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## **PUBLIC INTEREST ENVIRONMENTAL LITIGATION: A TOOL TO ENSURE COMPLIANCE AND ENFORCEMENT**

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### **SUMMARY**

The Introduction to this paper describes the evolution of environmental management together with the development of uncoordinated sector-wise governance mandated by sectoral laws. Institutional arrangements are described, including the development of authorities responsible for the management of natural resources. Along with major environmental issues facing Bangladesh and the status of laws regulating these issues, the paper deals with the right to a healthy environment which has been recognized through case laws as one of the fundamental rights, the enjoyment of which is being guaranteed by the Constitution of Bangladesh. Finally, the paper describes the emergence of Public Interest Environmental Litigation (PIEL) and the experience yielded during this short span of time about its role in ensuring compliance and enforcement in the backdrop of continuing non enforcement, lack of coordination and non compliance of laws for sound management of the environmental resource base.

### **1 INTRODUCTION**

Bangladesh is a country of 143,999 km<sup>2</sup> with a population of 120 million people. The country is mostly flat land with some hills in the northern and eastern areas. It has a large area of mangrove forest along the coast of the Bay of Bengal, known as the land of rivers. Bangladesh is particularly vulnerable to natural disasters such as floods and cyclones and it was in the wake of two consecutive floods in 1987 and 1988 that environmental issues assumed importance.

Traditionally, the people of Bangladesh, being the inhabitants of the flood plains of the huge deltaic ecosystem, lived in harmony with the nature as a result of which the values, life cycle, customs, usage, proverb and idioms resound the tone of the chord of bond with the ecology. Bangladesh inherited a legal system introduced in the 19th and 20th centuries by the British. The basic structure of the system is built upon common law principles that promoted a feudal ownership concept and allocation with an absolute rent fixing and receiving authority. Even huge resource bases like forests and fisheries were settled under the permanent settlement regulations in 1793 and possessed by the feudal lords. After the adoption of the State Acquisition and Tenancy Act in 1950 in the then East Pakistan, the feudal system was abolished and the estates were acquired by the State. The holders of various titles to resources become tenants of the State. The rent receiving interests vested in the State. However, the concept of different titles especially of "ownership" remained almost unfettered, and the management system continued to employ use-oriented approaches to harness optimal economic benefit. Public agencies became "feudal" over the management of public resources devoid of public input or accountability.

The advent of the modern State with a system of statutes witnessed a blend of “revenue” and “resource” oriented regimes with some significant prohibitions of acts dangerous to human environment, health and the ecology. The regulatory regime now has provisions for actions having direct, indirect and casual link with environment and ecology in the forms of policies, legislation, institutions and traditions. Nonetheless, many of the available laws and mechanisms remain unutilized, unexplored and barely expounded. The regulatory regime is “sectoralized” under various “Ministries”, and managed and governed in the same style. This sector-based compartmentalization of environmental regulation developed into an uncoordinated, competing and often adversarial approach unfriendly to sustainable management of resources and ecological governance.

Perhaps the study of environmental regulatory regime and the role of law in that process have received late recognition in many jurisdictions including Bangladesh for various inadvertent reasons. It stayed almost as a custom to talk about it and do nothing or live in wards than practice, which is the most neglected aspect of over administration.

## **2 INSTITUTIONAL SETUP**

- a. Resource management laws are provided in the sectoral laws of various ministries and public agencies.
- b. Most of the civic and anti-nuisance rather environment related provisions are provided in the powers and functions of various statutory local government bodies. Tortious liability is perhaps included in these laws. Besides there is the Department of Public Health under the Ministry of Local Government, Rural Development and Cooperatives.
- c. A water pollution control project turned into Department of Environment Pollution Control following an Ordinance of 1977 on Environment Pollution Control and the said department was under the Department of Public Health in Ministry of Local Government Rural Development and Cooperatives (MLGRDC).
- d. In 1989, a separate Ministry of Environment and Forest was created bringing under it the Department of Environment Pollution Control from the MLGRDC renaming the same as Department of Environment, and the Forestry Division of the Ministry of Agriculture as Forest Department.
- e. Ministry of Planning also has an Environment section that checks the environment aspects of Government projects.
- f. The environmental issues relating water resources is looked after by the Water Resources Planning Organization by an act of 1992, the Bangladesh Atomic Energy Commission is entrusted to regulate radio activity under the Nuclear Safety and Radiation Control Act, 1993. There are other agencies too who are vested with the duty to protect specific aspects of environment.

