PUBLIC INTEREST LITIGATION: DELIVERANCE FROM ALL EVILS?

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Bangladesh may be a comparatively small jurisdiction, but you share all the characteristics of the other South Asian jurisdictions, and of course you also partake in the Anglo-Indian legal traditions of the subcontinent. As a specialist in these South Asian laws, working from London, the nature of my subject puts me in a unique and tricky position. On the one hand, I am expected to focus on the British contributions to your laws, which have been underpinning the basic structures of the formal legal system as you know it. I am probably expected to say how wonderful and durable these inherited institutions are, but as an expert in the current laws rather than legal history, I am more interested in the present and must analyse and evaluate what South Asian legal systems .are achieving today - or what they are not achieving. For, there is plenty of evidence, even from your daily papers, that some of your laws are not functioning as they should, that law as a tool of governance is being played with politically, rather than being applied for the benefit of the country as a whole.

Precisely here lies the dilemma for scholarship on South Asian laws. One is expected to be critical, but there is a fine distinction between criticizing and maintaining a critical analysis. By which standards should one measure questions of public interest in your country? The question today is still whether Bangladeshi law is some minor cousin of the Common Law family, or whether you are maybe something quite different, namely a hybrid legal system with elements from different legal traditions. In view of your particular national history, there can be no doubt that you are a unique jurisdiction in your own right, and one that deserves to be studied more in depth, and by more people. But what do we see instead? Lots of bright young people from Bangladesh are studying law in the UK, but is this simply becoming a passport to a greener pasture, or are these

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This is a revised version of the Lecture given in the Auditorium of the Supreme Court Bar Association Building in Dhaka on 27th January 2002, launching the SOAS Law Alumni Association of Bangladesh.

young people in due course going to make some contribution to your legal system? Most of these young aspiring lawyers are simply studying English law, as though this was an appropriate tool for developing Bangladeshi law.

Of course I could not stand here and claim that public interest litigation is wonderful, cures all ills, and delivers us from all evils. But not to have it, there can be no doubt, would be worse. Whatever your views may be of public interest litigation, you cannot deny that it does many things that 'normal' law does not achieve - whether one likes this or not is a totally different matter.

But what is 'normal' law? Let us begin to unravel that key issue first. Those who know me and my teaching and writing will be able to anticipate my next question: It is, precisely, the very basic question of 'what is law'? Every year my first year students in London profess astonishment, if not dismay, over the fact that there is neither universal agreement about the nature of law, nor its most basic definition. So, law students should expect to be studying something whose nature is severely contested, and to be taught a subject which their own teachers are still struggling to understand, if they are honest. But it has always been all too easy to claim that studying law is just a matter of learning the right rules. The test of a good legal education becomes, in my view, whether a future lawyer is going to be educated properly about the intrinsically complex nature of law and its many manifestations. How can one study Muslim law in one class, and Western theories of law in the next, and keep them in separate compartments of the brain? Law appears in many different forms, and this must have implications on our definition of this phenomenon, which law students ignore at their peril. Simple Austinian positivism may be a dominant concept, but is clearly only one form of law, and one method of dealing with our question. Dicey's theory of Parliamentary Sovereignty was merely an English constitutional incarnation of Austin's theory of sovereignty,[1] it does not explain many other forms of constitutional arrangement observable in the world.

Even in England, thus, pure positivism is not a legal reality, it is everywhere a theory, and of course one of several interlocking and partly conflicting theories. What III about natural law and considerations of morality? What about socio-legal approaches and their many manifestations? And what about the other types of law that you are familiar with here, Muslim law and Hindu law? How do they fit into a pattern of

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[1] Sathe, S. P., *Judicial activism in India. Transgressing borders and enforcing limits.* New Delhi et at.: Oxford University Press, 2002, at p. 28.

global legal theory, and of justice-conscious legal practice?

In 2000, I published a major comparative legal study[2] which confirms that law is everywhere culture-specific and that in tandem with globalisation and uniformisation of laws, there are everywhere local and national manifestations of law which are specific to particular jurisdictions, making the global phenomenon of law an utterly plural and complex entity. Since law in itself is such a plural phenomenon, and appears in so many different ways all over the world, it is no coincidence that different legal theories have tried to understand and analyse one or the other aspect of law, or a combination. Pure positivism is not all one needs to know about legal theory, it is only one of many theoretical models. English law, too, is not just 'the law', as many law students still far too simplistically assume without further reflection. English law is itself culture-specific, and is therefore one particular type of law that is itself composite and complex, but is certainly not the only law that an educated lawyer (even in England) needs to know.

