Chapter Seven

LOCUS STANDI OF PIL PETITIONER: BACKGROUND AND DEVELOPMENT IN ENGLAND, INDIA AND PAKISTAN

For public interest litigants, direct access to the High Court Division has been ensured through Article 102 of the Constitution of Bangladesh that provides for the 'writ' jurisdiction. To enforce fundamental rights, and other rights where no equally efficacious remedy is provided by law, an application may be made to the High Court Division for directions and orders.

The background and history of this power, enjoyed by the High Court Division, may be traced from the English courts to the courts of the sub-continent. Bangladeshi legal system has not only inherited the principles of common law regarding writs, it continues to be influenced by the recent English and sub-continental developments. This is especially so in case of *locus standi* of the PIL petitioner.

Generally, in private law litigation, only the person aggrieved can approach the court. In cases where interest of the society or the public in general is concerned, the applicant must have some special grievance apart from the general grievance suffered by the public. This simple rule is based on certain basic jurisprudential principles. One is to avoid multiplicity of proceedings; the other is that the person who suffers knows best his own case.

This general private law rule of *locus standi* goes directly against PIL, the essence of which is litigation by one in the interest of another. Thus the first challenge in the development of PIL has been to overcome the traditional rules of *locus standi*.

The present chapter will briefly outline the background of the writ jurisdiction, trace the traditional rules of standing and examine recent PIL developments in this regard in England, India and Pakistan. The following chapter will discuss the Bangladeshi developments in this respect.

WRITS AND THE LAW OF STANDING IN ENGLAND

The discussion of the present sub-chapter has two main themes. First, the backgrounds of the five writs in England are outlined to focus on the fact

that their origins, histories and purposes have been different and that these writs have been under the process of continuous development. Second, the principles of standing are analysed to emphasise the lack of uniformity in traditional rules and somewhat unsatisfactory present situation despite recent developments. The impact of these issues are detailed in chapter eight relating to the development of public interest standing in Bangladesh.

Background of the writ jurisdiction

'Prerogative writs' originated in the English law to ensure that the public authorities properly carry out their duties and the inferior courts and tribunals function within their proper jurisdiction. Each writ has its own purpose. *Habeas corpus* is used to bring up the body of a person imprisoned or detained; *certiorari* reviews orders and convictions of inferior tribunals and removes indictments for trial; *prohibition* aims to prevent inferior tribunals from going beyond their jurisdiction; *mandamus* is issued to compel the performance of a public duty; *quo warranto* challenges the usurpation of public office.

These writs have different historical origins and had varying degrees of effectiveness at different stages of their development.[1] But by the sixteenth century, even the last of these remedies had become generally available to ordinary litigants. In the seventeenth and eighteenth centuries, these various writs came to be labelled 'prerogative' because they were conceived as being intimately connected with the rights of the Crown.[2] Except for *habeas corpus*, they are discretionary and are distinct from 'writs of course' because proper cause must be shown to the satisfaction of the court as to why they should issue.

Prerogative remedies, it has been observed, escaped the radical reforms of the nineteenth century.[3] There remained enormous procedural defects, anomalies and complexities. An attempt in 1933 resulted in certain

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1 For an excellent outline of the historical origins of the prerogative writs, See SA De Smith (1980) *Judicial Review of Administrative Action*, 4th Edition, London, Stevens and Son Limited at 584-595.

2 Sir William Wade and Christopher Forsyth (1994) *Administrative Law*, 7th Edition. Oxford, Clarendon Press at 614 holds the generally accepted view that these writs were 'prerogative' because they were originally available only to the crown and not to the subjects. Their hallmark is that they are granted at the suit of the Crown. However, De Smith, as above at 584, points out that this view can be accepted only with a number of reservations. Thus, for example, *prohibition* and *habeas corpus* appear to have issued on the application of subjects from the very beginning.

3 Wade and Forsyth as above at 668.

procedural changes.[4] In 1938 formalities were simplified by replacing the writs of *certiorari, prohibition* and *mandamus* by orders of similar title and scope.[5] As an exception, *habeas corpus* remained a writ.[6] Information in the nature of *quo warranto* was replaced by injunction.[7] The procedure was somewhat simplified, but the substantive law remained the same.[8]

During and after the Second World War, administrative law became conservative, static and non-adventurous.[9] This situation changed in the 1960s and administrative law started to develop at a great pace. By the 1970s, due to the huge influx of administrative matters and the development of administrative law, the need for a radical change became apparent.

An important reform in English law was affected in 1977 by an amendment of Order 53 of the Rules of the Supreme Court. Later the Supreme Court Act 1981, section 31 gave statutory force to these changes. Among other developments, by a single application for judicial review, an applicant can seek one or more of the remedies and the Court has option to grant either a declaration or injunction. This, again, is principally a reform of procedure. Many aspects of the remedies still remain complex and dependent on the old body of laws, but the reform indicates a slow progress towards a more rational system.

Development of the rules of standing in the English courts

Even in the traditional law, standing rules for *habeas corpus* are quite liberal

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4 Administration of Justice (Miscellaneous Provisions) Act 1933, section 5. One significant development was that the applicant could proceed without the presence of the respondent in the preliminary stage.

5 Administration of Justice (Miscellaneous Provisions) Act 1938, section 7. This was later replaced by Supreme Court Act 1981, section 29.

6 RM Jackson (1977) *The Machinery of Justice in England*, 7th Edition. London, New York and Melbourne, Cambridge University Press at 44, says that it was apparently thought that to meddle with *habeas corpus* might be construed as subversive activity. RJ Sharpe (1989) *The Law of Habeas Corpus*, Oxford, Clarendon, provides a comprehensive specialist literature on *habeas corpus* focusing on the law of England and referring extensively to Australia, Canada and New Zealand.

7 Administration of Justice (Miscellaneous Provisions) Act 1938, section 9. Later replaced by the Supreme Court Act 1981, section 30.

8 Even procedurally, the law remained unsatisfactory. For example, *certiorari* and declaration could not be sought in one proceeding and there were no interlocutory facilities.

9 Wade and Forsyth, above note 2 at 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.

and the detenue himself or any person acquainted with the facts and circumstances of the case can approach the court.[10] Similarly, in *quo warranto*, a stanger whose motive is not improper can apply for the remedy.[11] However, as to *certiorari, prohibition* and *mandamus*, the law of standing was quite complicated till 1977 as different rules applied for different remedies.

With regard to *certiorari*, the generally accepted view stated that there is no strict standing requirement.[12] If the applicant is a person aggrieved, the court will intervene *ex debito justitiae*, in justice to the applicant. Where the applicant is a stranger, the court considers whether public interest demands intervention. There was a second view demanding some interest of the applicant, but the authorities were in favour of the former view.[13]

In case of *prohibition*, one line of cases held that anyone can have *locus standi*.[14] But some other cases took a more private-right approach and required a specific interest in the applicant.[15] Still some other cases argued that the court has no discretion to withhold a remedy if the jurisdictional defect is patent.[16]

Even though the meaning of 'particular grievance' appears to be wide, there were few examples of *certiorari* or *prohibition* granted to total strangers.

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10 For the standing rules relating to *habeas corpus* in England, see Sharpe as above note 6 at 221-227.

11 The leading case is *R v. Speyer* [1916] 1KB at 595.

12 There is a long list of authorities supporting this view. In *R v. Surrey Justices* [1870] LR 5 QB 466 a local inhabitant succeeded in quashing a highway order made without proper notice. Later authorities include *R v. Butt Ex parte Brooke* [1922] 38 TLR 537; *R v. Brighton Borough Justices, Ex parte Jarvis* [1954] 1 WLR 203; *R v. Thames Magistrates' Court, Ex parte Greenbaum* [1957] 55 LGR 129 where a news vendor successfully challenged allocation of a street trader's pitch by a magistrate without jurisdiction.

13 Cases supporting the second view appear to be either *obiter dictum* or ambiguous, e.g. *R v. Russell, Ex parte Beaverbrook Newspapers Limited* [1969] 1 QB 342 where the newspaper was considered a person aggrieved by a magistrate's orders affecting the rights of the press to report criminal proceedings. See also *R v. Bradford-on-Avon Urban District Council, Ex parte Boulton* [1964] 1 WLR 1136.

14 Leading cases include *De Haber v. Queen of Portugal* [1851] 17 QB 171; *Worthington v. Jeffries* [1875] LR 10 CP 379.

15 *Foster v. Foster and Berridge* [1863] 32 LJ QB 312; *R v. Twiss* [1869] LR 4 QB 407.

16 *Mayor and Alderman of City of London v. Cox* [1867] LR 2 HL 239; *Farquharson v. Morgan* [1894] 1 QB 552. But in *Chambers v. Green* [1875] LR 20 Eq. 552, Jessel MR held that the Court always had discretion to refuse *prohibition* to a stranger.

One such example is *R v. Greater London council Ex parte Blackburn*,[17] where *prohibition* was issued at the instance of a private citizen applying primarily from motives of public interest. Similarly, the court granted *certiorari* to a trade union acting on behalf of one of its members.[18] A citizen, having no legal right as such, successfully challenged a planning permission granted to his neighbour on the ground that the decision was vitiated by bias.[19]

In *mandamus*, one line of authorities started with *R v. Lewisham Union*[20] where the applicant was required to show infringement of a legal right in the traditional private law sense. Some cases used the term 'right' in a private sense but gave it a broader meaning.[21] Apparently, the courts failed to realise that *mandamus* was a public law remedy. Gradually, however, the situation improved as one line of authority explicitly regarded a sufficient or special interest to satisfy the requirements for standing. Sometimes this meant some genuine interest greater than that of the public at large.[22] In some later cases, the courts started allowing standing to an applicant whose interest was no greater than that of other people.[23]

Interestingly, as regards the meaning of the term 'aggrieved person', a

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17 [1976] 1 WLR 550. Licensing of indecent films was successfully challenged. Although the applicant's wife, the co-applicant was a rate payer and they had children who might have been harmed by indecent films, that interest was not considered decisive.

18 *Minister of Social Security v. Amalgamated Engineering Union* [1967] AC 725.

19 *R v. Hendon RDC Ex parte Chorley* [1933] 2 KB 696.

20 [1897] 1 QB 498. A local sanitary authority unsuccessfully sought *mandamus* against the guardians of a poor law union on the ground that they were neglecting their statutory duty to enforce the Vaccination Acts. The result of this judgement appears to be freedom for government departments to break the law. Thus in *R v. Commissioners of Customs and Excise, Ex parte Cook* [1970] 1 WLR 450 certain bookmakers were unable to enforce a statute against their competitors.

21 *R v. Hereford Corporation, Ex parte Harrower* [1970] 1 WLR 1424.

22 In *R v. Manchester Corporation* [1911] 1 KB 560 an insurance company was granted a *mandamus* to compel the Manchester Corporation to make a by-law as required by a local Act, since the Company had procured the provision in question that gave them an interest superior to that of the general public. See also *R v. Cotham* [1898] 1 QB 802.

23 In *R v. Paddington Valuation Officer, Ex parte Peachey Property Corporation Ltd* [1966] 1 QB 380 a company was allowed to challenge a valuation list for rating purposes without showing that it was more aggrieved than any other ratepayer; similarly in *R v. Commissioner of Police of the Metropolis, Ex parte Blackburn* [1968] 2 QB 118 the police was sought to be compelled to take more effective action to enforce the law against gaming clubs and pornography.

most important authority, *Ex parte Sidebotham*,[24] was a case relating to statutory appeals rather than 'prerogative remedies'.[25] James LJ said:

> . . . the words "person aggrieved" do not really mean a man who is disappointed of a benefit which he might have received if some other order had been made. A "person aggrieved" must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongly deprived him of something, wrongfully refused him something, or wrongfully affected his title to something.[26]

Sub-continental and Bangladeshi Courts often relied on this restrictive definition.

By the 1970s, however, the law in England was gradually being liberalised. Especially, in the *'Blackburn/McWhirter'*[27] cases, 'sufficient interest' criteria appeared to have replaced the 'legal right' formula.[28] The positive role played by Lord Denning in this respect greatly influenced sub-continental lawyers and judges.[29] While PIL was being introduced in Bangladesh, the lawyers consistently argued in the line of Lord Denning.[30]

In spite of some progress, the common law position in England

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24 [1880] 14 Ch. D 458. This was followed by a number of decisions including *Ex parte Official Receiver In Re Reed Bowen & Co.* [1897] 19 QBD 174 and *Buxton v. Minister of Housing and Local Government* [1961] 1 QB 278.

25 PP Craig (1989) Administrative Law, 2nd edition. London, Sweet and Maxwell at 357, observes that there is no necessary reason why the interpretation of bankruptcy legislation should carry analytical weight in other areas, and ample reasons can be found for distinguishing the decision.

26 *Ex parte Sidebotham* above note 24 at 465.

27 These cases, brought in public interest, include *R v. Commissioner of Police, Ex parte Blackburn* [1968] 2 QB 118; *Blackburn v. Attorney General* [1971] 1 WLR 1037; *R v. Police Commissioner, Ex parte Blackburn* [1973] QB 241; *Attorney General v. Independent Broadcasting Authority* [1973] QB 629 and *R v. Greater London Council, Ex parte Blackburn* above note 17.

28 However, it has been pointed out that the 'sufficient interest' formula can be applied as restrictively as the 'legal right' formula - the distinction is not clear enough. See AJ Harding (1989) *Public Duties and Public Law*, Oxford, Clarendon at 196-197.

29 For example, see Bhagwati J's discussion in the famous case of *SP Gupta and others v. Union of India and others* AIR 1982 SC 149 at 193.

