Public Interest Litigation

Constitutional Issues and Remedies

Naim Ahmed

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To my father
Advocate Syed Ahmed
who has taught me the art of thinking like a lawyer
and
my late mother
Chowdhury Jahan Sultana
this work is more a result of her dreams rather than mine

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Preface

Public interest litigation is one of those rare topics that interest lawyers and non-lawyers alike. Not only in terms of elegance and novelty, this is a topic with a high profile due to its importance, relevance and necessity. It fascinates with the promises it makes, the changes it brings and the style in which it operates. This book is an attempt to capture this fascination – it paints a picture of public interest litigation in Bangladesh.

This book is primarily based on my doctoral research conducted in the School of Oriental and African Studies (SOAS) of London University. While preparing this book, I have extensively added, discarded and re-written various chapters of the thesis to cope with the rapidly changing legal landscape. The original text and arguments of the thesis have been modified to a great extent. It was a difficult task, but never a boring one.

I could not complete this difficult task without sincere help from various individuals and organisations. First of all, I am deeply indebted to my doctoral supervisor, Dr WF Menski of SOAS, for his inspirational support. He not only offered me excellent supervision, but lend me a hand whenever I needed help, stepping beyond the simple supervisor-student relationship. Simple words of thanks can not express my gratitude.

I am grateful to many lawyers, judges and academics for their valuable suggestions and assistance. I would especially like to thank, in no particular order, late Dr Mohiuddin Farooque, Dr Michael Palmer, Advocate Nizamul Huq Nasim, Advocate M Saleem Ullah, Advocate M Idrisur Rahman, Dr Borhan Uddin Khan and Advocate Rizwana Hasan. My special thanks goes to Mr Biplob Kumar Poddar for helping me, as a research assistant, in the preparation of the book. I am also grateful to my senior, Barrister Mohammad Ali, for his encouragement and support. I must also thank the Commonwealth Scholarship Commission for awarding me a scholarship and the British Council for administering it, enabling me to conduct my research in London.

My friend and colleague Advocate Saifur Rashid offered me immense help – especially as I dumped my professional works upon his shoulders while I was busy with the book. I am also grateful for the enthusiastic and strong support of Bangladesh Legal Aid and Services Trust, and its advisor Dr Shahdeen Malik. Dr Malik helped me in every way imaginable. He also took the trouble of reading the manuscript and offered me valuable suggestions and recommendations.

Finally, I cherish the loving support and encouragement of my father, Advocate Syed Ahmed.

Naim Ahmed

Dhaka, November, 1999

Chapter One

INTRODUCTION

I

The term 'public interest litigation' (PIL), a new phenomenon in our legal system, is used to describe cases where conscious citizens or organisations approach the court *bona fide* in public interest.[1]

In Bangladesh, concerned citizens and organisations have challenged illegal detention of an innocent person for 12 years without trial,[2] importation of radio-active milk,[3] environmental damage resulting from defective flood action programme,[4] appointment of the Chief Metropolitan Magistrate without prior consultation with the Supreme Court[5] and so on.[6] Within its scope, which is continuously expanding, PIL includes cases involving poverty related problems, police atrocities, illegal detention, environmental and consumer matters, health related problems, rights of children and women, minority affairs and other human rights issues.

This is a significant new development from at least two standpoints. First, the courts are for the first time concerned with public interest matters. This is beyond the traditional role of the judges who previously adjudicated private disputes only. Second, it involves a public law approach with respect to the rules of standing, procedure and remedies so that private citizens can advance public aims through the courts.

What prompted this new advancement and how? What are the meaning, scope and basis of PIL? What is the constitutional position of PIL? What are the new rules of standing, procedure and remedies? The present book is an attempt to answer these questions in the Bangladeshi context.

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1 For a detailed examination of the meaning and scope of PIL, see below chapter four.

2 *State v. Deputy Commissioner, Satkhira and others* 45 DLR (1993) 643.

3 *Dr Mohiuddin Farooque v. Bangladesh represented by Secretary Ministry of Commerce and others* 48 DLR (1996) 438.

4 *Dr Mohiuddin Farooque v. Bangladesh* (FAP 20) 17 BLD (AD) (1997) 1.

5 *Md Idrisur Rahman v. Shahiduddin Ahmed and others* 51 DLR (1999) (AD) 162.

6 See below chapter three for a developmental history of PIL in Bangladesh.

II

The basis of legitimacy of the law courts is impartiality. In the Common law based legal systems, including that of Bangladesh, this impartiality is safeguarded through an adversarial model of litigation. Thus the judge is a neutral umpire and is not supposed to intervene while the parties debate their case in front of him. So sacred is this impartial stance that it is believed that 'bias even for a good cause is bias all the same'.

This system works well in most of the cases as long as they involve private disputes where the strengths of the parties are more or less evenly balanced. But when one of the parties is disproportionately poor and powerless, it becomes very difficult to litigate on equal terms. The disadvantaged party can afford neither the best lawyers nor the other resources available to his adversary. In private interest cases, this is the basis for providing legal aid to the poor. The same problem crops up in public interest matters as well. Those who are suffering, the people as a whole or a segment of the society, are often poor, ignorant, unorganised or afraid to approach the court. Since indifference and absolute reliance on the adversarial model would cause injustice, social activists advance PIL believing that 'equal treatment of unequals is inequality'.

The concept and practice of PIL is thus an exception to the general rules of our Common law based legal system. It is not a revolution in the sense that it does not attempt to overthrow the entire existing system. But it is not a mere tinkering with the system either. It brings along with it a new set of principles and procedures that negate the traditional approach when public interest is concerned. Accordingly, the courts act *suo motu*, liberally interpret the rules of standing, treat letters as writ petitions, appoint commissioners, enlist aid from volunteers, award compensation to the victim and provide for continuous monitoring of the situation. PIL thus is a major reformation at both conceptual and practical levels.

Development of PIL has been gradual. Before its introduction in Bangladesh, it successfully developed in several other jurisdictions. The term 'public interest litigation' was first used in the USA in the late 1960s and early 1970s when a special type of cases sought to represent the underrepresented interests of the society in law courts.[7] It came as a part of the greater movement of 'public interest law' that included legal aid, alternative dispute resolutions,

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[7] For the American development of PIL and the state of public interest law, see Burton A Weisbrod, Joel Handler and Neil K Komesar (eds.) (1978) *Public Interest Law: An Economic and Institutional Analysis,* Berkeley et al., University of California Press and Nan Aron (1989) *Liberty and Justice for All: Public Interest Law in the 1980s and Beyond,* Boulder and London, Westview Press.

lobbying and so on. Funded by voluntary sector organisations, lawyers organised themselves into public interest law firms. Success of PIL in the USA influenced other jurisdictions including Canada, Australia and England.[8] The English judges, and subsequently the lawmakers, gradually liberalised the principles of *locus standi* enabling concerned citizens to approach the court for public interest. However, the most remarkable development of PIL took place in India in the early 1980s.[9] In the aftermath of the emergency period, there was a rapid expansion of free press and activities of voluntary sector human rights groups. A number of judges proceeded as social activists and induced and led a major change of the traditional law by introducing PIL. Accordingly, any person can activate the court to safeguard the interest of the public, especially those of the poor and vulnerable section of the community. This new development was seen as a constitutional imperative to attain social justice. Pakistan joined the club in the late 1980s after the restoration of democracy.[10] The judges introduced PIL on the ground that the Islamic social justice precepts of the Constitution validate a PIL approach.

Advancement of PIL in Bangladesh coincided with the restoration of democracy.[11] Some attempts to introduce PIL in Bangladesh started since 1992.[12] Initially, it was difficult to overcome the threshold problem. However, relentless efforts of the social activists enabled the progressive minded judges to interpret the Constitution liberally through a series of cases. When success finally came in 1996, the Supreme Court not only found that PIL is valid under the constitutional scheme, but that the Constitution mandates a PIL approach.[13]

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8 For the state of public interest law in England, see Jeremy Cooper and Rajeev Dhavan (eds.) (1986) *Public Interest Law,* Oxford, Basil Blackwell. For a more recent evaluation of the success of PIL in England, see Justice and Public Law Project (1996) *A Matter of Public Interest: Reforming the Law and Practice on Intervention In Public Interest Cases,* London, Justice and Public Law Project.

9 For a compendium of Indian cases with very good analysis, see Sangeeta Ahuja (1997) *People, Law and Justice: Casebook on Public Interest Litigation,* Vols. 1 and 2, London, Sangam Books. For a more recent study of Indian case laws, see PM Bakshi (1999) *Public Interest Litigations,* New Delhi, Ashoka Law House.

10 Evolution of PIL in Pakistan has been examined in Mansoor Hassan Khan (1993) *Public Interest Litigation: Growth of the Concept and its Meaning in Pakistan,* Karachi, Pakistan Law House.

11 See below chapter three for a detailed examination.

12 See especially Sara Hossain, S Malik and Bushra Musa (eds.) (1997) *Public Interest Litigation in South Asia: Rights in Search of Remedies,* Dhaka, University Press Limited. This is a compilation of papers presented at a workshop held in Dhaka in 1992.

13 See the authoritative exposition in *FAP 20* case, as above note 4.

PIL thus travels from one jurisdiction to another. We have welcomed PIL in Bangladesh very recently; however, one is unsure about its eventual success. In fact, the success of PIL in other jurisdictions can not be any guarantee of its success in Bangladesh. Superficial similarities between jurisdictions may conceal profound cultural and political differences that may prove detrimental to the exportation of an idea from one jurisdiction to another.[14] It is thus necessary to appreciate that the development, scope and practice of PIL are to a large extent jurisdiction specific. The prevailing constitutional scheme and socio-economic circumstances of a particular jurisdiction is bound to shape the scope of PIL and adjust it according to the particular needs and demands of the society.[15] In other words, even if imported from a similar jurisdiction, PIL needs to be domesticated to function properly.

Has PIL been properly domesticated in Bangladesh? This book answers the question in the affirmative and examines how this has been done. The autochthonic nature of our Constitution and the people's power principle provide the constitutional basis and legitimacy of PIL. After the initial inertia, the steady flow of PIL cases demonstrates the robust approach of the activists and judges. Thus after the introduction, acceptance and domestication of PIL, it is now time to further explore the possibilities of PIL and concretise our human rights jurisprudence. The book is an exploratron of these possibilities.

III

The present introductory chapter aims to introduce the book. The second chapter deals with the historical development of PIL in certain selected jurisdictions including USA, England, India and Pakistan. These jurisdictions have been selected because they exerted considerable influence in the shaping of PIL in Bangladesh. The third chapter examines the development of PIL in Bangladesh. We analyse the initial years and observe the close nexus of the

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[14] Jeremy Cooper (1991) *Keyguide to Information Sources in Public Interest Law,* London, Mansell at 15. He provides a list of literature that examines this issue. As to the difference of American and Indian PIL, see Upendra Baxi (1985) "Taking suffering seriously: Social action litigation in the Supreme Court of India" in Rajeev Dhavan, R Sudarshan and Salman Khurshid (eds.) *Judges and the Judicial Power: Essays in Honour of Justice V.R. Krishna Iyer,* London & Bombay, Sweet & Maxwell and Tripathi, pp. 289-315 at 291.

[15] This important issue has been analysed from a comparative perspective in David Feldman (1992) "Public interest litigation and constitutional theory in comparative perspective" in Vol. 55 No 1 *Modern Law Review,* pp. 44-72.

development of PIL and the restoration of the democratic process. The fourth chapter focuses on the meaning, nature and scope of PIL and compares it with other associated concepts such as public interest law. The fifth chapter examines a number of theoretical approaches that has been considered to understand, explain and legitimise PIL. The sixth chapter examines the constitutional basis of PIL in India, Pakistan and Bangladesh. It demonstrates how the autochthonic nature of the Constitution and the supreme place of the 'people's power' idea legitimise and mandates PIL in Bangladesh. The seventh chapter outlines the gradual development of the traditional rules of *locus standi* with reference to England, India and Pakistan. These developments have been instrumental in the Bangladeshi context and this has been discussed in chapter eight. Chapter nine examines the innovative approaches taken in PIL cases with regard to procedure and remedies. Finally the concluding chapter provides some general observations and assessments.

Chapter Two

BACKGROUND AND DEVELOPMENT OF PIL

A scrutiny of PIL in various jurisdictions demonstrates a very interesting pattern. PIL first emerges as a result of expressions of social commitment of conscious individuals. Then it faces an initial period of recognition problem. Eventually, it breaks down the traditional constrains. Once successful, it is treated as a major development and becomes a permanent feature of the legal system. Finally, this success in its part inspires other jurisdictions to follow the same route. PIL thus travels from one jurisdiction to another.

However, development of PIL is closely dependent on the constitutional culture and historical experience of the people. Therefore, its history in each jurisdiction is unique. The present chapter outlines the development of PIL in USA, England, India and Pakistan. These have immensely influenced the Bangladeshi developments, which will be examined in the next chapter.

EMERGENCE OF PUBLIC INTEREST LAW IN AMERICA

The term PIL, as it is now known, and the associated term 'public interest law', were first coined in the United States. While arrogant capitalism and excessive individualism often typifies the American society, there is also a strong tranquil current of collectivism and social mindedness. This concern for the society has brought many changes during this century. In the legal field, it has brought new techniques, mechanisms, approaches and procedures in favour of the collective interest. Public interest law includes a number of these developments including legal aid, research, formation of public opinion, lobbying and litigation conducted by specialised lawyers and organisations. PIL, litigation in the interest of the public, is thus only one of the various methods of the greater movement of public interest law.

Roots

There are a number of movements that may be identified as the roots of public interest law and have shaped its 'patterns of organisation, modes of financing and choices of strategies'.[1]

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[1] Nan Aron (1989) *Liberty and Justice for All: Public Interest Law in the 1980s and Beyond,* Boulder and London, Westview Press at 6.

The first major root of public interest law may be traced to the legal aid movement that started during the 1870s.[2] Legal aid movement brought two new features to the established system. One is that *pro bono* work became institutionalised. The other is that it reflected not an individual lawyer's concern but the concern of the community that was often subsidised by a third party benefactor. By the first half of the century, legal aid became a regular and established feature. Public interest lawyers borrowed the organisational form of legal aid firms. On the one hand, there was commitment and enthusiasm to serve the people. On the other hand, they were professionals with independent offices, salaried staff and full time devotion.

The second root of public interest law lies in the works of the Progressive Era Reformers. At the turn of the twentieth century, during the time of rapid industrialisation and social and political changes, a movement aimed to check the evils of unregulated business enterprises achieved remarkable success. New legislation aimed to protect the workers and consumers and monitoring institutions like the Federal Trade Commission came up to defend collective rights.

Progressive Era Reform helped to advance the philosophical basis of public interest law as it proceeded with the assumption that the Government should intervene in the economic life of the society so that the market does not operate in a way injurious to public welfare. Another contribution of the progressive legacy is that it focused on the self-realisation of the lawyers; their commitment and obligation to the society.[3]

The third root directly antecedent of public interest law is the American Civil Liberties Union (ACLU) and its offshoot the National Association for the Advancement of Colored People / Legal Defense and Education Fund (NAACP/LDF). ACLU was founded during the World War I and was mainly a citizens' lobbying group. It worked to protect the democratic rights of the citizens including rights to free speech and due process. With the help of a network of volunteer lawyers, ACLU acted as a watchdog of governmental corruption and abuse of power.

However, it was the activities of NAACP that has given the public interest law firms their present strategy and inspiration. In the 1930s, especially after 1939 when it became independent of its parent organisation,

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2 The year, more precisely, is 1876 when a programme was taken to assist recently arrived German immigrants.

3 Progressive Era Reformers, says Aron above note 1 at 8, believed that the changes should primarily be brought by the legislature and the government. Modern public interest lawyers, however, react against a restricted judiciary and tend to rely more on judicial intervention.

NAACP initiated a movement with the aim to emancipate the Black Americans from their legal, political and economic disabilities. Specially important were legal matters and steps taken to challenge various inequalities through litigation.

In 1954, the landmark case of *Brown v. Board of Education*[4] was a huge success. In that case racial segregation in education, employment and housing based on the 'separate-but-equal' notion was rejected as being inherently unequal. In consequence, a number of subsequent cases gradually eliminated segregation in public facilities. Legal victories to a great extent aided the forceful social movement for equality and, as a result, the Federal Commission on Civil Rights was established in 1958 and the Civil Rights Act was passed in 1964. In 1963, a very important case for public interest law was *NAACP v. Button*. This case removed a number of potential legal obstacles to public interest law. It was now possible for the activists to raise public interest matters in law courts and to treat litigation as one of the strategies of the greater movement of social reform.

NAACP remains a predecessor of modern PIL firms since its organisational and operational model has been consistently followed. As regards organisation, highly qualified professionals worked in a full time basis within an institutionalised structure. Operationally, the main focus was not on routine cases as in legal aid firms, but on strategic cases with an aim to achieve social reform. In other words, activism was blended with professionalism.

Expansion

In American history, the 1960s and 1970s were people's decades. It was a time when Post World War II technological advancements tended to dehumanise the society and Cold War/ Vietnam issue galvanised conservatism. At the same time, however, social movements reached to astonishing peaks. Socially conscious activist individuals and organisations proceeded to advance the causes of unrepresented constituencies like the poor and the helpless, consumers, minorities, women and sought to eliminate a plethora of discrimination and inequality. While so doing, they found the mechanisms of public interest law, especially PIL, as one of their main tools.

Support came from several quarters. First, charitable organisations, often in the form of private foundations, came forward offering financial assistance to the PIL lawyers. Contribution from organisations such as Sierra

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[4] [1954] 347 US 483.

Club Legal Defense Fund and the Ford Foundations was crucial in the expansion of public interest law.[5]

Second, the Federal Government took an increasingly liberal view that was, to a considerable extent, the result of successful PIL cases. Consequently, government funded legal aid organisations were given more support and financial assistance; new laws relating to social and civil justice were passed; administration became more open to the citizens with respect to its decision making process; and public interest law firms were recognised as tax-exempt charitable organisations.

Third, the private bar and the law schools began to stress on *pro bono* activities. Young bright lawyers often voluntarily ignored the lure of commercial law firms. Lawyers found involvement in PIL cases a good way of discharging their social responsibilities.

Eventually, due to gradual progress throughout the late 1960s and 1970s, public interest law and PIL became a part of the American legal system. By 1985, Fred Strasser could declare:

> Fifteen years after the new generation of public interest law was born, the turbulent practice has survived to become a permanent fixture on the American legal landscape.[6]

Attaining maturity

Public interest law, however, suffered serious backlash in the 1980s. This was the result of two major events. First, as a consequence of the remarkable success of PIL, vested interests including commercial interests and conservative elements became more organised and unitedly attacked the newly achieved advancements. Second, a new wave of conservatism swept America. With the election of Ronald Reagan as President in 1980, the notion that the domestic role of the Federal Government should be curtailed even if it means reduction of social spending gained considerable public support.

Despite the backlash, public interest law has survived. This alone shows that PIL has become a part of the mainstream. There is a continuous stream of PIL cases. Public support for public interest firms is still very strong. Law schools' focus on public advocacy and programmes like clinical legal education has become a permanent feature. Most of all, the lawyers as a

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[5] Other major organisations that came forward include the Centre for Law and Social Policy, the Centre for law in Public Interest, the Citizens Communication Centre, the Institute for Public Representation, the Natural Resources Defense Council, Public Advocates Inc. etc.

[6] Fred Strasser (1985) "Public interest law acquires the concerns of middle age" Vol. 7 *National Law Journal*, at 1 and 8.

community, and the society as a whole, remain appreciative of the role of law and legal-professionals in social reform. PIL has now reached such a stage of maturity that even its strongest opponents - industry lobbyists - concede that it is ". . . a part of the scene today, and that's just the way it is".[7]

PUBLIC INTEREST LAW AND PIL IN ENGLAND

Regarding individual legal activism for common good, the historical experience of the English has been somewhat different from that of the Americans. Yet, as in the States, the movement for legal aid is probably the most important precursor of the modern public interest law.

Legal aid in England, although practised in one form or another prior to the 2nd World War, became firmly entrenched since 1949. A major reform began with the creation of the Legal Aid and Advice Scheme and entrusting it to the Law Society, the national association of solicitors.[8] The emergence of the so-called 'welfare state' attempted to ensure that the poor, for their individual problems, get some sort of legal assistance. However, further major developments were made only in the early 1970s when the legal aid system was reorganised incorporating the modern concepts.[9] In fact, litigation in social or public interest, public advocacy, formation of public opinion for social interest, etc. did not start earnestly till the mid 1960s.

The new wave started with a band of law oriented social action groups. Child Poverty Action Group, Joint Council for the Welfare of Immigrants, SHELTER and other similar groups assumed high public profile. They advised on and litigated individual cases, negotiated with bureaucracies, fought test cases and took issues beyond the United Kingdom to the European Court and European Court of Human Rights.

Successive governments, eager to please the electorate, created another group of institutions. The Parliamentary Commissioner for Administration investigates complaints against the central government, health service, local authorities and the police. Voluntary small claims courts aim to aid the consumers in the direction of informal arbitration. The Office of Fair Trading regulates competition and protects certain consumer interests. Parliament has established semi-autonomous bodies to work on racial issues.

In terms of litigation in public interest, the development in England mainly took place within the ambits of administrative law where administrative actions are challenged by the citizens. It was a slow process.

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[7] As quoted in Strasser, as above at 1.

[8] This was achieved under the Legal Aid and Advice Act 1949.

[9] See Legal Advice and Assistance Act 1972 and Legal Aid Act 1974.

Gradually a number of liberall judges, including Lord Denning, extended the meaning of the term *'locus standi'*, enabling the activists to approach the court.[10] Significant changes were brought in 1977-1981 when a set of new rules liberalised applications for judicial review.[11]

Thus, the development of PIL in England is mainly a story of the evolution of the *'locus standi'* rules. We shall not enter into the details here since it has been discussed elaborately in chapter seven below.

It must be noted, however, that the success of the English activists in terms of PIL appears to have been less pronounced than the Americans. One reason is the difference of legal and political culture – the Americans are more litigation oriented than the English. Another reason involves the history of the English Administrative law. It has been pointed out that during and after the 2nd World War, administrative law in England became conservative and non-adventurous.[12] The development of administrative law started in earnest during the 1960s. Thus, it took some time for the law to adjust with the growing demands of social justice.

English activists and judges, when they use the term public interest law, stress the peculiarities of the English system. Whenever the litigation oriented American approach is taken, disregarding the English circumstances, it is usually treated as 'legal imperialism'.[13] In fact, the failure of PIL to instantly emulate the American success story is said to be due to the failure to appreciate the cultural differences of the two countries.[14] Carol Harlow observed:

> When public interest law crossed the Atlantic, its proponents were left with clear alternatives: either public interest law could adapt to the British

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[10] For these developments, see below chapter seven. See also Lord Denning (1979) *The Discipline of Law*, London, Butterworths.

[11] Order 53 rule 3(5) of the Rules of the Supreme Court was amended in 1977 and was later incorporated in the Supreme Court Act 1981, section 31(3).

[12] Sir William Wade and Christopher Forsyth (1994) *Administrative Law*, 7th Edition, Oxford, Clarendon Press, pp. 18-19 describe this as a gloomy period for administrative law. They catalogue a number of judicial abdications and errors showing how the judges surrendered power that they previously enjoyed. SA De Smith (1980) *Judicial Review of Administrative Action*, 4th Edition, London, Stevens and Son Limited at pp. 292-293 suggested that this was an attitudinal spillover from the War.

[13] Rajeev Dhavan (1986) "Whose law? Whose interest?" in Jeremy Cooper and Rajeev Dhavan (eds.) *Public Interest Law*, Oxford, Basil Blackwell, pp. 18-48 at 38.

[14] Jeremy Cooper (1991) *Keyguide to Information Sources in Public Interest Law*, London, Mansell, at 15 poses the question: "Just because something works in one jurisdiction, why should it work in another? Superficial similarities between jurisdictions may conceal profound cultural and political differences that will prove fatal to the exportation of an idea from one jurisdiction to another."

> context by following parliamentary and governmental paths to reform or it could try to push the British legal process into the American mould. By and large the second option has been chosen. Public interest law has retained its court orientation. . . . this has been a mistake and is an important cause of the disillusion experienced by many of its keenest advocates.[15]

PIL IN INDIA

The background

It has been suggested that the judges and scholars pioneering PIL in India were influenced and inspired by the American development.[16] Especially, Bhagwati J. cited Cappelletti in the *Judges' Transfer* case[17] and favourably discussed his ideas in a subsequent article.[18] Western scholars including Cappelletti were discussed by other Indian writers as well, but this generally happened when the concept of PIL had already been introduced and accepted in India.[19]

Perhaps the primary and most important factor that prompted the development of PIL in India was a strong sense of social consciousness of a number of judges. By the late 1970s, even after more than three decades of independence, India was still an underdeveloped and poor third world country with millions of people barely surviving in abject poverty. The state not only failed to ameliorate the conditions of the poor, it faltered to incorporate substantial distributive or social justice for the masses. The

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[15] Carol Harlow (1986) "Public interest litigation in England: The state of the art" in Jeremy Cooper and Rajeev Dhavan (eds.) *Public Interest Law,* Oxford, Basil Blackwell, pp. 90-137 at 91.

[16] See SK Agrawala (1985) *Public Interest Litigation in India: A Critique,* New Delhi, Tripathi and Indian Law Institute at 8. To Agrawala, it was obvious that the inspiration for PIL has come from the American experience. Clark D Cunningham (1987) "Public interest litigation in Indian Supreme Court: A study in the light of American experience" in Vol. 29 No 4 JILI, pp. 494-523 at 496 suggests that the Indian PIL has possibly drawn some inspiration from a seminal article by Cappelletti. See M Cappelletti (1978-79) "Vindicating the public interest through the courts: A comparativist's contribution" in M Cappelletti et al. (eds.) *Access to Justice,* Vol. III Alphen aan den Rijn, Netherlands, Sijthoff and Noordhoff, pp. 513-564.

[17] *SP Gupta and others v. Union of India and others* AIR 1982 SC 149 at 192.

[18] PN Bhagwati (1987) "Social action litigation: The Indian experience" in Neelan Tiruchelvam and Radhika Coomaraswamy (eds.) *The Role of the Judiciary in Plural Societies,* London, Frances Pinter, pp. 20-31 at 21. However he claims not only to be familiar with the American developments but also proceeds to distinguish it from the Indian PIL. See PN Bhagwati, as above at 22, and PN Bhagwati (1984-85) "Judicial activism and public interest litigation" in Vol. 23 *Columbia Journal of Transnational Law,* pp. 561-577 at 569.

[19] For example, see Parmanand Singh (1988) "Public interest litigation" in Vol. XXIV *Annual Survey of Indian Law,* pp. 123-146 at 124. He borrows Chayes' ideas of PIL and applies them to the Indian context.

legislature was seen as insensitive to the cause of the poor and merely a forum for politicians who were desperate to realise their personal ambitions.[20] The executive also failed to meet the expectations of the people and there were widespread governmental inefficiency, mistakes and lawlessness.

The situation became all the more precarious during the emergency period of 1975-77. On the one hand, the democratic institutions were under pressure and the judiciary became increasingly subordinate to the executive and the legislature. On the other hand, it was a populist period led by Indira Gandhi when many judges, including justices Krishna Iyer and Bhagwati, became part of a nation-wide movement for legal services and became 'people-prone'.[21] In the immediate aftermath of the emergency, the perception of failure of the governmental branches to solve socio-economic problems was amplified as it was shared and projected by the free press.[22] Finding no other alternative, a number of conscious citizens, non-governmental organisations and social action groups started knocking at the door of the judiciary.[23] The result was judicial activism, related to the so-called 'judicial populism', which may be understood as a part of the court's effort to retrieve a degree of legitimacy following the emergency period.[24]

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[20] Gobinda Mukhoty (1985) "Public interest litigation: A silent revolution?" in 1 *SCC Journal*, pp. 1-11 made an assessment of the legislature's attempts to pass legislation for the poor and concluded that generally, the attempts did not succeed mainly due to bad implementation.

[21] These judges organised legal aid camps in distant villages, attempted to provide de-professionalised justice through camps and people's courts and called for a total restructuring of the legal system. See Upendra Baxi (1985) "Taking suffering seriously: Social action litigation in the Supreme Court of India" in Rajeev Dhavan, R Sudarshan and Salman Khurshid (eds.) *Judges and the Judicial Power: Essays in Honour of Justice V.R. Krishna Iyer*, London & Bombay, Sweet & Maxwell and Tripathi, pp. 289-315 at 293.

[22] See Baxi, as above at 294, for the important role played by the press in the development of PIL.

