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LEGAL ACTIVISM FOR ENSURING ENVIRONMENTAL JUSTICE

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Abstract

This article reviews some of the roles environmental lawyers have played in ensuring environmental justice in Bangladesh. It leans on law and social movement theories to explicate the choice (and ensuing success) of litigation as a movement strategy in Bangladesh. The activists successfully moved the courts to read the right to a decent environment into the fundamental right to life, and this has had the far-reaching effect of constituting a basis for standing for the activists and other civil society organisations. The activists have also sought to introduce emerging international law principles into the jurisprudence of the courts. These achievements notwithstanding, the paper notes that litigation is not a sustainable way to institute enduring environmental protection in any jurisdiction and recommends the utilisation of the reputation and recognition gained through litigation to deploy or encourage more sustainable strategies.

KEYWORDS: Environmental legal activism, law and social movements, right to a decent environment, PIL, locus standi, Bangladesh

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I. INTRODUCTION

Public interest litigation (PIL) denotes litigation initiated for the protection of public interest. In this type of litigation, the aggrieved party need not be the party in the court of law; this type of litigation can be introduced by the court itself or by any member of the public. This is an example of legal activism, by which society can claim redress for an act that is not directly safeguarded by the *Constitution* and where the State has failed to redress it.[1] In *A. B. S. K. Songh (Railway) v. Union of India,*[2] the Supreme Court of India provides the cultural orientation of PIL in this region. In this case, the court clearly mentions that the current jurisprudence of this region[3] is not an individualistic Anglo-Indian model; it is broad-based and people-oriented. It has toned down the confusion regarding the *locus standi*, as it mentions that "the narrow concept[s] of 'cause of action' and 'person aggrieved' and 'individual litigation' are becoming obsolescent". PIL took its form after the seminal judgment of the Supreme Court of India in *S. P. Gupta v. Union of India*.[4]

Until 1994, Bangladesh had no reported PIL decided by the Supreme Court. The Bangladesh Environmental Lawyers Association (BELA)[5] brought an environmental issue in the form of a PIL before this court for the first time in this country. *Dr. Mohiuddin Farooque v. Bangladesh & Others*[6] was the first case of

[1] Tsun Hang Tey, "Public interest Litigation in Malaysia: Executive Control and Careful Negotiation of the Frontiers of Judicial Review" in Po Jen Yap & Holning Lau, eds., *Public interest Litigation in Asia* (London: Routledge, 2010); Vipon Kititasnasorchai & Panat Tasneeyanond, "Thai Environmental Law" (2000) 4 S.J.I.C.L. 1; Surya Deva, "Public interest Litigation in India: a Quest to Achieve the Impossible?" in Po Jen Yap & Holning Lau, eds., *Public interest litigation in Asia* (London: Routledge, 2010).

[2] A.I.R. SC. 298,317 (1981).

[3] The Indo-Pak Sub Continent including Bangladesh and Nepal.

[4] In this case, the court provides the framework of this type of litigation as follows: "[W]here a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right or any burden is imposed in contravention of any constitutional or legal provision or without any authority of law…and such person or determinate class of persons is by reason of poverty, helplessness or disability or socially or economically disadvantaged position, unable to approach the Court of relief, any member of the public can maintain an application for an appropriate direction, order or writ". For details, see AIR S.C. 149 (1982) at 188.

[5] Established in 1992, BELA is the best known Bangladeshi NGO working with the broad objective of promoting environmental justice and contributing to the development of sound environmental jurisprudence. BELA is a member of IUCN–the World Conservation Union, Environmental Law Alliance Worldwide and the South Asian Watch on Trade, Economics and Environment. In 2003 it received the Global 500 Role of Honors of the United Nations. For details, see online: <http://www.belabangla.org/bela/index.php?option=com_content&view=article&id=48:introducing-bela& catid=40:belabangla> (last accessed 17 November 2011).

[6] Writ Petition No. 891 of 1994. Dr. Mohiuddin Farooque was the founder of BELA.

this nature in this country. Thus, the determination of *locus standi* of the petitioner was the vital substantive issue to be settled.[7] In this case, the legality of an experimental structural project of the huge Flood Action Plan of Bangladesh was challenged. The High Court Division of the Supreme Court of Bangladesh[8] initially rejected the petition of this case on the grounds that the petitioner had no standing. The petitioner had preferred an appeal to the Appellate Division of the Supreme Court of Bangladesh. The Division decided the issues of *locus standi* in PIL. In July 1996, the Appellate Division gave its decision, in which Mustafa Kamal, J. observed:

> 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 organisation, espousing that particular cause is a person aggrieved and has the right to invoke the jurisdiction under Article 102.

Since 1994, BELA, Bangladesh Legal Aid and Services Trust (BLAST), *Ain o Salish Kendra* (ASK), and numerous lawyers have undertaken a large number of cases that have contributed to the development of PIL in this country. To date, the PILs in this country have been due to various environmental problems; amongst these, the relief sought against pollution caused by companies is prominent. This is mainly because the environmental regulation framework and this country's governmental agencies are either inefficient, biased, or do not have adequate strategies to tackle environmental degradation by business operations.

In Bangladesh, the human right to a decent environment has been established as a fundamental right. The judicial activism that made this possible is a direct outcome of the activism of the environmental lawyers. In most of the cases, it is those lawyers that initiated the arguments that the courts took up in reaching the favourable decisions. The judges themselves have even voiced

[7] Writ Petition No. 998 of 1994.

[8] The Supreme Court of Bangladesh is the highest court of this country. This court is divided into two Divisions: The Appellate Division and the High Court Division. Both these divisions sit in Dhaka. The High Court Division has some original jurisdiction and it is the appellate authority of the subordinate courts. It decides all writ petitions. Against the decision of this Division, an aggrieved person can go to the Appellate Division. The decision of this Division is final. These Divisions are safeguarded by the *Constitution* and they provide clarification of any issues related to the constitutional provisions. For details, see Articles 94–113 of the *Constitution of the Peoples' Republic of Bangladesh*.

appreciation of the efforts of the environmental lawyers on more than one occasion.[9]

However, the successes of this activism via environmental PIL still have significant problems beyond the limitations of PIL. This activism in Bangladesh often develops "policy evolution fora" for a particular national issue and influences executive governance through judicial governance in sectors highlighted by groups of public interest litigants. Along with an insufficient impact on a substantive change into the social movement, this type of overlapping in the major organs of the state illustrates some dissatisfaction with judicial process. Government efforts to control environmental legal activist organisations under NGO regulations comprise another obstacle for this activism. This hinders the entrance of other organisations into the legal activism arena.[10] Additionally, ongoing limitations in resources are continually a major bottleneck, even for well-established organisations. For instance, these organisations are in extreme shortage of legal and scientific literature on the environment.

Research and publication from the social movement organisations are insufficient. Moreover, there is a dearth of supporting quality research from academia. These factors have compelled the environmental lawyers to carryout research by themselves. Nevertheless, it is very difficult for the lawyers to conduct extensive research in light of time constraints and limited funds. To compound matters, each time the environmental lawyers refer to in-house research in arguments, their positions carry less weight because the researcher himself is a party to the dispute. Sometimes, environmental organisations appear helpless in their fight against wealthy and influential parties, since litigation in Common Law courts involves a great amount of resources. Threats of death and other forms of harm are common against human rights defenders or environmental activists of developing countries, and Bangladesh is no exception.[11]

Moreover, the social change motion set by the judicial activism in this country, in most cases, is less than participatory, which has (arguably) led to unrealistic solutions. There are some limitations of this activism, with respect to

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[9] *Dr. Mohiuddin Farooque v. Bangladesh and Others,* 55 DLR (HCD) 69 (2003) (hereinafter *Industrial Pollution Case*) at [62]; *Dr. Mohiuddin Farooque v. Bangladesh and Others,* 50 DLR (HCD) 84 (1998) at [83] (hereinafter *FAP 20 Judgment on Merit*).

[10] Asian Centre for Human Rights, "Bangladesh's Offer: Become GONGOs or Be Ready for Government Takeover", online: <http://www.achrweb.org/Review/2004/0704.htm> (last accessed 28 January 2009); Shah A.M.S. Kibria, "Farewell to the NGOs: Their Days in Bangladesh are Over?" *The Daily Star* (6 February 2004).

[11] Amnesty International, "Bangladesh: Human Rights Defenders Under Attack", online: <http://www. amnesty.org/en/library/asset/ASA13/004/2005/en/dom-ASA130042005en.pdf> (last accessed 28 January 2009).

access, effectiveness, and sustainability. These shortcomings need to be explored and addressed if the true promise of this activism is to be unleashed.

Given this, the aim of the present paper is to discuss the evolution of environmental legal activists in Bangladesh – to highlight the achievements and note the challenges. In having this discussion, various analytical approaches may be adopted. However, the paper will lean on some law and social movement theories to put the Bangladesh environmental movement in perspective and explicate the adopted strategies.[12] This approach has the added advantage of providing some basis for making recommendations useful not only for Bangladeshi activists but also for other organisations that are similarly situated. The aspect of social movement theories that is the main concern in this paper is litigation as a movement strategy – particularly legal mobilisation, which helps illuminate the reasons for the choice of litigation as a movement strategy.

To help locate environmental civil society organisations in Bangladesh within the social movement discourse, the remainder of the present section briefly discusses social movements generally. However, it also discusses the role of law in social movements and highlights the features of legal mobilisation theory of major concern in the context of the present study. The second section of the paper discusses the achievements of the Bangladesh environmental legal activists, particularly regarding the recognition of the right to a decent environment, the standing of some civil society organisations, and the progressive development of environmental jurisprudence in Bangladesh. The third section proceeds based on legal mobilisation and other social movement theories to discuss the choice of litigation in Bangladesh and the possible reasons for the successes seen in the achievements outlined in the second section. Section four discusses the limits of litigation, particularly PIL as a movement strategy. Section five summarises the findings of the analysis and offers predictions of future developments, opportunities, and challenges for environmental activism in relation to PIL.

A. Social Movements

The aim of this part is not to provide a template for determining whether or not the civil society organisations engaged in environmental legal activism in Bangladesh qualify as social movement organisations. Instead, it is to map an

[12] Key questions answered by social movement theorists include "why movements originate when they do, how they attract and maintain support, how they present issues and formulate strategies and tactics, how they structure organizations, how they change cultures, why they generate opposition and sometimes decline, and how and why they succeed or fail in their objectives", S. Staggenborg, *Social Movements* (Don Mills, Ont.: Oxford University Press, 2008) at 2.

overview of some of the views adopted by scholars on the meaning of the term.[13] As McCann noted, "considerable disagreement and uncertainty exist regarding just how the very concept of 'social movement' itself should be defined."[14] Hence, the overriding considerations here are whether the activities of the organisations in focus can be explicated by reference to social movement theories and whether reference to such theories can provide useful insight, particularly regarding lessons learned from prior studies.

According to Charles Tilly in *Social Movements*, a distinctive way of pursuing public politics began to take shape in western countries during the late 18th century, which has since spread and come to be known as social movements. Such movements combined three elements: 1) campaigns of collective claims on target authorities;[15] 2) an array of claim-making performances, including special purpose associations, public meetings, media statements, and demonstrations (social movement repertoire); and 3) public representations of the causes' worthiness, unity, number of members, and commitment.[16] In Tilly's view, social movement campaigns involve interactions between at least three parties: "a group of self-designated claimants, some object(s) of claims, and a public of some kind."[17] He treated the concept as a distinctive form of contentious politics. It is contentious because social movements involve collective making of claims that would conflict with someone else's interests if realised. It is also politics, because governments of some sort figure somehow in the claim-making as either claimants, objects of the claim, allies of the objects, or monitors of the contention.[18]

In *Contentious Politics*, Charles Tilly and Sidney Tarrow added social movement bases – the organisations, networks, traditions, and solidarities that sustain social movement activities – as a fourth element to the three elements mentioned above, and proffered a definition of social movements.[19] They defined it as "a sustained campaign of claim making, using repeated performances that

[13] There are different definitions of social movements, and some of these do not even consider litigation as a social movement tactic/strategy. Given this, this article confined it within the established thoughts of social movement and judicial activism, and do not attempt to made any comparative study with the different definitions of social movement and judicial activism.

[14] M. McCann, "How Does Law Matter for Social Movements" in B. Garth & A. Sarat, eds., *How Does Law Matter* (Evanston, IL: Northwestern University Press, 1998) at 77.

[15] C. Tilly, *Social Movements, 1768-2004* (Boulder: Paradigm Publishers, 2004) at 4. For Tilly, authorities include government officials, property owners, religious functionaries and other whose action or inaction significantly affect the welfare of many people.

[16] *Ibid.* at 7.

[17] *Ibid.* at 4; "A campaign always links at least three parties: a group of self-designated claimants, some object(s) of claims, and a public of some kind…Not the solo actions of claimants, object(s), or public, but *interactions among the three, constitute a social movement*. (emphasis added)".

[18] *Ibid*. at 3.