30 Bangladeshi activists have very high regard for Lord Denning's judgements and his book Discipline of Law: see Lord Denning (1979) *The Discipline of Law*, London, Butterworths. *Kazi Mukhlesur Rahman v. Bangladesh (Berubari case)* 26 DLR (SC) (1974) 44 at 52, discussed one of the *Blackburn* cases - *Blackburn v. Attorney General* above note 27. Subsequently, the *Blackburn* cases were discussed in other PIL cases including the leading case of *Dr Mohiuddin Farooque v. Bangladesh (FAP 20 case)* 17 BLD (AD) (1997) 1 at 12-13.

remained confusing and in many cases contradictory. Some significant changes were brought in 1977-1981. 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). The new rules introduced application for judicial review, a single form of proceeding for all the remedies. There is now one simple and uniform test of standing - the applicant must have 'sufficient interest'.

In the famous case of *R v. Inland Revenue Commissioners (IRC), Ex parte National Federation of Self-Employed and Small Businesses Limited*,[31] a public oriented doctrine of standing, which was previously un-coordinated, gained attention. Their Lordships explained the new liberal law of standing and overruled the restrictive principle of the *Lewisham*. Standing is declared to be a mixed question of fact and law. Thus, even if the applicant's interest is remote, he has a reasonable chance of succeeding if there is a clear case of default or abuse. This suggests that an *actio popularis* is allowable in suitable cases.

With respect to citizen's actions brought by a total stranger, the law of standing still requires further clarification as there is hardly anything that provides a coherent set of principles in favour of *actio popularis*. Also, there remains the negative influence of the *Gouriet*,[32] the modern authority on standing in injunction and declaration, where the House of Lords held that a private person can not enforce a public right substituting the Attorney General.

Despite certain shortcomings, after the *IRC* case, the law courts are increasingly receptive to public interest cases where applications are brought by persons whose own private rights are not affected.[33] In recent times, there has been a considerable number of public interest cases reflecting this new liberal attitude of the courts.[34]

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[31] [1982] AC 617. Casual workers in Fleet Street newspapers often adopted fictitious names and paid no taxes. IRC made a deal whereby the casuals would fill in tax returns for the previous two years, then the period prior to that would be forgotten. An association of taxpayers challenged the waiver of the large arrears.

[32] *Gouriet v. Union of Post Office Workers* [1978] AC 435.

[33] 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 at 6.

[34] See for example *R v. Inspectorate of Pollution, ex parte Greenpeace Ltd* (No. 2) [1994] 4 All ER 328; *R v. Secretary of State for Foreign and Commonwealth Affairs, ex parte Rees-Mogg* [1994] 1 All ER 457 and *R v. Secretary of State for Foreign and Commonwealth Affairs, ex parte The World Development Movement Limited* [1995] 1 WLR 386.

REMEDIES IN THE NATURE OF WRITS IN INDIA AND PAKISTAN AND THE RULES OF STANDING

In British India, the power to issue writs was conferred on the Supreme Courts of Calcutta, Madras and Bombay from the very beginning. When the successor High Courts were created under the High Courts Act 1861, this power was inherited. But the power was applicable mainly within those towns. In 1877, the Specific Relief Act took away from the three High Courts the power to issue the common law writ of *mandamus* and granted power to issue directions in the nature of *mandamus*.[35] Again in 1898, the Criminal Procedure Code replaced the writ of *habeas corpus* with directions in the nature of *habeas corpus* and extended the Court's territorial jurisdiction.[36] In 1923, other High Courts gained the power to issue directions in the nature of *habeas corpus*.[37] All these changes were of form, not of substance.

The most significant development came when the Constitution of India was adopted on 26 January 1950. 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*.[38] The jurisdiction of the Supreme Court is limited to matters of fundamental rights - the High Courts have no such limitation under Article 226.

In Pakistan, Article 22 of the 1956 Constitution conferred power on the Supreme Court to enforce fundamental rights.[39] This resembled Article 32 of the Indian Constitution. Again, Article 170 followed the Indian Constitution's Article 226 and power of judicial review was given to the

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35 Sections 45 and 50 of the Specific Relief Act 1877.

36 Criminal Procedure Code 1898, Section 491. From this point, *habeas corpus* was available throughout the territory that was under the Courts appellate jurisdiction.

37 This was done by amending section 491 of the Criminal Procedure Code.

38 The power of the Indian Court is not limited to issuing the five writs but include any appropriate 'order' or 'direction'. Examples of leading cases taking advantage of this wider scope include *Jashingbhai v. District Magistrate, Ahmedabad* AIR 1950 Bombay 363; *Ramsharan v. UP* AIR 1952 All 752; *Ajit Kumar v. Assam* AIR 1963 Assam 46. Yet, it may be argued that the directions and orders issued in these cases are actually acknowledgement of a somewhat wider definition of the writ of *mandamus* in its Indian context. HM Seervai (1984) *Constitutional Law of India: A Critical Commentary*, Vol. 2 Bombay, Tripathi at 1326 thus proceeds to say: "It is difficult to conceive of any 'direction' or 'order' which would secure a result which could not be secured by the writs expressly mentioned."

39 For Pakistani law, see S Mahmood and Nadeem Shaukat (1992) *Constitution of the Islamic Republic of Pakistan*, 1973, Lahore, Legal Research Centre.

High Courts mentioning the name of the five writs. Unlike the Supreme Court, the power of the High Court was discretionary. When a new Constitution was framed 1962, the Pakistan Supreme Court's original jurisdiction was taken away and it could only hear appeals from the judgements of the High Courts. Also, Article 98, which replaced Article 170 of the old Constitution, did not mention the English writs by name. Instead, the article codified the jurisdiction incorporating the essence of the English writ jurisdiction.[40] The power of the High Court remained discretionary. Finally came the Constitution of 1973 where Article 199 retained the formulation of Article 98 of the 1962 Constitution. Despite these changes, there is little difference between the provisions of the Indian and the Pakistani Constitutions either in substance or in form.

By the time India and Pakistan introduced the writs as constitutional remedies, a very large body of case law had grown up in England around prerogative writs and the Indian and Pakistani judges turned to English decisions for guidance. But unfortunately, the approach of the judges turned conservative and static. The reason, as we have noted earlier, is that after the Second World War, administrative law in England relapsed into an impotent condition.[41]

Locus standi under Indian constitutional provisions

As regards *habeas corpus*, the traditional English rule, that even a person other than the detenue can approach the court, is followed in India.[42] In *quo warranto* matters, from the very beginning, the Indian judges relied on *R v. Speyer*[43] and allowed any member of the public to apply provided that the application is made *bona fide*.[44]

With respect to *certiorari, prohibition* and *mandamus*, Indian judges had

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40 Hamoodur Rahman J. in *Government of West Pakistan v. Begum Abdul Karim* 21 DLR (SC) (1969) 1 at 11 observes with respect to *habeas corpus* that the new formulation frees the Court from formalities observed in the 'old prerogative writs'. This view appears to be too simplistic since any progressive development is due to the change of circumstances where the judges are more willing to be active, rather than a change of words in the constitutional text.

41 See above for detailed discussion.

42 See Seervai, above note 38 at 1206, for the standing rules regarding *habeas corpus* in India.

43 Above note 11.

44 See for example: *Maseh Ullah v. Abdul Rehman* AIR 1953 All 193; *Rajendre Kumar Chandanmal v. Government of State of Madhya Pradesh* AIR 1957 Madhya Pradesh 60; *VD Deshpande v. Hyderabad* AIR 1955 Hyderabad 36.

the opportunity to diverge from the English law of standing when 'prerogative writs' were incorporated as constitutional remedies. But initially the courts took a rather restrictive approach. It was held that the existence of a right of the petitioner is the foundation of the exercise of jurisdiction under Article 226.[45] Similarly, the right to be enforced under Article 32 must ordinarily be a right of the petitioner.[46]

Accordingly, it became an established principle that although in strict law any member of the public can apply for *certiorari*, it is unlikely that it would be granted to a person who was not aggrieved.[47] The High Court has no option but to accept the application by an aggrieved party. But in case of a stranger, the Court must be satisfied as to the validity of his claim. So there was little practical difference with the old English law. The situation was the same in *prohibition*.[48] In *mandamus*, numerous cases established that the applicant must be a person aggrieved.[49]

By the 1970s, the shortcomings of these restrictive rules became a matter of concern.[50] One line of exceptions gave some right to ratepayers and taxpayers.[51] Sometimes, statutes recognised *locus standi* of persons not aggrieved in the traditional sense.[52]

However, a more dramatic improvement of situation was seen in the late 1980s with the introduction of the idea of PIL. A series of cases went on further to accord standing in cases where the person or class of persons actually aggrieved could not come to the Court due to social, economic or

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45 *Orissa v. Madan Gopal Rungta* [1952] SCR 28 at 33; *Kalinga Air Lines v. ITO* AIR 1971 Cal 476 at 478.

46 *Chiranjit Lal Chaudhury v. Union* AIR 1951 SC 41.

47 *TT Devasthanams, Tirupathi v. Ramachandra* AIR 1966 AP 112; *Muidanna v. RTA Anantapur* AIR 1967 AP 137.

48 The English decision of *Farquharson v. Morgan* [1894] 1 QB 552 has been repeatedly followed in India. See *Govinda Menon v. Union* AIR 1967 SC 1274.

49 See for example *Orissa v. Madan Gopal Rungta* above note 45; *Haji Sattar v. Joint Commissioners of Imports & Exports* AIR 1953 Cal 591; *Calcutta Gas Co. (Prop.) Ltd. v. WB* AIR 1962 SC 1044; *Mani Subral Jain v. State of Haryana and others* AIR 1977 SC 276.

50 VS Deshpande (1971) "Standing and justifiability" in Vol. 13 No. 2 *JILI*, pp. 153-188.

51 In *Varadrajan v. Salem Municipality* AIR 1973 Mad 55, a ratepayer questioned misuse of funds. In *KR Shenoy v. Udipi Municipality* AIR 1974 SC 2177, a ratepayer could challenge granting of cinema licence by the municipality.

52 In *Ratlam Municipality v. Vardhi Chand* AIR 1980 SC 1622, residents of a locality compelled a municipality to construct drain pipes. See also *JM Desai v. Roshan Kumar* AIR 1976 SC 578.

other disadvantaged position.[53]

The new rules of PIL standing developed by these cases gained an authoritative exposition in *SP Gupta and others v. Union of India and others*.[54] Bhagwati J. said:

> . . . where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right or any burden is imposed in contravention of any constitutional or legal provision or without authority of law or any such legal wrong or legal injury or illegal burden is threatened and such person or determinate class of persons is by reason of poverty, helplessness or disability or socially or economically disadvantaged position, unable to approach the Court for relief, any member of the public can maintain an application for an appropriate direction . . .[55]

When the grievance is not of any particular person or determinate number of people, but relates to the public in general:

> . . . any member of the public having sufficient interest can maintain an action for judicial redress for public injury arising from breach of public duty or from violation of some provision of the Constitution or the law and seek enforcement of such public duty and observance of such constitutional or legal provision.[56]

Thus, the 'aggrieved person' formula was abandoned in favour of the 'sufficient interest' doctrine in matters of PIL. What is sufficient interest is to be determined by the Court in each individual case, since any attempt to define it would delimit its scope.[57] The result of these changes has been an explosion of PIL cases in India.

Locus Standi under Pakistani constitutional provisions

In *habeas corpus* matters, Pakistani judges follow the traditional English rules like their Indian counterparts and allow persons other than the detenue to

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53 See for example, *Dr Upendra Baxi v. State of UP* (1981) 3 SCALE 1136 where two law professors had standing when they wrote a letter to the Court pointing out constitutional violations affecting inmates of a protected home; *People's Union of Democratic Rights v. Union of India* AIR 1982 SC 1473 where an association sought compliance with labour laws in relation of workmen in a construction project; *Miss Veena Sethi v. State of Bihar* (1982) 2 SCC 583; *Fertilizer Corporation Kamgar Union v. Union of India* AIR 1981 SC 344.

54 Above note 29.

55 As above at 188.

56 As above at 194.

57 As above at 192.

approach the court.[58] Similarly, in *quo warranto* matters, the rule established in *R v. Speyer*[59] is followed and *bona fide* applications by strangers are allowed.[60] This has not been affected even after the replacement of the Latin term since the Constitution of 1962.

As regards *certiorari, prohibition* and *mandamus*, the courts in Pakistan initially followed the restrictive traditional rules of standing like the Indian judges. The court emphasised the need for the existence of a legal right of the petitioner to demand performance.[61] Thus a direct personal interest was required and the applicant had to be a person aggrieved. This view was taken with respect of Article 170 of the Constitution of 1956 in *Tariq Transport v. Sargodha Bus Service*.[62] Later, when the Latin terms were replaced in Article 98 of the Constitution of 1962, the old view was re-confirmed in *Abdus Salam v. Chairman, Election Authority*.[63]

A somewhat lenient view was expressed in *Fazle Din v. Lahore Improvement Trust*[64] where Hamoodur Rahman CJ said:

> . . . the right considered sufficient for maintaining a proceeding of this nature is not necessarily a right in the strict juristic sense but it is enough if the applicant discloses that he had a personal interest in the performance of the legal duty which if not performed or performed in a manner not permitted by law would result in the loss of some personal benefit or advantage or the curtailment of a privilege or liberty or franchise.[65]

This case, however, remained an exception and the general restrictive rule remained unchanged.

Following the advent of PIL in India, the Pakistani Court pronounced a new public interest standing in *Benazir Bhutto v. Federation of Pakistan and*

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58 For the standing rules regarding *habeas corpus* in Pakistan, see S Mahmood and N Shaukat above note 39 at 749-750.

59 Above note 11.

60 *SM Wali Ahmed v. Mahfuzul Haq* PLD 1957 Dac 209; *Mohammad Sadeque v. Rafique Ali* PLD 1965 Dac 330; *Dr Kamal Hussain v. Serajul Islam* 21 DLR (SC) (1969) 23; *Farzand Ali v. Province of West Pakistan* PLD 1970 SC 98.

61 *Pakistan v. Md Sayeed* 13 DLR (SC) (1961) 94.

