PUBLIC INTEREST LITIGATION: JUDGES PERSPECTIVE

Justice A.K. Badrul Huq.

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Pro bono public allegation, the litigation at the instance of a public spirited man, popularly known as Public Interest Litigation, exposing the cause of others is now being considered in the western countries, Saarc countries including Bangladesh as a pressing need of modern societies. Now-a-days, emergence of Public Interest law is now closely connected with the development of the conception of Rights, which are Social Rights, Welfare Rights, Social Justice Rights, Civil and political Rights.

In the nineteenth century no person could be a 'aggrieved person' unless his personal right was infringed or his property was affected. No other person could take the shelter of the court of law unless he could show that he was a 'person aggrieved'. But with the passage of time and to meet the requirement of the pressing need of the people belonging to oppressed, downtrodden, deprived and disadvantageous section of the community, the concept of the 'person aggrieved' started witnessing marked change opening a new horizon, a gateway, the sole purpose being to meet the requirements of pressing need. In the later part of the Twentieth century, the concept of 'person aggrieved' and Public interest Litigation had under gone a great change through the historic Judgments of the Apex courts of the Western countries, United States of America, India and Pakistan.

The countries of the Third World got freed from the yoke of colonialism following the end of the Second Great War. In the year 1971, Bangladesh emerged as an Independent Sovereign State after a bloody straggle of nine months from the colonial repression. Constitution had been framed to protect interest of the citizens of the land and to do welfare to the people. Equality, Human dignity and Social Justice, are the main aims of Bangladesh as being part of her Proclamation of independence and these are embodied in the Preamble of the Constitution in which the Rule of law, Fundamental Rights and Freedom, Equality and Justice-Political, Economic and Social need to be secured for all citizens. The constitution also embodied directive Principals of State Policy, which incorporate many of the basic Fundamental Rights set out in the Universal Declaration of Human Rights as well as in the two Covenants on Human Rights, the International Covenants on Civil and Political Rights (ICCPR) and international Covenants on Economic, Social and Cultural Rights (ICESCR). Right to move to the High Court Division of the Supreme Court of Bangladesh has also been made part of the Fundamental Rights. This has conferred upon the Supreme Court unequivocal power for giving direction and orders to any person or authority for the enforcement of the Fundamental Rights conferred by Part III of the Constitution. (Art.44). The liberalization of the "Sanding rule" or "Locus standi", which has facilitated public interest litigation is really a mode to achieve access to justice to all including the have-nots. Mere guarantee of Fundamental Rights in the Constitution for the benefit of the citizens of the country without also ensuring that

they become a reality is meaningless. There are many people who are not even aware of their rights in spite of greater general awareness in recent times. The guarantee of basic human rights in the Constitution is sufficient discharge of duty, is a great fallacy unless it is a reality for every citizen of the country. This is what requires the liberalization of locus standi so that socially activist groups and other public spirited individuals, not busybodies, in true public spirit could bring such matters to the court and the court could step in and grant relief to such people who are guaranteed the right but the not even aware of it and are being denied it constantly.

The concept of Public Interest litigation had been introduced into the Indian Jurisprudence by the Supreme Court of India in the period of 1970's. The Judges of the Supreme Court of India were guided by the spirit and sense of social consciousness and they felt strongly a departure from the old traditional approach. Mr. Justice Krishna lyer became the Pioneer in the field of Public Interest Litigation. The concept of Pro bono, Publico was introduced by his famous Judgment in the case of Fertilizer Corporation[2] which was further expounded by Chief Justice Bhagwati in a case known as Judge's case (S.P. Gupta Vs. Union of India)[3].

The Judges of the Supreme Court of Pakistan being also inspired by the sense of social consciousness came forward to fulfill the aspiration of the Public in introducing the concept of Public Interest litigation. Pakistan being a Third World country faced the problems of poverty and social injustice. Public Interest litigation has been described as a lost of eradication of social evils from the society through the medium of law. The case of Benazir Bhutto[4] is characterized as the milestone in this regard. In that case the Chief Justice Halem extended the scope of Fundamental Right of a citizen of Pakistan.

