NEW PATHS TO JUSTICE: A TALE OF SOCIAL JUSTICE LAWYERING IN BANGLADESH

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Social justice lawyering in Bangladesh has significantly transformed over the last few decades. Sustained authoritarian regimes in Bangladesh during 1971-1990 severely impaired independence of key institutions like the judiciary. With democratic transition imminent in 1990, lawyers played a significant role in consolidating judicial independence and leading the democratic movement. This article examines their contributions to the development of PIL and argues that although social justice lawyers emerged as strong actors during the democratization process, their traditional role has been largely marginalized due to significant politicization of the bar and the rise of other actors in this foray, including an increasingly activist judiciary and a vibrant community of NGOs. However, within this transformed space, social justice lawyers are assuming new patterns of practice with a view to enhancing access to justice for the largely impoverished citizenry. In making these claims, the article further argues for a historical, contextual and culture-specific understanding of social justice lawyering in developing countries like Bangladesh.

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I. INTRODUCTION

The development of Public Interest Litigation (PIL) in South Asia in its modern lexical form, i.e. "the use of courts to affect social change" took root roughly in the 1970s and 1980s. In the post-colonial Indian subcontinent, modern notions of constitutionalism and judicial review emerge from a nationalist history of independence. This historical narrative for most parts of South Asia represents more than merely freedom from colonization; independence from British rule also symbolized the promise of a better society, one that acknowledged, respected, and guaranteed fundamental rights. This is exemplified by the

adoption of written constitutions with promises of aspirational social and economic objectives in many of the countries in this region including Bangladesh, India, Pakistan, Sri Lanka, etc. By and large most of these constitutions confer certain fundamental rights of varying degrees to its citizens and grants the power of judicial review to the courts. As a result, courts have emerged as a strong forum for not only upholding these rights, but also exercising activism where there have been constitutional transgressions among the various branches of the state. Judiciaries in many of these countries have increasingly adopted a favorable attitude towards the use of PIL for advancing social change.

The literature on PIL in South Asia, particularly those focusing on creative interpretations of the constitution and judicial activism, go to considerable length in analyzing the case law, the influence of regional decisions and the role of the domestic courts themselves.[2] However, the sole emphasis on courts can often miss the context within which the legal actors operate. Much of this literature, with some exceptions,[3] has not focused on the role of the legal practitioners and the law profession generally in affecting social change.

This article attempts to present a concise overview of the ways in which Bangladeshi lawyers pursue social justice—a task which is both daunting and exciting. It is daunting for two reasons. First, it is an endeavor to present a subject that has been widely written about and analyzed at great length.[4] Secondly, it is an attempt to discuss a vast topic in one concise article. However, it is exciting and inspiring because it is an opportunity to invert the same subject and tell its story from the perspectives of the practitioners. For the purposes of this article, PIL simply means recourse to courts for social justice, social justice represents causes or issues affecting citizens that maybe pursued or advocated for (with or without recourse to courts) in the public interest

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[2] *See generally* NAIM AHMED, PUBLIC INTEREST LITIGATION : CONSTITUTIONAL ISSUES & REMEDIES (1999); RIDWANUL HOQUE, JUDICIAL ACTIVISM IN BANGLADESH: A GOLDEN MEAN APPROACH (2011); Sara Hossain, Shahdeen Malik, & Bushra Musa, PUBLIC INTEREST LITIGATION IN SOUTH ASIA - RIGHTS IN SEARCH OF REMEDIES (1997); FIFTY YEARS OF THE SUPREME COURT OF INDIA—ITS GRASP AND REACH (S.K. Verma & Kusum eds., 2000); Kamal Hossain, *The Role of the Judiciary as a Catalyst of Social Change,* SUPREME COURT OF PAKISTAN, http://www.supremecourt.gov.pk/ijc/Articles/9/3.pdf (last visited Sept. 20, 2013).

[3] *See, e.g.*, YVES DEZALAY & BRYANT GARTH, ASIAN LEGAL REVIVALS: LAWYERS IN THE SHADOW OF EMPIRE (2010); SCANDINAVIAN INSTITUT. OF AFRICAN STUDIES, UPPSALA & INT'L CTR. FOR LAW IN DEV., LAWYERS IN THE THIRD WORLD: COMPARATIVE AND DEVELOPMENTAL PERSPECTIVES 236 (C.J. Dias, R. Luckham, D. Lynch & J. C. N. Paul eds., 1981) [hereinafter LAWYERS IN THE THIRD WORLD].

[4] *See* HOQUE, *supra* note 1; Hossain, Malik & Musa, *supra* note 1; Hossain, *supra* note 2.

and social justice lawyering broadly encompasses various public interest or social justice activities that use law to generate social and political reform on behalf of marginalized groups.

Bangladesh shares a common legal past as well as significant history of secession from India and Pakistan. Dr. Kamal Hossain aptly describes in the opening line of his book how "twice within twenty five years, in their quest for freedom and justice, the people of Bangladesh were involved in the creation of a new state."[5] The India-Pakistan partition of 1947 assigned the area now known as Bangladesh to the sovereign state of Pakistan as an effort to settle communal strife between Hindus and Muslims in India. Bangladesh, then East Pakistan, experienced a second episode of subjugation and struggled for autonomy from its western counterpart, culminating in a violent war declared by Bengalis on March 26, 1971. After nine months of carnage, mass killings, and ethnic cleansing, Bangladesh became an independent nation-state on December 16, 1971.[6] A written constitution rooted in the tenets of nationalism, socialism, secularism, and democracy was adopted in 1972.[7] It guaranteed fundamental rights to the people[8] and conferred the power of judicial review to the court, enabling it to interpret and uphold its constitutional mandate as well as affect social change.

