Chapter 1

INTRODUCTION

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

In Bangladesh concerned citizens and organizations have challenged illegal detention of an innocent person for 12 years without trial, importation of radio active milk, Environmental damage resulting from defective flood action programme, appointment of the Chief Metropolitan Magistrate without prior consultation with the Supreme Courts and so on. Within its scope, which is continuously expanding, PIL includes cases involving poverty related problems, police atrocities, illegal detention, environmental and consumer utters, health related problems, rights of children and women, minority affairs and other human rights issues.[1]

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

This system works well in most of the cases as long as they involve private disputes where the strengths of the parties are more or less evenly balanced. But when one of the parties is disproportionately poor and powerless, it becomes very difficult to litigate on equal terms. The disadvantaged party can afford neither the

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[1] Naim Ahmed, *Public Interest Litigation: Constitutional Issues and Remedies,* 1st ed. (Dhaka: Bangladesh Legal Aid and Services Trust (BLAST), 1999). pp. 1-3.

best lawyers not the other resources available to his adversary. In Private interest cases, this is the basis for providing legal aid to the poor. The same problem crops up in public interest matters as well. Those who are suffering, the people as a whole or a segment of the society, are often poor, ignorant, unorganized or afraid to approach the court. Since indifference and absolute reliance on the adversarial model would cause injustice, social activists advance PIL believing that equal treatment of unequal is inequality'.[2]

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 procedure that negates 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.[3]

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

Funded by voluntary sector organizations, lawyers organized themselves into public interest law firms. Success of PIL in the USA Influenced other jurisdictions including Canada, Australia and England The English judges, and subsequently the lawmakers, gradually liberalized the principles of *locus standi* enabling concerned citizens to approach the court for public interest. However, the most remarkable development of PIL took place in India in the early 1980s. In the aftermath of the emergency period, there was a rapid expansion of three press and

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[2] *Ibid.*

[3] *Ibid.*

activities of voluntary sector human rights groups a number of judges proceeded as social activists and induced and led a major change of the traditional law by introducing PIL. Accordingly, any person can active the court to safeguard the interest of the public, especially those of the poor and vulnerable section of the community.

Chapter 2

GENERAL CONCEPT ABOUT PIL

2.1 Meaning of PIL

Actio Popularis, Writ and Public Interest Litigation- these three terms are interrelated and may be denominated as indivisible. First, I should explain the term '*actio popularis'*.

This term comes from the very ancient Roman law. It means such action to obtain remedy by a person or a group in the name of the general public, or other abstract entities such as morale, etc. without being or directly in an authorized way representing the victim.[4] The undeveloped concept of public interest litigation can be traced in the system of *actio populaies* of Roman law which permitted anyone in the society to initiate an action for a public delict in the court of law or to bring an action of restitution or injunction for the protection of public property or a religious charitable property. Thus the system of *actio populaies* of Roman law can be described as historical basis of the present form of public interest litigation.[5]

The expression next is 'writ', which is the most popular and over the years it's playing significant role in upholding justice not only in our country but many other countries all over the world. Historically it was originated and developed in British legal system. In law, a writ is a formal written order issued by a body with administrative or judicial jurisdiction.[6] It may also be defined as a written

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[4]*Actio popularis*, [http://sim.law.uu.nl/sim/thesaurus.nsf/289cec490a7bbca5c125664f00335177/ff67ef5aec8fe263c125664300460628?OpenDocument, accessed on 10 March 2010].

[5] Kaylash Rai, *Administrative Law*, (Allahbad: Central Law Publications, 2005), p.327.

[6] Public interest litigation, [http://en.wikipedia.org/wiki/Writ, accessed on 12 March 2010].

document by which one is summoned or refrain from doing something.[7] As the governmental functions increased and the concept of rule of law come into sight and the courts become independent, writ came to be prerogative of the people. By gradual evolution, it becomes a strong machinery to enforce fundamental rights for the person suffers injury. Five kinds of prerogative writs have been introduced in Bangladesh through Article-102 (ii) of the Constitution. Those are- *habeas corpus*, *quo warranto*, *prohibiton*, *mandamus*, and *certiorari*.

It is assumed that the expression 'Public Interest Litigation' may generated from the idea of the above two terms. Through gradual evolution we find PIL in recent yeas in a new dimension but the skeleton is *actio popularis* and writ. It is a special type of litigation which may be distinguished from ordinary litigation in the following way.

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

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

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

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

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

[7] Md. Abdul Halim, *Constitution, Constitutional Law and Politics: Bangladesh Perspective*, (Dhaka: BCC Foundation, 2003), p.369.

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

2.2 Definition of PIL

Public Interest Law is the name that has recently been given to efforts to provide legal representation to previously unrepresented groups and interests. Such efforts have been undertaken in the recognition that the ordinary market place for legal services fails to provide such services to significant segments of the population and to significant interests. Such groups and interests include the poor, environmentalists, consumers, racial and ethnic minorities and others.

According to Stroud's Judicial Dictionary "Public Interest- A matter of public or general interest does not can that which is interesting as gratifying curiosity or a love of information or amusement; but that in which a class of the community have a pecuniary interest, or some interest by which their legal rights or liabilities are affected. [8]

According to Black's Law Dictionary 'Public Interest' is defined as: "Public Interest- Something in which the public, the community at large, has some pecuniary interest, or some interest by which their legal rights or liabilities are affected. It does not mean anything so narrow as mere curiosity, or as the interests of the particular localities, which may be affected by the matters in question. Interest shared by citizens generally in affairs of local. State or National Government 'Public Interest Law' has been a uniquely American development. It has been defined in many ways.[9]

The Council for Public Interest Law wet up by the Ford Foundation in the USA, in its Report," has opted for a broad definition. "Public Interest Law" is the name that has recently been given to efforts to provide legal representation to

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[8] Mamta Rao, *Public Interest Litigation: Legal Aid and Lok Adalats*, 2nd ed. (Lucknow: Eastern Book Company, 2004), pp. 9-11.

[9] *Ibid.*

previously unrepresented groups and interests include the poor. Environmentalists, consumers, racial and ethnic minorities, and others.[10]

The American Bar Association has given a much wider definition of Public interest Law involving lawyers in the poor bono process generally. According to this definition, Public interest Law means: “Legal service provided without fee or at a substantially reduced fee which falls into one or more of the following areas.

