

Public Interest Litigation; a New Dimension of Judicial Activism: Prospects&Potentials

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Abstract:Public Interest Litigation (PIL) is a concept which fully justifies the universally accepted promise that human beings are social animals. No one wants to see his fellows defenseless, in the face of violation of his fundamental rights, due to insufficient means. This very notion has led to the revolutionary concept of PIL. The term PIL is a new phenomenon in our legal system. In PIL the courts are seen for the first time to be concerned with public interest matters going beyond the traditional role of the judges. It involves a public law approach with respect to the rules of standing, procedure and remedies. PIL is one of the unique ideas with the development of which the concept of **abstract judicial review** has been revealed. Not only that, the Public Interest Litigation is the horizon of the judicial **rolling review**. The uniqueness of PIL is also lies in the feature of absence of the theory of **Judicial Restraint**. Not only in terms of elegance and novelty, this is a topic with a high profile due to its importance, relevance and necessity. This paper aims to show the new approaches of the court which have strengthen the judicial activism.

Keywords: -Public Interest Litigation, PIL, Judicial Approach, Fundamental rights, judicial activism.

I. INTRODUCTION

PIL or Public Interest Litigation is fairly recent phenomena in South Asia as well as in Bangladesh. To activate the judicial method to pursue a public cause or the rule of law, and allows the court to provide unorthodox remedies PIL refers to that activist jurisprudence that allows any person without being actually aggrieved. The concept and practice of PIL is thus an exception to the general rules of our Common law based legal system. It is not a revolution in the sense that it does not attempt to overthrow the entire existing system. But it is not a mere tinkering with the system either. It brings along with it a new set of principles and procedures that negate the traditional approach when public interest is concerned. Accordingly, the courts act suo motu, liberally interpret the rules of standing, treat letters as writ petitions, appoint commissioners, enlist aid from volunteers, award compensation to the victim and provide for continuous monitoring of the situation. PIL thus is a major reformation at both conceptual and practical levels. In most developing countries, the legal regime of environmental laws is weak and the laws are difficult to enforce and sometimes ambiguous. Public interest litigation has helped to bridge this gap. Public interest litigation is important where the government is not willing to promote/protect the environment. The government may not be willing to prosecute those who violate environmental laws and at times the government is a violator of environmental laws. In some jurisdictions an injunction can be brought to compel or stop the government from degrading the environment. In most developing countries governments lack resources to prosecute and investigate the entire criminal cases that take place within its jurisdiction. Public interest litigation enables individuals to bring action on behalf of the community, a role the government may not play. Where criminal remedies are not enough, e.g. a fine may be too small compared to the amount of environmental degradation. A civil suit is well suited for orders such as restitution and compensation which may not be provided for by criminal laws of a country. Where criminal remedies are not enforceable, e.g. where a crime is committed by a company and yet the punishment for the crime is imprisonment, it becomes hard to punish the company. Litigation on behalf of the public can be brought as a tort under negligence, nuisance and the rule of strict liability Ryland Vs Fletcher. In analyzing Public Interest Litigation. This paper examines the active performance of judiciary in handling of Public Interest Litigation and prospects and potentials of this newly emerging role of Bangladesh judiciary.

