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Current Trends of Public Interest Litigation in Bangladesh

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The term "Public Interest Litigation" has been used in the legal domain for about more than one hundred years. This conception was first invoked in the American Jurisdiction in 1876 approximately when German immigrants had been legally helped by American lawyers and it was termed as 'Social Action Litigation' at that time. Though the word public interest litigation was first used in the year 1960 in America. At that period of time the milestone decision in Brown Vs Board of Education was set the path for Public Interest Litigation.[1] However, the legal history accounts a journey of 150 years approximately to make this concept familiar with various legal systems across the world. In the sub-continent, the Indian Jurisdiction first adopted this method as a tool to do justice circumventing the adversarial system. In this article I have attempted to examine the current state of public interest litigation in Bangladesh in a skeleton manner by using empirical method of research.

The legal system of Bangladesh adopted the public interest litigation method since its very inception and we can divide the journey into three phases. Before examining the phases of the journey it is worthful to define the meaning of the public interest litigation from the perspective of this article. Here we used the public interest litigation as a term to express entire pro bono publico works by the socially aware persons for the welfare of the society. The first phase of journey started with ***Kazi Moklesur Rahman Vs. The Govt. of Bangladesh,*** popularly known as the ***Berubari*** case.[2] In that case the locus standi of the petitioner was established by the Hon'ble Supreme Court though the writ petition was dismissed due to its being pre-mature. But the barren period came, the second phase of journey, where no development was actually initiated. At this time the state power was over taken by the military after the tragic killing of the founder of the nation. The first military rule was succeeded by another and ended only in 1991 when a public upheaval toppled the autocratic regime of Ershad. The third phase of public interest litigation started just before the ousting of the autocratic ruler Ershad. This time the 8th amendment was challenged by a litigant and this initiative has ultimately been turned into a public interest litigation case.[3] A significant number of legal experts were involved in the hearing to defend the sanctity of the constitution and the judiciary.

After this grand opening, the real journey started where **Dr. Mohiuddin Farooque** led the show with the ***Flood Action Plan case***, popularly known as the ***FAP Case***,[4] challenging the government initiative in Tangail district flood control project which was allegedly against the welfare of the people. In that writ petition the petitioner alleged that the action plan was not only the cause of environment degradation and ecological imbalance but also violates several laws of the land. The writ was first turned down by the

[1] 347 U.S. 483 (1954)
[2] Kazi Moklesur Rahman Vs. State, 26 DLR (AD) P.44
[3] Anwar Hossain Chowdhury Vs. Bangladesh, 1989 BLD (SPL).
[4] Dr. Mohiuddin Farooque Vs. Bangladesh, 49 DLR (AD) P.1

Hon'ble High Court Division; but on appeal the Hon'ble Appellate Division opened the door of public interest litigation by liberalizing the rule of standing. After this opening the Bangladeshi jurisdiction entertained many cases in the public interest; and the horizon diversified. In the Flood Action Plan case Mr. Justice ATM Afzal set two principles for invoking Public Interest Litigation. Firstly, where there is a threat to fundamental right of citizens any citizen can invoke the jurisdiction, secondly where a constitutional issue of grave importance is raised 5. Almost the same principles are echoed by Mr. Justice Hamidul Haq and Madam Justice Nazmun Ara Sultana in Chowdhury Mahmood Hasan and others Vs Bangladesh and others.[5] In their language, "A person not personally aggrieved may also come if his heart bleeds for his less fortunate fellow for any wrong done by the Government. When an action concerns public wrong or invasion on the fundamental rights of indeterminate number of people, any member of the public suffering the common injury has the right to invoke the writ jurisdiction."[6]

Now various organisations have come forward to help people specially those who are in marginalised segments of society, even sheltering the victims, providing social support and enforcing alternative dispute resolutions. Moreover, government legal aid is available for the poor litigant persons.

Many legal aid groups have emerged, of them Bangladesh Legal Aid and Services Trust (BLAST), Ain-O-Shalis Kendro, BRAC Human Rights and Legal Services, Madaripur Legal Aid Association are prominent and they contributed immensely. Their effort to the cause have made Bangladesh a pioneer in this field. In recent years the legal aid organisations have contributed a lot in this area by using constitutional authority of the higher court. The **Shapon Chowkidar Case**, led by BLAST, open the door for government job opportunities to be provided to the persons with disabilities.[7] After the death of Rubel, a university student, human rights organisations led by BLAST successfully moved a writ petition in which the Hon'ble High Court set a guideline about police remand. On appeal by the government, the Hon'ble Appellant Division of the Supreme Court of Bangladesh also was pleased to uphold the Hon'ble High court Division's Judgment with some modifications.[8] Very recently the two finger test used on rape victims has been challenged by the by BLAST and other organisations. In that writ petition the existing medical evidence collection guidelines regarding rape victims have been questioned.[9]

There are some very positive achievements also occurring regarding child rights issues. The Hon'ble Court upon hearing of a writ petition has declared corporal punishment in schools and other educational institutions illegal[10] and on the basis of this judgment the government has band the corporal punishments in the educational institutions. The Hon'ble Court in response to another writ petition[11] also banned child labour.

[5] Ibid. P.3-4
[6] 54 DLR (HC) P.537
[7] Shapan Chowkidar Vs. Bangladesh, Writ Petition Nos.2867 of 2010 and 2932 of 2010. (Pending).
[8] Bangladesh and others Vs. BLAST and others, 2016 BLT (SPL)
[9] BLAST and others Vs. Bangladesh and others, Writ Petition No.10663 of 2013. (Pending)
10 63 DLR (HC) P.463
[11] 63 DLR (HC) P.95

On the other hand responding to the initiatives of the pro-bono persons and organisations the Hon'ble Court declared Fatwa by unauthorized persons illegal.[12] This development was not easy because of vested interest groups relating to so called religious organisations. Pressure was tremendous; but the Hon'ble Court and activists made it possible.

