Law and Our Rights

"All citizens are equal before law and are entitled to equal protection of law"-Article 27 of the Constitution of the People's Republic of Bangladesh

Public Interest Litigation in Bangladesh: Recent Trends

By Sara Hossain and Mirza Hassan

ALTHOUGH public interest litigation (PIL) has only been a visible feature in our courts in the 1990s, it is part of a much longer history of democratic struggle which implicates law and the judicial process. Enabled by the transition to democracy, PIL is itself now a part of the process of democratic transition.

Earlier, judicial intervention had been invoked against the worst excesses of autocratic or military regimes, in respect of illegal detention, arbitrary arrest, torture, ill treatment and arbitrary executions. Such legal strategies formed a part and arose out of the ongoing movement for democracy, with many of the primary actors being individual lawyers active both in the bar and in party politics.

In contrast, the recent development of PIL depends on changed actors, with civil society organisations, free of any political party affiliations, taking the lead in developing PIL. The real shift has come with the growth of rights-based non-profit, organisations, working from the margins of formal associations such as bar associations, and their ability to build effective legal coalitions with progressive lawyers.

The Actors

The Petitioners

In Bangladesh, PIL has been led primarily by lawyers or civil society organisations. In a few significant matters, the court has taken suo moto action, in order to address human rights abuses within the prison system or, most recently, acts of criminal violence during *hartals* (general strikes). However, in the majority of cases noted below, a handful of human rights, legal aid or lawyer's organisations have initiated legal action (such as Ain o Salish Kendra, the Bangladesh Legal Aid and Services Trust, the Bangladesh Environmental Lawyer's Association or the Bangladesh Women Lawyers' Association). In cases relating to the issue of safe custody, women's rights groups (such as Mahila Parishad or the Bangladesh Nari Progoti Shongo) have also come forward as petitioners. In a few cases, public spirited individuals (see *Sharif Nurul Ambia v DCC*), local community groups (see *Senbag Thana Pollution Free Environment Committee v Bangladesh*) or civil society organisations (such as the Shonmilito Shamajik Andolon) have catalysed PIL, with the assistance of legal aid organisations.

The Respondents

PIL directly pits civil society organisations against the state. While civil society actors initiate PIL, state agencies are impleaded as respondents in each case. The cases filed so far have impleaded as respondents the Ministries of Home Affairs, Environment and Forestry, Foreign Affairs and Law, Justice and Parliamentary Affairs, as well as police and prison authorities and the relevant statutory bodies charged with environmental regulation. In many cases, PIL has sought to establish the state's responsibility for its positive acts resulting in violations of constitutional rights. It has also sought, on occasion, to impute responsibility for the consequences of state inaction, specifically for the failure to fulfil the obligation of due diligence to prevent rights violations by non-state actors. In such cases, private actors have been impleaded as respondents (such as the Bangladesh Medical Association, a private association of doctors, in a case challenging the validity of their nation-wide strike).

The Issues

PIL has addressed a wide-ranging set of civil society concerns, relating to both individual rights and the broader development agenda.

Initially focused on the classic civil liberties issues, such as custodial ill-treatment (through the use of bar fetters), PIL has expanded to address environmental questions, the rights of communities (through a series of cases challenging forced evictions), and consumer protection issues.

PIL has itself become part of the struggle to institutionalise democracy, as cases have been filed challenging the proposed legal framework for local government elections as well as continuing state controls over the electronic media.

Further, PIL has sought to deepen our understanding and practice of democracy, in which each citizen's individual rights and autonomy are respected. Thus, a series of PIL cases have been filed challenging the practice of incarcerating women in jail in so-called "safe" custody, a practice which appears to be premised on women's incapacity to make independent decisions or live autonomous lives.

In a sense, PIL has been used by civil society actors not only in attempts to discipline the state, but also to trammel the unfettered operation of the market and to develop consumer protection. Thus PIL has been initiated to limit the impact of an unregulated market in curtailing the enjoyment of the right to health, in relation to the sale and distribution of irradiated milk, and the impact of the explosion at the Magurchara gas field.