62 PLD 1958 SC 437.

63 17 DLR (1965) 191. Similar view is taken in *Pakistan Steel Re-Rolling Mills Association v. Province of West Pakistan* PLD 1964 Lah 138.

64 21 DLR SC (1969) 225. In this case, the petitioner felt aggrieved when, in a residential scheme where he had his house, an adjacent plot earmarket for a market was given for setting up a sectarian institution.

65 As above at 230.

another.[66] Under Article 184(3) of the Constitution of 1973, the Supreme Court has power to make orders in the nature of writs when a question of public importance with reference to any of the fundamental rights arise. The Court held that an applicant need not be aggrieved if he appears *bona fide* for the enforcement of the fundamental rights of a group or a class of persons who are unable to appear before the Court.[67] This case formed a basis and subsequent cases, both in the High Court and the Supreme Court, established PIL in Pakistan.[68]

The present chapter illustrates a number of important factors of the development of public interest standing in India and Pakistan. The judges were influenced by the English situation where each 'prerogative writ' has its own distinct origin, purpose and history of development. To the sub-continental judges, a huge body of English case law gave a false sense of security that the various rules and principles of writs were firmly established. But in fact, being a patchwork of authorities, there were numerous contradictions within this complexity. Also, the law was conservative, especially after the Second World War, when the Indian and Pakistani Courts turned to these decisions. In the sub-continent, the distinct liberal trend advocated by the written Constitutions was thus overlooked for a long time.

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66 PLD 1988 SC 416.

67 As above at 491-493.

68 The famous case that initiated PIL is *Darshan Masih v. State* PLD 1990 SC 513 where the Supreme Court enforced fundamental rights of bonded labourers on the basis of a telegram.

Chapter Eight

LOCUS STANDI OF PIL PETITIONER: BANGLADESHI DEVELOPMENT AND THE NEW PRINCIPLES

As to the power of the High Court Division to issue certain orders and directions in the nature of writs, Article 102 of the Constitution of Bangladesh provides:

(1) The High Court Division on the application of any person aggrieved, may give such directions or orders to any person or authority, including any person performing any function in connection with the affairs of the Republic, as may be appropriate for the enforcement of any of the fundamental rights conferred by Part III of this Constitution.

(2) The High Court Division may, if satisfied that no other equally efficacious remedy is provided by law -

(a) on the application of any person aggrieved, make an order -

(i) directing a person performing any functions in connection with the affairs of the Republic or of a local authority to refrain from doing that which he is not permitted by law to do or to do that which he is required by law to do; or

(ii) declaring that any act done or proceeding taken by a person performing functions in connection with the affairs of the Republic or of a local authority has been done or taken without lawful authority and is of no legal effect; or

(b) on the application of any person, make an order -

(i) directing that a person in custody be brought before it so that it may satisfy itself that he is not being held in custody without lawful authority or in an unlawful manner; or

(ii) requiring a person holding or purporting to hold a public office to show under what authority he claims to hold that office.

The first part, Article 102(1), relates to fundamental rights. The power of the Court is not discretionary since Article 44(1) declares that the right to move the Court to enforce fundamental rights is itself a fundamental right.[1]

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[1] This has been re-iterated, among other cases, in *Haji Joynal Abedin v. State* 30 DLR (1978) 375 and *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

So the situation is similar to Article 32 of the Indian Constitution.[2]

The second part, Article 102(2), relates to cases involving non-fundamental rights. It uses the same language and defines the same five types of 'writs' as Article 98 of the Pakistan Constitution of 1962. Clause 2(a)(i) provides for remedies in the nature of *prohibition* and *mandamus*; clause 2(a)(ii) grants remedies in the nature of *certiorari*; clause 2(b)(i) relates to remedies in the nature of *habeas corpus*; and clause 2(b)(ii) deals with remedies in the nature of *quo warranto*.

For the purpose of our discussion on standing, however, we have two broad types. In the first category are cases under clause 1 and clause 2(a) where the applicant must be a 'person aggrieved'. In the second category are cases under clause 2(b) where any person can apply, whether or not aggrieved. Interestingly, in cases of *habeas corpus* and *quo warranto*, the applicant is required to show grievance in cases of fundamental rights but not in cases of non-fundamental rights. This apparent anomaly, however, does not give other types of rights more importance than fundamental rights. The Court has taken the prudent view of harmonious interpretation and as such no one is denied relief on this issue. Mahmudul Islam says:

> It is very difficult to accept a contention that the condition for enforcement of the fundamental right relating to personal liberty is more onerous than the condition for issuance of an ordinary writ of *habeas corpus*. A reasonable and harmonious interpretation should be given and it should be taken that the requirement of 'aggrieved person' to apply for enforcement of fundamental rights is not applicable in respect of a petition involving detention of any person. In fact, the courts have not insisted on an application by an aggrieved person even though the petition for *habeas corpus* alleged violation of fundamental rights.[3]

In spite of the close resemblance with the Indian and Pakistani constitutional provisions, the standing rules in Bangladesh have developed through a somewhat different route. The following discussion will examine how the Bangladesh Supreme Court, following the English, Indian and

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even though his application was rejected by the Court of Settlement on the ground of limitation.

2 One difference is that the decisions of the High Court Division of Bangladeshi are not final and are subject to appeal under Article 103. There is another important difference. In India, since Article 32 only involves breach of fundamental rights, if the applicant's challenge involves both fundamental rights and non-fundamental rights, he must go to the High Courts under Article 226 where the remedy is discretionary. In Bangladesh, one petition containing both types of breach is sufficient.

3 Mahmudul Islam (1995) *Constitutional Law in Bangladesh*, Dhaka, Bangladesh Institute of Law and International Affairs at 455.

Pakistani Courts, gradually came out of the restrictive *locus standi* rules where public interest is involved.

'PERSON AGGRIEVED' IN PRIVATE INTEREST LITIGATION

Under the Constitution of Bangladesh, the Court held from the very beginning that a petitioner under Article 102 must have some right and direct personal interest in the subject matter.[4] Ruhul Islam J's explanation in the *Dada Match Workers Union*[5] became an authority:

> An application for an order of *certiorari* can only be made by an aggrieved party and not merely one of the public and in the case of *mandamus* it is an established principle that the applicant must show that there resides in himself a legal right to the performance of the legal duty by the party against whom the *mandamus* is sought.[6]

This approach was dutifully followed in subsequent cases.[7]

In relation to cases where a group or an organisation seeks to take action on behalf of its members or to protect their interests, it has been held by the Bangladeshi Court that a trade union,[8] a society or an association[9] is not a 'person aggrieved' for the purpose of Article 102 when it is representing its members. This means that although a trade union can represent its members in industrial disputes and an association in various other forums - a writ in a representative capacity on behalf of the members is not admissible.

However, the union or society will have standing when it is not representing the members and is aggrieved itself.[10] In case of a company, it must apply itself with regard to its operations, not individual members or shareholders. The reason is that a company has a distinct and separate legal entity and stands on a different footing than a society.[11] Although

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4 For an early case, see *Eastern Hosiery Mills Sramik Bahumukhi Samabaya Samity Ltd. and another v. Government of Bangladesh* 27 DLR (1975) 674.

5 *Dada Match Workers Union v. Government of Bangladesh* 29 DLR (1977) 188.

6 As above at 194.

7 A series of cases followed this view. See for example *Khulna Shipyard Employees Union v. General Manager, Khulna Shipyard and others* 30 DLR (1978) 368 and *Zamiruddin Ahmed v. Government of Bangladesh* 34 DLR (1982) 34.

8 See *Dada Match Workers Union* above note 5 and *Khulna Shipyard Employees Union* above note 7.

9 *Bangladesh Electrical Association and others v. Bangladesh* 46 DLR (1994) 221.

10 In *Bangladesh Hastashilpa Samabaya Federation Ltd (KARIKA) v. Bangladesh* 45 DLR (1993) 324 at 327, a society was given standing when the subject-matter related to the management of the society.

11 *Bangladesh Jute Mills Association v. Director General of Food and others* (1989) Unreported Writ Petition No. 295/1989. See also *Md Siddiqur Rahman and others v. The Board of Trustees, Port of Chittagong and others* 27 DLR (1975) 481 where it was held that a

representative applications are denied, a constituted attorney can apply for a person aggrieved.[12]

The above principles were actually developed and applied in cases of private interest litigation. These principles were followed strictly and no exception was allowed even where the problems related to public interest matters. This takes us to a number of relevant issues.

First, the courts from the very beginning stressed that there can not be any hard and fast definition of the term 'person aggrieved'. Since the facts and circumstances of each case are different, one generalised rule would cause hardship. Even in the Pakistan period, the Dhaka High Court expressed this opinion in the *Abdus Salam's* case.[13] In the Bangladeshi period, as analysed later, the *Berubari* case established this principle with regard to the Bangladesh Constitution.[14] More recently, Amir-ul Islam Chowdhury J. said:

> There is no hard and fast meaning that could be ascribed to the term "aggrieved person". The meaning of the term "aggrieved person" is to be determined with reference to the facts and circumstances of each case.[15]

However, this principle, that standing is a mixed question of fact and law, was not utilised in favour of public interest cases – *locus standi* was not liberalised merely on the ground that the facts and circumstances of a case relate to public interest.

Second, it is interesting to note that when the Bangladesh Supreme Court started functioning under the Constitution of 1972, there was no apparent reason to interpret the law of standing differently from the Pakistani courts. Nothing in the Constitution suggested a departure from the 'well-established' constitutional principles of *locus standi* that are applicable to the more or less identical provisions of the Constitutions of India and Pakistan. In fact, the formulation of Article 102 is more or less the same as Article 98 of the Pakistani Constitution of 1962. Thus in fact the court did not show undue conservativeness, it merely followed the traditions of English, Indian and

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corporate body is a person. These cases relied on the Indian case of *Chiranjit Lal Chaudhury v. Union of India* AIR 1951 SC 41.

12 *Zamiruddin Ahmed* above note 7 at 42.

13 *Abdus Salam v. Chairman, Election Authority* 17 DLR (1965) 191 at 198.

14 26 DLR (SC) (1974) 44. See below for further discussion on this case.

15 *Zamiruddin Ahmed* above note 7 at 42. In this case, a constituted attorney was allowed to petition on behalf of the aggrieved who was out of the country and was prevented by the Government from returning.

Pakistani authorities.

AN EARLY DEVELOPMENT OF PUBLIC INTEREST STANDING: THE *BERUBARI* CASE

In *Kazi Mukhlesur Rahman v. Bangladesh* (*Berubari* case),[16] when the applicant challenged an international treaty, he actually came to vindicate his own rights. His right to move freely throughout the territory and to reside and settle in any place therein as well as his right of franchise was threatened. But the judgement clearly re-interpreted a citizen's right *vis-à-vis* the power of the State. Sayem CJ said:

> It appears to us that the question of *locus standi* does not involve the Court's jurisdiction to hear a person but of the competency of the person to claim a hearing, so that the question is one of discretion which the Court exercises upon due consideration of the facts and circumstances of each case.[17]

He added:

> . . . We heard him in view of the constitutional issue of grave importance raised in the instant case involving an international treaty affecting the territory of Bangladesh and his complaint as to an impending threat to his certain Fundamental Rights guaranteed by the Constitution, namely, to move freely throughout the territory of Bangladesh, to reside and settle in any place therein as well as his right of franchise. Evidently, these rights attached to a citizen are not local. They pervade and extend to every inch of the territory of Bangladesh stretching upto the continental shelf.[18]

Thus we have several important propositions.[19]

(1) The High Court Division does not suffer from any lack of jurisdiction under Article 102 to hear a person.

(2) The High Court Division will grant *locus standi* to a person who agitates a question affecting a constitutional issue of grave importance posing a threat to his fundamental rights which pervade and extend to the entire territory of Bangladesh.

(3) If a fundamental right is involved, the impugned matter need not affect a purely personal right of the applicant touching him alone. It is enough if he shares that right in common with others.

(4) In interpreting the words "any person aggrieved", consideration

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[16] 26 DLR (SC) (1974) 44.

[17] As above at 52

[18] As above at 53.

[19] Mustafa Kamal J. in *Dr Mohiuddin Farooque v. Bangladesh (FAP 20)* 17 BLD (AD) (1997) 1 at 14. In the same case Afzal CJ identifies two general principles as above at 3.

of "fundamental rights" in Part III of the Constitution is a relevant one.

(5) It is the competency of the person to claim a hearing which is at the heart of the interpretation of the words "any person aggrieved".

(6) It is a question of exercise of discretion by the High Court Division as to whether it will treat that person as a person aggrieved or not.

(7) The High Court Division will exercise that jurisdiction upon due consideration of the facts and circumstances of each case.

Sayem CJ begins by pointing out that standing does not involve the Court's jurisdiction to hear a person. In other words, standing and justiciability must not be confused. Then he proceeds to suggest that the Court has discretionary powers to determine standing which involves competency of the applicant to claim a hearing. As to this competency, there are two situations. Where it is merely a question of law, the old rules of *certiorari, prohibition* or *mandamus* will determine standing depending on the type of relief sought. But when it is a question of fact, the old rules can be abandoned since standing will depend on the gravity of the situation.

Although the *Berubari* emphasised the court's discretionary power to determine each case on the basis of its merits, it did not altogether reject the old rules or declare that the question of fact is the sole determining factor. So in effect, standing remains both a question of law and fact but in certain cases a broader approach could be taken. the *Berubari* identified the cases where the court is required to take such a broader approach. When a fundamental right of a citizen is infringed or threatened, it is enough if he shares the right in common with the public in general, he need not have a special grievance.[20] Also, if a constitutional issue of grave importance affecting one's fundamental rights is raised, he qualifies as aggrieved.