[19] C. Tilly & S. Tarrow, *Contentious Politics* (Boulder: Paradigm Publishers, 2007) at 8.

advertise the claim, based on organisations, networks, traditions, and solidarities that sustain these activities."[20]

This, as is to be expected, is not the only characterisation of "social movements": many other theorists adopt descriptions that do not distinguish as strictly as Tilly's does. Suzanne Staggenborg, for example, identified several theorists who argue that movement activity occurs in a wide range of venues and through a variety of forms of collective action. Among these, McCarthy and Zald, define social movements as "a set of opinions and beliefs in a population which represents preferences for changing some elements of the social structure and/or reward distribution of a society."[21] While this definition more easily explains most civil society organisations that would benefit from social movement theories, one of the problems with its non-restrictive general view is that it fails to adequately differentiate social movements from minority political parties, interest groups, and other forms of collective action for purposes of analysis. This is an important point because, to put it in Tilly's words, expansion of the term to include all sorts of popular collective action may "badly handicap any effort to describe and explain how social movements actually work".[22] Beyond this handicap, Tilly saw little harm in such a broadening of the term in casual political discussion.[23]

Notwithstanding, many theorists have sought ways to distinguish social movements from other forms of collective action. For example, McCann outlined four ingredients to delimit social movements and differentiate them from political parties and interest groups for the purpose of the introduction to his *Law and Social Movements*. Only three of those are necessary for our purposes here: 1) "Social movements aim for a broader scope of social and political transformation than do more conventional political activities."[24] This means that, although social movements may press for tangible short-term goals, they are inspired by more radical visions of a different and better society.[25] 2) Although social movements employ a wide range of tactics (as do parties and interest groups), social movements would tend to rely more on communicative strategies of information disclosure as well as disruptive tactics such as protests, strikes, and marches that halt or upset ongoing practices. These are sometimes combined with conventional methods, such as litigation. The emphasis here is on "disruptive". Litigation here

[20] *Ibid.*
[21] See S. Staggenborg, *Social Movements, supra* note 12 at 6–7.
[22] C. Tilly, *Social Movements, 1768-2004, supra* note 15 at 7.
[23] *Ibid.*
[24] M. McCann, "Introduction" in M. McCann, ed., *Law and Social Movements* (Burlington: Ashgate, 2006) at xiv.
[25] *Ibid.*

serves as a platform for "rebellion" against existing structures of relations.[26] 3) "Social movements tend to develop from core constituencies of non-elites whose social positions reflect relatively low degrees of wealth, prestige, or political clout."[27] This does not mean that social movements and the elite do not mix, because "movements may find leadership or alliance among elites and powerful organisations".[28] In sum, theorists like Tilly have favoured a narrowly delimited concept of social movement, while others like McCarthy and Zald prefer a less restrictive description, and yet others like McCann proffer a way to distinguish movements from other forms of collective action when a less restrictive definition is utilised.

McCann went on to discuss legal mobilisation by social reform movements.[29] In doing so, he addressed Rosenberg's perspective, which is a much stronger critic of judicial activism for social movement.[30] While Rosenberg questions whether judicial activism can bring about social change at all, McCann tempers the doubts by raising his argument that this activism may not do so directly, but that the symbolic and strategic values behind this activism can.[31] He built this argument on Scheingold's perspective on the politics of rights.[32] McCann explored some theories that are deemed useful for our purposes here. Among these, legal mobilisation is one of the theories that explore the relationship between law and social movement – a brief discussion of this relationship is important to help frame the present paper.

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[26] *Ibid*. See also K. J. Fitzgerald & J. Kathleen, "Radical Social Movement Organizations: A Theoretical Model" (2000) 41(4) The Sociological Quarterly 573–592.
[27] *Ibid*.
[28] *Ibid*.
[29] M. McCann, "Legal Mobilization and Social Reform Movements" in M. McCann, ed., *Law and Social Movements* (Burlington: Ashgate, 2006) at 3–32.
[30] Regarding Rosengber's perspective, see G. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: University of Chicago Press, 1991) at xii+425; G. Rosenberg, "Hollow Hopes and Other Aspirations: A Reply to Feeley and McCann" (1993) 17 Law & Soc. Inquiry 761-778; for a critique of Rosenberg's arguments, see M. Feeley, "Hollow Hopes, Flypaper, and Metaphors" 17 Law & Soc. Inquiry 745-760.
[31] McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* (Chicago: Chicago University Press Ltd, 1994); M. McCann, "Reform Litigation on Trial" (1992) 4 Law & Social Movements 715–747.
[32] Scheingold argues that law surfaces, at least in part, as a "myth of rights." The myth of rights refers to the widespread assumption that 1) "litigation can evoke a declaration of rights from courts," 2) "that it can, further, be used to assure the realization of these rights," and 3) "that realization is tantamount to meaningful change". In this way, the myth of rights expresses an elemental faith in the promises of constitutional government, a "faith in the political efficacy and ethical sufficiency of law as a principle of government." For details, see S. Scheingold, *The politics of Rights: Lawyers, Public Policy, and Political Change* (Ann Arbor: University of Michigan Press, 2004).

1. Law and Social Movements

In *Law and Social Movements*, McCann noted that social scientists have paid considerable attention to the role of law, litigation, and lawyers in social movements, and that consensus on these issues has generally mirrored changes in the larger political culture.[33] "Most studies in the late 1950s and 1960s, for example, provided a generally optimistic view, emphasizing the growing accessibility of courts to long-marginalized groups such as racial minorities and the poor".[34] Conversely, publications on the topic, prior to 2006, have presented a more pessimistic view of the utility of litigation for advancing progressive social change in a capitalist society.[35] One body of literature, mostly from the Critical Legal Studies movement, has critically analysed the ideological biases of prevailing public and private law doctrines, which tend to support the status quo power relations.[36] Another body of literature focused on the institutional limitations and trade-offs inherent in social movement litigation. These studies point out that the neediest citizens lack the resources to undertake litigation, while those who can afford it find out that it is limiting, costly, and can fragment movement-building efforts, discourage people from popular mobilisation strategies, and lead to an emphasis of judicial victory over genuine social change.[37] Nevertheless, in his search for a balanced perspective on this issue, McCann has been led to reconsider the insights of "legal mobilisation" theory. "This approach fully acknowledges that litigation alone rarely advances significant social change, but at the same time it recognizes that legal rights advocacy can in some circumstances provide a useful resource for social movement building and strategic political action."[38]

The legal mobilisation approach urged by McCann sees laws as identifiable traditions of symbolic practice. Quoting Marc Galanter,[39] McCann notes that law should be analysed more as a system of cultural and symbolic meanings instead of as a set of operative controls. Law affects people primarily through communicative symbols – threats, promises, models, persuasion, legitimacy, stigma, *etc*.[40] "Evaluation of how Reform litigation and other institutional activities matter thus require accounting for the variable ways that

[33] *Ibid.* at 3.
[34] *Ibid*.
[35] *Ibid*.
[36] *Ibid*.
[37] *Ibid*. at 4.
[38] *Ibid.*
[39] M. Galanter, "Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) about our Allegedly Contentious and Litigious Society" (1983) 31 UCLAL Rev. 4 at 127.
[40] *Ibid*.

differently situated groups interpret and act on those signals sent by officials over time."[41] Since the content and relative power of legal meaning vary among differently and unequally situated citizens, legal norms, conventions and tactical manoeuvers also vary in significance over time. It also follows that discursive strategies and institutional ploys become more significant for some types of struggles than for others. This leads to a further assumption that "law…can at once both empower and disempower variously situated social groups in different types of relations."[42] Since law, from this viewpoint, can perpetuate status quo power relations (though it can equally provide sources of opposition and change within particular institutional terrains), the more important challenge is to "determine how and to what degree groups can work within and through these legal traditions to advance their causes."[43] In this regard, in a social movement approach, there are two levels in which legal power can be relevant to action: 1) in shaping the overall "structure of opportunities" available to movements, and 2) in the various legal resources available to groups in their struggles.[44] As will be seen below, it is also especially regarding "opportunities" and "resource mobilisation"[45] that the kind of legal mobilisation theory advocated by McCann has been the most useful in analysing the legal activism by the environmental social movement in Bangladesh.

In this paper, "environmental legal activism" refers to the effort of some members of the lawyers' community to ensure sound environmental and ecological order by applying the legal mechanism as a tool. This includes undertaking legal action against originators of environmental pollution. The conducting of research, awareness creation, and other forms of legal assistance and advocacy are also countenanced by the term. Environmental PIL aims to

[41] M. McCann, *supra* note 14 at 81.
[42] *Ibid*. at 82.
[43] *Ibid*.
[44] *Ibid*.
[45] It would be worth describing the nexus amongst "right litigation", opportunities and resource mobilisation. Litigations for rights arose due to two sets of reasons – changes to political opportunity and the involvement of certain types of people in the political movement, specially lawyers. Political opportunity (including the justice delivery system) structure is a concept under a social movement theory known as "political process model". In this process, resource mobilisation is a vital component. In the political process model, resource mobilisation is also called "mobilising structures" that refers to the ability of the social actors like human and organisation. This is an extended version of the thoughts of resource mobilisation within the political process model. In this article, when we refer to "structural opportunity" we usually mean this version of resource mobilisation. For details of these types of resource mobilisation, see S. M. Buechlers, *Social Movement Theory: A Sociology of Knowledge Analysis in Social Movements in Advanced Capitalism: The Political Economy and Cultural Construction of Social Activism* (New York: Oxford University Press, 1999); D. Adams, *Political Process and the Development of Black Insurgency 1930-1970* (Chicago: Chicago University Press, 1999).

ensure access to justice for all members of the society, particularly members of the marginalised segment of the society. Therefore, legal activism comprehends the entire range of manoeuvres envisaged by legal mobilisation theories, including litigation. Litigation has historically been an important component of the repertoire of claim-making strategies available to environmental movements around the world. While parts of the present paper establish that litigation has been effectively employed in Bangladesh, legal mobilisation theories form the primary basis for explicating the choice of litigation by the movement organisations and the reasons for the successes. However, other related theories that deal with the rise and fall of social movements also help to buttress the limitations of litigation and the need to highlight other activist roles such as legislative and policy advocacy.

Nevertheless, legal activism is not to be confused with judicial activism, which relates to the activism of judges, although, as will be seen below, the receptiveness of the judiciary to novel environmental claims is vital to the effectiveness of litigation as a social movement strategy. Furthermore, for the purposes of this paper, the view has been adopted that "environmental justice" can be achieved through "the fair treatment and meaningful involvement of all people regardless of race, colour, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies."[46] Perhaps the concept is best understood by drawing attention to "environmental injustice":

> Environmental injustice occurs whenever some individual or group bears disproportionate environmental risks, like those of hazardous waste dumps, or has unequal access to environmental goods, like clean air, or has less opportunity to participate in environmental decision-making. In every nation of the world poor people and minorities face greater environmental risks, have less access to environmental goods, and have less ability to control the environmental insults imposed on them.[47]

Therefore, legal activism for the prevention of environmental injustice is another way of describing the focus of this paper. The next step is to show how the foregoing theories apply to the movement in Bangladesh.

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[46] EPA (USA), "Environmental Justice", online: <http://www.epa.gov/environmentaljustice/index.html> (last accessed 27 April 2009).

[47] K. Shrader-Frechette, *Environmental Justice: Creating Equality, Reclaiming Democracy* (Oxford: Oxford University Press, 2002) at 3.

B. The Environmental Social Movement in Bangladesh

The campaigns for environmental protection in Bangladesh, although varied and multifaceted, are sufficiently interlinked and sustained to meet most characterisations of "social movement". They have even displayed all of the elements in Tilly's restrictive characterisation of the term: collective claims, claim-making performances, and public representations of worthiness *etc*. The strong participants in these campaigns include, but are not limited to, the Bangladesh Centre for Advanced Studies (BCAS), the *Bangladesh Poribesh Andolon* (BAPA), and BELA. Since 1986, BCAS has been involved in research and publication on environmental issues. It seeks to address sustainable development through (a) environment-development integration, (b) good governance and people's participation, (c) poverty alleviation and sustainable livelihoods, and (d) economic growth and public-private partnership. It has produced a number of publications that have influenced national environmental policymaking.[48] BCAS's contribution to environmental conservation is recognised within and outside Bangladesh.[49] BAPA seeks to build a nationwide civic movement aimed at stopping and reversing environmental degradation in Bangladesh. It favours social mobilisation, policy advocacy, and conservation, and has organised conferences, adopted resolutions, and been involved in awareness campaigns through its publications, protests, and other activities.[50] BAPA's contribution to the environmental movement is also acclaimed by a number of authors.[51]

However, regarding environmental legal activism in Bangladesh, the oldest and most prominent of these organisations is BELA. In Tilly's characterisation, it is the claims for a better environment, which brings these organisations together, that constitute the social movement, and not the organisations themselves.[52] Nevertheless, BELA and others engaged in litigation

[48] See BCEAS, "BCAS website", online: <http://www.bcas.net/AboutBCAS/About_Index.html> (last accessed 17 April 2009).

[49] UNEP, "Climate Change Links 2008 Champions of the Earth Award Winners", online: <http://www.unep.org/documents.multilingual/default.asp?documentid=525andarticleid=5738andl=en> (last accessed 25 June 2009).

[50] See BAPA, "BAPA website", online: <http://www.bapa.org.bd/Default.aspx > (last accessed 27 May 2009).

[51] See D. A. Ahsan *et al.*, "The Relationship of National and International Environmental NGOs in Bangladesh and Their Role in Wetland Conservation" (2009) 3 International Journal of Environmental Research 23 at 31; and N. Islam, "Broader Significance of the Environmental Movement in Bangladesh", online: <http://www.ben-center.org/BEN/BAPA/nazrulislam.oct20.htm> (last accessed 10 January 2009).