1. Poverty law;
2. Civil Rights Law;
3. Public Right Law;
4. Charitable Organization Representation;
5. Administration of Justice.[11]

2.3 When a PIL can be filed

A PIL can be filed only in a case where 'public interest' at large is affected. Because merely one person affected by state inaction not a ground for a PIL.

Following are some of the possible areas where a PIL can be filed.

1. Where a factory or industrial unit is causing air pollution and people nearby are getting affected.
2. Where, in an area or street there are no streetlights, causing inconvenience to commuters.
3. Where there is regular loud 'making' in a residential area causing noise pollution?
4. Where some construction company is cutting down trees, causing environmental pollution.
5. Where poor people are affected because of government's arbitrary decision to impose heavy 'tax'.

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[10] *Ibid.*

[11] *Ibid.*

6. For directing the police/jail authorities to take appropriate decisions in regards to jail reforms, such as segregation of convicts, delay in trial, production of under trial persons before the court on remand dates.
7. For abolishing child labor, and bonded labor.
8. Where rights of working women are affected by sexual harassment.
9. For keeping a check on corruption and crime involving holders of high political office.
10. For maintaining roads, sewer etc in good condition.
11. For removal of big hoarding and signboard from the busy road to avoid traffic problem.

2.4 Who can file for PIL

Earlier it was only a person whose interest was directly affected along with others, whereby his fundamental right is affected, that used to file such litigation. Now, the trend has changed, and any public-spirited person can file a PIL on behalf of a group of persons whose rights are affected. Hence, it is not necessary that the person filing a case should have a direct interest in that PIL. For example, a person in Dhaka can file a PIL for that a cracker factory in Rajshahi is running on child labor; or a citizen can file a PIL challenging government's arbitrary decision to impose heavy 'tax' that is affecting the poor people, though the citizen filing the PIL may not be personally so much affected by that; similarly a lawyer can file a PIL for release of some under trial in a jail, who has spent more number of years in jail than the period prescribed as punishment for persons the offence they are being tried for. Hence, it is clear that any person can file a PIL on behalf of a group of affected people. However whether a PIL should be allowed or not will depend on the facts of each.

A PIL can be filed when the following conditions are fulfilled**:**

- There must be a public injury and public wrong caused by the wrongful act or omission of the state or public authority.
- It is for the enforcement of basic human rights of weaker sections of the community who are downtrodden, ignorant and whose fundamental and

constitutional rights have been infringed.

- It must not be frivolous litigation by persons having vested interests.[12]

2.5 Against whom a PIL can be filed

A PIL can be filed only against the State, in some cases against municipal authorities, but not against any private party. However a 'private party' can be included in a PIL as a 'Respondent' only after making the state authority or authorities concerned a party or parties. For example, a tannery factory in Hazaribagh of Dhaka is causing pollution, then people living nearly, or any other person can file a PIL against (a) the government, (b) the Ministry of Forest and Environment, and also against (c) that particular factory. However, it is to be mentioned that a PIL is filed in the same manner as a writ petition is filed. Proceedings in a PIL commence and carried on in the same manner, as in a writ petition. However, in between the proceedings if the judge feels he may appoint a commissioner to inspect allegations of anti-public interest activities etc.[13]

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[12] PIL-who can file, [http://www.virtualpune.com/citizen-centre/html/file-pil.shtml, accessed on 12 March 2010].

[13] Winkipedia, [http://en.wikipedia.org/wiki/Public Interest litigation, accessed on 6 March 2010].

Chapter 3

ORIGIN AND DEVELOPMENT OF PIL

3.1 PIL in England

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

Legal aid in England, although practiced in one form or another prior to the 2nd world war, become firmly entrenched since 1949. A major reform began with the creation of the Legal Aid and Advice Scheme and entrusting it to the Law Society, the national association of solicitors.[14] The emergence of so called 'welfare state' attempted to ensure that the poor, for there individuals problems, get some sort of legal assistance. However, further major developments were made only in the early 1970s when the legal aid system was recognized incorporating the modern concepts.[15] In fact, litigation in social or public interest, public advocacy, formation of public opinion for social interest, etc. did not start earnestly till the mid 1960s.

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

Successive governments, eager to please the electorate, created another group of institutions. The Parliamentary Commissioner for Administration investigates

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

[15] *Legal Advice & Assistance Act 1972* and *Legal Aid Act 1974.*

complaints against the central government, health service, local authorities and the police. Voluntary small claims courts aim to aid the consumer in the direction of informal arbitration. The office of Fair Treading regulates competition and protects certain consumer interests. Parliament has established semi-autonomous bodies to work or racial issues.

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

Gradually number liberal judges, including Lord Denning, extended the meaning of term '*locus standi'* enabling the activities to approach the court. Significant changes were brought in 1977-1981 when a set of new rules liberalized applications for judicial review.[16]

It must note, however, that the success of the England activities in terms of PIL appears to have been less pronounced then the Americans. One reason is the difference of legal and political culture – the Americans are more litigation oriented then the English. Another reason involves the history of the England administrative law. It has been pointed out that during and after 2nd world war, administrative law in England become conservative and non-adventures. The development of administrative law started in earnest during the 1960s. Thus it took some time for the law to adjust with the growing demand of social justice.

English activities and judges, when they use the term public interest law, stress the peculiarities of the England system. Whenever the litigation oriented American approach is taken disregarding the English circumstances, it is usually treated as 'legal imperialism'. In fact, the failure of PIL to instantly emulate the American success story is said to be due to the failure to appreciate the cultural difference of two countries.

[16] Order 53 rules 3(5) of the rules of the Supreme Court were amended in 1977 and were later incorporated in the Supreme Court act 1981, 31(3).

3.2 PIL in America

The term PIL, as it is now known, and the associated term 'public interest law1, were first coined in the United States. While arrogant capitalism and excessive individualism often typifies the American society, there is also a strong tranquil current of collectivism and social mindedness. This concern for the society has brought many changes during this century. In the legal field, it has brought new techniques, mechanisms, approaches and procedures in favour of the collective interest. Public interest law includes a number of these developments including legal aid, research, formation of public opinion, lobbying and litigation conducted by specialized lawyers and organizations. PIL, litigation in the interest of the public, is thus only one of the various methods of the greater movement of public interest *law.*[17]

There are a number of movements that may be identified as the roots of public interest law and have shaped its 'patterns of organization, modes of financing and choices of strategies'.[18]

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

The second root of public interest law lies in the works of the Progressive Era Reformers. At the turn of the twentieth century, during the time of rapid industrialization and social and political changes, a movement aimed to check the

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[17] Naim Ahmed, *ibid,* p.11.