## **3 MAJOR ENVIRONMENTAL ISSUES FACING BANGLADESH**

### **3.1 Regional / Global**

- Ecological changes due to shared water disputes
- Maritime boundary dispute and a weaker regime on marine resources

- Green house effect and its consequence on Bangladesh
- Refugees and migration
- Ecological effect caused by transfrontier activities

### 3.2 National

- Population and poverty
- Degradation of resources (anti-people and uncoordinated)
- Conflict of development with environment illiteracy Vs ignorance
- Pollution: water, air, soil
- Destruction of mangrove, tree cover and firewood
- Loss of fisheries
- Unplanned human settlement
- Unplanned urbanization and industrialization
- Loss of wildlife
- Natural hazards

## 4 STATUS OF LAWS

About 182 laws (excluding rules and by-laws) have so far been identified by BELA. The existence of all these laws and a number of public agencies, however, failed to deliver to the nation what the legislation envisaged. The number of sector- and/or issue- based laws in Bangladesh are as follows:

<u>SECTOR OR ISSUE</u>	<u>NUMBER OF LAWS</u>
i. Pollution and Conservation	2
ii. Health	30
iii. Food and Consumer Protection	13
iv. Occupational Rights and Safety	11
v. Public Safety and Dangerous Substances	6
vi. Displacement, Relief and Rehabilitation	3
vii. Land Use and Administration	12
viii. Agriculture and Agro-chemicals	16
ix. Water Resources	6
x. Fisheries	6
xi. Forestry	4
xii. Wildlife and Domestic Animals	11
xiii. Energy and Mineral Resources	8
xiv. Local Government	9
xv. Rural and Urban Protection	16
xvi. Transportation and Safety	16
xvii. Cultural and Natural Heritage	2
xviii. Protection of Vulnerable Groups	7
xix. Miscellaneous	2

Note: Many of the laws are also cross cutting and multiple sectoral application and ramification.

## **5 RIGHT TO HEALTHY ENVIRONMENT**

The Constitution of Bangladesh, 1972 does not explicitly provide for the right to healthy environment as a fundamental right. Article 31 states that every citizen has the right to protection from “action detrimental to the life, liberty, body, reputation or property”, unless these are taken in accordance with law. Article 32 states that “No person shall be deprived of life or personal liberty save in accordance with law”. These two Articles together incorporate the fundamental “right to life”. The next question that peeps into mind is whether the “right to life” includes the right to an environment capable of supporting the growth of meaningful “existence of life” and includes the right to a healthy environment?

In two recent cases the Appellate Division (AD) and the High Court Division (HCD) have dealt with the question in a positive fashion. The Appellate Division, in the case of Dr. Mohiuddin Farooque vs Bangladesh and others (BLD, 1997, p.1) has been expounded that “articles 31 and 32 of our Constitution protect right to life as fundamental right. It encompasses within its ambit, the protection and preservation of environment, ecological balance free from pollution of air and water, sanitation without which life can hardly be enjoyed. Any act or omission contrary thereto will be violative of the said right to life.” (Choudhury, J, para. 101).

The High Court Division, in the case of Dr. Mohiuddin Farooque vs. Bangladesh and others ( 48 DLR, 1996, p. 438), stated that right to life includes right to fresh air and water and a situation beyond animal existence in which one can expect normal longevity of life.

Hence, it appears that right to healthy environment has now become a fundamental right as per the case laws, which puts additional responsibility upon the judiciary to ensure that rule of law is guaranteed in cases where the sustainability of a proposed or undertaken development project is questionable and those victim of breach of public law and the judicial precedent is appropriately collated by the judiciary.

## **6 PUBLIC INTEREST ENVIRONMENTAL LITIGATION:**

The system of governance in Bangladesh is quite chaotic in terms of its legal regime and all institutions involved are responsible. There is hardly any consistency between policy, law and the institutional framework. The lack of synchrony itself has created the regulatory anarchy. The law enforcers are often the violators. Public accountability is almost non-existent and hence there is the free hand. The so-called public activities are matters of the domain of public agencies, and the general public have no effective role or voice. The complex and conservative legal system has seemingly weakened people’s trust and confidence in it. In the back drop of such scenario, the arrogance of the defiant law enforcers can be effectively questioned, *inter alia*, by the people through the court as judicial scrutiny which is quite popularly known in most legal systems as public interest litigation initiated by concerned peoples or citizens groups and non government bodies.