Although Bangladesh has a checkered history of pervasive military rule,[9] the scope of judicial review has consistently expanded

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[5] KAMAL HOSSAIN, BANGLADESH: QUEST FOR FREEDOM AND JUSTICE 1 (2013) [hereinafter HOSSAIN 2013].

[6] *See generally* ANTHONY MASCARENHAS, BANGLADESH: A LEGACY OF BLOOD (1986); RICHARD SISSON & LEO E. ROSE, WAR AND SECESSION: PAKISTAN, INDIA, AND THE CREATION OF BANGLADESH (1990); WILLEM VAN SCHENDEL, A HISTORY OF BANGLADESH (2009); HASAN ZAHEER, THE SEPARATION OF EAST PAKISTAN: THE RISE AND REALIZATION OF BENGALI MUSLIM NATIONALISM (1994); LAWRENCE ZIRING, FROM MUJEEB TO ERSHAD: AN INTERPRETIVE STUDY (1994) [hereinafter ZIRING 1994].

[7] This is also referred to as Mujibism. *See* 9 Modern Legal Systems Cyclopedia 9.30.22 (Kenneth Robert Redden ed., 1984-1985).

[8] These include for example the right to equality before law (Article 27), the right to non-discrimination (Article 28), equality of opportunity in public employment (Article 29), protection of right to life and personal liberty (Article 32), safeguards against unlawful arrest and detention (Articles 33), prohibition of forced labor (Article 34), freedom of movement (Article 36), freedom of association, assembly and speech (Articles 37-39), etc. *See* CONST. OF THE PEOPLE'S REPUBLIC OF BANGL. Nov. 4, 1972, arts. 27-29, 32-34, 36-39.

[9] The history of Bangladesh can be divided into two distinct periods; one being authoritarian consisting of military rule from 1972 to 1990, and democratic rule from 1991 onwards. The principal regimes in 1972- 1990 were led by Sheikh Mujibur Rahman from 1972 to 1975, by General Ziaur Rahman from 1976 to 1981 and by General Hossain Mohammad Ershad from 1982 to 1990. The authoritarian regime of Ershad came to an end in December 1990 and since then three free, fair but highly contentious elections were held in 1991, 1996 and 2001 under

since 1991 after the country transitioned as a democratic state through its first free and fair election. Since then, the courts have reviewed a plethora of cases, including those relating to executive transgressions, human rights abuses, implementation of social and economic rights etc.

A survey of the period between 1971-1990 and 1991 onwards reveals that the approach to PIL by the courts and the manner in which lawyers pursue social justice underwent significant changes, especially in the latter period. Under authoritarian rule in the 1970s and 1980s, initial PIL efforts were geared towards constitutional issues focusing mostly on separation of powers. However, since democratic transition, a wider range of causes such as women's rights, consumer protection and environment and economic justice have been addressed through PIL.

One of the major contributing factors behind the success of PIL has been the role played by lawyers and the bar associations. They preserved constitutional sanctities through the use of PIL and capitalized on political opportunities, thereby inspiring an activist judiciary. However, along with democratic transition and liberalization of the state in general, the approach to PIL and the nature of lawyering has transformed. In recent years, non-state actors such as non-governmental organizations (NGO) have emerged, claiming a strong presence in the democratic space. With the Supreme Court's liberal interpretation of standing, NGOs have increasingly taken the lead in bringing public interest petitions to court while lawyers' groups and bar associations have become factious and privy to party-politics.

This article argues that although social justice lawyers have been socially and politically empowered during the democratization process of 1991, their traditional role has been marginalized due to an increasingly politicized bar, increased judicial activism and considerable rise of non-state actors (such as NGOs) within the democratic space. As a result, they are assuming new roles and engaging in new patterns of practice through alternative means and models. This article claims that in the quest to advance social change and achieve social justice, lawyers are also helping build, consolidate and reform key political institutions with

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transitional or caretaker governments. The two major parties Awami League led by Sheikh Hasina and Bangladesh Nationalist Party led by Khaleda Zia have been in power interchangeably. There was a period of an army-backed caretaker or transition government between 2006 and 2008 due to the failure of the parties to agree on handing over power. But this was resolved by 2009 with another election. *See generally* ZIRING 1994, *supra* note 6; HOSSAIN 2013, *supra* note 5 (on political history of Bangladesh up to 1975); Parvaz Azharul Huq, *Civil Society and Democracy in Bangladesh*, SOCIAL CHANGE, June 2005, at 85 (discussion on various periods of democracy up to 2005).

a view to enhance access to justice for the citizenry, especially the largely impoverished population.

While there may be similarities in the way PIL is understood across the globe, this article further argues that the motivations and underlying values for pursuing social justice through PIL and the strategies adopted by practitioners are often country and sometimes even culture-specific, as will be shown in the case of Bangladesh. Thus, there is a need to understand the role of social justice lawyers in the context of history, broad-based development and legal aid activities. This will also help understand the patterns of practice relating to PIL in Bangladesh as well as other similarly situated countries.