[52] Tilly, *supra* note 15 at 6: ("Analysts often confuse a movement's collective action with the organizations and networks that support the action or even consider the organizations and networks to constitute the movement…rather than the networks in which they engage").

represent an important component of the campaigns: the litigation facet thereof. Whereas Tilly, did not countenance litigation as a social movement performance, legal mobilisation theorists like McCann do.

C. Environmental Legal Activism in Bangladesh

The majority of environmental protection achieved through legal activism discussed below is related to the activities of BELA. However, after the landmark judgment in the FAP-20 case (discussed below) – in which standing was allowed for environmental civil society organisations if certain conditions are present – some other human rights and legal aid organisations, including, BAPA, Bangladesh Legal Aid and Services Trust (BLAST), and *Ain o Salish Kendra* (ASK) began to participate in filing PILs for environmental protection. BLAST, ASK, and BELA have worked together to file a number of PILs for environmental protection. For example, both BELA and BLAST moved separate writ petitions for prevention of Vehicular Pollution in Dhaka City.[53] Additionally, BELA provides legal assistance to several other environmental organisations in filing writ petitions, some cases filed under the name of BELA were made on behalf of other environmental civil society organisations.[54] Since BELA is the only environmental civil society organisation in Bangladesh that has environmental legal advocacy as its reason for existence, it is not surprising that it has filed and won many more environmental cases than any of the others has.[55] This is why its activities and processes feature most prominently in the present analysis. Nevertheless, the road to the litigation championed by these organisations has been rife with obstacles.

Bangladesh is gifted with an unparalleled natural panorama. The country is affluent in terms of natural resources and hardworking people. However, it is deficient in terms of sustainable and sound management of these environmental

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[53] *Dr. Mohiuddin Farooque v. Bangladesh and Others*, 55 DLR (HCD) 613 (2003) (hereinafter *Dhaka City Vehicular Pollution Case*).

[54] Some of these cases are: *Nijera Kori v. Bangladesh and others*, Writ Petition no. 7248 of 2003 (Illegal Shrimp Cultivation); *Bangladesh Environmental Lawyers Association (BELA) and Global Village, Rangamati v. Bangladesh and others*, Writ Petition No. 2459 of 2004 (Construction of a Community Centre in the Sole Municipal Park of Rangamati town); *Bangladesh Environmental Lawyers Association (BELA) and Thengamara Mohila Sabuj Sangha (TMSS) v. Bangladesh and others*, Writ Petition No. 4244/04 (Illegal Sand Extraction from River Korota); *Nijera Kori and others v. Bangladesh and others*, Writ Petition No. 5194 of 2004 (Illegal Shrimp Cultivation and Settlement of Land in favour of Landless People). See BELA, "List of Public Interest Litigation", online: <http://www.belabangla.org/html/pil.htm> (last accessed 30 January 2009).

[55] BELA's website lists 62 cases it has filed, about 43 of which have had some sort of decision. Most of the decided cases had positive outcome: online: <http://www.belabangla.org/html/pil.htm> (last accessed 29 June 2009); none of the other organisations surveyed had anything close to these numbers on environmental issues.

resources.[56] Historically, the law and institutions dealing with natural resources in Bangladesh were "use" oriented; they are geared towards extracting maximum economic benefit. Sometimes, this approach forecloses the interest of future generations.[57] Like other South Asian common law counterparts, the legal system of Bangladesh features an adversarial legal system of "formal procedural justice dominated by litigants of equal status engaged in adversarial processes, and provides binding, win-lose remedies".[58] One present day result of this system is that its adversarial nature is not always attractive, and its time-consuming, expensive nature means that the civil courts are not easily accessible to those who are most affected by environmental degradation. Additionally, the emerging principles of international environmental law have been very slow in finding their way into the jurisprudence of Bangladesh's civil courts.

Given the foregoing barriers in the legal system, litigation ought not to have been a viable option for environmental protection in Bangladesh. Nevertheless, some legal practitioners considered it possible to champion environmental justice through the courts. Against this backdrop, this paper now explores the contribution of legal activism in advancing the course of the overall social movement for ensuring environmental justice in Bangladesh. The barriers that existed in the legal system help explain why the legal activists did not choose well-travelled paths in civil procedure such as the traditional writ of summons, instead using writ petitions in procedures that may be described as PIL. In Bangladesh, a civil suit starts with the presentation of a plaint (writ of summons) by the plaintiff. However, there is no scope for PIL under the *Civil Procedure Code*, although there is scope for class action, representative action, and action in public nuisance. Notwithstanding, as will be seen below, Article 102 of the *Constitution* seems to provide such a scope and has been leveraged as such through writ petitions.[59] However, this does not explain why litigation was thought desirable in the first place.

The paper leans on law and social movement theories to discuss the reasons for the PIL being used, the possible reasons for the measure of success achieved so far, and the limits of PIL as a social movement strategy. First,

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[56] See UNEP and ESCAP, *Coastal Environmental Management Plan for Bangladesh Vol. One: Summary* (Bangkok: UN, 1987).

[57] M. Farooque, "Regulatory Framework and Some Examples of Environmental Contamination in Bangladesh" in BELA, ed., *Selected Writings of Mohiuddin Farooque* (Dhaka: BELA, 2004) at 20.

[58] H. E. Chodosh *et al.*, "Indian Civil Justice System Reform: Limitation and Preservation of the Adversarial Process" (1997-1998) 30 New York University Journal of International Law and Politics 1 at 1-4.

[59] For a more detailed outline of the procedural rights in the courts of Bangladesh, see J. Razzaque, *Public interest environmental litigation in India, Pakistan and Bangladesh* (The Hague: Kluwer Law International, 2004) at 191–193; 289–292.

however, the section below will review some of the achievements of the legal activists before discussing the reasons and limits of the litigation strategy to help illustrate the broader discussion.

II. THE ACHIEVEMENTS OF THE LEGAL ACTIVISTS

The present section discusses a number of the cases that established the right to a decent environment in Bangladesh, granted standing to civil society organisations, and introduced some emerging international law principles into the county's jurisprudence. However, these cases are discussed in a way that highlights the role of the activists; the arguments they proffered are highlighted, where possible. Although the emphasis here is not on the judicial activism of the judges, there are instances where the arguments of the activists stopped and the judges went a little further in some of the cases. The section is not meant to be exhaustive. [60]

A. Recognition of the Right to a Decent Environment

The recognition of the right to a decent environment as a fundamental right is viewed by some as the first important step towards ensuring environmental justice for all. The legal activists in Bangladesh share this view and have sought to establish this right in Bangladesh. Although there is no specific provision in the *Constitution* of Bangladesh on the fundamental right to a decent environment, Articles 31 and 32 of the *Constitution* do guarantee the right to life. The activists broadly interpreted this right to life to include the right to a decent environment. In this regard, a series of writ petitions filed by BELA engendered some positive development.

The question of the broader meaning of the right to life was raised for the first time in the case of *Dr. Mohiuddin Farooque v. Bangladesh and others* (*Radiated Milk Case*).[61] In that case, part of several consignments of skimmed milk imported by Respondent No. 6, Danish Condensed Milk Bangladesh Limited, was found, after several tests, to contain radiation levels above the minimum approved level of 95 Bq per kilogram. The petitioner, the then Secretary General of BELA, submitted to the court in a public interest Writ

[60] For a more elaborate discussion of environmental PIL in Bangladesh, see *ibid.*; For the literature on the PIL in general in Bangladesh, see N. Ahmed, *Public Interest Litigation in Bangladesh: Constitutional Issues and Remedies* (Dhaka: BLAST, 1999); R. Haque, *Judicial Activism in Bangladesh: A Golden Mean Approach* (Newcastle upon Tyne: Cambridge Scholars Publishing, 2011); W. Mesnki, "Public Interest Litigation: Deliverance From all Evils" (2002) 6 Bangladesh Journal of Law 1-9; J. Cooper, "Public Interest Law Revisited" (2000) 2 (1) Bangladesh Journal of Law 1-25.

[61] *Dr. Mohiuddin Farooque v. Bangladesh and Others*, 48 DLR (HCD) 438 (1996) (hereinafter *Radiated Milk Case*).

Petition that the consumption of food items containing radiation levels above the approved limit is a threat to the life of the people of Bangladesh, including himself. He cited Article 18 (1) of the *Constitution*, which requires the State to take measures to raise the level of nutrition and improve public health. He also cited Article 21 (2) of the *Constitution*, which enjoins public officers to strive to serve the people and noted that the activities of government officers in dealing with the consignment in question have threatened the life of the people. He thus contended that the officers in question had violated Articles 31 (right to the protection of the law) and 32 (right to life and personal liberty) of the *Constitution* in not compelling the importer to send back the tainted milk.[62] Kazi Ebadul Hoque, J., agreed with the petitioner and thus agreed to the extended meaning of the right to life. Thus, the right to life was construed as including a right to a decent environment. This interpretation has had far reaching effects, most notably on the question of the *locus standi* of environmental activists.

In *Dr. Mohiuddin Farooque v. Bangladesh and others* (the *FAP-20 Case*),[63] the relationship between the right to a decent environment and *locus standi* came out clearly. The case was an appeal of the decision of a High Court Division of the Supreme Court (hereinafter, High Court Division) summarily rejecting a writ petition filed by the then Secretary General of BELA.[64] The Petition was brought under Article 102 of the Bangladesh *Constitution*;[65] however, the trial court rejected it on the grounds that the appellant is not "any person aggrieved" within the meaning of that provision. On appeal, Dr. Faroque argued, *inter alia*, that those whose fundamental rights are being violated need not themselves invoke the jurisdiction under Article 102 (1); others espousing their cause may do so provided the persons aggrieved do not object. He noted, "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".[66]

In the lead judgment, Mustafa Kamal, J., agreed. He found that Article 102 (1) is "a mechanism for the enforcement of Fundamental Rights which can be enjoyed by an individual alone insofar as his individual rights are concerned, but

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[62] *Ibid*. at [4].
[63] *Dr. Mohiuddin Farooque v. Bangladesh and Others*, 49 DLR (AD) 1 (1997) (hereinafter *FAP 20 Case*).
[64] From the Judgment and Order dated 18-8-94 passed by the High Court Division in Writ Petition No. 998 of 1994.
[65] *The Constitution of the People's Republic of Bangladesh* (As Modified up to 17 May 2004), Article 102 (1) The High Court Division on the application of any person aggrieved, may give such directions or orders to any person or authority, including any person performing any function in connection with the affairs of the Republic, as may be appropriate for the enforcement of any the fundamental rights conferred by Part III of this *Constitution*.
[66] *FAP 20 Case*, *supra* note 63 at [25].

which can also be shared by an individual in common with others when the rights pervade and extend to the entire population and territory."[67] Having noted this finding, the next important question, for our purposes, is whether the protection of the environment amounts to the protection of a fundamental right. On this, His Lordship noted that the petition is concerned with an environmental issue but that there is no specific fundamental right in the constitution dealing with the environment.[68] However, he skirted the question of whether the fundamental right to life encompasses the right to a decent environment, choosing instead to rely on the averment of the appellant in making the connection between the environment and fundamental rights.

However, in his concurring judgment, B. B. Roy Choudhury, J., did not shy away from making a direct connection between environmental protection and fundamental rights. This has helped the appellant getting *locus standi* to maintain the writ petition on their behalf. His Lordship noted that the protection and preservation of environment, ecological balance, freedom from pollution of air and water, and sanitation, without which life can hardly be enjoyed, are within the ambit of the constitution of this country.[69]

In another writ petition filed by BELA to stop pollution from some ultra hazardous industries, A.B.M. Khairul Hoque J. shared the same view. He mentions that life means a "qualitative life among others, free from environmental hazards."[70]

In that case, BELA brought the action as a "person aggrieved" under Article 102 of the *Constitution*, with the right to life as the fundamental right that has been breached.[71] It maintained that although the Government by its own survey identified factories and industrial units that created ecological imbalance due to discharge of various industrial wastes into the air and water bodies, it has failed to implement the decision taken in the light of the survey. This, BELA contended, violated the Government's statutory duties. [72] The court agreed.

In another case, filed in connection with the failure of the government to seal tube-wells that were contaminated with arsenic, the Appellate Division of the Supreme Court recognised the connection between environmental pollution and the violation of the right to life, as well as the need to improve the natural and man-made environment with a view to protecting this right. In this case, Md

[67] *Ibid.* at [44].
[68] *Ibid*. at [55].
[69] *Ibid*. at [102].
[70] *Industrial Pollution Case*, *supra* note 9 at [53].
[71] *Ibid*. at [13] and [14].
[72] *Ibid*. at [18].

Tafazzul Islam, J., citing the decision of the Indian Supreme Court in the *Virender Gaur v. State of Haryana*,[73] observed that:

> [H]ygienic environment is an integral facet of right to healthy life, and it will be impossible to live with human dignity without a humane and healthy environmental protection. Therefore, it has now become a matter of grave concern for human existence. Promoting environment protection implies maintenance of environment as a whole comprising the man-made and natural environment. Therefore, there is a constitutional imperative of the State government and the municipalities not only to ensure and safeguard proper environment but also an imperative duty to take adequate measures to promote, protect, and improve both the man-made and the natural environment.[74]

Therefore, beginning with the radiated milk case, legal activism has facilitated the recognition of the human right to a decent environment in Bangladesh. The Supreme Court interpreted the fundamental right to life liberally to include the right to a decent environment by accepting the views of activist lawyers. While the reading of the right to life to include decent environment is hardly a novel construction, having been used in India before now, for example, it is not an incontrovertible approach. Nonetheless, it may be considered vital to environmental protection in a jurisdiction like Bangladesh.