II. PUBLIC INTEREST LITIGATION IN BANGLADESH

In the Constitution of the Peoples Republic of Bangladesh, under Article 102, there are five kinds of writs, namely certiorari, habeas corpus, mandamus, prohibition and quo-warranto. Originated first in England, these writs were exercised by the Judges of the King's Bench and called prerogative writs exercised by that Court on behalf of the King. Article 102 of the Constitution of Bangladesh provides for granting remedies similar to that of the above writs, though it does not speak of any of such writs in specific terms. Sub-clause (i) of clause (a) of sub-article (2) of article 102 provides for remedies similar to that of writs of prohibition and mandamus. Sub-clause (ii) of clause (a) of the same article provides for remedy similar to writ of certiorari. Sub-clause (i) of clause (b) of the sub-article (2) of article 102 provides for remedy similar to that of habeas corpus and sub-clause (ii) of the same clause (b) provides for remedy similar to that of quo-warranto. Of these five writs two can be invoked by any person according to the provisions of article 102 of our constitution. These are writ of habeas corpus and quo-warranto. But other three writs can only be invoked by an "aggrieved party". These latter three writs are very important but any cannot apply for these writs because writ powers of the HCD is not any discretionary power and any person cannot apply for these three writs; only an "aggrieved person" has *locus standi* (right to sue). As to the issue of *locus standi* and aggrieved person which were issues knocking the door of the Supreme Court for nearly a decade justice Mustafa Kamal commented in 1994- "But the emerging trend of constitutional litigation is that it is not only the person whose interest is adversely affected by an order of a public official who is coming to the court to seek a redress, but also other persons, voluntary societies, representative organizations, trade union etc which are coming in increasing numbers to test the validity of a law or an action of public official in which their own direct personal interests are not involved but in which they have a sufficient interest. It is these groups of new generation of constitutional litigants who are knocking at the door of the Supreme Court to gain entry into the threshold point. Constitutional lawyers, judges and courts all over the world are now facing them and providing adequate response to their loudly raised voice for excess to justice. It will be interesting to see how the Supreme Court of Bangladesh finds its own answer to this issue.

However, lastly our Supreme Court has come forward to unite the knots of procedural technicalities in respect of *locus standi* and respond to the loudly raised voice for excess to justice. It was the case of Dr. Mohiuddin Farooque V. Bangladesh where the Supreme Court extended the scope of writ jurisdiction through which voluntary society having no personal interest in the case would be able to test the validity of a law or an action of the executive affecting public interest. Public interest litigation got great fillip with the emergence of Bangladesh Environmental Lawyers Association (BELA). At the instance of BELA High Court Division prohibited environmental pollution during Dhaka City Corporation election in 1994, and strike by doctors working in the government hospitals causing untold sufferings to the patients. At the instance of BELA High Court Division in 1996 also directed the government to take measures to prevent import of contaminated foods from abroad. In those cases question of *locus standi* was not raised. In 1993, High Court Division held that president of Retired Government Servants' Association has *locus standi* to file a writ petition on behalf of its members and that decision remained stayed till 1996 by the Appellate Division on appeal. BELA brought several public interest litigations for protection of environment, public health, prevention of pollution, enforcement of fundamental right of right to life, freedom of expression to prevent state control of Radio and Television, prevention of child trafficking, prevention of discrimination in public service against blind persons etc. but those are still pending for decision. On the application of a citizen High Court Division directed abstaining members of National Assembly to attend the session of the Parliament. On appeal that direction has been stayed by the Appellate Division. Question of *locus standi* has finally been settled by the Appellate Division in the Flood Action Plan case brought by Dr. Mohiuddin Farooque, founder secretary of BELA in 1996 holding that any member of the public suffering a common wrong, common injury or common invasion of fundamental rights of an indeterminate number of people or any citizen or an indigenous association espousing such cause has *locus standi*. Before and after that decision BELA, Ain o Shalishkendra, Bangladesh Legal Aid Services Trust, Bangladesh National Women Lawyers' Association, Bangladesh Nari Progati Sangha, Bangladesh Mahila Ainjibi Samiti, Bangladesh Mahila Parishad and many public spirited persons brought public interest litigations before the High Court Division for redress of the grievances of the deprived sections of the people. Since *locus standi* has been liberalized in 1996, some of the public interest