Expanding Rights

Through PIL, the parameters of rights may themselves be expanded. Thus, the right to life is interpreted progressively in the context of PIL to include not only the right to a healthy environment but also the right to education in relation to cases on the sale of irradiated milk and the implementation of the Flood Action Plan respectively.

The rights to equality, equal protection under the law and non-discrimination have been invoked when challenging restrictions on the disabled from appearing in civil service exams, the imposition of the Flood Action Plan, the trafficking of children for use as camel jockeys and the incarceration of women and girls in jail in "safe" custody.

The right to free expression has formed the basis of a challenge to the continuing state control of the electronic media.

The right to freedom from torture or cruel, inhuman and degrading treatment or punishment has been implicated in challenges to the practice of "safe" custody or the use of bar fetters on prisoners, as has the right to personal liberty, in relation to the detention of a refugee and of a person who served years in prison following the completion of his sentence.

Aims of PIL

PIL is premised on a reconceptualisation of the state as a welfare state deeply involved in social and economic transformation, rather than a law and order state or regulatory state. PIL provides a means for civil society actors to concretise this notion of the state as a welfare state and to demand that it enforce fundamental rights and principles, rather than merely articulating them as aspirational goals.

It also provides a means to compel the state to begin to emerge from a colonial legal regime and to make the constitution work by enforcing fundamental rights. Given the failures of our political system to address or implement the demands raised by democratic movements, civil society is constrained to take recourse to the law, through PIL, to press for these demands and to enforce the state's political accountability. So, for example, PIL has addressed two issues at the centre of the political agenda, relating to local government, in relation to certain provisions of the Gram Parishad Act (which has elicited a promise from the Government to consider possible amendment of the offending provisions) and media autonomy (where no action has been taken by the Government as yet).

The Impact

Successes

There have been a number of major success stories resulting from PIL. In a case filed by BELA, the BMA, a non-state actor, was compelled to call off a national strike following the issuing of a mandatory injunction by the High Court Division.

In the first and only judgment of the Appellate Division in a PIL matter to date, in BELA's case challenging the implementation of the FAP-20 Project, it was held that rights-based civil society groups/advocacy organisations with a demonstrated track record could initiate actions for the redress of the rights of those unable to access the courts for reasons of poverty or other disadvantage. (Although PIL cases had been initiated earlier, the FAP case resulted in the first judgment establishing this expanded notion of standing).

In other cases, although judgments may not have been passed, interim orders have effectively brought about the results sought and provided substantive relief to those affected. Court orders have resulted in the protection of thousands of basti (slum) ,residents from forced eviction. In individual cases, interim orders have also led to the release of women held in "safe" custody or prisoners held in bar fetters.

Limits

Of course, PIL is not and cannot be a substitute for other social movements, particularly where existing political polarisations may paralyse or inhibit a common understanding of the public interest. Thus, we can speculate that this trend is reflected in the failure of any organisation to file PIL in relation to the implementation of the upazilla parishad laws (which involved similar bureaucratic controls to those imposed under the Gram Parishad Act). It also appears to be reflected in the failure of civil society to respond effectively to the downward spiral of violence resulting from the stand off between the ruling party and the opposition and manifested in the continuation of violent hartals. Indeed, we might further speculate this deadlock can only be broken by decisive action from the court, rather than from the legal profession, and the High Court's recent *suo moto* action regarding violent enforcement and disruption of hartals points in this direction.

Further, while PIL may initially *expose* the failure of state authorities to act in accordance with the law or to protect constitutional rights, it may be unable to effectively ensure any form of accountability. The PIL challenging certain provisions of the Gram Parishad Act succeeded only to the extent that it prevented the state from being non-transparent. As a result of the case, the Government has effectively suspended the implementation of the Act, but has not taken steps towards its amendment as yet.