1. The Complexities of Recognising the Right to a Decent Environment by Extending the Ambit of Right to Life

Some commentators have highlighted the difficulties inherent in the postulation of a substantive right to a decent environment. For example, Boyle highlighted some of the objections to this approach. He notes that "definitional problems are inherent in any attempt to postulate environmental rights in qualitative terms."[75] The terms satisfactory, decent, viable, or healthy environment may be incapable of substantive definition. The approach by the courts of Bangladesh has not only upheld such a right, but did so by reading the right into an existing right.

Regarding the correct ambit of "right to life", the overall scheme of international human rights law may not be said to have countenanced this interpretation. Most of the instruments have separate provisions for

[73] [2] SCC 577 (1995) at [7].
[74] *Rabia Bhuiyan, MP v Ministry of LGRD and others,* 59 DLR (AD) 176 (2007) at [25].
[75] A. Boyle, "The Role of International Human Rights Law in the Protection of the Environment" in A. Boyle & M. Anderson, eds., *Human Rights Approaches to Environmental Protection* (Oxford: Clarendon Press, 1996) at 50.

health/standard of living/environment and the right to life.[76] For the Covenants, the right of everyone to the highest attainable standard of physical and mental health through, *inter alia*, the improvement of all aspects of environmental and industrial hygiene is found in the *International Covenant on Economic Social and Cultural Rights*(*ICESCR*), Article 12 (2) (a).[77] The right to life is found in the *International Covenant on Civil and Political Rights* (*ICCPR*), Article 6. The United Nations negotiations by which these rights are provided for under separate instruments have implementation consequences. *ICCPR* rights are slated for immediate implementation, while *ICESCR* rights are intended to be implemented progressively in keeping with available resources.[78] Both *Covenants* were adopted at the same time, and different rights were assigned to each according to how the member States agreed they were to be implemented. Furthermore, in interpreting the right to life in Article 6 of the *ICCPR*, the Human Rights Committee (HRC) did not countenance environmental protection, speaking instead of killings, deprivation of life, and wars.[79]

Nevertheless, it would be quite difficult to argue that the judicial decisions requiring the sealing of tube wells contaminated with arsenic and preventing the distribution of milk tainted with unacceptable levels of radiation, as seen in the above cases, does not protect the right to life. However, when it comes to the discharge of various industrial wastes into the air and water bodies, as also seen in one of the above cases, it becomes questionable as to whether the right to be protected from such pollution quite reaches the threshold of a non-derogable right. According to the HRC, the right to life is "the supreme right from which no derogation is permitted even in times of public emergency."[80] This is more so given that there may be real technical and/or financial constraints to the enforcement of adequate pollution standards. In short, the reinterpretation of the right to life to include the right to a decent environment will not always be a perfect fit; it would sometimes lead to open-ended obligations that would inordinately stretch state resources, particularly in a developing country like Bangladesh. However, for the purposes of the present paper, it must be ascertained whether it was necessary to couch the claim for a decent environment

[76] See *e.g.,* UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III): provides for the right to life under Article 3 and the right to a standard of living adequate for health and wellbeing in Article 25.
[77] *International Covenant on Economic Social and Cultural Rights, 1966* (*ICESCR*), 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976), Art. 12.
[78] See Arts. 2 *ICCPR, 1966* and *ICESCR, 1966*.
[79] CCPR, *CCPR General Comment No. 6 The Right to Life,* 30 April 1982, online: <http://www.unhchr. ch/tbs/doc.nsf/0/84ab9690ccd81fc7c12563ed0046fae3> (last accessed 28 April 2009).
[80] *Ibid.,* para. 1.

in the language of rights and, if so, whether the right to life was the only viable option.

Bangladesh is a party to most of the major international environmental conventions.[81] However, the country is very slow in enacting domestic laws to implement the treaties. Accordingly, the presence of a social movement for environmental justice is not surprising. It is equally unsurprising that the activists chose to frame their claims in the language of rights, because traditionally, the language of rights have proved effective in rallying people to social movement causes around the world. According to McCann, an acknowledged manifestation of legal mobilisation in reform politics is its contribution to movement building. This building process is made up of two related aspects: the development of an agenda of rights-based claims, and mass constituent activation and organisation based on the rights claims.[82] Citing Elizabeth Schneider, McCann noted that agenda building around particular rights claims can emerge in a number of ways, including by exploiting the conflict between settled rights claims and practices that violate those rights, by exploiting contradictions within discursive logics of rights, or by developing logical extensions or new applications of already settled rights claims.[83]

The extent of the contribution of the establishment of the right to a decent environment to the building of the environmental movement in Bangladesh, and some of the conditions that would have informed litigation as a movement strategy are explored below. However, at this juncture, it suffices to posit that the activists actually developed their rights-based claim by insisting on a logical extension to the right to life. Given the difficulties associated with a substantive right to a decent environment and the shortcoming of retrofitting the right to life to accommodate environmental claims, did the activists have options other than extending the meaning of the right to life? As will be seen below, the standing of the activists to bring environmental claims on behalf of people who are unable to represent themselves was contingent on there having been a breach of a fundamental right. Part III of the *Constitution* of Bangladesh does not contain any environmental rights; thus, the right to life would seem to be the only option with a chance of success, particularly in light of the successful extension of its ambit to include environmental claims in India.[84] Therefore, it would seem that the

[81] Department of Environment, *List of Environment Related International Conventions, Protocols, Treaties Signed/Ratified by Bangladesh*, online: <http://www.doe-bd.org/agreement.html> (last accessed 28 April 2009).
[82] M. McCann, *supra* note 29 at 10.
[83] *Ibid.* at 10–11.
[84] See generally; *Damodhar Rao v. Municipal Corporation*, Hyderabad (AIR 1987 AP 170); *L. K. Koolwal v. State of Rajasthan* (AIR 1988 Raj 2); *V. Lakshmipathy v. State of Karnataka* (AIR 1992 Kant 57); *Chetriya Pardushan Mukti Sangarsh Samiti v. State of UP* (AIR 1990 SC 2060);

activists had few options if they were to pursue a litigation strategy. Whether or not the status quo should be maintained in this regard is a different question altogether. Without doubt, it would be more desirable for any jurisdiction to develop laws, policies, and an enforcement climate that upheld wholesome environmental protection beyond court-mediated settlements. In light of this, litigation as a movement strategy will also be explored below.[85] First, however, the following subsection will discuss how the activists achieved *locus standi* and sought to incorporate emerging international environmental principles into the jurisprudence of Bangladeshi courts.

B. *Locus Standi*

As is the case in many other jurisdictions, one of the initial problems encountered by the environmental legal activists was that of *locus standi.* The surmounting of this problem represents one of the strongest contributions of the environmental legal activists to the cause of environmental justice in Bangladesh.

In the *FAP-20 Case*[86] discussed above, the Appellate Division of the Supreme Court paved the way for *locus standi* for environmental activists and other civil society organisations. It interpreted the constitutional term, "person aggrieved", to allow BELA, represented by Dr. Mohiuddin Farooque, to file a writ petition under Article 102 of the *Constitution* on behalf of the people affected by a government flood mitigation pilot project. The project is known as the Compartmentalisation Pilot Project (CPP) under the Flood Action Plan (FAP) Number 20. As noted above, the High Court Division summarily rejected BELA's Writ Petition as it was of the opinion that neither Dr. Farooque nor BELA was directly affected by the project and, consequently, did not constitute a "person aggrieved", under Article 102 of the *Constitution*. The restrictive interpretation of this constitutional provision by the High Court Division was overturned on appeal by the Appellate Division of the Supreme Court, granting standing to Dr. Farooque. On this issue, Mostafa Kamal, J., held that:

> [I]nterpreting the word '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.[87]

Subhash Kumar v. State of Bihar (AIR 1991 SC 420); *Virendra Gaur v. State of Haryana* 2 SCC 577 (1995).

[85] According to McCann, "Legally constituted ways of doing carry with them their own limitations, biases, and burdensome baggage." McCann, *supra* note 29 at 6.

[86] *FAP 20 Case*, *supra* note 63.

[87] *FAP 20 Case*, *supra* note 63at [47].

B.B. Roy Choudhury, J., went further, and held that:

> The expression 'person aggrieved' means not only any person who is personally aggrieved but also one whose heart bleeds for his less fortunate fellow beings for a wrong done by the Government or a local authority in not fulfilling its constitutional or statuary obligations.[88]

BELA's achievement in moving the courts to grant standing to an environmental civil society organisation for the first time is particularly significant considering the history of standing in Bangladeshi courts prior to the decision.

Perhaps the first case in which the question of *locus standi* was addressed in Bangladesh is *Kazi Moklesur Rahman v. Bangladesh and another.*[89] In that case, the petitioner challenged the Delhi Treaty on the grounds that its terms involved the cession of part of the territory of Bangladesh. Although the writ petition was summarily dismissed by both the High Court Division and the Supreme Court on appeal, the Supreme Court observed that the appellant had the competency to claim a hearing.[90] The Supreme Court found that the fact that the appellant was not a resident of the region of Bangladesh affected by the treaty did not preclude his competency to bring the claim. This competency is based on the threat to the appellant's fundamental freedom of movement in the entire territory of Bangladesh. The court referred to this as a constitutional issue of grave importance.[91]

This liberal view notwithstanding, this case gives no authority for standing for a person whose own fundamental right has not been infringed, such as an environmental civil society organisation not claiming redress on its own behalf. Moreover, some other *locus standi* cases involving associations of persons that came after this case did not meet with success. In *Bangladesh Sangbad Patra Parishad*,[92] it was found that the petitioner could not maintain the petition in a representative capacity. This ruling was cited with approval in *Dada Match Workers Union*,[93] where it was held that a trade union cannot maintain an application under Article 102 of the *Constitution* asking relief for its members. The court observed that the petitioner was not espousing the cause of a downtrodden and deprived section of the society that cannot afford to enforce its fundamental rights.

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[88] *Ibid*. at [97].
[89] 26 DLR (SC) 44 (1974).
[90] *Ibid.* at [17] and [18].
[91] *Ibid*. at [18].
[92] *Bangladesh Sangbadpatra Parishad (BSP) v Bangladesh* 43 DLR (AD) 126 (1991) at [12].
[93] *Dada Match Workers Union v Bangladesh* 29 DLR (HCD) 188 (1977).

Nevertheless, in *Retired Government Employees*,[94] the High Court Division held that the petitioner was a "person aggrieved" within the meaning of Article 102 (1) and (2) of the *Constitution*. It found that the association had an interest in ventilating the common grievances of all its members. Again, this ruling is no authority for standing for a person whose own fundamental right has not been infringed. However, in the *FAP 20 Case*, just such a petitioner was granted standing, not least because BELA declined to let the extant legal position deter it from pursuing environmental justice. The fact that BELA was championing the cause of the downtrodden and the seriousness of the fundamental right to life, which encompasses the right to a decent environment, informed the court's decision in that case. The judgment not only opened the door to writ petitions for safeguarding environmental rights, but also for ensuring all other fundamental rights.

C. Progressive Development of Environmental Jurisprudence

Law informs societal actions and cultures such that judicial pronouncements seem to be one way to introduce internationally recognised environmental principles into the national discourse in a jurisdiction where official endorsement and application is slow. A survey of decided cases in Bangladesh reveals that the activists shared this view, because one of the consequences of the sort of legal activism discussed in the foregoing paragraphs is the development of the environmental jurisprudence of Bangladesh, including, in particular, the recognition of emerging international environmental laws and norms in the domestic arena. The international environmental law norms that the activists have sought to implement in Bangladesh include Intergenerational Equity, the Polluter Pays Principle, and the Precautionary Principle.[95] These they sought to highlight through PIL as well as legislative advocacy; however, the response from the judiciary has been mixed at best. The Bangladesh Supreme Court mentioned intergenerational equity on some occasions but has generally not been supportive of the principle, though there are signs that this attitude is changing. However, the High Court Division adopted a slightly different view in a recently decided case filed by BAPA. In *Bangladesh Paribesh Andolon and another v Bangladesh and others*, Imman Ali, J., observed that the "right to have open space, parks, waterbodies, etc. are rights accruing to Nature and the Environment, which it is

[94] *Bangladesh Retired Government Employees Welfare Association v Bangladesh* 46 DLR (HCD) 426 (1994) at [21].

[95] On implementation of these international environmental law principles in Bangladesh, see generally, Razzaque, *Public interest environmental litigation in India, Pakistan and Bangladesh*, *supra* note 59, at 333–73.

the bounden duty of the State to preserve *for the sake of future generations*. [emphasis added]"[96]

This case equally heralded a new direction for environmental jurisprudence in Bangladesh. A group of environmental activists challenged the legality of construction of residences for the Speaker and Deputy Speaker within the National Assembly Area through alteration of the original plan of the National Assembly Complex. The complex is recognised as a masterpiece: the work of a globally renowned architect, Louis Isadore Kahn, which is regarded as one of the best monuments of International Architectural Modernism. The court prohibited any kind of change in the original plan of the complex.[97] It directed the government to consider declaring the complex a National Heritage Site and to apply to UNESCO to declare it a World Heritage Site in order to protect it from further defacement.[98] This judgement could result in the application of the terms of the *World Cultural and Natural Heritage Convention*[99] in Bangladesh, and perhaps pave the way for its implementation in the country.

