

Public Interest Litigation: Identifying priorities

It must be conceded that where a person complains of legal injury arising from violation of some constitutional or legal right or a legally protected interest, he must be able to show, when his locus standi is questioned, that he has suffered an injury at the hands of the other side and seeks redress. However, if court upholds this standing principle, causes and controversies coming before the courts will not get fair trial and a large segment of society will be denied access to justice. Since 1980 Bangladesh court of justice extends to include a person who may not be personally aggrieved or injured, but is nevertheless a public spirited or socially conscious individual or a voluntary organisation. Such a person or organisation may approach the court and draw its attention to the legal misery. This way court was open for public interest litigation, paving the way for justice to the large segment of society who are individually or collectively unable to approach the court. This is the genesis of public interest litigation in Bangladesh. The major concern which impelled liberalisation of locus standi is that if the doors of the court are closed to a party who though not personally affected, but espousing a genuine cause and has drawn the court's attention to a breach of a constitutional obligation, governmental agencies would be left free to violate the law. In such cases not only will the cause of legality suffer but people whose fundamental rights are infringed and who are unable to enforce them may turn to the streets. Thus it is essential that the rule of law must win the aggrieved person for the law court and wean him from the lawless street. In recent years in Bangladesh there is a move towards recognising rights as shared among peoples and communities and adapted the concept of locus standi to the changed context for PIL. Such PIL ensures constitutional promise of protection to the weaker sections of a community.

Issues for interest for PIL:

Public Interest litigation in Bangladesh is still in its primary stage and has dealt with issues limited to civil society concerns and individual rights. Initiated with the consumer protection issues, issues of custodial ill-treatment (using bar fetters), negligence of doctors, environmental questions, imprisonment in the name of safe custody, rights of communities regarding eviction from the slums, right to health and state control over the local elected representative have been addressed so far.

In our opinion intending promoters of the cause of PIL should extend work in the recovery of khas land for the landless poor, ensure use of government fisheries by the real fishermen, proper allocation of local and public resources, and regular attendance of government doctors at various hospitals, regular attendance of teacher at the village primary schools and many other issues of public interest. The point sought to be emphasised is that at the top of the list should be the priorities of the poor and their basic necessities, which are so often denied to

them. Judges role in the Public Interest Litigation:

A serious flaw is that in quite few cases effective steps has not been made available to the victims of exploitation despite important judicial pronouncements. The reason is lack of effective post judgement monitoring and follow up. This is most unfortunate and must be corrected if the credibility of the court and the efficacy of the PIL are to be preserved. If the court should decide to entertain PIL petitions it should do so with thoroughness and must not lose its enthusiasm after the delivery of judgement. If its orders and directions are not carried out it may justifiably incline at executive authority and do so with determination. The court's reluctance to exercise its contempt power against defaulting governments and concerned authorities has led to a sense of frustration among those who approached it with high expectations.

PIL needs to be structured. Contempt powers to secure compliance with the court orders and directions need to be used with tact and firmness. Post judgement monitoring needs to be strengthened. In this regard a monitoring committee can be developed under the supervision of respective judges. The monitoring committee can also undertake fact-finding and study missions on new issues brought by party. Copy of the committee's report should be sent to writ petitioner and respondent. Judges should provide legal, moral, and technical support to the human rights and legal aid NGOs and activists in the area. Judges should write and speak on issues of public interest and human rights, serving as formal and informal guides on law reform and most of all helping to facilitate participation in various process of legal reforms. In this way respective judges can be close partner and ally often part of the broader social movements.

Conclusion:

Legal and human rights activists and professionals and concerned agencies and individuals working in the legal sphere should feel it obligatory to identify through proper investigation and research the priority areas of PIL that would serve the poor majority to overcome poverty and also become a partner in the development process. Media can play an important role in promoting and raising awareness in the public interest issues. More importantly judges need to be more sensitive towards the issue of public interest litigation.