[23] Barnett R Rubin (1987) "The civil liberties movement in India: New approaches to the State and social change" in Vol. XXVII *Asian Survey*, pp. 371-392 provides a detailed discussion on the civil liberties movement in India in the aftermath of the emergency period.

[24] The role of judicial populism in the development of PIL in India has been strongly emphasised by Baxi, above note 21 at 290. For further support of Baxi's arguments, see Jamie Cassels (1989) "Judicial activism and public interest litigation in India: Attempting the impossible?" in Vol. 37 *American Journal of Comparative Law*, pp. 495-519 at 510. Earlier Upendra Baxi (1980) *The Indian Supreme Court and Politics*, Lucknow, Eastern Book Company has discussed the issue of judicial populism in more detail and appreciated the fact that the Indian judges were moving towards a more populist direction.

The cases

After the emergency period, it gradually became clear that a number of social activist judges were trying to find a new way to revitalise their constitutional power in favour of the people. Thus, for example, although the term PIL was not used, Krishna Iyer J. in a 1976 case observed:

> Test litigation, representative actions, *pro bono publico* and like broadened forms of legal proceedings are in keeping with the current accent on justice to the common man and a necessary disincentive to those who wish to by-pass the real issues on the merits by suspect reliance on peripheral procedural shortcomings. Even Art. 226 viewed on wider perspective, may be amenable to ventilation of collective or common grievances, as distinguished from assertion of individual rights although the traditional view, backed by precedents has opted for the narrower alternative. Public interest is promoted by a spacious construction of locus standi in our socio-economic circumstances and conceptual latitudinarianism permits taking liberties with individualisation of the right to invoke the Higher Courts where the remedy is shared by a considerable number, particularly when they are weaker.[25]

Soon a number of cases were decided that were extraordinary in at least two ways. First, the main focus was on the interest of the public or vulnerable social segments. Second, the judges proceeded as activists and not as passive observers.

By the late 1970s and early 1980s, social activist judges, including Justice Krishna Iyer and Justice Bhagwati, were busy constructing a PIL jurisprudence through a number of cases involving social justice matters. Thus the Judges acted on the basis of a letter sent by a prisoner describing torture upon another prisoner,[26] reviewed the system of confinement of undertrial prisoners in a case where some of them were held in custody longer than the maximum sentence that could be imposed upon conviction[27] and ordered a municipality to carry out its statutory duties.[28]

A few of the leading cases of this time gained considerable media attention and also played important role in the construction of the new rules of standing. For example in *Fertilizer Corporation Kamagar Union v. Union of India*,[29] where the employees challenged sale of plants and equipment of a

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25 *Mumbai Kamgar Sabha v. Abdulbhai* AIR 1976 SC 1455.

26 *Sunil Batra v. Delhi Administration* AIR 1980 SC 1579.

27 *Hossainara Khatoon and others v. Home Secretary State of Bihar* (1980) 1 SCC 115.

28 *Municipal Council, Ratlam v. Verdhichand and others* AIR 1980 SC 1622.

29 AIR 1981 SC 344.

factory, Krishna Iyer J. treated the matter as a public interest and gave the employees standing. He observed:

> Law, as I conceive it, is a social auditor and this audit function can be put into action only when someone with real public interest ignites the jurisdiction. We cannot be scared by the fear that all and sundry will be litigation-happy and waste their time and money and time of the Court through false and frivolous cases.[30]

He also said that PIL as a part of the process of participative justice and standing in civil litigation 'must have liberal reception at the judicial doorsteps'.[31]

In another leading case, *People's Union for Democratic Rights v. Union of India*,[32] a letter sent by a social welfare organisation claiming violation of labour laws was treated as writ petition and the court emphasised on a non-adversarial approach by appointing ombudsmen. Krishna Iyer J. constructed a new set of rules of standing for PIL matters and declared that the court 'would cast aside all technical rules of procedure' where public interest in involved.[33]

Similarly, the court adopted a non-adversarial approach to investigate and ameliorate the conditions of bonded labourers in the famous case of *Bondhua Mukti Morcha v. Union of India*,[34] which eventually necessitated subsequent monitoring of the situation by the court. Justice Bhagwati observed:

> The Government and its officers must welcome public interest litigation, because it would provide them an occasion to examine whether the poor and the down-trodden are getting their social and economic entitlements or whether they are continuing to remain victims of deception or exploitation at the hands of strong and powerful sections of the community and whether social and economic justice has become a meaningful reality for them or has remained merely a teasing illusion and a promise of unreality, so that in case the complaint in the public interest litigation is found to be true, they can discharge their constitutional obligation, root out exploitation and injustice and ensure to the weaker sections their rights and entitlements.[35]

The bold attitude of the judges in these cases resulted in a huge number of applications by citizens seeking to defend constitutional and fundamental

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30 As above at 354.

31 As above at 355.

32 AIR 1982 SC 1473.

33 As above at 1483.

34 AIR 1984 SC 802.

35 As above at 811.

rights of the poor and the helpless. Issues dealt with the court involved constitutionality of reservation of promotion for scheduled cast,[36] constitutional rights of inmates of protective homes,[37] inhuman conditions of prison inmates,[38] rights of pensioners,[39] illegal detention without trial,[40] unsatisfactory conditions of railway services[41] and eviction of pavement duellers without rehabilitation.[42]

The most famous exposition of PIL came in 1982. The law minister initiated a circular declaring that as far as possible, one third of the judges of each High Court should be from outside the state. A number of petitions were filed by independent advocates challenging the circular on the ground that the circular constituted a threat to the independence of the judiciary and was, therefore, unconstitutional and void. Thus came the case *SP Gupta and others v. Union of India and others*[43] popularly known as the *Judges' Transfer* case.

PN Bhagwati J., AC Gupta J., S Murtaza Fazal Ali J., VD Tulzapurkar J., DA Desai J., RS Pathak J. and ES Venkataramaiah J. gave detailed judgements constructing a PIL jurisprudence, including a liberal set of rules of *locus standi*. The spirit of these judgements is summarised by Bhagwati J. when he says:

> Today a vast revolution is taking place in the judicial process; the theatre of law is fast changing and the problems of the poor are coming to the forefront. The court has to innovate new methods and devise new strategies for the purpose of providing access to justice to large masses of people who are denied their basic human rights and to whom liberty and justice have no meaning. The only way in which this can be done is by entertaining writ petitions and even letters from public-spirited individuals seeking judicial redress for the benefit of persons who have suffered legal wrong or a legal injury or whose constitutional and legal rights have been violated but who by reason of their poverty or socially or economically disadvantaged position are unable to approach the court for relief.[44]

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36 *Akil Bharatiya Soshit Karamshcri Sangh (Railway) v. Union of India* AIR 1981 SC 298.

37 *Dr Upendra Baxi v. State of UP* (1983) 2 SCC 308.

38 *Sheela Barse v. State of Maharashtra* (1983) 2 SCC 96.

39 *DS Nakara v. Union of India* AIR 1983 SC 130.

40 *Rudul Shah v. State of Bihar* AIR 1983 SC 1086.

41 *P Nalla Thampy Thera v. Union of India* AIR 1984 SC 74.

42 *Olga Tellis v. Bombay Municipal Corporation* AIR 1986 SC 180.

43 AIR 1982 SC 149.

44 As above at 210-211.

After this authoritative exposition, Indian development of PIL acquired a new phase of maturity. The battle for recognition and establishment of PIL has been won. Now the activist judges and lawyers concentrated on the diversification and application of PIL in different fields.

PIL has not only become a permanent feature of the Indian law, Indian developments have immensely influenced PIL in a number of other common law based legal systems. The first jurisdiction to follow the Indian example was Pakistan.

PIL IN PAKISTAN

The background

Pakistan, being an underdeveloped country like India, has the same problems of poverty and social injustice. Executive lawlessness, combined with the failure of the legislature to ensure the progress of law, has given rise to similar frustrations as had been experienced by the Indians. Yet the situation was perhaps been even more complicated in Pakistan because of the failure of democracy for prolonged periods due to the imposition of martial law.[45] While Pakistan had three Constitutions in the formal sense of the term, there were several interim constitutional arrangements in between.[46] One consequence of this chaos was the pathetic status of the fundamental rights of the people. Annulled, curbed or declared non-applicable, these rights could not be claimed by the aggrieved for long periods at a time. Whenever the Constitution was restored, the judiciary

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[45] After gaining its independence in 1947, Pakistan had its first Constitution only in 1956 which was annulled in 1958 by the first Martial Law. The second Constitution was adopted in 1962, but was abrogated in 1969 by the second Martial law. In 1973, came the third Constitution but it was kept in abeyance from 1977 to 1985 by another Martial Law regime. We are still to find out about the effects of the recent take-over of the government by the Pakistan Army in October 1999. For a gradual development of the constitutional history of Pakistan, see GW Choudhury (1969) *Constitutional Development in Pakistan,* Lahore, Longman; Masud Ahmad (1978) *Pakistan, a Study of its Constitutional History: 1857-1975,* Lahore, Research Society of Pakistan; Riaz Ahmad (1981) *Constitutional and Political Developments in Pakistan,* Karachi, Pak-American Commercial Ltd; and Paula R Newberg (1995) *Judging the State: Courts and Constitutional Politics in Pakistan,* Cambridge, Cambridge University Press.

[46] It may be argued that Pakistan has experienced nine constitutional arrangements since its independence in 1947. These are: (i) Government of India Act 1935 as adopted by Pakistan (Provisional Constitution) Order 1947; (ii) Constitution of 1956; (iii) The Laws (Continuance in Force) Order 1958; (iv) Constitution of 1962; (v) Provisional Constitution Order 1969; (vi) The Interim Constitution of 1972; (vii) Constitution of 1973; (viii) The Laws (Continuance in Force) Order 1977; and (ix) Provisional Constitution Order 1981. See MH Khan (1993) *Public Interest Litigation: Growth of the Concept and its Meaning in Pakistan,* Karachi, Pakistan Law House at 29, footnote 2.

started to move towards establishing its authority till the next Martial Law came to halt everything once again.

This situation resulted in the popular perception that the traditional litigation was failing in many respects. The realisation dawned that ". . . the weaker sections of society because of their economic or social position, remain cut off from the rest of the society and thereby suffer hardships".[47] The integrity of the entire legal system was in question, as Khan observed that the people seemingly do not respect the "Common Law" which they feel has been imported into the country.[48] This feeling, it has been noted, was shared by a number of judges.[49]

The situation started changing as soon as the Martial Law was lifted in 1985. In fact, this may be compared with the Indian situation in the aftermath of the emergency.[50] Pakistan witnessed a newly heightened social consciousness of the judiciary, the same factor that earlier played an important part in the development of PIL in India. With the Constitution working and all the fundamental rights fully restored, the judges began to appreciate their role and responsibility. This re-evaluation generated a change of attitude of the judiciary, termed by Mahmood and Shaukat as 'judicial glasnost';[51] a conscious effort to resort to judicial activism when necessary. The court gradually started not only self-criticism, but also allowed criticism and fair comment from the legal scholars and even from the press.[52] The media also started to expose social evils of the country.[53] Investigative journalism became successful. Theatres, television programmes, books and articles all played their part in augmenting social consciousness.

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47 MH Khan (1992) "The concept of public interest litigation and its meaning in Pakistan" in *PLD Journal*, pp. 84-95 at 92.

48 As above.

49 MH Khan, above note 46 at 51, quotes Hamood-ur-Rahman CJ who in 1975 appealed to discard the principles of administration of justice based on Anglo-Saxon ideas. Similarly, Justice Afzal Zullah has repeatedly refused to apply English legal principles on the ground that they are inadequate to ensure justice. See for example, *Haji Nizam Khan v. Additional District Judge* PLD 1976 Lah 930 and *Ghulam Ali v. Ghulam Sarwar Naqvi* PLD 1990 SC 1.

50 See above for further discussion.

51 S Mahmood and Nadeem Shaukat (1992) *Constitution of the Islamic Republic of Pakistan, 1973*, Lahore, Legal Research Centre at iv of preface.

52 See Mansoor Hassan Khan, above note 46 at 40-43, for further discussion. One of the examples he cites to prove his point involves a case where a lawyer moved an application for contempt of court against a Chief Justice because some of the judges were seen queuing up "just to receive the favour of a handshake from the ruler of the day".

53 While describing the role of the media in detail MH Khan, above note 46 at 54, says: "The PIL which we are witnessing in Pakistan today is, to quite some extent, media spurred".

The cases

The environment was conductive and Pakistan was soon to follow the Indian example. PIL developed there in the late 1980s.[54] In 1988, in the famous case of *Miss Benazir Bhutto v. Federation of Pakistan*,[55] a political party challenged a new order by the Martial Law government for registration of political parties. The Supreme Court gave standing to the political party and refused to take a conservative or traditional stance. *Benazir Bhutto's* case established a framework of standing rules in matters of public importance.

This was soon followed by the leading case of *Darshan Masih alias Rehmatay and others v. The State*.[56] The court acted on the basis of a telegram demanding enforcement of fundamental rights involving bonded labourers. The court enunciated the philosophy, rules of standing and procedure of PIL. The proceeding was concluded and an order was passed on the basis of an agreement reached by all concerned.

Afzal Zullah CJ, followed by Nasim Hasan Shah CJ, played vital roles in the development of PIL in Pakistan. They invited PIL cases and attempted to establish a procedural framework to deal with PIL petitions. This was made public in a judicial conference held in Quetta on 15th and 16th August 1991.[57] It was declared that it is the responsibility of the Judiciary under the Objectives Resolution and under the Constitution to take notice of violations of rights of citizens.

As it happened in the USA and India, despite opposition, PIL became an integral part of the Pakistani legal system by the early 1990s.

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54 MH Khan, above note 46, provides the most comprehensive study on the Pakistani development. See also Faqir Hussain (1993) "Public interest litigation in Pakistan" in *PLD Journal*, pp. 72-83 and Syed Mushtaq Hussain (1994) "Public interest litigation" in *PLD Journal*, pp. 5-10.

55 PLD 1988 SC 416.

56 PLD 1990 SC 513.

57 See Quetta Conference (1991) Judicial conference held at Quetta on 15th and 16th August 1991: Memorandum of proceedings" in PLD Journal, pp. 126-152. The judges attempted to create a special procedural structure within the judiciary, with the help of the administration, to receive and consider PIL petitions promptly. However, this project appears to have been abandoned now.

Chapter Three

DEVELOPMENT OF PIL IN BANGLADESH

The colonial legacy is responsible for many of the shortcomings of the Bangladeshi legal system. The fact remains, however, that even after gaining independence twice in the last fifty years, we find the system fundamentally unaltered. When the British started to reform, change and eventually transform the legal system inherited from the Mughals, they attempted to import and transplant the common law system and the Anglo-Saxon jurisprudence.[1] In many cases this was compromised because of the difference of society, culture, politics and religion. But essentially, the rulers believed that they were introducing the common law system for the betterment of the colony. In any case, the prime motive was to create a system that would help to rule the colony effectively.

In British India, therefore, we had imitations of the British bench and the bar. The lawyers and judges of Indian origin were important and leading members of a new Indian aristocracy created to facilitate the colonial rule. They were not only trained in English law but also believed the common law system to be the best and utterly indispensable for the Indian society. It was, a 19th century colonial legal system, with all its goods and evils which the newly independent nations of India and Pakistan inherited in 1947.

Muslim-dominated East Bengal joined Pakistan and the legal developments in Pakistan and India took two separate roads after 1947. Although in both countries the written constitutions attempted a conscious departure from the colonial legacy, Pakistan was not as successful as India in maintaining democratic practices in the political field.[2] For Bangalis, the Pakistan period was full of clashes and power struggles between different interest groups and especially between the Western and Eastern part of the country. This was made worse by martial laws and the absence of democratic processes. The Constitution was repeatedly abrogated, discarded

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1 For a general account of Indian legal history, see VD Kulshreshtha (1995) *Landmarks in Indian Legal and Constitutional History*, 7th edition, Revised by BM Gandhi, Lucknow, Eastern Book Company.

2 For recent appraisals of the constitutional history of Pakistan, see Riaz Ahmad (1981) *Constitutional and Political Developments in Pakistan*, Karachi, Pak-American Commercial Ltd. and Paula R Newberg (1995) *Judging the State: Courts and Constitutional Politics in Pakistan*, Cambridge, Cambridge University Press.

and written from scratch. A natural healthy development of law was, consequently, frustrated.

The east-west conflict finally resulted in an armed liberation movement in 1971. Bangladesh was born under the leadership of Sheikh Mujibur Rahman, the head of the Awami League, the largest political party.[3] This marked the point of departure of the Bangladeshi legal system from that of Pakistan. The new country adopted a Constitution in 1972.

The Constitution of Bangladesh has a chequered history.[4] From the very beginning, it was subject to major amendments that tended to restrictively redefine the limits of fundamental rights.[5] One of these early amendments, the Third Amendment,[6] was triggered by *Kazi Mukhlesur Rahman v. Bangladesh and another*,[7] popularly known as the *Berubari* case.

INITIAL EXPERIENCE AND THE *BERUBARI* CASE (1972-74)

On 16 May 1974, the Prime Ministers of Bangladesh and India signed a treaty in Delhi providing *inter alia* that India will retain the southern half of South Berubari Union No. 12 and the adjacent enclaves and in exchange Bangladesh will retain the Dahagram and Angarpota enclaves. This treaty was challenged on the ground that the agreement involved cession of territory and was entered into without lawful authority by the executive head of government. The petitioner Kazi Mukhlesur Rahman was an advocate and came to the Court as a citizen and as such his standing was in question.

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3 Hasan Zaheer (1994) *The Separation of East Pakistan: The Rise and Realisation of Bengali Muslim Nationalism*, Dhaka, University Press Limited, provides a recent account of the birth of Bangladesh. See also AMA Muhith (1992) *Bangladesh: Emergence of a Nation*, Dhaka, University Press Limited.

4 Mustafa Kamal (1994) *Bangladesh Constitution: Trends and Issues*, Dhaka, University of Dhaka, sketches the history of the Bangladeshi Constitution from a lawyer's perspective. For a more general analysis of political scientists, see Aleem-Al Razee (1988) *Constitutional Glimpses of Martial Law in India, Pakistan and Bangladesh*, Dhaka, Dhaka University Press Limited, and Dilara Choudhury (1995) *Constitutional Development in Bangladesh: Stresses and Strains*, Dhaka, The University Press Ltd.

5 The Constitution (First Amendment) Act (No. XV of 1973) provided for detention and trial of war criminals keeping it out of purview of the provisions relating to fundamental rights. The Constitution (Second Amendment) Act (No. XXIV of 1973) inserted provisions for 'Proclamation of Emergency' and suspension of fundamental rights during emergency situations. This amendment further qualified fundamental rights provisions by including preventive detention laws for the first time in the Constitution.

6 The Constitution (Third Amendment) Act (No. LCCIV of 1974).

7 26 DLR (SC) (1974) 44.

Locus standi was granted by Sayeem CJ on the ground that Mr Rahman agitated a question affecting a constitutional issue of grave importance posing a threat to his fundamental rights that pervade and extend to the entire territory of Bangladesh. The Court decided that the question is not whether the Court has jurisdiction but whether the petitioner is competent to claim a hearing. So the question is one of discretion which the Court is to exercise upon due consideration in each case. The application, however, was rejected on the ground of being pre-mature. But since the Court observed that a cession of territory needs parliamentary approval and enactment, the government soon initiated the Third Amendment of the Constitution.

The effect and influence of the *Berubari* case is enormous. It has often been considered as the starting point of PIL in Bangladesh where "the Court went very close to the doctrine of public interest litigation".[8] Being the judgement of the Appellate Division, *Berubari* was resorted and referred to whenever a widening of the standing rule was sought. This case may be regarded as an early achievement of the young Bangladeshi jurisdiction in its attempt to assert its creative authority. This case, it has recently been claimed in the *FAP 20* case, is unique since it precedes the PIL developments of the neighbouring jurisdictions.[9] This argument is summed up by Afzal CJ in the *FAP 20* case as he says:

> It is a matter of some pride that quite early in our Constitutional journey the question of *locus standi* was given a liberal contour in that decision by this Court at a time when the Blackburn cases were just being decided in England which established the principle of "sufficient interest" for a standing and the doctrine of public interest litigation or class action was yet to take roots in the Indian jurisdiction.[10]

THE BARREN PERIOD (1975-1986)

The Constitution, which provided for a parliamentary democracy, was under serious threat due to post-war instability, natural calamities including a famine and deterioration of the law and order situation. A desperate ruling party engineered the Fourth Amendment of the Constitution in January

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8 Syed Ishtiaq Ahmed (1993) "An expanding frontier of judicial review - public interest litigation " in Vol. 45 *DLR Journal*, pp. 36-45 at 43.

9 *Dr Mohiuddin Farooque v. Bangladesh and others (FAP 20)* 17 BLD (AD) (1997) 1 at 14. Mustafa Kamal J. says that an echo of some of the Berubari principles can be found in *SP Gupta and others v. President of India* AIR 1982 SC 149, a case decided in India eight years after *Berubari*.

10 As above at 3.

1975.[11] This introduced a dictatorial presidential government with a one-party political system.

The reaction was violent. In August of the same year, President Sheikh Mujibur Rahman, leader of the liberation struggle and the Awami League, was killed. The government was toppled and a martial law was declared. The Constitution was to remain in force subject to the martial law, i.e. it was partially suspended.[12] The martial law was administered initially by Khondoker Moshtaque Ahmed, a politician and ASM Sayeem, a retired Supreme Court judge. But the real power was in the hands of the army. The Chief of the army, General Ziaur Rahman, eventually became the martial law administrator. He gradually formed his own political party and decided to run the country as an elected President. By the time this martial law gradually gave way to a civil government in 1979, a multi-party democratic system had taken shape due to systematic dismantling of the Fourth Amendment.[13]

The civil government, which lasted till 1982, was dominated and controlled by General Zia. Still, the political and legal environment was comparatively free and the Court started to give a series of bold and significant decisions.[14] But this was again interrupted when, after the assassination of Zia in a failed *coup dé état*, the newly elected President was removed by General Ershad in March 1982.

Under the new martial law the Constitution was suspended altogether. A mini-Constitution was inserted in the Schedule to the Martial Law Proclamation which was to govern the country. Again, the Court was rendered inactive as this new device "quietened the legal front effectively".[15] General Ershad followed General Zia and after forming his own political

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[11] Act No. II of 1975.

[12] M Ershadul Bari discusses in detail the restrictions imposed upon the judiciary by the martial law and concludes that the judiciary had very little room left to manoeuvre. See M Ershadul Bari (1987) "Martial law and judiciary in Bangladesh: 1975-1979" in Vol. 10 Nos. 1 & 2 *Law and International Affairs*, pp. 35-51 and M Ershadul Bari (1989) "The imposition of martial law in Bangladesh, 1975: A legal study" in Vol. 1(1) *The Dhaka University Studies*, pp. 59-73.

[13] These changes brought by various Martial Law Proclamations were later ratified by the Constitution (Fifth Amendment) Act (No.1 of 1979). Although many of the autocratic provisions, including some of the unfettered powers of the President, were taken away, it still remained a Presidential system.

[14] Mustafa Kamal, above note 4 at 84, charts and discusses a number of significant constitutional cases from this period, but there is no PIL or PIL-like case.

[15] As above at 86. See also MA Mutaleb (1986) "Judicial independence: The contemporary debate (Bangladesh)" in Vol. 38 *DLR Journal*, pp. 42-45 for an interesting discussion of the state of judicial independence under Ershad's martial law.

party, started to transform himself as a political leader. Eventually, martial law was withdrawn in 1986, but the system remained primarily an autocratic one.

The constitutional journey in the first 15 years shows that the Court did not have an opportunity to function properly, let alone allow for the development of new ideas and views under the martial law regimes. The *Berubari* principle could have marked the turning point in the Bangladeshi jurisdiction for carrying forward the movement of PIL, notes Ishtiaq Ahmed, but the process was thwarted when the constitutional order was disrupted.[16] Mustafa Kamal J. explains in the *FAP 20* case:

> What happened after Kazi Mukhlesur Rahman's case in Bangladesh was a long period of slumber and inertia owing not to a lack of public spirit on the part of the lawyers and the Bench but owing to frequent interruptions with the working of the Constitution and owing to intermittent de-clothing of the constitutional jurisdiction of the superior Courts.[17]

Kept inactive and helpless, the Court's strategy was best described by Justice MH Rahman:

> In some of the developing countries the very existence of judiciary as an institution is at stake. In that unenviable condition the primary role of a judge will be, if he does not decide to leave his post, to hold on. If he fails to roar like a lion it is understandable. If he keeps a glum face and gives a withering look then that will be a good work. For the time being the worthwhile role for him will be to do justice between a citizen and a citizen, so that a foundation may be laid for the future when a citizen will be able to expect justice against the mighty and the overbearing as well.[18]

A significant case from this period is *AK Mujibur Rahman v. Returning Officer and others*.[19] General Ziaur Rahman was a presidential candidate while still being a member of the Armed Forces. Military laws were amended to facilitate his candidacy. This amendment was challenged by a voter. The petition was summarily rejected by Shahabuddin Ahmed J. on merit but the question of standing was not disputed.

Standing was discussed in *MG Bhuiyan v. Bangladesh*[20] where an advocate challenged an Ordinance as a citizen. As he was not personally affected, Munim CJ denied standing following the traditional view.

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16 Ishtiaq Ahmed above note 8 at 44.

17 Above note 9 at 15.

18 MH Rahman (1988) "The role of the judiciary in the developing societies: Maintaining a balance" in Vol. II Nos. 1 & 2 *Law and International Affairs*, pp. 1-10 at 4-5.

19 31 DLR (1979) 156.

20 BCR 1981 (AD) 80. This was an appeal from *MG Bhuiyan v. Bangladesh* BCR 1982 HCD 320.

Indian developments of the early 1980s had no noticeable effect in Bangladesh by this time. At least there is no judgement that sheds any light in this regard.[21] In a 1987 Conference of judges, MH Rahman J. discussed Bhagwati J's achievements but was very sceptical in following him.[22] PIL was, in general, still an unknown concept.

However, the modern legal aid movement can be traced back to this period. In 1978, the Madaripur Legal Aid Association was established. It was the first village-based and grass-root legal aid organisation in Bangladesh.[23] This association not only spread the idea of legal rights of the poor but gradually came to assist public interest activists.

BEGINNING OF PUBLIC INTEREST CASES (1987-1990)

After the withdrawal of martial law, from 11th November 1986, the Supreme Court started functioning with respect to its original writ jurisdiction.[24] General Ershad's democracy was controlled and guided, elections were held but failed to ensure the legitimacy he desired. The limited democratic practice, however, gave the Court some opportunity for a more active role. In 1988, the Eighth Amendment[25] of the Constitution made Islam the state religion and decentralised the higher judiciary.[26] This decentralisation was successfully challenged in the Court, resulting in one of the most important of all post liberation judgements.

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21 Exceptionally, an editorial of the *BCR Journal*, Editorial (1987) BCR Journal, pp. 4-5, appealed for PIL and stressed on learning from the Indian experience.

22 MH Rahman, above note 18 at 1-10, appears to appreciate the activist role played by Justice Bhagwati, but refuses to follow him on the traditional ground of non-interference in political matters and economic non-viability of the implementation of social justice pronouncements of the Court.

23 Alimuzzaman Chowdhury (1987) "Collective legal self reliance movement in South Asia" in Vol. 39 *DLR Journal*, pp. 21-23 traces the early years of this association and terms its activities as an attempt for 'collective legal self reliance'. For history, organisation and achievements of this association, see also Julius L Chambers et al. (eds.) (1992) Public Interest Law Around the World, an NAACP-LDF symposium report. Reported by T Hutchines and J. Klareen, New York, *Columbia Human Rights Law Review*, pp. 26-32.

24 The Constitution (Seventh Amendment) Act (No. I of 1986) ratified the Martial Law of Ershad.

25 The Constitution (Eighth Amendment) Act (No. XXX of 1988).

26 For an analyses of the state religion amendment, see Shah Alam (1991) "The state-religion amendment to the Constitution of Bangladesh: A critique" in Vol. 24 *Verfassung und Recht in Übersee/Law and Politics in Africa, Asia and Latin America*, pp. 209-225. As regards decentralisation, for a critical legal analysis, see Editorial (1987) "The Supreme Court - The Chief Justice - Supreme Court Bar Association - Martial Law" in Vol. 39 *DLR Journal*, pp. 1-14.