[18] *Ibid.*

evils of unregulated business enterprises achieved remarkable success. New legislation aimed to protect the workers and consumers and monitoring institutions like the Federal Trade Commission came up to defend collective rights.

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

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

3.3 PIL in India

It has been suggested that the judges and scholars pioneering PIL in India were influenced and inspired by the American development.[19] Especially, Bhagwati J cited cappelletti in the judges Transfer case and favorably discussed his idea in subsequent article. Western scholars including cappelletti were discussed by other Indian writers as well, but this generally happened when the concept of PIL had already been introduced and accept in India.

Perhaps the primary and most important factor that prompted the development of PIL in India was a strong sense of social consciousness of a number of judges. By the late 1970s, even after more then three decades of independence, India was

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[19] Naim Ahmed, *ibid,* p.12.

still an underdeveloped and poor third world country with millions of people barely surviving in abject poverty. The state not only failed to ameliorate the conditions of the poor, it faltered to incorporated substantial distributive or social justice for the messes. The legislative was seems insensitive to the poor and merely a forum for politicians who were desperate to release there personal ambitions. The executive also failed to meet the expectations of the people and there were widespread governmental inefficiency, mistake and lawlessness.

The situation becomes all the more precarious during the emergency period of 1975-77. No the one hand, the democratic institutions were under pressure and the judiciary increasingly subordinate to the executive and the legislature. On the other hand, it was a populist period led by Indira Ghandi when many judges, including justice Krishna Iyer and Bhagwati, become part of a nation-wide movement for legal service and become people-prone. In the immediate aftermath of the emergency, the perception of the failor of the governmental branches to solve socio economic problem was amplified as it was shared and projected by the free press. Finding no other alternative, a number of conscious citizens, non-governmental organizations and social action group started knocking at the door of judiciary. The result was judicial activism, related to the so called 'Judicial populism', which may be understood as a part of the courts effort to retrieve a degree of legitimacy following period.[20]

3.4 PIL in Pakistan

As India, The Pakistani activities stressed on social justice provisions of Pakistani Constitution. Yet one major difference is that in the light of this special status of Islam in Pakistan, PIL activities were required to establish that the concept and techniques of PIL are in conformity with the Islamic provisions as enshrined in the Pakistani Constitution. In Pakistan, therefore, social justice means Islamic social justice.[21]

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[20] Naim Ahmed, *ibid,* p.13.

[21] *Ibid.*, p.86.

Pakistan is an Islamic Republic where Islam as the state religion. The constitution contains a number of very important Islamic social justice provisions. Out of these, the Preamble or the objectives resolutions and the principles of policy are very significant.

The preamble, containing the objectives resolution, declares the sovereignty of Allah alone which is delegated to the state of Pakistan through its people for being exercised within the limits prescribed by Him as a sacred trust. Its also which is declare that the principles of democracy, freedom, equality, tolerance and social justice as enunciated by Islam shall be enabled to the order there lives in the individuals and collective spears in accordance with the teachings and requirements of Islam as set out in the Holy Quran and the sunna. Chapter two of the constitution provides for the principle of policy. They includes, among other thing, the duty of the state to take step to ensure the Islamic way of life[22] (Article - 31), promotion of social justice and eradication of social evils[23] (Article - 37) and the promotion of social and economic well-being of the people.

The fundamental right as guaranteed by the constitution have been discussed in part two chapter one (Article 8-28). They generally provides first generation or political rights, such as the right to life or liberty, freedom of movement, assembly and speech, right to property, right to equality and non-discrimination etc.

Article 199 provides for the write jurisdiction of the High, giving it power to make order to enforce the fundamental rights guaranteed by the Constitution. The Supreme Court has similar power to issue write under Article 184(3) when it consider that question of public importance with reference to the enforcement of any fundamental rights is involved.[24]

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[22] The *Constitution of Islamic Republic of Pakistan*, Article 31.

[23] *Ibid,* Article 37.

[24] Naim Ahmed, *Ibid.*, p. 87.

Chapter 4

DEVELOPMENT OF PIL IN BANGLADESH

4.1 Development of PIL in Bangladesh

The colonial legacy is responsible for many of the shortcomings of the Bangladeshi legal system. The fact remains, however, that even after gaining independence twice in the last fifty years, we find the system fundamentally unaltered. When the British started to reform, change and eventually transform the legal system inherited from the Mughals, they attempted to import and transplant the common law system and the Anglo-Saxon jurisprudence. In many cases this was compromised because of the difference of society, culture, politics and religion. But essentially, the rulers believed that they were introducing the common law system for the betterment of the colony. In any case, the prime motive was to create a system that would help to rule the colony effectively.[25]

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

Muslim dominated East Bengal joined Pakistan and the legal developments in Pakistan and India took two separate roads after 1947. Although in both countries the written constitutions attempted a conscious departure from the colonial legacy, Pakistan was not as successful as India in maintaining democratic practices in the political field. For Bengalis, the Pakistan period was full of clashes and power

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[25] Naim Ahmed, *ibid*, p.20.

struggles between different interest groups and especially between the Western and Eastern part of the country. This was made worse by martial laws and the absence of democratic processes. The Constitution was repeatedly abrogated, discarded and written from scratch. A natural healthy development of law was, consequently, frustrated.

The Constitution of Bangladesh has a chequered history. From the very beginning, it was subject to major amendments that tended to restrictively redefine the limits of fundamental rights. One of these early amendments, the Third Amendment, was triggered by *Kazi Mukhlesur Rahman v. Bangladesh and another*,[26] popularly known as the *Berubari case*.[27]

4.2 Initial Experience and the *Berubari* Case (1972-74)

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

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

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[26] 26 (1974) DLR, 44.

[27] Naim Ahmed, *ibid.*, p. 21.

parliamentary approval and enactment, the government soon initiated the third Amendment of the Constitution.

