

Judicial Activism in Bangladesh: A Golden Mean Approach

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By

Ridwanul Hoque

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Dedication

The late Moulana Abdul Fattah, my father
Nawal Fattah Hoque, my son

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FOREWORD

If leading global minds like Jacques Derrida and Amartya Sen tell us almost in unison that justice is always ‘in the making’ and is never perfectly reached, lawyers should long ago have realised that they have their work cut out forever in the arduous task of finding the right balance between ideal and practice. A lot of legal writing these days, however, under attractive banners like ‘international law, ‘human rights’ and ‘good governance’ engages in simplistic fantasies about an ideal world. Worse, many authors prescribe their own versions of soft-sounding remedies that may be quite harsh and are often plainly unrealistic. Even less constructively, it has become a fashion to critique ‘third world’ abuses of law and power without offering meaningful guidance on how to solve mankind’s perennial problems over justice, which of course also plague the ‘first world’, only in different forms and often under more sophisticated covers. This smug tendency to advise others, especially ‘Oriental others’ on how to cultivate justice has made a growth industry out of certain aspects of Eurocentric and North American legal academia, with attractive offerings of courses, snazzy and expensive special programmes and even international missions purportedly designed to make this world a better place.

Since many such initiatives are driven by privileged people from the West, there is an element of self-interested activism in much of this, which ultimately may just lead to cushy jobs for so-called progressive people and/or their acolytes, with pompous claims occupying moral high grounds that may be little else than newly colonised islands of self-interested idealism in a global sea of continuing poverty and deprivation. Many academics can talk endlessly and with ease about poverty alleviation, activism of all kinds, and now prominently post-conflict reconstruction, without ever having to dirty their hands with the polluting real concerns of the ‘slumdogs’ of this world. Sitting in judgment from the high table perspective of Western academia seems such an easy task, but is it ultimately constructive? And, does it tell us enough about law itself as a tool for achieving progress on the road to justice?

When an elite academic from a less developed country embarks on building a legal career, whether as a practitioner or an academic, s/he has many crucial choices to make about methodology and ideology. Choices

also have to be made about how to understand and enliven the meaning and application of activism in a world that remains full of basic rights abuses despite glorious statements and brilliant theories. In a recent conference, an experienced academic from a border region of the East/West and North/South divide suggested that by now lawyers know a lot about law, but when it comes to choice making, do we grab the right tools to accomplish the job in hand? Or do we simply fall back to well-established old models of law as command of the sovereign or slippery rule of law symbolisms to prescribe wonder drugs for legal development and the cultivation of justice? While most lawyers indeed know quite well that law is in reality a plurality of pluralities, they almost instinctively reach for plumbing tools that are just not sufficiently sophisticated to plug the constant leaks of justice and the leakages of accountability and responsible governance that appear all over the globe. We should know better, and we often do know better, but we simply are not activist enough.

What Upendra Baxi would call ‘hard labour with a pen’ becomes of necessity a form of political intervention in which a scholar puts his or her conscience on the block in an effort to make a career and—hopefully—also to make a difference. Those of us who like to fool ourselves that we can create a better world by writing books rather than digging wells or teaching people how to raise goats or chickens need to do continuous soul-searching, which in some parts of the world is called *ijtihad*, to maintain an activist stance that continues to be able to improve this world.

When Ridwanul Hoque first embarked on the research for the present book, which was to lead to a PhD as a foundation for a solid academic career, he was brimming with globally inspired ideals about judicial activism and the power of judges. But as a Bangladeshi lawyer, he also knew deep down that reality is cruelly different. As a public law expert, he was aware of the ease with which one nation could suppress another, and how easily strong individuals could exploit their privileges. He knew how quickly electoral mandates could turn into dictatorships and how easy it was, even at the level of college politics, to sideline peripheral players in any scenario through purportedly due processes of law. Nurtured in the hothouse of Bangladeshi illusions about nation-building and good governance, Ridwan thus embarked on a journey of researching how—and ultimately even whether—judicial activism could make a real difference. The hope remained that there must be a right way, a correct path, familiar themes to Muslims and really all humans, at the end of the day. But this hope was always threatened by the unsatisfactory realities of political and legal abuse and by disrespect for the concerns of those who need the protection of others. Somehow, there was always opposition to whatever

was suggested or done, fights over principles and practice, violent disagreements over how justice was to be perceived and be apportioned.

In re-examining global legal theory and testing it against the troublesome realities of his own jurisdiction, a country that in 2011 will celebrate only its 40th birthday, Ridwan did not shy away from taking a critical and even self-critical approach to call a spade a spade where necessary, and to pinpoint abuses of law and procedure where they occurred. Writing about judicial activism easily gets shackled by fussy and pedestrian debates about what judges may or may not do as unelected agents of governance. The book produced here out of the foundations of the doctoral thesis goes much beyond such reductionist pedestrianisation of law, for it courageously lifts the debate into the skies of global legal realism. The analysis perceptively addresses bottlenecks of justice, identifying shackles and mental blocks in our own minds against activist concerns for justice for the common citizen. The delayed birth of public interest litigation in Bangladesh is clearly not only due to colonial manipulation of legal minds and of governance. It creates a lot of continuing pain and injustice because even post-colonial governments that rule in the name of the people have been constantly tempted to abuse power. Bangladeshis know only too well that this is not even an issue of party politics or of a particular personality trait; it seems to be a systemic defect built into post-colonial structures of governance in South Asia and elsewhere.

Bangladesh is a case in point for such tortuous neglect of principles of good governance, disregard of basic norms of public service and particularly accountability of those in power. Rather than enjoying the ruler's privilege and authority, destructive positioning and petty politicking have squandered precious resources and much goodwill that this new nation found on its contested birth. It has been easy to condemn this young country and its not so young leading elites for lack of concern for justice and for creating barriers to benign judicial intervention in cases of abuse. This excellent detailed study partly blames traditional anglocentric legal education for lack of sensitivity about culture-specific problems over basic justice. But it also demonstrates that controlling abuse of public power and private privileges remains a critical challenge not just for Bangladeshi judges, but also for the amazingly rich, though often not properly managed nation of Bangladesh, and for the whole world.

This fine book is therefore much more than a case study of the author's familiar terrain or a critical description of a messy national jurisdiction. It is a wonderful and ultimately very insightful illustration of the global challenge of legal navigation—kite flying, as I call it now—in which easy