In *Anwar Hossain Chowdhury v. Bangladesh (8th Amendment case)*[27] the amended Article 100 of the Constitution was challenged as *ultra vires*. The Court, by a majority judgement of three against one, declared that the basic structure of the Constitution can not be altered and as such the amendment was void.[28] The Court not only confirmed its power of judicial review, it proceeded to discuss various aspects of constitutionalism in Bangladesh and judicial activism. In this judgement the principle of the supremacy of the Bangladesh Constitution, the validity and authority it derives from its autochthony and the imperative nature of its dynamism were established.

The judgement was a severe blow to General Ershad's authority and enhanced the prestige of the Court enormously. It was also a reference for judges for future whenever the authority of the judiciary was to be decided *vis-á-vis* other governmental organs. As such this case is sometimes described as a forerunner of PIL cases.[29]

Defying General Ershad's autocratic regime, concerned citizens started coming to the Court with their petitions. The first group of petitions came in the nature of *quo warranto,* since such proceedings do not require the petitioner to have a personal grievance. The position of *quo warranto* petitioners was strengthened in *M Mostafa Hossain v. Sikder M Faruque and another,*[30] where BH Chowdhury CJ reaffirmed that in a writ of *quo warranto* challenging authority of a person holding public office, any citizen, irrespective of personal grievance can come to the Court.[31] In that case, the Court even rejected a compromise petition on the ground that a matter of great public interest was involved.

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[27] 1989 BLD (Spl.) 1; 41 DLR (AD) (1989) 165.

[28] The Court followed the Indian epoch-making decision of *Keshavananda v. State of Kerala* AIR 1973 SC 1461. However, it was pointed out in the *8th Amendment* case, as above at 168, that the basic structure doctrine was not first discovered in *Keshavananda*. This doctrine has been recognised in other jurisdictions from long before, including the Dhaka case of *Fazlul Quader Chowdhury v. Mohammad Abdul Hauqe* PLD 1963 Dac SC 463; 18 DLR (SC) (1963) 69. This decision was later cited in the famous Indian case of *Sajjan Singh v. State of Rajasthan* AIR 1965 SC 845.

[29] Mahmudur Rahman (1997) " Existing avenues for public interest litigation in Bangladesh" in Sara Hossain, S Malik and Bushra Musa (eds.), *Public Interest Litigation in South Asia: Rights in Search of Remedies,* Dhaka, University Press Limited, pp. 79-86 at 83-84.

[30] 7 BLD (AD) (1987) 315. This was an appeal from *M Mostafa Hossain v. Sikder M Faruque and another* 7 BLD (1987) 53.

[31] For a more detailed discussion, see below chapter eight.

In *Saiyid Munirul Huda Chowdhury v. AKM Nurul Islam*[32] an advocate challenged the appointment of the Vice President of Bangladesh on the ground that he formerly held the office of Chief Election Commissioner and as such Article 118(3)(a) of the Constitution disqualifies him for a 'service of the Republic'. MS Ali J. held that the office of the Vice President is excluded from the category of persons holding an 'office of profit in the service of the Republic' and summarily dismissed the petition.

In another *quo warranto* matter, *M Saleem Ullah v. Justice Mohammad Abdul Quddus*,[33] an advocate challenged the appointment of a Supreme Court Judge in the post of Joint Secretary in the Ministry of Law as violative of the Constitution. AMK Chowdhury J. decided that the appointment was valid but only because it was protected by a Martial Law Proclamation.[34]

In 1988, the Young Lawyers Forum (*Jubo Ainjibi Forum)* initiated *KM Zabir v. Amanullah and others*.[35] The petitioner claimed that the soft drink company Pepsi had violated the law by resorting to lottery techniques.[36] Claimed by the Forum to be the first of its kind, the case was fought in the name of PIL and won. The Court even awarded cost to the association since they had 'fought the case on behalf of the whole country'.[37]

For the first time during this period, we see a number of lawyers forming into groups and attempting to fight *pro bono publico* cases. *Justice Quddus Chowdhury's* case was the first of a series of cases where M Saleem Ullah and his friends appeared before the Court as concerned citizens. Over the years they brought a considerable number of constitutional cases and subsequently formed the Association for Democratic and Constitutional Advancement of Bangladesh (ADCAB).[38] On the other hand, the Young

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[32] 1 BLC (1996) 437. This 1987 case was reported after nine years when interest in the issue revived after another citizen challenged the appointment of the President in *Abu Bakar Siddique v. Justice Shahabuddin and others* 1 BLC (1996) 483; 17 BLD (1997) 31. In a comparable case, parliament members in India challenged the election of President Dr Zakir Hossain on the ground of constitutional disability in *Baburao Patel v. Dr Zakir Hossain* AIR 1968 SC 904.

[33] 46 DLR (1994) 691.

[34] Martial Law Proclamation of 24/3/1982. This was later amended by the Proclamation (First Amendment) Order (No. 1 of 1982) and the Proclamation (Amendment) Order (No. 1 of 1983).

[35] Unreported CMM Court Dhaka Case No. 1097A1/88.

[36] In 1965, Section 294B was inserted in the Penal Code 1860 making any offering of prize in connection with trade an offence punishable with six months imprisonment, or fine, or with both. This appears to be an attempt to defend anti-gambling principles of Islam.

[37] Above note 35 at 2.

[38] Mr MI Farooqui and Mr Mohsen Rashid were other founding members of ADCAB.

Lawyers Forum did not pursue its initial success by filing more public interest cases, perhaps because it was mainly concerned with young advocates rather than with social justice. But the reason the *Pepsi* remained relatively unimportant was due to the fact that it was fought in a Magistrate Court, the judgement having no force of judicial precedent.

However, these cases dealt mainly with the political rights of the applicants. Even in the few cases where the subject matter is not political, they represent concerns of the middle classes rather than those of the poor or the socially deprived.

MISCONCEIVED ATTEMPTS (1991)

By 1990, the movement for democracy gained momentum. General Ershad was compelled to resign on 4 December, 1990. He was arrested and the then Chief Justice Shahabuddin Ahmed headed an interim government. Although indirectly, this increased the prestige of the judiciary.

Since, under the Constitution, an election was required to be held within 180 days for the vacant posts of President and Vice President, in *M Saleem Ullah v. Election Commission and another*,[39] an attempt was made to compel the Election Commission to proceed with an election. This writ was kept pending.

The election, which was free and fair, was conducted by Justice Shahabuddin's government. This was won by the Bangladesh Nationalist Party (BNP) headed by Khaleda Zia, the widow of General Ziaur Rahman. The Eleventh Amendment[40] of the Constitution ratified Justice Shahabuddin's interim government while the Twelfth Amendment[41] in September 1991 restored the parliamentary system of government. Due to these amendments, Mr Saleem Ullah's case became infractuous. The Twelfth Amendment changed the form of the government from presidential to parliamentary. Apparently, it changed certain features of the government declared in 1989 to be basic in the *8th Amendment* case. From then on, the Parliament operated under full democracy and there was no shadow of a dictator.

In this year came *Bangladesh Sangbadpatra Parishad v. The Government of Bangladesh*.[42] The government had constituted a wage board for fixing the

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[39] Unreported Writ Petition 633/91.

[40] The Constitution (Eleventh Amendment) Act (No. XXIV of 1991).

[41] The Constitution (Twelfth Amendment) Act (No. XXVIII of 1991).

[42] 43 DLR (1991) 424. Later *Bangladesh Sangbadpatra Parishad v. The Government of Bangladesh* 12 BLD (AD) (1992) 153.

wages of newspaper employees. An association of newspaper owners challenged the Constitution of the wage board and its authority and pleaded PIL. In the Appellate Division, Mustafa Kamal J. refused standing on the ground that the applicant was not a 'person aggrieved'.[43] It was also pointed out that the Indian PIL decisions can not be followed blindly since the Indian constitutional provisions are not similar to the Bangladeshi ones.

The effect of this pronouncement by the Appellate Division was perhaps greater than anticipated. *Sangbadpatra* was not a PIL case. If it had been, the decision of the Court could have been different. The judge said:

> The petitioner is not espousing the cause of a downtrodden and deprived section of the community unable to spend money to establish its fundamental rights and enforce its constitutional remedies. It is not acting *pro bono publico* but in the interest of its members.[44]

This indication was noticed from the very beginning by a number of commentators. In 1992, Mahmudur Rahman regretted that the Court was unduly conservative, but realised that it was not a PIL case.[45] Similarly Ishtiaq Ahmed in his analysis of Bangladeshi PIL cases, does not include the *Sangbadpatra*.[46] In 1994, delivering a lecture in Dhaka University, Mustafa Kamal J. gave even clearer approval in favour of PIL.[47] But still, the indication given in the *Sangbadpatra* in favour of PIL was apparently not clear enough for the judges and the majority of the lawyers to detect.

The lawyers and some judges of the High Court Division remained under the impression that since the Constitution of Bangladesh does not have provisions similar to the Indian ones, there is no scope for PIL. Also, the use of the term 'a phrase which have received a meaning and a dimension over the years' caused some confusion at a time when very few of the lawyers and judges had any firm idea or understanding about this new concept.[48] This judgement for them meant that there can be no departure

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[43] This case has been discussed in more detail from the perspective of the standing of the applicant in chapter eight.

[44] Above note 42 at 156.

[45] Mahmudur Rahman, above note 29 at 84.

[46] Ishtiaq Ahmed, above note 8 at 36-45.

[47] Mustafa Kamal, above note 4 at 159-166.

[48] Ishtiaq Ahmed (1996) "The rule of standing - some reflections" in The National Workshop on Public Interest Litigation: Sharing Experiences and Initiatives, a workshop organised by Ain O Salish Kendra, Bangladesh Legal Aid and Services Trust and Madaripur Legal Aid in Dhaka on 26-17th July, at 5 analyses in detail the intricacies of this confusion. He argues that in different types of writs, the phrase has different meanings and in cases of constitutional fundamental rights, the common law rules developed in England do not apply. For a detailed analysis, see below chapter eight.

from the traditional view. The *Sangbadpatra* is, therefore, a perfect example where attempts by a privileged group to use the techniques of PIL have actually damaged the movement for cases with genuine concern for social justice.

HEIGHTENING OF THE CONSCIOUSNESS OF PIL (1992)

In the political arena, 1992 was a year of calm when the newly earned democracy started to function. The most significant PIL cases in this year related to personal liberty matters.

Anwarul Hoque Chowdhury J. in *Ayesha Khanam and others v. Major Sabbir Ahmed and others*[49] expanded the traditional *habeas corpus* principle by giving standing in a case of private detention.[50] The petitioner was a mother seeking custody of her child. *Bangladesh Mohila Parishad,* a voluntary organisation, fought successfully as a party.

Hatem Ali, a man aged 104, was released from prison that year as a result of investigative journalism.[51] Arrested in 1978, he was accused of five criminal cases but was convicted of none. In a similar case, Falu Mia was released after 21 years in prison.[52] He had been convicted of crime, but overstayed in the prison for six years due to administrative callousness. The newspapers again played the leading role.[53]

Since the government responded promptly, there was no reason for Hatem Ali or Falu Mia to come to the High Court. A precedent on PIL was to be set in *State v. Deputy Commissioner, Satkhira and others,* known as *Nazrul Islam's* case.[54] Nazrul Islam had been held in prison for 12 years without any trial. Justice MM Hoque noticed a newspaper reporting this news, initiated the criminal miscellaneous case *suo motu* and released Nazrul.[55]

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[49] 46 DLR (1994) 399.

[50] This law has recently been followed in *Sharon Laily Begum Jalil v. Abdul Jalil and others* 48 DLR (1996) 460. In this case, the mother was held competent to seek *habeas corpus* when her husband kidnapped the children.

[51] This incident received considerable media coverage. For a summarised version, see the report "Who will bring back 14 years of Hatem Ali's life?" in *Boyoska Punorbason Kendra Bulletin,* October 1993 at 9.

[52] *State v. Falu Mia* unreported Savar PS 5(8)92 and 12(4)92; Criminal Misc. 1755/1993.

[53] See for example, the report "Falu Mia does not know why he has spent 21 years in prison" in *Bhorer Kagoz,* 15.11.93 at 1.

[54] 45 DLR (1993) 643.

[55] This was another brilliant piece of journalism, the report titled "Acquitted from all charges, but in prison for 12 years" in the Ittefaq, 06.10.92 at 1.

In all these cases, we see co-operation among journalists, NGOs, judges, lawyers and the administration. The most important role was played by the journalists who were using the full potential of the newly found freedom of speech. As soon as these reports were published, they provoked strong public reaction and criticism of the law enforcement agencies. In the *Hatem Ali's* case, a Government Minister became involved, in the *Falu Mia's* case an NGO came forward.[56] The Court praised the co-operation of journalists and government officers in the *Nazrul Islam's* case.[57] This case was not only the first *suo motu* case of its kind by the High Court, it was also bold in the way it criticised law enforcement agencies and the directions it gave for further investigation into similar matters. On the whole, these cases demonstrated the power of PIL and the prestige it can give to the Court. It was difficult for law professionals to remain ignorant of these newly emerging public interest issues. As these personal liberty cases involved genuine and serious violations of fundamental rights, the Court was not hesitant to resort to a liberal approach.

However the success in detention cases was offset by failures in some other cases. In *Syed Mahbub Ali and others v. Bangladesh*[58] a number of subordinate court judges were promoted without consultation with the Supreme Court. This was challenged by a group of practising advocates as 'concerned citizens'. Relying on the *Sangbadpatra,* Abdul Jalil J. held that they had no *locus standi.*

In another interesting case, *Dr Ahmed Hussain v. Bangladesh,*[59] an advocate was given standing to challenge the reservation of seats for women in the Parliament as anti-constitutional. But MH Rahman J. held that the case itself had no merit.[60]

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[56] Home Minister Mr Abdul Matin Chowdhury took personal interest in Hatem Ali's case. Since Hatem Ali had no relatives, after release, he took shelter with an NGO - The Center for the Rehabilitation of Aged Persons. Falu Mia was assisted by the Bangladesh Human Rights Implementation Organisation.

[57] Above note 54 at 650.

[58] Unreported Writ Petition 4036/1992; later Appeal No. 317/1993.

[59] 44 DLR (AD) (1992) 109.

[60] A similar question was raised in *Fazle (Md) Rabbi and others v. The Election Commissioner* 44 DLR (1992) 14. The Court observed that there is nothing anti-constitutional in reserving parliamentary seat for women. See Article 10 of the Constitution containing the fundamental principle that the government shall take steps to ensure participation of women in all spheres of life. Article 12 provides an exception to the fundamental right of non-discrimination enabling the State to make special provisions in favour of women as a backward section of citizens.

The steady increase of the involvement of lawyers' groups and voluntary sector organisations was further boosted when in October 1992, a two-day seminar on PIL titled 'Rights in Search of Remedies' was held in Dhaka.[61] The initiative was taken by two voluntary sector associations: the Madaripur Legal Aid Association and *Ain O Shalish Kendra*. Eminent jurists, judges and lawyers from India and Pakistan joined their Bangladeshi counterparts and exchanged views. Wide presence and participation from the bench and the bar made it a very successful venture. For the first time, PIL became an issue in the discourse of Bangladeshi law. For a relatively close-knit legal community, this single seminar did more than anything else to popularise the idea of PIL and 'visibly created immense interest particularly in the legal circle'.[62] Ishtiaq Ahmed observed:

> An international seminar recently held in Dhaka and attended by jurists from India and Pakistan including the Chief Justice of Pakistan and attended by our legal and judicial luminaries, younger generations of lawyers and students of law, has left behind a salutary impact on our minds regarding the philosophy and jurisprudence of this class of litigation.[63]

FACING A THRESHOLD PROBLEM: LIMITED SUCCESS THROUGH TECHNICAL INNOVATIONS (1993)

Number and variety of PIL cases continued to increase in 1993. A highly sensitive issue came for the determination of the Court in the *Kadiani* case.[64] The petitioner, advocate Nurul Islam, claimed to be a 'concerned citizen' and Muslim. He held important posts in several religious organisations. The Court was asked to compel the government to declare the members of the Kadiani sect non-Muslims. Abdul Jalil J. decided that the government has no authority to determine whether or not a particular sect is non-Muslim.[65] However, standing was allowed and a *prima facie* case was recognised.

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[61] The papers from this seminar has recently been published. See Sara Hossain, S Malik and Bushra Musa (eds.) (1997) *Public Interest Litigation in South Asia: Rights in Search of Remedies*, Dhaka, University Press Limited.

[62] Editorial comment in M Amir-ul Islam (1993) "Rights in search of remedies" in Vol. 45 *DLR Journal*, pp. 6-14 at 6. The editors also declared support and commitment to PIL from the DLR Journal. This was important for PIL since DLR is the leading law reporter in Bangladesh.

[63] Ishtiaq Ahmed, above note 8 at 44.

[64] *ABM Nurul Islam v. Government of Bangladesh* unreported Writ Petition 298/1993.

[65] The petitioner relied on Pakistani laws where the Kadianis are considered non-Muslim. But the Court refused to follow Pakistani cases and pointed out that Bangladesh has no law akin to the Anti-Islamic Activities of Kadian Group, Lahori Group and Ahmadias (Prohibition and Punishment) Ordinance (No.XX of 1984).

Continued democratic and political stability combined with increased activism from the Court gave rise to a number of consumer cases with much media coverage. In the *Tabani Beverage,*[66] like the 1989 *Pepsi* case, a form of lottery was offered by a beverage company without seeking permission from the government as is required under the law. This was successfully challenged in the lower courts. Bangladesh Legal Rights Trust filed the civil case while the criminal case was brought by the Committee for the Protection of Lawyers' Rights.

The Committee for the Protection of Lawyers' Rights initiated another consumer case. The petitioner in *M Ali Akand v. Shamsul Islam and others*[67] came as a concerned and affected citizen and challenged a company selling certain Indian-made soap representing that it was made in Bangladesh.

Since these cases were fought in the lower courts, their effect on the development of PIL remained limited. The opportunity to get a High Court ruling for PIL came in the *Paracetamol* case.[68] A journalist, a father of a child of four, hoped to compel the government to perform its duty to monitor the production of toxic Paracetamol syrup which was causing death to infants.[69] Rule was issued. But before any judgement could be pronounced, the medicine was withdrawn from the market under the direction of the government. This prompt action rendered the case infractuous.

Although these were the first batch of consumer cases fought in the name of PIL, none of these cases were pursued by consumer associations or other organised citizen's rights groups. Organisations of young lawyers pursued less than well-researched briefs. The efforts were not only random, but mainly targeted middle-class concerns. Apparently, the most genuine public interest issue was involved in the *Paracetamol* where the opportunity to get a judgement in favour of PIL was lost due to prompt governmental action.

A genuine issue concerning the poor was raised in the *Slum Dwellers* case.[70] When Mirpur area slum dwellers were ordered to vacate government

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[66] *Bangladesh Ain Odhikar Trust v. Tabani Beverage & others*, (Civil) 2nd Assistant Judge Court, Dhaka, TS 324/93. *M Sultan Uddin v. M Fazlul Hoque* (criminal) Dhaka CR case No. 2739/93. Later, a writ was filed on the same issue, but this was done by a rival beverage company and no public interest was claimed.

[67] Unreported Dhaka CR Case 1721/1993.

[68] *Syed Borhan Kabir v. Bangladesh and others* unreported Writ Petition 701/1993.

[69] *BELA Newsletter,* Vol. 1:1 at 5, claims that in 1992, 230 infants died as their kidneys failed due to toxic Paracetamol syrup. Instead of using PROPYLENE GLYCOL, the companies were using DI-ETHYLENE GLYCOL which is cheaper but toxic.

[70] *Rokeya Khatun v. Sub-Divisional Engineer and others* unreported Writ Petition 1789/1993.

lands within 24 hours, public-spirited lawyers helped a destitute old lady to claim that she must not be removed unless the government provides her with an alternative home. The Court's rejection of the plea that she has a right to stay or be alternatively provisioned was seen by the lawyers as a denial of PIL. However, the Court maintained the *status quo* for quite a long time, practically giving ample time to the slum dwellers to make alternative arrangements.

A pronouncement in favour of PIL finally came in *Bangladesh Retired Government Employees Welfare Association and others v. Bangladesh*.[71] An association of retired government employees sued, challenging discrimination on pension matters. This was recognised as a matter of public interest. Naimuddin Ahmed J. said:

> . . . the petitioner No.1 is an association for looking after the welfare of the retired government employees and the question of pension of the retired government employees is a question in which the common interest of all retired government employees are involved and, as such, to our view, it is an absurd proposition to suggest each individual pensioner to come forward and file a separate writ petition vindicating a common right. There is no doubt that since the petitioner No.1 looks after the common interests of all retired government employees it is entitled to ventilate this interest before this Court in the form of public interest litigation.[72]

This judgement was a remarkable achievement as it firmly supported and established PIL. It must be noted, however, that even though the standing of the association was in question, other petitioners, i.e. the pensioners, were personally aggrieved and had clear standing. Also, this case involved a particular interest group as opposed to the public in general. Furthermore, the Court avoided the *Sangbadpatra* principle by pointing out that the facts of the two cases are different. So, this being a judgement of the High Court Division, the negative influence of the Appellate Division's judgement in the *Sangbadpatra* was still there.

NEW WAVE OF PIL ATTEMPTS: GAINING MORE GROUNDS (1994)

Although a considerable number of cases were filed as PIL in 1994, they fall into two broad categories. The first type involved political issues while the second type dealt with environmental and consumer concerns.

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[71] 46 DLR (1994) 426.

[72] As above at 434.

Political issues as PIL cases

From 1 March 1994, the opposition parties started to boycott sessions of the Parliament. Their first complaint was against a supposedly slanderous statement made by a government minister in Parliament. But after a highly controversial parliamentary by-election, they continued the boycott on the demand of a caretaker government. This proposed non-party government, they explained, will run the country in times of parliamentary elections, eliminating the possibility of vote-rigging. This demand gained popular support and was accompanied by demonstrations, processions, picketing and frequent nation-wide strikes.

The boycott was challenged by a political activist supporting the party in power. Public interest standing rule was successfully used as he approached the Court as a 'citizen and voter'. This was *Anwar Hossain Khan v. Speaker of Bangladesh Sangsad Bhavan and others,*[73] known as the *Parliament Boycott* case. He sought to enforce his fundamental right of being represented in the Parliament. Quazi Shafiuddin Ahmed J. said:

> As Constitution is a solemn expression of the will of the people, the supreme law of the Republic, any violation by anybody including the members of the Parliament shall be called in question by each and every citizens of Bangladesh.[74]

Since the Constitution is of revolutionary origin and derives its validity and power from the people, *locus standi* can not be denied if the people come forward to 'safeguard, protect and defend the Constitution'. The Court also noted the *Berubari*[75] principle that in questions of grave constitutional importance, any citizen can come to the Court. The Parliament members were ordered to return to the Parliament.

This decision, given on 11 December 1994, caused a huge uproar and the opposition parties criticised the judge as biased.[76] They quickly went on appeal. The Appellate Division, perhaps worried not to politicise the Court unreasonably, stayed the order of the High Court Division till disposal of the matter and resorted to the tactic of delaying a disposal. Soon, on 28th December, the opposition members resigned *en masse* and the appeal became infractuous.

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73 47 DLR (1995) 42.

74 As above at 46.

75 Above note 7.

76 The political situation generated such intense feelings that a number of leaders indicated defiance of the judgement. Their extremist followers even bombed the judge's house, but nobody was injured. See the Bangladesh Observer 12-14.12.1994.

The *Parliament Boycott* case raised several problems for the movement for PIL. Although public interest standing was recognised, this case was too much politicised to become a good precedent for PIL. Controversy and media attention made the judges more cautious and they were under pressure not to go too far with respect to public interest standing. Also, the Appellate Division's caution resulted in the lingering influence of the misunderstood *Sangbadpatra* case to continue.

Another problem of the *Parliament Boycott* case was that it gave the impression that political activists, being able to disguise as 'concerned citizens', could be granted standing to raise their preferred political debate in the judicial arena. In fact, PIL was soon used by the political activists in a number of cases.

In *Md Kafiluddin v. Maulana Syed Fazlul Karim and another*[77] it transpired that a religious leader had declared in a public gathering that anyone not a fundamentalist is a bastard, not a Muslim. Md Kafiluddin, an advocate, claimed that this statement injured the religious feelings and belief of the public. This case is still pending.

M Saleem Ullah, in the *Haiti Troops* case,[78] challenged the decision of the government to send peace troops to Haiti under UNO supervision without seeking approval from Parliament. The petitioner's standing was not discussed, but Mahmudur Rahman J. rejected the petition on merit and also expressed his unwillingness to deal with policy matters.

Mr Saleem Ullah continued his assault on the government with a number of *quo warranto* cases. In *Justice Sultan Hossain's* case,[79] the question was whether an ex Chief Election Commissioner can be appointed as chairman of the Press Council. The matter is pending. In the *Settlement Court Judges* case,[80] the eligibility of two judges was challenged. The government swiftly removed both of them and the case became infractuous.

In *Md Idrisur Rahman v. Shahiduddin Ahmed and others*,[81] an advocate claimed that the appointment of the CMM (Chief Metropolitan Magistrate)

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[77] Dhaka CMM Court, Petition Case No. 1998/1994.

[78] *M Saleem Ullah v. Bangladesh* 47 DLR (1995) 218.

[79] *M Saleem Ullah v. Justice Sultan Hossain Khan* unreported Writ Petition 990/1994.

[80] *M Saleem Ullah v. Md Aminul Islam, Chairman, Court of Settlement No.1* unreported Writ Petition 245/1994 and *M Saleem Ullah v. Khondoker Badruddin, Chairman, Court of Settlement No.2* unreported Writ Petition 820/1994. The point of law was whether the government can appoint a retired district judge when the statute provides for a person who is either a district judge or competent to be so.

[81] Writ Petition 1381/94.

without prior consultation with the Supreme Court was unconstitutional. Rule was issued but judgement was delayed.[82]

These cases aimed to establish political rights and advance democratic process. Significantly, lawyers were the petitioners, not volunteer organisations or conscious non-lawyer citizens. In general, these cases failed to bring immediate positive results as the Court often doubted either the elements of public interest or the intentions of the applicants.

Environmental and consumer issues

The misunderstood case of the *Sangbadpatra* adversely affected a very important environmental case in 1994. The Bangladesh Environmental Lawyers Association (BELA) had been active since 1991. After its initial period of organisation and groundwork, it started initiating test litigation in the public interest. Led by Dr Mohiuddin Farooque, almost all the cases fought by BELA are well-researched, with genuine public or citizen's interest involved and were methodically and relentlessly pursued. Above all, this association is the first to have resources and skill to combine other public interest law activities such as lobbying and negotiation with litigation.

However, relying on the *Sangbadpatra,* standing was rejected by Ismailuddin Sarkar J. in *Dr Mohiuddin Farooque v. Bangladesh / Sikandar Ali Mondol v. Bangladesh.*[83] The Flood Action Plan 20 (FAP 20) of Tangail, claimed BELA, would adversely affect more than a million human lives and natural resources including flora and fauna. Also, the plan ignored participation of the local people. But BELA was held not aggrieved.

Another attempt was made in the *Industrial Pollution* case,[84] where the government and a number of industries were asked to control unchecked pollution. Rule was issued and this case is still pending. BELA also failed to win on merit in *Bangladesh Environmental Lawyer's Association v. Election Commission & Others.*[85] The claim was that during the City Corporation elections, posters, loudspeakers etc. were polluting the environment. The petitioner's standing was not contested in this case.

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82 A judgement finally came in 1999 when the Court made the rule absolute, see 19 BLD (HCD) (1999) 291; this was later affirmed by the Appellate Division, see *Bangladesh v. Idrisur Rahman* 19 BLD (AD) (1999) 203.

83 Unreported Writ Petition 998/1994 and 1576/1994.

84 *Dr Mohiuddin Farooque v. Bangladesh* unreported Writ Petition 891/1994.

85 46 DLR (1994) 235.

BELA had its first success in the *Doctors' Strike* case.[86] The Bangladesh Medical Association (BMA) went on strike in favour of certain demands.[87] MM Hoque J. issued an initial rule directing the doctors to refrain from striking. But again, since the government negotiated successfully with the doctors, the case became infractuous before a full judgement could be delivered. However, even the rule was enormously effective. It gave prestige and popular recognition to Dr Farooque and his organisation, which was an inspiration for subsequent PIL cases.[88] The rule also made it difficult for organisations to go on strike.[89]

In *Chairman, Civil Aviation Authority of Bangladesh v. Kazi Abdur Rouf and others*,[90] a headmaster's attempt to question the formation of the managing committee of a school was held not a case *pro bono publico*.