The Supreme Court also indirectly recognised the "Precautionary Principle" when it recognised the rights of potential consumers in the *Radiated Milk Case*.[100] Additionally, in one of the more recent cases filed by BELA, the Supreme Court directed government authorities to make necessary rules and regulations so that no hazardous ships can enter the territorial waters of Bangladesh for breaking purposes. It reasoned that the breaking of ships with hazardous substances may cause significant harm to the coastal and marine environment of the country.[101] This, indeed, is a tacit precautionary approach to environmental protection.

Furthermore, in one of the writ petition cases now pending for further hearing in the High Court Division, government authorities were directed to undertake investigation to identify and measure the areas within a pristine island, Sonadia, where shrimp cultivation/forest clearing is taking place or has taken place. The government is also to list those who are involved in such cultivation/clearing and the enabling arrangements; assess, in monetary terms, the loss of forest resources for such individual shrimp cultivation/forest clearing; and

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[96] *Bangladesh Paribesh Andolon and another v Bangladesh and others* 58 DLR (HCD) 441 (2006) at [28].
[97] *Ibid*. at [29].
[98] *Ibid*. at [34].
[99] *Convention Concerning the Protection of the World Cultural and Natural Heritage, 1972*, 23 November 1972, 1037 UNTS 151 (entered into force 15 December 1975).
[100] *Radiated Milk Case*, *supra* note 61. See Razzaque, *Public interest environmental litigation in India, Pakistan and Bangladesh*, *supra* note 59, at 357–58.
[101] *Bangladesh Environmental Lawyers Association (BELA) v. Bangladesh and others*, Writ Petition No. 3916 of 2006, judgment delivered on 6 July 2006, unreported (hereinafter *MT Alfaship Case*) at 4.

submit a report to the court within two months.[102] The activists' hope is that the court will apply the polluter pays principle. In yet another Writ Petition, also related to commercial shrimp cultivation, the High Court Division issued a Rule Nisi, calling upon the respondents to show cause as to why they should not be directed to compensate the affected people for the loss suffered by them due to the flow of saline water over their lands.[103] The activists also hope that the Supreme Court would consider these pending cases from a different viewpoint by positively responding to their arguments and, thereby, play an instrumental role in implementing emerging international environmental law norms in Bangladesh. While intergenerational equity, the precautionary principle, and the polluter pays principle may not be said to have become firmly established legal norms in Bangladesh, these dicta represent important strides in the right direction.

III. WHY LITIGATION

This part of the paper considers not only why litigation was considered viable in Bangladesh but also why it was successful. The theories considered apply by implication to other countries that bear certain similarities to Bangladesh. Some legal mobilisation theorists take the view that it is the direct effect (*i.e.*, the short-term remedial reliefs) of formal legal action that motivates the choice of litigation as a strategy.[104] However, McCann urges an approach to legal mobilisation that also considers the indirect effects of official legal action on social struggles. These may include "catalysing movement building efforts, generating public support for new rights claims, or providing pressure to supplement other political tactics."[105] In addition to the agenda development already discussed above (section II(A)(1)), forms of constituent activation discussed by McCann include publicity, rights consciousness, and political identity.[106]

In Bangladesh, some of the cases discussed above attracted extensive media attention, most of which was positive. Therefore, it is not surprising that environmental questions have gained increased prominence in the national discourse. While it is difficult to measure the overall effect of the cases on mass constituent activation and the growth of the environmental movements, signs of these are available. BELA, for one, has grown from a few activists to a staff of nearly 60 people in six different offices around the country. The publicity

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[102] *Bangladesh Environmental Lawyers Association (BELA) v. Ministry of Land and others*, Writ Petition no. 4286 of 2003.
[103] *Gaurang Proshad Roy and Bangladesh Environmental Lawyers Association (BELA) v. Bangladesh and others*, Writ Petition No. 5732 of 2005.
[104] M. McCann, *supra* note 29 at 8.
[105] *Ibid*.
[106] *Ibid.* at 11–15.

spawned by the successful cases and the various awards bestowed on BELA and its leaders[107] have arguably added a layer of legitimacy to the environmental cause. The high success rate of the litigations also adds some persuasiveness or pressure to supplement other political tactics. Thus, legal activism yields not only direct results in terms of court ordered reliefs, but also indirect effects that support other movement strategies. Given the networking amongst the social movement organisation in Bangladesh, it is believed that these effects are felt to varying degrees in other organisations that are not directly involved in litigation.

The foregoing throws some light on the advantages of litigation as a social movement strategy; however, it fails to fully answer the questions of why the activists considered litigation an option in the first place and why it has had the measure of success explained above. Some social movement scholars have developed theories that help outline the conditions that inform the choice of litigation from a social movement's repertoire of actions. McCann outlined two of these theories: resource mobilisation and structural opportunities.[108]

A. Resource Mobilisation

According to McCann, scholars have a wide range of approaches to resource mobilisation, but they tend to elevate two types of concerns. "One is the focus on a pre-existing core of activist leaders who serve as the primary 'agents of rights mobilisation'".[109] Here, an existing core of activists may use litigation to mobilise a mass constituency. A second category of resources "includes various pre-existing organisational ties among mobilizable constituencies."[110] Here, the theory is that organisations that are able to network with others on whom they can depend for resources such as personnel and money are more likely than previously unaffiliated persons to succeed in rights-oriented actions. The professional and educational backgrounds of social movement organisation participants form part of the resources available to an organisation, according to Hilson. Of interest to present purposes, he notes, "litigation is also only likely to be adopted as a strategy where an individual within an SMO [Social Movement Organisation] or its network has direct experience of the law."[111]

These theories are certainly borne out by the legal mobilisation story of Bangladesh. BELA was established in 1992 with Dr. Mohiuddin Farooque (1954–

[107] In 2003, BELA became a laureate of the UNEP Global 500 Role of Honour, See UNEP, *Adult Award Winner in 2003*, online: <http://www.global500.org/ViewLaureate.asp?ID=724> (last accessed 9 May 2009.
[108] McCann, *supra* note 29 at 18.
[109] *Ibid*.
[110] *Ibid*.
[111] C. Hilson, "New Social Movements: the Role of Legal Opportunity" (2002) 9 Journal of European Public Policy 238 at 240–241.

1997) as its founder and executive director and a group of young lawyers as founding members. The first petition by a national NGO with environmental protection consequences was filed by BELA in 1994.[112] From the very beginning, BELA has been a member of the Coalition of Environmental NGOs (CEN) in Bangladesh.[113] CEN is a loose coalition of environmental NGOs involving both lawyer- and non-lawyer-led NGOs. While CEN may not be said to be very active, it is likely that just the sense of belonging to such an umbrella organisation would, at the very least, act as moral support for emerging organisations. It is also likely that, at inception, BELA had encouragement and ideas from fellow members. In any case, it is clear that BELA was funded by pre-existing organisations. The Asia Foundation, for example, intimates that it had a meeting with Dr. Farooque in the spring of 1993 in which the details of its first grant to BELA was shaped.[114] This was before BELA filed its first petition.[115] In sum, the availability of resources is part of the reason that litigation was chosen in Bangladesh, and it played no small role in its relative success.

B. Structural Opportunity

In McCann's view, structural opportunities pertain to changes in social relations experienced over time by particular groups of citizens. These could be changes related to economic depression, work roles, or new forms of state control that bring new forms of hardship and oppression. Such changes may also unsettle expectations and open new vistas of perceived opportunity or sense of entitlement. One shortcoming in this view is that it relies heavily on some of the "classical theories of the 1960s and early 1970s [which] emphasized the role of discontent or grievances in explaining the emergence of social movements".[116] Some theorists have deemphasised this view. McCarthy and Zald, for example, pointed to some empirical work that casts doubt on the assumption of a close link

[112] *Dr. Mohiuddin Farooque v. Election Commission and others*, Writ Petition No. 186/1994 (Nuisance during Election Campaign)

[113] BELA also relates with international alliances like IUCN-the World Conservation Union, Friends of the Earth International and Environmental Law Alliance Worldwide (E-LAW).

[114] K. McQuay & S. Kabir, "Reflecting on Rizwana Hasan's Goldman environmental Prize", online: <http://asiafoundation.org/in-asia/2009/04/22/reflecting-on-rizwana-hasans-goldman-environmental-prize/> (last accessed 1 May 2009).

[115] To date, BELA has received financial assistance from a number of organisations including the Government of Bangladesh, Canadian International Development Agency, United Nations Development Programme and *Manusher Jonno* Foundation.

[116] Hilson, "New Social Movements: the Role of Legal Opportunity", *supra* note 111, at 240.

between preexisting discontent and generalised beliefs in the rise of social movement phenomena.[117]

Without doubt, legal mobilisation could be precipitated by previously unexploited opportunity that has always been there. In this regard, a more general theory of political opportunity is more suitable to analysing the choice of litigation in Bangladesh. The approach taken by Chris Hilson in discussing "political opportunity" is particularly helpful for our purposes. Hilson drew attention to the structural and contingent components of opportunity. Structural opportunity refers to the structural openness or "closedness" of a political system, while contingent opportunity refers to the contingent receptiveness of political elites to collective action.[118] In this respect, attention must be paid to not only the openness in terms of access to the administration but also to the political receptivity to the claims being made. Hilson further noted that "litigation or protest may arise from lack of success in conventional political arena[s]"; access, though necessary, is not sufficient for success, as political elites must also be receptive to the claims being made and be willing to change policy accordingly.[119] In the Bangladesh experience, BELA cites environmental degradation through "faulty policy priorities and approaches and of course poor governance that also accounts for non-implementation of environmental laws"[120] as the backdrop for its emergence as a legal advocacy group. As noted above, some environmental protection NGOs, such as BCAS, preceded BELA; nevertheless, BELA still claimed faulty policy priorities and approaches at its inception. This indicates a measure of lack of success of the environmental movement in the conventional political arena.

Furthermore, Hilson demonstrated a distinction between the broader political opportunity and the narrower legal opportunity, which theorists are wont to subsume under political opportunity. Legal opportunity relates to opportunities in court-based litigation strategy. The structural side of legal opportunity refers to the more stable features of a system, such as access to justice and standing, while the key contingent feature is judicial receptivity to policy arguments.[121] Contingent legal opportunity perhaps accounts for the actual courtroom successes of the legal activists in Bangladesh, as seen in the cases discussed above. It touches on the judicial activism of the Bangladeshi bench and the receptiveness of the judges to the claims of the activists. This helps account for not only the initial

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[117] J. McCarthy & M. Zald, "Resource Mobilization and Social Movement: A Partial Theory" in J. Goodwin & J. Jasper, eds., *Social Movements* (London: Routledge, 2007) at 33.
[118] Hilson, "New Social Movements: the Role of Legal Opportunity", *supra* note 111, at 242.
[119] *Ibid*.
[120] The Access Imitative, BELA, online: <http://www.accessinitiative.org/partner/bela> (last accessed 4 November 2012).
[121] Hilson, "New Social Movements: the Role of Legal Opportunity", *supra* note 111, at 243.

choice and success of the litigation strategy, but also for its continued employment in the movement.

Judicial activism is one of those terms that defy easy definition, and this paper is not well positioned to explore the concept in any extensive manner. However, placing reliance on parts of the multidimensional model proffered by Cohen and Kremnitzer, it is not difficult to see that the major decisions that the Bangladesh legal activists would consider successful involved some judicial activism. Cohen and Kremnitzer had three visions of judicial activism, one of which hinges on the traditional vision of the judiciary. Although this vision does not fully address the various ways in which courts can impact upon society, it suffices for the purposes of the present paper. Under this approach, "activist courts are activist when they change the law, overstep their role of dispute resolution, and decide on policy and other broad social questions."[122]

Cohen and Kremnitzer discussed twelve parameters against which particular decisions may be measured to determine the level of activism of a court. Some of these indicate a measure of activism in the cases discussed above. For example, the second of the parameters concerns interpretation and holds that a court that interprets a legal text in possible contradiction with assumed original intent or its linguistic meaning is more activist than one that sticks to the original meaning.[123]As noted above, the meaning the courts assigned to the "right to life" is not one that is countenanced in the scheme of international human rights law. It is also unlikely that the framers of the *Constitution* had that meaning in mind. According to the fifth parameter, courts that are ready to jump threshold hurdles such as standing are generally more activist.[124] This, again, is exactly the line the courts chose to tow in response to the arguments of the legal activists on standing for environmental civil society organisations in Bangladesh. Finally, according to the ninth parameter, a court that extensively relies on foreign arrangements that are not binding in the domestic sphere would be more activists than one that does not. On the face of the cases discussed above the courts overtly relied on the outcome in the Indian courts only in a few of the cases. However, there is no gainsaying the fact that Indian jurisprudence influenced the receptiveness of the Bangladeshi judges to the environmental claims of the activists on the right to life and standing, not least because of the similarity in the outcomes. All these amount to ripe legal opportunity; an activist judiciary that is amenable to particular rights claims is always a legal opportunity for any social movement that champions such claims. This explains the continued use of litigation by the environmental social movement in Bangladesh.