The *Berubari* remained an exception even though one or two attempts were made to use public interest standing arguments. In *Mazharul Huq v. The Returning Officer and others*,[21] a voter was denied standing when he claimed

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[20] One interesting factor is that the people who were residents of Berubari, the enclave in question, probably had a special grievance. But they were under the administrative control of India and were unable to come to the court.

[21] 27 DLR (AD) (1975) 11. In this case, a candidate for a local election was declared uncontested winner since the only opposing candidate had died before the polling day. The petitioner also made a failed attempt to show his personal interest by claiming

deprivation of right of franchise and demanded re-election. The Court examined the relevant statute in a mechanical way although, as a result, a substantial portion of the electorate was prevented from voting for their party or candidate of choice.[22] In a subsequent case, *MG Bhuiyan v. Bangladesh*,[23] an advocate challenged the constitutionality of an Ordinance on the ground that every citizen can come to the court for declaration of nullity of any law. The Appellate Division refused to make an exception of the traditional rules and denied standing because it could not find his legal right or specific grievance.

The *Berubari* is often regarded as the first Bangladeshi PIL case and was relied upon by the PIL petitioners in almost all subsequent attempts to attain standing. But from a PIL perspective, the *Berubari* has its limitations. First, the *Berubari* case involves constitutional questions of grave importance – not all public interest matters. Second, it is involved with fundamental rights only and does not relate to non-fundamental rights. Third, it does not deal with cases where a public-spirited petitioner, not himself affected, seeks to move the Court to protect the fundamental rights of others. Fourth, since there can not be any specific definition of the term 'constitutional question of grave importance' – it remains problematic for the petitioners to get relief as long as the court is conservative.

PUBLIC INTEREST STANDING: THE INITIAL PROBLEMS OF RECOGNITION

Initially, when the term PIL was used by the petitioners asking for public interest standing, there were two main problems. Sometimes, the causes they espoused did not concern public interest. In some other cases, the judges were too conservative to widen the traditional principles. In this respect, the leading case is the *Sangbadpatra*[24] which was subsequently followed by a series of cases.

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that he had 'indomitable desire' to contest the election but refrained himself in support of the deceased candidate.

22 The changing attitude of the Court can be seen in the recent comparable decision in *Sharifuddin (Md) v. Md Mofizuddin Sarker* 49 DLR (1997) 86 where the Court directed re-election because participation of a disqualified candidate materially affected the result of the election.

23 BCR 1981 AD 80. This was an appeal from BCR 1982 HCD 320.

24 *Bangladesh Sangbadpatra Parishad (BSP) v. The Government of People's Republic if Bangladesh and others* 12 BLD (AD) (1992) 153.

The *Sangbadpatra*

PIL, after the term was coined, was first pleaded in the *Sangbadpatra*, a case that generated interest in the subject. In that case, an association of newspaper owners challenged the constitution and an award declared by a statutory Wage Board.

The preliminary issue for determination was whether the association had standing to bring a writ application on behalf of its members. It was claimed that the said association was the only representative of the newspaper owners who were undoubtedly aggrieved. The High Court Division relied on the principle that since direct personal interest is absent, an association, not being itself a 'person aggrieved', can not come to court on behalf of its members.[25] The Court relied on the principle established in earlier cases including the *Dada Match Workers Union*[26] and *Khulna Shipyard Employees Union*.[27] The *Berubari* was discussed but considered not relevant. Abdul Jalil J. observed that the association in question, Bangladesh Sangbadpatra Parishad,

> . . . has nothing to lose or win by the impugned award. It is the owners of the newspapers and the employees who are affected by the award and not Bangladesh Sangbadpatra Parishad. This Parishad may represent the employers anywhere but it has no *locus standi* to invoke the jurisdiction of this Court under Article 102 of the Constitution as it is not a "person aggrieved" for the purpose of Article 102 of the Constitution.[28]

When the case came to the Appellate Division, Mustafa Kamal J. upheld this view. He re-iterated that the petitioner may represent the employers in the Wage Board and may even have capacity to act as the employer's representative in various other forums, but has no *locus standi* with respect to the writ jurisdiction. This does not mean, he further clarified, that the petitioner can never file a writ petition. "It can and it may, if it has a personal interest in the subject matter".[29]

Another line of argument was presented in the Appellate Division for the first time. Public interest standing was claimed. It was argued that 'almost anyone' can challenge the constitution and decision of the Wage Board because it involves violation of the fundamental right of freedom of

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25 *Bangladesh Sangbadpatra Parishad (BSP) v. The Government of People's Republic if Bangladesh and others* 43 DLR (1991) 424.

26 Above note 5.

27 Above note 7.

28 Above note 25 at 429.

29 Above note 24 at 156.

the press. Mustafa Kamal J. rightly said:

> . . . the present case is definitely not a public interest litigation. 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.[30]

The *Sangbadpatra* demonstrates that the techniques of PIL were taken up by an élite for their own purposes at the very beginning of the introduction of public interest standing in Bangladesh. As a result, since standing is a mixed question of law and fact, the court refused to modify the traditional rules in favour of opulent media magnets.

The outcome, however, was actually unfavourable to the development of public interest standing. In fact, the observations of the Court on PIL was misunderstood and raised confusions. The judge said:

> In our Constitution, the petitioner, seeking enforcement of a Fundamental Right or constitutional remedies, must be a "person aggrieved". Our Constitution is not at *pari materia* with the Indian Constitution on this point. The Indian Constitution, either in Article 32 or in Article 226, has not mentioned who can apply for enforcement of Fundamental Rights and constitutional remedies. The Indian Court only honoured a tradition in requiring that the petitioner must be an "aggrieved person". The emergence in India of *pro bono publico* litigation, that is litigation at the instance of a public spirited citizen espousing causes of others, has been facilitated by the absence of any constitutional provision as to who can apply for a writ . . . Therefore, the decisions of the Indian jurisdiction on public interest litigation are hardly apt in out situation. We must confine ourselves to asking whether the petitioner is an "aggrieved person", a phrase which has received a meaning and dimension over the years.[31]

Arguments against PIL could be drawn by inference from this observation. First, Indian decisions on PIL are not relevant since the constitutional provisions in the two countries are not the same. So the advance of PIL in India is to be ignored. Second, the petitioner must himself be a 'person aggrieved'. This is a constitutional imperative that has to be respected. The Indian situation is different because there is no provision that the petitioner must be a person aggrieved. Third, the meaning of 'person aggrieved' must be taken from earlier authorities and traditions since it is, as stated above, "a phrase which has received a meaning and a dimension over the years". These and other arguments, confusedly derived from the

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30 As above.

31 As above at 155.

Sangbadpatra, subsequently formed a formidable barrier for PIL.

Some other cases

After the *Sangbadpatra,* the judges of the High Court Division took a restrictive view. In *Syed Mahbub Ali and others v. Ministry of Law and others,*[32] certain members and officials of the Bar challenged the promotion of subordinate courts judges by the government without consultation with the Supreme Court. The petitioners' reliance on the *Berubari* was considered not relevant. The Court relied on the *Sangbadpatra* and said that the petitioners may represent the Bar elsewhere but not in writ jurisdiction.

In the High Court Division's judgement in the *FAP 20,*[33] where a governmental scheme to control flood was challenged, the Court again relied on the *Sangbadpatra* and accordingly refused to consider Indian cases on PIL.[34]

A culmination of this line of argument can be found in *Raufique (Md) Hossain v. Speaker, Bangladesh Parliament and others.*[35] The opposition members resigned from the Parliament *en masse,* an act for which no constitutional provision could be found. In this case, almost all the leading authorities on standing from England, India and Pakistan were discussed along with Bangladeshi judgements. Mahmudur Rahman J. heavily relied on the *Sangbadpatra* and re-iterated the basic arguments that the applicant must be a 'person aggrieved' and the meaning of the term must be restrictively defined as has been traditionally established over the years.

Mahmudur Rahman J. asserted that this was not a social action or public interest case.[36] Since he made it clear that it was not a PIL case, PIL as a principle was not opposed. Yet, the result was somewhat unfavourable for PIL because it was not made clear what would happen if it was a public interest matter. Also, the following observation could be misunderstood as a negation of PIL:

> Article 102 of our Constitution because of the expression a "person aggrieved" and expression "enforcement of any fundamental rights

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32 (1992) unreported Writ Petition 4036/1992.

33 *Dr Mohiuddin Farooque v. Bangladesh / Sikandar Ali Mondol v. Bangladesh* (1994) Writ Petitions 998/94 and 1576/94.

34 The case subsequently went on to the Appellate Division and the decision of that Division provides the most authoritative exposition of PIL in Bangladesh. see below for further discussion.

35 47 DLR (1995) 361 at 385-388.

36 As above at 383.

> conferred by Part III of this Constitution" has narrowed down the scope of this writ jurisdiction unlike that of India under Article 226 in which the fathers of the Constitution in their attempt to meet the social economic condition and for enforcement of such right widened the jurisdiction consciously . . . As I have examined several decisions cited at the Bar of the Indian jurisdiction I think that those are on the language employed in the Indian Constitution which is much wider in scope to apply high prerogative writs by the Supreme Court under Article 32 and by the respective High Courts of India under Article 226.[37]

ARGUMENTS IN FAVOUR OF PUBLIC INTEREST STANDING

We have already discussed in chapter six the liberal rules of interpretaion of the Constitution that enabled PIL to develop. These rules state that any particular constitutional provision must be read in the context of the entire Constitution and accordingly a PIL approach must be taken since the Constitution of Bangladesh mandates social justice and the people are the focal point of its concern. In accordance with this liberal attitude towards constitutional interpretation, *locus standi* of the PIL petitioner was the most important issue to be re-defined. The single stumbling bloc for the new construction was the term 'any person aggrieved' contained in clauses 1 and 2(a) of Article 102.

It has been observed that the Constitution does not define the term 'person aggrieved'.[38] Ishtiaque Ahmed says:

> . . . it must be recognised that however inappropriate and inept the expression "person aggrieved" may be in the total context of the Constitution and of Art. 102, it is not a term defined by the Constitution.[39]

Thus it appears that the judges are free to define the term in consonance with the social and collective justice spirit of the Constitution instead of blindly following traditionally inherited rules.

Since the Constitution does not define the term, the judges have relied on the numerous authorities on the point. Too much reliance on the so called 'established rules' propounded by these authorities has been the cause of confusions, contradictions and conservatism. The result, however, is the assumption that the phrase 'person aggrieved' has received a fixed meaning

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37 As above.

38 Mahmudul Islam above note 3 at 511.

39 Syed 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 7.

and dimension over the years.[40]

This assumption is not correct due to several reasons. In England, as we have already discussed, each 'prerogative writ' had its separate origin, purpose and history of development.[41] So the rules of standing for each writ developed differently by the judges who were dealing with one case at a time. Even in the same writ, contradictory and confusing standards were applied in different cases.[42] Sub-continental courts followed this tradition and even when the Pakistani Constitution of 1962 discarded the Latin terms, there was no shift from the earlier position. Acceptance of restrictive English decisions by some earlier sub-continental authorities was later followed in the majority of cases. As a result, the judges had more than one test to ascertain aggrievement; the rule was expressed in various terms including 'particular grievance', 'specific legal right', 'sufficient interest and 'special interest'.[43] This is no proof of the phrase receiving a specific meaning and a particular dimension over the years.

The term 'person aggrieved' was generally used for *certiorari*. Therefore, when the term is used for the three writs under the Constitution, it is difficult to fix a single ascertainable meaning. Even when it is used in relation to other writs, the test is never the same. Recent developments in England towards a more uniform system also show the absence of any immutable principle.[44]

A main problem of identifying an all-accepted definition of the term is that the issue of standing is a mixed question of law and fact. Since the adoption of the 'sufficient interest' formula in England and India, the judges in the two countries have shown different degrees of willingness to grant public interest standing.

Also important is the fact that there is no concept of constitutionally declared fundamental rights in England. Thus, the principles of the *Lewisham* or the *Sidebotham* may be relevant to legal rights, but it is incorrect to apply them unhesitatingly to all matters of fundamental rights in Bangladesh.

It has been repeatedly asserted that under the Constitution, a person

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40 Above note 24 at 155.

41 See above chapter seven.

42 As above.

43 Ishtiaq Ahmed above note 39 at 9.

44 See *R v. Inland Revenue Commissioners [IRC], Ex parte National Federation of Self-Employed and Small Businesses Limited* [1982] AC 617.

does not have to be 'personally', 'directly', or 'primarily' aggrieved.[45] Amir-ul Islam argues that the formulation is 'application of' and not 'application by' the applicant.[46] He also argues that the term 'any person' used in the Constitution is quite different from the definite term 'the person'. Another argument of this type is that the term 'any person' should be read disjunctively from the word 'aggrieved'.[47]

Under the proviso of Article 153(3), if there is any conflict between the Bangla and English version of the Constitution, the Bangla version will prevail. The word used in the Bangla version is সংক্ষুব্ধ (sangkhubdha) - a term closer to 'concern' rather than 'aggrieved'. This unique argument was forwarded by Dr Mohiuddin Farooque in the *FAP 20* but was not taken up by the judges.[48]

All these arguments, both conceptual and technical, tend to emphasise two points regarding the law of standing. First, the court must follow the Constitutional directives and provisions rather than inherited traditions. Second, these constitutional provisions indicate liberal rather than restrictive rules of interpretation.

NEW RULES OF PUBLIC INTEREST STANDING

There are two broad categories of public interest standing.[49]

(1) Representative public interest standing: The petitioner approaches for a person or class of persons who by reason of helplessness, disability or economic inability cannot move the court for relief.

(2) Citizen standing: A breach of public duty results in violation of collective right of the public at large.

Both of these aspects of standing developed in Bangladesh gradually through a number of cases although the most authoritative expression can be found in the case of the *FAP 20*.

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[45] Syed Ishtiaq Ahmed (1993) "An expanding frontier of judicial review - public interest litigation " in Vol. 45 *DLR Journal*, pp. 36-45 at 39 and Mahmudul Islam above note 3 at 511-512. This may be compared with the Sri Lankan situation where, under Article 126(2), petitions for infringement of fundamental rights are available only to the person 'himself or by an Attorney-at-law on his behalf'.