In 1994, a number of cases were negotiated before judgement, frustrated by steps taken by the government or kept pending. When judgement was given, standing was either not discussed or rejected. Thus although some important ground was gained in favour of PIL, the search for a pronouncement setting general principles and guidelines for PIL did not end.

THE SUPREME COURT DRAGGED INTO POLITICS (1995)

On 28 December 1994, the opposition *en-masse* resigned from Parliament and continued their movement. Thus they could avoid the Court's direction, given in the *Parliament Boycott*[91] case, to go back to the Parliament. But the Speaker, in the hope of a compromise, was delaying his acceptance of their resignation. This caused a stalemate.

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86 *Dr Mohiuddin Farooque v. Bangladesh represented by Secretary Ministry of Health and family Welfare & Others* unreported Writ Petition 1783/1994.

87 Ahmed Shafiqul Huque and MH Chowdhury (1989) "Pressure group and public policy: Profile of the Bangladesh Medical Association" in Vol. 12 No1 *Law and International Affairs*, pp. 67-80, discuss the nature, composition and operation of the BMA with the intention of assessing its role in the policy-making process in Bangladesh. They are of the opinion that there are no regular channels of mobilising public opinion and pressuring the government into accepting the demands of special interest groups.

88 Major newspapers hailed the Court Order as a great victory. See the *Ittefaq*, 5.10.94 at 1.

89 On 8th October 1994, for example, the Engineering, Agriculture and Medical cadre of the Bangladesh Civil Service officers, known as *Prokrichi*, postponed a proposed indefinite strike that was to begin from 10th October because of 'legal complications'.

90 46 DLR (AD) (1994) 145.

91 Above note 73.

The result, the famous *MPs Resignation* case,[92] comprised of two writs. Raufique Hossain claimed that the attempt to resign is anti-constitutional while Alauddin Khalid asserted that the Speaker, by not accepting the resignation, is violating the Constitution. The Court was again involved in a controversial political issue and was under tremendous pressure, as the future of democracy largely depended on its decision.

The Chief Justice constituted a special bench of three judges. In the leading judgement, Mahmudur Rahman J. rejected the plea that the Court had no jurisdiction. However, both the petitioners, who came as 'conscious citizens', were denied standing because they did not have any constitutional or legal right that was violated.[93] The *Sangbadpatra* provided the guiding principle.

Yet, this judgement was not particularly bad news for PIL activists for two reasons. First, the Court was by this time conscious that the political activists have hijacked the techniques of PIL for their own purposes. So it was repeatedly observed that this was not a PIL case.[94] Second, the Court did not attempt to negate the earlier decisions including the public interest standing rules declared in the *Parliament Boycott*.

Finally the government, unable to decide, asked the Supreme Court to advise whether the boycott rendered the seats of the members empty. This was the *First Constitutional Reference* in the history of Bangladesh.[95] The Court declared the seats empty. While the prestige of the Court in the eyes of the people increased enormously, it was another opportunity for the Court to assert its power *vis-à-vis* the legislature.

In the meantime, nation-wide processions, picketing and strike continued. These strikes or *hartals* were challenged by an advocate. In *Abu Bakar Siddique v. Sheikh Hasina and others* (*Hartal* case),[96] AB Siddique claimed that calling of *hartal* infringes his constitutional rights. MM Hoque J. summarily rejected his petition.

The party in power attempted to counter the opposition by using publicly owned radio, TV and newspapers. This 'propaganda' by the

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[92] *Raufique (Md) Hossain v. Speaker* 15 BLD (1995) 383.

[93] As above at 389 and 392.

[94] As above at 382, 388 and 392. Even the petitioners did not claim that this was PIL.

[95] 1995 (III) (Special issue) BLT (HCD) 159; 47 DLR (AD) (1995) 111. Article 106 of the Constitution of Bangladesh provides for the 'Advisory Jurisdiction of the Supreme Court'.

[96] Unreported Writ Petition 2057/95. See below chapter three for the recent *hartal* related case; *The State v. Md Zillur Rahman and others* 19 BLD (HCD) (1999) 303.

government was challenged by Dr Farooque in *Dr Mohiuddin Farooque v. Bangladesh* (*Media* case).[97] Rule was issued.

When the Government started to compile a voter list in order to conduct an election, a voter challenged the voter registration form in *Md Aminul Gani Titu v. Election Commission*.[98] Again, the petition was summarily rejected.

Continued attempts by the democratically elected government to influence the judiciary through re-appointment of retired judges in various public posts gave rise to serious controversy. Furthermore, in the parliament, the government prevented a bill proposing more power to the Supreme Court regarding these matters.[99] Consequently, political and constitutional activists resorted to PIL and raised these issues in the Court.

Appointment of justice AKM Sadeque as Chief Election Commissioner (CEC) was protested by the Opposition.[100] In *Justice Sadeque's* case, Mr Saleem Ullah challenged his appointment on the ground that the appointment of a judge who has already retired is anti-constitutional.[101] In *Md Aminullah's* case,[102] a judge's promotion to the post of joint secretary in the Ministry of Law was challenged. These two cases are awaiting trial, but since the judges are no longer in the posts questioned, it appears that these cases have become infractuous.

The controversy relating to justice Abdur Rouf is perhaps the most illustrative of the problem of appointment of judges. Justice Abdur Rouf, a judge of the High Court Division, was appointed by the government as the CEC in 1995. This was challenged by Mr Saleem Ullah in *Saleem Ullah v. Md Abdur Rouf, Chief Election Commissioner*[103] on the ground that an acting judge can not, at the same time, hold the office of the CEC. The appointment was also vehemently criticised by the opposition. In response, a supporter of the ruling party, Dr Ahmed Hussain, approached the Court as a citizen petitioner in *Dr Ahmed Hussain v. Shamsul Huq*.[104] He claimed that criticism

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[97] Unreported Writ Petition 466/95.

[98] Unreported Writ Petition 1154/95.

[99] See MI Farooqui (1996) "Judiciary in Bangladesh: Past and present" in Vol. 48 *DLR Journal*, pp. 65-68 for further discussion, where the author demonstrated that the democratically elected government had been acting in the same way as the previous autocratic regimes and continued to keep the judiciary under pressure.

[100] The *Bangladesh Observer*, 28.4.95 at 1.

[101] *M Saleem Ullah v. Justice AKM Sadeque* unreported Writ Petition 1010/95.

[102] *M Saleem Ullah v. Md Aminullah and others* Writ Petition 93/95.

[103] 48 DLR (1996) 144.

[104] 48 DLR (1996) 1.

by Shamsul Huq Chowdhury, chairman of the 'Co-ordination Council of the Lawyers' and an elected member of the Bar Council, amounted to contempt of court.[105] While this contempt case was lost on merits, *Justice Abdur Rouf's* case became infructuous because, as the judge retired from the post of CEC, the government reinstated him in the Appellate Division. However, this reinstatement was challenged by Mr Shamsul Huq Chowdhury in *Shamsul Huq Chowdhury v. Justice Md Abdur Rouf*[106]on the ground of violation of separation of powers. The Court held that the government has power to make such re-appointments under the existing constitutional provisions.[107]

It appears that 1995 was not a good year for PIL since no good social action case came before the Court. The *Vehicular Pollution* case[108] was an exception where Dr Farooque sought to oblige the government to take steps to check hazardous smoke and unduly shrill horns of vehicles. This case is pending hearing.

Another activist step was taken by MM Hoque J. in *Eliadah McCord v. State*.[109] A *suo motu* rule was issued when the judge read a newspaper report that an American girl accused of drug smuggling was sentenced for life when she was a minor.[110] On production before the Court, the accused admitted that she attained majority at the time of trial. But on humanitarian ground, the Court *suo motu* reduced her sentence and ordered her release.[111]

In appears in conclusion that, in 1995, desperate power-struggle between the political parties created a stalemate situation. A free press and strong public opinion prevented Army intervention and compelled the politicians not to ignore the Constitution. When the party in power finally agreed to

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105 See the *Bangladesh Observer*, 22.5.95 at 1.

106 49 DLR (1997) 176.

107 As to the impact of PIL cases on existing constitutional rules of appointment and discipline of judges, there are some other very important recent cases which are relevant even though no direct public or citizens interest was claimed. For example, in *Md Masdar Hossain and others v. Bangladesh* 18 BLD (HCD) 558, the vires of certain statutory provisions supposedly detrimental to the independence of judiciary was challenged by 218 judges. The rule was made absolute in a judgement declared in 1997. In *Aftab Uddin (Md) v. Bangladesh* 48 DLR (1996) 1, the promotions of three District Judges were challenged by another District Judge. The Court held the promotions unconstitutional for lack of prior consultation with the Supreme Court.

108 *Dr Mohiuddin Farooque v. Bangladesh* unreported Writ Petition 300/95.

109 48 DLR (1996) 495.

110 The *Daily Sangram*, 18.07.95 at 1.

111 The Appellate Division, however, reversed this decision in Criminal Appeal 2/96. Subsequently, Eliadah was fortunate enough to obtain a Presidential pardon and was released in July 1996.

create a caretaker system, the dispute was focused on how to amend the Constitution. Constitutional problems became the most important political and media issues. Mustafa Kamal J. observed: ". . . almost the whole of the educated citizenry of the country has turned into constitutional experts overnight."[112]

Supporters of political parties and constitutional activists attempted to bypass the political stalemate through judicial pronouncements. They claimed to represent the public interest and tried to utilise the newly found freedom the judiciary was enjoying. But the Court had to be careful not to be seen supporting any particular political party. Especially after the *Parliament Boycott* case, the pressure was tremendous. Chief Justice ATM Afzal acknowledged this in the *First Constitutional Reference 1995:*

> Having regard to the questions of law raised and the nature and context of the Reference and particularly our anxiety to keep the Court aloof from political controversies that are raging outside for long and the constraint of the time factor, we decided to keep the hearing confined to the representative section of and constitutional experts at the Bar. In order that the Court may not be held responsible for prolonging and thereby adding the "political crisis" by consuming a long time over the hearing, we decided to hear the matter with all expedition.[113]

The judges refused standing and rejected a number of cases like the *MPs Resignation* case, the *Hartal* case or the *Voters' Registration* case apparently to discourage pure political intentions of the petitioners. But they were still keen to decide on the matters of law. Thus, for example, in the *MPs Resignation* and the *Constitutional Reference* they took a liberal view in determining the Court's jurisdiction. There was not a single case where the Court refused standing on the principle that PIL should not be allowed and no earlier pro-PIL decision was actually overruled.

Apparently, the Court's reluctance to grant full recognition to PIL was the result of the deluge of cases where special interests of the privileged groups were litigated in the name of the people. Political and constitutional activists effectively dominated the PIL-movement and the focus was not on social justice issues. While the judges did not say, in so many words, what PIL cases should be concerned about, they gave clear signals that the politicisation of PIL was not desired.

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[112] Mustafa Kamal (1995) "Democracy, constitutionalism and compromise" in Vol. 15 *BLD Journal*, pp. 6-10 at 6.

[113] Above note 95 at 160.

THE YEAR OF SUCCESS (1996)

Steady success of PIL cases

The year of success for PIL was 1996. In a number of cases, the judges not only recognised PIL and granted standing to the petitioners, they proceeded to construct a jurisprudential basis.

Use of PIL for political purposes continued in 1996. The ruling party conducted a general election in March that was boycotted by all major opposition parties. The new Parliament constitutionalised the concept of caretaker government by incorporating the Thirteenth Amendment.[114] The first Caretaker government was formed under former Chief Justice Muhammad Habibur Rahman. The Thirteenth Amendment was challenged in *Syed Muhammad Mashiur Rahman v. President of Bangladesh and others*.[115] MM Hoque J. summarily rejected the application on the ground that the Amendment do not appear to come within the definition of alteration, substitution or repeal of any provision of the Constitution.

The Caretaker government faced a challenge in *Md Asaduzzaman Ripon v. The State*[116] where the Court restrained the functioning of several Government officers. The petitioner, a student leader of the Bangladesh Nationalist Party, claimed that these officers took part in the opposition movement violating their service rules. On appeal, the Appellate Division ordered them to resume duties till hearing of the case. This case is still awaiting hearing.

The Caretaker government conducted a free and fair election which was won by the Awami League. Democracy survived another great challenge. The new Awami League Government appointed Justice Shahabuddin Ahmed as the President, a ceremonial post.[117] This appointment was challenged in *Abu Bakar Siddique v. Justice Shahabuddin and others*[118] by AB Siddique, the President of the Muslim Millat Party. Mr Siddique claimed that one can not join 'service of the republic' after retiring as a judge. He lost

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114 The Constitution (Thirteenth Amendment) Act (No.1 of 1996). This provides that the person who among the retired Chief Justices of Bangladesh retired last will be the Chief Adviser. Under the leadership of the Chief Adviser, a group of non-partisan advisers will run the government and conduct the parliamentary election. The President will remain as the titular head.

115 17 BLD (1997) 55.

116 Unreported Writ Petition 1635/1996.

117 This is the second time Justice Shahabuddin Ahmed became President. Previously, he headed the interim government that conducted the democratic election in 1990 after the fall of Ershad.

118 1 BLC (1996) 483.

on merit.[119] But discussing the *Berubari* principle, MM Hoque J. granted standing:

> Following the aforesaid principle enunciated by the Supreme Court we hold that since several constitutional questions of great public importance having far-reaching consequences are involved in the present case, the present writ petition is maintainable.[120]

This was a great stride for PIL that proved that the *Berubai* principles wered not dead letters.

Dr Farooque came in 1996 with a number of PIL cases. In *Judges Appointment*,[121] he sought to compel the government to appoint judges in vacant seats of the Supreme Court. Mahmudur Rahman J. observed that this is a PIL but refused standing on the ground that no constitutional or legal right has been infringed. The right to life was extended in the *Radioactive Milk*[122] case where the importation of radio-active milk was successfully challenged by Dr Farooque. Kazi Ebadul Hoque J. even went on to dictate how and in what manner government departments should co-ordinate their monitoring system. The standing of Dr Farooque was not challenged by the respondents. This case discussed right to life, extended its meaning and provided another stepping stone for the consumer activists. In the *Child Trafficking* case,[123] Dr Farooque sought to stop kidnapping and trafficking of Bangladeshi children and using them as Camel jockeys, especially in the United Arab Emirates. Rule was issued.

The *FAP 20*: Appellate Division's verdict

The formal exposition of PIL for which the activists were waiting for a long time came from the Appellate Division in 1996. The standing of the petitioner was seriously contested by the government in the appeal of *Dr Mohiuddin Farooque v. Bangladesh / Sikandar Ali Mondol v. Bangladesh (FAP 20)*.[124] This was the case that was previously lost in the High Court in

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[119] This is almost an echo of *Saiyid Munirul Huda Chowdhury's* case, see above note 32.

[120] Above note 118 at 489.

[121] *Dr Mohiuddin Farooque v. Bangladesh represented by Secretary Ministry of Law, Justice and Parliamentary Affairs* 48 DLR (1996) 433.

[122] *Dr Mohiuddin Farooque v. Bangladesh represented by Secretary Ministry of Commerce and others* 48 DLR (1996) 438.

[123] *Issa Nibras Farooque and others v. Bangladesh represented by Secretary. Foreign Affairs and others* unreported Writ Petition 278/96.

[124] 17 BLD (AD) (1997) 1. After clarification of the issue of standing, the case was finally decided by the High Court Division in August 1997, see *Dr Mohiuddin Farooque v. Bangladesh* 50 DLR (1998) 85.

1994.[125] The only issue in question before the Appellate Division was the petitioner's standing, not the merit of the case. However, the concern of the petitioner was genuine because the environment of a huge area involving more than a million people was in issue.

The five justices of the Appellate Division found that the petitioner's intention was *bonafide* and unanimously granted standing in an epoch-making judgement. It was declared that in the Constitution of Bangladesh, which is 'autochthonous' in nature, the people are the ultimate holders of power.[126] Accordingly, social and economic justice issues must have primacy over special or individual interests. Thus in cases of public wrong or injury, any member of the public can file a writ petition on behalf of the entire public or a particular vulnerable section of the society.[127]

In the *FAP 20*, PIL was recognised as a special type of constitutional litigation under the Bangladeshi legal system. The conceptual and constitutional basis of PIL was discussed in detail.[128] Public interest standing rules were declared in a liberal manner covering almost all aspects of *locus standi* of the petitioner.[129] The Chief Justice invited Mustafa Kamal J. to deliver the leading judgement who removed all confusions that arose after the misunderstood decision of the *Sangbadpatra*.[130] There was, however, no need to overrule *Sangbadpatra* or any other decision since it was clear that the *Sangbadpatra* was not a PIL.[131]

RECENT PIL CASES: EXPANDING THE HORIZON

The activists greeted the positive outcome of the *FAP 20* judgement with much enthusiasm. It opened the gate for PIL and removed all doubts and confusions about the validity of PIL cases.

Yet, the first reaction was not a deluge of frivolous cases, petitions, letters or telegrams. It was soon apparent that Mustafa Kamal J. was right when he said that taking up the people's causes at the expense of his own is a rare phenomenon, not a commonplace occurrence.[132] Since the court was

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125 Unreported Writ Petition 998/1994 and 1576/1994.

126 Above note 124 at 18.

127 As above at 19.

128 See below chapter six.

129 See below chapter eight.

130 Above note 124 at 1.

131 As above at 17. Mustafa Kamal J. said: "The Sangbadpatra Parishad case was decided on the facts of that case and that is how it should be read."

132 As above at 20.

not flooded with cases, there was no immediate need felt to open PIL cells or declare PIL guidelines like Indian or Pakistani Courts. PIL cases came as a gentle inevitable steam rather than a flood.

The court has embarked on the second phase of the development of PIL. With the help of the wisdom already acquired by the Indian and Pakistani judges, the High Court Division is steadily expanding the horizon of PIL. The judges are applying PIL jurisprudence in new fields taking care that neither the resources of the Court, nor that of the government are stretched in any way. In some of the cases, either the public interest element was not strong enough, or the judges were unwilling to embark on adventures for which they were not yet ready. But generally, PIL petitioners approaching with genuine social action matters are successful.

Certain cases deals with matters relating to the functioning of the democratic process. In *Md Idrisur Rahman v. Shahiduddin Ahmed and others,*[133] the appointment of the Chief Metropolitan Magistrate without prior consultation with the Supreme Court was challenged in 1994. This case was decided finally in 1999. The High Court Division decided in favour of the petitioner which was later affirmed by the Appellate Division. In *Ziaur Rahman Khan v. Government of Bangladesh,*[134] a number of political activists and MPs questioned a new provision inserted in three statutes relating to local governments of Rangamati, Khagrachari and Bandarban area. The challenge was partially successful since the Court declared time limit for fresh election. Petitioners failed in *Saiful Islam Dilder v. Government of Bangladesh and others*[135] where extradition of Indian tribal leader Anup Chetia was challenged. A very interesting *suo motu* rule was issued in *The State v. Md. Zillur Rahman and other,*[136] where the legality of *hartal* was assessed in the light of offences against public tranquillity under sections 141 to 160 of the Penal Code. It was decided that decision to observe hartal by five or more persons amounts to unlawful assembly only when they decide to compel others to do the same. The Court dismissed the petition. In *Dr Ahmed Husain v. Bangladesh,*[137] the petitioner challenged new provisions for securing duty free cars for parliament members. In *Mrs Parvin Akhter v. The Chairman,*

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[133] Writ Petition 1381/94; 19 BLD (HCD) (1999) 291; Also 19 BLD (AD) (1999) 204 and 51 DLR (AD) 163.

[134] 49 DLR (1997) 491.

[135] 50 DLR (1998) 318; 18 BLD (HCD) (1998) 615.

[136] 19 BLD (HCD) (1999) 303.

[137] 18 BLD (AD) 1998 184; 51 DLR (AD) (1999) 75.

Rajdhani Unnayan Kartipakkha and others,[138] petitioners successfully challenged destruction of lake and greenery in the Gulshan Model Town.

In the area of detention, the courts remain vigilant. In *Bilkis Akhter Hossain v. Bangladesh and others,*[139] along with three other similar petitions, detention of four political leaders was held *mala fide* and illegal. For the first time, compensation was awarded to the detenues. Each detenue received an amount of one lakh taka. A similar case where compensation was awarded is *Md Shahanewas v. Government of Bangladesh.*[140] An innocent person was arrested by an ASI of Police in the name of an absconding criminal. The Court awarded compensation of an amount of twenty thousand taka to be realised from the negligent ASI. In *State v. Deputy Commissioner Bogura and others,*[141] *suo motu* rule was issued when a newpaper reported unlawful detention in jail. The rule was subsequently discharged.

Genuine social interest matters involving the poor and the downtrodden have been considered in several cases. In the much-publicised case of *Sultana Nahar v. Bangladesh and others,*[142] eviction of sex-workers from their residences was challenged. Initially, the two justices of the High Court Division arrived at different conclusions. As the case was referred to the third judge, it failed both on the point of standing and on merit.[143] *Dr Mohiuddin Farooque v. Bangladesh and others,*[144] the Flood Action Plan (FAP 20) case of Tangail was finally heard on merit and the Court gave a number of directions and orders to be complied with by the government. If media coverage and publicity is taken as a guide, one of the most important recent PIL cases is *Ain O Salish Kendra (ASK) and others v. Government of Bangladesh and others.*[145] The petitioners challenged eviction of slum-dwellers in Dhaka without making any alternative arrangement. The Court ordered that the eviction process should proceed phase by phase, giving reasonable time and rehabilitate the slum-dwellers. In *Salma Sobhan v. Government of Bangladesh*

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[138] 18 BLD (1998) 117.

[139] 17 BLD (1997) 411.

[140] 18 BLD (1998) 337.

[141] Unreported Writ Petition No.1389/1999.

[142] 18 BLD (1998) 363.

[143] MM Hoque J. liberally interpreted the facts and law and positively decided in favour of the petitioner. But the third judge, Mahmudur Rahman J., agreed with Hassan Ameen J. and dismissed the rule.

[144] 50 DLR (1998) 84; 18 BLD (1998) 217. This is the original case from which, on the point of standing, the Appellate Division gave its authoritative pronouncement.

[145] 19 BLD (HCD) (1999) 489.

and others,[146] the petitioner challenged continued restraint of a prisoner in bear fetter (*Danda beri*) for a period of 33 months. Interim relief was granted but the rule is awaiting hearing.

Apart from the cases mentioned here, there is a considerable number of PIL cases pending before the courts and as such have not been reported.[147]

The number and variety of cases indicate the progression of PIL towards maturity. As PIL has become a permanent feature of the Bangladeshi legal system, Non Governmental Organisations and Social Action Groups are working hard to utilise this new avenue. They are popularising PIL through Seminars, publications etc. and filing well-researched PIL cases. Instead of a litigation-only approach, Bangladeshi activists are already attempting to diverge in order to pursue other types of public interest law activities.

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[146] Writ Petition No. 2852/1997. Sections 46, 56 and 58 of the Prisons Act 1894 and rules 485, 486, 708, 718-72 of the Jail Code were challenged on the grounds that they violated rights guaranteed under Articles 27, 31 and 35 of the Constitution.

[147] For a list of Bangladeshi PIL cases, see Sarah Hossain, Mirza Hassan and Shahana Hayat (1999) "Case Table on public interest litigation" in *Grameen Poverty Research*, Vol. 5 No. 1 April 1999, pp. 19-26.

Chapter Four

WHAT IS PIL: AN EXAMINATION

There is no confusion as to the general meaning of PIL – that it is 'litigation in the interest of the public'. Yet the more one attempts to be specific about the scope of PIL, the less satisfactory becomes this general description. Terms like 'litigation', 'public' or 'interest' have different meanings and scope in different situations. Further complications arise when the term 'public interest' is the issue. Since the term is culture specific, no single definition can satisfy everyone. Hence the scope of the term depends, to a great extent, on the point of view chosen.

In practice, there has been a compromise of different viewpoints about the scope of PIL. The activists and jurists accept the general meaning of PIL and leave the details to the discretion of the individual judge. Thus the scope of PIL in any particular jurisdiction depends more on practical experiences as demonstrated by judicial pronouncements than on any particular theoretical framework.

Yet there are a few general components that help us to determine whether a particular issue is of public interest and whether a particular litigation is PIL. These general components of the meaning and scope of PIL have been discussed in the present chapter, along with a number of associated terms that one can not avoid while attempting to understand PIL.

MEANING OF THE TERM 'PUBLIC INTEREST LITIGATION'

While the concept of PIL was just taking shape, Bhagwati J., one of the pioneers of PIL in India, observed in *People's Union of Democratic Rights v. Union of India*:

> Public interest litigation is essentially a co-operative effort on the part of the petitioner, the State or public authority and the Court to secure observance of the constitutional or legal rights, benefits and privileges conferred upon the vulnerable section of the community and to reach social justice to them.[1]

PIL started to evolve and develop with great speed and the judges extensively applied the concept to different areas. This wider scope of PIL was ensured by defining it from a very broad angle, by describing PIL simply as

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[1] AIR 1982 SC 1473 at 1477. Activist judges generally rely on Bhagwati's definition. For an example, see *PV Kapoor v. Union of India* 1992 Cri LJ 128 at 136.

litigation in the interest of the public.[2] Kirpal J. said in *People's Union for Democratic Rights v. Ministry of Home Affairs*:

> As I understand the phrase "Public Interest Litigation", it means nothing more than what it states namely it is a litigation in the interest of the public. Public interest litigation is not that type of litigation which is meant to satisfy the curiosity of the people, but it is a litigation which is instituted with a desire that the court would be able to give effective relief to the whole or a section of the society. [3]

Like the Indians, Pakistani judges and writers have generally considered PIL as a purpose-oriented idea. PIL is described as a task of the eradication of social evils through the medium of law as is enjoined by the Constitution.[4] Hussain says:

> Public interest litigation means what it says namely litigation in the interest of the public. . . . it must be emphasised that the *raison d'être* of public interest litigation is to break through the existing legal, technical and procedural constraints and provide justice, particularly social justice to a particular individual, class or community who on account of any persoàl deficiency or economic or social deprivation or state oppression are prevented from bringing a claim before the Court of law. [5]

PIL may be distinguished from ordinary litigation in the following way. First, PIL is for the benefit of the people as a whole or a segment of the society. It aims to enhance social and collective justice and there must be a public cause involved as opposed to a private cause. This includes several situations:

a. Where the matter in question affects the entire public or the entire community, e.g. illegal appointment of an unfit person as a government servant;

b. Where the issue involves a vulnerable segment of the society, e.g. eviction of slum-dwellers without any alternative arrangement;

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[2] Soli J Sorabjee (1994) "Obliging government to control itself: Recent developments in Indian administrative law" in Vol. Spring 1994 *Public Law*, pp. 39-50 at 49 says that PIL is a form of legal proceeding in which redress is sought in respect of injury to the public in general. See also Faqir Hussain (1993) "Public interest litigation in Pakistan" in *PLD Journal*, pp. 72-83 at 72.

[3] AIR 1985 Delhi 268 at 290. see also a more recent definition by S Ratnavel Pandian J. who attempts to explain PIL with more accuracy in *The Janata Dal v. Harinder Singh and others* AIR 1993 SC 892 at 906: ". . . lexically the expression 'PIL' means a legal action initiated in a Court of Law for the enforcement of public interest or general interest in which the public or a class of the community have pecuniary interest or some interest by which their legal rights or liabilities are affected."

[4] Mansoor Hassan Khan (1992) "The concept of public interest litigation and its meaning in Pakistan" in *PLD Journal*, pp. 84-95 at 84 and Nasim Hasan Shah (1993) "Public interest litigation as a means of social justice" in *PLD Journal*, pp. 31-34 at 31.

[5] Hussain above note 2 at 72-73.

c. Where the matter affects one or more individuals but the nature of the act is so gross or serious that it shocks the conscience of the whole community, e.g. rape of a minor girl in police custody.

Second, in the situations mentioned above, any individual or organisation may approach the court. In other words, PIL involves liberalisation of the rules of standing. This includes cases initiated *suo motu*; because the judge himself is a concerned citizen in such a case.

Third, the court adopts a non-adversarial approach as opposed to an adversarial system of litigation. This includes procedural aspects as well as the aspects of granting relief. As a result, the court may treat letters as writ petitions, appoint commissioners, award compensation or supervise and monitor the enforcement of its orders.

In short, PIL may be described as a type of litigation where the interest of the public is given priority over all other interests with an aim to ensure social and collective justice, the court being ready to disregard the constraints of the adversary model of litigation. Thus when conscious citizens or organisations, with *bonafide* intentions, approach the court for the interest of the public in general or a disadvantaged or under-privileged segment of the society and not for any private, vested, special or group interest, it is termed as 'public interest litigation'. An injury to the public interest will be apparent only when some constitutional or legal rights, privileges or benefits are affected or where a constitutional or legal duty or obligation has not be performed. PIL becomes a necessity when protection of law is unavailable to the public or a segment of it due to ignorance, poverty, fear or lack of organised endeavor.