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[122] M. Cohen & M. Kremnitzer, "Judicial Activism: A Multidimensional Model" (2005) 18 Can. J.L. & Jur. 333 at 336.
[123] *Ibid*. at 341.
[124] *Ibid*. at 342.

The foregoing notwithstanding, the use of litigation as a social movement strategy has limitations, and it is to these we turn in the following section.

IV. THE LIMITS OF LITIGATION AS A MOVEMENT STRATEGY

A. To PIL or Not to PIL

So far, the paper has discussed the use of PIL as a social movement strategy in Bangladesh and considered the reason for the choice of litigation and why it has been successful. However, the choice of litigation as a movement strategy does seem to bring limitations. As noted above, McCann acknowledged that "litigation alone rarely advances significant social change."[125] However, he also recognised that legal rights advocacy can, in some circumstances, provide a useful resource for social movement building, as has been demonstrated above. Regarding the use of litigation in environmental activism, some commentators have highlighted the shortcomings of PIL in particular, especially in India.[126] According to Rajamani, "[a]lthough the Court has done and continues to do exemplary work, the exercise of public interest environmental jurisdiction raises concerns with respect to access, participation, effectiveness and sustainability, concerns which need to be explored and addressed if the true promise of public interest jurisdiction is to be unleashed."[127] In their article, *The Delhi Pollution Case: the Supreme Court of India and the Limits of Judicial Power*, Armin Rosencranz and Michael Jackson noted that The Supreme Court ruling to mandate the conversion of the Delhi bus fleet to CNG in *M.C. Mehta v Union of India*[128] was a well-informed and logical decision. Notwithstanding, they pointed to some disadvantages of the strong stance taken by the court in that case, and concluded that "the Court's action [mandating the conversion of the Delhi bus fleet to CNG] seems likely to impede capacity building in the pollution control agencies, and thereby to compromise the development of sustained environmental management in India."[129]

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[125] McCann, *supra* note 29 at 4.

[126] See A. Rosencranz & M. Jackson, "The Delhi Pollution Case: The Supreme Court of India and the Limits of Judicial Power" (2003) 28 Colum. J. Envtl. L. 223. (Demonstrates with the *Delhi Pollution case* how litigation would not always provide long term environmental protection); L. Rajamani, "Public Interest Environmental Litigation in India: Exploring Issues of Access, Participation, Equity, Effectiveness and Sustainability" (2007) 19 J. Envtl. L. 293. (Highlights the limitations and other concerns that arise from the exercise of public interest environmental jurisdiction in Indian courts).

[127] Rajamani, "Public Interest Environmental Litigation in India: Exploring Issues of Access, Participation, Equity, Effectiveness and Sustainability", *supra* note 126 at 295–296.

[128] S.C. Writ Pet. (Civil), *M.C. Mehta v Union of India* (1985) (No. 13029/1985).

[129] A. Rosencranz & M. Jackson, "The Delhi Pollution Case: The Supreme Court of India and the Limits of Judicial Power", *supra* note 126 at 253–254.

According to G.L. Peiris, "PIL represents a daring, and in some respects unique, response to a problem of unparalleled proportions. The character and degree of the challenge are related to societal conditions in the subcontinent, which pose the danger of significant alienation of a large section of the community from the values infusing the legal system." However, the vigour and novelty of this judicial initiative have led to intractable dilemmas regarding the relationship between the judiciary and other organs of government. At the centre of the problem is the political accountability of the courts and, perhaps, the practicality of their leadership roles in the formulation and implementation of broad social policy.[130] In the body of this piece, Peiris referred to several heterodox features of PIL, including the tendency of the courts to get embroiled in the most controversial and divisive of policy issues;[131] detailed administrative adjudication; and fact-finding mechanisms including the appointment of committees of experts bestowed with extensive powers of discovery.[132]

Some of these concerns are quite instructive and are briefly considered below regarding Bangladesh. A full consideration of the concerns is not possible in the present paper, so only brief comments are offered. Nevertheless, it should be noted from the outset that the paper considers that although a considerable amount of flexibility attaches to PIL in most developing-country jurisdictions, PIL as a procedure of litigation should not be viewed as insuperably problematic, nor should explored solutions include the abrogation of the procedure. This is particularly so when the entire gamut of PIL jurisdiction is considered, especially the human rights jurisdiction.

Commentary on the exercise of PIL jurisdiction in India, for example, ranges from opposition to appreciation of the role of the court in achieving social justice.[133] Hence, the criticism outlined above notwithstanding, there is no shortage of extenuation commentaries on the exercise of PIL jurisdiction in India. For example, on the relegation of *locus standi* rules to allow PIL, Peiris observed that "[at] the core of the concern consistently shown by Indian courts for fostering PIL in the conditions of contemporary life in the subcontinent, is candid recognition that, in the absence of innovative mechanisms of this nature, substantive rights central to human dignity cannot but assume an illusory character in the eyes of large sections of the population."[134] On the question of direct judicial involvement in controversial policy issues, including the

[130] G.L. Peiris, "Public Interest Litigation in the Indian Subcontinent: Current Dimensions" (1991) 40 International and Comparative Law Quarterly 66 at 89.
[131] *Ibid*. at 72.
[132] *Ibid*. at 75–80.
[133] Madhav Khosla, "Addressing Judicial Activism in the Indian Supreme Court: Towards an Evolved Debate" (2009) 32 Hastings Int'l & Comp. L. Rev. 55 at 55–56.
[134] Peiris, *supra* note 130 at 70.

preservation of the environment, the author explored the problem, noted some redeeming features, and opined that "[on] the whole, then, the assessment of priorities by Indian courts is empirical and shows sensitivity to contextual factors."[135] On the question of fact-finding committees/commissions, Vijayashri Sripati noted that most of the petitioners in PIL cases were public-spirited individuals or organisations who, due to limited resources, found it onerous to establish or prove violations of rights by states. This was the impetus of the courts in forming the commissions to aid the litigants in the expensive task of fact finding.[136]

In Bangladesh, PIL for environmental justice is principally a procedure engendered by the interplay of Articles102 and 32 of the *Constitution*. This makes PIL primarily a fundamental rights enforcement procedure, whereby certain stringent procedural hurdles are relaxed. Although barriers are somewhat more relaxed in PIL procedures, one is not to suppose that there are no other barriers to entry to the effect that frivolous actions would ensue. As seen in the *FAP 20 Case*, representation of those who cannot represent themselves would seem to be a pre-requisite.[137] Although standing has been gained for environmental civil society organisations, in his concurring judgment in the *FAP-20 Case*, Latifur Rahman, J., noted, "that any application filed by an individual, group of individuals, associations and social activists must be carefully scrutinized by the court itself to see as to whether the petitioner has got sufficient and genuine interest in the proceeding to focus a public wrong or public injury."[138] The test of "sufficient and genuine interest", therefore, still subsists in Bangladesh, notwithstanding the granting of standing to social groups.[139] Furthermore, from our discussion of resource mobilisation above, it is clear that not every organisation would be able to employ PIL as a movement strategy. In the light of the current enforcement climate for environmental laws and policies in Bangladesh, to argue against PIL in broad terms and recommend further procedural restriction of access to the courts would seem difficult to support. Nevertheless, some of the questions raised on the manner in which the courts have chosen to exercise their powers in PIL cases deserve further discussion as they relate to Bangladesh. In particular, the questions of access, participation,

[135] *Ibid*. at 75.
[136] Vijayashri Sripati, "Human Rights in India-Fifty Years after Independence" (1997) 26 Denver Journal of International Law and Policy 93 at 121.
[137] *FAP 20 Case*, *supra* note 63, at [97]; *Dada Match Workers Union, supra* note 93.
[138] *FAP 20 Case*, *supra* note 63 at [86].
[139] See also Razzaque, *Public interest environmental litigation in India, Pakistan and Bangladesh*, *supra* note 59, at 292: "As the Constitution [of Bangladesh] suggested the 'aggrieved person' test, the court is hesitant to ignore this test altogether. Rather, they have interpreted it within the framework of the 'aggrieved person' test with all the flavour of the 'sufficient interest' test."

effectiveness and sustainability pointed out by Rajamani, and Armin Rosencranz and Michael Jackson, are pertinent.

1. Effectiveness

Regarding effectiveness, Rajamani notes that "[a]lthough the Court's environmental commitment is seldom challenged, its ability to devise effective solutions to the problems under consideration is often called into question."[140] In the first place, given the other issues raised in that paper (such as sustainability) perhaps the courts should not go as far as devising solutions rather than reaching decisions that point administrators in the right direction. However, if the issue is whether the decisions have been effective in protecting the environment, one would have to consider the short term direct effects and reliefs in the decisions, and the long term indirect effects of the decisions.

In Bangladesh, regarding the short-term reliefs and their implementation, the environmental legal activists have had mixed results. In some instances, they were successful in not only eliciting favourable court decisions, but also in securing positive responses from the government in the implementation of the judicial decisions. A good example is the *Dhaka City Vehicular Pollution Case*.[141]

Dhaka, the capital of Bangladesh, is one of the most polluted cities in the world. Many vehicles in Dhaka city used leaded petroleum and contributed to the emission of lead-laced gases. To save the city dwellers from air pollution, BELA filed a writ petition for necessary direction to control vehicular air pollution in Dhaka City. In that case, the Supreme Court directed the government to, *inter alia*, phase out all existing two stroke three-wheeler vehicles, which were the most polluting vehicles, from Dhaka City by December, 2002. Although this was a difficult task, the government implemented the court direction. However, the implementation of this decision did not occasion the type of hardship and top-heavy court-mediated oversight discussed by Rajamani regarding the Delhi Vehicular pollution cases. "The government gave the three-wheeler owners many incentives and options and pushed them to the wall to accept these. For the most part, drivers were rehabilitated in some way or the other."[142]

However, this successful implementation outcome has not been replicated across the board. In many other cases, the decisions have not been properly implemented. Some of the projects that were successfully challenged by the activists were ultimately executed by the government. Some of these projects

[140] Rajamani, "Public Interest Environmental Litigation in India: Exploring Issues of Access, Participation, Equity, Effectiveness and Sustainability", *supra* note 126, at 309.
[141] *Dhaka City Vehicular Pollution Case, supra* note 53 at 36.
[142] "Air Pollution", *The Daily Star* (24 April 2009).

have engendered serious environmental harm. For example, the FAP-20 project referred to above was ultimately improperly executed in defiance of the judgment.

In the judgment on merit in the *FAP 20 Case*, A.K. Badrul Huq, J., observed that "in implementing the project the respondents cannot with impunity violate the provisions of law. We are of the view that the FAP-20 project work should be executed in compliance with the requirements of law."[143] Unfortunately, government authorities have not followed the relevant principles of the applicable laws. They violated the directions of the court in the judgment. The worst part of the execution of the project is that no compensation has been paid to the people affected by it. As a result, BELA filed another writ petition against different government authorities to assess the compensation for the "Project Affected People". [144] In this writ petition, the High Court Division issued a Rule Nisi, calling upon several government authorities.[145] However, any compensation for the said Project Affected People is yet to be realised. This goes to show that although the legal activists have been successful in achieving the recognition of the human right to a healthy environment, the real fruits of this jurisprudential development are not always easily translated into reality in the lives of the people.

The vulnerabilities of judicial activism have been magnified with the recent deadlock in the relocation of the leather goods and processing industry in an effort to stop massive environmental pollution. The leather-processing industry is one of the oldest industries in Bangladesh. It is mainly located on the banks of the Buriganga, one of the main rivers at the heart of the capital city of this country. Bangladesh has more than 200 leather goods and processing companies, and at least 178 of these are located in 50 acres of land on the banks of the Buriganga.[146] They process hides into finished leather using acids and chromium, producing roughly 20 million square metres of leather and leather goods each year. They account for an average of 1.5 per cent of the total exports of this country over the last three years.[147]

The most important feature of this industry is the fact that it is the main water polluter in this country. None of the companies within this industry has an effluent management plant, and most of their 30,000 workers work in chemical-filled environments without the required protective equipment. It is notoriously

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[143] *FAP 20 Judgment on Merit*, *supra* note 9.

[144] *Bangladesh Environmental Lawyers Association (BELA) v. Bangladesh and others*, Writ Petition No. 1691 of 2001(hereinafter *PAP Case*).

[145] BELA, "List of Public Interest Litigation", online: <http://www.belabangla.org/html/pil.htm>(last accessed 30 January 2009).

[146] Satadal Sarkar, "When Will the Waste Flow in the Buriganga Stop?" *The Prothom Alo* (Dhaka) (10 November 2010).