[46] M Amir-ul Islam (1996) "Person Aggrieved: PIL and Bangladesh on the threshold" 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 26-27th July at 8.

[47] See the appellant's arguments in *FAP 20* above note 19 at 11.

[48] As above.

[49] Latifur Rahman J. in *FAP 20* above note 19 at 25.

Representative public interest standing: Liberalisation in the *Welfare Association* case

In the *Welfare Association*[50] case, an association of retired government servants challenged a discriminatory law involving pensions. The government pleaded the traditionally accepted principle that an association can not represent its members in a writ.[51] The government relied on a number of traditional authorities from sub-continental jurisdictions including the leading case of *Dada Match Worker Union* and the *Sangbadpatra*.[52] Petitioners pleaded the Indian PIL of *DS Nakara and others v. Union of India*[53] which was followed in Pakistan in *IA Sharwani and others v. Government of Pakistan and others*.[54]

As regards the cases on representative standing, the judge accepted the earlier authorities as establishing a general rule. But he went on to create an exception in public interest and granted standing using two broad tests.

The first test is that the subject matter should be a matter of public interest as opposed to private interest. The judge argues that the Constitution is not a morbid document but a dynamic instrument capable of being interpreted and applied in the ever-changing socio-economic circumstances.[55] While so doing, the judiciary is bound to interpret the Constitution in favour of socio-economic justice. Thus when someone is unable to come to the Court due to poverty or otherwise, his representative should not be denied standing on merely technical grounds. He says:

> 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

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50 *Bangladesh Retired Government Employees Welfare Association v. Bangladesh* 46 DLR (1994) 426.

51 It may be noted that despite the problem of recognising the association as a party, it was a good case in relation to the co-applicants who were aggrieved personally. The President and Vice President of the Association, who were retired government employees themselves, were also petitioners.

52 From the Bangladeshi jurisdiction, other cases discussed were *Khulna Shipyard Employees Union* above note 7 and *Zamiruddin Ahmed* above note 7. The Pakistani case of *Tariq Transport v. Sargodha Bus Service* PLD 1958 SC 437 was also examined.

53 AIR 1983 SC 130. In this PIL, a society represented a large number of pensioners. Here as well, the co-petitioners were personally aggrieved and undoubtedly had standing.

54 1991 SCMR 1041.

55 Above note 50 at 435.

rights and interest of all citizens.[56]

If a fundamental right is not enforced and a citizen is kept in perennial suffering, the court will fail to discharge its constitutional obligation. So the 'pedantic and lexicographic' interpretation of the words 'person aggrieved' must be avoided if there is no conflict with any specific provision of the Constitution.

The second test is that as long as an association looks after the welfare and common interest of its members "it is entitled to ventilate this interest before this Court in the form of public interest litigation".[57] This is so because it is an absurd proposition to suggest that each individual member must come forward and file a separate writ. Apparently, if the above tests yield positive results, an applicant will be granted *locus standi* as an exception to the general rule.

Naimuddin Ahmed J. refused to discuss the *Sangbadpatra* on the ground that the facts of the *Sangbadpatra* and the *Welfare Association* are not similar and as such there is no need to follow the *Sangbadpatra* principle. The distinction between the two cases lies in the fact that *locus standi* is a mixed question of fact and law. The Court has a discretion to grant standing taking into consideration the circumstances in each case. Accordingly, a group of opulent Newspapers owners do not have the same status as a group of old middle-class pensioners. Subsequently, in the *FAP 20*, this issue was further clarified while appreciating the decision in the *Welfare Association*.

Citizen standing: Liberalisation in the *Parliament Boycott* case

In the *Parliament Boycott* case,[58] when the opposition MPs started continuous abstention from parliamentary sessions, a prayer for *mandamus* was brought by an advocate claiming to represent the rights of the public. He claimed that this mass abstention is anti-constitutional and the MPs must go back to the Parliament and pay back all the salaries and other allowances received during the period of their unauthorised absence. The petitioner came as a citizen and a voter. He claimed that the MPs represent the whole nation and as such any constitutional breach or violation committed by any member of Parliament can be questioned by any citizen. The other side argued that he was not a 'person aggrieved' under Article 102.

While granting standing, as we have already discussed in chapter six,

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[56] As above.

[57] As above at 434.

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

Qazi Shafiuddin J. canvassed liberal rules to interpret the Constitution and relied on the 'people's power' idea.[59] He discussed the Preamble and Article 7 and pointed out that all powers of the Republic are the powers of the people delegated to relevant authorities. These authorities must exercise this power constitutionally. If there is any violation, any citizen can challenge this since he is a source of power along with all other citizens of the country., This is all the more so because under the Preamble, it is the people of Bangladesh who are to safeguard, protect and defend the Constitution.

This case apparently argues that there should be no standing requirement at all in cases of Constitutional violation when the entire public is affected. This is a wide concept and the only real restriction seems to be the discretion of the judge to ascertain whether or not there has been a constitutional violation. Still this case did not touch all the aspects of public interest standing. One such limitation is that it applies only to constitutional fundamental rights and not to other types of rights. Similarly, this case is no authority for cases where someone, whose own fundamental rights are not in question, brings a petition for a person or class or persons.

There are reasons why this case was not taken immediately as an authority for the introduction of PIL. The concept of PIL as such was not discussed. In fact, it was a highly criticised judgement and was immediately stayed pending an appeal.[60] Later, due to change in the political circumstances, the case became infractuous. But the 'people's power' argument was later adopted and expanded in the *FAP 20*. Finally, it must be noted that although the *Berubari* principle of 'constitutional issue of grave importance' could be applied in the *Parliament Boycott*, it was not even mentioned.

Constitutional issue of grave importance: the *Berubari* principle in the *Justice Shahabuddin's* case

The *Berubari* principle, liberal standing rule where a constitutional issue of grave importance is concerned, was faithfully followed in *Justice Shahabuddin's*[61] case. A citizen challenged the assumption of the office of the President by former Chief Justice Shahabuddin Ahmed on the ground that a retired judge can not hold any office of profit in the service of the Republic.

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[59] As above at 45-46. For the role of 'peoples power' idea in constitutional interpretation, see above chapter six.

[60] See above chapter three.

[61] *Abu Bakar Siddique v. Justice Shahabuddin Ahmed and others* 1 BLC (1996) 483.

The applicant's standing was disputed.[62]

Md Mozammel Hoque J. first expanded the meaning of 'person aggrieved'. He said:

> Article 102 of the Constitution provides that a person who is aggrieved may file an application under Article 102(2) of the Constitution. But it does not provide that a person should be personally aggrieved. If the Constitution provides personal aggrievement, then the scope of Article 102 would be narrower.[63]

He agreed with the petitioner's contention that the term 'aggrieved' may be used to express different meanings. Thus a grievance may be personal, constitutional, mental, economic, political or social. Article 102 shelters a person in any kind of aggrievement.

On this issue, the court rightly refused to follow the *Sangbadpatra* because it related to representative standing and the facts and circumstances were different. The court considered the facts of the case in determining standing and emphasised the importance of the questions involved. The President is the Head of the State and symbol of unity of the entire country. If any constitutionally disqualified person becomes President, it will touch and affect each and every citizen of Bangladesh.[64] So it was undoubtedly a very important constitutional issue. The Court, after discussing the *Berubari*, said:

> Following the aforesaid principle enunciated by the Supreme Court we hold that since several constitutional question of great public importance having far-reaching consequences are involved in the present case, the present writ petition is maintainable.[65]

Thus, the court faithfully followed the *Berubari*. The Indian case of *SP Gupta* was examined with approval but PIL as a concept was not discussed as such.[66] In terms of principles, nothing new was introduced except a recognition that the term 'aggrieved' is wider than personal grievance. But in terms of judicial practice, this is the first case that actually used the *Berubari*

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[62] The writ, as appears from its cause title and prayer, was filed as *quo warranto*. The respondents vehemently argued that it was pre-mature since Justice Shahabuddin Ahmed had not even taken oath of office. The judge refused to deny the writ on this technical question alone and decided to treat the petition as *certiorari* and proceeded to hear the parties. Hence the relevancy of the issue of standing.

[63] Above note 61 at 488.

[64] As above.

[65] As above at 489.

[66] As above at 488.

principle without any qualifications.[67]

General principles of public interest standing: Exposition in the *FAP 20*

We have already discussed the *FAP 20* case in chapter six and observed how the constitutional provisions are to be interpreted when public interest is concerned.[68] The result has been a consensus that the entire Constitution must be taken into account to interpret any specific provision. Accordingly, since the Constitution mandates social justice and upholds 'people's power', PIL can not be denied. On the basis of these rules of interpretation, the judges of the Appellate Division gave their separate judgements explaining public interest standing. ATM Afzal CJ says:

> Any person other than an officious intervenor or a wayfarer without any interest or concern beyond what belongs to any of the 120 million people of the country or a person with a oblique motive, having sufficient interest in the matter in dispute is qualified to be a person aggrieved and can maintain an action for judicial redress of public injury arising from breach of public duty or for violation of some provision of the Constitution or the law and seek enforcement of such public duty and observance of such constitutional or legal provision.[69]

In the words of Latifur Rahman J:

> Thus I hold that a person approaching the court for redress of a public wrong or public injury has sufficient interest (not personal interest) in the proceedings and is acting bonafide and not for his personal gain or private profits, without any political motivation or other oblique consideration has locus standi to move the High Court Division under Article 102 of the Constitution of Bangladesh.[70]

BB Roy Choudhury J. observes:

> . . . the expression "person aggrieved" means not only any person who is personally aggrieved but also one whose heart bleeds for his less fortunate fellow-beings for a wrong done by the Government or a local authority in not fulfilling its constitutional or statutory obligations.[71]

The leading judgement delivered by Mustafa Kamal J. observes:

> . . . when a public injury or public wrong or infraction of a fundamental

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67 Although *Justice Shahabuddin* was decided a month after *FAP 20*, the judgement of the Appellate Division was not available at the time. Thus Mozammel Hoque J. could not rely upon the latest decision of the Appellate Division in *FAP 20*.

68 See above chapter six.

69 See *FAP 20* above note 19 at 4.

70 As above at 26.

71 As above at 31

> right affecting an indeterminate number of people is involved it is not necessary, in the scheme of our Constitution, that the multitude of individuals who have been collectively wronged or injured or whose collective fundamental right have been invaded are to invoke the jurisdiction under Article 102 in a multitude of individual writ petitions, each representing his own portion of concern. In so far as it concerns public wrong or public injury or invasion of fundamental rights of an indeterminate number of people, any member of the public, being a citizen, suffering the common injury or common invasion in common with others or any citizen or an indigenous association as distinguished from a local component of a foreign organisation, espousing that particular cause is a person aggrieved and has the right to invoke the jurisdiction under Article 102.[72]

These new rules have several significant aspects which require to be further examined.

DETERMINATION OF *LOCUS STANDI* UNDER THE NEW PRINCIPLES

Although the rules of standing have been liberalised in PIL, it does not mean that the court will allow standing in each and every case without applying its mind. From the judgements of the *FAP 20* case, we find several important aspects that requires consideration by the court.

Distinguishing a public from a private cause

The first issue the judge needs to address is whether the matter involves a private or a public cause.[73] If an individual cause is espoused, the petitioner needs to be a person aggrieved and his own interests require to be affected. If, however, he pursues a public cause involving public wrong or public injury, he need not be personally affected. It must be taken into consideration, as has been noted by BB Roy Choudhury J., that the Constitution neither defines the term 'person aggrieved' nor requires the applicant to be personally aggrieved.[74]

The 'person aggrieved' rule is an invention of the private law and not of public law. Latifur Rahman J. explains that the traditional rules requiring the petitioner to be personally aggrieved is based on the theory that the remedies and rights are co-relative and therefore only a person whose own right is violated is entitled to seek remedy.[75] However, if this doctrine is

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[72] As above at 19.

[73] As above at 19.

[74] As above at 29 and 31.

[75] As above at 22-23.

followed strictly in public law, it will be tantamount to ignoring the good and well-being of the citizens in many cases, especially poorer sections of the society.

It appears that the traditional law of private interest standing, which is rather conservative, is not touched by the *FAP 20*. Mustafa Kamal J. says: "The traditional view remains true, valid and effective till today in so far as individual rights and individual infraction thereof are concerned."[76] As a result, since the *Sangbadpatra* was a case of private cause, there was no need to overrule it. The *FAP 20* creates a new set of rules only for public interest standing where a public cause is espoused.[77]

Presence of 'wrong', 'injury' or 'violation'

A public cause itself is not enough to activate the court unless there is some wrong or injury or violation of some provision of the Constitution or the law.

This actually involves the question as to whether 'public cause' involves only pre-defined and easily determinable rights. There are many cases of violation or breach of such a nature that a wrong or injury to the public is apparent but the corresponding right is diffused or very thinly spread. The Appellate Division rightly stressed on the violation, breach, wrong or injury rather than the right itself.

In the leading judgement, Mustafa Kamal J. emphasises not on public right but on 'public wrong or public injury or invasion of fundamental rights'.[78] Afzal CJ grants standing in cases of 'breach of public duty or for violation of some provision of the Constitution or the law'.[79] Latifur Rahman J. merely requires public wrong or public injury.[80] BB Roy Choudhury J. is concerned with 'wrong done by the Government or a local authority in not fulfilling its constitutional or statutory obligations'.[81]

This also clarifies another important aspect - public interest standing is

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76 As above.

77 Interestingly, Mustafa Kamal J. observes that the *Sangbadpatra* was not an authority even for the proposition that an association can never be a person aggrieved if it espouses the causes of its members in a representative capacity. This may be taken as a hint that even in private interest standing, the Court is prepared to rule more liberally in future. See as above at 17.