The Courts of Sri Lanka are showing much leniency and a softer notion on the concept of Public Interest litigation. In Sri Lanka persons who are not directly affected nor aggrieved are allowed by the courts to bring litigation in the Courts.

The Constitution of Nepal which is the out come of the Movement for Democracy of the year 1990 is a very progressive Constitution. The adoption of the Constitution was followed by a land mark Judgment of the Supreme Court of Nepal in Tanakpur case[5] which is comparable to Berubari Case[6] under Bangladesh Jurisdiction.

Coming now to Bangladesh, the concept of Public Interest litigation and Locus Standi has been mooted for expansion for the voiceless, disadvantaged, weaker, oppressed and downtrodden people who are otherwise helpless, powerless and unable to gain access to the Courts of law and justice to ventilate their grievances and sorrows by Bangladesh Environmental Lawyer's Association popularly known as 'BELA' under the dynamic leadership of Dr. Mohiuddin Farooque, its General Secretary. Of course, the Berubari case is the first case on Public Interest litigation and Locus Standi. In the said case it was held by the Supreme Court of Bangladesh that a citizen is a person aggrieved for the purpose of maintaining a writ petition challenging a international treaty. The said case was an unnoticed one and the Principle so decided in the said case was not followed in consistent manner. Then, after a period of a Twenty years in the year 1994 Dr. Mohiuddin Farooque championed the concept of the Public Interest litigation and the question of Locus Standi in the case of Dr. Mohiuddin Farooque Vs. Bangladesh and others[7]. Dr. Mohiuddin Farooque being petitioner filed Writ petition No. 998 of 1994 and the said Writ Petition was Initiated Pro bono Publico. Dr. Fafooque questioned the Flood Action Plan of the Government of Bangladesh which is known as FAP-20, a Flood Control Program covering a wide area of the District of Tangail and Serajgonj. The Supreme Court of Bangladesh allowed standing to Dr.

Mohiuddin Farooque. It is observed: The expression 'any person aggrieved' is not confined to individual affected persons only but it extends to the people in general, as a collective and consolidated personality. If an applicant bonafide espouses a public cause in the public interest he acquires the competency to claim a hearing from the Court.

The theory of Public Interest litigation establishing Human Right for the poor, the less privileged and weaker segments of the population was thus set in the case of Dr. Mohiuddin Farooque which paved the way of flourishment of Public Interest Litigation in Bangladesh.

The Appellate Division sent the Writ Petition to the High Court Division for hearing the same on merit after setting aside the order of rejection of the Writ Petition summarily holding that the Petitioner has Locus Standi to file and maintain the Writ Petition.

On August 27, 1997 the High Court Division consisting of his Lordship Mr. Justice Kazi Ebadul Hoque and myself delivered the Judgment making the Rule absolute in part[8]. The Respondents who were Government of the Peoples Republic of Bangladesh and others were allowed to implement and execute Fap-20 project activities subject to the strict compliance with direction in the greater Public Interest ensuring that no serious damage to the environment and ecology be-caused by the Fap-20 activities. I took the privilege of being the Author Judge of the said Judgment.

In search of Justice, for the enforcement of Fundamental Rights/Human Rights what should be the Judge's perspective or in other words judicial obligation or judicial activism can be permissible to what extent is now the question before the judiciary in Bangladesh in the light of other countries of the world. In India anxiety about social justice and the removal of discrimination on all irrational grounds has caused Judges like Krishna Iyer to become pioneers of a kind of judicial activism that is often in true with the **dep't,** felt emotions of ordinary citizens. It is concerned about torture, cruel, inhuman and degrading treatment or punishment. In S.P. Gupta Vs Union of India[3] it has been unanimously ruled .... that where judicial redress is sought for legal injury to a person, or a determinate class of persons who, by reason of poverty, helplessness, social or economically disadvantaged position or disability are unable to approach the Court any member of the public, acting bonafide and not for oblique considerations, may maintain an action on their behalf. Such a person may seek judicial redress for the legal wrong or injury caused to such other person of determinate class of persons. Perhaps it is the special needs of India which propels its courts into radical refashioning of the instruments of the common law and reconceptualisation of the role of a modern judiciary in a free society.

