

Public Interest Litigation in Bangladesh: A Long Way to Go

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Abstract

'Public Interest Litigation' can be defined from the term itself; it means a litigation which is filed by a person in the interest of the public at large. Therefore, Public Interest Litigation means, a litigation for the protection of public interest. This power has been given to the public by the court through judicial activism. However, for this litigation the litigant has to satisfy the court that he has initiated the litigation not for his own personal interest rather for the interest of the public at large. Public Interest Litigation refers to such kind of activist jurisprudence that allows a person without being personally aggrieved to pursue the court for a public reason for appropriate remedy. In Bangladesh Public Interest Litigation is a post-democratic or post 1991 phenomenon and its emergence or much labour birth was largely influenced by the political change. The constitutional provision that backs up the Public Interest Litigation in Bangladesh is Article 102 of the Constitution of the Peoples' Republic of Bangladesh. Public Interest Litigation in Bangladesh has not achieved the expected success due to lack of fine tuning process and the lack of expected judicial activism. Furthermore, the 'non-enforceable' Fundamental Principles of State Policy in the constitution is also a bar in respect of the smooth functioning of Public Interest Litigation. In Bangladesh Public Interest Litigation can be used as a tool for social transformation and as such it has a long way to go in future.

Keywords: Public Interest Litigation, Constitutional Law, Judicial Activism, Bangladesh.

Introduction: Anglo Saxon system of jurisprudence is the base of the court system of the People's Republic of Bangladesh.

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Under this system a person having sufficient interest or locus standi in the subject matter of the suit may come to the appropriate court of justice, having appropriate jurisdiction to try the suit, for appropriate remedy. The theory of laissez faire is the base of this strict rule of locus standi or sufficient interest. Under this theory the state has little to no concern about the welfare of the citizen of the state rather its main function is to maintain internal rule and order and to defend the state from external aggression. However, in a welfare state the government should be always ready to protect the rights of the citizen. Therefore, if there is any infringement of any right of any person or a group of person then that infringement shall come under the review of judicial consideration by the victim himself or by a public spirited person. This is the concept of public interest litigation that any infringement of right can be challenged by a person who is not directly connected with this matter.

Origin of the Public Interest Litigation

The American concept of public interest litigation and the class actions of the 1960s are the initial inspiration of Public Interest Litigation. Such kind of litigation is called as 'Public Interest Law' in the USA and is called as 'Public Interest Litigation' in the Indian Subcontinent. The USA is the real pioneer in the path of Public Interest Litigation which influenced some Public Interest Litigation activist worldwide to work for Public Interest Litigation in the 1960s and 1970s. The pioneer US case in the field of emergence of Public Interest Litigation is *Brown V. Board of Education*.³

Definition of Public Interest Litigation

'Public Interest Litigation' can be defined from the term itself; it means a litigation which is filed by a person in the interest of the public at large. However, 'public interest' is defined by Stroud's judicial dictionary⁴ as, 'a matter of public or general interest does not mean 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.'

'Public Interest Litigation' is defined by Bhagwati J. in the case of *People's Union of Democratic Rights V. Union*⁵ of India as, 'Public interest litigation is essentially a co-operative effort on the part of the petitioner, the State or

3. 347 U.S. 483 (1954)

4. Vol. 4, 4th Edition

5. AIR 1982 SC 1473

public authority and the Court to secure observance of the constitutional or legal rights, benefits and privileges conferred upon the vulnerable section of the community and to reach social justice to them'. Moreover, Kirpal J. in the case of *People's Union of Democratic Rights V. Ministry of Home Affairs*⁶ said, 'As I understand the phrase "Public Interest Litigation", it means nothing more than what it states namely it is a litigation in the interest of the public. Public interest litigation is not that type of litigation which is meant to satisfy the curiosity of the people, but it is a litigation which is instituted with a desire that the court would be able to give effective relief to the whole or section of the society'.

'Public Interest Litigation' is known as 'Public Interest Law' in the USA and American Bar Association defines 'Public Interest Litigation' as, '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 Rights Law; (4) Charitable Organization Representation; (5) Administration of Justice.'

Therefore, Public Interest Litigation means, a litigation for the protection of public interest. This power has been given to the public by the court through judicial activism. However, for this litigation the litigant has to satisfy the court that he has initiated the litigation not for his own personal interest rather for the interest of the public at large. Public Interest Litigation refers to such kind of activist jurisprudence that allows a person without being personally aggrieved to pursue the court for a public reason for appropriate remedy.

In this regard the *Malaysian case of Mohamed bin Ismail v Tan Sri Haji Othman Saat* states, '...if they (public authorities) transgress any law or constitutional directive, then any public-spirited citizen, even if he has no greater interest than a person having regard for the due observation of the law, may move the court and the court may grant him appropriate legal remedy in its discretion.'⁷

Public Interest Litigation in Bangladesh

In Bangladesh Public Interest Litigation is a post-democratic or post 1991 phenomenon and its emergence or much labour birth was largely influenced by the political change.