Reference:

1) Public Interest Litigation in South Asia Rights in search of remedies Edited by Sara Hossain, Shahdeen Malik, Bushra Musa.

2) Public Interest Litigation in Bangladesh: Recent Trend

Written by Sara Hossain and Mirza Hassan
(An article published in the newsletter of the programme for research on poverty alleviation, Grameen Trust)

Law and Morality

Naved Ahmed Chowdhury

IS Bangladesh a lawless country? By going about the newspaper reporting on all the atrocities going on in our country, all the blood being shed in the name of politics, children being raped at court premises and persons being shot at on minor skirmishes, one can be sceptical, if anything else, about the authority of Judiciary in public life and the helpless attitude people take when the talk revolves around rule of law in this country. If the purpose of having a judiciary is to promote rational decision making by helping people decide their future with some confidence, then Bangladesh as country, has I am very sad to say, has failed miserably.

Law, first of all, is designed to maintain the social order by responding to disruptions. The disruptions may involve a criminal act, in which case state will prosecute the wrongdoer. Or it may involve a private grievance, in which case the judiciary in the country make legal remedies available to the plaintiff as well as the defendant. A third function of law is to ensure social behaviour to the extent that people respect its authority by teaching what is right and wrong. The effectiveness of law against all these ground is also highly debatable in Bangladesh.

Laws have a moral component, there is no doubt about that. They are affected and shaped by moral value. In our culture, as in most, there are laws against stealing, murdering and raping. But interestingly there has been instances where the government of Bangladesh in past have repeatedly enacted or in some cases encouraged laws which have been highly ambiguous in nature. Thus even if moral components are readily identifiable, competing values may mitigate against imposing a law, as we have seen in this country.

So how deep can be the social responsibility of the judiciary? The question betrays an oversimplified view of the relationship of the public interest and the role of the judiciary since neither private individuals nor the judiciary that guide their conduct by ethical and social values beyond the demands of law should be constrained merely because they are elected to do so. The realm of moral responsibility go hand in hand with political legitimacy. Moral responsibility is an attribute that can manifest itself in organisations as surely as competence or efficiency.

The judiciary and the political process will and must remain the primary mechanism for protecting the public interest but one must remember that in country like Bangladesh where democratic norms still have a long way to go political process will not substitute for moral judgement of the citizenry. For that a free and fair judiciary is essential.

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Public Interest and Judiciary

S M Morshed

I would like to put following suggestions to fulfil the public interest in the judiciary system of Bangladesh:

1. Complete separation of judiciary from the Executive/Administration department. Only the officers of BCS Judicial Cadre will conduct the cases in the court.

2. The laws related to grant bail should be reformed and developed, so that none should be ordered to go to the jail before the charge against him is proved.

3. At present there are some scope for politicisation in the judicial system, as the Recruitment of Attorney General and also the Public Prosecutors. This system should not continue more, in lieu of this existing system.

an independent, neutral and transparent policy should be developed for the recruitment of Attorney General and Public Prosecutors.

4. The proposed GRAMEN ADALAT is another step for politicisation in the grassroots level. If it is implemented, then the rural people may be deprived from justice.

5. To create more legal awareness among the mass people 'Law' should be included in the academic curriculum in secondary and higher secondary level.

6. Fees for the Advocates in different level of courts should be fixed. And Assistants to the Lawyers (Muhuri) should be paid by the lawyers, not by the clients.

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Quest for Local Level Justice: Transforming the Shalish in Rural Bangladesh

VILLAGE society in Bangladesh had traditionally made use of a system of non formal dispute resolution mechanism known as the *shalish*. The *shalish* provides judgement on diverse issues, ranging from marital discord to property distribution to access to common property resources. While the system is non-formal (not having state sanction), it has great legitimacy in rural Bangladesh. This legitimacy stems both from the failure of the state in providing low cost easily accessible legal institutions, as well as the close connection of the *shalish* with the local community. The preference of the *shalish* to legal courts stem from the alienated nature of the courts themselves, which are seen as elements of the state machinery—corrupt, coercive and insensitive to the needs of the rural populace.