litigations has been disposed of by the High Court Division in 1997. In Flood Action Plan Case the government was directed to protect the environment and ecology and to observe relevant provisions of law in executing the flood protection scheme. In 1999, High Court Division directed RajdhaniUnnayanKartripaksha (RajUK) not to reduce the area of park and other common facilities by covering the same into residential or commercial plots in Uttara model town. Earlier in a case, High Court Division declared that park in Gulshan residential area should be maintained free from nuisance for the protection of health and hygiene of the residents of that area. That Division also directed removal of bar fetters of a prison detainee, and also released a woman in handcuffs from safe custody. That Court also stayed construction of a market building on the site earmarked for car parks, filling up of a lake, and eviction of slum dwellers in the Dhaka City. With the liberalization of *locus standi* public interest litigation has great prospect in ameliorating the conditions of the downtrodden and deprived sections of the people, and bringing succor to their sufferings making the assurances of fundamental rights in the Constitution a reality in their lives. But there is also the danger of flooding the court with unnecessary litigations at the instance of busybodies posing as public spirited persons, and thereby unnecessarily burdening the High Court Division which is already overburdened with cases which take years together for disposal, and thus causing undue hardship on the litigant public. This crisis can be averted if the court remains vigilant at the inception, and meticulously examines the *bonafide* of the petitioner to seek redress through public interest litigation.

III. JUDICIAL ACTIVISM

The thorough discussion above made enable us to be optimistic about the future of judicial public interest and constitutional activism in Bangladesh. To give a neat account of PIL's achievements in Bangladesh is not yet possible, but it has certainly had some impact on social ordering and the executive's behavior. For instance, it is because of Public Interest Litigation the environmental law of Bangladesh is gradually taking a pro people shape and has been attracting some measure of legislative-executive activism. Originally linked with the idea of having an accessible judicial system for the wider community, PIL in Bangladesh previously focused on 'the weak' as well as on pure rights. However, while PIL has recently extended its stake to a broader set of constitutional issues, it has not delivered on its promises. It is said that the elitist use of PIL has undermined a much-needed focus on social justice and public empowerment.

a. Remedial Nature: Remedial nature of PIL departs from traditional *locus standi* rules. It indirectly incorporated the principles enshrined in the part IV of the Constitution of India into part III of the Constitution. By riding the aspirations of part IV into part III of the Constitution had changed the procedural nature of the Indian law into dynamic welfare one. *Bandhu Mukti Morcha v. Union of India*, *Unni Krishnan v. State of A.P.*, etc were the obvious examples of this change in nature of judiciary.

b. Representative Standing: Representative standing can be seen as a creative expansion of the well-accepted standing exception which allows a third party to file a habeas corpus petition on the ground that the injured party cannot approach the court himself. And in this regard the Indian concept of PIL is much broader in relation to the American. PIL is a modified form of class action.

c. Citizen standing: The doctrine of citizen standing thus marks a significant expansion of the court's rule, from protector of individual rights to guardian of the rule of law wherever threatened by official lawlessness.

d. Non-adversarial Litigation: In the words of Supreme Court in *People's Union for Democratic Rights v. Union of India*, "We wish to point out with all the emphasis at our command that public interest litigation is a totally different kind of litigation from the ordinary traditional litigation which is essentially of an adversary character where there is a dispute between two litigating parties, one making claim or seeking relief against the other and that other opposing such claim or resisting such relief". Non-adversarial litigation has two aspects: **First**, Collaborative litigation: In collaborative litigation the effort is from all the sides. The claimant, the court and the Government or the public official, all are in collaboration here to see that basic human rights become meaningful for the large masses of the people. PIL helps executive to discharge its constitutional obligations. Court assumes three different functions other than that from traditional determination and issuance

of a decree. (i) Ombudsman- The court receives citizen complaints and brings the most important ones to the attention of responsible government officials. (ii) Forum – The court provides a forum or place to discuss the public issues at length and providing emergency relief through interim orders. (iii) Mediator – The court comes up with possible compromises. **Second, Investigative Litigation:** It is investigative litigation because it works on the reports of the Registrar, District Magistrate, comments of experts, newspapers etc.

e. Crucial Aspects: The flexibility introduced in the adherence to procedural laws. In *Rural Litigation and Entitlement Kendra v. State of U.P.*, Supreme Court rejected the defense of *Res Judicata*. Court refused to withdraw the PIL and ordered compensation too. To curtail custodial violence, Supreme Court in *Sheela Barse v. State of Maharashtra*, issued certain guidelines. Supreme Court has broadened the meaning of Right to live with human dignity available under the Article 21 of the Constitution of India to a greatest extent possible.