'LITIGATION' AND FORUM OF PIL

One important aspect of PIL is that it entails 'litigation' - the process of settling legal disputes in a court of law under appropriate procedures.[6] From a wider viewpoint, it includes cases not only in law courts but also at the instance of quasi-judicial or administrative authority. Yet, PIL being a specific type of litigation and nothing more, it excludes legislative activities and other extra-legal means of promoting public interest, e.g. lobbying, negotiation, etc.

As it is a type of litigation, PIL has all the constraints and limitations of the litigation process. However, to promote public interest, the constraints of the litigation process have been liberally construed where PIL is involved.

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6 In the *Janata Dal*, above note 3 at 906, S Ratnavel Pandian J. reiterates that the expression litigation means a legal action including all proceedings therein initiated in a Court of Law with the purpose of enforcing a right or seeking a remedy.

In general, PIL indicates a petition in public interest in the nature of writ under Article 102 of the Constitution of Bangladesh. Development of PIL in Bangladesh so far has revolved around this constitutional jurisdiction. But PIL is not confined only within the constitutional jurisdiction. There is scope for PIL in Civil and Criminal courts as well as in special courts and tribunals provided that such litigation fulfills the criterion of PIL.[7] Thus for example, Order 1 rule 8 relating to representative suits or section 91 regarding public nuisance of the Civil Procedure Code are relevant.[8]

However, the present book is concerned, apart from certain exceptions, with the constitutional aspects of PIL and the civil and criminal law aspects are not within its scope.

WHAT IS 'PUBLIC INTEREST'

The terms 'public' and 'interest' are by no means easy to define. When they combine to form the term 'public interest' – we have a fertile ground for confusions and competing ideas.

The word 'public' literally means pertaining to the people of a country or locality. In other words, "the community as an aggregate, but not in its organised capacity, hence the members of the community".[9] The term can be used for either all members of the community or groups of members or any section or class of that community.[10] It is a term of uncertain import and must be limited in every case by the context in which it is used.[11]

The term 'interest' is a relation of being objectively concerned in something by having a right or title to, a claim upon or a share in that thing. It includes varying aggregates of rights, privileges, powers and immunities. Here also, the word has different implications in different contexts.[12]

When the words 'public' and 'interest' combine to form the term 'public interest', it becomes difficult to define due to a number of factors. The phrase is

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7 In Bangladesh, some of the relevant laws have been outlined and examined in AM Mahmudur Rahman (1997) "Existing avenues for public interest litigation in Bangladesh" in Sara Hossain, S Malik and Bushra Musa (eds.), *Public Interest Litigation in South Asia: Rights in Search of Remedies,* Dhaka, University Press Limited, pp. 79-86.

8 For a recent exposition of the legal position relating to private and public nuisance in Bangladesh, see *Wahid Mia v. Dr. Rafiqul Islam* 49 DLR (1997) 302.

9 *Tatem Steam Navigation Co v. Inland Revenue Commissioners* [1941] 2 KB 194.

10 *Sri Venkataraman Devaru v. State of Mysore* AIR 1958 SC 255. Also, section 12 of the Penal Code 1860 says that the word 'public' includes any class of the public or any community.

11 *Jennings v. Stephens* [1936] 1 Ch 469 at 476 and 479.

12 An analysis from a legal perspective has been made by Devlin J. in *Bearmans Ltd v. Metropolitan Police District Receiver* (1961) 1 All ER 384 at 391 and 393.

used in different disciplines including political science, economics and law with different connotations and from different perspectives. It again depends on the user and one's purpose; from democrats to autocrats everybody uses it.[13] Finally, it also varies from one jurisdiction to another. This confusion has led writers to say that 'no general agreement exists about whether the term has any meaning at all'[14] and that the concept 'makes no operational sense'.[15]

Generally, public interest means a commonality of interest, a single interest that a certain group of people or citizens are presumed to share.[16] Barry and Rees actually extend this still further:

> The concept of public interest . . . is a device which permits us to treat the human interests of all men as a function of human interests within a given political region. It has considerable value as a weapon for criticising selfish private interests or class interests, and its advantages in a highly individualistic and often savagely competitive society are obvious.[17]

Thus, while a special interest furthers the ends of some part of the public, public interest ultimately serves the ends of the whole public.[18] Even in the case of a conflict among different private or special interests, the public interest lies in the best and most just solution of the conflict which ensures that the public as a whole gain a better environment after the conflict is resolved. Thus, for example, it is a matter of public interest to protect minority rights because, although a major portion of the public might lose something, the community as a whole would gain by the progress made in terms of human and fundamental rights.

As to how this commonality of interest might be determined, there is no agreement. It is often supposed that public interest suggests a consensus among the 'preponderance' of the people or the dominant portion of the

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13 It is said that the term lends itself to convenient use, partly because it resists, by its nature, precise definition. See G Colm (1960) "In defence of the public interest" in Vol. 27 *Social Research,* pp. 297-307.

14 A Downs (1962) "Public interest: Its meaning in democracy" in Vol. 29 *Social Research,* pp. 5-36.

15 G Schubert (1960) *The Public Interest,* Glencoe, Free Press of Glencoe.

16 A number of writers have dealt with the debate surrounding public interest including F Sorauf (1957) "The public interest reconsidered" in Vol. 19 *Journal of Politics,* pp. 616-639; B Barry and W Rees (1964) "The public interest" in Supp. Vol. XXXVIII *The Aristotelian Society Conference Proceedings,* London, pp. 1-38; V Held (1970) *The Public Interest and Individual Interests,* New York, Basic Books; B Mitnick (1976) "A typology of conceptions of the public interest." in Vol. 8 No. 1 *Administration and Society,* pp. 5-29.

17 Barry and Rees above note 16.

18 See for example Martin Meyerson and Edward C Banfield (1955) *Politics, Planning and the Public Interest,* New York, The Free Press at 322.

public.[19] Public interest has also been seen as the sum total of all interests in the community balanced for the common good.[20] Some idealists believe that public interest consists of the course of action that is best for society as a whole according to some absolute standard of values regardless of whether any citizens actually desire them.[21]

For practical purposes, however, the courts have attempted to describe 'public interest' with more certainty. Thus a principle emerged in early English law that a matter of 'public interest' is one in which a class of the community have a pecuniary interest, or some interest by which their legal rights or liabilities are affected.[22] This principle of common law appears to have been generally followed in the sub-continent including Bangladesh. In a Bangladeshi case, while borrowing from the English jurisdiction, Anwarul Hoque Chowdhury J. held:

> The expression public interest is nowhere defined in the Passport Order. It has however received judicial interpretation years ago from the courts of English Jurisdiction. In *South Hetton Coal Company case,* reported *in 1894 1 QB at page 133* Lord Esher MR while dealing with the question of fair comment in matters of public interest observed that when so many people of a particular locality is affected by failure of sanitation, a fair comment is in public interest. Public interest [sic] thus, connotes matter of interest in which a class of the community would have pecuniary interest or any other interest by which their legal right or liabilities are effected.[23]

This description depicts the traditional and well established attitude taken by the courts both in England and in the sub-continent.[24]

The term 'public interest', has some other traditional meanings as well. It is often equated with national interest, national security or even non-justiciability.[25] It has also been acknowledged that "the expression interest of

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[19] Above note 14 at 5.

[20] F Raymond Marks, Kirk Leswing and Barbara A Fortinsky (1972) *The Lawyer, the Public, and Professional Responsibility,* Chicago, American Bar Foundation at 51.

[21] Above note 14 at 11. The concept of 'justice as fairness' of John Rawls is essentially an ethical public interest ideal. See John Rawls (1971) *A Theory of Justice,* Cambridge, Harvard University Press and The Belknap Press.

[22] See Campbell CJ's discussion in *R v. Bedfordshire* 24 LJ QB 84.

[23] In *AR Shams-ud-Doha v. Bangladesh and others* 46 DLR(1994) 405 at 408. The judge here relied on two earlier cases. These are *South Hetton* case (1894) 1 QB 133 and *Attorney General v. PYA Quarries* (1957) 2 QB 169.

[24] DC Jain (1986) "The phantom of "public interest"" in AIR Journal, pp. 85-89.

[25] The traditional meanings of the term used in England has been enumerated by Carol Harlow (1986) "Public interest litigation in England: The state of the art" in Jeremy Cooper and Rajeev Dhavan (eds.) *Public Interest Law,* Oxford, Basil Blackwell, pp. 90-137 at 90.

the general public embraces public security, public order and public morality".[26]

DETERMINING 'PUBLIC INTEREST' IN A PIL CASE

In PIL, the litigation must involve some clearly ascertainable public interest which is given due recognition and conscious preference with an aim to ensure collective justice. Apparently, three stages are involved in an ideal case:

a. Public interest is given priority over special interests, private interests, group interests and vested interests. In other words, in a free competition of interests of different kinds, the interest of the public prevails;[27]

b. It is the judge who decides what is public interest by exercising his discretion. This thus is predominantly a matter of fact and is decided in a case to case basis;

c. The discretion of the judge is exercised judiciously and not arbitrarily or whimsically.

It may appear that 'public interest' is a vague and fluid concept, the meaning of which changes from time to time depending on the problem at hand. Accusations of vagueness, however, may be countered in several ways.

First, in most cases, we instantly know whether a matter involves public interest or not when we encounter it. Nobody needs special legal training to appreciate that unhindered importation and distribution of radio-active milk is against public interest. In other words, in a good case, it is almost automatic that the element of public interest is recognised and appreciated.

Second, there is a whole body of PIL case laws already accumulated in India and Pakistan. We must also add the growing number of Bangladeshi cases to the list. We now have a considerable number of decided cases which the judges can follow in determining public interest elements in similar situations.

Third, evidence of public awareness and reaction, especially through popular protests and newspaper reports, is a good indication for the judge that the matter at hand is one of public interest. However, a matter would not be a case of public interest merely because the public are interested in it.

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[26] *Jesingbhai v. Emperor* AIR 1950 Bom 363 (FB).

[27] Even in private interest litigation, the courts examine the various competing interests to make sure that public interest is not injured. For an illustration, see the recent case of *Frank Shipping Ltd. v. Bangladesh* 50 DLR (AD) (1998) 140. The petitioner's prayer was rejected because it failed to show that its own private interest was so overwhelming that public interest should be subordinated thereto.

Fourth, the court may also lay down its own guidelines for entertaining PIL cases.[28] In India, the High Courts constituted PIL cells back in the 1980s to deal with PIL by distinguishing the good cases from the bad ones before the process of admission.

In fact, rigidly specifying acts and issues as public interest matters would actually hamper the interest of the public, stifling the future growth of PIL. Public interest can be properly served only if there is a level of elasticity in the concept so that it can change its shape to meet the demands of time and social changes without rigour.

PROCEDURAL UNIQUENESS OF PIL

Under the traditional procedural law, two competing interests clash in front of the judge who acts as a neutral umpire. This is the so called adversarial model of litigation that has developed in relation to private interest litigation. Where public interest is concerned, this model is unsuitable for obvious reasons. The poor and the disorganised, or a conscious citizen, can not compete with powerful vested interests in terms of time, money and energy required to fight a case. Anti public interest elements can easily out-resource good intentioned PIL activists. So the PIL activists stress on the fact that, in many cases, 'equal treatment of unequals is inequality'.

To remedy the situation, the concept of PIL suggests that, to the extent it is thought proper and necessary to ensure justice, the courts should be ready to abandon the features of the private law model. In other words, a non-adversarial model may be chosen over the adversarial system of litigation.

Suitability of private law litigation model for resolving public law issues has been seriously questioned back in 1976 by Abram Chayes.[29] He observed the fact that a public law litigation approach reverses many of the crucial characteristics and assumptions of the traditional concept of adjudication. In a public law model:

(1) The scope of the lawsuit is not exogenously given but is shaped primarily by the court and parties;

(2) The party structure is not rigidly bilateral but sprawling and amorphous;

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[28] For Indian Supreme Court's guidelines issued in 1988 by Bhagwati CJ, see Sangeeta Ahuja (1997) *People, Law and Justice: Casebook on Public Interest Litigation*, Vols 1 and 2, London, Sangam Books, pp. 860-861. For similar guidelines and identifying features used by the Pakistani Supreme Court, see Nasim Hasan Shah (1993) "Public interest litigation as a means of social justice" in *PLD Journal*, pp. 31-34 at 32.

[29] Abram Chayes (1976) "The role of the judge in public law litigation" in Vol. 89 No. 7 *Harvard Law Review*, pp. 1281-1316.

(3) The fact inquiry is not historical and adjudicative but predictive and legislative;

(4) Relief is not conceived as compensation for past wrong in a form logically derived from the substantive liability and confined in its impact to the immediate parties; instead, it is forward looking, fashioned ad hoc on flexible and broadly remedial lines, often having important consequences for many persons including absentees;

(5) The remedy is not imposed but negotiated;

(6) The decree does not terminate judicial involvement in the affair: its administration requires the continuing participation of the court;

(7) The judge is not passive, his function limited to analysis and statement of governing legal rules; he is active, with responsibility not only for credible fact evaluation but for organising and shaping the litigation to ensure a just and viable outcome;

(8) The subject matter of the lawsuit is not a dispute between private individuals about private rights, but a grievance about the operation of public policy.[30]

Although Chayes dealt with the American jurisdiction The characteristics of Public Law Litigation identified by him were adopted by Cunningham in 1987 to describe the Indian situation with the observation that the phenomenon described by Chayes was perhaps intended to encompass a wider range of cases.[31] In 1988, analysing the case of *Sheela Barse v. Union of India*,[32] Singh identified a number of characteristic features of PIL following the Chayes model.[33] In the Bangladesh perspective also, the Chayes model holds true and good.

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30 As above at 1282-1283.

31 Clark D Cunningham (1987) "Public interest litigation in Indian Supreme Court: A study in the light of American experience" in Vol. 29 No. 4 *JILI*, pp. 494-523 at 494.

32 (1988) 4 SCC 226.

33 Parmanand Singh (1988) "Public interest litigation" in Vol. XXIV *Annual Survey of Indian Law*, pp. 123-146 at 124 says in a modified form: a) The proceedings are exogenously determined by variations of the theme and are opposed to private law litigation models. b) The party structure is sprawling and amorphous. c) The relief looks to the future and is generally corrective rather than compensatory and often involves an ongoing process. d) The subject matter is to be defined, adjusted or readjusted according to the exigencies. e) The rights of the petitioner are always subordinate to the interests of those for whose benefit the action is brought. f) The court will be reluctant in initiating any coercive action for non-compliance as the main purpose of PIL is to ensure active and willing co-operation between different branches of the government.

In short, PIL involves activism and flexibility on the part of the court in three phases.[34]

First, the rules of *locus standi* have been liberalised.[35] Any conscious citizen or organisation, with *bonafide* intentions, can approach the court for public good.

Second, the court ignores procedural rigidity and formalities during the process of adjudication.[36] This includes acceptance of letters, telegrams etc. and treating them as petitions, *suo motu* actions by the judge, investigative commissions, enlisting aid from volunteers, seeking assistance from *amicus curiae* etc.

Third, the court ventures to grant innovative and appropriate remedies going beyond the traditional techniques of providing relief.[37] These include, apart from traditional remedies, continuing supervision and monitoring, granting of compensation, devising guidelines for government departments etc.

BOUNDARIES THAT PIL CAN NOT CROSS

Presence of an issue of public interest does not itself make a good PIL case. Since it is essentially a litigation, PIL must operate within the limits of certain constraints.[38]

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34 Different writers have identified the main features of PIL in different ways. Jamie Cassels (1989) "Judicial activism and public interest litigation in India: Attempting the impossible?" in Vol. 37 American Journal of Comparative Law, pp. 495-519 at 498 takes a simple approach and identifies four distinctive characteristics of PIL for India. These are: a) liberalisation of the rules of standing, b) procedural flexibility, c) a creative and activist interpretation of legal and fundamental rights and d) remedial flexibility and ongoing judicial participation and supervision. More or less in the same tune, Mario Gomez (1993) In the Public Interest: Essays on Public Interest Litigation and Participatory Justice, Colombo, Legal Aid Centre of the University of Colombo at 13 identifies three main features: a) The expansion in the rules of standing. b) The dispensation with the formal writ petition and initiation of actions by means of a letter. c) The adoption of commissions of enquiry as fact gathering mechanisms.

35 see below chapters seven and eight.

36 see below chapter nine.

37 see below chapter nine.

38 A good analysis of the limitations has been provided by GL Peiris (1991) "Public interest litigation in the Indian subcontinent: Current dimensions" in Vol. 40 *International and Comparative Law Quarterly*, pp. 66-90 at 84. See also Parmanand Singh (1986) "Judicial socialism and promises of liberation: Myth and truth" in Vol. 28 No. 3 *JILI* pp. 336-347 at 344 and S Kamalkar (1989) "Parameters of public interest litigation" in Vol. XCI *Bombay Law Reports Journal*, pp. 1-3 at 1. Also *Shri Sachidanand Pandey v. State of West Bengal* AIR 1987 SC 1109 is a good example of judicial recognition of the need to delimit the field.

First, as it is in case of any litigation, the court can not proceed with a PIL case unless certain basic requirements are fulfilled. Some of the important points are:

a. There must be some violation of constitutional or legal rights, entitlements or privileges or non-performance of constitutional or legal duties.[39] In PIL cases, issues are liberally construed to protect diffused and collective rights, but mere moral rights or unsubstantiated apprehension, for example, are not enough to demand relief.

b. The courts are reluctant to do anything that the judicial mechanism is not designed to perform. Thus, for example, the highly technical job of compiling a list of drugs that should be banned can not be done by the courts of law.[40] The courts sometimes assume monitoring and supervisory role – but only in rare cases, for a limited time and if there is no other alternative.

c. The courts step in only when it is possible to provide an effective and adequate remedy through judicial process.[41]

d. It is a general rule that where there is an alternative remedy, the High Court Division will not entertain a petition, unless it can be shown that the alternative remedy is not efficacious. This also applies to PIL cases. Since this is a self-imposed fetter, the courts are not absolutely barred from entertaining writ petitions even in presence of efficacious alternative remedies. In PIL cases also, the judges are not absolutely prevented by the general rule, although it will be broken only in rare circumstances.

Second, the courts must adhere to the judicial respect for the constitutional allocation of responsibility, i.e., the theory of separation of powers. Even in PIL matters, due to this self-imposed restraint, the courts can not do a number of things.

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[39] For the principle, see *Dr Mohiudin Farooque v. Bangladesh and others* 17 BLD (AD) (1997) 1 at 19. See also the interesting case of *Dr Ahmed Husain v. Bangladesh* 18 BLD (AD) (1998) 184, where the court held that a constitutionally permissible act can not be challenged merely because it is indecent. That case related to importation of duty free vehicles for parliament members.

[40] *Vincent Parikulangara v. Union of India* 1987 2 SCC 165.

[41] *People's Union for Democratic Rights v. Ministry of Home Affairs* AIR 1985 Delhi 268 at 281. For a recent Bangladeshi example, where the court considers the 'fund constraint' of the government, see *Ain O Salish Kendra (ASK) and others v. Government of Bangladesh and others* 19 BLD (HCD) (1999) 489 at 498.

a. The court can not dictate or force the executive to shape 'public policy'.[42]

b. The legislature can not be forced or compelled to initiate legislation.[43]

c. The court can not usurp the administration. Continuing surveillance or monitoring of public bodies can be made for limited period only in extreme and rare cases where no alternative at all is available.[44]

d. Where the administration is already dealing with a matter, the court can not order parallel investigation unless it is fully satisfied that the statutory body is not functioning property.[45]

But it has been declared that despite the constitutional allocation of responsibility, when the court is satisfied that other branches of the government are not functioning properly, it must act to ensure social justice.[46]

Third, the court enquires whether the petitioner is approaching with *bonafide* intentions. Issues serving private interests, political gains or curiosity of the court or the public would not initiate PIL.[47]

PUBLIC INTEREST LAW AND PIL: PIL AS A PART OF A GREATER MOVEMENT

'Public interest law' is a new chapter in modern public law. Focusing on 'public interest' it includes legal aid, lobbying for legislation, awareness programmes, conciliation proceedings, village mediation projects, etc. and litigation. Public interest law, however, is an American term and in the sub-continent, the equivalent phrase generally used is 'movement for legal aid'. PIL

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42 See for example *M Saleem Ullah v. Bangladesh* 47 DLR (1995) 218 where the sending of troops to Haiti was challenged. For Indian cases, see *State of Himachal Pradesh v. Umed Ram Sharma* (1986) 2 SCC 68; *Assam Rifles Multi-Purpose Co-operative Society Ltd v. Union of India* (1987) 2 SCC 638 at 639. See also Mehboob Pervez Awan (1992) "*Probono publico litigatio*: Whether principles of policy can be enforced under public interest litigation" in *PLD Journal*, pp. 67-70.

43 *State of Himachal Pradesh v. A Parent of a Student of Medical College, Simla* (1985) 3 SCC 169.

44 *People's Union* as above note 41.

45 *State of West Bengal v. Sampat Lal* AIR 1985 SC 195 at 201.

46 *People's Union* as above note 41; *State of West Bengal v. Sampat Lal* AIR 1985 SC 195 at 201.

47 See *Dr Mohiuddin Farooque v. Bangladesh (FAP 20)* 17 BLD (AD) (1997) 1 at 19 and *Saiful Islam Dilder v. Government of Bangladesh* 50 DLR (1998) 318; 18 BLD (HCD) (1998) 615 at 321. For the leading Indian case on this point, see *People's Union for Democratic Rights v. Ministry of Home Affairs* (1984) 3 SCC 16. For a more detailed discussion, see chapter eight.

is thus nothing more than one of the constituents of public interest law, or in other words, a part of the greater movement for legal aid.

The term public interest law was first being widely used in the USA during the late 1960s. By the early 1970s the term entered the legal literature as a major subject of study and analysis. Public interest law has been consistently described in the US as a mode of representing the underrepresented or the unrepresented in the society.[48] The question is, what are the modes or techniques of such representation? In other words, what are the activities that may be included within the scope of public interest law?

Handler observes that the term was employed, in the early 1970s, to describe foundation-supported law firms organised to engage in law reform, principally in the environmental and consumer areas.[49] At that time, these firms were distinguished from traditional civil rights and poverty groups.[50]

In 1973, the Special Committee of the American Bar Association on Public Interest Practice took a broader view and defined public interest law activities as follows:

- Legal services to the poor;
- Representation without fee or at a substantially reduced fee in cases seeking the vindication of an individual's fundamental civil rights and rights belonging to the public at large;
- Representation of charitable organisations.[51]

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48 For a collection of definitions of public interest law, see Jeremy Cooper (1991) *Keyguide to Information Sources in Public Interest Law,* London, Mansell, at pp. 5-11. For a typical example, see Nan Aron (1989) Liberty and Justice for All: Public Interest Law in the 1980s and Beyond, Boulder and London, Westview Press at 3 where he says: "Public interest law is the name given to efforts to provide legal representation to interests that historically have been unrepresented or underrepresented in the legal process."

49 Joel F Handler (1978-79) "Public interest law firms in the United States" in M Cappelletti et al. (eds.) *Access to Justice,* Vol. III, Alphen aan den Rijn, Netherlands, Sijthoff and Noordhoff, pp. 421-442 at 421 discusses the entry of large foundations, such as the Ford Foundation, in the late 1960s and early 1970s in the field by providing funding for voluntary public interest law firms on a large scale.

50 It has been observed that the line separating public interest law from poverty and civil rights law could best be defined historically. See Gordon Harrison and S Jaffe (1972). "Public interest firms: New voices for new constituencies" in Vol. 58 *American Bar Association Journal,* pp. 459-467.

51 Special Committee of the American Bar Association on Public Interest Practice 1973, as quoted by Cooper above note 48 at 6.

Halpern, in 1974, extended this definition by incorporating two important points; that poverty is not the only reason for which interests are excluded from the decision making process and that public interest law is involved in the comfortable arrangement between the corporate and governmental power with an aim to promote citizen interests.[52]

The trend of expanding the scope of public interest law continued since two influential bodies, the American Bar Association and the Council for Public Interest Law also supported an extended view. The Bar Association's definition of 1975 included poverty law, civil rights law, public rights law, charitable organisation representation and administration of justice. [53] In 1976, the Council included in its definition groups such as the poor, environmentalists, consumers, racial and ethnic minorities, mental patients and others.[54]

Bellow and Kettleson complained in 1979 that there is a hodgepodge of definitions of public interest practice that either narrowly restrict what is brought under the public interest umbrella or include almost any form of *pro bono* legal representation or public service activity.[55] But in practice, the trend has been to support a broader definition.

When the concept was introduced and applied in the United Kingdom, a wider approach was favoured. The views of the English and American writers turned out to be very much similar. Thus in 1986, in a leading text on public interest law in the United Kingdom, Cooper and Dhavan, opted for a broad definition and even included lobbying by representation and publication. They defined:

> Public interest law consists in the use of litigation and public advocacy (i.e., lobbying by representation or publication) to advance the cause of minority or disadvantaged groups, and individuals, or the public interest.[56]

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[52] Charles R Halpern (1974) "Public interest law: Its past and future" in Vol. 58 No. 3 *Judicature*, pp. 118-127 at 120.

[53] The American Bar Association Resolution on Public Interest Practice, 1975, as quoted by Cooper above note 48 at 6-7.

[54] Council for Public Interest Law (1976) Balancing the Scales of Justice: Financing Public Interest Law in America, Washington DC, Council for Public Interest Law.

[55] G Bellow and J Kettleson (1979) "From ethics to politics: Confronting scarcity and fairness in public interest practice" in Vol. 58(1) *Boston University Law Review*, pp. 337-390.

[56] Jeremy Cooper and Rajeev Dhavan (eds.) (1986) *Public Interest Law*, Oxford, Basil Blackwell at 5. Earlier Weisbrod excluded legislative lobbying from his definition claiming that it can not properly be called public interest law; see Burton A Weisbrod, Joel Handler and Neil K Komesar (eds.) (1978) *Public Interest Law: An Economic and Institutional Analysis*, Berkeley et al., University of California Press at 24.

Recently, Cooper has emphasised on legal aid institutions, alternative dispute resolutions, test cases, lobbying, legal education and legal research and stressed on a combination of these strategies.[57]

In the sub-continent, the term PIL was coined during the early 1980s in India. From the very beginning, PIL in India means 'public interest litigation' and not 'public interest law'. Back in 1985, Agrawala, one of the foremost critics of PIL, said:

> By some strange quirk PIL in India has come to be used as an abbreviation for 'public interest litigation' rather than for 'public interest law'.[58]

But there is, in fact, nothing strange in this difference due to a number of reasons.

The first reason, without doubt, belongs to the different historical experiences of the activists of the two countries. In the USA, public interest law has been the outcome of attempts by minority groups, voluntary sector organisations and vigilant individuals to secure proper representation. The combined pressure from such activists resulted in, along with other strategies, a new type of litigation. In contrast, PIL in India has primarily been judge led and to a great extent judge induced.[59] It was the judges of the Supreme Court who started inviting PIL in the first place. Since a judge's arena is the arena of litigation only, it is perhaps natural that the focus of this new concept is predominantly on litigation rather than on other strategies.

The second reason, closely related with the first, is that the organisations and associations that acted as public interest activists in the USA had stronger tradition, greater organisational strength and better resources than their Indian counterparts. In a cash hungry Indian situation, the relative easiness in pursuing litigation for instant results appeared easier than pursuing other costly and time consuming procedures and strategies.

Whatever are the reasons, the 'social justice' revolution of the Indian legal field in the early 1980s appear to have highlighted litigation. The same have been the cases in Pakistan and Bangladesh. Since litigation became the main

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[57] Jeremy Cooper (1993) "Mobilizing law in the public interest" in Vol. 3 Issue 1 *Southampton Institute Law Review*, pp. 5-10 at 6-7. See also Jeremy Cooper (1998) "Public interest law revisited" in Vol. 2 No. 1 *Bangladesh Journal of Law*, pp.1-25.

[58] SK Agrawala (1985) *Public Interest Litigation in India: A Critique*, New Delhi, Tripathi and Indian Law Institute at 6 footnote 14.