78 As above at 19.

79 As above at 4.

80 As above at 26.

81 As above at 31.

not limited to constitutional rights. Latifur Rahman J. explains:

> The operation of Public Interest Litigation should not be restricted to the violation of the defined Fundamental Rights alone. In this modern age of technology, scientific advancement, economic progress and industrial growth, the socio-economic rights are under phenomenal change. New rights are emerging which call for collective protection and therefore we must act to protect all the constitutional, fundamental and statutory rights as contemplated within the four corners of our Constitution.[82]

Sufficient interest of the petitioner

When a public cause is present and a violation is established, the court considers that 'cause' carefully since it is a determining factor as to the competency of the applicant to claim a hearing. Thus whether or not the petitioner has 'sufficient interest' is to be decided in a case to case basis.

In case of citizen standing, it is enough for the petitioner to show an interest or concern common with the general public. But in cases of representative public interest standing, where the petitioner is espousing the cause of a vulnerable section of the society, he must show that his concern is real and not illusory.

While Mustafa Kamal J. does not use the term, Latifur Rahman J. requires 'sufficient interest' from the petitioner.[83] Afzal CJ says:

> The liberal interpretation given to the expression any person aggrieved in the judgements of my learned brothers, in my opinion, approximates the test of or if the same is capsulized, amounts to, what is broadly called, 'sufficient interest'.[84]

He subscribes to the scope of 'sufficient interest' as explained by Bhagwati J. In the leading Indian case of *SP Gupta*, making it clear that the scope of 'sufficient interest' in Bangladesh is more or less the same as in India. Bhagwati J. says:

> What is sufficient interest to give standing to a member of the public would have to be determined by the Court in each individual case. It is not possible for the Court to lay down any hard and fast rule or any straitjacket formula for the purpose of defining or delimiting 'sufficient interest'. It has necessarily to be left to the discretion of the Court. The reason is that in a modern complex society which is seeking to bring about transformation of its social and economic structure and trying to reach social justice to the vulnerable section of the people by creating new social, collective 'diffuse' rights and interests imposing new public duties on the State and other

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82 As above at 28.

83 As above at 26.

84 As above at 4.

> public authorities infinite number of situations are bound to arise which cannot be imprisoned in a rigid mould or a procrustean formula. The Judge who has the correct social perspective and who is on the same wavelength as the Constitution will be able to decide, without any difficulty and in consonance with the constitutional objectives, whether a member of the public moving the court in a particular case has sufficient interest to initiate the action.[85]

Bona fide intention of the petitioner

In ordinary situations, the affected party itself is required to come to the court. So in cases of public interest standing, the Court will enquire as to why the affected party is not coming before it. Also, a person pleading sufficient interest may be able to cross the threshold stage but the respondent is free to contest this claim on the facts of the case or question whether the petitioner's intentions are *bona fide*.

The question of the petitioner's intention is very important in PIL since it is the most potent weapon for the court to check meddlesome interlopers. Giving appropriate emphasis on this point, Mustafa Kamal J. says:

> The High Court Division will exercise some rules of caution in each case. It will see that the applicant is in fact espousing a public cause, that his interest in the subject matter is real and not in the interest of generating some publicity for himself or to create mere public sensation, that he is acting *bona fide*, that he is not a busybody or an interloper, that it is in the public interest to grant him standing and that he is not acting for a collateral purpose to achieve a dubious goal, including serving a foreign interest.[86]

This caution has been re-iterated by the other judges as well.[87] Even in traditional cases, a petitioner was required to have *bona fide* interest. The new situation only demanded a greater emphasis on this point.

Mustafa Kamal J. has cautioned that petitioners serving foreign interests or local components of foreign organisations will not be granted public interest standing.[88] The aim is to protect national interest from foreign interference and not to prevent organisations from filing PIL cases merely because they receive funds from abroad.

One way of determining the intention of the petitioner is to enquire his previous contributions relating to the matter at hand. Mahmudur Rahman J.

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85 *SP Gupta and others v. Union of India and others* AIR 1982 SC 149.

86 *FAP 20* above note 19 at 19.

87 As above at 4, 26 and 31 by ATM Afzal CJ, Latifur Rahman J. and BB Roy Choudhury J. respectively.

88 As above at 19.

says:

> Merely because one is a Secretary-General or a member of any Human Rights Organisation is not sufficient ground to hold that he has a sufficient interest in the field. Where a writ petitioner fails to bring anything on record to satisfy the court that he consistently has been endeavouring to obtain remedy for a section or group of people in the event of violation or threatened violation of their any legal or constitutional rights whose abject poverty, illiteracy and socially disadvantaged position bar access to Court for redress of injustice, and the petitioner or his organisation fails to satisfy that he or his organisation has contributed in order to secure justice or to restore or enforce any of the human rights in the field for which he has been espousing cause of those persons in the Court of law as a public spirited person such person or organisation can not be said to be a "person aggrieved" within the meaning of Article 102(1) of the Constitution of the People's Republic of Bangladesh for lack of sufficient interest in the field.[89]

In short, 'sufficient interest' of the petitioner has to be established through his previous 'track record'.

It appears that the track record principle can help to determine the sufficiency of the interest of the petitioner, but it can not be the only ascertaining factor. There are several good reasons. First, once there is a public wrong or injury manifestly apparent, it will amount to denial of justice if the petition is rejected merely on the ground of lack of 'track record'. The victims can not be made to suffer indefinitely just because the petitioner did not help them on previous occasions. Second, a rigid application of the track record formula will tend to restrict concerned individual citizens approaching the court. PIL, in such a case, will be used only by the powerful, well-resourced and foreign funded NGOs. In Bangladesh, so far, individually concerned citizens and lawyers have filed a very high proportion of genuine PIL cases. Third, the track record formula will tend to stifle growth of PIL in new fields wherein we do not yet have organisations working or contributing.

PIL AND REMEDIES IN THE NATURE OF *HABEAS CORPUS*

While clauses 1 and 2(a) of Article 102 gave rise to controversy due to the presence of the term 'person aggrieved', there is no such term in clause 2(b). This includes remedies in the nature of *habeas corpus*.

Habeas corpus under the Constitution of Bangladesh

In Bangladesh, mainly due to the prolonged rule of autocratic regimes, the

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[89] *Saiful Islam Dilder v. Bangladesh* 50 DLR (1998) 318 and 321.

law relating to *habeas corpus* is regarded as a most important constitutional issue.[90] The Constitution guarantees right to life and liberty as fundamental rights under Articles 31 and 32. Article 33 provides safeguards as to arrest and detention. Although there was no provision of preventive detention in the original Constitution, the oversight was quickly corrected by the ruling party in 1973 by amending Article 33.[91] This was followed by the notorious Special Powers Act in 1974.[92] These laws in combination with the oppressive periods of martial law was devastating for the right to liberty.[93]

The judges responded by taking a very wide view of interpretation. In fact, the court introduced so many exceptions to the general rules and required such stringent criteria to be fulfilled that once a detenue managed to appear before a court, he had a very good chance of being released. As a result of the Supreme Court's interpretations of various provision of the Special Powers Act, "it has become exceedingly difficult for the Government to sustain an order of preventive detention".[94] According to a research conducted by QR Hoque, almost 95% of the preventive detention cases that came before the High Court Division had been found to have been made either illegally or without any lawful authority.[95] It appears that considering

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[90] Constitutionally approved preventive detention statutes form the most important and problematic aspect of *habeas corpus* in the sub-continent. For an overview of the Indian situation, see Paramjit S Jaswal (1993) "India: Judicial review" in Andrew Harding and John Hatchard (eds.), *Preventive Detention and Security Law: A Comparative Survey,* Dordrecht, Boston and London, Martinus Nijhoff, pp. 71-103. For Pakistani situation, see Faqir Hussain (1989) *Personal Liberty and Preventive Detention,* Peshwar, University of Peshwar.

[91] Constitution (Second Amendment) Act (XXIV of 1973), section 3.

[92] Act XIV of 1974.

[93] For a short analytical overview of personal liberty and preventive detention, see S Malik (1993) "Bangladesh" in Andrew Harding and John Hatchard (eds.), *Preventive Detention and Security Law: A Comparative Survey,* Dordrecht, Boston and London, Martinus Nijhoff, pp. 41-57 and Naimuddin Ahmed (1997) "Law of preventive detention 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.103-122. For a more detailed study, see Quazi Reza-ul Hoque (1999) *Preventive Detention Legislation and Judicial Intervention in Bangladesh,* Dhaka, Bishwa Shahittya Bhavan. Here, the author traces in detail the historical and analytical development of the law. He argues that the existing penal laws can deal more efficiently with the matters covered by preventive detention laws which were introduced to satisfy the whims of the authoritarian regimes.

[94] S Malik as above at 57.

[95] QR Hoque, above note 93 at 288, comes to this conclusion after examining the outcome of the *habeas corpus* petitions filed since 1974 till August 1998.

the circumstances, the Supreme Court performed extremely well.

Even in the traditional law, the principles of standing in *habeas corpus* are quite liberal.[96] Although there is no hard and fast rule, it is generally expected that the detenue himself should be the petitioner. But the detenue is often unable to act due to the nature of his detention. In such a case a person other than the detenue can appear before the court. But the court insists that the petitioner is acquainted with the facts and circumstances of the case.

When the detenue is unable to appear before the court, the proper person to file a petition is any of his relations. Thus, in Bangladesh, a mother was allowed to apply for her son,[97] and a wife for her husband.[98] In absence of a relation, a friend is allowed to apply.[99] In case of a minor, the applicant must either be entitled to its custody or be interested in the minor's welfare. In these Bangladeshi cases, however, standing was taken for granted and was not contested.[100]

Application by a total stranger is said to be allowed only in the rarest of cases where the court has been apprised of material which immediately and obviously establishes the illegality of the detention or custody.[101] There is always a possibility that if a stranger is allowed to apply on the detenue's behalf, there will be an abuse of the process of the court. Complication may arise if, after the court's refusal of the stranger's petition, the detenue applies himself claiming that the first petition was made without authority. Thus the court has discretion to ask whether the application made by a stranger is reasonable under the circumstances of a particular case.

Continued activism in public interest through *habeas corpus*

Because of the already liberal rules relating to *habeas corpus*, the public interest approach faced no major bar in such matters and the task was merely to expand the scope of *habeas corpus* petitions even more. Recent developments have taken several routes.

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96 See above chapter seven.

97 *Aruna Sen v. Bangladesh* 27 DLR (1975) 122.

98 *Nasrin Kader Siddiqui v. Bangladesh* 44 DLR (AD) (1991) 16.

99 *Dheman Chakma v. Secretary, Ministry of Home Affairs and others* (1991) unreported WP 3276/1991.

100 The authority for the Bangladeshi judges, it appears, is *Azizul Huq v. East Pakistan* PLD 1968 Dac 728, a case decided in the Dhaka High Court during the Pakistani period. See also *Chiranjit Lal Chaudhury v. Union of India* above note 11, for the leading Indian authority.

101 *Ram Kumar v. District Magistrate* AIR 1966 Punj 51; *Sundarajan v. Union of India* AIR 1970 Del 29.

The definition of personal liberty has been widened, granting standing in previously unrecognised cases. In *Ayesha Khanam and others v. Major Sabbir Ahmed and others*,[102] the court declared that Article 102 (2) (b) (i) applies not only to detention by the authority but also to cases of private detention.

The court has taken an activist stance in many cases. In *Alam Ara Huq v. Government of Bangladesh*,[103] a detenue was re-arrested twice within the jail compound after successive orders of release by the Court. The third time, the detenue was brought personally before the Court and was released from the Court premises itself. There are certain examples of *suo motu* interventions including the *Nazrul Islam's* case,[104] the *Eliada's*[105] case and in *State v. Deputy Commissioner Bogura and others*.[106] Compensation was awarded to the detenue in *Bilkis Akhter Hossain v. Bangladesh and others*[107] and *Shahanewas v. Bangladesh and others*.[108]

PIL AND REMEDIES IN THE NATURE OF *QUO WARRANTO*

In relation to remedies in the nature of *quo warranto* under Article 102 (2) (b) (ii), similar to *habeas corpus* matters, there is no need for the petitioner to be a 'person aggrieved'.

We have already discussed that the traditional English standing rules regarding *quo warranto* and the relevant Indian and Pakistani law are quite liberal.[109] The primary reason is that the enquiry relates to a matter in which the public are interested. There is no requirement for the petitioner to be an aggrieved person or to show that he has a legal right or personal interest in the matter. Due to the very nature of this liberal rule, there is a possibility of vexatious proceedings or cases by troublemakers with *mala fide* intentions. So the test of the *bonafides* of the petitioner is very important in *quo warranto* matters.

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[102] 46 DLR (1994) 399. A minor son, abducted by the father, was given back to the mother. This decision has been recently followed in *Sharon Laily Begum Jalil v. Abdul Jalil and others* 48 DLR (1996) 460.

[103] 42 DLR (1990) 98.

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

[105] *Eliadah McCord v. State* 48 DLR (1996) 495.

[106] Unreported Writ Petition No.1389/99.

[107] 17 BLD (1997) 395 at 411. This was heard and disposed off with three other similar petitions. Writ Petition Nos. 1660-1663/1997 involved Goyeshwar Chandra Roy, Mirza Abbas, Dr. Khondaker Mosharraf Hossain and Abdul Mannan respectively – all leaders of the Bangladesh Nationalist Party.

[108] 50 DLR (1998) 633.

[109] See above chapter seven.