6. AIR 1985 Delhi 268

7. [1982] 2MLJ 133 at 136, per Wan Yahya J.

The reason behind the delayed implementation of Public Interest Litigation in Bangladesh are the unwillingness of judges to break away from colonial legal thinking and the unwillingness of broad interpretation of constitutional textualism.

The case of *Kazi Mukhlesur Rahman V. Bangladesh (the Berubari case)* in 1974 was an early decision of Bangladesh Supreme Court which had strong Public Interest Litigation flavour and was very close in establishing a judicial review in public interest. However, in 1991 the Bangladesh Supreme Court rejected the possibility of Public Interest Litigation in the case of *Bangladesh Sangbadpatra Parishad V. Bangladesh (the Sangbadpatra case)* as unlike Indian constitution Bangladesh constitution requires a 'person aggrieved' test for constitutional remedy under Article 102 of the constitution. The Sangbadpatra case states, "In our Constitution the petitioner seeking enforcement of a fundamental right... must be a 'person aggrieved'... The emergence in India of pro bono publico litigation...has been facilitated by the absence of any Constitutional provision as to who can apply for a writ."

The Public Interest Litigation won its jurisprudential battle and was finally accepted in 1996 by the case of *Dr. Mohiuddin Farooque V. Bangladesh (the FAP 20 case)*. In this case an organization namely Bangladesh Environmental Lawyer's Association (BELA) was granted locus standi to challenge an ongoing flood control project. Moreover, in this case Justice Kamal made a much-awaited statement: "[W]hen a public injury or public wrong or an infraction of a fundamental right affecting an indeterminate number of people is involved...any member of the public, being a citizen...or an indigenous association...has the right to invoke the [Court's] jurisdiction."

'Public Interest' in Public Interest Litigations

The Public Interest Litigation shall be filed in 'Public Interest'. Therefore, in an ideal Public Interest Litigation three stages are involved:

- a) Public interest shall be given priority over special interest.
- b) The judge shall decide the public interest by exercising his/her discretionary power.
- c) The judge shall exercise his or her discretionary power judiciously as opposed to whimsically or arbitrarily.

The Constitutional Backing of Public Interest Litigation

The constitutional provision that backs up the Public Interest Litigation in Bangladesh is Article 102 of the Constitution of the Peoples' Republic of Bangladesh. For any breach of fundamental rights under Part III of Bangladesh Constitution, Article 102 of the Constitution allows the court to pass an order requiring the government to do what is required by law and not to do what is no required by law. In this regard an "aggrieved person" can go to the court for effective remedy under Article 102 of the Constitution. However this "aggrieved person" test has been gradually relaxed by the apex court itself and now any person or any development organization may go to the court for effective remedy on behalf of the affected people of the society.

When Public Interest Litigation can be filed

In Bangladesh Public Interest Litigation can be filed in the following grounds:

1. Public Interest Litigation is filed for the benefit of the society as a whole or a segment of the society. Therefore, for Public Interest Litigation there must be a public cause as opposed to a private cause. However, public cause includes several situations:
 - a) Where the entire public or entire community is affected by the matter in question.
 - b) Where a vulnerable segment of the society is involved by the matter in question.
 - c) Where one or more individuals are affected by the matter in question but its nature is so gross or serious that the conscience of the whole community is shocked.
2. For Public Interest Litigation any individual or organization may approach the court in good faith. This includes sou motu (on his own motion) activity of the judges because the judge himself is a conscious citizen of the state.
3. In Public Interest Litigation the court follows the non-adversarial system of litigation as opposed to adversarial system of litigation.

Court's activism and flexibility in Public Interest Litigation:

The Public Interest Litigation requires the activism and flexibility of the court in three phases:

1. The liberal interpretation of the 'person aggrieved' test for ensuring locus standi (right to sue) of the petitioner.
2. During the process of adjudication the court shall ignore the procedural rigidity and formalities.
3. In providing relief the court shall go beyond the traditional techniques and grant innovative and appropriate remedies.

Boundary of Public Interest Litigation

Public Interest Litigation shall operate within a boundary. There shall be a limit that Public Interest Litigation cannot cross. In respect of deciding the boundary of Public Interest Litigation the following conditions may be mentioned:

1. Unless certain basic requirements are fulfilled the court cannot proceed with a Public Interest Litigation:
 - a) There must be a non-performance or violation of constitutional or legal duties.
 - b) The court shall be reluctant to perform an act that the judicial mechanism is not designed to perform.
 - c) The court shall proceed only if it is possible to provide effective remedy through judicial process.
 - d) If there is an alternative remedy the court may not entertain a petition unless the alternative remedy is not efficacious. However, the court is not absolutely barred from entertaining a petition even if there is an efficacious alternative remedy.
2. The court must follow the constitutionally allocated responsibility. Therefore, in Public Interest Litigation matters the court cannot do a lot of things:
 - a) To shape public policy the court cannot dictate or force the executive.
 - b) To initiate legislation the court cannot force or compel the legislature.
 - c) The administrative cannot be usurped by the court.
 - d) The court cannot order for a parallel investigation when the administration already dealing with the matter unless the court is satisfied that the administration is not functioning properly.
3. The court must be satisfied that the petitioner is approaching the court with bona fide (good faith) intention.