[147] Product-Wise and Region-Wise exports, the Ministry of Commerce of the Government of Bangladesh, online: <http://www. epb.gov.bd/?NoParameter&theme=default&Script=exporttrend#Region> (last accessed 14 February 2011).

the most significant water polluter in Bangladesh: the leather industry alone pollutes 26 per cent of the total river water of Bangladesh.[148] People living near these tanneries are "exposed to higher morbidity and mortality compared to people living two to three kilometres away".[149] A recent report shows that the leather goods and processing plants of different companies (particularly on the banks of the Buriganga) have dumped approximately 3,000 tons of liquid waste in the Buriganga. In effect, they have turned this river into a toxic dump by indiscriminately discharging their waste into it.[150]

Given these circumstances, the government has decided to shift these manufacturing units to a 200-acre industrial zone near the capital city. Bangladesh Small and Cottage Industries Corporation (BSCIC) has developed this zone for these units at a cost of US$66.42 million, and has almost finalised the process for establishing a central effluent plant in this zone, at a cost of US$61.42 million. Nonetheless, this relocation is at a crossroads. In 2003, the High Court Division finally provided a guideline, which is mandatory for all residents of this country according to the constitution of Bangladesh, to facilitate the relocation. However, the industry owners and government authorities have failed to begin the move.[151] The court has repeatedly provided more time, but the relocation has not advanced.[152] This regulatory deadlock syndrome can be traced back to the notification of August 7, 1986, when the Ministry of Local Government, Rural Development and Cooperatives identified 903 industrial units of 14 sectors as polluters. It directed the Department of Environment, the Ministry of Environment and Forests and the Ministry of Industries to ensure appropriate pollution control measures were undertaken by these industries within three years. The notification also obliged these authorities to ensure that no new industry could be established without pollution-fighting devices. However, between 1986 and 1994, they failed to ensure that these industries undertook any suitable pollution control measures.

In 1994, BELA filed a writ petition before the High Court Division of the Supreme Court of Bangladesh seeking relief against the indiscriminate pollution

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[148] Mohammad Golam Rasul, Faisal Islam & Mohammad Masud Kamal Khan, "Environmental Pollution Generated from Process industries in Bangladesh" (2006) 28(1) International Journal of Environment and Pollution 144.

[149] A.K. Enamul Haque, "Human Health and Human Welfare Costs of Environmental Pollution from the Tanning Industry in Dhaka – An Environmental Impact Study" in Moinul islam Sharif & Khandaker Mainuddin, *Country Case Study on Environmental Requirements for Leather and Footwear Export from Bangladesh* (Dhaka: Bangladesh Centre for Advanced Studies, 2003) at 10.

[150] Sharif & Mainuddin, *ibid*. at 9; for details and the source of this information, see Sarkar, "When Will the Waste Flow in the Buriganga Stop?", *supra* note 146.

[151] Anisur Rahman Khan, "Tanneries Relocation Move Hits Roadblock" *The Independent* (Dhaka) (21 July 2010).

[152] *Ibid*.; Satadal Sarkar, "When Will the Waste Flow in the Buriganga Stop?", *supra* note 146.

of air, water, soil and the environment by 903 industrial units. These units included tanneries; paper, pulp, and sugar mills; distilleries; as well as the iron and steel, fertiliser, insecticide and pesticide, chemical, cement, pharmaceutical, textile, rubber and plastic, tyre and tube and jute industries.[153] It was pled that, though the air and water of the major rivers of this country were being severely affected by these 903 units, the government organisations responsible had failed to tackle this damage to the ecological system. The petitioner, moreover, informed the court that the number of polluting units had risen to 1,176, according to the list prepared by the Department of Environment.

In the first instance, the court issued a Rule Nisi to the respondents, including the Ministry of Local Government, Rural Development and Cooperatives, Ministry of Environment and Forest, Ministry of Industries and Department of Environment to show cause as to why they should not be directed to implement the decisions of the Government. After hearing all the parties, the Rule was made absolute. On July 15, 2001, the court directed the Director General of the Department of Environment to implement the decision to mitigate the pollution by the original 903 units within six months from the date of the judgment. The court directed to "report to this Court after six months by furnishing concerned affidavit showing that compliance of this Order of this Court."[154] To ensure the implementation of the court's directions, it was further held that "it will be imperative on the part of the Director General to take penal action against such department for persons who are responsible for not implementing the letter of the Environment Conservation Act, 1995."[155]

Of these 903 industrial units, most are leather goods and processing companies. Of the 178 tanneries situated on the bank of Buriganga, 158 have been red-listed by the Department of Environment.[156] None of these companies has any kind of effluent plant, which has virtually transformed the Buriganga into a pool of septic water.[157] According to the environmental laws of Bangladesh, this situation is intolerable. BELA brought this issue before the High Court Division of the Supreme Court of Bangladesh and claimed directions for relocating these units from the bank of the Buriganga.[158] The court issued a Rule Nisi on March 3,

[153] *Industrial Pollution Case*, *supra* note 9.
[154] *Ibid*. A synopsis of this case is available at Bangladesh Environmental Lawyers association, "List of Selected Public interest Litigation (PIL) of BELA", online: <http://www.belabangla.org/pdf/pil.pdf> (last accessed 22 October 2011).
[155] *Ibid*.
[156] A.K. Enamul Haque, "Human Health and Human Welfare Costs of Environmental Pollution from the Tanning Industry in Dhaka—An Environmental Impact Study", *supra* note 149 at 9, 10.
[157] Anisur Rahman Khan, "Tanneries Relocation Move Hits Roadblock" *The Independent* (Dhaka) (21 July 2010).
[158] *Bangladesh Environmental Lawyers Association (BELA) v. Bangladesh and Others*, Writ Petition No. 1430 of 2003.

2003, and called upon the seven government agencies and two tannery associations as respondents. The court summoned the Secretaries of the Ministries of Industries and Commerce and Environment and Forest; the Director General and the Director of the Department of Environment; a member of the Planning Commission; and the chairmen of RAJUK (the capital city development authority), BSCIC, and the Tanners Association. They were asked to show cause as to why they should not be directed to relocate the tanneries from the city to a suitable location, as contemplated in the Master Plan prepared under the *Town Improvement Act 1953*, within 18 months from the date of judgment. The court directed them to ensure that adequate pollution-fighting devices were developed in the new location or site as required under the *Environment Conservation Act 1995* and the *Factories Act 1965*. They were also directed to notify the court regarding the process of the relocation of the tanneries and submit a report in this regard to the court within six months. This petition is still pending before the court.

While failing to treat these tanneries according to the provisions mentioned in the Act and other related laws, the government is trying to relocate them to a well-planned leather industry zone near the city; an industrial zone has been developed with adequate industrial plots for them. Many of them have obtained their plots in the new industrial zone where the construction of an effluent plant is underway. Nonetheless, the tanneries are not interested in moving from the banks of the Buriganga. They maintain that they will not consider relocating until the government (a) pays them $155.57 million as compensation, (b) discharges them from the debt they owe to the commercial banks, (c) provides them loans at a low interest rate, and (d) ensures that the government will bear the cost of maintaining the effluent plant. In 2006, a committee, formed by the secretaries of the government ministries concerned, suggested the government pay $33.60 million to the tanneries as compensation.[159] Both parties are standing their ground with respect to their remaining demands.

The PIL filed by BELA is still pending before the court. According to Article 112 of the *Constitution* of Bangladesh, all executive and judicial agencies are obliged to carry out the directions of the High Court Division of the Supreme Court of Bangladesh. Unfortunately, these respondents have not been able to carry out the court's directions; they have sought more time from the court, and the court has allowed them time for the ends of justice. Meanwhile, the Buriganga has been becoming increasingly toxic, and the government is losing its investment in preparing a modern leather industrial zone. At this time, the respondents have extended their time to carry out the court's directions, and nobody knows when they will reach a concrete solution.

[159] Abul Hasnat & Suvongkor Kormokar, "Leather Industry Passing a Critical Situation" *The Prothom Alo* (5 November 2011).

Long-term indirect effects of court decisions are more difficult to measure. However, the recognition, publicity, and impetus that these decisions have given to the legal activists as intimated above are all part of the indirect effect; they amount to political capital that could supplement other movement strategies outside the courts. Beyond these, there are other signs of long-term effectiveness of decided cases, even in cases with adverse short-term outcomes. For example, in *BELA v. Bangladesh* (*Modhumoti Model Town Case*),[160] the petitioner challenged the legality of a land development project that interfered with natural drainage by making changes to the flood flow/sub-flood flow zones near Dhaka City contrary to the Dhaka Metropolitan Master Plan. However, the court ruled that although the project is illegal, the interest of the third party purchasers of plots of land in Modhumoti Model Town should be protected as they are bona fide purchasers for value without notice.[161] In the short run, this was not the complete positive outcome that BELA hoped for. However, in 2008, the government announced that it was going to amend rules to stop unplanned urbanisation across the country. The first rule for private housing projects that resulted from the *Modhumoti Model Town Case* only applied to the Rajdhani Unnayan Kartripakkha (Rajuk) areas.[162]

2. Sustainability

According to Rajamani, in India, the phenomenon of endless judicial oversight in public interest cases is not sustainable for several reasons. It takes up the time of the court and hampers the functioning of the judicial system. The courts are able to cope with the time constraints in part by appointing committees whose ad hoc nature may lead to inconsistencies and possible inequities. Furthermore, such lengthy court oversight leads to reactive instead of proactive administration. It also creates an unhealthy and tension-ridden relationship of dependence and places tremendous strain on government resources.[163] As noted above, in the context of the *Delhi Pollution Case*, Rosencranz and Jackson pointed out the likelihood of the strong stance of the Supreme Court leading to impediment of capacity building in the pollution control agencies and compromise of the development of sustained environmental management in India.[164]

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[160] *Bangladesh Environment Lawyers Association (BELA) v. Bangladesh, Represented by the Secretary, Ministry of Housing and Public Works and others*, Writ Petition No. 4604 of 2004 (Judgment on 27 July 2005, unreported) (*Modhumoti Model Town Case*).
[161] *Ibid*.
[162] "Amended Rules Soon to Stop Unplanned Urbanisation" *The Daily Star* (21 July 2008).
[163] Rajamani, "Public Interest Environmental Litigation in India: Exploring Issues of Access, Participation, Equity, Effectiveness and Sustainability", *supra* note 126, at 315–316.
[164] A. Rosencranz & M. Jackson, "The Delhi Pollution Case: The Supreme Court of India and the Limits of Judicial Power", *supra* note 126.

The foregoing concerns are increasingly applicable to Bangladesh, where the Supreme Court has a tendency to follow its Indian counterpart in environmental cases. Lawyers in Bangladesh frequently refer to Indian judgments, and the judges also cite Indian cases in their judgments, as is evident in some of the cases discussed in this paper. Recently, like the Indian Supreme Court, Bangladeshi courts have started maintaining lengthy oversight of the implementation of their decisions. For example, in *BELA v. Bangladesh* (*MT Enterprise Case*), the Supreme Court issued the following order:

> The Government is directed to set up a High Level Technical Committee comprising representatives from Ministry/Department of Shipping, the Ministry/Department of Environment, Ministry of Labour and Manpower; Retired Naval officers; Academicians/Experts in the field of Marine Engineering and Marine Biology; Specialist in the field of Environment, Science and Ecology, [and] Hazardous Waste Management; and relevant NGOs, such as BELA.[165]

Similarly, in *Rabia Bhuiyan, MP v. Ministry of LGRD and others*, the Appellate Division of the Supreme Court maintained lengthy oversight of its decision requiring, *inter alia*, a yearly report on steps taken to implement the relevant policy.[166] In adopting this measure, the court relied on two decisions of the Supreme Court of India. These were *MC Mehta v. Union of India*[167] (*the Delhi Pollution Case*), where the court required the submission of regular reports by a committee it set up, and the ruling of the High Court Division in the *Dhaka City Vehicular Pollution Case*,[168] where the court deemed the case pending for the purpose of monitoring and required six-monthly reports.

In short, few will doubt that litigation does not yield long-term social change. Notwithstanding, some social movement theories indicate that there is a danger of the continued employment of litigation even after it has outlived its usefulness as a strategy or when other strategies would be more effective. The transformation of social movement organisation may take place in several ways, including by "organisational maintenance". In this phenomenon, "the primary activity of the organization becomes the maintenance of membership, funds, and other requirements of organizational existence."[169] The danger of this sort of

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[165] *Bangladesh Environmental Lawyers Association (BELA) v. Bangladesh, Represented by the Secretary, Ministry of Shipping and others* (Unreported, order dated 05 March 2009 and 17 March 2009), online: <http://www.elaw.org/node/3747> (last accessed 9 May 2009) at [9].
[166] *Rabia Bhuiyan, MP v. Ministry of LGRD and others*, 55 DLR (AD) 184 (2007) at [29].
[167] 6 SCC 12 1999 at [2.4].
[168] *Dhaka City Vehicular Pollution Case*, *supra* note 53 at [15].
[169] M. Zald & R. Ash, "Social Movement Organizations: Growth, Decay and Change" in J. Goodwin and J. Jasper, eds., *Social Movements*, *supra* note 117 at 76.

transformation is all too real when an organisation such as BELA becomes defined by success in high profile cases with the attendant recognition and publicity. In such cases, the temptation to maintain the status quo is high. The word of caution here is that organisational maintenance should not be allowed to supplant the original environmental pursuits.

3. Access and Participation

Rajamani also argued that there is a tremendous scope for value preferences in PILs because of the characteristic procedural flexibility, collaborative approach, judicially supervised interim orders, and the forward-looking reliefs. The courts are thus perceived as middle class intellectuals that are more receptive to others of their ilk. This perception, argues Rajamani, is in itself deeply restrictive for participation. Furthermore, litigation cost factors contrive to alienate the poor from the portals of the courts, such that PILs are filed on behalf of the poor and not by them.[170]

Room for biases and value preferences characteristic of whatever echelon of the society the judges belong to would seem to be inevitable, with the procedural flexibility that continues to be a feature of PILs in India. There are also signs that Bangladeshi courts are not immune to this charge. In reading some of the judgements cited in this paper, one could not but notice some instances in which the judges seem not to be particularly fettered by extant limitations of the law. For example, in the decision of the Appellate Division to maintain administrative oversight of its ruling in *Rabia Bhuiyan, MP v. Ministry of LGRD and others,* there was no analysis by the court to provide some basis in law for such a novel role for the courts. The court chose instead to place reliance on the fact that the Indian Supreme Court had done the same thing.