While having no legal authority the *shalish* plays an extremely important role in ensuring acquiescence to prevailing moral codes of conduct on which rural society is based. In fact the *shalish* is effectively used to "discipline" individuals and groups so that the prevailing structure of power is not challenged. The system of *shalish*, therefore, by attempting to maintain prevailing norms, values, and social structure, often reflects very closely the existing class and gender hierarchy in rural society. In conflicts between the rich and the poor, or on issues reflecting gender subordination, judgements are usually made in favour of dominant groups. It is this context of the *shalish*, as the custodian of the prevailing social hierarchy, that all social activists have challenged. However, most grassroots workers, most organization working with women and the poor, also realize the benefits of the informal governance system of the *shalish*, especially vis a vis the structure and operations of the state judiciary. Hence, attempts at seeking justice at the local level, justice in favor of the subalterns, justice for the marginalized, justice for women, is based on attempts at transforming the *shalish* and making it more sensitive to the needs of the subordinate groups.

The New Shalish Initiative

Currently in Bangladesh a few human rights and legal aid organizations (the Ain O Shalish Kendra, Madaripur Legal Aid and Nagorik Uddyog as the pioneering ones) are actively involved in this experiment of effecting greater justice at the local level through transforming the *shalish* system. This is being done through a two pronged initiative. New *shalish* committees as being formed at the village level and the union level (the seat of local government) which builds on the prevailing groups of elders by including new representatives of the poor. Secondly, these *shalish* committees are being given training on legal rights of citizens and laws of the land pertaining to human rights, personal laws and inheritance laws. The inclusion of women and poor people

Towards a People Friendly Judiciary

Adilur Rahman Khan

ROMANS made laws to control their slaves. Spartacus challenged that and went to battle against them. Time and again, laws were made to control workers, peasants and the oppressed by the ruling class in any given society. Marxists would argue that the laws are tools of oppression against the working masses and the judiciary is the vehicle for that. Great lawmakers like Prophet Moses, Jesus or Muhammad (SM) dedicated their lives to the cause of bringing justice against oppressive rulers and systems. Even in contemporary society, Judges and Jurists have been known for their judicial activism — Lord Denning is a well-known example who often ensured social justice despite conservative laws, rules and regulations.

Bangladesh, the country which fought twice for its independence within twenty-four years this century, is still juggling with its legal system and with the remnants of a colonial legal framework. The second independence in December 1971 and the subsequent enactment of the constitution of Bangladesh in 1972, provided a scope for a people-friendly judiciary for the common people of Bangladesh, who are the real founders of this country, as enshrined in the preamble of our original constitution of 1972.

Unfortunately, the government of the post liberation period failed miserably to bring any change towards a people-friendly judicial system. This has also been neglected by the subsequent military rulers.

The very concept of bringing justice to the door-steps of the common people remained and still remains a far cry away and the new rich, white color criminals and cronies of repressive regimes become the beneficiaries of the loopholes found in the laws. Peasants, workers, small businessmen and poor women of urban and rural background do not know how to reach the corridors of justice in order to move against injustices.

Moreover, the judiciary, which is supposed to be the protector of the constitution, has historically failed to do even that, which is evident during the time of the introduction of a single party system (known as BAKSAL), which lowered the power of the judiciary and transferred that power on the then President of Bangladesh (who was also made the Chairman of BAKSAL). The judiciary again became helpless and weak when the Chief Justice readily agreed to become the Chief Martial Law Administrator (CMLA) — perhaps a unique switch at that time. Another Chief Justice of the Martial Law era lowered the judiciary further by pronouncing that Martial Law was the supra law and the constitution should not compete with that. This was decided in the case of Halima Kha-

toon.

