Book Review

Sara Hossain, Shahdeen Malik and Bushra Musa (eds), Public Interest Litigation in South Asia: Rights in Search of Remedies, Dhaka, 1997, pp.xvi +184, Price,Taka 270.00.

The judiciary in South Asia is increasingly assuming an impressive role through liberal interpretations of various laws and statutes for a better regime of social justice. Public Interest Litigation has emerged as a pivotal instrument of such judicial activism. It is well recognised that PIL was initiated by the judiciary of India, both in the substantive and procedural spheres. PIL attempts to ensure access to justice to the socially and economically disadvantaged, deprived and exploited sections of the people who are unable to seek remedy through court due to various resource constraints. PIL, particularly in India, has led the way for expansive interpretation of the procedural rule of *locus standi* and has also opened up the judicial system for those who, otherwise, would have been restricted in terms of access to judicial remedies for violation of their rights.

The transition of legal formalism to judicial activism is also referred to as a Social Action Litigation because the problems which are brought before the courts under public interest litigation relate to much wider field of social injustice rather than the injustices engendered by violations of the formal legal system. It is increasingly used as an effective means to secure implementation of the constitutional and legal rights of the under privileged and ensuring social justice for them. PIL is also considered a timely response to social, economic and collective rights.

With the emergence of modern welfare state and the end of colonialism, new categories of rights such as social, economic, cultural and collective have evolved to facilitate equitable justice. Moreover, the complexities of modern societies generate diffused pattern of interests and duties of the individual. In these situations, the traditional individualistic litigation is seemed to be inadequate to address social, collective and diffused rights and, as a result, the necessity for new remedies and procedures are required. The development of PIL is a quest for such new remedies. Indeed, the courts are increasingly assuming the task of restructuring the societal order through PIL so that the social and economic rights become a meaningful actuality for the poor and the disadvantaged sections of the society.

PIL is also considered a "strategic arm of legal aid". The main problem involved in delivering legal aid is to identify ways and means to reach the large number of poor in an effective manner. PIL provides some of the ways and means to resolve problems of legal aid by facilitating justice to a large segment of the people.

Unlike India, recourse to PIL for seeking remedies for violating of rights of large segment of the populace is a relatively recent phenomenon in Bangladesh. In fact the comprehensive judgement of the Appellate Division, *Dr. Mohiuddin Farooque vs Bangladesh*[1] paving the way for PIL was delivered less than two years ago. This perhaps explain the paucity of publications on PIL in Bangladesh. So far the book Public Interest Litigation in South Asia: Rights in Search of Remedies[2] is the only one on PIL, published in Bangladesh. Although this book contains articles presented at a seminar held in Dhaka a few years ago, its publication in 1997 coincides with, as it were, the major breakthrough in PIL by the judgement in the case of the *Dr. Mohiuddin Farooque*, and as such the publication is a timely one. This book analyses the jurisprudential basis of the concept of Public Interest Litigation developed by the judiciary of the SAARC countries. The book is divided into five sections dealing with various dimensions of PIL and explores the idea of judicial activism, national experiences, and the relevant issues and challenges.

Clarence J. Dias discusses the issue of PIL under the heading of "Social Activism and Movements for the Legal Reform" from a historical perspective of the SAARC region which shares a common colonial legacy. This commonality of historical background has shaped many of the movements for political, economic and social justice in the region. The article argues that the SAARC countries are moving towards an indigenisation process of their legal system; social legislation for redistributive justice; judicial activism confronting the "access" problem; struggle against authoritarian rule; promoting pluralism for protection of minority rights; and formulating an innovative framework to ensure equitable access to the resources and gender justice. The author is quite optimistic that by enhancing the participatory nature of parliamentary processes, increasing the transparency and accountability of the administration, and safeguarding the independence of the judicial process, the constitutions of these countries can be rejuvenated for the well being of common people. In this regard, lawyers, jurists and intellectuals alike have to develop socially relevant jurisprudence, concepts, theories and legal reform policies around the broad concern of sustainable development for a common future of the South Asian countries. In this transformation process,

---

1 49 (1997) DLR (AD) 1; 17 (1997) BLD (AD) 1.