The effect and influence of the Berubari case is enormous. It has often been considered as the starting point of PIL in Bangladesh where "the Court went very close to the doctrine of public interest litigatiori". Being the judgment of the Appellate Division, Berubari was resorted and referred to whenever a widening of the standing rule was sought. This case may be regarded as an earl achievement of the young Bangladeshi jurisdiction in its attempt to assert its creative authority. This case, it has recently been claimed in the FAP 20 case, is unique since it precedes the PIL developments of the neighboring jurisdictions.[28] This argument is summed up by Afzal CJ in the FAP 20 case as he says:

It is a matter of some pride that quite early in our Constitutional journey the question of *locus standi* was given a liberal contour in that decision by this Court at a time when the Blackburn cases were just being decided in England which established the principle of "sufficient interest" for a standing and the doctrine of public interest litigation or class action was yet to take roots in the Indian jurisdiction.[29]

4.3 Constitutional Provision for Development of PIL in Bangladesh

Compared with the position at Common Law where *locus standi* is determined by an examination of the merits of the application for judicial review, in Bangladesh, standing is thought to be always a 'threshold' question. In *Mohiuddin Farooque v. Bangladesh,* it was held that an association such as an environmental pressure group has standing to challenge the legality of the 1988 Bangladesh Flood Control Plan. It was an 'aggrieved person' within the meaning of Articles 102(1) & 102(2) of the Constitution. In this case the spirit of the Constitution was invoked to ascertain the meaning of the words 'any person aggrieved' meaning only and exclusively individuals and excluding consideration of the people as a collective

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[28] *Dr. Mohiuddin Farooque v. Bangladesh and Others*, (1997), BLD, AD.1.

[29] Naim Ahmed, *ibid*, p.22.

and consolidated personality would be a stand against the Constitution. The Constitution as a whole, including the fundamental rights, ought to be considered in deciding the question of standing. The Constitution of Bangladesh provides a framework for economic and change to be effected through legislation. It has enumerated in its First Schedule enactments which would be protected from judicial review. Article 47 expressly specifies certain types of legislation involving economic restructuring which would not be held void on the ground of inconsistency with fundamental, rights if Parliament expressly declared that such legislation was made to give effect to any of the fundamental principles of state policy.

The Bangladesh Constitution has thus gone beyond both the Indian and Pakistani Constitutions by laying down that these principles would not only be applied by the state in the making of laws as provided in the Indian Constitution, but would also be a guide to the interpretation of the Constitution and the other laws of Bangladesh and would form the basis of the work of the state and its citizens. The principles enumerated in Part II (Article 8 to 25) provide a mandate for economic and social change to the executive and the legislature which are directed to adopt measures to remove disparity and ensure equality of opportunity to all citizens. Article 15 also declares it to be a responsibility of the state to provide the basic necessities of life including food, clothing, shelter, education and medical care. These principles are thus not intended to operate as pious declarations but as directives to the state, which comprises not only the legislature and the executive but also the judiciary. The Constitution was thus clearly conceived as a charter for a programme of extensive affirmative action. It has been observed in another context: Affirmative action by its nature involves the disturbance of inherited rights.

It is redistributors rather than conservative in character. It is not a brake on change but rather a regulator of change, designed on the one hand to guarantee that change takes place, and on the other hand that it proceeds in an orderly way according to established criteria. Affirmative action enables all the interested parties to make an appropriate contribution, or at least to know where they stand.

It presupposes the concentration of diverse force in an agreed direction, with the State playing an ultimately decisive, though not necessarily exclusive, role in the process.

Public interest litigation can play a critical role by invoking Article 8 of the Constitution to support interpretation of legislation in a manner which advances the implementation of the fundamental principles of state policy. Article 8 was so invoked in a recent case in Bangladesh to challenge the constitutionality of the dissolution and abolition of elected local councils at the Thana level.

The fundamental principles of state policy read together with fundamental rights spell out a unified design of a political, social and economic order which the Constitution pledges to secure for the people. It thus not only mandates each organ of the state to implement those principles but also provides a valuable reservoir which conscious citizens can draw upon for the purposes of public education, for mobilization of public opinion and indeed to initiate public interest litigation to realize the pledges of social and economic justice made by the Constitution.

4.4 The Need to Expand *Locus Standi* in Bangladesh

The Constitution of Bangladesh provides that every person is entitled to equal protection of law (Article 27) and to be treated only in accordance with law (Article 31). The High Court Division of the Bangladesh Supreme Court can be activated under Article 102 of the Constitution for enforcement of these rights 'on the application of any person aggrieved'. In order to appreciate the underlying nuances of the expression 'a person aggrieved', it is necessary to understand the abject of Article 102 in the context of the constitutionally guaranteed fundamental rights, the mechanism for their enforcement (as provided by Article 102(1) read with Article 44) and the conditions under which the writ jurisdiction under Article 102(2) may be invoked. Article 102(2) provides:

'The High Court Division, may if satisfied that no other equally efficacious remedy is provided by law on the application of any person aggrieved makes an order.'[30]

Article 102 thus provides a remedy in cases where the law does not provide for an equally efficacious remedy. It is thus manifestly intended to expand available remedies and cannot be construed restrictively. This Article may well have been framed in consideration of persons who would not otherwise by able to avail of equally efficacious remedies under any other law. Remedies under existing laws may be inefficacious for a number of reasons. In particular, the poor, the illiterate and the weak may be unable to obtain access to law where they cannot afford a lawyer to pay court fees and other ancillary expenses. Besides, other remedies may be time consuming and cumbersome in procedure. The writ jurisdiction under Article 102 holds a particular promise for the poor, the illiterate and the disadvantaged.

There is no scope therefore to interpret Article 102 restrictively except for those who are preoccupied with an outmoded concept of *locus standi*. Writing from the standpoint of Anglo-Saxon jurisprudence, two prominent authors had commented, more than two decades ago:

Restrictive rules about standing are in general inimical to a healthy system of administrative law. If a plaintiff with a good case is turned away, merely because he is not sufficiently affected personally that means that some government agency is left free to violate that law and that is contrary to the public interest. Litigants are unlikely to expend their time and money unless they have some real interest at stake. In rare case where they wish to sue merely out of public spirit they should be discouraged.[31]

There has been no detailed deliberation as to the requirements of 'an application' for the purpose of Article 102. The Court therefore may not find it difficult to treat a post card addressed to it as an application and more so since

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[30] Sara Hossain, *Public Interest Litigation in South Asia: Rights in Search of Remedies*, 1st ed., (Dhaka: The Elora Art Publicity, 1997), p.66.

[31] *Ibid.*

such a treatment of a post card is well founded in the oldest cases on PIL and has been followed in many jurisdictions since its first use in the U.S. Supreme Court in 1876. ‘Procedure is not an alibi to strangle the right to life, nor a priestly ceremonial for a decent burial of a Fundamental Liberty’, as pointed out by Justice Krishna lyer.