The findings of different research groups and the reports from newspapers portrait the plight of the ordinary people suffering from injustice and lawlessness in Bangladesh, the country which was supposed to be liberated for the cause of the ordinary people. The absence of judicial activism has aggravated the situation and has only made it worse.

There are reports from different international and national organizations which have also started to appear in the newspapers which deal with the corruption in the lower judiciary which is making the ordinary people more helpless and hindering the course of justice. In this over all situation it has become necessary to directly address the weaknesses and problems of the judiciary to make it free from all 'diseases' for the interest of the common people and to introduce activism into it to create a just society.

In order to make the judiciary more effective and pro-people, the following things should be introduced into it: (i) the introduction of a case management system by taking effective control in each and every case by the judges, (ii) the introduction of a continuous trial system whereby one case is completely heard and deal with before moving on to another one (instead of the present mode of hearing ten different incomplete cases in one single day, where the judge himself cannot fully and properly concentrate on the matter — which may even be adjourned for ages after its first hearing) (iii) the need for out of court settlements may also be encouraged to settle civil disputes and by doing this the judiciary can reduce its burden, (iv) the method of plea bargaining can be introduced as another concept to reduce the time of the hearing in court. However, the aforesaid ideas can only be taken up if the judiciary is ready to go for judicial activism in this country to bring about social justice.

There has been recent talk about making the judiciary proactive by bringing Public Interest Litigations before the Courts. But bringing Public Interest Litigations before a reluctant Court is like crying on deaf ears.

I am personally in favour of a pro-people judiciary which is ready to go for judicial activism, because a reluctant judiciary can allow us to have tyrant rulers whereas a vigilant and pro-people judiciary will suppress that trend and bring justice to the society.

If things are not changed by understanding the needs of the time, there may be a time when the poor oppressed people will stand up against this class divided, corrupt society and its apparatus in order to defend their rights. As Justice Krishna Iyer said, "defy law to defend justice."

within the *shalish* committee is dependent on organized groups of the poor and the support of local NGOs. Legal aid training provides an understanding of existing state laws to eliminate clear violations of existing pro-women and pro-poor laws. Of course what ultimately inhibits such violations is the capacity of local NGOs to take of-fending parties to court.

We present here, three cases of successful *Shalish* conducted by human right groups.

Shalish Against Dowry

Naju Akhter was the daughter of a poor peasant. Her marriage was arranged by a professional matchmaker in December 1994. Naju's father sold his land to pay a dowry of 10,000 takas at the time of the wedding. Even though he was very poor and could hardly afford this money, his daughter was growing up and it was even more difficult for him to face the social stigma of keeping his unmarried girl at home. Naju's parents felt that the dowry would at least buy their daughter a happy married life. However, soon after her wedding Naju faced the wrath of her months in law. She complained about Naju's cooking, she scolded her for not doing enough work, and taunted her for looking pretty. Naju's mother in law would say "you had only brought 10,000 takas from your parents. That is long gone. How will we survive now."

Naju put up with this silently. One night Naju's husband asked her to sign on a blank sheet of paper. Naju refused. She knew too well how people had lost all their assets, had given up all their legal rights through signing on blank paper. Naju's husband became furious and demanded that she bring more money from her father. Naju knew her father had sold off their last bit of agricultural land for her marriage. All they has left was the homestead. She refused. The husband started scolding her. His mother joined in. Naju was sent home to her parents.

At her parents house. Naju met workers of Nagorik Uddyog, the legal aid organization. She asked for their assistance. NGO workers sought to mediate through a *shalish*. Naju's husband refused. Naju, with the assistance of NGO workers, filed a case against her husband for forcing her to pay dowry, an illegal act according to the laws of the state. Naju's husband's family agreed to a *shalish*. The NGO withdrew their case. The *shalish* was conducted in the presence of two school teachers, the elected representative of the local government and two women member. The *shalish* decided that Naju's in laws should seek forgiveness from Naju's parents, should take Naju back, and should never ask for dowry or torture her. All sides agreed to this decision. Naju is back with her husband.