f. Relaxation of strict rule of *Locus Standi* vs. judicial restraint: The strict rule of *locus standi* has been relaxed by way of (a) Representative standing, and (b) Citizen standing. In *D.C. Wadhwa v. State of Bihar*, Supreme Court held that a petitioner, a professor of political science who had done substantial research and deeply interested in ensuring proper implementation of the constitutional provisions, challenged the practice followed by the state of Bihar in re-promulgating a number of ordinances without getting the approval of the legislature. The court held that the petitioner as a member of public has 'sufficient interest' to maintain a petition under Article 32. The rule of *locus standi* have been relaxed and a person acting *bonafide* and having sufficient interest in the proceeding of Public Interest Litigation will alone have a *locus standi* and can approach the court to wipe out violation of fundamental rights and genuine infraction of statutory provisions, but not for personal gain or private profit or political motive or any oblique consideration. Court has to strike balance between two conflicting interests. Nobody should be allowed to indulge in wild and reckless allegations besmirching the character of others; and avoidance of public mischief and to avoid mischievous petitions seeking to assail, for oblique motives, justifiable executive and the legislature. It is depressing to note that on account of trumpety proceedings initiated before the courts, innumerable days are wasted, which time otherwise could have been spent for the disposal of cases of genuine litigants. Though the Supreme Court spares no efforts in fostering and developing the laudable concept of PIL and extending its long arm of sympathy to the poor, ignorant, the oppressed and the needy whose fundamental rights are infringed and violated and whose grievances go unnoticed, unrepresented and unheard. By the broader interpretation of *locus standi* the judiciary has gone beyond the typical theory of judicial restraint which has ultimately paved the way of ensuring equity & justice in the society.

g. Epistolary Jurisdiction: The judicial activism gets its highest bonus when its orders wipe some tears from some eyes. This jurisdiction is somehow different from collective action. Number of PIL cells was open all over India for providing the footing or at least platform to the needy class of the society.

h. Abstract Judicial Review: Judiciary has gained a bargaining power over legislative matters with the parliament which results in policy compromise for the sake of public interest.

i. Rolling Review: The judiciary has become concerned more with the following up of the execution and implementation of the rule *Nisi* issued in the respective writ of PIL where in other cases its duty exits as soon as the declaration of the rule. Through the practice of PIL we have get our judiciary pro-active to implementation rather than mere enforcement.

IV. CONCLUSION

Public Interest Litigation is one of the rare topics that interest lawyer and non-lawyer alike. Not only the term of elegance and novelty. This is a topic with a high profile due to its importance, relevance and necessity. The concept of Public Interest Litigation as has emerged into the judicial administration of Bangladesh is yet to nature with the concept of justice as guaranteed by the Constitution. 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' However, it can be said that, PIL which has now come to occupy an important field in the administration of law should not be "public interest litigation" or "private interest litigation". There must be real and genuine public interest involved in the litigation and not merely an interest to nurture adventure. Once nose into for a probe, it cannot also be invoked by a person or body of persons to further his or their personal cause or satisfy his or their personal grudge and enmity. Courts of justice should not be allowed to be polluted by unscrupulous litigants by resorting to the extraordinary jurisdiction. A person acting *bona fide* and having sufficient interest in the proceeding of public interest litigation will alone have *locus standi* and can approach the court to wipe out violation of Fundamental rights and genuine infection of statutory provisions but not for personal gain or private profit or political motive or any oblique consideration.

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 realization is not a cure-all for all types of issues and problems. Retaining a close nexus with the press, the voluntary sector organization is increasingly using new strategies including publication, lobbying and representation. Future of PIL in Bangladesh is very bright. Since PIL is an expression of social consciousness of the fortunate few, its progress is of our social responsibility.

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