4.5 PIL in the Code of Civil Procedure

Sections 91 and 92 of the CPC offer some scope for PIL. Section 91 of the CPC concerns suits relating to public matters and public nuisance. Thus, in a case where an act not warranted by law or an omission to discharge a legal duty causes inconvenience or damage to the public, an action in the form of PIL may be brought before the courts. Obstruction of a public highway by occupying and encroaching upon a portion thereof or for example, throwing garbage in a crowded residential area resulting in conditions which are uncongenial to the health of city dwellers, are matters which may be redressed through PIL. Section 92 of the CPC concerns public trusts that is trusts created for the benefit of the general public, and similarly opens an avenue for PIL, i.e., a suit of a representative character. The subject matter of such suits is confined to public trusts and as such, actions will only lie against the trustee and may only be initiated with the consent of the Attorney-General. We can, however, find an avenue for PIL in Order 1, Rule 8 of the CPC, which provides for the institution of a suit at the instance of a member of the public in a representative capacity.

4.6 PIL in the Code of Criminal Procedure

Before the Constitution came into force in pre-partition India, section 491 of the CrPC took the place of the high prerogative writ of the common law of England. Under section 491 CrPC., the High Court Division of the Supreme Court of Bangladesh is empowered to issue a writ on an application by a prisoner or at the instance of any other person on his behalf or by the Court *suo moto*, in order to

secure the liberty of a person imprisoned without any lawful authority or taken into custody in direct violation of his fundamental right to free movement.[32]

In a recent case, the High Court Division *suo moto* passed an order widening the scope for PIL in such cases on the basis of a newspaper report.[33] This order in such circumstances opened a new horizon for PIL in Bangladesh. The High Court Division ordered the Deputy Commissioner, the Superintendent of Police and the tailor of the District of Satkhira to show cause as to why one Nazrul Islam had been detained. In jail and to produce him before the Court. The Court acted on the basis of a report published in the Daily Ittefaq oil 6 October, 1992. Justices M.M. Haq and Mahfuzur Rahman of the High Court Division issued the order. As no action was taken by any public spirited individuals, the learned judges initiated the action from a sheer sense of their duty as the guardians of the fundamental rights of citizens.[34]

4.7 PIL in the Penal Code

There are provisions in the PC relating to offences affecting public health, safety, Convenience, decency and morals. Section 268 of the PC deals with an offence against the public in general, which may be caused either by an act which is regarded as an annoyance to the public or an omission to do an act required, for the common welfare of the public. Section 269 of the PC relates to a negligent act likely to spread infection or disease dangerous to life. Section 278 [35] of the PC injurious to health. Section 292 of the PC relates to pornography. This last section was inserted for the purpose of giving effect to Article I of the International Convention for the Suppression of the Circulation of and Traffic in Obscene Publications.[36]

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[32] Sara Hossain, *ibid.*, pp. 80-1.

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

[34] Sara Hossain, *ibid.*, p.81.

[35] *Ibid.*, p.78.

[36] Sara Hossain, *ibid.*, pp. 81-2.

4.8 PIL in the Environmental Pollution Control Ordinance

The EPO provides for 'the control, prevention and abatement of environmental pollution in Bangladesh'. It provides various penalties for failure to adopt measures for the prevention, control or abatement of pollution to the environment. Pollution has been defined by this law as the contamination or other alteration of the physical, chemical or biological properties of am, air, eaters or soil, including change in temperature, taste, color, turbidity or any other characteristics of air water or soil, or such discharge of any liquid, gaseous, solid, radioactive or other substance into any air, waters or soil as will, or is likely to, create a nuisance or render such air, water or soil as will, or is likely to, create a nuisance or render such air, water or soil harmful, injurious, detrimental or disagreeable to public health, safety or welfare or to domestic, commercial, industrial, agricultural, recreational, or other bona fide uses, or to livestock, wild animals, bird, fish, plants or other forms of life'.[37]

This law has also defined waste to include 'sanitary sewage, Industrial discharges and all other liquid, gaseous, solid, radioactive or other substances which may pollute or tend to pollute environment'. Cognizance of an offence under this law can be taken by a court only on a report in writing by an authorized person. This provision seriously retards the initiation of PIL. Steps may be taken to suitably amend the EPO to enable a public-spirited citizen to bring an action for the protection of the people from industrial hazards and the threat of pollution.[38]

4.9 The Employment of Children Act

The provisions of this Act prohibiting the employment of child labor could be treated as providing an avenue for PIL. Any public-spirited citizen could obtain an order prohibiting the employment of child labour in contravention of law from a court.[39]

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[37] Sara Hossain, *ibid*, p.82.

[38] *Ibid.*

[39] *Ibid.*

4.10 Institution Conducting PIL

4.10.1 BELA

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 the Parliament to attend the session of the Sangsad. 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 Faruk, 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 Shalish Kendra (ASK), Bangladesh Legal Aid Services Trust (BLAST), Bangladesh National Women Lawyers' Association, Bangladesh Nari Progati Sangha, Bangladesh Mahila Ainjibi Samiti 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 Rajdhani Unnayan Kartripaksha (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 liberalisation 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.[40]

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[40] Public Interest Litigation, [http://banglapedia.org/HT/P_0307.HTM, accessed on 8 March 2010].

4.10.2 BLAST

BLAST took a number of public interest issues to the Supreme Court and obtained positive rulings. Those ranged from release of long held prisoners to environment protection, from protection of bostee dwellers to enforcement of law on edible iodized salt. The progress in the implementation of the rulings of the High Court division of the Supreme Court has been skewed, partly due to government administrative indifference and partly due to the limited capacity of BLAST to monitor external agencies specially government. However, it continued to pursue its goal of mounting advocacy with the involvement of all concerned – the GO as far as possible and the like minded NGOs.[41]

The Advocacy and Public Interest Litigation (PIL) Cell of BLAST was conceived with the objective of effecting systemic pro-poor changes in legislative policy and practice through advocacy as well as litigating in the interest of the poor and the marginalized. BLAST, through its unit offices, has effective presence in 18 districts across the country. It also has a very close-knit network with all bar associations, leading human rights organizations, civil society and the media. BLAST has the advantage of having a very knowledgeable and illustrious Board of Trustees comprising eminent jurists and legal luminaries, retired and experienced Supreme Court Judges and prominent journalists of the country. Since its inception in April 2003, the Advocacy and PIL Cell is endeavoring to ensure increased safety and security and access to justice for the poor and the disadvantaged who are deprived of their basic human rights owing to resource and knowledge constraints. BLAST believes that a 'just society' governed by the Rule of Law can best ensure and protect the fundamental and human rights of the people and the activities of the Advocacy and PIL Cell of BLAST are geared to achieve these objectives.