Controversies exist in India about Judicial activism. Judicial activism requires judicial restrain. In India from the highest level of judiciary there has been recognition that excessive or ill-judged activism may damage to the very Institution, which gives birth to it. Whether judicial activism is a good thing or a wise or fraught with peril or positively damaging to judicial institution are questions exclusively for the Indian to judge.

In the United States of America, the tension between judicial activism and judicial restrain has been presented since the foundation of the Republic and the creation of the Supreme Court. The history of the Supreme Court of the United States teaches that judicial activism is not confined to a particular ideological or social viewpoint. It may be liberal. But it may also be quite conservative. In the early years of this century the "Judicial activists" on the Supreme Court of the United States impeded legislation

enacted by the Congress, or the legislatures of the States, dealing with social or economic affairs. Thus legislation governing child labor, workers' hours and workers' rights were consistently struck down as being violations of the commerce clause of the US Constitution or the judicially created doctrine of "liberty of contract" under the due process clause of the 14th Amendment. A well known example of this kind of judicial activism is the decision of the Supreme Court in Lochner v New York[9]. In that decision, the court invalidated legislation of the State of New York regulating the hours that bakers could work. The Court held that this was a violation of "liberty of contract".

Come of the controversies which have arisen in the United States and India have also presented themselves to the Australian judiciary more urgently in recent times, For a long period the established doctrine of the courts of Australia was that expressed by Chief Justice Dixon in a passage known to every Australian lawyer and law student of this generation. Although stated in the context of constitutional interpretation. Sir Owen Dixon's works had a wider application. He said[10] close adherence to legal reasoning is the only way to maintain the confidence of all parties in federal conflicts. It may be that the court is thought to be excessively legalistic. I should be sorry to think that it is anything else. There is no safer guide to judicial decisions in great conflict than a strict and complete legalism.

In a letter addressed to Yale University in 1955 Concerning Judicial Method, Chief Justice Dixon accepted that judges do develop the law. But he was at pains to emphasis that it was a very limited function[11] : It is one thing for a court to seek to extend the application of accepted principles to new cases or to reason for the more fundamental to settle legal principles to new conclusions or to decide that a category is not closed against unforeseen circumstances which might be subsumed there under but it was wrong for a judge; who is discontented with the result held to flow from a long accepted legal principle, deliberately to abandon the principle in the name of justice or of social necessity or of social convenience.

Judicial activism in Bangladesh like Indian judicial activism has not yet got momentum. Recently on encouraging and outstanding initiative had been taken by a Division Bench of the High Court Division presided over by Mr. M.M. Haque J in State Versus Deputy Commissioner, Sathkira and others[12]. On the basis of a news item published in Daily Ittefaq under the caption 'সব মামলা হইতে অব্যহতি অথচ বার বৎসর যাবত জেলে". Suomoto Rule was issued upon the Government, the Deputy Commissioner Satkhira, and the relevant jail authority. Rule was made absolute and Nazrul Islam who suffered unlawful detention in the jail was directed to be set at liberty forthwith. In Dr. Mohiuddin Farooque Versus Bangladesh and others[6] it has been posited that a citizen can be dispossessed of his property if public interest and State necessity required with Just compensation for taking the property and no person shall be deprived of his life and property except according to the procedure established by law.