Until 1994, Bangladesh had no reported cases decided by the Supreme Court on environmental issues. The first such case was filed in January 1994 by the Bangladesh Environmental Lawyers Association (BELA). Since then this group has undertaken a large number of cases which have contributed to the development of public interest litigation. Various environmental problems were the cause of action in these suits in which relief was sought against anti-civic activities, industrial pollution, vehicular pollution, unlawful construction, illegal felling of public forests, razing of hills, land use and unlawful development schemes among others. Offenses against human health and dignity were also challenged in court.

On two occasions the question of “standing” of Bangladesh Environmental Lawyers Association (BELA) was kept open, i.e., *Dr. Mohiuddin Farooque vs. The Election Commission & Others* (47 DLR, p. 235) and *Dr. Mohiuddin Farooque vs. Bangladesh & Others* (Writ Petition No. 891 of 1994). The second case relates to 903 polluting industries and factories where the High Court Division of the Supreme Court has issued Rule Nisi in the nature of mandamus.

However, in *Dr. Mohiuddin Farooque vs. Bangladesh & Others* (Writ Petition No. 998 of 1994) in which the legality of an experimental structural project of the huge Flood Action Plan of Bangladesh was challenged, the High Court Division initially rejected the Petition on the ground that the Petitioner (representing BELA) had no “standing”. The Petitioner has preferred an appeal to Appellate Division where the Court granted leave to decide the locus standi in PIL. In July, 1996 the Appellate Division has given its decision in which Mustafa Kamal, J. said, “In so far as it concerns public wrong or public injury or invasion of fundamental rights of an indeterminate number of people, any member of the public, being a citizen, suffering the common injury or common invasion in common with others or any citizen or an indigenous association, as distinguished from a local component of a foreign organization, espousing that particular cause is a person aggrieved and has the right to invoke the jurisdiction under Article 102”.

## **7 ROLE OF PUBLIC INTEREST ENVIRONMENTAL LITIGATION (PIEL) IN COMPLIANCE AND ENFORCEMENT**

Public Interest Environmental Litigation generates awareness, educates the actors and creates values in the society even if the case is lost in a court of law on technical grounds. Such efforts also bring changes in the behaviour, however limited, which may become significant and unavoidable norm eventually. It is further an attempt to resolve the intra and inter sectoral conflicts of law on mandatory delimitation. Legal mechanism and the role of judiciary have proved to be very effective process in any advocacy or activism. It has been quite successfully used in many countries like India (Sangal, 1992). Although in most cases on environment the judiciary may not respond the way an activists would like (due to its own limitation), such attempts create awareness that marks the making or remolding of values in the society.

The impact of Public Interest Environmental Litigation may not always be visible but may also be the initiation of a process which in the long run would provide tangible dividends. One such example can be cited in this regard as observed from the writ petition no. 186/94 (*BELA vs. The Election Commissioners and Others*). In this case the failure of the Election Commission and other law enforcing agencies in preventing the candidates from violating laws in the name of election campaign for the post of Mayor and Commissioners of the Dhaka City Corporation (capital city of Bangladesh) was raised in January 1994. All the campaigners of the candidates defaced peoples property, encroached on public streets and pavements and used too many loud speakers disturbing peace for the people and creating pollution. The High Court Division directed the respondents to show cause as to why the election shall not be postponed since it was not being conducted in accordance with the law. All the respondents appeared and the major political parties joined as respondent to make commitment that all illegal acts would be stopped and removed. The Attorney General ensured that funds would be placed to repaint peoples property. The impact of this case can be partly evaluated now as follows: the law enforcing agencies assessed their extent of statutory sanction; political parties nay the nation came to know that what they had been doing and witnessing for more than half a century as “election culture” was not lawful and people could challenge such acts and failures. During the

recent June 1996 parliamentary election there was hardly any wall writing or electioneering boxes on public properties or rampant use of loud speakers. The credit for such situation, inter alia, should also go to the litigation of BELA for the case which was well publicized.