As a matter of policy and basic mandate, BLAST engages all its strength to ensure an equitable, fair and accessible legal system through which the economically disadvantaged and vulnerable segments of the society, especially

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[41] BLAST, [http://www.blast.org.bd/, accessed on 8 March 2010].

women, men and children, can establish and enforce their fundamental rights to life, liberty and property. Simultaneously, the organization is committed to the protection of other fundamental as well as social and economic rights of the indigent people in particular. BLAST strives to empower the poor, women and disadvantaged people through legal aid; legal rights awareness campaigns, mediation and public interest litigation in the establishment of their rights. It also aims to create an enabling legal environment through reviewing and proposing changes to impugned and repressive laws and policies those are discriminatory and oppressive against the poor and the marginalised. The Advocacy and PIL cell is meant to supplement BLAST to achieve its above-noted objectives. To this effect, issues under the following categories will, as a matter of general policy, be prioritized and taken up for advocacy and PIL:

- Legal problems encountered by the hardcore poor;
- Reduction of inequality;
- Fundamental human rights violations of the poor in particular;
- Legal issues having vast implication on the overwhelming majority of the impoverished population of Bangladesh;
- All forms of discriminations (particularly against women);
- Burning issues that have a direct linkage to poverty alleviation;
- Laws those are repressive, discriminatory against the poor and women in particular;
- Legal issues concerning safety and human security; and
- Regulatory reform.[42]

[42] BLAST, [http://www.blast.org.bd/pilandad.html , accessed on 8 March 2010].

Chapter 5

JUDICIAL APPROACH ON PIL IN BANGLADESH

5.1 *Kazi Mukhlesur Rahman v. Bangladesh and Others*[43]

In the application Kazi Mukhlesur Rahman prayed for a declaration that the agreement between the Governments of the PRB and the Republic of India signed on the 16th day of May, 1974 by the Prime Ministers of the two countries involved cession of Bangladesh territory was without lawful authority and of no legal effect.

The Prime Ministers of Bangladesh and India signed a treaty in Delhi providing inter alia that India will return the southern of South Berubari Union No.12 and the adjacent enclaves and in exchange Bangladesh will retain the Dahagram and Angarpota enclaves.

The appeal dismissed on the ground of being premature. But the main feature is that *locus standi* was granted by Sayeem CJ on the ground that Mr. Rahman agitated. He said-

"The fact that the appellant is not a resident of the southern half of South Berubari Union No. 12 or of the adjacent enclaves involved in the Delhi Treaty need not stand in the way of his claim to be heard in this case. 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 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 up to the continental shelf."

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[43] 26(1974), DLR, 44.

5.2 ***Bangladesh Sangbadpatra Parishad v. The Government of People's Republic of Bangladesh*** [44]

Bangladesh Sangbadpatra Parishad (BSP), an association of owners of newspapers and news organization, challenged (1) sections 9, 10(3) and 11 of the Newspaper Employees Act, 1974 as unconstitutional and (2) the constitution of the Fourth Wage Board and the interim award dated 30.12.90 given by it.

A rule nisi was issued, but it was discharged by the High Court Division. It held that-

"The petitioner has no direst personal interest in the Act or in the implementation of the Wage Board Award. It is not liable to pay anything to anybody under the award in question but it is the owners of the individual newspaper who are pay and they are actually aggrieved. It is nothing to lose or win by the impugned award."

The Appellate Division observed,

"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 226, has not mentioned who can apply for enforcement of fundamental rights and constitutional remedies………..We must confine ourselves to asking whether the petitioner is an aggrieved person."

Mustafa Kamal J. 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."

Therefore, The petition was dismissed.

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[44] 43(1991), DLR, 424.

5.3 *Dr. Mohiuddin Farooque v. Bangladesh*[45]

Dr. Mohiuddin Farooque, Secretary General, Bangladesh Environmental Lawyers Association, shortly BELA filed the writ petition both under Article 102 (1) and Article 102(2)(a) of the Constitution praying for issuance of a Rule Nisi upon the respondents to show cause as to why all the activities and implementation of FAP-20 undertaken in the District of Tangail should not be declared to have been taken without lawful authority and to be of no legal effect. The cause which the appellant espoused in the writ petition is the apprehended environmental ill-effect of a Flood Control Plan affecting the life, property, livelihood, vocation and environmental security of more than a million people in the district of Tangail.

The leading judgment was delivered by Mr. Justice Mustafa Kamal with whom concurred the Chief Justice Mr. Justice ATM Afjal and Mr. Justice Mohammad Abdur Rouf, Mr. Justice Latifur Rahman and Mr. Justice Bimalendu Bikash Roy Chowdhury delivered separate judgments fully agreeing with Mr. Mostafa Kamal. The judgment was delivered on July 25, 1996.

As to the locus standi of the petitioner-appellant it was stated that the appellant is the Secretary-General of Bangladesh Environmental Lawyers Association, shortly BELA, an Association registered under the Societies Registration Act, 1860. He has been authorised by a resolution of the Executive Committee of BELA dated 16-6-1994 to represent the Association and move the High Court Division under Article 102 of the Constitution and to do all other acts and things in connection therewith. BELA has been active since 1991 as one of the leading organisations in the field of environment, ecology and relevant matters of public interest. It has studied policies, surveyed and examined legal quasi-legal issues; institutional aspects and traditional issues on environment and ecology and actively participated in many government, non-government and independent national and regional/international activities and has gained widespread recognition both at home and abroad. BELA being an Association of Lawyers has been raising the legality of the FAP activities on all available occasions, especially

[45] 17(1997), BLD, AD, 1.

as an invited panel speaker in the Second Conference on the Flood Action Plan held at Dhaka in March, 1992. BELA's questioning of the legality of FAP and FPCO evoked derogatory remarks from certain quarters. BELA also received written complaints from a number of aggrieved people from Tangail District seeking legal assistance and other supports after having been frustrated in pursuing their own remedies with the FAP-20 authorities, human rights organisations etc. The media has also repeatedly published the adverse environmental and ecological impact of FAP-20. As an environmentally concerned and active organisation BELA responded to the complaints of the local people and conducted investigations at various times in 1992-93 in the FAP-20 areas. During the local inspection it was found that a significant number of people of the project area were against the project.