This article is divided into the following parts: Part II begins with a survey of existing literature on social justice lawyering, Part III discusses some aspects of the history of PIL in Bangladesh and its contribution towards consolidation of constitutionalism; Part IV investigates the agency of both legal and non-state actors in shaping PIL and social justice in Bangladesh, Part V traces a generational shift among Bangladeshi legal practitioners pursuing social justice and finally the article concludes with some observations on how social justice lawyering may be better-understood in terms of historical, contextual and cultural factors as well as broad-based development.

II. PUBLIC INTEREST LITIGATION AND SOCIAL JUSTICE LAWYERS

A. LAWYERS PURSUING SOCIAL JUSTICE: SOME TYPOLOGIES

The success and efficacy of PIL is often illustrated through epoch-making Supreme Court decisions in the United States, which include for example, the famous cases freeing public schools from de jure segregation or the achievement of abortion rights.[10] These cases have undoubtedly inspired generations of lawyers to defend the interests of marginalized groups, enabling them with access to resources and courts to contest the existing patterns of power and privilege. In pursuing social change, lawyers often deploy a number of strategies in order to alter the public discourse around reforms. These efforts have also included

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[10] Roe v. Wade, 410 U.S. 113 (1973); Brown v. Board of Educ., 347 U.S. 483 (1954); Plessy v Ferguson, 163 U.S. 537 (1896). *See generally* GERALD ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991) (a discussion on the efficacy of litigation in affecting social change).

mobilization of various resources and personnel in the form of institutional mobilization such as the National Association for the Advancement of Colored People (NAACP), the Legal Defense Fund, American Civil Liberties Union (ACLU), and other private foundations since the 1960s. Driven by lawyers grounded within a strong legal profession, these institutions have successfully used PIL to advocate for social change.

The strength of the American legal profession is closely related to America's unique political institutions. Some scholars have argued that "the growth of American law since independence stemmed in part from the evolving presence of lawyers in both politics and society."[11] Similarly, the role of lawyers as catalysts for social change is well-established in many other developed democracies like the United States. American scholars Austin Sarat and Stuart Scheingold employ the term "cause lawyer"[12] to describe lawyers committed to using law for social or political change and serving a particular cause by necessarily taking sides in political, social, economic, cultural, legal and moral struggles. This makes cause lawyering a deeply moral and political activity that transcends client service and encourages pursuit of the cause lawyers' vision of the right, the good or the just.[13]

Cause lawyering literature merits credit in that it broadly encompasses different facets of cause lawyering and locates lawyers in the context of their roles viz. a. viz. social movements, advocacy, authoritarian regimes etc. However, it does not distinguish between causes and public interests and acknowledges the difficulty of defining 'public interest' in terms of worthy and unworthy causes.[14] Thus, the rubric of cause lawyering can include ranges as diverse as poverty, property rights, feminist, right to life, human rights, public interest, social justice, civil liberties and critical lawyering.[15] This makes it

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[11] *Jayanth K. Krishnan,* Lawyering for a Cause and Experiences from Abroad, *94* CALIF. L. REV. 575, 575 (2006).

[12] *See generally* CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES (Austin Sarat & Stuart Scheingold eds., 1998) [hereinafter CAUSE LAWYERING]. In this volume alternative terminologies have been used to convey what cause lawyering is which includes *"lawyering for the good"* (Carrie Menkel-Meadow), *"speaking law to power"* (Richard Abel), *"impact lawyering"* (John Kilwein), and *"critical lawyering"* (Louise Trubek and M. Elizabeth Kransberger).

[13] *Id*; STUART A.SCHEINGOLD & AUSTIN SARAT, SOMETHING TO BELIEVE IN: POLITICS, PROFESSIONALISM, & CAUSE LAWYERING 2 (2004).

[14] *Id.* at 5.

[15] *Id.* at 3.

indistinguishable from other typologies, posing difficulties in conceptualizing as well as contextualizing it outside the Anglo-American legal system.[16]

It is not inconceivable that Sarat and Scheingold derive their characterizations of cause lawyers from an American model with well-institutionalized separation of powers. In this model, courts have emerged as strong independent power brokers and a locus for upholding the rule of law as well as initiating social change. Depicted this way, cause lawyering seems to be especially compatible with legal systems in which courts and lawyers are independent—and "cause lawyers" can turn "litigation into an assertive political weapon"[17] as well as an effective strategic tool to achieve political or social solutions.[18] While the independence of courts and the law profession can generally be assumed to have institutionalized in developed democracies, in developing countries lawyers and judges often struggle and face insurmountable challenges.

Political institutions function in a much different pattern in developing countries where courts often find themselves embroiled in politics and engaged in "Rights Revolutions."[19] Often in these countries, neither the courts nor the law profession will have consolidated political independence. Nevertheless, many in the legal community continue to believe in the value and legitimacy of using law to address injustices.[20] Dezalay and Garth view these tendencies among Asian lawyers as a kind of legal revival based on colonial legacies of post-colonial nations and a collective belief on fundamental notions of democracy, rule of law, and good governance.[21] However, this type of lawyering has been further

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[16] *See* Patricia Goedde, From Dissidents to Institution-Builders: The Transformation of Public Interest Lawyers in South Korea, 4 U. PA. E. ASIA L. REV. 63 (2013), *available at* http://scholarship.law.upenn.edu/ealr/vol4/iss1/5 (last visited 29 October 2013) (a discussion on contextualizing cause lawyering in South Korea).

[17] *Id.* at 6.