In the same vein, the courts are likely to be flexible in other aspects of their exercise of PIL jurisdiction, such that the scope for discretion is enlarged. The degree to which the blame for this shortcoming should be apportioned between the judges, who reach the decisions, and the legal activists, who frame the claims, is difficult to determine without further research. However, both can play a role in attenuating this feature of PIL in Bangladesh. The judges can self-restrain, while the activists should, in framing their claims, bear in mind that there is much to be gained from the continued objectivity of the judiciary.

Perhaps the activists in Bangladesh have an opportunity to play a role here because there are fewer organisations engaged in PIL and some of the organisations have initiated educational programs that include environmental training for judges. Having said this, in seeking to reform this area of law, regard

[170] *Ibid*. at 302–303.

must also be paid to some of the plausible *raison d'être* of the flexibility that attaches to PIL, as adumbrated in some of the extenuation commentaries above. Care must also be taken to not overemphasise this limitation, because different forms of biases and value preferences are equally true of the judiciary in most countries on various issues, whether or not the environment is in issue, and whether or not the courts countenance PILs.

Furthermore, for Bangladesh, anybody familiar with the state of the poor would agree that there are real obstacles to the poor representing themselves. The poor have neither the financial resources nor the technical knowhow for self-representation. Indeed, understanding the issues at stake in some environmental matters would usually be an uphill task for the general populace. One can only imagine the difficulty that would be involved in explaining the health issues in the *Radiated Milk Case* to the underprivileged. Most of the poor would ordinarily view the tainted product as affordable milk. The same is true regarding the ship breaking and shrimp cultivation cases; many would understandably see the impugned activities as sources of income and nothing more because the dangers and adverse effects are not immediately apparent. These limitations leave representative litigation as one of the few viable options. Having said this, it is equally true that it is a failure of Bangladeshi environmental legal activism that poor people seem to have a minimal role in the decision-making process.

A recent incident buttresses this point. On February 22, 2010, newspaper reports indicated that workers of shipbreaking yards "staged a protest against a new national import policy that requires all vessels destined for recycling in Chittagong to carry a pre-cleaning certificate."[171] This policy is a direct result of the *MT Enterprise Case* referred to above.[172] However, there is an allegation that this kind of protests is fake and mostly carried out by people hired by the shipbreaking industry owners.[173]

Notwithstanding, whereas this protest demonstrates that segments of the society were unhappy with the decision, it would be naive to conclude that this is the sole or predominant view on the matter, because there are other views. In a video clip on a webpage in the website of the Goldman Prize, the Chief Executive of BELA contends that ship breaking is a trade of hazardous waste in disguise, since the ships are not pre-cleaned before being sent to Bangladesh and as such release toxic wastes into the coastal area. She informed that they received reports

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[171] Liz McCarthy, "Bangladesh Shipbreaking Protest Slammed as Fake" *Lloyed's List*, online: <http://www.shipbreakingbd.info/newspaper_news/Lloyed_List_23_02_10.html> (last accessed 17 December 2010).

[172] *Bangladesh Environmental Lawyers Association (BELA) v. Bangladesh, Represented by the Secretary, Ministry of Shipping and others*, *supra* note 165.

[173] McCarthy, *supra* note 171.

of deaths in the shipbreaking yards at least once a month.[174] She also notes, "[this] is polluting the coastal environment, affecting the fishermen, killing so many labourers so on that ground we move against this very hazardous operation of the industry."[175] The clip also featured a young woman who had lost her husband in a ship-breaking yard accident, and another man who claims to have been disabled due to an accident sustained in one of the yards. BELA selects the cases it files from hundreds that are reported to it with requests for redress.[176]

Hence, although the underprivileged would in some instances be adversely affected by some of the decisions, it is still a segment of that same constituency that seems to animate BELA's litigation activities, and the same may be said for at least some of the cases filed by the other legal activist organisations.

Using the shipbreaking cases as an example, the question then is how to balance the right to life of the workers and the health of the people in the coastal area against the right of all the workers in the ship breaking and ancillary industries to a means of livelihood. Perhaps a balance could be struck if litigation is used sparingly as a last resort, and even then with extensive consultation with the stakeholders and assessment of the impact of the anticipated reliefs on the less privileged. Imaginative reliefs could then be sought with emphasis on how to reduce the negative impact of possible rulings on those dependent on the impugned industry or activity. Perhaps the courts could also encourage out-of-court settlements with a view to encouraging the leaders in each industry to contribute to phased implementation and the rehabilitation of those who would be affected. The possibility of an adverse ruling should encourage all to negotiate a settlement outside the courts.

The main justification of PIL in Bangladesh is, for the most part, that the poor and underprivileged are unable to represent themselves. With appropriate

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[174] The Goldman Environmental Prize, "Syeda Rizwana Hasan", online: <http://goldmanprize.org/2009/asia> (last accessed 28 June 2009).

[175] *Ibid*.

[176] There are no official statistics regarding human casualties in these yards. The figures relating to these casualties are dependent on regular local media releases complied by local NGOs. According to these sources, 500 people died over the last fifteen years, with 200 deaths occurring in the last five years. In both cases, these deaths amount to between 1,000–1,200 over the last three decades, assuming that the annual loss of life of shipbreaking workers is more or less the same in each year. However, these figures do not cover the deaths of workers who die as a result of chronic diseases due to exposure to toxic substances. For details, Erdem Vardar et al., "End of Life Ships: The Human Cost of Breaking Ships" (December 2005). This report can be found online at <http://www/fidh.org/IMG/pdf/shipbreaking2005a.pdf> (last accessed 14 November 2011). For a detailed discussion on the PIL related with labour regulation of this industry, see Md. Saiful Karim, "Violation of Labour Rights in the Ship-Breaking Yards of Bangladesh: Legal Norms and Reality" (2009) 25(4) Int'l J. Comp. Lab. L. & Ind. Rel. 379.

environmental enlightenment, even where the poor are unable to access the courts, other forms of action, such as protest, would be viable.[177]

In sum, PILs do have limitations. Environmental PILs have had mixed results in Bangladesh in practical terms. The picture of a handful of activists continuing indefinitely to represent the poor and defend the environmental causes is not a pretty one.[178] The attendant lengthy judicial oversight of PIL-engendered decisions is certainly unsustainable. Perhaps these facts are not lost on the activists. The chief executive of BELA, for example, is reported to have reflected that "some of the most significant achievements in environmental law and policy reform have resulted from the patient dialogue and relationship building that she and her colleagues at BELA have advocated."[179]

Given credit to the civil society groups and the courts for developing an awareness and legal activism in environmental regulation in Bangladesh, a core question is whether the judiciary could be an engine of social change. Rosenberg doubts the feasibility of such a role. He has developed court types – a dynamic court model and a constrained court model – and tests the impact of these courts by examining social policies and practices before and after a number of apex courts' decisions often regarded as important sources of social change. He finds that the courts decisions have had no or virtually no significant independent direct or indirect effect on social change. He argued that special change depends on other factors like political efforts wholly separate from the court system.[180] Rajamani also assessed the impact of the leading PILs on the social changes in India. He finds that the legal activism has been able to provide some "chemotherapy for the carcinogenic body politic"[181] and exemplary work.

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[177] Marc Galanter has explained the theoretical issues related with such dilemma. For details see M. Galanter, "Why the 'haves' come out ahead: Speculations on the limits of legal change" (1974) 9 Law & Soc'y Rev. 95-160; See also Shahnaz Huda, *Protecting the Common Good: Successes in Public Interest Litigation* (Dhaka: Asia Foundation, 2002).

[178] For instance, in the last few years, Human Rights and Peace for Bangladesh, an NGO, alone has filed more than 50 PILs. In these PILs, this NGO along with its president Advocate Mr. Monjil Murshed, has sought judicial direction for multifarious issues ranging from the issues related with the evacuation of markets from car parks, police action for protecting minorities, publication of investigation report of a murder case, illegal encroachment of rivers and so on. We tried to get details of this NGO's PIL profile, but did not get in its website. The website does not even provide details of its contact. The link of its website is <http://hrpb.org/index.php>.

[179] McQuay & Kabir, "Reflecting on Rizwana Hasan's Goldman environmental Prize", *supra* note 114.

[180] G. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: University of Chicago Press, 1991) at xii+425; G. Rosenberg, "Hollow Hopes and Other Aspirations: A Reply to Feeley and McCann" (1993) 17 Law & Soc. Inquiry 761-778; for a critique of Rosenberg's arguments, see M. Feeley, "Hollow Hopes, Flypaper, and Metaphors" 17 Law & Social Inquiry 745-760.

[181] U. Baxi, "Preface" in S.P. Sathe, ed., *Judicial Activism in India* (New Delhi: Oxford University Press, 2002).

However, he raises concerns over the exercise of public interest environmental jurisdiction with respect to access, participation, effectiveness, and sustainability.[182]

The discussion above also shows that legal activism in Bangladesh often developed "policy evolution fora" for a particular national issue and gets into the executive governance with judicial governance in sectors highlighted by a group of public interest litigants.[183] Along with an insufficient impact on a substantive change into the social movement, this type of overlapping in the major organs of the State reveal some dissatisfaction with the judicial process. The social change motion set by the judicial activism in this country, in most cases, is less than participatory; therefore, arguably, this has led to unrealistic solutions. Some stakeholders have already raised their voices against this activism, claiming that the solutions provided from the court system are, in most cases, ineffective and unsustainable.

In PIL, the court can focus more on the development of some principles to solve a particular issue, and it should not get heavily involved in regulating the organisations of the government. It should, rather, boost the notion of "new governance", where the governance is less reliant on state-dictated preferences and more on public-private collaboration, flexibility, and pragmatism.[184] Legal activism can push the political system to take the agents related to social change onto the board. To put this pressure on the political system and to bring other agents of social change into the governance system, courts can use PIL as a forum.

V. CONCLUDING REMARKS

The aim of PIL is to provide the opportunity for any member of the society to use the judicial activism to obtain redress for any activities detrimental to public welfare. It is a means by which the apex court can deal with public rights and liabilities within the constitutional framework and can direct the government agencies to address any issue ruled to be against the public interest. In a society where poverty and corruption are prevalent and corporate society has a strong

[182] L. Rajamani, "Public Interest Environmental Litigation in India: Exploring Issues of Access, Participation, Equity, Effectiveness and Sustainability",*supra* note 126 at 296.

[183] It would be worth mentioning the latest reported PIL at this point. In a leave to appeal against High Court Division order in Writ Petition No. 3503 on 2009, the Appellate Division of the Supreme Court of Bangladesh has put the maxim "*Salus Papuli Suprema lex*" in the imperative, that is, "*Salus Papuli suprema lex esto*" – let the safety of the people be the supreme law. The impact of this notion taken by the apex court would be many. One of those effects would be the use of PIL as a means of getting personal redress. For details, see 62 DLR(AD) 2010, at 428–435.

[184] Bradley Karkkainen, "New Governance In Legal Thought And In The World: Some Splitting As Antidote To Overzealous Lumping" (2004) 89 Minn. L. Rev. 471.

influence on political society, PIL could be an effective way through which the judicial activism can insist that public and private organisations are more accountable, especially against the backdrop of the legislatures' apathy and the lack of political will in the executive branches.[185] However, its potential to create a strong peoples' movement to reach their goal using PIL is not sufficient. Nevertheless, using PIL as a means, the outlook of legal activism creating a much more constructive role of society in general and informed groups in particular is rosy.

It is likely that the organisations currently engaged in litigation would continue to file cases. However, the danger is that this is likely to continue even when short term remedial reliefs would be the only benefit as returns on long term movement-building benefits begin to diminish. The legal activists may find themselves increasingly engaged in organisational maintenance. Litigation, being reactive, would then be incapable of contributing to the desirable goal of sustainable environmental justice. Since litigation is already yielding movement-building benefits, this paper recommends that these be relied upon incrementally in the deployment of more sustainable strategies, such as education, lobbying, and other forms of participation in policy development. This calls for greater focus on strategies other than those presently adopted. However, this may necessitate the formation of new organisations with greater expertise in the new forms of political strategy. To be successful, the new entrants would have to form strong partnerships with the legal activists that have already gained reputation, prestige, and other forms of political capital. Therefore, the long-term success of the environmental social movement in Bangladesh may depend on the readiness of the established organisations to encourage and support new organisations with new strategies. The focus of this paper on the activities of social movement organisations should however not belie the fact that the implementation of environmental laws and policies remains, primarily, the responsibility of States.

[185] P. Hassan & A. Azfar, "Securing Environmental Rights Through Public Interest Litigation In South Asia" (2003) 22 Va. Envtl. L.J. 215 at 246; For more details see R. Barnett, "The Civil Liberties Movement In India: New Approaches To The State And Social Change" (1987) 27(3) Asian Survey 371–392; A.K. Thiruvengadam, "In Pursuit of 'The Common Illumination of Our House': Trans-Judicial Influence and the Origins of PIL Jurisprudence In South Asia" (2008) 2 Indian Journal Of Constitution Law 67–103.