Remaining Questions

Despite some of the immediate "successes", real questions remain regarding the impact, if any, of the PIL filed to date in improving the lives of people. A serious difficulty lies in the requirement that the petitioners much themselves pursue or follow up cases. As this process becomes lengthier and more routine, the initial enthusiasm of the petitioner for PIL also begins to trail off. Even where cases are pursued seriously, the court is often unwilling or unable, because of delays and backlog, to take up such matters. Again, in other cases, PIL may be driven by lawyers with little concern for the involvement of or accountability to the individuals or communities affected.

We clearly need to reflect further on questions of process and accountability, and could learn valuable lessons both from neighbouring countries which have pioneered PIL, and from a more critical review of our own experiences.

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To Them Public Interest Litigation is a ray of hope, a tool of justice

Of Judges and Justice: An Indian Overview

By Raju Ramachandran

THE judiciary has traditionally been viewed as the weakest of the three organs of state, because it does not have an inbuilt mechanism to enforce its writ. Its relevance and authority depend entirely on the respect accorded to it by the executive and the legislature. It may be trite to say that an independent, fearless and competent judiciary is essential for the survival of democracy, the rule of law and civil liberties. But a hyperactive judiciary presents its own dangers to democracy because judges are not elected and are practically irremovable under our Constitution. In fact, in the current debate in the United Kingdom over the need for a Bill of Rights, serious fears have been expressed in responsible quarters about the desirability of giving unelected judges the power to strike down laws of Parliament which offend the Bill of Rights. Expressions like 'judicial despotism' and 'judicial tyranny' are freely used in public discourse in major democracies: expressions that seem blasphemous in India. A Harvard professor went to the extent of describing the activist judiciary in the USA as 'the imperial judiciary'.

Over the years, the judiciary in India has come to occupy a position not merely of pre-eminence but supremacy. The power of judicial review over laws which offend the provisions of the Constitution has always been there, as a necessary concomitant of a written federal constitution which clearly demarcates the fields in which Parliament and the state legislatures can legislate. The chapter on fundamental rights begins with an article (Article 13) which states that laws which offend fundamental rights shall be void. But the area in which the judiciary has, by its own interpretation, asserted primacy is in the area of amendments to the Constitution.

Now constitution-making is a political process: a nation's constitution is not a legal document, but a political testament. Equally, it must follow that any changes needed in a country's basic laws are matters of political judgment. In the early years of the working of the Constitution, the judiciary took the view that the power of Parliament to amend the Constitution, subject to the procedural safeguards provided in the Constitution itself, was absolute. But in the Golaknath case (1967) the Supreme Court took the view that fundamental rights could not be touched, even by an amendment to the Constitution. Six years later, in Kesavananda Bharati's case (1973), the Supreme Court by a thin majority held that the power of Parliament to amend the Constitution did not extend to altering its 'basic structure'. What constitutes this basic structure is a matter for the courts to determine on a case by case basis. Today it might be obvious features like sovereignty, democracy, secularism and federalism. Tomorrow, it could extend to such aspects as the Westminster-model and federalism with a strong unitary basis, which might make it impossible to introduce a Presidential form of government or to grant greater autonomy to the states.

During the Emergency, an abortive attempt was made by the Indira Gandhi government to get the Kesavananda Bharati decision reversed, but since then it has been accepted by nearly all jurists. TR Andhyarujina, a distinguished commentator says:

A highly activist judiciary with an unlimited power of judicial review must be reconciled with the representative and majoritarian character of our constitutional democracy. We know how to make the political branches accountable — but tenured judges cannot be made accountable in the same sense. At the apex level the commands of the judiciary are irreversible except by itself.

It is now well-known that the power of judicial review has itself been held to be part of the basic structure of the Constitution, yet it needs to be emphasised that the power of judicial review extends to matters which are traditionally viewed as prerogative powers on 'political questions': the power to declare an emergency under Article 352, the power to impose President's Rule on states under Article 356 and even the power of the President under Article 72 to grant pardon to convicts after judicial remedies have been exhausted.

