR (HCD) 234] is the first reported suo motu proceedings in Bangladesh. (III.) The supreme judiciary may condone non-compliance with procedural formalities or requirements in judicial proceedings. The exercise of so-called epistolary jurisdiction by the supreme court of India is a case in point of this pattern. In *Rural Litigation and Entitlement Kendra* v *State of UP* [AIR 1985 SC 652], the Supreme Court of India treated a letter from the Rural Litigation and Entitlement Kendra, Dehradun as a writ petition. The supreme judiciary of India, in this instance, excused the formal requirement of filing application with affidavit.

As regards remedy, judicial activism in Bangladesh partakes of the following patterns. (I.) The supreme judiciary may grant such types or quantity of remedy as are not stipulated in the constitution. In *Secretary, Ministry of Finance* v *Masdar Hossain* [2000 BLD (AD) 104], the supreme judiciary gave direction for establishment of a separate Judicial Service Commission and Judicial Pay Commission. Objection was raised to the jurisdiction of the supreme judiciary to issue such direction to the Parliament or the President. (II.) The supreme judiciary may grant remedy against a cause or persons or authorities in respect of whom no remedy has been provided in the constitution. This article, not by any means, makes the claim that the patterns of judicial activism mentioned above are all-inclusive. There are cases which may entail more than one of the aforesaid activist patterns. *Anwar Hossain Chowdhury* v *Bangladesh* [1989 BLD (Spl) 1] sets the perfect example of such case.

(Concluded)

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