2 Sara Hossain, Shahdeen Malik and Bushra Musa (eds), Public Interest Litigation in South Asia: Rights in Search of Remedies, Dhaka, 1997.

he observes, PIL marks a shift away from an adversarial judicial system to a new legal order to broaden the judiciary's participatory role in the social movement.

Justice D. A. Desai, in his article "The Jurisprudential Basis of Public Interest Litigation" outlines how the English legal system with different cultural, normative and institutional backgrounds had been transplanted into the legal system of the subcontinent with its economic backwardness, rural traditional society and high rate of illiteracy. As a result, the adoption of the norms and ideology of imperial legal system became counter productive for the South Asian countries. According to him, the concept of *locus standi* is a creation of colonial legal system and the strict application of this principle may lead to the denial of access to justice to the impoverished, deprived and disadvantaged segments of society. So, the restrictive rules about standing are, generally, inimical to the new social order which the constitution of India seeks to create by inserting provisions of social and economic rights in the directive principles of state policy. The conferment of the social and economic rights and the imposition of duties on the state for taking affirmative action generate situations in which a single human action can be beneficial to a large number of people. He suggests that the PIL is such a single action of a public spirited or socially conscious individual or a voluntary organization for drawing attention of the court to the misery, oppression and denial of rights of a large segment of society who are individually or collectively unable to approach the judiciary. Since it deals with the deprived section of the society, he also refers it as a "social action litigation", an instrument of combating the repressive actions of the agencies of the state, notably the police, the prison and custodial authorities and governmental lawlessness. He referred to some decisions of the Indian Court, such as the *Bandhu Mukti Morcha*,[3] *D. S. Nakura vs. Union of India*,[4] and other to describe the transformation that took place in the jurisprudential concept of locus standi.

Soli Sorabjee conceives Public Interest Litigation as a liberated concept of procedural rule of *locus standi*. In his article "Protection of Fundamental Rights by Public Interest Litigation" he perceives PIL as an instrument for redressing public injury, enforcing public rights and interests and, thus, vindicating the rule of law. The main objective of PIL is to secure effective access to justice for the economically and socially disadvantaged classes and groups and for meaningful realisation of the guaranteed fundamental rights. Without easy access to justice, legal and constitutional rights would be mere teasing illusions.

---

[3] (1983) 3 SCC 161 at 186 para 12; AIR 1984 (SC) 802.

[4] (1983) 1 SCC 305 at 344 para 64; AIR 1983 (SC) 130.

Rejecting any suspicion that PIL would open the flood-gates of litigation, the writer thinks that PIL is in fact an appropriate recognition of democratisation of judicial remedies and it is a much needed pragmatic approach to newer concepts of social justice. He, then, argues that the major reason which impelled liberalisation of *locus standi* is that the closing the doors of the court to a party who, though not personally affected but is espousing a genuine cause and drawing the court's attention to a breach of constitutional obligations by the government agencies would be detrimental to the public interest and the rule of law. He focuses on "epistolary jurisdiction" through which the Supreme Court and High Courts of India have substantially contributed to the development of Public Interest Litigation.

The Indian Supreme Court has evolved a number of practices under "epistolary jurisdiction"; for example, treating letters as writ petitions without requiring the help of lawyers to activate the courts; appointing commissions for the purpose of gathering facts and data in regard to a complaint of breach of fundamental rights. Thus, through judicial activism, fundamental rights of the constitution have become a living reality for poor segments of the population.