The truth of the matter is that the judiciary has a political character, in the sense that it plays a major role in democratic governance. It is in the light of this position that an overview needs to be taken of its personnel — their background, selection, training, performance and removal.

Considering the importance of the institution of the Supreme Court, it is essential that the right persons are appointed to it. Judges of the High Court hold office till the age of 62 and judges of the Supreme Court till the age 65. They can be removed from office only by a special Parliamentary procedure.

> But the idea of classifying a judge's misconduct into major and minor grades is abhorrent, at least in the context of the superior judiciary. A judge under a cloud of a minor penalty like a reprimand or a censure would lack legitimacy: his functioning would shake the confidence of the public in the administration of justice. A judge accused of misbehaviour either stays on after an honourable vindication, or goes on being found guilty.

There is a curious dichotomy in the procedure for selection to the Bench between the district judiciary and the superior judiciary. Right from the post of the lowest Munsiff to the post of a District Judge, when direct recruitment is to be made, applications are invited. Examinations or interviews are conducted. On the other hand, when it comes to appointments to the superior judiciary (and here we are talking mainly of the High Courts, since there have been only three appointments to the Supreme Court directly from the bar), the post of a judge takes on a hallowed character. (What a 'New Statesman' columnist said about the British budget exercise is as apposite here: the secret rituals surrounding the process of judicial appointments is reminiscent of a Freemasons' lodge).

Traditionally, every High Court has one third of its members drawn from the district judiciary, and here there is a greater measure of objectivity, because their promotions are based on confidential reports which, among other things, carry an assessment to their judicial abilities. But no member of the Bar can apply to become a High Court judge: Judgeship has to be 'offered'. This offer is by the Chief Justice of a High Court in consultation with two senior colleagues and once it is accepted, the final word is with the Chief Justice of India. The role of the executive is limited to supplying information about a candidate's character and antecedents. This is the result of a majority view in the Second Judges case (1993). And here one can do no better than to refer to Justice Ratnavel Pandian's powerful critique of the process of judicial appointments in that very case.

On the basis of nearly two decades of experience at the Bar and two decades on the bench he says '... I had (the opportunity to notice that on (a) few occasions, the candidates have been initiated for judgeship either on regional or caste or communal basis or on extraneous considerations. There have been complaints, which cannot be easily brushed aside, that some of the recommendations have been tainted with nepotism and favouritism. Not doubt, there is an abundance of sermons preachings and teachings, that the selection and initiation of candidates for judgeship should be free from extraneous considerations, nepotism and favouritism, yet can it be said that in reality, such high-flown sermons are implicitly followed by all including some of the preachers?... Regrettably, it is a fact of life that some have followed such homilies more in the breach than in their observance. Even today there are complaints that generations of men from the same family or caste, community or religion, are being sponsored and initiated and appointed as Judges, thereby creating a new "theory of judicial relationship".'

These remarks were made in the context of the right of the executive to suggest nominees for judgeship. He upheld this because of his view that the judiciary must have a representative character, which could not be ensured if the identifying of candidates for judgeship was left to judges alone. While stressing that merit should not be sacrificed, he made the point that our democratic polity was not meant for 'any self-perpetuating oligarchy'.

The process of making judicial appointments under the present constitutional scheme is clearly unsatisfactory. The process of appointment starts with the inherent limitation of the field of choice being confined to the perception of the judges themselves, and that too to 'litigators', or court lawyers who argue cases. In the coming years a significant proportion of legal talent is likely to be diverted to non-litigative areas: arbitration, negotiation, mediation, consultancy and collaborations. A wider field of selection and a less insular selecting body would be necessary if the best legal talent is to be made available to the judiciary.

An amendment to the Constitution to create a National Judicial Commission (which was recommended by the Law Commission and was seriously considered during the brief tenure of V P Singh) would be most necessary reform in this regard. But such a commission would need to be more broad-based than envisaged so far. It needs representation not only from the judiciary and the executive, but also from the legislature, the Bar and the academic world. Such a commission should have the power to advertise vacancies, initiate applications, short-list applicants and interview them with regard to their qualifications, experience, abilities, temperament, social philosophy, personal background and antecedents. The painful scandals that sometimes emerge in public confirmation in processes of judges in the United States do not detract from the essential desirability of constitution functionaries with protected tenures laying their records open to public scrutiny before appointment.

