DEVELOPMENTAL LAWYERING : A WAKE-UP CALL

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1. Introduction

Development scholars have only belatedly come to focus on the role which law; legal systems, law reform and legal process play in economic and social development. Attention has recently been focused on the legal dimensions of the development process as a result of a number of factors.

First, the clarity of the perception that a wholesale revamping of the legal system is necessary to effect development.

Second, a realization that the effectiveness of government in implementing development-oriented public policies involves the use of law as an instrument of social change as well as social control and that inefficiencies in the legal system have been a contributing factor to ineffective development policies.

Third, in some countries the recognition that law and legal process can help to protect the citizenry from the excesses of an overreaching state.

Greater attention has come to be focused on social infrastructure, including the infrastructure of legal rules, which are intended to shape economic activity. The task is more than one of creating new, "modern" laws, which are accessible, comprehensible and usable. The modernization of legal systems in the developing countries involves *inter alia* law reforms; the creation of mechanisms for the continuing review and revision of laws and legal regulations, both old and new, the training of lawyers and judges, etc. The core of the legal professions in the common-law world (in terms of both numbers and ideological dominance) is the private practitioner who represents commercial interests and facilitates the transfer of property. The periphery of these legal professions includes salaried lawyers in business and in government. It also encompasses the legal aid programmes created by many western nations since World War Two. However, today it is universally recognised that the legal professions in their hitherto existing multifarious forms have failed to attain 'human development'. Existing forms of lawyering, therefore, are in the need of revision and replacement by a new form of lawyering that I call developmental lawyering.

2. Understanding Human Development

It is now believed that social progress is facilitated by a 'human development' approach in all spheres. Criticizing an "excessive preoccupation with GNP growth and national income accounts", the first UNDP Human Development Report declared that "we are rediscovering the essential truth that people must be at the centre of all development"[1], and launched the idea of human development as a focus for formulating policies to bring this about. The first report defined human development as a process of "enlarging people's choices":

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> *Human development has two sides: the formation of human Capabilities such as improved health, knowledge and skills and the use people make of their acquired capabilities for leisure, productive purposes or being active in cultural, social and political affairs. If the scales of human development do not finely balance the two sides, considerable human frustration may result.*[2]

The idea of expansion of human capabilities as the standard of progress was introduced into economic theory by Nobel prize winner Amartya Sen, who describes capabilities as what people can or cannot do: that is, "whether they can live long, escape avoidable morbidity, be well nourished, be able to read and write and communicate, take part in literary and scientific pursuits, and so forth".[3] He points out that focusing on the expansion of goods and services is inadequate, because the "conversion of commodities into capabilities varies enormously with a number of parameters, e.g., age, sex, health, social relations, class background, education, ideology and a variety of other interrelated factors".[4] This focus on expanding the activities that people are able to engage in rather than the extent to which they say they are satisfied avoids the problem that people's preferences are shaped by their experiences. Oppressed people may say that they are content with life because anything better seems inconceivable. In the words of Amartya Sen: "The insecure sharecropper, the exploited landless labourer, the overworked domestic servant, the subordinate housewife, may all come to terms with their predicament in such a way that grievance and discontent are submerged in cheerful endurance by the necessity of uneventful survival. The hopeless underdog loses the courage to desire a better deal and learns to take pleasure in small mercies".[5]

From this viewpoint, a focus on fulfilment of basic needs is also inadequate, since it is a passive concept, emphasizing what can be done for a person, rather than what a person can do. Unlike the concept of capabilities, that of basic needs does not have a link with positive freedom ("freedom to").

A person's enjoyment of capabilities is linked to the exercise of entitlements. The ability to live a long life in human dignity depends on whether a person can establish sufficient command over resources, tangible and intangible alike. Freedom to a meaningful access to justice is but a crucial component of a life in human dignity, and this is where a lawyer enters the picture.

3. Development and Empowerment

It is often advocated that sustained human development requires three elements to be successful. Economic and social capital is the first two elements. Economic capital is financial investment as measured by funding for businesses, houses, commercial buildings and infrastructure.

Social capital is the organized voice of the community and can be measured by civic infrastructure derived through activities such as community organizing, citizen participation, and community-based decision making. Social capital is defined as "promoting a rich social fabric and a strong community voice".[6]

The third element is often overlooked. Economic and social capital yield political capital. Political capital reflects community empowerment, defined as "a capacity to define clearly one's interests, and to develop a strategy to achieve those interests".[7] Political capital goes beyond voice by culminating

in self-direction. Community groups use political empowerment to make independent decisions, e.g., to independently set the terms of negotiation for development, chose the course of action to satisfy the community needs including the legal interventions necessary. Empowerment thus becomes the product as well as the goal for development.[8]

On a closer scrutiny, we can identify five aspects to sustainable human development – all affecting the lives of the poor and vulnerable:

Empowerment- The expansion of men and women's capabilities and choices increases their ability to exercise those choices free of hunger, want and deprivation. It also increases their opportunity to participate *in, or endorse, decision-making affecting their lives.*

Co-operation- With a sense of belonging important for personal fulfilment, well being and a sense of purpose and meaning, human development is concerned with the *ways in which people work together and interact.*

Equity- the expansion of capabilities and opportunities means more than income – it also means equity, such as an education system to which everybody should have access.

Sustainability- the needs of this generation must be met without compromising the rights of future generations to be free of poverty and deprivation and to exercise their basic capabilities.

Security- Particularly the security of livelihood. People need to *be freed from* threats, such as disease or repression and from *sudden harmful disruptions in their lives.*[9] (emphasis mine)

In our understanding, therefore, human development and empowerment must include client's empowerment not only vis-à-vis the existing socio-economic and politico-legal system, but also vis-à-vis the lawyer who apparently works for him/her. In his turn, the lawyer should also work in a manner that will facilitate and not hinder client empowerment.