[59] This apt and often quoted observation was made by Baxi in the early 1980s; see Upendra Baxi (1985) "Taking suffering seriously: Social action litigation in the Supreme Court of India" in Rajeev Dhavan, R Sudarshan and Salman Khurshid (eds.) *Judges and the Judicial Power: Essays in Honour of Justice V.R. Krishna Iyer*, London & Bombay, Sweet & Maxwell and Tripathi, pp. 289-315 at 291.

focal point for the activists, the term 'public interest law' is rarely used. PIL in the sub-continent is regarded as a 'strategic arm of the legal aid movement' – which it is.[60] But it is also important to appreciate the fact that PIL is one of the constituents of public interest law – a greater movement for social and collective justice.

PIL AND SAL (SOCIAL ACTION LITIGATION)

The subcontinental PIL is not a blind imitation of its American counterpart, according to Indian and Pakistani activists.[61] Some of the differentiating factors are:

a. PIL in India and the US emerged as representing distinctive phases of socio-legal developments of each country and consequently the salient characteristics of its birth and growth under the two jurisdictions are not the same;
b. In the US, PIL is the result of a gradual development induced mainly by voluntary sector institutions, but in India it is to a great extent judge led and even judge induced;
c. PIL in the US depends largely on substantial resource investment from the government and private foundations, this is significantly less so in India;
d. The focus in the US is on civic participation in governmental decision making; in India, it is on governmental lawlessness - for the Indian activists, distributive justice is more important than participatory justice;
e. In the US, the spotlight is on public interest law, litigation being the most important aspect. In India, the focus is almost entirely on litigation. But in the area of litigation, Indian version is in substance much wider than the American one.

Assuming that the above differences are justification enough and with a desire not to confuse the Indian PIL with the American one, Baxi offered the term social action litigation to express the Indian phenomenon.[62] Although the Indians need to learn from the American experience, he argued, the 'emerging

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[60] Bhagwati J. in *People's Union for Democratic Rights v. Union of India* AIR 1982 SC 1473 at 1476.

[61] see Baxi's arguments above note 59 at 290. See also PN Bhagwati (1987) "Social action litigation: The Indian experience" in Neelan Tiruchelvam and Radhika Coomaraswamy (eds.) *The Role of the Judiciary in Plural Societies,* London, Frances Pinter, pp. 20-31 at 22 and Syed Mushtaq Hussain (1994) "Public interest litigation" in *PLD Journal,* pp. 5-10 at 7.

[62] Above note 59 at 290.

perceptions of failure' of the American PIL demands proper appreciation of the vital 'political cultural differences'. Otherwise, he feared, the attempts of transferring the success stories might not succeed. A number of activists, including Bhagwati J., a pioneer in the field, readily supported this proposal.[63]

The first critique came from Agrawala.[64] He argued that this nomenclature makes no essential difference in the basic content and philosophy of PIL. Refusing to believe that the Indian experience is qualitatively different, he says that to replace the widely used and understood nomenclature "A philosophy of SAL as something completely distinguishable from PIL has first to be developed". A number of writers later followed this reasoning.[65] Even now, the term PIL is still in vogue - both in academic works and law reports, though a considerable number of activists still use the term SAL.[66]

It appears that the term SAL has failed to replace the term PIL totally, but has become a species within the genus. If the matter involves public interest, it is PIL. Whenever the litigation indicates social activism, an attempt to rectify social evils or pre-empt social progress, the litigation may be termed as SAL. In other words, PIL involves the collective rights of the entire public where no individual is specially affected; SAL involves a determinate group or class of people who has sustained the primary injury.[67] In practice, an activist chooses the term SAL or PIL depending on the extent of his social commitment. The more he is social justice minded, the more he tends to use the term SAL.

REPRESENTATIVE SUITS AND PIL

Representative suits are described in the Code of Civil Procedure in the following way:

> Where there are numerous persons having the same interest in one suit, one or more of such persons may, with the permission of the Court, sue or be

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[63] Above note 61 at 22.

[64] Agrawala above note 58 at 7.

[65] See for example Mridul Marudhar (1986) *Public Interest Litigation: A Profile*, Jaipur, Bharat Law House at 1.

[66] See for example support for SAL by IP Massey (1990) Administrative Law, Lucknow, Eastern Book Company at 250, footnote 25. See also Yasmin Shahnaz Meer (1993) "Litigating with Fundamental Rights: Rights litigation and social action litigation in India" in Vol. XV *Delhi Law Review*, pp. 38-57 at 39.

[67] This view has been expressed by Soli J Sorabjee (1997) "Protection of Fundamental Rights by public interest litigation" in Sara Hossain, S Malik and Bushra Musa (eds.) *Public Interest Litigation in South Asia: Rights in Search of Remedies*, Dhaka, University Press Limited, pp. 27-42 at 28.

> sued, or may defend, in such a suit, on behalf of or for the benefit of all persons so interested.[68]

This is very similar to class action suits in the American jurisprudence.

A representative suit, however, is not the same thing as a PIL for the simple reason that it is designed to deal with group interests to avoid a multitude of similar actions and protection of social or public interest is not its primary purpose.

First, a representative suit is conducted within the perimeters of the traditional adversarial system. It is neither of inquisitorial nature, nor designed to assist social activism. PIL, on the other hand, involves a negation of the adversarial method and includes innovative techniques in the process of adjudication as well as in granting relief.

Second, the petitioner of a representative suit is aggrieved in the traditional sense of the term and some other persons share the same grievance with him. PIL cases often involve a petitioner who is not aggrieved personally, especially in the traditional sense.

Third, representative suits may be filed where there are 'numerous persons'. This term carries its specific meaning. On the one hand, 'numerous persons' do not embrace the general public.[69] So it excludes cases where the interest of the entire public is concerned. On the other hand, the word is not synonymous with numberless or innumerable and the body of persons represented must be sufficiently definite. Still, there is no rule fixing any limit to the numbers and the actual number need not be capable of being ascertained.[70] So the court must apply its discretion as to what is or is not numerous in a particular case.[71]

It appears that there is a scope of filing PIL cases as representative suits where a segment of the society, whose number is sufficiently definite, is injured. But representative suits do not offer relief to the public as a whole and the innovative remedies provided under the writ jurisdiction are not available.

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68 Code of Civil Procedure 1908, Order I rule 8(1).

69 See for example *Gurushiddappa v. Gurushiddappa* AIR 1937 Bom 238 at 241.

70 *Hasan v. Masoor* AIR 1948 PC 68 at 70.

71 *Narayanan v. Kurichithanam* AIR 1959 Ker 379.

Chapter Five

THE CONCEPT OF PIL: THEORETICAL APPROACHES

Whether PIL is essentially a revolution or a reformation depends on the perspective of the observer rather than on any theoretical paradigm. Yet, being a radical development, PIL requires to be justified by its proponents, explained by the activists and understood by the lawyers. As a result, various attempts have been made to theorise the concept of PIL.

However, it must be stressed that a single precise 'theory' of PIL, accepted by everyone, is neither available nor possible. Instead of a 'theory of PIL', the following discussion attempts to follow the patterns of some of the theoretical approaches taken by the proponents of PIL. It needs to be mentioned that our discussion is in no way exhaustive.

CAPPELLETTI'S ANALYSIS: MASSIFICATION THEORY

PIL has been explained as a consequence of the 'massification phenomena' of modern societies. In other words, due to the ever-increasing size, concerns and complexity of modern societies, certain rights can not be attained through traditional means. PIL is one attempt to solve this problem. Thus PIL is considered as a reflection, in the field of law, of the emerging, growing and lasting need of modern societies.

In 1978, Cappelletti advanced the so-called 'massification theory'.[1] He used comparative analysis and assumed that some basic socio-economic and political needs are shared by all advanced societies and on this premise he examined the legal answers given to those common needs.

According to Cappelletti, our contemporary society or more ambitiously, our civilisation, may be characterised as a mass-production mass-consumption civilisation. But this massification extends far beyond the

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1 M Cappelletti (1978-79) "Vindicating the public interest through the courts: A comparativist's contribution" in M Cappelletti et al. (eds.) *Access to Justice,* Vol. III. Alphen aan den Rijn, Netherlands, Sijthoff and Noordhoff, pp. 513-564. This essay is an adapted version of an earlier lecture, see M Cappelletti (1976) "Vindicating the public interest through the courts: A comparativist's contribution" in Vol. 25 *Buffalo Law Review,* pp. 643-690. Cappelletti's theory has often been examined by the sub-continental activists; see for example *SP Gupta and others v. Union of India and others* AIR 1982 SC 149 at 192.

economic sector and embraces all spheres of our lives, including the field of law. Cappelletti says:

> More and more frequently, because of the "massification" phenomena, human actions and relationships assume a collective, rather than a merely individual character; they refer to groups, categories and classes of people, rather than to one or a few individuals alone. Even basic rights and duties are no longer exclusively the individual rights and duties of the 18th or 19th century declarations of human rights inspired by natural law concepts, but rather meta-individual, collective, "social" rights and duties of associations, communities and classes. This is not to say that individual rights no longer have a vital place in our societies; rather, it is to suggest that these rights are practically meaningless in today's setting unless accompanied by the social rights necessary to make them effective and really accessible to all.[2]

Cappelletti says that the complexity of modern societies generates situations in which a single action can be beneficial or prejudicial to a large number of people. This makes the traditional scheme of litigation as a two party affair quite inadequate because an individual alone is unable to protect himself efficiently in these cases. His interest is either too small, so that a legal action would not pay, or too diffuse, so that his rights are denied by the court or he may even be unaware of his rights. To protect his new social, collective and diffuse rights, therefore, it is necessary to abandon the individualistic traditional approach. New social, collective, diffuse remedies and procedures are required. The quest for these new remedies and procedures is responsible, among other things, for the development of public interest law and PIL.

THE CLASSIC AMERICAN APPROACH: REPRESENTING THE UNDERREPRESENTED

PIL has been consistently described as a method of representing the underrepresented or unrepresented interests in society. This is the so-called classic ideology of public interest law.

In the USA, the classic approach mainly dealt with the participation of unorganised interests. The focal point is civil justice, or as recast by Trubek and Trubek, civic justice.[3] Civic justice, according to them, means a full opportunity for all citizens to participate in the life of the commonwealth. They say:

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2 Cappelletti as above at 518.

3 Louise G Trubek and David M Trubek (1981) "Civic justice through civil justice: A new approach to public interest advocacy in the United States" in M Cappelletti et al. (eds.) *Access to Justice and the Welfare State*, Alpen aan den Rijn, Sijthoff, pp. 119-144.

> This approach was based on a critique of the American political system. The critique took as a given that it was essential to provide greater protection to the rights of citizens in their roles as consumers, and users of the environment, and to categories like children, women, etc. It concluded that the operation of the American system of "pluralist" bargaining hampered, rather than helped, the effort to protect these interests. Pluralism was supposed to ensure democracy, but it did not. While pluralist politics worked well for organised groups, who could bargain with each other and with government for rights and privileges, it worked against such unorganised interests which were excluded from a decision-making process open only to people who could speak for organised constituencies.[4]

This problem was sought to be solved by reforming the legal system and by giving equal access to the unorganised. Access meant legal representation and public interest litigation became a device for ensuring equal access. This approach thus assumed that if unorganised groups were properly represented in the courts of law, their due rights and privileges could be safeguarded. PIL was seen as a weapon to equalise the resources available to organised and unorganised groups.

This classic' approach however gave away to a more rational understanding of public interest law and Trubek and Trubek proposed that only a wider strategy, of which PIL is a part, can ensure significant progress towards civic justice.[5] Out of proportion reliance on litigation and legal advocacy had to be replaced by a more sensible view of promoting other types of public interest activity and combining all the strategies together.

PIL AND ASSERTION OF NEW ENTITLEMENTS

It has been observed that if the focus is on the Western jurisdictions, emergence of public interest law can be found closely connected with the development of the conceptions of 'rights'.[6] PIL may be explained as a mechanism used to assert certain new rights and entitlements, such as

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4 As above at 122.

5 Trubek and Trubek, as above at 144, sum up the elements of such a strategy. For further elaboration, see Louise G Trubek, David M Trubek and P Kent (1980) The *Executive Order on Consumer Affairs Programs: New Voice for "Consumers in Federal Agencies"?* Madison, Wisconsin, Centre for Public Representation Inc.

6 Rajeev Dhavan and Martin Partington (1986) "Co-operation or independent strategy? The role of social action groups" in Jeremy Cooper and Rajeev Dhavan (eds.) *Public Interest Law*, Oxford, Basil Blackwell, pp. 235-260 at 236. Elsewhere Cooper, while providing a select bibliography on this issue, observes that the relationship between rights theory and public interest law is covert rather than explicit. See Jeremy Cooper (1991) *Keyguide to Information Sources in Public Interest Law*, London, Mansell at 14.

consumer rights, that have been attained in developed jurisdictions during the 20th century. This, in a sense, is a historical explanation of the development of PIL.

Contemporary legal thoughts and notions are said to be dominated by a package of rights produced in the eighteenth and nineteenth centuries. Consistent with the expectations of an evolving capitalist society, this classical liberal package concentrated on the rights to life, liberty and property which were considered as 'preferred' freedoms. It had two uneasy addenda, rights to equality and rights to process - uneasy because if implemented stringently, they tended to violate the *status quo* of the capitalistic society.

This liberal package in effect ignored the problems faced by the poor, the disadvantaged and minorities. Similarly, it was not concerned with the diffused or community rights. But as the needs of society gradually became too great to ignore, the poor and the disadvantaged were given a number of new rights. According to Dhavan and Partington, these are specific 'legal entitlements' and were not treated as preferred rights.[7] They were regarded as politically negotiable and easily alterable entitlements doled out by a welfare state.

These new entitlements are of several categories.[8] In the first category are social welfare rights. These rights, at the individual level, consist of specific welfare entitlements such as right to social security, housing, etc. At the collective level, these rights include diffused interests such as those of consumers or environmental issues.

In the second category are social justice rights. These rights aim to give more shape and substance to social aspects of the right to equality. Instead of formal equality, a new and complex social justice jurisprudence aims to provide substantial and real equality.

In the third category are civil and political rights. Civil rights are concerned with the manner in which people are treated in a civil society and the circumstances under which people can be deprived of their freedom while political rights deal with the important aspects of democratic participation in public life such as rights to fair elections.

These new entitlements involve a number of new challenges. Dhavan and Partington says:

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7 See Dhavan and Partington as above at 237.

8 As above.

> In the first place, they are concerned with various very complex social issues. These require detailed attention and research. Secondly, these entitlements have not been given the preferred position enjoyed by the rights identified by the classical liberal package. Thirdly, these entitlements are not just claimed against the state but against various species of private power. Fourthly, while the state has responsibility for providing some of these entitlements, the process by which these entitlements can be obtained involve the use of varied social, administrative and political skills. Fifthly, it is often the case that some of these rights are either concerned with state lawlessness (i.e., when the state violates the norm it has set for itself in respect of the exercise of power) and/or state inefficiency or incapacity as a result of which the state is not able to satisfy claims and demands arising out of these entitlements. Finally, the organic nature of modern society demands that many of these rights have to be viewed as collective entitlements. For these and other reasons, there are no easy answers to questions about how these entitlements can be articulated, processed and obtained.[9]

Apparently, in an attempt to solve these problems and to make the newly attained rights and entitlements legally enforceable and meaningful, a number of new strategies were required. PIL has developed as one of these new strategies – providing means to enforce such new rights and entitlements.

WEISBROD'S ECONOMIC ANALYSIS: PIL IN TERMS OF EQUITY AND EFFICIENCY

In 1978, Weisbrod presented an analysis of PIL in terms of equity and efficiency.[10] Public interest law, accordingly, was seen as a mechanism adopted to correct equity and efficiency failure of a basically capitalistic legal system operating within a free market economy.

Weisbrod grouped many of the facets of public interest law under two principal headings. His first concern, efficiency, involves technical and allocative aspects. Technical efficiency, for the purpose of law, involves ensuring justice at the lowest cost and shortest time. Such cost and time minimisation include procedural aspects of law so that the legal mechanism works in a technically efficient way. The allocative efficiency has to do with

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[9] As above at 240.

[10] Burton A Weisbrod (1978) "Conceptual perspective on the public interest: An economic analysis." in Burton A Weisbrod, Joel Handler and Neil K Komesar (eds.) (1978) *Public Interest Law: An Economic and Institutional Analysis*, Berkeley et al., University of California Press, pp. 4-29.

the degree to which productive resources of all kinds are to put to their best uses .

As regards equity, pursuit of public interest is seen as pursuit of greater equity in individual's access to the fruits of the socio-economic systems activities. Weisbrod says:

> With regard to equity, there is a public interest in achieving an equitable division of the society's income and other rewards, and of opportunity for individuals to improve their own positions, although, to be sure, the precise definition of the terms "equitable" and "opportunity" are controversial.[11]

Weisbrod suggests that there is a public interest in obtaining an efficient use of resources and in dividing in an equitable way the fruits of the use of those resources.

In a free market economy, the private sector, mainly due to competition, enhances efficiency to a large extent. Although whether it helps to attain equity is a controversial question. In any case, there are likely to be both efficiency and equity failures in the private market. The government is expected to correct such failures. But it is not always possible for the government to do so. In many instances, such equity and efficiency failures become severe. Therefore, in every free market economy there is a strong need to organise a voluntary non–profit sector that attempts to correct the failures of the governmental and private sectors.

Public interest law, and as such PIL, is thus a mechanism used by the non–profit sector with an aim to redress the failure of equity and efficiency within the legal system.

PIL AS A REACTION AGAINST ADVERSARIAL APPROACH

PIL is often considered as an attempt to remedy certain shortcomings of the adversarial system of adjudication that become apparent while enforcing collective and social rights.

The system of law introduced in British India was based on the so called 'common law' system – a colonial Anglo-Saxon jurisprudence. This was, and still is, adversarial in nature. The litigants approach the court as adversaries and are responsible to prepare, present and pursue their own cases. The judge is a neutral umpire. He will not interfere, investigate or inquire out of his own initiative. This unbiased aloofness is supposed to preserve the neutrality of the judge. Apart from certain exceptions, our legal system consistently follows the adversarial philosophy.

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[11] As above at 5.

In the sub-continent, the activists vehemently criticised the traditional colonial Anglo-Saxon adversarial approach. The activists regretted that even after decades of independence, the judicial system had followed the path of the Anglo-Saxon legacy left behind by the British which was framed by a colonial ruling government to suit its class interests and had little relevance to the prevalent sub-continental social conditions.[12] Bhagwati J. explains:

> Anglo-Saxon law is transactional, highly individualistic, concerned with an atomistic justice incapable of responding to the claims and demands of collectivity, and resistant to change. Such law was developed and has evolved in an essentially individualistic society to deal with situations involving the private right/duty pattern. It cannot possibly meet the challenge raised by these new concerns for the social rights and collective claims of the underprivileged.[13]

Pathak J. noted that an insistence to administer the adversarial Anglo-Saxon law in a political culture that highlights the mutual responsibilities of citizens in a situation of vast differences in wealth, status and literacy can not be justified.[14] New techniques were thus sought for, it was felt necessary to evolve what has been called a *'dalit jurisprudence'* which is more in harmony with the mores and needs of the Indian society.[15]

The adversarial system has its advantages. It advocates minimal intervention and consequently is supposed to be less expensive. But it fails to ensure justice where there is a disparity between the incomes, powers, influences and status of the litigants. In cases of public nature as opposed to those of private nature, especially where collective and diffused interests are involved, the adversarial system fails even more hopelessly. Where the applicants are poor, disorganised, ignorant or frightened to represent their case properly, the court must intervene to ensure justice. In most of the situations, a public interest litigant can not be expected to bear the cost and expenses of the cases all by himself.

As a result, the pure adversarial approach has been modified and changed to a great extent in almost all the jurisdictions. PIL, in the sub-continent, is seen as one of the exceptions to the adversarial scheme of

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[12] See Upendra Baxi (1991) "Conflicting conceptions of legal cultures and conflict of legal cultures" in Vol. 33 No. 2 *JILI* pp. 173-188 where he opposes the idea of a single universal theory of judicial process as impractical.

[13] PN Bhagwati (1984-85) "Judicial activism and public interest litigation" in Vol 23 *Columbia Journal of Transnational Law,* pp. 561-577 at 570.

[14] *Bandhua Mukti Morcha v. Union of India* AIR 1984 SC 802 at 839.

[15] NS Chandrasekharan (1986) "Dalit jurisprudence: Legal basis" in Vol. 28 No. 3 *JILI,* pp. 392-394 at 394.

adjudication – an exception introduced to protect the collective and social rights of the people in general.

PARTICIPATORY JUSTICE AND POLITICAL ASPECTS OF PIL

PIL is often seen as a mechanism through which the people, especially the poor and the deprived, participate in the decision making process. In other words, it ensures participatory justice by giving the people an opportunity to influence, although indirectly, legislative and administrative decision making. This brings us to a number of important issues relating to the political aspects of PIL.

First, sub-continental activists and judges emphasise on the political role of the judiciary complaining that this role has often been ignored or misunderstood. Thus, for example, Bhagwati J. said:

> . . . every constitutional question concerns the allocation and exercise of governmental power and no constitutional question can, therefore, fail to be political.[16]

Similarly Baxi, arguing that the Indian judges had started to confront the socio-political realities with renewed vigour in the aftermath of the Emergency, said:

> I believe it is time to take stock and to say what the judges regard as unsayable: that the Supreme Court is a centre of political power.[17]

This political power is not affected by the doctrine of separation of powers recognised by the constitutions of the sub-continent. In fact, the doctrine enhances this power indirectly because, under the constitutions of the sub-continental countries, the Court is the ultimate interpreter of constitutional issues.[18]

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16 *State of Rajasthan v. Union of India* AIR 1977 SC 1361.

17 Upendra Baxi (1980) *The Indian Supreme Court and Politics, Lucknow,* Eastern Book Company at 5.

18 It is quite interesting to view this argument in the light of the so called American 'doctrine of political question' - that the Court should refrain from entertaining certain matters because of their political nature. For the most widely accepted definition of the doctrine, see *Baker v. Carr* [1962] 369 US 186 217. However, recent observations made by the Appellate Division of the Supreme Court of Bangladesh in the *First Constitutional Reference (MPs Reference)* 1995 (III) (Special issue) BLT 159 at 171-173 indicate that the Bangladeshi Court is reluctant to rely on the American doctrine. See also Mahmudul Islam (1995) *Constitutional Law in Bangladesh,* Dhaka, Bangladesh Institute of Law and International Affairs at 373-374 for similar arguments.

Second, once this political role is recognised, it is argued that this has been reflected and expressed through PIL cases, although the courts are often reluctant to articulate their role. From the court's viewpoint, while conducting intensive judicial scrutiny of governmental action and non-action, legal activism is inevitable. From the viewpoint of the PIL petitioners, it is an alternative strategy to effect socio-economic and political transformation from outside the conventional political arena.

Third, the judges, it is argued, are not to deny their political role or escape responsibility, but to use PIL for genuine public interest causes. These causes include the socio-economic interest of the poor and the deprived, as opposed to the purposes of the privileged and the élite. Gomez says:

> By developing a concept of PIL the Indian Courts have definitely indulged in political action. By liberalising court procedures and scrutinising intensely several areas of governmental action and non-action, the Supreme Court has devised a highly politicised form of litigation. PIL is both a legal and political phenomenon, and in the final analysis, more political than legal.[19]

PIL, from this viewpoint, is an outcome of the recognition and application of the political power of the court. Through PIL, the people use the court as an alternative forum to take part in politics and the decision making process ensuring participatory justice.

SOCIAL ACTIVISM FOR SOCIAL JUSTICE

Of all the perspectives from which PIL has been examined, the social justice approach, accompanied with social activism, is perhaps the most significant one for the sub-continental proponents of PIL. The social responsibility of the citizens, including the legal professionals, which stems out of their social consciousness, is considered to be responsible for the development and success of PIL.[20]

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[19] Mario Gomez (1993) *In the Public Interest: Essays on Public Interest Litigation and Participatory Justice*, Colombo, Legal Aid Centre of the University of Colombo at 74. He analyses in great detail the relation between PIL and political action. He argues that PIL is a political phenomenon and has blurred the distinction between the political and judicial landscapes.

[20] The meaning of social justice has not been explored in any Bangladeshi case. It is, says Justice Anwarul Hoque Choudhury: ". . . an expectation of the people to have a social condition regulated by law which will guarantee a respect for human right, and for human dignity so that individual's personality can be well realised." See Anwarul Hoque Choudhury (1996) "Public interest litigation and distributive justice" unpublished paper presented in the Fifth SAARCLAW Conference: Development Through Law, Dhaka pp. 1-6 at 1.

In India, there are numerous examples demonstrating the judicial concern as to the role of the judges to alleviate the sufferings of the people. One passionate expression can be found in a much important earlier case where Dwivedi J. said:

> The Constitution is not intended to be the arena of legal quibbling for men with long purses. It is made for the common people. It should generally be so construed as that they can understand and appreciate it. The more they understand it the more they love it and the more they prize it.[21]

This sympathy for the downtrodden and poor was shared by a number of Supreme Court judges including the pioneers of PIL. Thus for example, Bhagwati J. said:

> Large population are today living a sub-human existence in conditions of abject poverty; utter grinding poverty has broken their back and snapped their moral fibre.[22]

The Indian emphasis on social justice has been reflected in the suggestion by Upendra Baxi to use the term SAL (social action litigation) instead of PIL.[23]

Similarly, in Pakistan, PIL has been consistently described as a task of the eradication of social evils through the medium of law.[24] Justice Shah says:

> Law is a dynamic instrument fashioned by society for the purpose of achieving harmonious adjustment of human relations by eliminating social tensions and conflicts. If the law fails to respond to the needs of a changing society then either it will stifle the growth of the society and choke its progress or if the society is vigorous enough, it will cast away the law which stands in the way of its growth. Let me emphasise that if law is to earn the respect of the people and achieve its purpose of correcting injustices and to restore social equilibrium in the society it must accord with the concept of social justice.[25]

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[21] *Kesavananda Bharati v. State of Kerala* (1973) 4 SCC 225 at 947. In the same case, at 968, Chandrachud J. cautioned not to defeat the hopes and aspirations of the 'teeming millions - half-clad, half-starved, half-educated'.

[22] *People's Union for Democratic Rights v. Union of India* AIR 1982 SC 1473 at 1477.

[23] Upendra Baxi (1985) "Taking suffering seriously: Social action litigation in the Supreme Court of India" in Rajeev Dhavan, R Sudarshan and Salman Khurshid (eds.) *Judges and the Judicial Power: Essays in Honour of Justice V.R. Krishna Iyer,* London & Bombay, Sweet & Maxwell and Tripathi, pp. 289-315 at 290. For a discussion on the different viewpoints of SAL and PIL, see above chapter four.

[24] Mansoor Hassan Khan (1992) "The concept of public interest litigation and its meaning in Pakistan" in *PLD Journal,* pp. 84-95 at 84 and Nasim Hasan Shah (1993) "Public interest litigation as a means of social justice" in *PLD Journal,* pp. 31-34 at 31.

[25] Nasim Hasan Shah (1993) Inaugural address in the conference "Law as an instrument of social justice" in *PLD Journal,* pp. 28-30 at 29.

Although the promoters of PIL in Pakistan shared the notion of social consciousness with their Indian counterparts, one distinguishing element was apparent from the very beginning - the emphasis on Islam. In Pakistan, Islamisation has its roots in the very creation of the State.[26] However, effective Islamisation of the laws of Pakistan started in the late 1970s. Social justice, as promoted by the Pakistani judges, is Islamic social justice. While introducing PIL, as they were under the Islamisation process, a most important issue for the pioneering judges was whether PIL conforms with the Islamic principles. They established this conformity and proceeded further by showing that the inspiration and rationale of PIL can be drawn from Islam itself.[27]

In spite of the difference of approach in India and Pakistan, social justice and activism of the judges has been the main feature of development of PIL in both the countries.

As a result of such concern for the poor and helpless, the judges turned to activism and elaborated the reasons why such activism was needed. Krishna Iyer's reasoning is dramatically expressed in the following passage:

> When a system keeps millions in sub-human status and millionaires in super-human control, practises inglorious grandeur and unconscionable brutality, and jaundiced justice, when a nation becomes submissive or communal-feudal-medieval and kilkenney-cat political unmindful of the masses, and the classes chase pleasure, position and shameless wealth, silence is a sin and dissent a duty . . . The explosive syndrome or passivist pathology are grave risks to our Secular Socialist Republic. Then the therapeutic process of activist protest and functional dissent finds its finest hour of fulfilment. *The day After* is too late. Now, Now.[28]

He forcefully argued that in the competition between the courts and the streets as dispenser of justice, the rule of law must win the aggrieved person

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[26] For a summarised version of the background of Islamisation in general, see David Taylor (1983) "The politics of Islam and Islamization in Pakistan" in JP Piscatori (ed.) Islam in the Political Process, Cambridge, Cambridge University Press, pp. 181-198. For more detailed account see Afzal Iqbal (1986) *Islamisation of Pakistan*, Lahore, Vanguard. For Islamisation of laws in Pakistan see Rashida Patel (1986) *Islamization of Laws in Pakistan?* Karachi, Faiza Publishers and Rubya Mehdi (1994) *The Islamization of the Law in Pakistan*, Richmond, Curzon Press.