The training of judges even at the lowest level has been minimal. At the High Court level, there is none. A practising lawyer appointed to the Bench starts judicial work from the day he is sworn in — his experience at the Bar is assumed to equip him with the requisite court management skills, time-control of cases and the art of writing judgments. A new judge sits for a period of time in a Division Bench with a senior judge, and this breaking in is believed to equip him with the necessary knowledge of procedure. Though it would be difficult to expect middle-aged lawyers to undergo long and arduous training in 'judgery', at least a month's orientation by sitting and retired judges is eminently desirable for those going from the Bar to the Bench.

Apart from the initial training of a judge, continuing education on a regular basis is essential at all levels of the judiciary. Fortunately, a beginning was made in this direction a few years ago with the setting up of the Institute for Judicial Training and Research at Lucknow, and the recent establishment of the National Judicial Academy under the auspices of the Supreme Court will make training and continuing education a permanent feature of judicial careers.

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To be continued

law watch

Past Crimes catch up with the Dictators

By Harun ur Rashid

THE House of Lords (the highest Court in Britain) has decided on 24th March that General Augusto Pinochet of Chile is not immune from the extradition proceedings to Spain for international crimes of torture. The Six Law Lords out of seven arrived at the decision. However, they decided that General Pinochet as the President of Chile would be accountable to the crimes in Britain after 1988 because Britain ratified in 1988 the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted by the UN General Assembly in 1984 and entered in force in 1987).

After the decision the British Home Secretary(Home Minister) Jack Straw (a Barrister) decided that the criminal proceedings against General Pinochet should proceed in the Magistrates's Court in accordance with the British Extradition Act.

Why Pinochet is immune until 1988 ?

The primary reason is that the extradition law in Britain (as also in Bangladesh and in most of the Commonwealth countries) introduced the double criminality test. Simply put, this means that the crime for which a person is requested for extradition is also to be considered a crime in the country of the person's temporary stay (in this case Britain). Although torture is an international crime under the 1984 Convention, it was not considered a crime until 1988 by Britain. Therefore the alleged crimes of Pinochet were not considered crimes in Britain and the concept of crime cannot be applied retrospectively. Because of the delay in the ratification of the Convention by Britain, General Pinochet was let off from the hook for most of the alleged crimes. Observers believe that the Law Lords have taken an attitude of caution, moderation and compromise.

International implications of the decision

This decision sets a precedent in international law that a leader is arrested in a third country and held accountable to the inhuman treatment of torture perpetrated on the individuals. It confirms that a leader will not find an easy refuge in a third country without the risks of being extradited to another country for the commission of international crimes, even though the leader managed not to be tried before a court in his/her country. The Law Lords have ruled that the arms of law could be extended to any powerful leader if that person is alleged to have committed international crimes.

From now on no dictator or a leader will appear to be safe and secure in a third country if that individual was charged with international crimes.

In the past, the perpetrators of international crimes could not be put to trial because of the absence or the inadequacy of international law or of the machinery for trial. To cite a few instances, many individuals, such as Idi Amin and Milton Obote of Uganda, Mengistu Haile Mariam of Ethiopia, Francois Duvalier (Papa Doc) and his son Jean-Claude Duvalier (Baby Doc)of Haiti continue to remain free although they are accused of genocide and international crimes.

Although the House of Lords decision appears to be a clear warning to all leaders who has been involved in the commission of international crimes, the critics of the decision maintain that the decision has opened a can of worms. Each and every former leader could be indicted for international crimes by an aggrieved country. For example, Libya could pursue its criminal charges against former President Reagan and the former US Secretaries of State and Defence for bombing Libyan leader's residence in Tripoli, killing his child in 1986. Bangladesh may have a prima facie case against the former US Secretary of State Henry Kissinger for his alleged complicity with the Pakistan's military regime in the commission of genocide and war crimes against the people of Bangladesh in 1971.