4. Lawyering and Empowerment of the Client

The dominant culture of professional conduct in lawyering is the doing of technical work to or for others in opposition to other people. In other words, a lawyer's work exists within a legal culture, which posits legal work as a technical service done within an adversary process.[10] When a lawyer is working as a member of a team, co-counsel etc., he is not necessarily working within a collaborative or cooperative framework. Although these different formats of legal work exist, they exist within the overriding epistemology of legal work, which sets up the construct of legal work as the doing of technical work to or for others. Thus, the lawyer may not perceive the adversarial perspective he brings into his collaborative and cooperative relations with others.

Within this dominant legal culture, the lawyer bases his interactions on being the possessor of technical knowledge or being perceived as the possessor of technical knowledge. While it is certainly true that the lawyer possesses technical knowledge, it is also true that the lawyer may excessively rely on this fact in constructing a professional vision of what constitutes appropriate attitudes, communications and behaviours. The vision of the lawyer as an objective, detached practitioner of specialized knowledge has permitted us to remain non-self aware communicators. This fact continues to distance the practitioner from self, client, and others.

As lawyers we are trained to be rule bound. After all, lawyers often apply rules in problem-solving. In order to isolate the rules for application, lawyers look backward in history to find precedent. Lawyers freeze present facts in order to compare them with the facts in precedential cases for purposes of application and distinction in pending cases. In other words, every problem becomes a set of facts to be applied to a legal rule or compared to an earlier situation defined in terms of its relationship to a legal rule. Even when new facts come to light distinguishing a present matter from existing doctrine, the present facts are still parsed from surrounding reality and become static in order to permit analysis.[11]

As lawyers we are trained to view matters instinctively as involving dichotomous positions.[12] That is, we view matters as right or wrong, relevant or irrelevant, rational or irrational, meritorious or frivolous. Given particular legal tasks, such findings may have merit and may be desirable. However, we often instinctively think and behave in this positional mode even when it is not beneficial. This mode prevents us from seeing different perspectives or options, which would help, solve the matter. Our legal culture conditions us to believe that legal analysis is inadequate where positions are contrasted and ambiguity contained. After identifying legal issues, the lawyer's task becomes the replacement of ambiguity with specific meaning. Therefore, we tend to respond automatically to the inherent conflict or the dispute in the case by developing the differences and opposing interests. Thus, our communications and behaviour are affected by our profession's orientation towards conflict and ambiguity.

Although we may often engage in various formats in legal work where we see ourselves actively cooperating or collaborating with others, we, nevertheless, operate within our overriding legal perspective of the lawyer functioning with an individualistic non-self-aware style towards tasks and responsibilities. This approach to work is due in part to the tension between regularly working in disputes within the adversarial legal process and being prone to reduce ambiguity in legal work. A significant result of this orientation is the need among lawyers to achieve control in conflict, i.e., control over the client, control of the work place and translation of competitive behaviour into presumptively successful professional behaviour.[13] Whatever is the outcome of this type of lawyering the client has a passive role to play in this paradigm. Doing the technical work to or for others does not affect the traditional content of lawyering. This is what many have dubbed as **'regnant lawyering'**. As Lopez sees it, the regnant lawyer is characterized as:

- formally representing clients, primarily through litigation, whether in "service" or "impact" cases
- having a rather negative understanding of community education and organizing
- considering attorneys as the pre-eminent problem solvers and therefore connecting only loosely to other institutions and groups
- badly understanding the interaction between the community and outside structures, institutions and events and having a negative opinion about subordinated clients being able to help themselves
- seeing the law and attorneys as the means to fighting subordination and not knowing and not

trying to learn to what extent, if any, formal legal changes penetrate the lives of subordinated clients.[14]

In the backdrop of these and other pitfalls of traditional, regnant lawyering, authors have been advocating for new kinds of lawyering which will take into proper account the issue of empowerment of the client to achieve social justice. One of the earliest responses to the problem was a kind of lawyering that evolves around client interests, perceptions and active client roles and came to be known as **client-centred lawyering.** Main attributes of the conception of the client-centred lawyer include:[15]

- identifying problems from a client's perspective The lawyer must take into account of the race, gender, class, religion, experiential and personality differences among clients and between a particular client and the lawyer;
- actively involving the client in the process of exploring potential solutions. It is, after all, the client's problem and the client should be encouraged to state preferences in light of his or her specific goals. Moreover, since there are typically several potential solutions to a problem, many of which may be non-legal, the client often will be able to offer solutions that were not considered by the attorney;
- encouraging the client to make decisions that have a substantial impact on the matter. The client must be satisfied with the outcome of any representation. Therefore, the client should be able to choose the solution that will most likely gratify his or her unique needs and perspective;
- providing advice based on the client's values;
- acknowledging a client's feelings and recognizing their importance. Clients often have emotional reactions to situations, impacting their client choices and the outcomes. The lawyer must allow the client to express these feelings and must recognize their importance in the counselling and decision making process;
- conveying the desire to help. This requires the lawyer to express his or her personal commitment to help the client.

Client-centeredness, in its extreme, requires the lawyer to avoid giving the client opinions or advice as to choices. The client is to make choices free from manipulation based on the lawyer's views as to what is best.[16] Ellmann writes that lawyers should "learn to say, or rather to guide, less – for the crucial decisions must be as far as possible the product of the client's own will, rather than the result of the overt instructions or veiled guidance of the attorney".[17]

It is, however, important to note that the thrust of the client-centred lawyering features suggests the traditional legal setting of an individual client with a discrete problem. It is less pertinent to solutions in which a community group has an open-ended and chronic problem. Furthermore, it has been shown in the literature that client-centered representation of a community can eventually destroy its independence. Marsico, for example, explains that such an approach inevitably threatens client autonomy: The most well intentioned lawyer who employs a client-centred approach by actively listening to the client, soliciting information about the client's legal and non-legal concerns, and

involving the client in identifying legal and non-legal alternatives and selecting the best solution, cannot help but influence the client's decision in subtle ways. These include making relevancy judgements about how much information to give the client, ordering the information in a way that ultimately influences the client's choice, and choosing the phrasing and styling of alternatives.[18] Marsico concludes that this risk to client autonomy is even greater in poverty lawyering because social subordination may easily be replicated in the client-lawyer relationship.[19]