Development programmes are undertaken administrative sector-wise by sectorally compartmentalized public agencies, activities on any of the key sectors create major impact on the other because the institutional linkages or the coordination mechanism do not exist or operate (Government of Bangladesh, 1991). Therefore most of the laws which have bearing on environment and ecology are sectoral enactment either as substantive legislation and/or, as statute on institutional framework explaining powers and functions. The agencies are protected by their empowering laws against legal action and citizens are generally barred from having recourse to the provisions of these laws. Most of these laws are either not enforced or applied in a manner incompatible to their conservation and sustainability spirit. The utilization of constitutional remedy through the initiation of Public Interest Environmental Litigation showing violation of fundamental rights has been found to be effective in activating the provisions of such laws in public interest. In one case against indiscriminate, unlawful and unauthorized cutting or razing of hills the court ordered the Department of Environment to submit a status report taking necessary assistance from other concerned agencies. The petition filed by BELA for minimization of vehicular pollution would require close coordination among the activities of different organs having chain reaction of the issue.

Neither legal rights nor interests can be extinguished without appropriate compensation. Many of the adverse local social and environmental impacts induced by development projects could be avoided or minimized if the procedures of law were followed. In the context of payment of compensation for undertaking development programmes it has been in practice to award the same only to persons affected by the acquisition of land. But some laws contain provisions for claiming compensation by the affected people for damage of rights of fishery, drainage, use of water or other right of property. The jurisdiction of the High Court Division has been invoked by BELA claiming implementation of a project in consonance with legal requirements for payment of compensation to the affected people for all sorts of losses which are legally recoverable. On hearing the parties, the High Court Division observed that "in implementing the project the respondents cannot with impunity violate the provisions of law ... We are of the view that the Flood Action Plan-20 Project work should be executed in complying with the requirements of law". After pronouncement of the judgment BELA assisted the affected local people in submitting claims for compensation to the appropriate authority. In the meanwhile the concerned authority for implementation of project has initiated steps for setting out parameters basing on which the compensation for all other sorts of damages to be assessed and paid.

The land use pattern in the country has been the prime cause for current trend of rapid degradation of environment. Unplanned and unregulated utilization of lands either owned by public or private entities have further been aggravating the situation. However, inconsiderate and indiscriminate authorization for use of land in a manner incompatible with traditional land use pattern leading to disputes between traditional and alternated land users. The authorization and utilization of lands for various purposes without paying necessary heed to environmental consequences have been creating a chaotic situation leading to mis-management having negative impact upon overall administration of the country's land resource. Particularly, the management of public land is the worst hit sector which requires some modification and accountability for sustainable resource exploitation. Some of the cases filed by BELA regarding the use of public land is aimed at strict compliance of legal norms for land management. In such cases the High Court Division stayed the effectiveness of such unlawful attempts and we hope that the verdict announced on full length hearing of those petitions would act as a barrier in exercising the land management practice.

The number of appeals that have entertained so far start from grievances of the civil servants down to the poor landless to protect their statutory and traditional rights and professions. The process of empowering the large section of the downtrodden populace has been the central objective of the activity of BELA which has been to some extent materialized through the initiation of Public Interest Environmental Litigation to prevent the abuse under various disguise. It has responded to every call whether directed to it or from the news received from the media to stand for the people of different parts of the country within the limited resources.

Public Interest Environmental Litigation can effectively be initiated in respect of disaster happened due to any development work where EIA and access to its review procedure is mandatory. Since disaster or environmental management measures are described and proposed in EIA, it would be easier to challenge in times of disaster whether those commitments have been fulfilled. In a recent gas explosion incident in Bangladesh occurring from a drilling-well, the EIA has been the crucial issues for litigation.

Public Interest Environmental Litigation has contributed in strengthening the capacity of the concerned institution in implementing duties and responsibilities as enumerated in the sectoral laws aiming to maintain environmental standard. The notion of law enforcement has taken such a shape where it can be said that non enforcement makes laws non existent. Such non enforcement of laws may also be attributed to a number of other reasons hindering the sustainable development. Through Public Interest Environmental Litigation the concerned authority is directed to carry out the duties stated in the respective statute which gradually making the development environment friendly through compliance of legal principles.

## 8 CONCLUSION

The method of Public Interest Environmental Litigation (PIEL) has opened up a new horizon. It is not alone a mode of fostering the enforcement of environmental or other regulations through judicial process, but a potential way in creating awareness amongst the members of a society about their rights and duties. This species of litigation can be an unique vehicle of rendering service to those who can not speak for themselves. It can clarify and promote judicial remedies making the judiciary progressive and the ramification of which gives the people a fair idea about the interface between the issues and the regulatory regime. It elaborates the functional interpretation of law with precision thereby removing ambiguity lessening the scope of exploitation with accountability. PIEL fills in the gaps in law, the inconsistency in the regulatory regime between law, policies and institutional framework and enjoins law with morality.

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