About the possibilities of abuse of the process of the court through PIL, he expresses the optimism that the judicial self-restraint will act as check on the judicial activism and the court is prudent enough to allow only a person to initiate PIL who is a public spirited one or a responsible representative of the public, and whose interest in PIL is not for personal gain or private profit or political motivation or other oblique consideration. Despite some shortcomings, he concludes that the prospects of PIL for advancement of the public good are immense. In his own words,

> Numerous under-trial prisoners languishing in jails have been released; persons treated like serfs and held in bondage have secured freedom and have been rehabilitated; the conditions of inmates of prisons and mental asylums and of workers in stone quarries and brick kilns have been ameliorated.[5]

Dr. Kamal Hossain explores the prospects of PIL from the fundamental principle of state policy in his article "Interaction of Fundamental Principles of State Policy and Fundamental Rights." He observes that countries adopting constitutions in recent decades, specially in South Asia, have distinguished non-justifiable Fundamental Principle of State Policy from justiciable fundamental human rights in their constitutions. However, he argues, drawing any simplistic line of difference between these provisions will be construed against the spirit of the constitution. The Fundamental Principles of State Policy, he suggests, ought to be read together with fundamental rights spelt out

---

[5] Soli J. Sorabjee, "Protection of Fundamental Rights by Public Interest Litigation" in supra note 2, p.40.

as a unified design of a political, social and economic order which the constitution pledges to secure for the people of these countries. They provide the mandate for innovative laws, institutions and remedies and for affirmative action designed to give substance to the constitutional pledges of freedom, equality and justice. The three organs of the state; the judiciary, executive and legislature are obliged to realise these constitutional mandates through affirmative actions. He underscores the necessity for applying the doctrine of "harmonious construction" developed by the Indian Supreme Court in *Keshavanda's*[6] case, in interpreting these provisions to form a holistic and integral approach to the constitutions. Thus, a dynamic interaction between these provisions is essential to realise constitutional goals and aspirations. Regarding the prospect of the Public Interest Litigation in Bangladesh, he suggests that the Fundamental Principles of State Policy provide valuable reservoir which conscious citizens can draw upon for the purposes of public education, mobilisation of public opinion and, indeed, to initiate public interest litigation to realise the pledge of social and economic justice made by the constitution.

Amir-Ul Islam takes a comparative view in his paper "A Review of PIL Experiences in South Asia" to highlight the development of the PIL. He observes, PIL is the emerging concept of the rule of law and equal justice. It is not merely an isolated phenomenon concerning the problem of *locus standi*, but an integral part of the concept of distributive justice as distinct from that of justice for the privileged few. He considers adaptability is a *sine qua non* of the continual existence of a legal system. So, the restrictive concept of *locus standi* should also be adapted to changed social context to create a just and equitable order.

He claims that the term "person aggrieved" is not a creation of our constitution but is inherited from the colonial legal system. With the changing social order, the term *locus standi* needs to be construed in the context of the entire constitution including the Preamble, Fundamental Rights and Fundamental Principles of State Policy. From his paper it appears that the judicial activism of the South Asian countries emerged as a pivotal instrument for creating legal and social environment in which justice is made available to the poor, the less priviieged and the weaker segments of the population. Through judicial activism, the court assumes the role of social auditor or judicial ombudsman by providing a useful check on executive excess, preventing misuse of power, wastage of public funds and corruption. In his observation, the bench, the bar, social action group and NGOs are adopting similar liberal attitude regarding the standing rule in Nepal and Sri-Lanka.

---

[6] *Keshavanda vs State of Kerala*, AIR 1973 (SC), at 1461.

Regarding the standing rule of the Bangladesh Constitution, he suggests that although the remedy under Article 102 is restricted to "the person aggrieved", a proper construction of the language used in Article 102 makes it clear that the article is manifestly intended to expand remedies, not to restrict those. He holds that the remedy may be ineffacacious even under ordinary law for the poor and illiterate who may be unable to approach the court for necessary expenses, cumbersome procedure and ignorance of remedies. His firm conviction is that procedural rules should not obstruct substantive justice but these rules must act only as a handmaiden for the judges to do complete justice.

Justice A M Mahmudur Rahman mentions the existing statutory provisions which provide scope to initiate PIL. The most important provisions in this regard are contained in sections 91 & 92 of the Code of Civil Procedure which concern suits relating to public matters, public nuisance and public trust; section 491 of the Criminal Procedure Code (Cr. P. C) empowering the High Court Division for writs of *habeas corpus*; section 133 of the Cr. P.C. empowering a magistrate to provide remedy in case of public nuisance; sections 268, 269, 278, 292 of the Penal Code dealing with public offence, negligent act, noxious atmosphere, pornography; the Environmental Conservation Act 1995; the Employment of Children Act and the Factories Act dealing with security and maintaining adequate facilities for the workers.