Now, where does all this lead us to? Law is manifest everywhere, it is in operation all over the world, but it is not some dead thing, or a matter of the past. Law is everywhere a lived reality as well as a complex conceptual entity. Precisely here lies the origin of phenomena like public interest litigation, because it is a fact that laws do not just exist, they have to be made to work and operate in a particular socio-political context. This dynamic and applied nature of law constantly leads legal scholars, lawyers, *and judges,* to the intrinsic realisation that law in itself does not solve all problems, in fact the law often creates particular difficulties due to its very existence.

Thus, if we introduce a rule that any *bona fide* petitioner should have easy access to courts, without much procedure, and probably without the intervention of a lawyer, many lawyers - we know from experience and published literature - may be deeply unhappy. But is the law only for lawyers? What about the concerns of the common citizen, who could not reach the court until certain procedural changes were made? These common citizens were unhappy earlier, and they may be a little happier now, so there have been certain shifts of approach and evaluation of one and the same law - and both perspectives are legitimate and worthy of our attention.

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2 Menski, Werner, Ahmad Rafay A1am and Mehreen Kasun Raza, *Public interest litigation in Pakistan.* Karachi and London: Pakistan Law House and Platinium, 2000.

What this shows again is that law, everywhere, is a dynamic, contested phenomenon, under constant negotiation and therefore potentially marked by conflict rather than ready consensus. This is, of course, where judges come in and where debates about the judicial role are necessary and deeply instructive. If law is a dynamic, ongoing process of constant conflict resolution, rather than just a fixed set of rules, then judges cannot be merely detached participants in this process, they playa crucial role, which of course positivism with its focus on the top-down rule of law model has sought to diminish. If perfect law could simply be provided by statute or decree, there may not be any need for judges, since an ideal law in that mould of thinking should be absolutely clear and would require no interpretation.

But legal reality tends to be rather far from this ideal theoretical picture. What guarantee is there that the law that exists is a good law? Asking such almost banal but necessary questions, one stumbles into huge minefields about law and morality, and it becomes obvious that positivism on its own cannot be adequate to safeguard justice. We need judges, we need applied thinking about morality and society, we need men and women who can make informed pronouncements on what is right and wrong in particular situations. Many of you, I hope, have at some point studied the book by Griffith on the politics of the judiciary (Griffith 1985). Many positivists feel that this study is too political, but that is precisely the key point: if law as such is a dynamic tool and a complex process, rather than a static entity, then law is inevitably political, it takes sides all the time. And the judges are supposed to be in the middle, as neutral arbiters, or are they perhaps not that neutral? Here we see that the static positivist assumptions about law are often matched by equally static and again unrealistic presuppositions about judges. Being a judge, as part of the job description, so to say, involves being dynamic and hence f activist Thinking creatively about contested positions and desirable solutions must be an integral part of the judicial job description. A judge must think even the unthinkable – and then act to prevent it. A judge, in other words, must at all times be alert and active - but is that the same as activism?

Here in Bangladesh, it appears that you hesitated for a long time before you came to terms with public interest litigation, which developed in India and a little later in Pakistan in front of your eyes. I still remember the time when Nairn Ahmed was with me in London, planning his PhD on public interest litigation in Bangladesh, and official the birth of PIL just refused to happen, for a long time, until the well-known case of *Dr. Mohiuddin*

Farooque v. Bangladesh[3]. Dr. Nairn Ahmed's work[4] shows that even before the formal emergence of public interest litigation in Bangladesh there was a lot to say about it. Still, the formal and open emergence did and does in my view make a crucial difference and of course it firmly fits Bangladesh into the South Asian pattern of a global stronghold of public interest litigation.

In 1997, I gave the Fourth Cornelius Memorial Lecture before a distinguished audience in Lahore on public interest litigation as a strategy for the future.[5] I observed then, as I do now, that South Asia leads the world in thinking (about public interest litigation. The legal cultures of South Asia, with their combination of Eastern and Western approaches, and especially the duty-focus in South Asian laws, offer a fertile ground for the growth of public interest litigation. My colleagues in London and elsewhere are unimpressed and deny that South Asian law has any pioneer function. Even the most recent study on judicial activism in India by Professor S. P. Sathe from the ILS Law College in Pune, a leading authority on Indian constitutional law,[6] focuses on the evidence from English and American law and continues to argue as though South Asian judges are not really doing anything new. Even if, historically speaking, that may be correct, are today's South Asian judges doing a better job? Does public interest litigation in its post-modern South Asian manifestation achieve anything?