These and other demerits of the client-centered approach led to the formulation of **collaborative lawyering.** Collaborative lawyering models recognize that lawyers are generally outsiders to clients/ client communities and that this status interferes with client autonomy, and suggest that the way to deal with this problem is to eliminate those differences and become an insider. Comments an author: "The collaborative model requires an attorney with a high level of skill and even professional training at interpersonal relationships, with great sensitivity and perception, and with lots of time to devote to one client".[20] Some lawyers find collaborative lawyering to be synonymous with "working with others".[21] These lawyers believe that effective lawyering requires a competent level of self-awareness and social interaction if the reach of a lawyer's professional activity is extended to his behaviour when "working with others". From this perspective, law practice requires the meshing rather than the separation of human interaction and legal tasks. In other words, the boundaries between substantive legal tasks and the processes of human interaction are not fixed. Because their respective contents are often commingled, paying attention to the quality of human interaction is often not a diversion from the necessary attention to the quality of the substance of legal tasks. Effectively "working with others" requires the pragmatic lawyer to cultivate his ability to use the non-adversarial communication skills.

Expanding the range of behaviour deemed part of a lawyer's professional conduct to include "working with others" originates from the view that all lawyering has an essential public purpose. Some authors have gone so far as to assert that "the loss of the tradition of public service in lawyering impairs the lawyer's awareness of their duties to both clients and the public at large."[22] Although the lawyer and the client may enter into a private contractual relationship for the provision of legal services, this service is distinct from all other private professional services in that it is by this relationship that the client interfaces with the norms of his government in being part of the social order. The lawyer is the transmitter of these norms and to some degree represents the authority of the legal system. In addition, through the use of lawyers, vast segments of the public gain access to government for determination of rights, duties and obligations in society and to society.

The quality of the non-adversarial communication, collaboration, and problem-solving skills used by the lawyer is as important as the substance of the activity because both affect the outcome. In the client's perception, this is usually an outcome representing the authority of the social and legal order in resolving the client's case. This authority is perceived by the client as dictating the actual outcome no matter whether the outcome is negotiated, litigated or adjudicated. The actions of lawyers affect a lay person's opinion and understanding of his government. Lay persons respond not only to the substance of their issues but also to the human interaction of their lawyers as well. It necessarily follows that lawyers, as public actors, should be seriously concerned about the quality of their behaviours in human interaction.

Adopting "working with others" as an area belonging to the lawyer's professional conduct has the potential for empowering both the lawyer and the client. The lawyer should be less confused about content and the client's objectives, and the client more able to appreciate what is happening. The lawyer "working with others" will be assisting the client in making choices rather than mindlessly exercising authority in the social dynamic with the client at the expense of the client. Still, the client will seek guidance from the lawyer. The reality of the lawyer's social authority and technical expertise will still influence client decision making at both conscious and unconscious levels. There can be, however, a shift in the lawyer's behaviour, which increases the likelihood of mutual understanding, more effective counselling, and informed active choice.

"Working with others" as a form of collaborative lawyering leaves many lawyers feeling vulnerable to the needs of the client. Assuming an equal level of authority with the client, rather than a superior level of authority, exposes lawyers to a more equal human dynamic in which they are expected to be responsive to the actual needs and concerns of the client. Although this level of interaction should yield more accurate identification of the client's wishes, lawyers may translate this challenge as requiring the lawyer to resolve all of the client's problems. Such a course of action is neither desirable nor appropriate. Rather, the lawyer should achieve a fuller understanding of the client's viewpoint and actual circumstances, which should inform her decision making with and on behalf of the client.[23]

Thus, this model of lawyering requires that lawyers should not solely control the agendas of substance and process. Attention to one's behaviour in interaction with others assists the lawyer in controlling the degree to which he is unconsciously influencing or altering the decisions for the client. The client has greater opportunity to become educated in the particularities of the case. If one takes the time to develop a deeper understanding of the client which is communicated to the client, and if the lawyer uses that understanding to fashion resolution processes, in actuality the client has a greater chance of becoming an active participant in the life of his case because he experiences himself as fully understood and his circumstances as respected. Consequently, this increases the possibilities for empowered client involvement.

5. Lawyering and Empowerment of the Community/Group Client

It is widely recognised that in contemporary society, the lawyer holds a position of power partly because the law has drawn away from regular people and become a system unto itself, un-accessible to a non-lawyer, with its own language, and its own liturgies of practice. In this sense, the ignorance of the client enriches the lawyer's power position. Thus, the lawyer, even the well-intentioned public interest lawyer, has a share of power that is only the result of others not having access to it.[24] A progressive form of lawyering in that scenario can, at best, empower individual clients. But we have seen earlier that 'development' necessarily connotes 'empowerment of the group or the community'. Naturally, the emphasis in cases with group or community interests is shifted elsewhere since "... development requires *a different type of legal aid*...concentrating on *public* rather than private issues, *intent on changing* instead of merely upholding existing law and social structures, *particularly the distribution of power* within society". (Italics mine)[25] Over the years this new kind of lawyering for the interest of the larger groups came to be known as **public interest lawyering.** One of the main assumptions of these lawyers is that law, if used creatively, can be one source, among a number of

sources, that enables people to mobilize and engage in positive action to better their lives. Unlike mainstream law, public interest lawyering is not oriented to the individual, nor does it deal with a range of "single" disputes. It is invariably group oriented.[26] It deals with the assertion of group or collective rights, involves questions of injustice pertaining to a group or collectivity, or may involve a legal action where an individual is representative of a group. Public interest lawyers address issues, which impact on society as a whole or on a section of society. These lawyers see in this group dimension to its work the opportunity to make more profound structural changes in society and initiate larger ripples of change.