Dr. Mohiuddin Farooque, learned Advocate appearing with the leave of the Court, has himself argued the appeal on behalf of the petitioner-appellant. He submits that the words "any person aggrieved" occurring in Article 102 of the Constitution have to be read in the context of the entire Constitution, not isolated. Article 102 is an institutional vehicle for ventilating the rights and duties under the Constitution and not a mere procedural device, Article 38 of the Constitution confers on every citizen the right to form association and BELA has been registered as an association under the Societies Registration Act, 1860 with the aims and objects inter alia to organise legal measures to protect environmentally sensitive and fragile ecosystems. BELA devoted its time, energy and resources in studying the FAP project ever since its inception, meeting local people, listening to their grievances and carrying a lot of research on their behalf to find out the legal and constitutional infraction that FAP-20 has committed.. It can claim a legal relationship with the Court in pursuance of its declared aims and objects as the right to form an association also embraces the right to pursue the association's lawful objects as well.

Justice Mustapha Kamal, in his famous judgment, held:

"Now we proceed to say how we interpret Article 102 as a whole. We do not give much importance to the dictionary meaning or punctuation of the words "any

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

As to (i) above, it is wrong to view our Constitution as just a replica with local adaptations of a Constitution of the Westminster model among the Commonwealth countries of Anglo-Saxon legal tradition. This Constitution of ours is not the outcome to a negotiated settlement with a former colonial power. It was not drawn upon the consent, concurrence of approval of any external sovereign power. Nor is it the last of an oft-replaced and often substituted Constitution after several Constitutions were tried and failed, although as many as 13 amendments have so far been made to it. It is the fruit of a historic war of independence, achieved with the lives and sacrifice of a telling number of people for a common cause making it a class part from other Constitutions of comparable description. It is a Constitution in which the people feature as the dominant actor. It was the people of Bangladesh who in exercise of their own self-proclaimed native power made a clean break from the past unshackling the bondage of a past statehood and adopted a Constitution of its own choosing. The Constitution historically and in real terms is a manifestation of what is called "the People's Power", The people of Bangladesh, therefore, are central, as opposed to ornamental to the framing of the Constitution.

As for (ii) the Preamble and Article 7, the Preamble of our Constitution stands on a different footing from that of other Constitutions by the very fact of the essence of its birth which is different from others. It is in our Constitution a real and positive declaration of pledges, adopted, enacted and given to themselves by the people not by way of a presentation from skilful draftsmen, but as reflecting the ethos of their historic war of independence. Among other pledges the high ideals of absolute trust and faith in the Almightily Allah, a pledge to secure for all

citizens a society in which the rule of law, fundamental human rights and the affirmation of the sacred duty to safeguard, protect and defend the Constitution and to maintain its supremacy as the embodiment of the will of the people of Bangladesh are salutary in indicating the course or path that the people wish to tread in the days to come. Article 7 of the Constitution bestows the powers of the Republic with the people shall be effected only under and by the authority of, the Constitution. Article 7 does not contain empty phrases. It means that all the legislative, executive and judicial powers conferred on the Parliament, the Executive and the Judiciary respectively are constitutionally the powers of the people themselves and the various functionaries and institutions created by the Constitution exercise not their own indigenous and native powers but the powers of the people on terms expressed by the Constitution. The people, again, are the repository of all power under Article 7.

As for (iii) in Part II of the Constitution, containing Fundamental Principles of State Policy. Article 8(2) provides that the principles set out in this Part "shall be a guide to the interpretation of the Constitution and of the other laws of Bangladesh." It is constitutionally impermissible to leave out of consideration Part II of our Constitution when an interpretation of Article 102 needs guidance.

As for (iv), Part III of the Constitution bestows Fundamental Rights on the citizens and other residents of Bangladesh. Article 44(1) guarantees the right to move the High Court Division in accordance with Article 102(1) for the enforcement of these rights. Article 102(1) is therefore a mechanism for the enforcement of Fundamental Rights which can be enjoyed by an individual alone in so far as his individual in common with others when the rights pervade and extend to the entire population and territory. Article 102(1) especially cannot be divorced from Part III of the Constitution.

As for (v) the other provisions of the Constitution which will vary from case to case may also come to play a role in interpreting Article 102 of the Constitution.

Article 102 therefore is an instrumentality and a mechanism, containing both substantives and procedural provisions, by means of which the people as a collective personality, and not merely as a conglomerate or individuals, have

devised for themselves a method and manner to realize the objectives, purposes, policies, rights and duties which they have set out for themselves and which they have strewn over the fabric of the Constitution.

With the power of the people looming large behind the constitutional horizon it is difficult to conceive of article 102 as a vehicle or mechanism for realizing exclusively individual rights upon individual complaints. The Supreme Court being a vehicle, a medium or mechanism devised by the Constitution for the exercise of the judicial power of the people on behalf of the people, the people will always remain the focal point of concern of the Supreme Court while disposing of justice or propounding any judicial theory or interpreting any provision of the Constitution. Viewed in this context interpreting the words "any person aggrieved" meaning only and exclusively individuals and excluding the consideration of people as a collective and consolidated personality will be island taken against the Constitution. There is no question of enlarging locus standi or legislation by court.

It is therefore, the cause that the citizen –applicant or the indigenous and native association espouses which will determined whether the applicant has the competency to claim a hearing or not. If he espouses a purely individual cause, he is a person aggrieved if he is own interest are affected. If he espouses a public cause involving public wrong or public injury, he need not be personally affected. The public wrong or injury is very much a primary concern of the Supreme Court which in the scheme of our Constitution is a constitutional vehicle for exercising the judicial power of the people.

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.

As to the apprehension of floodgate, the people as a whole are no doubt a flood and the Constitution is the sluice-gate through which the people control its own entry. Our Courts will be prudent enough to recognize the people when the people appear through an applicant as also those who masquerade, under the name of the people. Taking up the people's causes at the expense of his own is a rare phenomenon, not a common place occurrence.

We hold therefore that the association appellant was wrongly held by the High Court Division not to be a "person aggrieved" in the facts and circumstances of the case and we hold further that the appellant is "any person aggrieved' within the meaning of both Article 102 (10) and Article 102(2)(a) of the Constitution.