Fundamental Rights guaranteed by the Constitution and internationally adopted Human Rights are rarely translated into reality. The Society has fallen in the grief of a few terrorist and corrupt people and the ordinary people particularly the poor became hostages in their hands. Justices is disadvantageous to the poor. Law is said to be arrested in the hands of few powerful persons. The judiciary got a significant role to meet the aspirations of the suffering humanity even showing judicial activism when a public spirited person lays a Public Interest Litigation before the Court. But the Court must be careful that it will permit the litigation when it is satisfied that the carriage of

proceedings is in the competent hands of a person who is genuinely concerned in public interest and is not moved by other extraneous consideration. The Court must be careful that the process of the Court must not be abused by shady and fraudulent cases by which court's valuable time is spent. It is to be remembered that indiscriminate use to the important liver of Public Interest Litigation would blunt the liver itself. It is of utmost important that those who invoke courts jurisdiction seeking a waiver of Locas Standi Rule must exercise restraint in moving the court. It must also be borne in mind that a Public Interest activist must not succumb to spasmodic sentiment and behave like a knight-errant roaming at will in pursuit of issues providing publicity. The litigant must remember that as a person seeking to espouse a public cause he owes to the public as well as to the court that he does not rush to court without undertaking a research. Public Interest Litigation, therefore, needs to be handled with great care and caution. The need is to prevent misuse of Public Interest Litigation and not to criticize the process. It is primary for the courts who devised this procedure to practice self-restraint and to also devise proper checks and balances to ensure that even persons who want to misuse it are not able to do so.

The judge of the common law in the region is controlled in any temptations to activism. The judge's boldest ambitions are held in check by the judicial method. But there is no clear divide, which marks off the limits of judicial creativity and activism. The communities have come to understand that some measure of "judicial activism" is not only permissible but is traditional in our system of law. Moreover, it is beneficial to the noble case of justice under the law. The challenge for judges is to find where the line lies in a particular case, at a particular time and place. Each judge knows that limits exist. Most would agree with recent remarks of Justice Anthony Kennedy, of the United States Supreme Court, that a society that leaves all or most of its hardest decisions to the courts is a weak society. The burden which society casts on its judges are greater today than over before. The judges are the servants of the law and of the societies. They must continue to find the sources of discipline in legal authority. But when new problems arise, when the common law has no exactly analogous decision or where the Constitution or the legislation is ambiguous, they must also look to legal principle and legal policy. Judges do not usually have the privilege to decline the obligation of decision. Sometimes they will commit error, for that is inherent in the human condition. But if the Judges search for the solution to the particular case with the illumination of legal authority, legal principle and legal policy and are sometimes called "judicial activists", the Judges must accept that appellation with fortitude. Judges activism has limits as every one of them knows. But in a real sense, the common law itself is the product of "judicial activists". The most Judges can hope is that they are successors, worthy in their time, to the great spirits who have preceded them.

1. Judge, Supreme Court of Bangladesh.
2. Fertilizer Corporation Kamgar Union Vs. Union of India AIR 1981 SC 344.
3. S.P. Gupta Vs. Union of India AIR 1982 SC 149.
4. Benazir Bhutto Vs. Federation of Pakistan PLD 1988 SC 416
5. Bharat Roy Upreti: Functions of the judiciary of Nepal under the New Constitution set up, the inaugural issue of SAARC Law (Journal).
6. Kazi Mukhlesure Rahman Vs. Bangladesh and others 26 DLR AD 44.
7. Dr. Mohiuddin Farooque Vs. Bangladesh and Others 17 BLD AD 1=49 DLR AD 1.
8. Dr. Mohiuddin Farooque Vs. Bangladesh and Others 50 DLR HCD 84=18BLD HCD 216.

9. Lochner Versus New York 196 US 45 (1905)
10. 1952 (85) CLR xi, xiv.
11. Sir Owen Dixon (1956) 26 ALJ 468 at 469-470.
12. State Versus D.C. Satkhira 45 DLR (1993) HCD 643.

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