[18] Richard A. L. Gambitta, *Litigation, Judicial Deference, and Policy Change, in* GOVERNING THROUGH THE COURTS 239 (Richard A. L. Gambitta, Marlynny L. May, & James C. Foster eds., 1981).

[19] CHARLES R. EPP, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE 2-3 (1998).

[20] *See generally* Frank Munger, *Globalization, Investing in Law, and the Careers of Lawyers for Social Causes: Taking on Rights in Thailand*, 53 N.Y. L. Sch. L. Rev. 745 (2008-2009).

[21] *See generally* DEZALAY & GARTH, *supra* note 3. In addition in many developing countries, this type of lawyering has been further shaped by foreign aid interventions in an effort to encourage development of "rule of law" practices throughout the developing world. For example, the Ford Foundation has been especially active in the South Asian region for funding many legal

shaped by exogenous factors such as global economy, global trade and foreign aid interventions encouraging "rule of law" or legal practices throughout the developing world. This begs the question then whether such "legal revivals" are inspired solely by colonial legacies or if they are an amalgamation of historical factors as well as larger hegemonic or external influences like foreign legal education, normative notions of democracy, rule of law etc. that are sometimes difficult to translate in local contexts. Sometimes, it may even be a combination of both, which makes these lawyers intermediaries linking colonial history, local culture and a globalized world.[22]

The notion of PIL in the American sense also poses conceptual difficulties as it has been considered "a culture-specific phenomenon which was developed in America and confidently exported to the rest of the world."[23] Hershkoff reinforces this idea by describing how "the social technology of public interest litigation seems to have developed in many different countries." Although she then cautions against generalizing the US model worldwide as PIL has taken "different shape[s] and assume[d] indigenous forms,"[24] in addition to Sarat and Scheingold's admonition against "providing a single, cross-culturally valid definition"[25] of cause lawyering—analyzing cause lawyering in this way nevertheless emphasizes a Western beginning.

In the South Asian legal discourse, the term "cause lawyer" maybe something of an alien presence due to the unpredictable patterns of pursuing causes and the politics around them. The acclimatization of law and lawyering in the process of furthering causes is often unique and unpredictable. Often the same lawyer maybe pursuing a social cause in one aspect of their work and adopt a radically different stance on a political issue when pursuing a political cause. Sometimes religious or political convictions may trump what is perceived to be right or just. Pakistan is a case in point, where the lawyers' movement of 2009 united

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assistance programs. *See generally* FORD FOUND., MANY ROADS TO JUSTICE (Mary McClymont & Stephen Golub eds., 2000).

22 *See* Mitra Sharafi, *A New History of Colonial Lawyering: Likhovski and Legal Identities in the British Empire*, 32 L. & Soc. Inquiry 1059 (2007) (a discussion on lawyers as cultural translators and ethnographic intermediaries in the formation of colonial identities).

23 Helen Hershkoff, *Public Interest Litigation: Selected Issues and Examples*, WORLD BANK, http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/PublicInterestLitigation[1].pdf (last visited Jan. 5, 2013), at 18 (quoting Dhavan, *Whose Law? Whose Interest?, in* PUBLIC INTEREST LAW (Cooper & Dhavan eds., 1986).

24 *Id.* at 18-19.

25 CAUSE LAWYERING, *supra* note 12, at 5.

the lawyers, judges, politicians, and the media. This brought them to the axis of politics in which they strategically engaged in direct action with visible alliances among them.[26] However, within just two years the assassination of Pakistan's liberal politician Salman Taseer[27] demonstrated a regressive development among the same elite group. The killer of Salman Taseer "was celebrated by many in Pakistan, including lawyers who showered him with rose petals and garlands at his first court appearance,"[28] many pledging to defend him. Examining this particular incident contextually reveals prevailing factions, polarization, and dominance of religious convictions over democratic values among the lawyers, judges, politicians, and the media at the time—also arguably reflecting the underlying politics and democratic deficits in Pakistan considered by some scholars as being in a "gray zone" between authoritarianism and democracy. [29] However, decontextualized use of the term "cause lawyering" as Stuart and Scheingold largely propose, would probably deem this latter group of lawyers as cause lawyers right alongside those that vociferously defended judicial independence. It should come as no surprise if some of them had, in fact, been part of or supported the lawyers' movement—thus, reflecting a thin line between social and political causes in these societies.

Restricting "cause lawyering" to lawyers alone can often be problematic because in many societies, as will be noted in this article, the first site for accessing legal services for dispute resolution or achieving social justice is neither the lawyer nor the formal justice system. Given these contextual issues, it may be noted that this article is not an effort to redefine "cause lawyering," rather it uses the term "social justice lawyering" cautiously in order to demonstrate the local context within which its practice has developed. Much of the scholarship discussed above, largely consists of functional analyses of the activities undertaken

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[26] *See generally* THE PAKISTANI LAWYERS' MOVEMENT & THE POPULAR CURRENCY OF JUDICIAL POWER, 123 Harv. L. Rev. 1705 (2009-2010).

[27] Salman Taseer, the governor of Punjab Province, was one of the country's most outspoken opponents of the nation's controversial blasphemy law, which mandates a death sentence for anyone convicted of insulting Islam. This law is often used to a disadvantage of minorities due to growing inclination towards religious intolerance in Pakistan. *See generally* Salman Masood, *Pakistanis Rally in Support of Blasphemy Law*, THE NEW YORK TIMES (Dec. 31, 2010), http://www.nytimes.com/2011/01/01/world/asia/01pakistan.html?_r=1&.