[27] For a detailed analysis, see Mansoor Hassan Khan (1993) *Public Interest Litigation: Growth of the Concept and its Meaning in Pakistan*, Karachi, Pakistan Law House at 48-53.

[28] VR Krishna Iyer (1985) *Judicial Justice: A New Focus Towards Social Justice*, Bombay, Bombay Campus Law Centre at 331. Iyer, in this case, is a bit verbose, but such passionate sincerity is perhaps a necessary element for successful social activism.

for the law court and wean him from the lawless street.[29] Bhagwati J. justified his activism in the *Judges'* case, saying that the rule of law will be substantially impaired if the court fails to secure fundamental rights to the poor people.[30] If the breach of public duties was allowed to go unredressed by the courts, it would promote disrespect for the rule of law.[31] It will also lead to corruption, encourage inefficiency and might create possibilities of the political machinery itself becoming a participant in the misuse or abuse of power. He also argued that in the modern welfare state individual rights and duties are being replaced by collective rights and duties of classes or groups of persons where every member of the public should have standing to challenge the action, otherwise the injury would go unredressed.[32]

Bhagwati J. claimed it to be necessary to go beyond technical and juristic activism to inquire about the purpose for which such activism is practised.[33] Even when the judge adheres to formal notions of justice and claims not to be concerned with the social consequences of what he decides, it is often a thin disguise, for in many such cases his instrumental objective is to preserve the *status quo*. Bhagwati's purpose for such activism is made clear when he says:

> We in India are trying to move away from formalism and to use juristic activism for achieving distributive justice or, as we in India are accustomed to labelling it, "social justice" . . . I would call this appropriately "social activism"- activism which is directed towards achievement of social justice . . . The modern judiciary can't afford to hide behind notions of legal justice and plead incapacity when social justice issues are addressed to it. This challenge is an important one, not just because judges owe a duty to do justice with a view to creating and moulding a just society, but because a modern judiciary can no longer obtain social and political legitimacy without making a substantial contribution to issues of social justice.[34]

The social activism advocated by the sub-continental activists proceeded with the assumption that judges are law makers, insisting that the traditional view that they merely interpret the law is fundamentally

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29 *Fertilizer Corporation Kamgar Union v. Union of India* (1981) 1 SCC 568 at 584.

30 As above note 1 at 189.

31 As above at 191.

32 As above at 192.

33 As above note 13 at 564-565.

34 As above. For a contrasting American view, see Geoffrey C Hazard (1969) "Social justice through civil justice" in Vol. 36 *University of Chicago Law Review*, 699-712. Hazard argues that social justice should not be the aim of the legal system and should be left to the conscience of the community.

wrong.[35] Baxi observed that while the elaboration of certain values in the Constitution assists the process of legitimisation of the ruling élite, at the same time, it tends to expose them to new demands and fresh challenges to their legitimacy.[36] The scope for judicial law-making widens when the legislature and the executive fail to perform their socio-economic functions. He further said:

> In other words, an activist judge will consider herself perfectly justified in resorting to lawmaking power when the legislature just doesn't bother to legislate. . . . in almost all countries of the Third World such judicial initiatives are both necessary and desirable.[37]

It appears that from the viewpoint of a social activist, the justification of PIL lies in the social responsibility of one citizen towards another and the development of PIL, accordingly, is an expression of the social activism aiming to achieve social justice.

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35 Upendra Baxi (1987) "On the shame of not being an activist" in Neelan Tiruchelvam and Radhika Coomaraswamy (eds.) *The Role of the Judiciary in Plural Societies,* London, Frances Pinter, pp. 168-178 at 168 claims that one does not attain jurisprudencial adulthood unless one accepts that judges are law makers. For details of Bhagwati's argument on this point, see Bhagwati, as above note 13 at 562-563. Prasad shows that even in the pre-PIL period, the Indian Supreme Court has created not only ordinary law but also constitutional law in the course of the exercise of its interpretative powers; see Anirudh Prasad (1980) "Imprints of Marshallian judicial statesmanship on Indian judiciary" in Vol. 22 *JILI,* pp. 240-258.

36 As above at 173.

37 As above.

Chapter Six

CONSTITUTIONAL MANDATE AND BASIS OF PIL

Whatever may be the reasons and justifications of the newly emerging concept of PIL, it must conform to the prevailing scheme and spirit of the Constitution. In other words, the concept and practice of PIL must be capable of being justified, explained and supported by constitutional provisions. Accordingly, the judges and lawyers in the sub-continent, including Bangladesh, proceeded to show that PIL not only conforms to the constitutional spirit and scheme, but the Constitution itself mandates a PIL approach. This constitutional basis of PIL is the subject matter of the present Chapter.

In the sub-continent, proponents of PIL advance their arguments in two stages. First, it is argued that the constitutions are people oriented and support the social justice approach. Thus, in intention and spirit, the constitutions of the sub-continental countries are pro-PIL. Second, they rely on the rule that no provision of the Constitution should be treated in isolation. Since interpretation of individual constitutional provisions is given on the basis of its scheme and spirit, which supports social justice, any interpretation is bound to support PIL. We shall examine in the present chapter how a PIL approach, under the constitutions of India, Pakistan and Bangladesh, is thus guaranteed.

Despite similarities, however, PIL evolves differently in different jurisdictions. In fact, it has long been demonstrated that the particular brand of constitutionalism prevailing in a given jurisdiction influence, and in turn is influenced by, the growth of PIL.[1] PIL in Pakistan is not just a copy of Indian PIL. Similarly, as the Constitution of Bangladesh has its uniqueness, PIL has been explained and understood in a unique Bangladeshi way. It has been labelled as ACL - 'autochthonic constitutional litigation'. The relationship between constitutional autochthony and PIL, a peculiar Bangladeshi feature, is also examined in the present chapter.

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1 David Feldman (1992) "Public interest litigation and constitutional theory in comparative perspective" in Vol. 55 No. 1 *Modern Law Review*, pp. 44-72.

PIL UNDER THE CONSTITUTIONAL SCHEME OF INDIA

Social justice provisions in the Indian Constitution

The socialist character of the Constitution of India has been emphasised in the Preamble by spelling out the aspirations of the people to secure to all citizens social, economic and political justice. The Preamble also affirms a determination to secure liberty of thought, expression, belief, faith and worship and equality of status and opportunity and to promote amongst the people a feeling of fraternity, ensuring the dignity of the individual and the unity of the nation. In 1976, the 42nd amendment of the Constitution added the words 'socialist' and 'secular' making India a 'sovereign socialist secular democratic republic'.[2] The Constitution incorporates in Part III (Articles 12 to 35) a range of fundamental rights which are legally enforceable and in Part IV (Articles 36 to 51) a range of directive principles of state policy which are not enforceable by any court, but are declared to be fundamental in the governance of the country and which the state has a duty to apply in making laws.[3] It is the directive principles of the Constitution which elaborate the provisions relating to distributive and social justice.

As to the enforcement, under Articles 32 and 226, the Supreme Court and the High Courts have power to issue writs in the nature of *habeas corpus, mandamus, certiorari, prohibition* and *quo warranto*. The jurisdiction of the Supreme Court is limited to matters of fundamental rights - the High Courts have no such limitation under Article 226.

The Preamble, together with the fundamental rights and directive principles of state policy constitute the most creative part of the Indian constitution. Bhagwati says:

> They encapsulate the social and economic rights of the people and hold out social justice as the central feature of the new constitutional order.[4]

Incorporation of the term 'socialist' and its effect was recognised by the

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2 Indira Gandhi's Congress party brought the Constitution (Forty-Second Amendment) Act 1976 which replaced 'sovereign democratic republic' with the new phrase.

3 See Jagat Narain (1985) "Judicial law making and the place of Directive Principles in Indian constitution" in Vol. 27 No. 2 *JILI*, pp. 198-222 for a discussion on the place of the directive principles in the Indian Constitution. For a more recent evaluation of the relationship between the fundamental rights and the directive principles, see Gokkulesh Sharma (1993) "An evaluation of relationship between Fundamental Rights and Directive Principles under Constitution" in *AIR Journal*, pp. 75-77.

4 PN Bhagwati (1984-85) "Judicial activism and public interest litigation" in Vol. 23 *Columbia Journal of Transnational Law*, pp. 561-577 at 568.

Supreme Court in the *Nakara* case.[5] In that case the judges considered 'socialism' as the core basis of the decision itself, not as a mere rhetorical framework. It was declared that the principal aim of the socialist state is to eliminate inequality in income and status and the basic framework of socialism is to provide a decent standard of life to the working people.

Although the Indian Constitution is not bound by any specific ideology or method of socialism, in Baxi's words, "the motif of socialism looms large in an otherwise bourgeois constitutional text and context".[6]

Despite criticisms from the traditionalists and the difference of opinion among the activist judges as to the finer details, it has generally been affirmed and established that the Constitution of India is of a socialist nature - a combined effect of the Preamble, the fundamental rights and the directive principles. It also follows that the Constitution not only endorses social justice, it demands positive action towards that goal.

Relation between principles and rights

A strong socialistic bias is not enough for the purpose of the development of PIL jurisprudence, because the matters relating to distributive and social justice found their place in the 'unenforceable' directive principles of state policy. There arose the important question of how to translate into law the socialist approach of the Constitution and how to deal with the relationship between the 'enforceable' rights and the 'unenforceable' principles.[7]

Soon after the promulgation of the Constitution, in 1951, the court held in the *Dorairajan*[8] case that the directive principles of state policy have to conform to and run as subsidiary to the chapter on fundamental rights. This

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5 *Nakara v. Union of India* AIR 1983 SC 130. For an earlier exposition of socialism by the court, see *Excel Wear v. Union of India* (1978) 4 SCC 225. For examples of decisions in line with the *Nakara* case see *Lingappa v. State of Maharashtra* AIR 1985 SC 389 and *Sadhuram v. Polin* AIR 1984 SC 1471.

6 Upendra Baxi (1983) "Pre-Marxist socialism and Supreme Court of India" in Vol. 4 *SCC Journal*, pp. 3-9 at 3 noted that even though the Constitution is avowedly socialistic since the amendment of 1976, judicial interpretation of the Constitution and the major economic legislation continue to betray strong capitalistic bias.

7 See Gokulesh Sharma (1993) "An evaluation of relationship between Fundamental Rights and Directive Principles under Constitution" in *AIR Journal*, pp. 75-77 and Jagat Narain (1985) "Judicial law making and the place of Directive Principles in Indian constitution" in Vol 27 No 2 *JILI*, pp. 198-222.

8 *State of Madras v. Champakam Dorairajan* AIR 1951 SC 226 at 228. See also *Ajaib Singh v. The State of Punjab* AIR 1952 Punj 309 at 319.

was followed in *Quareshi's*[9] case explaining that a harmonious interpretation must be placed upon the constitution. Accordingly, the state, while implementing the directive principles of state policy, must do so in such a way that its laws do not take away or abridge the fundamental rights. Similarly, in *Re Kerala Education Bill*,[10] it was said that in determining the scope of fundamental rights, the court can not entirely ignore the directive principles of state policy but should adopt the principle of harmonious construction and 'should attempt to give effect to both as much as possible'.[11] All these cases proceeded on the assumption that the fundamental rights were superior to the principles and that there is apparently a conflict between the two.

A departure was made in 1970, when Hedge J. elaborated the principle of harmonious construction in a different way, explaining that there can be no conflict between the rights and the principles, because 'they are complementary and supplementary to each other.[12]

In 1973, in the leading case of *Kesavananda Bharati v. State of Kerala*[13] it was again held that the rights and the principles supplement each other and it is the duty of the court to ensure the application of the principles in harmony with the rights so long as the basic structure of the Constitution is not destroyed. The issue in question was whether parliament can amend the Constitution curtailing any of the fundamental rights.[14] The court answered in the affirmative and upheld the validity of the newly inserted Article 31C,[15] which conferred on Articles 39(b) and (c) of the directive principles a status superior to the fundamental rights referred to in Articles 14, 19 and 31. The court observed that while fundamental rights cannot be abrogated as a whole, reasonable abridgements of fundamental rights could be effected

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9 *MH Quareshi v. State of Bihar* AIR 1958 SC 731 at 732.

10 AIR 1958 SC 956.

11 As above at 957.

12 *Chandra Bavan Boarding and Lodging v. State of Mysore* AIR 1970 SC 2042 at 2050.

13 AIR 1973 SC 1461.

14 Previously, the Supreme Court affirmed that the Parliament can make such amendments in *Shankar Prasad v. Union of India* AIR 1951 SC 548 and *Sajjan Singh v. State of Rajasthan* AIR 1965 SC 845. But in *Golak Nath v. State of Punjab* AIR 1967 SC 1643, this power was taken away. In consequence, the Parliament passed the Constitution (Twenty-fourth Amendment) Act 1971 seeking to restore the power. The 24th Amendment, along with the 25th, 26th and 29th amendments affected the fundamental rights.

15 Inserted by the Constitution (Twenty-fifth Amendment) Act 1971, section 3.

in the public interest.[16] The position was further enhanced when the court held in *Mumbai Kamgar Sabha v. Abdulvai*[17] that where two judicial choices are available, the construction in conformity to the social philosophy of Part IV has preference.

The next great leap was the 42nd amendment (1976) of the Constitution. As we saw, this included the word 'socialist' in the Preamble which strengthened the links between the directive principles and the fundamental rights and impressed upon the judges the importance of the directive principles and their obligation to assist in the realisation of social justice.[18] The 42nd amendment also amended Article 31C to confer primacy on all the directive principles of state policy over the fundamental rights contained in Articles 14, 19 and 31.[19]

However, Article 31C, as amended by the 42nd amendment, was struck down by the Supreme Court in *Minerva Mills Ltd. v. Union of India*[20] as unconstitutional on the ground that neither the principles, nor the rights can be given absolute supremacy and that to destroy the guarantees given by Part III in order to achieve the goals of Part IV would subvert the constitution by destroying its basic structure. The Court held:

> The Indian Constitution is founded on the bedrock of balance between Part III and Part IV. To give absolute primacy to one over the other is to disturb the harmony of the Constitution . . . Anything that destroys the balance between the two parts will *ipso facto* destroy an essential element of the basic structure of the Constitution . . .[21]

In a forceful dissent, Bhagwati J. refused to take a formal view of the Constitution, especially with regard to the right to equality guaranteed by Article 14. This guarantee does not entail mere formal equality but embodies the concept of real and substantive equality which struck at inequalities arising on account of vast social and economic differentials and is

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[16] As above note 13 at 1462-63.

[17] AIR 1976 SC 1455. This was followed by *State of Kerala v. NM Thomas* AIR 1976 SC 490.

[18] TK Tope (1982). *Constitutional Law of India*, Lucknow, Eastern Book Company at 254-255.

[19] Subsequently, the Constitution (Forty-forth Amendment) Act 1978, as an extension of the 42nd amendment, further strengthened the position of the directive principles by incorporating new articles and by removing the right to property altogether from the list of fundamental rights and by placing it elsewhere as Article 300A.

[20] AIR 1980 SC 1789.

[21] As above at 1790.

consequently "an essential ingredient of social and economic justice".[22] So he maintained that although a law giving effect to social and economic justice in pursuance of directive principles might conflict with a formal and doctrinaire view of 'equality before the law' guarantees, yet it would almost always conform to the principle of equality before the law in its total magnitude and dimension.

In the aftermath of the *Minerva,* in spite of a number of well-pronounced judgements, the debate has not been fully settled.[23] The notion that fundamental rights override directive principles is still being supported by some writers and judges.[24] But the principle of harmonious construction is followed in most of the cases.[25] In line with Bhagwati's dissenting opinion affirming the priority of the principles, in the case of *Sanjeeva Coke Manufacturing Co. v. Bharat Coking Coal Ltd,*[26] the court criticised the majority view of the *Minerva,* but it was not overruled. However, in a number of cases, the court upheld the importance of social legislation and sought to restore the directive principles impinging on fundamental rights.[27] The Indian experience shows that despite the compartmentalisation of the rights and principles, there has been, in practice, a dynamic interaction between these two parts which gradually enhanced the status of the principles.

It may be concluded that the Indian judges advocated a social justice approach that has drawn its legitimacy from the Constitution. Since these

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[22] As above at 1850.

[23] Gokulesh Sharma (1993) "An evaluation of relationship between Fundamental Rights and Directive Principles under Constitution" in AIR Journal, pp. 75-77 at 77, says that the situation remains unclear, although the courts have shown much judicial wisdom. Asad Hossain Choudhury (1996) "A new concept in the constitutional aspect: Public interest litigation" in Vol. 16 *BLD Journal,* pp. 16-23, however, believes that there has been a continuous process of development in favour of the principles.

[24] C Singh (1982) "The ideological roots of legal paternalism in India" in Vol. 24 No. 1 *JILI,* pp. 84-101 at 100 says that the directive principles misrepresent and misunderstand the function of law being a part of imperialistic and paternalistic ideology. HM Seervai (1983) *Constitutional Law of India: A Critical Commentary,* Vol. 1. Bombay, Tripathi at 1577-1694 criticised *Minerva* by saying that it represents 'the current fashionable view'. For a recent case, see *Supreme Court Employees Welfare Association v. Union of India* AIR 1990 SC 334.

[25] See for example *State of Tamil Nadu v. Abu Kavur Bai* AIR 1984 SC 326; *Karmachari Sangh v. Union of India* (1981) 1 SCC 246 at 308.

[26] AIR 1982 SC 239.

[27] See for example, *Laxmi Khandsari v. State of Uttar Pradesh* AIR 1981 SC 873; *Sonia Bhatia v. State of Uttar Pradesh* AIR 1981 SC 1274 and *Daktar Mazdoor Manch v. Union of India* AIR 1987 SC 2342.

social justice principles of the Constitution are placed as non-enforceable directive principles, a gradual enhancement of the status of the principles *vis-à-vis* the fundamental rights has been accomplished. This has enabled the court to emphasise social and collective rights and thus construct the rules of PIL.

PIL UNDER THE CONSTITUTIONAL SCHEME OF PAKISTAN

Social justice and Islamic provisions in the Constitution

As in India, the Pakistani activists stressed on social justice provisions of the Pakistani Constitution. Yet one major difference is that in the light of this special status of Islam in Pakistan, PIL activists were required to establish that the concept and techniques of PIL are in conformity with the Islamic provisions as enshrined in the Constitution.[28] In Pakistan, therefore, social justice means Islamic social justice.

Pakistan is an Islamic Republic where Islam is the state religion.[29] The Constitution contains a number of very important Islamic social justice provisions.[30] Out of these, the Preamble or the objectives resolution and the principles of policy are very significant.

The Preamble, containing the objectives resolution, declares the sovereignty of Allah alone which is delegated to the State of Pakistan through its people for being exercised within the limits prescribed by Him as a sacred trust. It also declares that the principles of democracy, freedom, equality, tolerance and social justice as enunciated by Islam shall be fully observed and that the Muslims shall be enabled to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Holy Quran and the Sunna. Chapter two of the Constitution provides for the principles of policy. They include, among other things, the duty of the State to take steps to ensure the Islamic way of life (Article 31), promotion of social justice and eradication of social evils (Article 37) and the promotion of social and economic well-being of the people (Article 38).

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[28] For a discussion about the constitutionality of PIL in Pakistan, see Faqir Hussain (1993) "Public interest litigation in Pakistan" in *PLD Journal*, pp. 72-83 and Mansoor Hassan Khan (1993) *Public Interest Litigation: Growth of the Concept and its Meaning in Pakistan*, Karachi, Pakistan Law House at 43-48.

[29] Articles 1(1) and 2 of the Constitution of Pakistan 1973.

[30] Asif Saeed Khan Khosa (1995) "Islamic provisions in the constitution of Pakistan" in *PLD Journal*, pp. 17-22 outlines the Islamic provisions of the Constitution of 1973 and compares them with the Islamic provisions of the earlier Constitutions.

The fundamental rights as guaranteed by the Constitution have been discussed in Part II, Chapter I (Articles 8-28). They generally provide first generation or political rights, such as the right to life or liberty, freedom of movement, assembly and speech, right to property, right to equality and non-discrimination etc.

Article 199 provides for the writ jurisdiction of the High Court, giving it power to make orders to enforce the fundamental rights guaranteed by the Constitution. The Supreme Court has similar powers to issue writs under Article 184(3) when it considers that a question of public importance with reference to the enforcement of any fundamental right is involved.

Relation between principles and rights

Similar to the Indian Constitution, the Preamble and the principles of policy in the Constitution do not have the same status as the fundamental rights, even though they contain the bulk of the social and collective rights. In the Constitution of 1956, Article 23 declared that the State was to be guided in the formation of its policies by the directive principles but such provisions could not be enforced in any court. Article 7 of the Constitution of 1962 and Article 29 of the Constitution of 1973 said, with respect to the principles of policy, that it is the responsibility of each organ and authority of the State, and of each person performing functions on behalf of an organ or authority of the State, to act in accordance with those principles in so far as they relate to the functions of the organ or authority.

Despite the non-enforceability, the Court proceeded to interpret the provisions creatively in *Haji Nizam Khan v. Additional District Judge:*

> The judiciary which is not included in the definition of the State cannot direct the organs, authorities and persons included in the definition of the State to act in accordance with the principles of policy. But this does not mean that the Superior Judiciary would not be able, on account of the said bar, either: (i) to set down a rule for itself to follow the Principles of Policy: or (ii) to declare it for the subordinate judiciary to act in accordance therewith.[31]

With the insertion of Article 2A in the Constitution in 1985, the responsibility to act in accordance with the principles has gained further support.[32] Article 2A declares that the principles and provisions set out in the objectives resolution are a substantive part of the Constitution and shall have effect accordingly. If any organ of the State fails to implement the

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31 PLD 1976 Lah 930 at 979.

32 Revival of the Constitution 1973 Order, 1985 (Presidential Order 14 of 1985).

sacred pledge as set out in the principles of policy, then there is no impediment on the judiciary to give effect to these principles. The Preamble and Article 2A, which emphasises the rights guaranteed by Islam, thus became powerful weapons to be used by activist judges.

Accordingly, in the case of *Benazir Bhutto v. Federation of Pakistan*[33] the Supreme Court extended the scope of fundamental rights and observed that such rights include the rights guaranteed by Article 2A as well as the rights available under the directive principles of policy. The court explained:

> While construing Article 184(3), the interpretative approach should not be ceremonious observance of the rules or usage of interpretation, but regard should be had to the object and the purpose for which this Article is enacted, i.e., this interpretative approach must receive inspiration from the triad of provisions which saturate and invigorate the entire Constitution, namely, the Objectives Resolution (Article 2A), the Fundamental Rights and the Directive Principles of State Policy so as to achieve democracy, tolerance, equality and social justice according to Islam.[34]

This is a very wide approach and enables the court to assume an activist role in promoting Islamic socio-economic and political justice declared in the non-enforceable objectives resolution and directive principles. Subsequently, in *Darshan Masih v. The State*,[35] the Court held that any conceivable just and proper order can be passed which is deemed to be appropriate for enforcement of these rights. This opened the gates for PIL and soon afterwards, in the Quetta conference, the judges invited PIL cases by declaring a procedural structure to receive and consider PIL petitions.[36]

It may be summarised that due to the ongoing Islamisation of the laws, Pakistani activists demonstrated that PIL is not contradictory to Islamic principles and further proceeded to show that PIL draws its inspiration and legitimacy from the Islamic social justice tenets as has been declared by the Constitution. The non-enforceable principles of policy, which contain the Islamic social justice rights, were given a very high status in relation to the fundamental rights. This enabled the judges to promote economic and social rights and formulate the principles of PIL.

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33 PLD 1988 SC 416.

34 As above at 421.

35 PLD 1990 SC 513.

36 Quetta Conference (1991) Judicial conference held at Quetta on 15th and 16th August 1991: Memorandum of proceedings" in *PLD Journal*, pp. 126-152.

PIL UNDER THE CONSTITUTIONAL SCHEME OF BANGLADESH

Social and collective justice provisions in the Constitution

The bias towards social and collective justice in the Constitution of Bangladesh can be traced back to its origin. In April 1971, the Proclamation of Independence was issued.[37] This historic document proclaimed independence against unjust war and genocide and acclaimed heroism, bravery and revolutionary fervour of the people. A major aim was ". . . to ensure for the people of Bangladesh equality, human dignity and social justice." So the document envisaged was an 'autochthonous' and 'social justice' Constitution. In December 1972, the Constitution was adopted. The Preamble of the Constitution of Bangladesh says:

> We, the people of Bangladesh, having proclaimed our independence on the 26th day of March, 1971 and through a historic war for national independence, established the independent sovereign People's Republic of Bangladesh;
>
> Pledging that the high ideals of absolute trust and faith in the Almighty Allah, nationalism, democracy and socialism meaning economic and social justice, which inspired our heroic people to dedicate themselves to, and our brave martyrs to sacrifice their lives in, the war for national independence, shall be fundamental principles of the Constitution;
>
> Further pledging that it shall be a fundamental aim of the State to realise through the democratic process a socialist society, free from exploitation - a society in which the rule of law, fundamental human rights and freedom, equality and justice, political, economic and social, will be secured for all citizens;
>
> Affirming that it is our sacred duty to safeguard, protect and defend this Constitution and to maintain its supremacy as the embodiment of the will of the people of Bangladesh so that we may prosper in freedom and may make our full contribution towards international peace and co-operation in keeping with the progressive aspirations of mankind;
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> In our Constituent Assembly, this eighteenth day of Kartick, 1379 B.S. corresponding to the fourth day of November, 1972 A.D., do hereby adopt, enact and give to ourselves this Constitution.

There are certain general rules of interpretation of the Preamble.[38] It is

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[37] To compare the text of the Proclamation with independence documents of other nations, see Albert P Blaustein et al. (eds.) (1977) *Independence Documents of the World*, Dobbs Ferry, Oceana Publications Inc.

[38] For an examination of these principles with reference to the Bangladesh Constitution, see Mahmudul Islam (1995) *Constitutional Law in Bangladesh*, Dhaka, Bangladesh Institute of Law and International Affairs.

neither a source of power nor a limitation on the enacting provisions of the Constitution. It can not be used to modify the clear language of the Constitution but if the language indicates more than one meaning, the meaning which is nearest to the purpose of the Constitution is to be preferred. In cases of ambiguity of the enacting part, the Preamble may be considered in order to resolve the doubt.

In the *8th Amendment* case,[39] it was held that it is the intention of the makers of the original Constitution, as expressed in the Preamble, that is the guide to its interpretation. It was further held that the Preamble is a part of the Constitution.[40] This is declared on the basis that the Preamble can only be amended by referendum.[41] Thus when a constitutional provision is clear but runs counter to the Preamble, the intention of the framers of the Constitution must be considered.

As a result the intention of the framers to attain a socialist society through democratic means becomes very important. 'Socialism meaning economic and social justice' has to be attained. In the *8th Amendment* case, BH Chowdhury J. pointed out that few constitutions have a Preamble like this one and observes that the Preamble under the Bangladesh Constitution is given a status higher than it enjoys in the Indian or Pakistani Constitution.[42] Mustafa Kamal J. says:

> . . . the Preamble of our constitution stands on a different footing from that of other Constitutions by the very fact of the essence of its birth which is different from others.[43]

While interpreting the Preamble in favour of social and collective justice, it must be read along with Article 7. It declares:

> (1) All powers in the Republic belong to the people, and their exercise on behalf of the people shall be effected only under, and by the authority of, this Constitution.
>
> (2) This Constitution is, as the solemn expression of the will of the people, the supreme law of the Republic, and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void.

The various functionaries and institutions created by the Constitution

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39 *Anwar Hossain Chowdhury v. Bangladesh* 1989 BLD (Spl) 1.

40 As above at 59, 147 and 174.

41 Under Article 142(1A), an amendment of the Preamble, along with some other important Articles, requires a referendum.

42 Above note 39 at 59.

43 *Dr Mohiuddin Farooque v. Bangladesh and others (FAP 20)* 17 BLD (AD) (1997) 1.

exercise people's power, not their own indigenous or native powers. Mustafa Kamal J. regards this Article as a cornerstone of the Constitution and a proud expression of constitutionalism.[44] Latifur Rahman J. observed recently in the *FAP 20*:

> This supremacy of the Constitution is a special and unique feature in our Constitution. Neither in the Constitution of India nor in the Constitution of Pakistan there is reassertion of the supremacy of the Constitution. This is a substantive provision which contemplates exercise of all powers in the Republic through the authority of the Constitution.[45]

Since the ultimate power belongs to the people, the priority must be given to their collective rights and interests. This is in harmony with the aims and objectives of the Constitution as declared in the Preamble.