Public interest lawyering is also manifest in different forms. The forms vary in the degree to which, in acting on behalf of others, the lawyers also act in partnership with them. Some lawyers of this kind identify cases or issues and develop related strategies and tactics by using their own professional judgement about what they think is best for the "client" community. Others try to involve the client community at all stages, basing their work on the experiences and reflections of that community. This latter type of lawyering strives towards legal self-reliance for the client community, seeking to build into client community an independent capacity to use the law and legal resources effectively.

More strikingly, public interest lawyering shares an intent on changing instead of merely upholding existing law and social structures. This intent often distinguishes their work from, for example, many forms of "working for others" which provide legal services to underserved or disadvantaged sectors of society, but may not intend, in doing so, to change the existing law and social structures or to challenge the distribution of power in the society.

The socio-economic context in which public interest lawyer's function is crucial to their work. They are contending with unequal development patterns and fighting unjust socio-economic policies. Matters relating to access to credit, marketing schemes, land ownership and use, land tenure and produce-sharing systems are matters of concern to them, as are questions of slum-dwellers rights, access to sanitation and water, environmental rights, and the rights of the indigenous peoples and tribals.

It is not an accident that public interest lawyering emerged in a socio-economic context in which law has assumed an irrelevance in the lives of many, or in which laws perpetuate situations of poverty and dependency – antithesis of development and empowerment. This type of lawyering, therefore, pursues as one of its objectives the redesigning of the legal map to promote a more equitable system of legal relations. These lawyers use a variety of tools in pursuit of their objectives.[27] Predominance of the tools of legal nature is very explicit here[28] and again litigation is perceived as one, if not the only, 'effective means' to attain the objectives. It is submitted that this kind of bias of public interest lawyering in favour of legal tools is not commensurate with the environment of abject poverty where 'the poor man is invisible to the affluent eye of the law'. It is apt to remember what Robert Kennedy observed way back in 1964:

"to the poor man, 'legal' has become a synonym simply for technicalities and obstruction, not for that which is to be respected. The poor man looks upon the law as an enemy, not as a friend. For him the law is always taking something away...we have to begin asserting rights which the poor have always

had in theory – but which they have never been able to assert on their own behalf. Unasserted, unknown, unavailable rights are no rights at all."[29] A progressive lawyer must never overlook the fact that "Poverty will not be stopped by people who are not poor. If poverty is stopped, it will be stopped by poor people. And poor people can stop poverty only if they work at it together. The lawyer who wants to serve the poor people must put his skills to the task of helping poor people organize themselves."[30] Therefore, what is necessary is a kind of progressive lawyering that will enable a community or a group to gain control of the forces, which affect their lives. In other words, social justice to become a reality must be preconditioned by empowerment of the poor and disadvantaged people.[31] Quite regrettably, public interest lawyering falls into the pitfalls of regnant lawyering, and consequently, empowerment of the community does not take place. Even in a good case of public interest lawyering, the 3 Ps of social justice values i.e. the privilege of power, people of subordination, and professional place of the lawyer eventually foster the position, strength and image of the lawyer and the community- client remains as disempowered as before. It is, therefore, now widely believed that public interest lawyering in its regnant forms cannot attain social justice and development and for which a different type of lawyering- **rebellious lawyering** is essential.[32] This anti-generic, rebellious lawyering is in other words, **empowerment (developmental) lawyering.**

6. Developmental Lawyering

Developmental lawyering includes several aspects of the collaborative and client-cantered lawyering but it goes further in describing the role of a lawyer in community development and empowerment. The developmental lawyer not only interacts with the client on a non-hierarchical basis, but also participates with the client in the planning and implementation of strategies that are designed to build power for the client and allow the client to be a repeat player at the political bargaining table. The developmental lawyer views the client's world in broader terms than merely its legal implications. He or she not only considers the political, economic and social factors of the client's problems, but also assists the client in developing and implementing enduring solutions, legal and non-legal, to these problems and to similar problems that may arise in the future.

It is not enough for lawyers merely to be non-hierarchical professionals who engage with clients on terms of social equality. Nor is it enough for lawyers merely to be technicians correcting the legal defects in the structure of a client's existence. It is not even enough for a lawyer to act aggressively to enforce a client's legal rights or to create new ones. The law, on its own, fails to provide the kind of long term relief that the poor and subordinated client needs. Developmental lawyers must recognize this fact and shift their focus from the limited prospect of the law to the greater potential of a truly cross-disciplinary and pro-active political assault on oppression. It never escapes the watchful mind of a developmental lawyer that while the law may be necessary weapon in that struggle, it is not a sufficient one.[33]

The foundation of the developmental lawyering model consists of being prepared to take on roles that more closely fit the multifaceted needs of the community. These roles can only be defined by the particular contexts in which the developmental lawyer functions. The paradigm of the "rebellious lawyer"[34] must expand to accommodate that reality. Certainly the developmental lawyer must bring to the table his or her "legal" skills. These skills may be why the client approached the lawyer in the

first place. But, as we have mentioned earlier, the chronic problems in poor societies like in Bangladesh are not strictly, or even primarily, legal. The need is to create community leaders and institutions capable of marshalling and utilizing power. Thus, the developmental lawyer must be prepared to participate, albeit in varying degrees, in community organization, project planning, development and implementation etc. He or she must be aware of and participate in the social, political, and economic aspects of community action.

While the lawyer has no premium on skills in these areas, his or her involvement and perspective can add depth to the client decision-making process. This kind of involvement can also help to bridge the often-present class gap between group/community and the lawyer. Even when the lawyer has a high degree of awareness of the obstacles at this level of involvement, problems are likely to arise. The best advice to be offered may simply be to become involved in the community. When groups address common problems, the developmental lawyer should be able to consider and, when appropriate, advise non-legal solutions. The law must be viewed as only one of the weapons against subordination and disempowerment. The developmental lawyer must be equipped to use it as well as other weapons to achieve real victories.