The assumption that public interest litigation is a post-Emergency phenomenon in India and that it took off formally through S. *P Gupta v. President of India,*[7] remains correct. But as Sathe now confirms for India, judicial activism is much older than S. *P Gupta.*[8]

Judicial activism is inherent in judicial review. Whether it is positive or negative activism depends upon one's vision of social change. Judicial activism is not an aberration but is a normal phenomenon and judicial review is bound to mature into judicial activism. Judicial activism also has to operate within limits.

Since, through judicial activism, the court changes the existing power

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3 17 (1997) BLD (AD) 1

4 Ahmed, Naim, *Public Interest Litigation. Constitutional Issues and Remedies,* Dhaka, 1999.

5 Menski et al, supra note 2, at pp. 106-132.

6 Sathe, supra note 1.

7 AIR 1982 SC 149

8 Sathe, supra note 1, at p. 6.

relations, judicial activism is bound to be political in nature. Through judicial activism, the constitutional court becomes an important power centre of democracy.

I can happily go along with that analysis. Judicial activism and public interest litigation are both techniques to bridge theory and practice and, more importantly, to harmonise ideal and reality as far as possible. Both are indeed inherently political activities. So judges have to take sides, and cannot hide behind a smokescreen of neutrality. Sathe now argues that there is a decline in the profile of politicians, who are too busy securing their own power instead of making laws.[9] This is a valid point, clearly, and it suggests that judges may be better guardians of justice than politicians. But justice is not even guaranteed through the judiciary. There is ample evidence to that effect virtually everywhere.

I brought for today's lecture a recent example from India. Some of you may have seen that on 6th August 2001, the Supreme Court of India issued binding directions to all High Courts on the delivery of judgments. This was done under Article 141 of the Indian Constitution, and thus became binding law. Significantly, the Supreme Court stressed that these directions "should remain in force only until such time as Parliament would enact measures to deal with this problem", but that might of course never happen. The case originated from Bihar, and the problem was that in a criminal case involving nine people, the accused were languishing in jail even two years after their case had been heard, but no judgment had been given. This kind of case scenario therefore takes us back right to the pioneer phase of the early 1980s, when similar problems in criminal justice were unearthed by the Supreme Court in several cases. Thus, nothing seems to have changed. Has the whole enterprise of public interest litigation and judicial activism been infructuous?

I do not accept that reasoning because it is malicious and disingenuous. Clearly, safeguarding justice is a never-ending task and a constant challenge everywhere, not only in South Asia. In my view, the courts are learning to become still more vigilant in their pursuit of adequate standards of justice, but in this process they are also often extremely circumspect in terms of politics. This does not mean, however, that they will not act. In the Bihar criminal case, the Indian Supreme Court laid down that the Chief Justices of all High Courts should monitor all delays of pronouncing judgments. If no judgment had been pronounced within two months, the Chief Justice should take certain actions, which would probably be quite embarrassing.

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9 Ibid., at p. 20.

The remedies provided include an application to the Chief Justice for early judgment and, if the problem continues, for transfer of the case to a different Bench. This landmark decision shows that the struggle for justice, and the process of seeking to secure justice, may have to be fought even within the judiciary. This also reflects a certain bureaucratisation of public interest litigation, but this is not actually a new phenomenon. It goes hand in hand with the judicialisation of legal processes, which is observed elsewhere. What this means, then, is more work for judges, as the problems that should have been solved still linger on, even into courts. At the same time, if even the judges become inefficient, there are bound to be serious problems. Judicial vigilance, far from representing the alleged takeover bid of un elected old men, constitutes a critical safeguard for justice.