Apart from these initiatives of civil society regarding public interest litigation, the superior court also came down heavy handedly in response to various legal irregularities. These initiatives have come as 'suo moto' manner and thus have been identified by the legal expert as judicial activism. The first instance of this kind of act was ***State Vs. Deputy Commissioner Shatkira and others***.[13] One Nazrul Islam was in prison for twelve years without trial and upon a newspaper report the Hon'ble Court issued suo moto rule and ultimately the victim was released from the prison. Several other instances of such pro bono activism have decorated our judiciary.

In spite of all these positive approaches, there are also various initiatives by vested interest groups to secure their interest through public interest litigation process. Some highly controversial political issues have been put before the superior court for adjudication. This type of initiatives created embracing situations for public interest cause. Bangladesh Sangbadpatra Parishad Vs. The Government of Bangladesh has been termed by the Court as 'not pro bono publico' act.[14] This writ was initiated by the owners of the newspapers challenging the constitution of Wage Board. Recently in another case, 'National Board of Revenue Vs. Abu Saeed Khan',[15] the Hon'ble Appellate Division of the Supreme Court elaborately discussed about the unfair motive of the petitioner's party and allowed the appeal by setting aside the Hon'ble High Court's order. In this judgment the Hon'ble Appellate Division set a guide line for public interest litigation. The relevant portion of the said judgment as follows:

"We reemphasize the parameters within which the High Court Division should extend its discretionary jurisdiction in entertaining a PIL.

1. Before entertaining a petition the Court will have to decide the extent of sufficiency of interest and the fitness of the person invoking the discretionary jurisdiction.
2. The Court which considering the question of bonafide in a particular case will have to decide as to why the affected party has not come before it and if it finds no satisfactory reason for non-appearance of such affected party/it may refuse to entertain the petition.
3. If a petition is filed to represent opulent members who were directly affected by the decision of the Government or public Authority, such petition would not be entertained.
4. The expression 'person aggrieved' used in Article 102(1) means not any person who is personally aggrieved but one, whose heart bleeds for the less fortunate

[12] 63 DLR (HC) P.1
[13] 45 DLR (HC) P.643
[14] 43 DLR (AD) P.126
[15] 18 BLC (AD) P.116

fellow beings for a wrong done by any person or authority in connection with the affairs of the Republic or a Statutory Public Authority.

5. If the person making the application on enquiry is found to be an interloper who interferes with the action of any person or authority as above which does not concern him is not entitled to make such petition.
6. The Court is under an obligation to guard that the filing of a PIL does not covert into a publicity interest litigation or private interest litigation.
7. Only a public spirited person or organization can invoke the discretionary jurisdiction of the Court on behalf of such disadvantaged and helpless persons.
8. The Court should also guard that in processes are not abused by any person.
9. The Court should also guard that the petition is initiated for the benefit of the poor or for any number of people who have been suffering from common injury but their grievances cannot be redressed as they are not able to reach the court.
10. It must also be guarded that every wrong or curiosity is not and cannot be the subject matter of PIL.
11. No petitions will be entertained challenging the policy matters of the Government, development works being implemented by the Government, Orders of promotion or transfer of public servants, imposition of tax by the competent authority.
12. The Court has no power to entertain petition which trespasses into the areas which are reserved to the executive and legislative by the Constitution.
13. A petition will be entertained if it is moved to protect basic human rights of the disadvantaged citizens who are unable to reach that Court due to illiteracy or monetary helplessness.
14. Apart from the above, the following some categories of cases which will be entertained;
    a. for protection of the neglected children.
    b. Non-payment of minimum wages to workers and exploitation of causal workers and complaints of violation of labour laws (except in individual case).
    c. Petitions complaining death in jail or police custody, or caused by law enforcing agencies.
    d. Petitions against law enforcing agencies for refusing to register a case despite there are existing allegations of commission of cognizable offences.
    e. Petitions against atrocities on women such as, bride burning, rape, murder for dowry, kidnapping.
    f. Petitions complaining harassment or torture of citizens by police or other law enforcing agencies.
    g. Petitions pertaining to environmental pollution, disturbance of ecological balance, drugs, food adulteration, maintenance of heritage and culture, antiques, forest and wild life.
    h. Petitions from riot victims."

Besides the constitutional scope there are some statutory avenues to use for public interest litigation. These are included in the Civil Procedure Code, the Criminal Procedure code and other environmental laws. These laws can be used before the lower judiciary for the purpose of protecting public interest. One can use section 91 and 92 of the Code of Civil Procedure for public interest and also can use Order 1, Rule 8 of the Code in a

representative capacity. Any member of society can use section 133 and 144 of the Code of Criminal Procedure for the peace of the society and that can also be possible under sections 269, 278, 290 and 292 of the Penal Code. In recent years pro bono activists are also using environmental laws for the purpose of public interest litigation in a limited way. These avenues should seriously be considered by the activists along with the constitutional jurisdiction, as they may be more effective and relevant in particular situations.

In conclusion, in spite of some short-comings and the presence of vested interest groups, public interest litigation has already taken an institutionalized shape in our jurisdiction. Our superior judiciary, with its landmark judgment in the NBR case, has set a guideline for pro bono cases without limiting the purpose. Moreover, the horizon of the pro bono activities is now diversified effectively by the social action activists and organisations.