What follows from the foregoing analysis is that a developmental lawyer cannot dispense with his or her full gamut of responsibilities unless he or she is a good community organizer. Loosely organized groups or community often need organizational support to enable them to undertake programmatic missions. Developmental lawyers need to provide this kind of support to new, nascent or loosely organized, poor and vulnerable groups.

As an organizer, a developmental lawyer's first job is to assist individuals to come together as a group. The lawyer-organizer then assists the group in developing its structure and decision-making capacity. However, a developmental lawyer's ultimate objective should be to identify and train community organisers and leaders from within the community. But until that happens, the developmental lawyer has to discharge that responsibility. This entails some very positive impact. Being involved in an organizing capacity puts a developmental lawyer in closer touch with the reality of a client's situation, attitudes and perceptions. It also permits members of a group or a community to repose more confidence in a lawyer because of this less formal and structured involvement with a group's struggle. Participating in an organizing capacity offers flexibility not generally found in lawyer-client relationship in other forms of lawyering. In addition, it is quite often the case that there is nobody else, at least initially, to take on these tasks. In this case, the development lawyer must function as an organizer until outside assistance can be obtained or until internal capacity comes to the fore. An organized group is a pre-condition to a successful struggle against subordination. Some authors identify this kind of lawyering as **community lawyering** and define it as "collaboration with community organizers and with people of many occupations and disciplines who have expertise to share with communities as they address specific problems and plan their future."[35]

7. Epilogue: A Wake-up call

A number of lawyers in Bangladesh have been engaging themselves in public interest lawyering for quite some time and they are portrayed as the non-traditional practitioners. Though it may be true that they are pursuing anti-generic lawyering it can be defined as neither "rebellious" nor 'progressive'

lawyering. Public interest lawyering, in our context, has been successful in providing temporary relief to a group or community, but there is yet to be an instance where it would have led to empowerment and consequently, development of the said group or community. Our development lawyers, therefore, must be both 'rebellious' and 'progressive' at the same time. This is unlikely to happen until we have a new breed of lawyers trained in anti-generic legal education. It is long over due to acknowledge that the law students will appreciate and understand the magnitude of problems of the poor only when they go to them, live with them, listen to their vows and share their sorrows and sufferings and in that context organize them. Only this will arouse in them a feeling for the neglected people living in abject poverty far from the fruits of modern technologies and life. The experience, which they will get, will stir their minds and they will be more responsive to the social needs of the underprivileged when they enter their profession. Developmental lawyers can assist their clients to voice their concerns effectively and achieve greater access to justice through avenues other than litigation. What we need today is the concerted effort of the potential development lawyers hidden in the minds of the law students.

Are the participants of the Human Rights Summer School prepared to take up this task?

The wake-up call in the form of maladies of the subordinated is already there. Can you hear it?

REFERENCES :

1. United Nations Development Programme, Human Development Report, 1990, p.iii
2. Ibid. P.10
3. Amartya Sen, Resources, Values and Development, Oxford, 1984, p.497
4. Ibid, p.511
5. Ibid.
6. Brown, P. Comprehensive neighbourhood-based initiatives, *Cityscape*, 2, pp.161-176.
7. Kennedy, M Transformative Community Planning: Empowerment Through Community Development. - http://www.picced.org/resource/pn/combased.htm (February 1997).
8. Robyne S. Turner. Entrepreneurial Neighborhood Initiatives: Political Capital in Community Development- *Economic development Quarterly*, Vol.13, No.1, February, 1999, pp.15-22.
9. United Nations Development Programme. Governance for Sustainable Development. A UNDP Policy Document. 2/1997.

   See also: Sudhir Anand & Amartya Sen, Sustainable Human Development: Concepts and Priorities, 1996.

   Marth Nussbaum & Amartya Sen, The Quality of Life, 1993.
10. Beryl Blaustone. To be of Service: The Lawyer's Aware Use of the Human Skills

    Associated with The Perceptive Self. In- *The Journal of the Legal Profession*, Vol.15: 241, 1990, p.256.
11. For instance, the excellent instruction in developing the facts and building the theory of a case in: D.Binder & P.Bergman, Fact Investigation From Hypothesis to Proof (1984) demonstrates how it is necessary to do exactly this in order to craft good case planning and argumentation.