On the threshold on the 21st century, when there is a global awareness with regard to the maintenance of ecological balance, the courts would not be justified in avoiding the problem of ecological imbalance. Justice Umesh Banerji analyses, in his paper "Environmental Protection through Public Interest Litigation", the obligation of the judiciary to the environmental degradation which is posing a threat to the humankind. He surveys how the Indian Courts have already responded, through PIL, to needs for protection of environment and is striking a balance between the challenges of development and the protection of nature. Evaluating the role of the judiciary in this regard, he remarks: "Environmental law, as it stands today in India, is an intermix of enactment and judicial pronouncements."[7] For him, the Indian judiciary is assuming a greater role in the protection of environment and in this regard he also referred to some important instances of PIL, i.e., *Rural Litigation and Entitlement Kendra vs State of Uttar Pradesh*,[8] *Calcutta Youth Front vs State*

---

[7] Mr. Justice Umesh C. Banerji, "Environmental Protection through Public Interest Litigation" in supra note 2, p.126.

[8] *Rural Litigation and Entitlement Kendra vs State of Uttar Pradesh*, 1988 AIR (SC) 2187 at 2198, para 26.

of West Bengal,[9] *S.P. Gupta vs Union of India,*[10] *Shriram Foods and Fertilizer Industries vs Union of India.*[11]

Women rights movement has emerged as a dominant political ideology in the quest for a just and progressive society in this century. Sultana Kamal focuses PIL from women's perspective in her article "Public Interest Litigation: A Women's Agenda." She shows how women are subjected to discrimination and exploited in the patriarchal society. She emphasised that women's role in society should be redefined and re-evaluated in the changed context. For her, no meaningful development is possible unless the concerns of women are incorporated in the national development policies. The existing legal and administrative system should also be restructured so as to facilitate the integration of woman in the mainstream of the society. Particularly, the judiciary has a fundamental role to play to safeguard women's interests and rights, keeping in mind the constitutional obligation of upholding fundamental rights and equality between men and women. The judiciary should dispense the responsibility to eradicate deep-rooted prejudices and social attitudes towards women by liberal interpretation of law. In her words:

> It is not only the law which perpetuates inequality in our society, the interpretation of the law, lawyers and judges, often work with the underlying assumption that women are unequal and do not have the rights to exercise choices in a meaningful manner.[12]

In this backdrop, the PIL may be a strong weapon to resist social evil of gender violence and discrimination which afflicts half of the society. So, the individualistic interpretation of the doctrine of *locus standi* becomes an impediment to women's access to justice. Thus, according to her, PIL may be one of the strategies in order to bring marked improvements in the status of women with regard to their rights.

It will now be relevant here to provide some glimpses of the development of PIL in Bangladesh and India. The concept of public interest litigation gained momentum from historic judgements of the Indian Supreme Court. The Indian Constitution, neither in Article 32 nor Article 226, has mentioned who can apply for enforcement of fundamental rights and constitutional remedies. In contrast, the Bangladesh Constitution explicitly mentions of "aggrieved person" which had traditionally been interpreted in a restricted sense. However, the Supreme Court of Bangladesh has widened the ambit and scope of this traditional concept of *locus standi* (aggrieved person) gradually through

---

9 Calcutta Youth Front vs State of West Bengal, (1986) 2 CLJ 26 at 32, para 6.

10 *S.P. Gupta vs Union of India*, AIR 1982 SC 149.

11 *Shriram Food and Fertilizer Industries vs Union of India*, (1986) 2 SCC 176.