[28] *See generally* Carlotta Gall, *Pakistan Faces a Divide of Age on Muslim Law*, THE NEW YORK TIMES (Jan. 10, 2011), http://www.nytimes.com/2011/01/11/world/asia/11pakistan.html?pagewanted=all.

[29] *See* Anil Kalhan, *"Gray Zone" Constitutionalism and The Dilemma of Judicial Independence In Pakistan*, 46 Vand. J. Transnat'l L. 1, 4 (2013).

by lawyers in pursuit of social or other causes. Admittedly, from a sociological perspective, there can be aspects within law and other professions which may share some invariance and similarities in institutional design, governance structures, and oversight.[30] However, in the context of developing countries the role of the lawyer has developed under a variety of different socio-political contexts.

In South Asia, social justice lawyers have defended their causes foremost through social movements as social activists and not exclusively as lawyers in court in the traditional sense. Since most of the South Asian legal systems inherited colonial structures, historically-specific comparisons maybe especially useful[31] to decipher the continuities and discontinuities in the development of post-colonial social justice lawyering.[32] Therefore, any resulting analysis ought to critically consider the historical, developmental and culture-specific contexts within which social justice lawyers operate. This will also help elucidate pertinent issues that maybe useful for formulating successful reform programs through policy prescription.

B. THE EMERGENCE OF SOCIAL JUSTICE LAWYERING IN SOUTH ASIA

Historically, the practice of law was more within the realms of commerce and trade rather than in the realm of serious intellectual endeavor.[33] With the expansion of the British Empire, legal institutions

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[30] *See generally* DAVID SCIULLI, STRUCTURAL AND INSTITUTIONAL INVARIANCE IN PROFESSIONS AND PROFESSIONALISM (2008).

[31] *See* Clarence J. Dias & James C.N. Paul, *Observations on Lawyers in Development and Underdevelopment*, *in* LAWYERS IN THE THIRD WORLD, *supra* note 3, at 337, 338.

[32] *See* Robin Luckham, *The Political Economy of Legal Professions: Toward a Framework for Comparison*, *in* LAWYERS IN THE THIRD WORLD, *supra* note 3, at 287, 290. For example, the nonviolent occupation of a public space, or sit-in, may be traced back to Mahatma Gandhi's campaigns for Indian independence. This is also an important consideration for tracing transnational social movement strategies. For example, in the United States, labor organizations and the northern-based Congress of Racial Equality (CORE) were inspired by sit-ins particularly as events in Greensboro began to gain traction. In 1955, Martin Luther King is known to have reached out to Reverend James Lawson, a civil rights activist and missionary who had served in India. He was familiar with the *satyagraha*, Gandhi's nonviolent resistance. "King urged Lawson to relocate to the South: *'Come now,' King said. 'We don't have anyone like you down there'*." MICHAEL J FRIEDMAN, FREE AT LAST: THE U.S. CIVIL RIGHTS MOVEMENT 37 (2010). On the other hand, it is well known that Gandhi had been inspired in his actions by the texts of Thoreau among other sources, indicating that transnational migration of ideas did not just occur in one direction, it traveled both ways.

[33] *See generally* RICHARD L. ABEL, THE LEGAL PROFESSION IN ENGLAND AND WALES (1988).

and lawyers became a necessity.[34] As industrialization and economic progress were underway, the social balance being increasingly characterized by interests of capital and commercial gain began shifting. This, in turn, accorded a higher level of social prestige for the legal profession in comparison to other professions. While Britain looked upon lawyers as those engaged in a trade, albeit held in high esteem, it was still unlikely to be equivalent to high prestige or aristocracy. In British-India, however, the legal profession carried an immense amount of social and political capital. It was considered to be an extremely prestigious and limited endeavor.[35] Very few people, other than heirs to very wealthy Zamindars or landowners in British-India, could afford to access the profession, particularly those seeking British training. However, it is from these privileged classes that the first of the Indian social justice lawyers emerged.[36]

Despite being trained in Britain and in some cases working within the British administration, some of these native lawyers managed to address oppression by developing and translating notions of rights, nation, freedom, etc. in the way South Asia understands them today. The tradition of protesting against injustices has taken root since the colonial times. Accordingly, PIL, as we understand it today, has manifested itself as a mechanism for participatory justice for enabling the poor and vulnerable citizens to access legal remedies.

C. EMERGENCE OF MODERN NOTIONS OF PIL AND THE DIFFERENCE IN ITS MANIFESTATION WITHIN THE REGION

India established the use of epistolary jurisdiction of courts, also commonly known as social action litigation, in making public interest claims.[37] Pakistan adopted similar processes with additional emphasis on

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[34] *See* J.S. Gandhi, *Law as an Instrument of Change in India*, *in* SOCIOLOGY OF LAW 99 (Indra Deva ed., 2005).

[35] *See* Samuel Schmitthener, *Development of the Legal Profession in India,* in SOCIOLOGY OF LAW 115-116 (Indra Deva ed., 2005).

[36] Some of the most salient examples of social justice lawyers in South Asia are Mahatma Gandhi, Muhammad Ali Jinnah, Hussain Suhrawardy, B.S. Ambedkar and others who played pivotal roles in the nationalist movement in British-India as well as shaping post-independence politics.