12. Henderson. The Dialogue of Heart and Head, 10 *CARDOZO L.Rev* 123 (1988).
13. Supra note 9 at p.259.
14. Gerald P. Lopez, Rebellious Lawyering: One Chicano's Vision of Progressive Lawyering, 1992, p.24. See also: Ann Southworth, taking the Lawyer out of Progressive Lawyering, *46 Stan. L. Rev (1993) at 214.*
15. Binder, Price & Bergman, Lawyers as Counsellors: A Client-Centered Approach, 1996, pp.19-21.
16. Michael Diamond, Community Lawyering: Revisiting the Old Neighbourhood, 32, *Column. Human Rights L. Rev.* 67 (Fall 2000) at note 82.
17. Stephen Ellmann, Lawyers and Clients, 34 *UCLA L. Rev.* 717 (1987) at 720.
18. Richard D. Marsico. Working for Social Change and Preserving Client Autonomy: Is There a Role For "Facilitative" Lawyering? *1 Clinical L.Rev.* 639 (1995)
19. Ibid at 640-54.
20. Ibid at 657-658
21. Supra note 9 at p.
22. Gordon, P. The Independence of Lawyers, 68 *BUL Rev.* 1 (1988)
23. D.Rosenthal. Lawyer & Client. Who's in Charge? (1974)
24. More on this see: Dr.Mizanur Rahman, Anti-generic Learning and Rebellious Lawyering: A Challenge to Regnant Legal Education and Lawyering in Bangladesh. -Dr.Mizanur Rahman (ed) Human Rights and Empowerment, 2000.p.152
25. Jose Diokno, Developmental Legal Aid in Rural Asean: Problems & Prospects, (1981)
26. Mario Gomez. The Legal Resources Project and its Understanding of Public Interest Law. - Working paper for IHRIP. (No date)
27. Though not exhaustive, a sample list of such tools is likely to include litigation, legal advice, paralegals, legislative advocacy and lobbying, legal research, education, ADR, Poly Clinics, Metalegal tactics, Alternative Tribunals etc. See supra note 25. See also: Upendra Baxi (ed) Law and Poverty: Critical Essays, Bombay, 1988.
28. ~~Supra note 24 at p.150-151~~.
29. Quoted by Justice Krishna Iyer in: The Social Dimensions of Law and Justice in Contemporary India – The Dynamics of a New Jurisprudence, p.6
30. Stephen Wexler. Practicing Law for the Poor, 79 *Yale L.J.* (1970), p.1049
31. Lucie E. White. "To Learn and Teach: Lessons from Driefontein on Lawyering and Power"- *Wisconsin Law review*, 1988, pp.699-769.
32. Prof.Mizanur Rahman, Public Interest Litigation and Social Justice: The Sub-continental Approach- Paper presented at a Ford Foundation Symposium on "*Public Interest Law: Concept and Practice*" on 16-18 November, 2001, Moscow, Russia.
33. Supra note 16 at 110.
34. More on "Rebellious Lawyering" see: Mizanur Rahman, supra note 28.
35. Jane E.Schukoske. Empowerment of Community Members Through Grass-Roots Organization: What Roles for Lawyers? -In: Dr.Mizanur Rahman (ed). Op.cit.p.103.

INVITING VISIONS : ROLE PLAYS ABOUT COMMUNITY ECONOMIC DEVELOPMENT**

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I. Introduction

Role play simulation can be a valuable technique to employ, whether teaching lawyering skills or substantive legal doctrine, or guiding community service. Role plays immerse participants in a particular context in which they can plan, perform and see reactions, elicit feedback and self critique. This chapter discusses the design and construction of role plays, also called simulations, to use in a variety of settings as a teaching and learning technique. It also touches briefly on debriefing student performances in role plays. Though there are references to "teachers" and "students" in this chapter, the technique is also useful as a planning device with a community group and other collaborators.

Community economic development is a relatively novel context for role play in law schools, where the traditional focus on litigation has made moot court prevalent. The need for interdisciplinary collaboration is particularly clear in economic development work. Role play involving planning with community groups and their technical advisors can be very useful. It can help students cultivate good communication and planning practices. This article invites law teachers, students and communities to create role plays to strengthen skills and imagination to achieve community economic development. As a teacher new to Bangladesh and who has taught in the USA, I urge collaboration among law teachers to undertake this visionary work.

Consider how one might devise role plays for the following situations

1. An NGO field supervisor is guiding students' socio-legal research on employment issues for pavement dwellers. She wants to prepare students to enlist the cooperation of the community members. Can a role play help students plan their approach to build trust?
2. A law professor teaching Income Taxation wants students to review the circumstances under which a donor can receive tax benefits from making a donation to an NGO. Can a role play enhance the learning of this area of substantive law?
3. A law department establishes a Community Development Clinic as an optional paper in the LL.B. curriculum. The clinic is asked to help villagers who are to be displaced by a dam project. Can a role play help the students analyze the villagers' options?

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** *This chapter is an adaptation of "Designing Role Plays for Law Students" in N. R. Madhava Menon, ed., Clinical Legal Education (1998). On teaching of community development law, please see sources* in Jane E. Schukoske, Empowerment of Community Members Through Grass-Roots Organizations: What Role for Lawyers? in *Human Rights and Empowerment* (Dr. Mizanur Rahman, ed., 2001).

II. Role Play Simulation as a Teaching and Learning Technique

A role play simulates an interaction between two or more people. When people observe roles, they have a chance to see the human context of what they are learning. When they play a lawyer, they experience the professional role. In that drama, finite in time, they exercise judgment about how to act. The simulation serves as a laboratory in which the student can experiment with responses to a situation. The role players and observers may then assess the performance and its effectiveness.

In situation 1 (interviewing pavement dwellers) above, the supervisor may wish to begin by demonstrating through a prepared role play or a film excerpt the silencing effect of asking in a formal way a series of "yes" and "no" questions, as a bad example to avoid. (The following would occur in the community's dialect, but here is translated into English.)

Student (role player): "Did your family come here from your village to look for work?

Man from the community (actor): "Yes."

Student: "But you haven't found any work, have you?"

Community member: "No"

Student: "Have you sent your children out to work?"

Community member: "No."

Student: "Is your family having trouble with the police coming to harass you?"

Community member: (No response.)

The teacher might then ask the students who observed the simulation to describe the interaction and the effects of the style of questioning. Students might observe that the student has not listened to the man's story and may have intimidated him. Students might note (either with or without prompting by the teacher) such things as the effect of the pointed questions, of the language spoken (dialect and manner), and of the frustration the man may feel due to his situation. The teacher might then ask that student or another to conduct the interview over again from the beginning to improve upon it. The performing student, the teacher and the class could then examine the questions used in the second interview to see the effect of rapport-building and using "open" questions to elicit general information and the use of "closed" questions to

confirm information or elicit specific details.

In situation 2 (income tax benefits for donors) above, a professor might set up a short role play in the midst of a class, saying to a student:

"Counsel your colleague Mr. Hussain as if he were the head of an NGO that came to you to ask advice about fundraising. Explain what you think the client would want to know about tax benefits for donations and the effect the special tax status would have on the NGO operations."

The student would then interact with Mr. Hussain. The class could discuss the student's treatment of the substantive legal information, as well as the student's effectiveness in anticipating the points most relevant to the client.