12 Sultana Kamal, "Public Interest Litigation: A Women's Agenda" in supra note 2, p.138.

a number of judgements. The first test of the procedural rule of *locus standi* before the judiciary was the case of *Kazi Mukleshur Rahman vs Bangladesh*[13] in which the appellant challenged the Delhi Treaty of 1974 regarding the demarcation of land boundary between India and Bangladesh. In upholding the *locus standi* of the petitioner, the court held that although the appellant is not a resident of the Berubari enclave, he might be heard in view of the constitutional issue of great importance involved in the case. The court held that the treaty posed threat to his certain fundamental rights guaranteed by the constitution, namely, the right to move freely throughout the territory of Bangladesh; to reside and settle in any place therein as well as his right of franchise. Evidently, these rights attached to a citizen are not local in nature but they pervade and extend to the whole territory of Bangladesh. The next crucial test which appeared before the Supreme Court was Bangladesh *Sangbad Parishad vs Govt. of Bangladesh,*[14] Bangladesh Sangbadpatra Parishad (B.S.P.), an association of newspaper owners and news organisations, challenged sections 9, 10(3) and 11 of the Newspaper Employees Act,1974 and the Constitution of the Fourth Wage Board. The High Court Division held that the petitioner, Bangladesh Sangbadpatra Parishad (B.S.P.) is not a "person aggrieved" to challenge the validity of the law or the Wage Board. It is the owners of the newspaper and the employees who are affected by the award and not Bangladesh Sangbadpatra Parishad. Later, the Appellate Division held that the petitioner was all along associated with the award-making process; it is not an "aggrieved person" and the court noted that the petitioner is not espousing the cause of any downtrodden and deprived sections of the community which is unable to spend money to establish their fundamental rights and enforce its constitutional remedies. It is not acting *pro bono publico* but in the interest of its own members. The judgment indicated that the court could allow such a petition if it were submitted on behalf of disadvantaged and deprived sections of the people unable to spend money to establish their fundamental rights. Thus, the door of the public interest litigation was not completely closed but it waited for some situation to interpret the term "person aggrieved" in the proper context of the entire constitution.

The next landmark judgement in this regard was *Bangladesh Retired Government Employees Welfare Association vs Bangladesh*[15] where the association of retired government employees filed a writ petition claiming superannuation pension according to pay due in posts held at the time of retirement. The court held that since Bangladesh Retired Government Servants

---

[13] *Kazi Mukleshur Rahman vs Bangladesh*, 26 (1974) DLR (SC) 44.

[14] *Bangladesh Sangbad Parishad vs Govt. of Bangladesh,* 43 (1991) DLR (AD) 126.

[15] *Bangladesh Retired Government Employees Welfare Association vs Bangladesh,* 46 (1994) DLR (HCD) 426.

Welfare Association was an organisation for looking after the common interests of all retired government employees, the Association was entitled to ventilate their interest before the court in the form of Public Interest Litigation. Justice Naimuddin Ahmed, in delivering judgement, observed:

> ....the constitution of the country is not a morbid document but a dynamic instrument capable of being interpreted and applied in the ever-changing socio-economic context of society. The judicial function is to interpret it in such a way to meet the socio-economic needs of those who are incapable, on account of poverty or otherwise, to seek assistance of the court which exists for safeguarding the rights and interests of all citizens. In this context to refuse to enforce a fundamental right and to leave a citizen to perennial suffering by denying justice to him merely on the technical ground of *locus standi* will virtually tantamount to failure of this court to discharge its constitutional obligation.[16]

Thus, our Supreme Court, over the years, was gradually moving towards the liberalisation of the standing rule.

The most significant change has been brought by the Supreme Court in the standing rule in the case of *Dr. Mohiuddin Farooqe vs Bangladesh*[17] in which the Supreme Court opted for a liberal interpretation of *locus standi* and held that voluntary societies and representative organisations having no personal interest in the cause would be allowed to challenge the validity of a law or an action of government agency affecting the public generally. The cause which the appellant espoused in the writ petitions was 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 following fundamental issues were raised and resolved by the court in this judgement:

1. As to the standing of the petitioner, it was decided that Bangladesh Environmental Lawyers Association is an association registered under the Societies Registration Act, 1860. It has been active for a couple of years as one of the leading organisations in the field of environment, ecology and relevant matters of public interest. In view of its dedicated commitment to prevent environmental degradation it has acquired a standing in its own right to represent the legal issues involved in the writ jurisdiction.