[37] Epistolary Jurisdiction was innovated by the Indian Supreme Court through liberal interpretation of *locus standi* where any person can apply to the court on behalf of those who are economically or physically unable to come before it or are unaware of their legal entitlements. Beginning in the late-1970's, the Court has allowed actions to be brought on their behalf by social activists and lawyers. Judges themselves have in some cases initiated *suo moto* action based on newspaper articles or letters. This practice of initiating proceedings on the basis of letters has

Islamic social justice.[38] Further, these legal systems allow for *suo motu* claims that are essentially cases initiated by judges on their own motion rather than through a petitioner. In South Asia, therefore, successfully addressing social grievances through PIL has in general required an active judiciary and an activist bar. Notions such as the political questions doctrine in the United States would be inapplicable here as courts often find themselves at the center of politics, compelling them to address political issues as a matter of necessity. This can, however, often compromise their independence—either by the regimes in power or simply due to the courts' regime-favoring administrative practices based on colonial foundations. Therefore, the terrain within which social justice lawyers operate often involves taking on the state both through direct action and litigation.

Lawyers play a central role in constitutional as well as social justice issues, which can often mean the same thing as many of the South Asian constitutions enshrine social and economic rights. The relationship between state, economy, and civil society is not as well delineated as in developed countries and the patterns in which they develop are often fraught with contradictions. Lawyers, therefore, often mediate both access to and exit from the authoritative decisions of the courts and can play a pivotal role in facilitating relations between the other branches of the state and civil society. In this way, social justice lawyers in many South Asian countries emerged as both constitutional architects and ideologists.[39]

III. EMERGENCE OF PIL IN BANGLADESH

Bangladesh inherited British common law traditions like India and Pakistan.[40] The societal structure in Bangladesh like many post-colonial nations is obligations-based where the concept of rights and justice emerge from a duty-oriented society.[41] Consequently, fulfilling of obligations becomes integral to accomplishing a collective rights-based

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now been streamlined and has come to be described as 'epistolary jurisdiction'. *See* HOQUE, *supra* note 2, at 152.

38 *Id.*

39 *See* Robin Luckham, *supra* note 32, at 334.

40 Bangladesh inherited English laws and Pakistani laws by virtue of the Laws Continuance Enforcement Order 1971 (10 April 1971), Bangladesh (Adaptation of Existing Laws) Order 1972, and Article 149 of the Constitution.

41 *See generally* HOQUE, *supra* note 2; WERNER MENSKI, COMPARATIVE LAW IN A GLOBAL CONTEXT: THE LEGAL SYSTEMS OF ASIA AND AFRICA (2nd ed. 2006).

society. Unlike the development of rights-based PIL in the United States, Bangladesh underwent a complex process of addressing constitutionalism through PIL. Like most developing countries, Bangladesh experienced first a period of institution building and, secondly, a subsequent period of consolidation of these institutions in terms of delineation of their power and authority vis-à-vis other major institutions of state. Insofar as this process relates to the independence of judiciary, it was largely driven, shaped, and influenced by the legal community through a series of PIL cases. Since then PIL has also successfully addressed social justice concerns.

A. THE CONSTITUTIONAL AND POLITICAL LANDSCAPE OF BANGLADESH

In post-bellum Bangladesh a written constitution based on socialist-democratic values and guaranteed fundamental human rights was adopted in 1972, which is held to be supreme over all other laws.[42] Although initially established as a parliamentary democracy, Bangladesh was largely governed by authoritarian rule between 1974 and1990. A mass-movement led by political parties and civil society ousted the authoritarian regime in 1990. Parliamentary system of government was reintroduced in 1991, which continues largely uninterrupted except for a brief two year emergency period and a military-backed transition government between 2006 and 2009. The two major parties Awami League led by Sheikh Hasina and Bangladesh Nationalist Party led by Khaleda Zia have been the only two parties to have alternated power since then.

Failing to fully democratize in all aspects of state governance, democracy remains to be consolidated in Bangladesh. Since 1990, the state and political parties have emerged as most powerful among other groups. Political and administrative patronage has largely weakened the bureaucratic machinery of the government, which bears the brunt of the ruling party dictates in public policy matters such as civil service recruitment, transfers, and similar bureaucratic decisions in order to

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[42] Bangladesh had gone through British colonial rule (1757-1947) and then had been under the dictatorial rules of the Pakistani Military (1947-1971). The Constitution declared the republic as a socialist democracy based on the rule of law and included, several entrenched and a wide spectrum of fundamental rights (CONST. OF THE PEOPLE'S REPUBLIC OF BANGL. Nov. 4, 1972, arts. 27-45). It is also held to be the supreme law of the land by virtue of article 7. *See* CONST. OF THE PEOPLE'S REPUBLIC OF BANGL. Nov. 4, 1972, arts. 7, 27-45.

advance vested political and economic interest.[43] As a result, the major political institutions remain largely weak and unable to consolidate their independence; while politics in Bangladesh remains violent and confrontational with deeply divided political elites. Issues relating to Bangladeshi identity, secularism, and liberation war continue to contribute to the contentious political discourse and its polarizing effects can be seen to be percolating directly and indirectly among civil society and other social groups.[44]

NGOs have been active in Bangladesh since the 1971 war. Until the nineties, most of their efforts were directed towards service delivery focusing on material public interest, local needs and welfare. However, with the opening up of the democratic space since 1991, media and democratic discourse has thrived and there is no dearth of civil society organizations (CSO) as well as NGOs. Since then, Bangladesh also underwent structural adjustment processes and adopted good governance policies. Government policies and laws allow for a relatively liberal legal framework which allows CSOs, NGOs, and other social welfare groups to register and function easily. Bangladesh has been internationally acclaimed for its poverty alleviation and social development efforts, more recently due to the micro-credit schemes introduced by Grameen Bank as well as other welfare programs of large NGOs like BRAC. The success of these programs has been secured through a combination of local as well as internationally sponsored initiatives.