In situation 3 (developing options for villagers) above, students might propose simulations as a way to anticipate the needs and perspectives of potentially adverse parties. The Clinic could identify who some of the main stakeholders are - villagers, state government and hydroelectric company that plans

to build the dam, for example. Students could be divided into three groups and assigned to view the situation from the perspective of their assigned role. This would help students identify the interests of each party, may help them outline a plan of fact investigation and imagine mutually beneficial solutions to the villagers' dilemma.

Teachers may have many different ways of approaching their objectives with role plays, which may differ in detail or in overall conception from the specific role plays suggested here. Their specific choices depend upon many factors, such as identifying which issues have proven difficult for students before, future directions intended for the classes, time available for planning and time available for execution and debriefing of the role play.

The size of the class will affect the teacher's design of a role play. In larger classes, teachers may use role plays for

- demonstration by students selected in advance, followed by discussion,
- a spontaneous performance in class, to prompt class discussion,
- simulations is small groups within the large class, and
- out-of-class work.

In small groups, the teacher can readily provide each student with multiple opportunities to play roles.

III. Designing Simulation Exercises

In designing role play simulations, the teacher performs several tasks:

(a) identification of learning objectives for students (such as specific aspects of substantive law, practical skills, ethical issues, reflection and self-analysis);
(b) choice of a context and a specific interaction,
(c) setting parameters such as time to be allowed and information sources to which students may refer;
(d) preparing written or other materials needed to perform the role play (fact patterns containing information available to all parties; instructions to specific role players; and documents or other evidence);
(e) determining how to assign students in the class to play, roles, and/or arranging for role players from outside the class;
(f) preparing instructions to give to students or faculty, observers concerning what to look for in the performing the simulation;
(g) preparing key questions or observations for use in debriefing to underscore the teaching objectives of the exercise; and
(h) after use of the simulation, considering to what extent the teaching goals of the exercise were met, and how the exercise could be improved to meet them better in the future.

A brief discussion of each of these tasks follows.

A. Teaching and Learning Objectives

The teacher generally starts design of a role play with consideration of particular points to explore. These may include substantive points of law, professional skills or professional and ethical values. They may also include learn from reflection on one's own performance.

These points should be kept in mind when deciding how to construct the role play and what to

emphasize in critique. A role play of a client interview for situation 1 (open questions), would focus more directly on the wording of questions, with less emphasis on precision in analysis of the facts that emerge from the interview, for example. A roleplay of an NGO client counseling for situation 2 (substantive law of income taxation) would focus more directly on the relevance of the questions and answers to the tax and fundraising issues. One needs to ensure that the fact scenario will not distract the student with issues that may be interesting in themselves but are not connected to the matters that the teacher intends students to learn about through this particular exercise.

Teaching and learning goals need to be realistic. While a great number of points can be crammed into a single problem, participants often will be able to discuss in depth and digest only a few key points. Adequate time for introductory and post-performance discussion of the role play is essential.

B. Context and Specific Interaction

The factors to be considered here include the general focus, specific issues to be covered, characters, and setting. The purpose is to shape an exercise that meets the learning goals that have been devised. For clarity, a teacher often chooses a specific focus for a short role play, such as the effect of asking closed question in an interview in situation 1 above. Feedback on the point can occur immediately, and the role play can be attempted a second time to apply the learning.

Longer role plays may be necessary for more complex issues, such as assessing the interests of government officials in situation 3 above. The more complex the role play, in general, the more information the teacher will need to provide about the characters and setting. Ideas for role play characters and settings may come from, among other sources,

- actual problems and planning for upcoming meetings,
- legal opinions,
- transcripts of actual trials,
- news stories, or
- imagination.

A simple device for creating role plays in the context of community economic development is to contact NGOs about obstacles they face in livelihood programs, loan program, disaster relief administration, and other such efforts.

C. Parameters

Parameters on preparation, conduct and debriefing of a role play must be spelled out so that the role players and observers know what to expect. This will lessen confusion and student anxiety and increase the likelihood that the teaching/planning goals of the exercise will be met.

As to preparation, it is useful to state approximately how long a simulation will last, its focus, and some general guidance on the information sources that students may use, so that students have an equal opportunity to prepare effectively. Setting research parameters prevents distraction from the main teaching goal of the simulation. In situation 3 above, for example, limiting the legal research that students may do may keep students focused on the goal of achieving practical outcomes for the villagers, rather than becoming distracted by research on procedural aspects of public interest litigation.

The duration of a role play is important to plan. Many role plays in front of a class are fifteen minutes or less, so that there is a time within a class hour to discuss the issues raised and to have a chance to

replay portions that need improvement. Role plays in small groups in or out of class which are designed to allow students to practice negotiation skills or rehearse an official meeting may require more time.

If a simulation includes investigating the facts of the case and probing solutions, the teacher will make available sources of information. They may include other role players such as clients or witnesses, written materials such as public documents, proposals and the like, or other persons such as an expert who has agreed to allow students to consult with him or her.

D. Preparing Written or Other Materials Needed For Role Play

Students need varied materials for simulations. Statements of fact patterns may include information available to all parties as well a confidential information known only to one.

Depending on the facts and issues presented, the teacher may need to prepare simulated documents or other evidence, and specific instructions for enacting the role play. The more complicated the simulation, the more the teacher will likely have to put in writing to make sure the role play occurs as planned. Supplying information through simulated documents prepared for the role play is often a good way to teach students to read documents carefully and to learn how to refer to them to support their analyses.

While the teacher defines the roles and situations, the teacher does not generally script a role-play like a theatrical play. One of the key elements of role plays is the spontaneity that makes them the closest approximation to actual professional encounters. An exception to this might be a very short demonstration role play designed to make one specific point (as in Situation 1 above).

E. Arranging for the Role Players

The teacher must assign students in the class to play roles, and often arrange for persons outside the class to play some of the roles. In the case of demonstrations, all the role players may be from outside class.