2. An innovative interpretation was adopted regarding the constitutional provision concerning public duty. Article 21 of the Constitution reads as follows: "It is the duty of every citizen to observe the constitution and the laws, to maintain discipline, to perform public duties and to protect public property."

---

16 Ibid., at p.435, para 23.

17 Supra note 1.

The petitioner which is an association of lawyers dedicated to the protection of a healthy environment is a concerned group. So, it is very much a "person aggrieved" and it must have an opportunity to put its concern at rest by approaching the Court for redress. The denial of *locus standi* to such a group will not only be an unconstitutional bar to the performances of public duty but also a judicial condemnation of the association's dedicated efforts to perform its public duty.

3. An unique interpretation was also adopted regarding Preamble of the Constitution. The Preamble and Article 8 also proclaim "the principles of absolute trust and faith in the Almighty Allah" as a fundamental principle of the Constitution and as a Fundamental Principle of State Policy. Absolute trust and faith in the Almighty Allah necessarily mean the duty to protect His creation and environment. The appellant is aggrieved, because Allah's creations and environment are in mortal danger of extinction and degradation.

4. The concept of intergenerational justice was also raised by the petitioner. The appellant is espousing the cause of violation of Fundamental Rights of a large segment of the population in respect of their right to life, property and vocation. The beneficiaries of this writ petition are not only the present generation, but also the generation yet to be born for whom the present generation holds the environment as an intergenerational trust. Every generation has a responsibility to the next to preserve that rhythm and harmony which their inherited environment has bequeathed to them.

5. Historical background of the constitution was also invoked. The constitution of Bangladesh is not the outcome to a negotiated settlement with a former colonial power; it is the fruit of the a historic war of independence, achieved with the lives and sacrifice of millions of people for a common cause. It is a constitution in which the people features as the dominant factor. According to Article 7, the people is the repository of all power of the Republic which shall be effected only under and by the authority of, the Constitution. Justice Mustafa Kamal observed:

> With the power of the people looming large behind the constitutional horizon it is difficult to conceive of Article 102 as a vehicle or a mechanism for realising exclusively individual rights upon individual complaints. The Supreme Court being 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 remain the focal point of concern of the Supreme Court while disposing of justice or pronouncing 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 a stand taken against the Constitution.[18]

6. Regarding the apprehension about the flood gate of litigation which may be opened by permitting public interest litigation, the Court provided for some safeguards. The Appellate division observed:

> 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 is no doubt a flood and the constitution is the sluice-gate through which the people controls its own entry. Our Courts will be prudent enough to recognise the people when the people appears through an applicant as also those who masquerade, under the name of the people.[19]

Undoubtedly, this momentous judgement will act as a moral and legal justification for the activists, lawyers, judges and academician to initiate public interest litigation in Bangladesh. This judgement ushers a new era for gradually converting constitutional rhetoric of social justice into a concrete reality by affording an opening for public interest litigation. Moreover, the judgement provides some rationale to reconsider the principles underlying our legal system.

The book reviewed is marked by clarity of thought and analytical rigour as the editors and contributors of this book are the most distinguished jurists of this region. In the absence of any other book in this regard published in this country, as already mentioned, a book of this kind should be an essential reading and source of reference for the legal community, academicians and activists engaged in this field. It is true that the events in the form of the judgement in the case of *Dr. Mohiuddin Farooqe vs Bangladesh* has outstripped some of the issues and concerns raised in the book, particularly in articles pertaining to Bangladesh, yet the book is a useful reminder of various dimensions of public interest litigation and a valuable guide to future issues, rights and remedies that may be presented to the judiciary to facilitate justice for the disempowered majority of the country.

by Abdullah-Al-Faruque*

---

[18] Ibid.

[19] Ibid.

* Abdullah - Al - Faruque, LL.B.(Hons), LL.M., Dhaka University, is a Staff Lawyers at Bangladesh Legal Aid and Services Trust (BLAST).