Value of Public Interest Litigation

Public Interest Litigation carries significant values. The values of Public Interest Litigation may be summarized as follows:

- a) Through Public Interest Litigation the weaker sections of the society can be ensured with effective judicial protection.
- b) Public Interest Litigation can ensure accountability of the government.
- c) Public Interest Litigation can ensure transparency in the decision making process of the government.
- d) Democracy deficits can be remedied by Public Interest Litigation.
- e) Public Interest Litigation can promote efficiency in the judicial institutions.
- f) Representation of the defused interests can be allowed by Public Interest Litigation.
- g) Access to justice can be ensured by Public Interest Litigation.
- h) Public Interest Litigation can allow participative justice.
- i) Public Interest Litigation can allow the government to enforce legal norms.
- j) Public Interest Litigation protects democratic governance and rule of law.

Remedies in Public Interest Litigation

In Public Interest Litigation remedies can be provided in any of the following situations:

1. The court may use epistolary jurisdiction to provide effective remedy in a Public Interest Litigation. In this regard the court may treat letters or telegrams as a writ petition and initiate a Public Interest Litigation. However, there is no bar to treat letters and telegrams as writ petition.
2. The court may act *sou motu* to initiate a Public Interest Litigation. The word *sou motu* is opposed to 'on the application of any party' as it means 'on his own motion'.
3. In a Public Interest Litigation the court can appoint commission for carrying out investigation and presenting reports and recommendations to the court.
4. In Public Interest Litigation the court can enlist some volunteers to aid the court. Most popular method in this regard is the appointment of 'amicus curiae' or 'friend of the court'.

5. In a Public Interest Litigation the court may order for continuous supervision and monitoring over the administrative organs of the state.
6. In a Public Interest Litigation the court may award compensation to the victim for wrong done to him. In respect of awarding compensation Justice MM Hoque states, 'Since the court exercise its Special Original Jurisdiction and since this Court has got extraordinary and inherent jurisdiction to pass any order as it deems fit and proper, we are of the view that this Court has power to award simple cost of the case as well as monetary compensation considering the facts and circumstances of each case'.⁸ However, the court may award compensation in two stages. Firstly, the court may award an amount of compensation as soon as the rule is issued as an interim relief till the case is finally disposed off. Secondly, the court may finally determine the amount of compensation and grant it to the victim at the time of disposal of the suit.

Recommendations

Regarding Public Interest Litigation the following recommendations can be given:

1. There is a tendency among lawyers to file a writ petition in the name of Public Interest Litigation to achieve easy popularity. Therefore, Public Interest Litigation shall be filed in respect of a really serious matter.
2. Sou motu activity of the judges in respect of Public Interest Litigation matter shall be exercised cautiously as this principle is against the principle of 'natural justice' as the principle of natural justice states, 'no one can be a judge in his own case'. Though this point can be contravened by the statement that the Public Interest Litigation is not initiated for the interest of the judge himself rather it is filed in the interest of the public.
3. Public Interest Litigation cannot be filed to pressurize the executive and legislature to compel them to do or monitor their day to day activities. Therefore, separation of powers as a constitutional principle shall also be maintained.
4. The Public Interest Litigation should not be limited to the High Court Division itself rather it should also be initiated in the District level.

8. *Bilkis Akhter V Bangladesh and Others* 17 BLD (1997) 395 at 407

In this regard a successful claim was initiated and won in the case of *KM Zabir V Amanullah and Others*.⁹

5. Most of the Public Interest Litigations in Bangladesh are filed on the basis of the reports of the newspaper. Therefore, the authenticity of the reports of the newspaper should be tested in a cautious manner.
6. In Bangladesh there is no permanent Writ Bench in the High Court Division. As the Public Interest Litigation is significantly involved with the discretionary power of the judges; therefore, there should be a permanent bench of the High Court Division that shall deal with the Public Interest Litigation matters only.
7. In the Public Interest Litigations when the orders of the court is made there is no proper monitoring and supervision mechanism. Therefore, the court shall enforce a proper monitoring and supervision mechanism in respect of Public Interest Litigation matters.

Conclusion

In Conclusion it can be said that the future of Public Interest Litigations in Bangladesh is very bright. However, Public Interest Litigation cannot work in isolation rather it is a part of legal aid and public interest law. Moreover, the Public Interest Litigation in Bangladesh has not achieved the expected success due to lack of fine tuning process and the lack of expected judicial activism. Furthermore, the 'non-enforceable' Fundamental Principles of State Policy in the constitution is also a bar in respect of the smooth functioning of Public Interest Litigation. Therefore, the liberal interpretation of the Fundamental Principles of State Policy with the Fundamental Rights as mentioned in the constitution is a need of the timer and the Public Interest Litigation can be used as a tool for social transformation and as such it has a long way to go in future.

9. Unreported CMM Court Dhaka Case No.1097A 1/88.

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