1. The Judiciary and The Bar

The Constitution of Bangladesh recognizes the judiciary as a fundamental institution for upholding the separation of powers[45] and allows for judicial review by the Supreme Court. Sustained authoritarian regimes prior to democratic transition severely impaired the judiciary's role through constitutional amendments,[46] which effectively validated the martial law regimes. Until the late eighties, the judiciary operated largely

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[43] *See generally* ROUNAQ JAHAN, BANGLADESH POLITICS, PROBLEMS AND ISSUES (2005).

[44] *See generally* Farhat Tasnim, Civil Society in Bangladesh: Vibrant but not Vigilant (2007) (unpublished Ph.D. dissertation, University of Tsukuba), *available at* http://www.tulips.tsukuba.ac.jp/limedio/dlam/B27/B2782934/1.pdf (last visited June 30, 2013).

[45] *See generally* CONST. OF THE PEOPLE'S REPUBLIC OF BANGL. Nov. 4, 1972, arts. 94(4), 96, 109.

[46] These include the 4th, 5th, and 7th Amendment which were enacted during military rule in order to legitimize the regimes by retrospectively validating the effect of laws and ordinances that were enacted during those regimes.

within constitutional constraints set for it with very little space for autonomy. On several occasions during military rule, the office of the chief justice also served the conflicting role of chief martial law administrator. As a result, historically the judiciary has been deferential to the executive, thereby perpetuating and often favoring military rule.[47]

In contrast, the bar has boisterously addressed democratic deficits in government on many occasions. The bar is regulated by the Bangladesh Bar Council, set up shortly after the war in 1972.[48] Some of the Bar Council's functions include maintaining and managing the enrollment of advocates, setting the enrollment examinations and acting as a controlling body of all district[49] bar associations. [50] All committees and positions within these associations are elected annually. All lawyers are required to be enrolled with the bar council and also be a member of the district bar association based on the district town in which they practice.

After the war in 1971, the drafting and framing of the constitution had significant contribution from the lawyers.[51] One of the devastating results of the war and part of a major cleansing strategy of the Pakistani army was mass killing of intellectuals.[52] In addition, the very conceivable possibility of wartime displacement and migration of

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[47] This deferential attitude of the courts can be observed in various decisions of the courts dating as far back as the East Pakistan days of Bangladesh. The martial law regime of Ayub Khan was held valid in 1958 by the Supreme Court of Pakistan in *State v. Dosso* (1958) PLD (SC) 533, where the then President Iskander Mirza was overthrown by military means. The courts justified its decision on the basis of the Kelsenian doctrine of necessity.

[48] The Bangladesh Bar Council was set up by means of a presidential ordinance known as The Bangladesh Legal Practitioner's and Bar Council Order, President's Order No. 46 of 1972 (May 18, 1972). It is therefore a statutory organization.

[49] Districts are local administrative units and there are 64 districts in Bangladesh. Each district has several sub districts or upazilas.

[50] There are two types of Bar Associations. The Supreme Court Bar Association is located in the Supreme Court in the capital of Dhaka, pertaining to all matters of the Supreme Court. The National Bar Associations are located in the districts around the country. Districts are local administrative units and there are 64 districts in Bangladesh. Each district has several sub districts or upazilas. Some districts, depending on size have more than one district court and therefore more than one bar association. The number of bar associations is around 82. Compiled from interview notes from interview held on June 1, 2010, with Advocate Z.I Khan, former Chairman of Human Rights and Legal Aid Committee, Bangladesh Bar Council.

[51] This is not an uncommon feature since constitutions are commonly written by lawyers who play integral roles in constituent assemblies. In the case of Bangladesh for example, Dr. Kamal Hossain played a significant role in the early constitutional politics and subsequent drafting.

[52] ANTHONY MASCARENHAS, THE RAPE OF BANGLADESH 116-17 (1971); Donald Beachler, *The politics of genocide scholarship: the case of Bangladesh*, 41 Patterns of Prejudice, no. 5, 467, 476-477 (2007).

large sections of the intelligentsia seeking refuge from persecution left a great void in what was to become a critical mass of future "legal elites" in Bangladesh. As a result, in the formative post-independence years, a very small number of lawyers were tasked with nation-building. Due to their commitment towards independence and support of the regime both before and after the war, many of these early lawyers went on to become statesmen, securing high ministerial positions within the government.

Despite political success, however, a growing legal community with ideological divisions led many of these lawyers to radically different political paths—often turning them against each other. The bar has a history of highly contentious politics and continues to reflect factions. Annual bar elections are generally held under the auspices political parties and remain fiercely competitive. Traditionally, the bar has been distrustful of the judiciary due to its past regime-favoring roles. Nevertheless, it has successfully used the courts as a forum for securing and consolidating the independence of the judiciary.