Claim for Deferred Denmohar

Shamoli Akhter, daughter of Idris Ali was married to Nazim Uddin (a policeman) in 1988. The *denmohar* (amount of money that the groom agrees to pay the bride) was set at thirty thousand takas; no dowry was demanded by the husband. Payment of the *denmohar* was deferred. They lived happily for six months but then the husband demanded five thousand takas from Shamoli for making a house. Shamoli's father borrowed money and met this demand. However Nazimuddin continued to mistreat his wife. Shamoli was pregnant but Nazimuddin wanted her to have an abortion. Shamoli refused. Nazimuddin got married for a second time without the permission of Shamoli or the *shalish* committee. Shamoli tried to lodge a complaint with the police station but failed. The policemen were friends of her husband. Shamoli then went to Nagorik Uddyog for assistance. Nagorik Uddyog arranged a *shalish* after notifying the husband. The *shalish* committee asked Shamoli what she wanted. She said if her husband paid her the *denmohar* she would not file a lawsuit against her husband for polygamy. Her husband agreed and subsequently deposited the money with Nagorik Uddyog.

Payment of Child Support

Fifteen years ago, Monowara was married to Sultan Mahmud. She was his fourth wife. After a few months of being married, Sultan Mahmud divorced Monowara. Monowara went back to her parents who were poor peasants. There Monowara had a daughter, Rikta. However Sultan Mahmud refused to accept his daughter and paid no child support money. Monowara worked as a maid at different houses and started raising her daughter in great

poverty. In the mean time Sultan Mahmud had become wealthy and a respectable members of the community. Monowara had made repeated attempts at trying to get Sultan Mahmud to pay for Rikta's upkeep. However all attempts failed. Many years passed and Rikta grew up. A year ago Monowara heard of the activities of Madaripur Legal Aid (MLA) in her village. One day she went with her 14 year old daughter to the MLA office and told them of her plight. MLA took her case up. After several months of trying MLA finally managed to call a *shalish* in November 1997. At the *shalish* Sultan Mahmud claimed that he had already paid the *denmohar* at the time of divorce. However MLA pointed out that he was also under legal compulsion to pay for child support. Sultan Mahmud asked for time and the *shalish* was reconvened in two weeks. Sultan Mahmud finally agreed to legally transfer some land to his daughter. In addition he would pay 500 takas every months and would pay for all expenses at her wedding.

Depriving the Daughter in Law from her Husband's Property

When Moharani claimed her part of the property from her husband's property after her husband's death, her father in law refused to share with her. The father in law was not only depriving the widow from her part but was also refusing the share of his grand daughters. Moharani then complained to Nagorik Uddyog. Nagorik Uddyog after consulting with both parties fixed a date for a *shalish*. The *shalish* decided that the father in law must give Moharani her share of her husband's property according to the Muslim Family Law Act of 1961. At the *shalish* the father in law agreed to the decision but later, with the support of local thugs, violated the *shalish* decision and filed a case against Moharani in court. He felt he could influence the court. Nagorik Uddyog's legal aid cell represented Moharani before the court. When the father in law realized that he would not win he approached Nagorik Uddyog and said that he would like to withdraw the case and follow the previous *shalish* decision. This was agreed upon and Moharani now has received her share of her husband's property.

This is excerpted from an article by Syed M Hashemi and Shahana Hayat. The program for Research on Poverty Alleviation is funding action research to make *Shalish* more sensitive to the needs of women and poor people.

ANNOUNCEMENT

Young Entrepreneurs and Professionals Forum (YEP Forum) in cooperation with The Daily Star and The British Council will arrange a dialogue on 'Expectations from Our Tele Media.' Eminent Makers, Artists, Producers, Social Activists, Journalist, and young Professionals will participate.

We invite you to send in a small write-up on the issue (250 words) which we will publish in the YEP page of The Daily Star.