Article 102 (2) (b) (ii) of the Constitution of Bangladesh, while formulating the remedy in the nature of *quo warranto*, did not deviate from these traditions. The High Court Division dealt with the question in the leading case of *Sikder Mohammad Faruque v. Md Mostafa Hossain and another*[110] where a person holding the office of the Chairman of an Upazila Parishad was challenged. The petitioner, having never been a candidate for the challenged office, had no personal direct interest as such. His standing was disputed. Mahmudur Rahman J. granted *locus standi* relying on *R v. Speyer*[111] and the Indian and Pakistani authorities that followed it. Since the petitioner seeks to vindicate the right of the public in general and not his personal interest, he must have standing unless there is some other equally efficacious remedy available.[112] On the *bona fides* of the petitioner, Mahmudur Rahman J. said:

> The grant of relief in a writ jurisdiction is a matter of discretion and the High Court Division in issuing of such a high prerogative writ is within its province to test the bonafide of the relator in order to see whether he has come with a clean hand for the reason that a writ of quo-warranto is not to issue "as a matter of course on sheer technicalities on the doctrinaire approach".[113]

On appeal, the decision of the High Court Division was upheld.[114] In the leading judgement, Shahabuddin Ahmed J. discussed English, Indian and Pakistani authorities and said:

> It is clear that for issuing of a writ of quo warranto no special kind of interest in the petitioner is required, nor is he required to show that he is personally aggrieved at the holding of office by that person.[115]

The public interest element is made even more clear when he says:

> . . . there is no room to entertain any doubt as to the maintainability of a writ petition by any citizen who questions the title to office of any person who is, or purportedly, holding a public office whenever it is found that the said functionary is disqualified from holding the office and the Court in its extra-ordinary jurisdiction will entertain the petition and examine the question on merit.[116]

It appears that the law is well settled. The clarification by the Appellate

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[110] 7 BLD (1987) 52.

[111] [1916] 1 KB 595

[112] As above at 59.

[113] As above at 60.

[114] *Md Mostafa Hossain v. SM Faruque and another* 7 BLD (AD) (1987) 315.

[115] As above at 319.

[116] As above at 320.

Division did not create any new principle. But the viability of using *quo warranto* for public interest purposes was clearly indicated. Accordingly, in a recent PIL case, where the appointment of the Chief Metropolitan Magistrate without consultation with the Supreme Court was challenged, Syed Amirul Islam J. reiterated:

> Any citizen of the State can maintain an application in the nature of *quo warranto* if he finds that anybody is holding any public office in flagrant violation of constitutional provision or in violation of any other law. Be that as it may the petitioner is a practising Advocate of this Court and a conscious citizen of the Country and he has every right to move this court under Article 102 of the Constitution if he finds that any person is appointed to any post in violation of any provision of law or the Constitution . . .[117]

The activists used the writ of *quo warranto* with skill and enthusiasm, especially after the *Mostafa Hossain* broke down a psychological barrier. They challenged even the most highly placed offices of the Government. In fact, the *Mostafa Hossain* was followed by almost 20 reported cases where they challenged holding of offices by the President, Vice-President, Supreme Court judges, government officials and elected representatives.[118] The *locus standi* of the petitioner was not disputed at the threshold unless it was found that the petitioner was not acting *bona fide*. For example, in the recent case of *Mohammad Abdur Rab Mia v. The District Registrar and others*,[119] the petition was dismissed because the petitioner did not come before the writ court to establish any public right but only to serve his selfish end.

The standing rules in *quo warranto* were already developed, in pre-PIL cases, including the *Mostafa Hossain*, to such an extent that the new PIL approach could be facilitated without incorporating new principles.

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117 *Md Idrisur Rahman v. Md Shahiduddin Ahmed* 19 BLD (HCD) (1999) 291.

118 Chapter three catalogues the gradual development of these cases over the years.

119 19 BLD (AD) (1999) 24.

Chapter Nine

PROCEDURE AND REMEDIES: JUDICIAL ACTIVISM IN PIL

Since it is opposed to the adversary model of private interest litigation, PIL brings with it a number of innovative changes in relation to procedure and remedies. There are several reasons why these innovative techniques are essential. First, PIL petitioners are concerned citizens. It can not be expected in all cases that they will bear all the expenditure, time and energy required to properly present and pursue the cases initiated. Second, the poor and the helpless are often no match for powerful opponents such as vested interest groups. Huge disparity of strength of the contending parties may cause injustice unless the court intervenes. Third, public interest matters often involve thinly spread out rights and diffused rights. As a result, traditional private interest model sometimes fails to provide adequate and appropriate relief. Fourth, safeguarding public interest demands a wider vision, which is not concerned merely with the settling of disputes. The court considers in detail the effects and consequences of its decision upon the social-economic life of the nation. This demands an approach that differs from private interest litigation model.

EPISTOLARY JURISDICTION

The court has power to treat letters and telegrams sent to it as writ petitions and initiate PIL cases on the basis of such communications.

Termed as epistolary jurisdiction, this has been an invention of the Indian courts in epoch-making cases including *Sunil Batra v. Delhi Administration*[1] and *Ichhu Devi v. Union of India*.[2] This was later followed in Pakistan in the famous case of *Darshan Masih v. the State*.[3] In Bangladesh, this practice has yet to be developed. Any objection on the ground that Article 102 of the Constitution contains the terms 'on the application of' is not tenable because the Constitution neither defines the term 'application' nor restrictively determines its scope. Also, the Constitution itself does not lay

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1 AIR 1980 SC 1579.

2 AIR 1980 SC 1983.

3 PLD 1990 SC 513.

down any specific procedure for preparing such an application. Thus, it appears that there is no bar to treat or convert letters as writ petitions.

Acceptance of letters and telegrams as writ petitions does not mean that it makes all sorts of procedural rules and requirements redundant. Once the communication is accepted as a petition, the court follows all rules and procedures which are applicable in a writ case.

Power of the court to treat letters and telegrams as writ petitions is not unfettered. It is mainly a matter of discretion of the court which is to be considered according to the facts and circumstances of each case. First, it must be apparent from the circumstances that justice will be denied unless the letter is given consideration. Second, epistolary jurisdiction applies mainly to violations of fundamental rights. Third, it applies to very grave, inhuman and serious situations only, for example, *habeas corpus* matters including police atrocities and torture.

One important principle to be followed is that the letters and telegrams should be addressed to the court, and not to any particular judge. Even when such a communication is addressed to a particular judge, it should be treated as directed to the court and accordingly forwarded to the court designated to deal with such communications. This is to avoid judge shopping by the litigants since it is an accepted principle of law that 'no litigant can choose his own forum'. Pathak J has observed:

> No such communication or petition can properly be addressed to a particular judge. Which judge or judges will hear the case is exclusively a matter concerning the internal regulation of the business of the Court, interference with which by a litigant or member of the public constitutes the grossest impropriety.[4]

Ideally, every letter and telegram should be considered under a general set of rules to be prescribed for the purpose. All letters should be dealt with by the Registrar of the Court for being posted, according to normal practice, before appropriate Benches. Special PIL cells in the Indian and Pakistani courts receive, sort out and determine priority of the hundreds of letters the courts receive each month.

SUO MOTU INTERVENTION

Where public interest is concerned, the judge can act *suo motu* and initiate a PIL case. The words *'suo motu'* mean 'on his own motion' as opposed to 'on an application by a party'.[5]

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4 *Bandhua Mukti Morcha v. Union of India* AIR 1984 SC 802 at 848.

5 *State of Andhra Pradesh v. JPC Simhachalam Company* (1972) 29 STC 279 at 284.

Generally, and in almost all the cases, newspaper reports prompt the judges to act *suo motu*. But the judge's source of information may be anything other than newspapers including letters, news item in any communication media including television, report given by a friend, somebody knocking at his door or the judge coming across some injustice in his daily life.

In a *suo motu* case, the judge himself appears, as a concerned citizen, to be the applicant. This is problematic from a theoretical perspective in the sense that it violates one of the basic tenets of jurisprudence – no one can be the judge of his own case. However, PIL cases merely create an exception without violating the general rule. *Suo motu* interventions in public interest do not propose to violate the principles of justice – the only intention is to protect social and public interest where immediate intervention is necessary. In fact, any apprehension that the judges might use the *suo motu* power arbitrarily is unfounded due to several reasons.

First, the power to intervene *suo motu* is exercised cautiously with much discretion. There is hardly any example where the court has abused this power. Second, the courts do not generally intervene where fundamental rights, which the court is duty-bound under the Constitution to protect, are not violated. Third, in practice, only very grave instances of violation are taken up by the courts *suo motu*. Each and every public interest matter will not qualify. Generally, unlawful detention matters are seen as fit cases for *suo motu* intervention. Fourth, although the court may initiate a PIL case, it generally appoints lawyers to present the case of the person suffering. Thus ultimately, the case is pleaded not by the judge, but by the lawyers of the respective parties.

There also arise certain technical problems in *suo motu* cases. The judge is not in a position to determine the veracity of the report upon which he is depending. Thus his ventures may often be based upon false or concocted reports resulting in wastage of court's resources. Another problem is that a prompt *suo motu* action may precede an application presented by the actual sufferer himself. However, these problems are somewhat theoretical and rarely cause any serious complications in practice. Also, the necessity of intervention in the face of grave violation of fundamental rights far outweighs such technical considerations.

The most famous Bangladeshi *suo motu* case is *State v. Deputy Commissioner, Satkhira and others*[6] where the judge issued a *suo motu* rule after reading a news item in a daily newspaper. One Nazrul Islam, who was held

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6 45 DLR (1993) 643.

in custody for 12 years without trial, was soon released. Recently, in *State v. Deputy Commissioner Bogura and others,*[7] *suo motu* rule was issued when a newspaper reported unlawful detention in jail. The rule was subsequently discharged.

A very interesting *suo motu* rule was issued in *The State v. Md Zillur Rahman and others,*[8] 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 observe the same. However, the *suo motu* rule in this case was issued under the inherent power affirmed in section 561A of the Code of Criminal Procedure. The Court said:

> It is well-settled that his section does not confer any new power to the High Court Division, but affirms its inherent power which it owns instinctively to do that real and substantial justice for the administration of which alone it exists.[9]

This very exceptional argument, however, has been forwarded for public interest.

INVESTIGATIVE COMMISSIONS

In a PIL case, the court can appoint commissioners for the purpose of carrying out an inquiry or investigation and presenting reports and recommendations to the court.[10] The court can appoint, for example, a judge of a lower court, a journalist, a specialist in his field, an advocate or a social scientist as a commissioner.

The main purpose of appointing commissioners is to establish a fact-finding mechanism. Since the PIL petitioner is often a conscious citizen who can not be expected to expend time and money to gather evidences, it sometimes becomes a necessity to appoint a commissioner. The rationale of appointing commissioners has been observed by Agrawala:

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7 Unreported Writ Petition No.1389/99.

8 19 BLD (HCD) (1999) 303.

9 As above at 303-304.

10 Order XXVI of Code of Civil Procedure 1908 provides for commissions for the purpose of examining witnesses, making local investigations, examining accounts and making partitions. However, this list is not exhaustive and does not limit the inherent power of the High Court Division to appoint commissioners for the ends of justice.

> These commissions are appointed on the rationale that the petitioners in PIL cases are not able to produce enough evidence in support of their case; the PIL litigator cannot be expected to spend money from his own pocket to collect that evidence; impartial assessment of facts is needed swiftly; official machinery is unreliable, inefficient and probably biased and the reporting in most cases has to be done against the state machinery; the court has no investigative machinery of its own, so the court must do something about it lest the disadvantaged sections of the community have their petitions rejected and fundamental rights continued to be violated. [11]

Commissioner's report serves two purposes. One is to gather all the facts and report back to the court. The other purpose is to make specific recommendations and suggestions to the court so that the court can deal effectively with the violation of the rights challenged.

Reports of commissioners clearly have evidentiary value and they furnish *prima facie* evidence of the facts and data stated in those reports. It would be for the court to consider as to what weight to attach to them.

Appointment of commissioners has certain difficult aspects as to which the court must remain alert. First, there is always a possibility that the commissioner appointed is not suitable enough for the job entrusted to him. The reason is that the commissioner may be a specialist in his field, but he might lack the proper skills as a fact finder, investigator and reporter. Second, the remuneration, which can be ordered by the court, is liable to be meagre since it generally comes from the purse of the government. This may result in waning enthusiasm. Third, the respondents might have serious objection as to the appointment of a commissioner. Unless these objections are heard and considered, the court is at the risk of loosing its unbiased stance.

ENLISTING AID FROM VOLUNTEERS

In PIL cases, volunteers are sometimes enlisted to aid the court. The reason is twofold. One is to establish a fact-finding mechanism. The other is to get assistance while providing relief and remedies to the victims.

The most common and widely practised procedure for the court in Bangladesh is to appoint *amicus curiae* – a lawyer who acts as 'friend of the court' and aids the court in the interpretation of law and fact.[12] Similarly,

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[11] SK Agrawala (1985) *Public Interest Litigation in India: A Critique*, New Delhi, Tripathi and Indian Law Institute at 26.

[12] In Bangladesh, *amicus curiae* played a historic role in the famous 8th Amendment case, *Anwar Hossain Chowdhury v. Bangladesh* 1989 BLD (Spl.) 1; 41 DLR (AD) (1989) 165. The Court appointed *amicus curiae* in the pioneering PIL case of *State v. Deputy Commissioner, Satkhira and others* 45 DLR (1993) 643.

lawyers may seek permission of the court to present their opinions and arguments as interveners.[13] The court may also grant permission to voluntary sector organisations to place their findings and reports before it and may consider their suggestions and recommendations. The court sometimes welcomes opinions of experts and asks them for their recommendations. Finally, the court may request voluntary organisations to assist and help the persons suffering either as an interim measure or as part of the relief provided after disposal of the case.

CONTINUING SUPERVISION AND MONITORING

One important device adopted by the courts in order to try to ensure enforcement of their orders has been the creation of special monitoring agencies who report back to the courts on the effectiveness of the ordered enforcement procedure. This only demonstrates that in some cases, the remedy requires to be tailor made to match the problem.