The teacher will often want to provide directions and information to role players in advance of class. Often a period of a week for preparation is useful so that role players can think about the role and ask any clarifying questions they may have. It also gives the teacher a chance to fill in any gaps or correct errors that may appear in the materials.

The teacher must also consider whether to draw all actors from the class, or to select some from outside. Students who play the role of a client or witness are in a position to empathize with the client and feel the effect of lawyering techniques on a client. Selecting an actor from outside the class may make the exercise feel more real to the student who is playing the lawyer. Use of actors gives the teacher more control over the way the role is played. For example, the teacher can instruct the actor to see how the student will manage an unexpected fact situation. For example, in situation 2 (counseling on income taxation) above, a teacher might instruct an actor playing the NGO director to ask about bribing an official to obtain the desired tax status to see if students would grapple with the issue.

Selection of actors from outside the class requires additional logistical effort from the teacher. Outside experts may contribute a lot of context to the interaction. Where student simulations are required, a teacher may wish to deduct marks for missing a scheduled simulation without advance notification and a compelling reason.

F. Instructions for Observers

The observers of a role play need to be given instructions on what to look for in the performance. The observers will generally be students for classroom demonstrations. For skill-building simulations for students, observers will be teachers and perhaps a small group of other students. For moot court competitions, observers are generally law teachers, practicing lawyers and judges.

After students have become familiar with role-play technique, a teacher may fairly evaluate their work in a role play. Especially if marks are being given, it is useful for the teacher or teachers evaluating the student work to have a list of the skills being evaluated and of the points that may be earned for each skill.

G. Preparing for Debriefing

The teacher should prepare key questions or observations to be used in debriefing to underscore the teaching objectives of the exercise. A few comments on the debriefing process that apply especially to role plays may be useful here.

Questions are the most effective tool for exploring role play performance. The clinical method is indeed "learning by doing." However, questions and points discussing what students have done can often greatly increase student learning from an experience. During the process of answering questions, students and teachers can learn points of view, identify skills developed and concepts used, and replay verbally how a difficult situation might have been approached in a better way. Specific questions cannot always be prepared in advance, but they will often cover the following topics:

1. What was the student (or other participant) attempting to do?
2. How had he or she prepared to do it?
3. What was actually done/said?
4. Was the action effective in meeting its goal?
5. Based on this experience, what would the participants and observers consider doing differently in such a situation in the future?

By asking these questions of the role players and observers, the teacher gains insight into student thinking and preparation. The dialogue can help students learn from each other. The teacher must coach the students to use this approach, especially in systems where higher education is principally based upon the lecture system. This method provides students with a method for reflecting on their own performance.

While questions are the best way to get students to think through issues for themselves, the teacher would be well advised to note in advance the most important points to be covered in the post-simulation discussion. Sometimes the points do not emerge spontaneously from student responses. The teacher may then incorporate the points into questions or summary comments about the performance. It is crucial to allow sufficient time for debriefing. A class can often profitably spend twenty minutes or more debriefing a well-designed ten minute role play.

Because of the lack of script, role plays bring surprises. If a simulation deviates totally from the teacher's learning objective, the teacher must exercise judgment whether to intervene to clarify a point and resume (or restart) the simulation. A teacher may choose to let the role play proceed, clarify the point in debriefing, and then conduct the role play again, perhaps with other students. When students execute a role play differently than the teacher expected, there may be an excellent opportunity for

student learning, allowing for correction of basic misunderstandings.

H. Improving and Disseminating Role Play Exercises

After use of the simulation, a teacher should consider to what extent the teaching goals of the exercise were met. In most cases, these objectives will have been substantially met, but the teacher will also see ways to improve the exercise to meet them better in the future. The changes may entail elimination of facts that turned out to lead students down a wrong path, or addition or subtraction of issues depending on whether the role play turned out to be too difficult or too easy for many students. Some role plays may turn out to be ineffective and may need to be replaced the next time that a course is offered.

This chapter has concentrated on design of a role play for which students prepare in advance based upon written material. The teacher may wish to receive feedback on a draft from others. For example, an expert practitioner may suggest amendment of the facts to create a better real life example, a role player may note a gap in the facts, or a student may raise questions about the instructions.

Where students of different classes participate in role plays - for example, where first year students serve as witnesses in an upper level trial advocacy course - a teacher may need more than one exercise available to make each point. This way students who served as witnesses the previous year will not have an advantage from their prior participation.

A good simulation problem has been honed to the point where it regularly produces a challenging experience for students, and regularly allow the students to understand most of the points the teacher wishes to present. Such problems can then be published to make them available to teachers and students in many law schools. One common pattern of publication is inclusion of several simulations on the same area of law as a supplement to a textbook on the subject. Another is the sale of single or multiple problems by an institution concentrating on training in one area or another. Such a clearinghouse might be a Bar Council, a university affiliate, or a non-governmental organisation.

IV. Conclusion

Role plays can provide a useful tool for the law teacher in a wide variety of courses. Occasional role plays can enliven and create a sense of immediacy in almost any course. Certain other courses, particularly those dealing with practice skills, can use simulations as their primary learning tool.

Development of role plays for community economic development work is needed. Most simulation materials available to law teachers have been developed in the context of individual representation and many in a litigation context. To prepare law students for work in this field, it is essential that law teachers, practitioners and activists create materials to teach relevant substantive law, skills, creativity and values.

REFERENCES :

American Bar Association Section on Legal Education and Admissions to the Bar, *Legal Education and Professional Development - an Educational Continuum* (1992) (known as "The MacCrate Report")

Gary Bellow and Bea Moulton, *The Lawyering Process: Materials for Clinical Instruction in Advocacy* (Foundation Press, 1978)

David F. Chavkin, *Clinical Legal Education* (Anderson Publishing Co. 2002)

Clinical Legal Education (N.R. Madhava Menon, ed., 1998)

Human Rights and Empowerment (Dr. Mizanur Rahman, ed., 2001