I think we can turn to any field of law or life to observe that problems over justice persist everywhere. While judicial activism and public interest 1itigation are manifestly not a remedy for all ills, this means that without them, life would probably be much worse. Certain improvements are manifest and irrevocable, such as the enlargement of the 'right to life' in the Indian and Pakistani Constitutions. However, it remains alarming that many perfectly good laws are not observed, or are purposely ignored, so that somehow a lingering, latent fear of lawlessness is in the air. Much remains to be said about that kind of fear and apprehension in the international dowry conference being held in Dhaka this Wednesday and Thursday, but the issue lurks everywhere. Take a look at your papers today. My hotel gave me a daily with the caption "Committed to the people's right to know", which in itself says something. The front page of the *Daily Star* today reports that 80 per cent of city people in Dhaka are without access to sewer facilities, and claims that the whole of Dhaka city will soon be one huge septic tank unless urgent steps are taken.

This is classic investigative, activist journalism, but what difference would it make if a public interest litigation was filed, given the risks to the purity of ground water, and thus to public health and by implication the individual right to life of many millions of people in Bangladesh? Here we see that many necessary improvements of life conditions cannot be achieved through an action in the court, but require executive activism and, above all, funds. The old saying that the court cannot feed or clothe people is certainly correct, but that still does not mean that public interest litigation is useless or irrelevant. Vigilance about justice and proper standards of public life and governance will forever be necessary. In that sense, I have no reason to depart from my earlier finding that all litigation

has an element of public interest in it,[10] and that, therefore, it would not be wise for anyone to slacken in the commitment to judicial activism and to public interest litigation.

In my analysis of public interest litigation in South Asia,[11] I tried to work with the model of overlapping phases, from a pioneer stage in detecting and highlighting crass violations of the most basic fundamental rights to the middle class usurpation of public interest techniques for private and often manifestly political gain. In Bangladesh, too, all these phases seem to co-exist at the same time now.. This means that also in your country there is continued need for much vigilance by the judges, lawyers, and the public, and it remains an issue, as elsewhere, to test the *bona fide* character of the petition. Public interest is not a matter for judges alone, it is a matter for every citizen. And because that is so, the temptation to violate it will also always be there - another reason why comprehensive judicial vigilance and alertness remain absolutely essential, ultimately of course in the national interest. A Pakistani PhD student of mine has aptly characterised this as a public interest form of the famously Kelsen-inspired doctrine of necessity, and has termed it 'higher necessity', in other words, protecting justice becomes a matter of national interest and self-preservation. From that angle, too, *bona fide* public interest litigation is a necessary instrument of governance, reducing tensions that may arise if persistent lawlessness becomes perceived as a problem and remains unaddressed altogether. Judicial vigilance over all aspects of justice is an inevitable corollary, therefore, of the role of judges and is firmly part of their job description, whether we like it or not.

However, in view of the analysis of law and governance presented here, it is manifestly unfair to expect judges to perform miracles. Hence, to criticise public interest litigation as ineffective and illusory argues from the wrong presumption that judges can somehow perform miraculous deeds that banish evil and bring only good. That is illusory, and will always be so. Judges manifestly cannot create the resources that might alleviate certain fundamental human rights infringements, which are regrettably a fact of life everywhere, not just in developing countries like Bangladesh. A judge might try to achieve a redistribution of attention by highlighting certain unacceptable abuses or lapses. There is certainly room for judicial activism in directing developmental thinking and processes, thus bringing about long-term beneficial effects which may not be immediately visible and thus

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10 Menski et al, at p. 130.

11 Menski et al, supra note 2.

remain unappreciated.

Analysed in this wider jurisprudential context,[12] it is thus evident that the question as put to me is wrong, or at least misleading, since there is simply no remedy for all human ills that the courts, or anyone else, could provide. Law needs to be understood more adequately as a process of continuing struggle, and as bargaining over the balance of private and public interest. I have no doubt that judicial activism and vigilance about standards of justice ought to remain at the centre of the functions of the judiciary everywhere. To that extent, indeed, all litigation is public interest litigation, and such litigation can help to alleviate some major ills by highlighting them as such. Recognition of the problem may already go some way towards solving it. It is infinitely better than not listening at all. Indeed, if public interest litigation has achieved little else, it has certainly helped to highlight certain persistent abuses of power, which are simply not acceptable in any justice-conscious jurisdiction and for which people in any nation may need to find their own solutions. Bangladeshis clearly engaged in that process now, and the judges do playa critical role in that context.

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12 See, for example, Griffith, J. A. G., *The Politics of the Judiciary*. 3rd ed. London: Fontana Press, 1985; Menski, Werner, *Comparative Law in a Global Context. The Legal Systems of Asia and Africa*. London: Platinium, 2000.