Although it appears in the first glance that this amounts to encroachment by the judiciary in the domain of the executive, it is not so in practice when applied judiciously and only in appropriate cases. Generally, supervision and monitoring involves a limited period until the case is finally disposed off or until the executive mechanism is ready to take over the responsibility.

What kind of monitoring is appropriate in PIL cases? It is not expected or proper for the judges themselves to take part in the actual on spot supervision, even though this has been attempted in Indian in a few earlier instances. In *Sheela Barse v. Union of India*,[14] where the issue was the protection of women in police custody, the court instructed a woman judicial officer to make regular visits to the police stations in question and report back to the High Court on whether the directives were being obeyed. In *Bandhua Mukti Morcha v. Union of India*,[15] the Supreme Court appointed the Joint Secretary of the Ministry of Labour to visit and monitor the quarries where the bonded labour network had existed. In *Mehta v. India*,[16] where environmental pollution was caused by a gas leak from a chemical plant, the court appointed an independent committee to visit the plant every two weeks.

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[13] An interesting example of the role of interveners can be found in the recent case of *Md. Hefzur Rahman v. Shamsun Nahar Begum and another* 19 BLD (AD) (1999) 27. The Court allowed a significant number of organisations and individual advocates to intervene and present their opinions. This, however, was not a PIL matter.

[14] (1988) 4 SCC 226.

[15] AIR 1984 SC 802.

[16] 2 SCC 176 (1986).

Monitoring and supervision by the court is made cautiously after clarifying certain issues. The court is always alert not to enter into the spheres of the other organs of the government. Generally, the judges refuse to supervise or monitor where appropriate alternatives are available. Another issue of concern is whether the supervision is viable and affordable in terms of money and time involved. The skill and commitment of the monitoring agency is scrupulously considered.

AWARD OF COMPENSATION

In PIL cases, the High Court Division can award compensation to the victim for wrong done to him. Awarding of compensation is neither new nor exclusive to PIL cases – but public interest matters are probably the most appropriate ones where compensation may be granted. This power of the court has been recognised in Bangladesh in the following words of MM Hoque J.:

> Since this Court exercises its Special Original Jurisdiction and since this Court has got extraordinary and inherent jurisdiction to pass any order as it deems fit and proper, we are of the view that this Court has the power to award simple cost of the case as well as monetary compensation considering the facts and circumstances of each case.[17]

Although *habeas corpus* matters are considered as fit cases for awarding compensation, there is no bar in awarding compensation in other cases.

Generally, a money claim has to be agitated in a suit to be instituted in a court of the lowest grade competent to try it.[18] Award of compensation under Article 102 is an exception to this general rule and is thus not a substitute for such a civil suit. In other words, even after awarding of compensation under Article 102, the right to claim compensation through the ordinary process of civil suit remains unaffected.[19]

Compensation awarded under Article 102 is thus of a palliative nature. It aims to provide immediate relief to the victim since it would amount to injustice if a poor, destitute, long suffering victim is sent to the civil court for

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[17] *Bilkis Akhter Hossain v. Bangladesh and others* 17 BLD (1997) 395 at 407. The Court based its decision mainly on a number Indian and Pakistani decisions. Furthermore, the Court relied on *Habibullah Khan v. Azaharuddin* 35 DLR (AD) 72, where the Appellate Division held that the Court can award compensatory cost if the discretion is exercised judiciously.

[18] It has long been held in India that the state is liable for the tortious act of its employees. See for example, *State of Rajasthan v. Vidhyawati* AIR 1962 SC 933 at 940 and *Joginder Kaur v. State of Punjab* (1969) Lab IC 501 at 504.

[19] *NC Mehta and another v Union of India and others* AIR 1987 SC 1086.

a compensation suit, without a penny in hand, to establish his claim through the long and rigorous process of civil litigation.

Compensation is awarded under Article 102 only when the infringement of fundamental rights appears to be gross and patent and *ex facie* incontrovertible. In many cases, compensation appears to be the most appropriate immediate remedy due to the poverty, disability or socio-economic disadvantaged position of the victim.[20]

The leading case with regard to compensation in Bangladesh is *Bilkis Akhter Hossain v. Bangladesh and others*[21] where illegal detention of a political leader for 17 days was challenged. The Court awarded an amount of one lakh taka to be paid by the government. In *Shahanewas v. Bangladesh and others*[22] the detenue was held in custody in place of an absconded convict with *mala fide* intentions. The Court ordered an award of twenty thousand taka to be realised from respondent No. 4, an ASI, who was in charge of the police outpost where the wrong was done.

Some of the trend setter Indian cases of compensation include illegal detention in prison for over 14 years,[23] unlawful detention of civilians by army personnel,[24] illegal detention of a person on the basis of "untrustworthy and meaningless evidence",[25] failure of police to produce arrested persons before the Magistrate within the requisite period,[26] police opening fire in a peaceful assembly of peasants and landless people.[27]

Compensation may be awarded in two stages. First, as soon as the rule is issued, the court may grant an amount as compensation. This is aimed at providing immediate interim relief till the case is finally disposed off. Second, at the time of disposal, the Court may finally determine the amount of compensation and adjust the amount with the portion already released. In any case, any amount awarded by the High Court Division may be

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20 As above.

21 17 BLD (1997) 395 at 411. This was heard and disposed off with three other similar petitions. Writ Petition Nos. 1660-1663/1997 involved Goyeshwar Chandra Roy, Mirza Abbas, Dr. Khondaker Mosharraf Hossain and Abdul Mannan respectively – all leaders of the Bangladesh Nationalist Party.

22 50 DLR (1998) 633.

23 *Rudul Shah v. State of Bihar and another* AIR 1983 SC 1086. See also KC Joshi (1988) "Compensation through writs: Rudul Shah to Mehta" in Vol 30 No 1 *JILI*, pp. 69-77.

24 *Sebastian M Hongray v. Union of India* AIR 1984 SC 1026.

25 *State of Maharatr v. Dadaji Kacharan Sonawane* (1984) Cri LJ 1023.

26 *Bhimsing v. State of Jammu and Kashmir* AIR 1986 SC 494.

27 *People's Union for Democratic Right v. State of Bihar and others* AIR 1987 SC 355.

described as interim compensation since the victim is free to file a regular suit for compensation and damages. Thus the High Court Division may send the case for disposal to a more appropriate forum.[28]

INDIRECT CONSEQUENCES AND ADVANTAGES OF PIL

In many PIL cases, winning the case outright is less important than securing indirect advantages that may arise due to the filing and pursuing of the case. There are several ways in which PIL helps the victim even without a favourable judgement.

First, litigation gives publicity to the cause espoused for – a publicity which is often free. Once the court takes into notice any problem or issue, it starts an ongoing debate. In other words, the activists can table a problem through litigation and bring little known human rights issues in the forefront. This helps human rights activists to create, mobilise and direct public opinion in favour of public interest. For example, the problems associated with the Flood Action Plan in Tangail area came to light because of the PIL case that challenged the plan.[29]

Second, litigation has an important fact finding role for social activists. The Court can request or even compel the government to release information. Thus PIL is often more successful in obtaining facts and information than prolonged research and lobbying. Even commissions and experts appointed by the court can help in this process.

Third, PIL cases, even when pending, can pressurise the executive and the legislature to ensure compliance of the Constitution and the law. PIL cases dramatise and publicise loopholes or injustices in existing laws, thus spurring the legislators to rethink public policy and pass new legislation to address the problem. PIL is often catalyst to legislation even when the court fails to give relief due to any existing law. Similarly, PIL cases can energise lethargic government departments, regulatory agencies and public institutions into action.[30] Also, PIL cases often greatly increase the bargaining power of the activists in different forums. Finally, PIL may

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[28] *Padma Beharilal v. Orissa State Electricity Board and another* AIR 1992 Orissa 68. In this case, an accident due to snapping of live electric wire. The petitioner was awarded interim compensation of Rs. 30,000/- and directed to approach appropriate court for relief. See also *Jaram Singh v. State of Himachal Pradesh* AIR 1988 HP 13.

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

[30] In the *Paracetamol* case, as soon as the initial rule was issued, the government jumped into action and banned the disputed drug even before the case was heard and the rule could be disposed off. See *Syed Borhan Kabir v. Bangladesh and others (Paracetamol)* unreported Writ Petition 701/1993.

encourage supporters within the bureaucracy and advance social justice causes.

Fourth, there is a deterrence factor of PIL. Once a case is initiated, it demonstrates the vigilance of the activists. The vested interests receive a signal that any further infringement will not go unchallenged.[31]

Fifth, the function of delay is another very important role of PIL. On the one hand, litigation can provide much needed time for the activists to organise and mobilise through other strategies to pursue their cause. On the other hand, delay often provides relief to the aggrieved persons who use the time to make alternate arrangements. In a number of petitions challenging eviction of slum duellers without providing alternative arrangements, the eviction orders remain not enforced while the cases are pending.[32]

Sixth, PIL cases help the greater movement of legal aid, or public interest law, in many ways. Litigation helps the activist lawyers to focus on particular problems. It is very much responsible for the development of flexible lawyering. PIL cases increase the social consciousness of the lawyers' community.

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[31] One example is *Dr Mohiuddin Farooque v. Bangladesh represented by Secretary Ministry of Health and family Welfare & Others* Unreported Writ Petition 1783/1994 where a rule was issued directing the doctors to refrain from striking. This case immediately influenced other similar incidents since the Engineering, Agriculture and Medical cadre of the Bangladesh Civil Service officers, known as *Prokrichi*, postponed a proposed indefinite strike that was scheduled to begin soon after.

[32] See for example *Rokeya Khatun v. Sub-Divisional Engineer and others* Writ Petition 1789/1993 and *Khodeja Begum v. Bangladesh and others* Writ Petition 1580/1995.

Chapter Ten

CONCLUSIONS

Initially, the development of PIL in Bangladesh was slow due to the threshold problem. This was mainly because of the prolonged periods of martial laws and autocratic regimes that curtailed the fundamental rights and disrupted the normal functions of the judiciary. Once the democratic institutions had a change to operate, the judiciary boldly re-asserted its proper constitutional role. As a result, progressive interpretations of the Constitution, including the development of PIL, became possible.

Apparently, the process of democratisation of the system and the development of PIL coincided in Bangladesh. The growth of PIL in the midst of this process has produced interesting results – each in turn influencing the other. Since the activists and lawyers were focused on the participation of the people in the decision making process, they often used the new technique of PIL for this end. During the last few years, there is hardly any constitutional question of significance that has not been raised before the Court.

However, the courts had to be very cautious. When confronted with issues that were mainly political in nature, the judges carefully separated the legal and constitutional aspects from the political ones. In some cases, as a result, the petitioners were unsuccessful. But in cases with genuine social justice matters, the courts did not hesitate to pronounce in favour of the petitioner. This is why almost all the successful PIL cases involve matters relating to the poor and the disadvantaged.

In any case, PIL has not only been successfully introduced, it has been domesticated as well. The role of the Supreme Court in this regard is momentous. As a result of wise and judicious use of its constitutional powers, the status of the court is now firmly entrenched in the popular mind. At the same time, we now have a Bangladeshi brand of PIL that is in tune with our constitutional and legal culture. Therefore, PIL has surely come to stay. The way forward is not to deny, criticize or restrict PIL, but to widen its scope and to bring it even nearer to the 'people'.

Finally, it needs to be mentioned that PIL does not work in isolation. It is a part of the greater movement for legal aid or a constituent of the greater theme of public interest law. So in the hand of the social activist lawyer, PIL is one of many strategies which the concerned citizens and activists in

Bangladesh are now using in combination. There is a realisation that litigation is not a cure-all for all types of issues and problems. Retaining a close nexus with the press, the voluntary sector organisations are increasingly using new strategies including publication, lobbying and representation.

Future of PIL in Bangladesh, therefore, is very bright. But the most important element for the continued advancement of PIL is the very spirit of activism that introduced it in the first place. Continued success depends less on the cold calculations of law and more on the warm feelings of our hearts. Since PIL is an expression of social consciousness of the fortunate few, its progress is guaranteed to the extent we appreciate, acknowledge and remain conscious of our social responsibility.

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ABBREVIATIONS

AC	Appeal Cases
ACL	Autochthonic constitutional litigation
AD	Appellate Division
AIR	All India Reporter
All	Allahabad
All ER	All England Law Reports
AP	Andhra Pradesh
ASI	Assistant Sub-Inspector
BCR	Bangladesh Case Reports
BELA	Bangladesh Environmental Lawyers Association
BLAST	Bangladesh Legal Aid and Services Trust
BLC	Bangladesh Law Chronicles
BLD	Bangladesh Legal Decisions
BLT	Bangladesh Law Times
Cal	Calcutta
CEC	Chief Election Commissioner
Ch D	Chancery Division
CJ	Chief Justice
CriLJ	Criminal Law Journal
Dac	Dacca
Del	Delhi
DLR	Dhaka Law Reports
FAP	Flood Action Plan
FB	Full Bench
Guj	Gujarat
HC	High Court
HCD	High Court Division
HL	House of Lords
ILR	Indian Law Reporter
J	Justice

JILI	Journal of the Indian Law Institute
JJ	Justices
KB	King's Bench
Ker	Kerala
KLT	Kerala Law Times
Lah	Lahore
LJ	Law Journal
LR	Law Reports
Mad	Madras
MP	Madhya Pradesh
Mys	Mysore
NGO	Non Governmental Organisation
P & H	Punjab and Haryana
PIL	Public interest litigation
PLD	All Pakistan Legal Decisions
PUCL	People's Union for Civil Liberties
Punj	Punjab
QB	Queen's Bench
SAL	Social Action Litigation
SC	Supreme Court
SCALEA	weekly law reporter of the Supreme Court of India
SCC	Supreme Court Cases
SCMR	Supreme Court Monthly Reports
SCR	Supreme Court Reports
Spl	Special
Vol	Volume
WLR	Weekly Law Reports
WP	Writ Petition