The decision seems to confirm that human dignity, liberty and freedom are universal and must not be abused . In future the conduct of a leader of a nation is to be judged by this yard stick. The international norms since early 1990s have shifted to incorporate the right to prosecute the leaders who are allegedly associated directly or indirectly with the international crimes. The protection of human rights is a matter of international concern and action. The UN machinery is very active and monitors regularly the records of human rights of every member-country of the UN.

The decisions of domestic courts relating to a foreign national have contributed considerably to the development of international law.. This decision of the House of Lords appears to be a remarkable and progressive one. The human rights derive from the inherent dignity of the human person. No exceptional circumstances should be invoked as a justification of torture and other inhuman or degrading treatment or punishment.

The writer is a former Bangladesh Ambassador to the UN in Geneva.

"Storm in a Tea Cup"

By Khan Saifur Rahman

MY attention has been drawn to a write up published in the June 13 issues of "Law and Our Rights" section of The Daily Star.

The write up published titled 'Judiciary and Court Reporting" in 'Law and Our Rights' page is said to have arisen from a news item appearing in an English daily," concerning the admission hearing of appeals against the conviction and sentence of killers of Bangabandhu."

It appears that M.Mohsin Rashid the columnist made an attempt to project a partial view on the subject. Besides, the wisdom displayed by the writer is not only offending but also tormenting to the conscience.

The publication as far as it concerns me is not only maligning but also derogatory to my professional reputation.

In this regard, Para-IV of the said column may be mentioned where the writer says, "With all due respect the learned lawyer for the appellant Mr Khan Saifur Rahman, a lawyer of some eminence, I respectfully submit that he was not aware of the laws when he had told the court that the said appeal of his clients Lt Col Sayed Farooque Rahman, Lt Col Muhiuddin Ahmed and other convicted appellants in the list of the Bench presided over by Mr Justice Golam Rabbani, without the lawyer of the appellant mentioning the same and praying for listing of the appeals or without the leaned Chief Justice sending the matter to the said court as it was the junior most bench having the jurisdiction to hear criminal matters."

The writer goes on saying, "The learned lawyer while making his submissions was not conversant with the rules of High Court Division applicable in the matters of admission."

No legal wisdom can be attributed to any convict at the stage of his appeal as killers, because the sentence is not final even by the disposal of appeal and dispensation of justice at the level of appellate division and until disposal of mercy petition (if called for) to the President. This refers to the Rule 751 (e) of the Jail Code.

For addressing the point at issue, the writer referred to Rule 17, Part II, Chapter XI of High Court Rules as the only guiding law on the subject. Perhaps the writer quoted the law to suit court rules as the only guiding law on the subject. Perhaps the writer quoted the law to suit his convenience or without knowing that some other laws are also to be read with his cited law. To put the legal matters correctly I am taking the liberty to mention here that quoted Rule 17, Part II Chapter Xi of the High Court Rules is to be read with Rules 12, 16 and 17 of part I Chapter II of the High Court Rules.

It is not unknown that for dispensation of justice it is a legal necessity to represent two sides of a trial or appeal. Being a defence counsel of the case, I believe, I am only helping the legal system of the country.

Back again to the point of law raised the Rules quoted by me (Rules 12, 16 and 17, part 1, Chapter II of High Court Rules) provide for criminal appeals to be laid before such Bench as the judges of the Division Court shall determine. The order of every such case, in which appeals shall be heard, shall be placed in the list of division court appointed for that purpose on the date fixed for hearing. It may be mentioned here that there are three Division Benches for hearing criminal appeals. The quoted Rule 17 calls for laying the appeal before 'the' Bench and not 'a' Bench as mentioned by the columnist.

Indeed, the writer has raised a storm in a teacup extending his liberty to the point where, the tip of my nose begins.

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