5.4 *Faustina Pereira v. State*[46]

This suo-motu Rule was issued on the basis of a letter addressed to Hon'ble Chief Justice by Dr. Faustina Pereira, Advocate of Supreme Court and also Coordinator of Advocacy Ain o Salish Kendra. The Hon'ble Chief Justice directed the Registrar to place the matter before this bench for taking appropriate action.

In the above letter the attention of Hon'ble Chief Justice was drawn to the fact that 29 prisoners of different countries were languishing in the jail for about 5(five) years even after serving out their sentence. The Rule as issued upon the relevant Ministry of the Government and we have heard the learned Deputy Attorney General and the learned Advocate on behalf of the petitioner Md. Nizamul Haque and also Dr. Faustina Pereira. Today we also heard Mr. Armand Roussclot, Regional Representative of International Organization for Migration who also appeared before us and informed us about the activities of the Organization after this Rule was issued.

At the time of hearing however, we have learnt from the submission of learned Deputy Attorney General Mr. M Faruque that the Government of Bangladesh is also anxious to release these prisoners but due to some formalities the prisoners

[46] Criminal Miscellaneous Case (*Suo Motu Rule*) No. 2737 of 2001, 53(2001), DLR, 79.

could not be released. As we have noticed earlier that some of the prisoners already are in jail for more than 6 years after serving out the sentences, it should have been proper for the jail authority and also Ministry of Home Affairs to take appropriate steps for their release at the earliest possible time. But it is unfortunate that no such steps were taken. We are afraid if timely steps are not taken in future more prisoners will meet the same fate. It is also learnt from the letter of the Inspector General of Prisons, Bangladesh dated 12-4-2001 that about 822 more foreign prisoners are waiting for release after serving out their sentence. The learned Advocate for the Ain o Salish Kendra, Md. Nizamul Haque, in this connection has invited our attention to rule 78 and rule 578 of the Jail Code and has submitted that keeping any prisoner in jail after serving out of the sentence is gross violation of Human Rights and Fundamental Rights as guaranteed under our Constitution. From Rule 78 we find that it is the first duty of the Superintendent of Jails to release time expired prisoners after observing all the rules regarding return of their private property grant of subsistence allowance for the return to their homes etc.

In the result, the Rule is made absolute. The Superintendent of Central Jail Dhaka is directed to release 28 prisoners mentioned in the Rule (except the prisoner Md. Safi who died on 5-5-2001) after receipt of the reply from the respective Embassies of the countries of those prisoners. If the Embassies fail to make any arrangement for the repatriation of the prisoners to their countries within one month, the Ministry of Home Affairs shall take necessary steps within one month next for the shelter of those prisoners on their release from the prison in the light of observations made in the judgment till their repatriation is finally arranged. The Superintendent of Central Jail Dhaka shall report about the release of the above prisoners within 3(three) months.

5.5 ***Dr. Mohiuddin Farooque v. Bangladesh & Others*** [47]

In 1994 BELA filed this Writ Petition seeking relief against indiscriminate pollution of air, water, soil and the environment by 903 industries of 14 sectors identified as polluters by the Ministry of Local Government, Rural Development and Cooperatives (LGRDC) vide Gazette notification dated 7 August 1986. The 14 sectors include Tanneries, Paper and Pulp, Sugar Mills, Distilleries, Iron and Steel, Fertilizer, Insecticide and Pesticide Industries, Chemical Industries, Cement, Pharmaceuticals, Textile, Rubber and Plastic, Tyre and Tube and Jute.

The Notification of 7th August 1986 directed the Department of Environment (DoE), the Ministry of Environment and Forests (MoEF) and the Ministry of Industries to ensure within three years that appropriate pollution control measures were undertaken by those industries. The Notification also required the said authorities to ensure that no new industry could be set up without pollution fighting devices. But unfortunately, even after the lapse of eight years when no measure was taken the above Petition was filed.

After seven years since the date of filling of the petition on the 15 July of 2001, the court has directed the Directed General, Department of Environment to implement the decision taken with regard to mitigation of pollution by 903 industries identified as polluters within the time frame of six months from the date of the judgment.

The Petitioner pleaded that the ecological system of the country more particularly the air and water including the major rivers (Buriganga, Surma, Karnaphuli and so on) are being severely affected by the identified 903 industries and that no affirmative action has been taken in furtherance of the decisions of the Gazette dated 7th August, 1986. Rather the number of polluting industries has multiplied as the recent list prepared by the DoE shows that the number of polluting industries have risen up to 1176. The Court earlier issued Rule Nisi to the Respondents including the LGRDC, Ministry of Environment and Forest, Ministry of Industries and Department of Environment to show cause as to why

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[47] 46(1994), DLR, 358.

they should be directed to implement the decisions of the Government dated 5 June, 1986 which was published in the official Gazette. After hearing the Petitioner, the Rule has been made absolute today and the DG, DoE has been directed to "Report to this Court after six months by furnishing concerned affidavit showing that compliance of this Order of this Court". To ensure implementation of the Court directions, the Honourable High Court further held that "It will be imperative on the part of the Director General to take penal action against such department for persons who are responsible for not implementing the letter of the Environment Conservation Act, 1995."

Chapter 6

CONCLUSION

Attempts to introduce PIL in Bangladesh started in 1992. Hence, it seems that advancement of PIL coincided with the restoration of democracy in the country in 1991. However, it was not easy to convince the judges giving relief through PIL, as it was a new phenomenon in our legal system. But, the legal and social activists were relentless in their efforts and finally enabled the progressive minded judges to interpret the Constitution in line with the public intent. And it was 1996, when the Supreme Court discovered that our Constitution not only validates but also mandates a PIL approach. As a consequence, a good number of PIL have been filed over the last few years. These PILs include cases involving illegal arrest and detention, police atrocities, environmental and consumers matters, poverty and health related problems, rights of children and women, rights of minority and indigenous people etc.

These PILs have brought about a great change of thought in public mind regarding people's rights, government responsibilities, rules and governance. But actually how much the PILs have contributed in safeguarding public interest is still a point to be debated. As a matter of fact, PIL just shows the ways and directions to secure public interest, and so, nothing can be achieved if the ways and directions are not complied with.[48]

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[48] Zahidur Rahman, Public Interest Litigation: An outline [http://www.thedailystar.net/law/2006/05/04/info.htm, accessed on 12 March 2010].

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