As to the rights and interests of the people that are to be upheld in accordance with Article 7, the Constitution declares certain matters to be fundamental. Part II of the Constitution (Articles 8-25) contains the fundamental principles of state policy while Part III (Articles 26-47) sets out the fundamental rights. These provisions are very much similar to those of the Indian and Pakistani constitutions.

Regarding the fundamental principles, Article 8(2) says:

> The principles set out in this Part shall be fundamental to the governance of Bangladesh, shall be applied by the State in the making of laws, shall be a guide to the interpretation of the Constitution and of the other laws of Bangladesh, and shall form the basis of the work of the State and of its citizens, but shall not be judicially enforceable.

Article 8(1) says that the principles of absolute trust and faith in the Almighty Allah, nationalism, democracy and socialism meaning economic and social justice, together with the principles derived from them as set out in Part II constitute the fundamental principles of state policy. It also states that absolute trust and faith in the Almighty Allah shall be the basis of all actions.

BH Chowdhury J. notes in the *8th Amendment* case that Article 8 is a protected Article and cannot be amended without referendum.[46] This shows the importance attached to this Article. Kamal Hossain says that the Bangladeshi Constitution has gone beyond both the Indian and Pakistani

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[44] Mustafa Kamal (1995) "Democracy, constitutionalism and compromise" in Vol. 15 *BLD Journal*, pp. 6-10 at 9.

[45] Above note 43 at 23. However, it must be noted that although Article 7 emphasises supremacy of the Constitution, such supremacy is automatically preserved in a written Constitution whether or not expressly declared.

[46] Above note 39 at 61.

Constitution in this regard.[47] It not only lays down that these principles would be applied in law making as provided in the Indian Constitution, but it also declares the principles as guide to the interpretation of laws and basis of the work of the State and its citizens.

The Constitution sets out the fundamental principles under the following heads: promotion of local government institutions (Article 9), participation of women in national life (Article 10), democracy and human rights (Article 11), principles of ownership (Article 13), emancipation of peasants and workers (Article 14), provision of basic necessities (Article 15), rural development and agricultural revolution (Article 16), free and compulsory education (Article 17), public health and morality (Article 18), equality of opportunity (Article 19), work as a right and duty (Article 20), duties of citizens and of public servants (Article 21), separation of judiciary from the executive (Article 22), national culture (Article 23), national monuments (Article 24), promotion of international peace, security and solidarity (Article 25).

The fundamental principles contain a charter for extensive affirmative action. They are re-distributory rather than conservative in character and aim to bring change in a constitutional way. Ishtiaq Ahmed goes so far as to say that they are the nation's dream of social revolution.[48]

As regards the fundamental rights, Art 26 declares that all existing and newly made laws must conform with Part III containing fundamental rights and any inconsistent law will become void to the extent of such inconsistency. The fundamental rights guaranteed under Part III include: equality before law (Article 27), discrimination on grounds of religion, etc. (Article 28), equality of opportunity in public employment (Article 29), prohibition of foreign titles, etc. (Article 30), right to protection of law (Article 31), protection of right to life and personal liberty (Article 32), safeguards as to arrest and detention (Article 33), prohibition of forced labour (Article 34), protection in respect of trial and punishment (Article 35), freedom of movement (Article 36), freedom of assembly (Article 37), freedom of association (Article 38), freedom of thought and conscience, and of speech (Article 39), freedom of profession or occupation (Article 40),

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[47] Kamal Hossain (1997) "Interaction of Fundamental Principles of State Policy and Fundamental Rights" in Sara Hossain, S Malik and Bushra Musa (eds.) *Public Interest Litigation in South Asia: Rights in Search of Remedies,* Dhaka, University Press Limited, pp. 43-52 at 49.

[48] Syed Ishtiaq Ahmed (1993) "An expanding frontier of judicial review - public interest litigation " in Vol. 45 *DLR Journal,* pp. 36-45 at 36.

freedom of religion (Article 41), rights to property (Article 42) and protection of home and correspondence (Article 43).

Article 44 declares that the right to move the High Court Division for the enforcement of the fundamental rights conferred by Part III is guaranteed.[49] Powers of the High Court Division to issue 'certain orders and directions' in order to enforce the fundamental rights are elaborated in Article 102.[50] Although the word 'writ' is not used, this Article actually deals with the five writs commonly practiced in common law based legal systems. Article 102 thus provides a mechanism to enforce public rights and interests.

Inter-relation between principles and rights

Apparently, the broad provisions of the Constitution of Bangladesh are similar to the comparable provisions of the Indian and Pakistani constitutions. The rights guaranteed under Part III are political in nature while the principles declared in Part II relate to economic, social and cultural matters. While the rights are judicially enforceablle, the princiles are not.[51] It is, therefore, important to examine the status of the principles *vis-à-vis* the rights because highter status of the principles enables the courts to prioritise social and collective interests over individual interests.

The principles are a guide to interpretation and the court must construe constitutional and legal provisions in conformity with the principles.[52] Any law made to further the Principles is *prima facie* constitutional. The principles are used to test the reasonableness of legal and constitutional provisions and in cases of vagueness or double meaning of any law, the meaning close to the principles must be taken. In cases of a provision apparently repugnant to the principles, the court must attempt to interpret the provision in conformity with the principles.

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[49] It has been held in *Haji Joynal Abedin v. State* 30 DLR (1978) 375 that the right to enforce the fundamental rights is itself a fundamental right. See also *Government of Bangladesh v. Ahmad Najir* 33 DLR (AD) (1981) 257. The effect is clearly demonstrated in the recent case of *Jobon Nahar and other v. Bangladesh and others* 49 DLR (1997) 108. In this case the Court held that since the right to enforce a fundamental right is another fundamental right, the petitioner can move the Court even though his application was rejected by the Court of Settlement on the ground of limitation. In India, the situation is the same under Article 32 of the Constitution.

[50] For further discussion with reference to the *locus standi* of the petitioner, see below chapter eight.

[51] Article 8(2) and 26 of the Constitution of Bangladesh.

[52] For a discussion in the context of the Bangladeshi Constitution, see Mahmudul Islam above note 38 at 49.

This raises the question of conflict between principles and rights. We have already seen the Indian position where the judges have discarded the 'supremacy of rights' doctrine and have gradually adopted a liberal 'harmonious interpretation' rule, giving the principles higher importance.[53] Mahmudul Islam observes that since the Bangladeshi and Indian constitutional scheme in this regard is the same, "the same position should obtain under our constitutional dispensation."[54]

However, in anticipation of possible conflicts in cases where welfare measures of the State might conflict with the fundamental rights, the framers of the Constitution provided some exceptions in Article 47(1).[55] In matters specified in that Article, any law made shall be immune from challenge on the ground of inconsistency with the fundamental rights if the Parliament declares that such law has been made to give effect to any of the fundamental principles.[56] Accordingly, classification of statutes by the Parliament will prevent a conflicting situation. Sultan Hossain Khan J. declared that the Court has wide powers in this matter because the reasonableness of such classification is justiciable by the Court:

> In case of conflict between Fundamental Rights and Fundamental Principles of State Policy, the Fundamental Rights shall prevail and laws so made which are inconsistent with Fundamental Rights should be declared void by this court. It is, however, to be noticed that in order to strike a balance between public good and Fundamental Right of an individual, harmony is to be established between a statute seeking welfare of the community and Fundamental Right and to that end the executive is authorised to make a reasonable classification as to the subject matter of the statute. This reasonableness of the classification is justiciable by Superior Court and must be judged by standards of an ordinary, prudent and reasonable man.[57]

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53 See above for further discussion.

54 Mahmudul Islam above note 38 at 50.

55 The exceptions include: acquisition, nationalisation, requisition or taking over control or management of property; amalgamation of commercial or other bodies; controlling the rights of administrators or executives of such bodies; controlling rights to search mineral wealth; protection of government ventures through monopoly; controlling rights to property and any right in respect of profession, occupation, trade or business including rights of employers or employees.

56 According to PB Gajendragadkar (1975) "The rule of law and role of law" in Vol. 1 No1 *Law and International Affairs*, pp. 1-13 at 4, this provision shows that the founding fathers attached great importance to the principles and they wanted to reserve to Parliament full freedom to regulate or control, within reasonable limits, the fundamental rights in order to achieve the objectives mentioned in Part II.

57 *Hamidul Huq Chowdhury v. Bangladesh* 34 DLR (1982) 190 at 200.

This does not, however, conclusively answer the question of enforceability of the fundamental principles where there is no conflict with the rights. In *Sheikh Abdus Sabur v. Returning Officer and others*,[58] BH Chowdhury CJ held that the fundamental principles of state policy cannot be judicially enforced despite the supremacy of the Constitution recognised by the Constitution itself. However, a more elaborate discussion can be found in the recent case of *Kudrat-E-Elahi Panir v. Bangladesh*,[59] where Shahabuddin J. said:

> The reason for not making these principles judicially enforceable is obvious. They are in the nature of People's programme for socio-economic development of the country in peaceful manner, not overnight, but gradually. Implementation of these Programmes require resources, technical know-how and many other things including mass-education. Whether all these pre-requisites for a peaceful socio-economic revolution exist is for the State to decide.[60]

The Court discussed the claim that even if the principles are not enforceable, the Court can declare a law void on the ground of manifest inconsistency with any provision of the Constitution including the principles. The Court examined a number of Indian PIL cases and concluded that those cases were not relevant since no law was made in contravention of any directive principle in those cases. In a concurring opinion, Mustafa Kamal J. explained:

> It is the Law of the Constitution itself that the Fundamental Principles of State Policy are not laws themselves but 'principles'. To equate 'principles' with 'laws' is to go against the Law of the Constitution itself. These principles shall be applied by the State in the making of laws, i.e., Principles of Policy will serve as a beacon of light in the making of laws, shall be a guide to the interpretation of the Constitution and of the other laws of Bangladesh, and shall form the basis of the work of the State and of its citizens. Not being laws, these principles shall not be judicially enforceable.[61]

He refused to accept an interpretation which would bring the principles at par with the rights on two grounds: first, the framers of the Constitution, if they so wished, would have provided for such an expression - the omission was 'deliberate and calculative'. Second, Article 8(2) proclaims the fundamental principles of state policy as principles, not laws and that is the

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[58] 41 DLR (AD) (1989) 30.

[59] 44 DLR (AD) (1992) 319.

[60] As above at 331.

[61] As above at 346.

mandate of the Constitution.

This clarification from the Appellate Division is neither rigid nor unfavourable to creative interpretation of the provisions of the fundamental principles. It actually encourages progressive judges to resort to the rule that the principles are a guide to interpretation. At the same time, the court is cautious to avoid any dispute as to the primacy of rights over the principles.

In the leading case of *Kudrat-E-Elahi Panir v. Bangladesh*, the Appellate Division was asked to interpret Article 59 relating to local government. The Court took the help of the fundamental principles enumerated in Articles 9 and 11 relating to popular representation and democracy and consequently held that there was no scope for forming a local government body composed of non-elected persons.[62] In *Aftab Uddin v. Bangladesh*,[63] the issue was the interpretation of Article 116 relating to the control and discipline of the subordinate courts. Naimuddin Ahmed J. interpreted the Article in favour of the constitutional aim of separation of judiciary as has been enunciated in the Preamble and the fundamental principles.

This technique of expanding the scope of fundamental rights has been used in a few public interest cases as well. In *Dr Mohiuddin Farooque v. Bangladesh* (*Radioactive Milk* case),[64] the right to life has been expanded to mean right to protection of health and normal longevity of an ordinary human being.[65] Kazi Ebadul Hoque J. expanded the meaning of Articles 31 and 32 with the help of Article 18(1), which contains the Principle relating to public health and morality. In the *FAP 20*,[66] BB Roy Choudhury declared that right to life encompasses within its ambit the protection and preservation of environment and ecological balance. The fact that the Bangladeshi Constitution has no provision relating to environment similar to Article 48A of the Indian Constitution did not prevent the Court from making this expansion. Recently in *Ain O Salish Kendra (ASK) and others v. Government of Bangladesh and others*,[67] the court relied on the fundamental principles to expand the right to life and focus on the rights of the slum-dwellers to be rehabilitated instead of being evicted.

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62 As above at 336.

63 48 DLR (1996) 1.

64 48 DLR (1996) 438 at 442.

65 The judge followed a number of Indian decisions including *Bandhua Mukti Morcha v. Union of India* AIR 1984 SC 802 and *Olga Tellis v. Bombay Municipal Corporation* AIR 1986 SC 180.

66 Above note 43 at 33.

67 19 BLD (HCD) (1999) 489 at 498.

Our discussion illustrates that a unique Bangladeshi feature, in the inter-relation between the rights and the principles, is the provision of Article 47(1). Laws relating to specific matters are granted immunity even if they contradict the rights if the Parliament declares that such law has been made to give effect to any of the principles. Article 47(1) has thus enhanced the position and status of the principles as Parliament has been given express power to make laws to attain the objectives of the principles. This has helped to avoid possible confrontations between rights and principles in many cases. In other words, social and collective rights are consciously given due importance in relation to individual rights.

In the *Kudrat-E-Elahi Panir's*[68] case, the Appellate Division clarified the distinction between rights and principles and at the same time encouraged the judges to use the principles as a guide to widen the scope of the rights. This has resulted in more liberalisation and emphasis on socio-economic rights of the people.

'CONSTITUTIONAL AUTOCHTHONY' AND 'PEOPLE'S POWER': BASIS OF CONSTITUTIONAL LEGITIMACY OF PIL IN BANGLADESH

What is the nature of the constitutional mandate that enables PIL to be recognised and accepted in Bangladesh? One uniqueness of the Bangladesh Constitution is its autochthonous nature – which in consequence highlight the 'people's power concept'. Accordingly, since this autochthonous Constitution reflects the power of the people, a PIL approach is mandated. The present sub-chapter examines this aspect with reference to the relevant cases.

Development of a guiding principle for PIL in Bangladesh

The case that first provided a conceptual groundwork for PIL is the *8th Amendment*[69] case of 1989 where it was declared that the Parliament cannot alter the basic structure of the Constitution and decentralise the Supreme Court. This was not a case on social justice, but related to the power relations debate. It came as an inspiration to the judges and lawyers favouring activism and a greater role for the judiciary. The judges declared the need for progressive and dynamic interpretation of the Constitution. They re-affirmed and re-established the principle that while interpreting the Constitution, the intention of its makers and its spirit must be taken into

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[68] Above note 59.

[69] Above note 39.

consideration and an Article should not be looked into in isolation.[70] Accordingly, an interpretation requires consideration of the so called 'unique features' of the Constitution of Bangladesh, one of which is its autochthonous nature.[71] BH Chowdhury CJ says:

> . . . our Constitution has proceeded from the people and it is not rhetorical flourish. Our Constitution is not the result of the process of the Indian Independence Act 1947 though we have taken inspiration from the wisdom of the past. Ours is an "autochthonous Constitution".[72]

This line of argument however was not adopted for PIL matters immediately. In 1993, Naimuddin Ahmed J. acknowledged the necessity to interpret the Constitution liberally and stressed on socio-economic issues in the *Welfare Association*:

> It must, however, be remembered that the Constitution of a country is not a morbid document but a dynamic instrument capable of being interpreted and applied in the ever-changing socio-economic context of society. The judicial function is to interpret it in such a way as to meet the socio-economic needs of those who are incapable, on account of poverty or otherwise, to seek assistance of the court which exists for safeguarding the rights and interests of all citizens.[73]

The first hint of an emerging unique Bangladeshi argument in favour of PIL came in the same year from Ishtiaq Ahmed, a leading constitutional lawyer.[74] He argued that a Constitution always carries the spirit of the age and the Constitution of Bangladesh reflects the historical realities of the time of its creation and contain a vision and dream of the unfolding future. Framers utilised the wisdom of the two decades long experience gained by the Indian and Pakistani Constitutions and enacted a Constitution 'which is distinctively our own'.[75] Then he said:

> The emphasis is relevant and important because it is a cardinal principle of interpretation of a constitution that in interpreting a word or a provision in the constitution the constitution must be read as a whole, every part of it throwing light on the other, every word used deriving its meaning and colour from the total context of the constitution. The preamble and part

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70 As above at 142 and 194.

71 As above at 109. BH Chowdhury CJ declares 21 'unique features'. Some of these, according to him, are 'basic features' and are not amendable by the mere amending power of the Parliament. Autochthony of the Constitution is placed first in this list.

72 As above at 59.

73 *Bangladesh Retired Government Employees Welfare Association v. Bangladesh* 46 DLR (1994) 426 at 435.

74 As above note 48 at 37.

75 As above .

> which follows the preamble, particularly Article 7, the Fundamental Principles of State Policy, the Fundamental Rights, the scheme of limited government - all these exist not in isolation but as parts of one whole document.[76]

In December 1994, Quazi Shafiuddin J. in the *Parliament Boycott*[77] case resorted to one of the distinctive features of the Constitution, its autochthonous nature.[78] He observed that Article 7 declares that all powers in the Republic belong to the people and must be exercised on their behalf under the authority of the Constitution which is, as the solemn expression of the will of the people, the supreme law of the Republic. Therefore, a citizen and voter is a member of the whole people of Bangladesh and 'is a source of power along with other citizens of the country'.[79] Since this power is to be exercised under or by the authority of the Constitution, any violation by anybody shall be called in question by each and every citizen of Bangladesh. He added a discussion of the Preamble in favour of his argument and pointed out that under the Preamble the people are to safeguard, protect and defend the Constitution.

The *Parliament Boycott* case attempted to provide an indigenous theoretical framework without resorting to Indian or Pakistani constitutional arguments. This was instrumental in strengthening the apprehension that attempts to follow other jurisdictions without appreciating the local situation are preventing the success of PIL. Dr Mohiuddin Farooque inferred:

> Public Interest Litigation (PIL) has recently been included in the topical talking judicial agenda (if not propaganda), perhaps, following or being enlightened by the trends in other legal systems and least, quite regrettably, as a principle originating from the aspirations of the land. As a result, some attempts have been made in Bangladesh, often in misplaced and misconceived manners in the name of PIL.[80]

He advocated 'autochthonic constitutional litigation' (ACL) and argued that to build a credible national jurisprudence the functional constitutionalism should be autochthonic.[81] Its spirit is to consider people's

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[76] As above.

[77] *Anwar Hossain Khan v. Speaker of Bangladesh Sangsad Bhavan and others* 47 DLR (1995) 42.

[78] As above at 45-46.

[79] As above.

[80] Mohiuddin Farooque (1994-1995) "Autochthonic constitutional litigation" in Vol. 2 Issue 4 *Bangladesh Environmental Lawyers Association Newsletter*, pp. 1 and 4 at 1.

[81] Suggestion of the term ACL reminds us of Baxi's proposal of SAL. See chapter four.

rights and public duties. Such autochthonic litigation, he argued, "would consolidate the supreme and sovereign authority of the people instead of disempowering them".[82]

In 1995, Mahmudul Islam re-iterated that an expression occurring in the Constitution cannot be interpreted out of context or only by reference to the decisions of foreign jurisdictions "where constitutional dispensation is different from ours".[83] The expression 'person aggrieved' has to be given a meaning in the context of the scheme and objectives of the Constitution. He discussed Articles 7 and 8, Part II and Part III and observed that the spirit and object of the Constitution can not allow a restrictive view of standing.

Again in February 1995, Mahmudur Rahman J. in the *MPs Resignation*[84] case observed the distinctness of the Bangladesh Constitution, especially from India and Pakistan, and discussed the nature of its autochthony.[85] But since the issue in question was not pleaded in public interest, he did not use this in favour of expounding on PIL.

Thus by 1996, there appeared to be a consensus among activists, leading constitutional experts, lawyers and judges as to the uniqueness of the constitutional scheme, necessity of inclusive interpretation and autochthonic nature inspiring public interest matters. All that was needed was a pronouncement by the apex Court, the Appellate Division, in order to remove the reservations of conservative judges and lawyers.

Appellate Division's interpretation in the *FAP 20* case

When the *FAP 20* case came to the Appellate Division, it was unlikely for the Court to refuse PIL since that would amount to denying the considerable liberalisation achieved in the few preceding years. But the possible extent or method of liberalisation was still a matter of conjecture. The judges, however, were delighted to have a 'proper' PIL case before them and all five concurred in its favour. Except for Rouf J, all of the judges gave separate judgements.

The leading judgement was delivered by Mustafa Kamal J. Earlier in 1991, he refused standing in the *Sangbadpatra*[86] case as not being a PIL and in the same case declared that the Indian constitutional position is different and

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82 Above note 80 at 4.

83 Mahmudul Islam above note 38 at 512.

84 *Raufique (Md) Hossain v. Speaker, Bangladesh Parliament and others* 47 DLR (1995) 361.

85 As above at 373.

86 *Bangladesh Sangbadpatra Parishad (BSP) v. The Government of Bangladesh* 12 BLD (AD) (1992) 153. For the facts of the case see chapter three.

can not be blindly applied to Bangladesh.[87] He further examined this theme in 1994 and was waiting to see "how the Supreme Court of Bangladesh finds its own answer to this issue".[88] In a 1995 lecture, he took pride in the autochthonic nature of the Constitution.[89] His judgement in the *FAP 20* is a follow up of these ideas.

In the *FAP 20,* Mustafa Kamal J. begins with the argument of inclusive interpretation. He states:

> Article 102 of our Constitution is not an isolated island standing above or beyond the sea-level of the other provisions of the Constitution. It is a part of the over-all scheme, objectives and purposes of the Constitution. And its interpretation is inextricably linked with the (i) emergence of Bangladesh and framing of its Constitution, (ii) the Preamble and Article 7 (iii) Fundamental Principles of State Policy, (iv) Fundamental Rights and (v) the other provisions of the Constitution.[90]

He then proceeds to discuss each of the five categories separately. Discussing the first point, he denies that the Bangladesh Constitution is just a replica with local adaptations of a Constitution of the Westminster model among the Commonwealth countries of Anglo-Saxon legal tradition. It is not the result of a negotiated settlement with a colonial power or consent or a foreign sovereign. Although it has been amended 13 times, it is not the last of an oft-replaced and oft-substituted Constitution.[91] This Constitution is the fruit of a historic war of independence achieved with the lives and sacrifice of a telling number of people for a common cause, making it a class part from other Constitutions of comparable description. It is a Constitution in which the people feature as the dominant actor:

> It was the people of Bangladesh who in exercise of their own self-proclaimed native power made a clean break from the past un-shackling the bondage of a past statehood and adopted a Constitution of its own choosing. The Constitution, historically and in real terms, is a manifestation of what is called "the People's Power". The people of Bangladesh, therefore, are central, as opposed to ornamental, to the framing of the Constitution.[92]

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87 As above at 155.

88 Mustafa Kamal (1994) *Bangladesh Constitution: Trends and Issues,* Dhaka, University of Dhaka at 161.

89 Mustafa Kamal above note 44 at 7.

90 Above note 43 at 17.

91 This clearly is a reference to the Pakistani situation where three constitutions and even a greater number of constitutional arrangements have disturbed constitutional stability.

92 Above note 43 at 17.

As regards the second point, the Preamble and Article 7, he again argues that the Bangladesh Constitution stands on a different footing by the very fact of the essence of its birth which is different from others. The people themselves have adopted, enacted and given themselves a real and positive declaration of pledges reflecting the ethos of the historic war of independence. The pledges in the Preamble indicate the course or path that the people wish to tread. On the other hand, Article 7 makes it clear that all legislative, judicial and executive powers are conferred by the people through the Constitution. The people, again, are the repository of all power.[93]

Regarding the third point, the fundamental principles, Mustafa Kamal J. says that since Part II shall be a guide to interpretation, it is constitutionally impermissible to leave out of consideration Part II when an interpretation of Article 102 needs guidance.[94] As for the fourth point, regarding the fundamental rights, he observes that Article 102 is a mechanism of the enforcement of the fundamental rights which can be enjoyed by an individual alone and can also be shared by an individual in common with others when the rights pervade and extend to the entire population and territory. So Article 102(1) can not be divorced from Part III. Finally, regarding the fifth point, the judge observes that the other provisions of the Constitution will come to play their role in the interpretation of Article 102, although their importance may vary from case to case.

Mustafa Kamal J. proceeds to say that the people have set out for themselves some objectives, purposes, policies, rights and duties and have strewn these over the fabric of the Constitution. Article 102 is an instrumentality and a mechanism by means of which the people aim to realise these constitutional aspirations. He says:

> With the power of the people looming large behind the Constitutional horizon it is difficult to conceive of Article 102 as a vehicle or mechanism for realising exclusively individual rights upon individual complaints. The Supreme Court being a vehicle, a medium or mechanism devised by the Constitution for the exercise of the judicial power of the people on behalf of the people, the people will always remain the focal point of concern of the Supreme Court while disposing of justice or propounding any judicial theory or interpreting any provision of the constitution. Viewed in this context interpreting the words "any person aggrieved" meaning only and exclusively individuals and excluding the consideration of people as a collective and consolidated personality will be a stand taken against the

93 As above at 18.

94 As above .

constitution.[95]

This principle, once established, enabled him to allow PIL and set out the detailed rules of standing in public interest matters.[96]

Chief Justice ATM Afzal agreed with Mustafa Kamal J. On the conceptual level, he added a 'theoretical foundation' for environmental PIL. This simple foundation is based, according to him, on Principle 10 of the Rio Declaration which says that environmental issues must be handled with the participation of all concerned citizens at the relevant level.[97]

Latifur Rahman J. also agreed with Mustafa Kamal J. But for him, it was the demand of the Constitution to ensure justice, economic and social, that is enough to inspire and validate PIL. He also observed the uniqueness of the Constitutional provisions, and proceeded to argue that the entire Constitution must be considered in the course of interpretation.[98] He discussed the Preamble, Article 7, Part II and Part III of the Constitution and came to the conclusion that the demands of social and economic justice direct the Court to allow public interest matters. He did not deal with the people's power theory. His recognition of the importance of social and economic justice becomes apparent when he says:

> The language used by the framers of the Constitution must be given a meaningful interpretation with the evolution and growth of our society. An obligation is cast on the constitutional Court which is the apex court of the Country to interpret the Constitution in a manner in which social, economic and political justice can be advanced for the welfare of the state and its citizens.[99]

As part of his argument, Latifur Rahman J. recognised the importance of judicial activism and felt that it is the constitutional duty of the judge to secure fundamental rights and as such to act when PIL is espoused.[100] The judiciary thus has a vast scope of social engineering.

BB Roy Choudhury J, agreeing with Mustafa Kamal J, found the spirit of the Constitution by discussing the Preamble, fundamental principles,

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[95] As above.

[96] See chapter eight.

[97] Above note 43 at 7. See David Robinson and John Dunkley (eds.) (1995) *Public Interest Perspectives in Environmental Law*, London and Colorado Springs, Wiley Chancery, for a public interest perspective in environmental law. The topic has been discussed with reference to the experiences of a number of jurisdictions including India.

[98] As above at 22-24.

[99] As above at 24.

[100] As above at 25-26.

fundamental rights and Article 102, saying that the meaning of Art 102 must not be understood in an isolated manner.[101] Although he argued in a fashion similar to Latifur Rahman J, he stressed less on social justice or judicial activism. He emphasised the simple fact that the spirit of the Constitution, contained in these provisions, makes it unthinkable that the framers of the Constitution had envisaged that the grievance of millions should go un-redressed merely because they are unable to come to the Court. As such, anyone "whose heart bleeds for his less fortunate fellow being' can initiate PIL".[102]

The unique Bangladeshi explanation as regards the constitutional basis of PIL has deep roots. The importance and profound impact of the liberation movement, including the war of 1971, can not be overestimated. It is a matter of pride for the Bangladeshis that the country, and the Constitution, were achieved through a war of liberation involving the people. Constitutional recognition of the supreme place of the people thus is not merely a rhetorical declaration, but has its roots in the political and constitutional history of the country as well as in the national psyche.

One consequence is the continuous assertion by the Bangladeshi lawyers and judges as to the uniqueness of the Constitution regarding the themes of autochthony and people's power that distinguishes the Bangladeshi interpretation from those of other sub-continental countries. This clearly is an expression of conscious attempts to build a unique and independent national jurisprudence.

101 As above at 15.

102 As above at 31.