2. Early Constitutionalism

The Supreme Court determined the rules of standing for aggrieved persons to challenge unconstitutional laws in court in the early seventies.[53] However, it had a limited scope within which to operate due to successive military regimes and continued to play a conservative and passive role until 1990. Preceding democratic transition, the judiciary largely adopted a positivist approach in adjudicating PIL based on perfunctory application of statutes instead of creative interpretation of the constitution and rights-based decision-making.[54] This is also, to some

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[53] *Kazi Mukhlesur Rahman v. Bangladesh* (1973) 25 DLR (HCD) 335, also known as the Berubari case challenged the constitutionality of the Delhi-Dhaka Treaty of 16 May 1974 involving an exchange of territories between India and Bangladesh. The petitioner challenged the constitutionality of this treaty and consequently the authority of the Executive to execute it. Initially, the court rejected the petition on the basis of *locus standi* as the petitioner was not a resident in the concerned territories and therefore not directly 'aggrieved' by the treaty. On appeal the Appellate Division ruled on the meaning and scope of standing. The issue raised in the case was considered to be of 'grave importance' involving the rights of the people as a whole; therefore, the petitioner had standing in such a case. It is important to note that by this period India had already interpreted and expanded its rules on standing. While it is not uncommon for the courts to maintain favorable views on regional decisions due to the common legal heritage they share, the Supreme Court of Bangladesh did not definitively settle the rules on standing for a PIL petitioner until the mid-1990s in *Dr. Mohiuddin Farooque v Bangladesh* (1997) 17 BLD (AD) discussed below in note 87.

[54] For example, in *Sultan Ahmed v Chief Election Commissioner* (1978) 30 DLR (HCD) 291 the court went as far as to denounce the supremacy of the constitution over martial law; in *Halima*

extent, reflective of the legacies of deference towards the executive that has been instilled in the judiciary through both colonial and authoritarian rule in various stages of nationhood. It helps explain the judiciary's unwillingness to assert its independence and the deferential attitude with which judges approached decision-making. This is most manifest in *Hamidul Haque Chowdhury v. Bangladesh*,[55] where the court refused to hold the Fourth Amendment[56] to the Bangladesh Constitution void. The judgment disguised the Court's deference by somewhat ingeniously finding that the amendment was accepted by the people and the judiciary's willingness to follow the law as it was accordingly validated the amendment. This decision unfortunately legitimized army rule by accepting and upholding the undemocratic constitutional amendments that had been made.

Further intrusions into judicial independence occurred during the Ershad regime whose rule, for most part of the eighties, was characterized by tumultuous politics and resistance. However, by the end of the eighties a major shift was underway that eventually ousted the government, marking a paradigmatic shift in the constitutional jurisprudence of Bangladesh.

Khatun v Bangladesh (1978) 30 DLR (AD) 207, at 219 the Appellate Division declared the judge's role to be limited to mere application of law—whereby it was possible for a judge to administer a "harsh or even an unjust law." For a discussion on judicial activism and constitutional politics in Bangladesh s*ee generally* HOQUE, *supra* note 2; Ridwanul Hoque, *The Recent Emergency and The Politics of The Judiciary in Bangladesh*, 2 NUJS L. Rev. 183 (2009), *available at* http://www.commonlii.org/in/journals/NUJSLawRw/2009/10.pdf. (last accessed Dec. 23, 2013)

[55] (1981) 33 DLR (HCD) 381. In rendering this decision, the Court refrained from identifying the non-democratic nature of martial law and disregarded the unconstitutional political act of changing the Constitution.

[56] The Constitution (Fourth Amendment) Act 1975, Act no. 2 of 1975, enacted on 25 January 1975. This amendment made material changes to the Constitution including introduction of a presidential form of government (overriding the previous parliamentary system); instilling a one-party system; curtailing the powers of the Parliament and extending the term of the first Parliament; curtailing the independence of the judiciary and preventing the Supreme Court exercise its jurisdiction over the protection and enforcement of fundamental rights.

B. CONSOLIDATION OF JUDICIAL INDEPENDENCE, SOCIAL MOVEMENT AND PIL

Since assuming power in 1982, the military-backed Ershad government[57] enacted various martial law regulations,[58] which significantly affected the functioning of the judiciary. First, the government deliberately changed the retirement age of Supreme Court judges to sixty two or on completion of three years as chief justice, whichever was earlier, in order to accommodate the appointment of Justice F.K.M.A Munim as chief justice of Bangladesh. Subsequently, in order to enable the same judge to continue in office, this rule was injudiciously repealed.[59] Secondly, further martial law proclamations of the Ershad government decentralized the High Court division (HCD) of the Supreme Court[60] by establishing "permanent benches" delegating additional power to the various divisional headquarters. The operations of the Supreme Court were diffused, requiring judges to be transferred from the HCD to preside over these newly formed benches in seven districts.[61]

There were several inherent problems with decentralization. First, the hasty manner in which it was designed would cause confusion in determining geographical jurisdiction of the divisional courts for claims that involved cause(s) of action arising out of or involving more than one of those divisions.[62] Secondly, the constitution already allowed for temporary benches to be formed in other parts of the country if the

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[57] President Hussein Mohammad Ershad assumed power by means of a coup d'état on March 24, 1982, and held on to power until he was finally overturned and general elections held in 1990. ZIRING 1994, *supra* note 6, at 150-215.

[58] *See* Office of the Chief Martial Law Administrator, *Martial Law Order No. 11*, BANGLADESH GAZETTE, EXTRA., (Apr. 11, 1982).

[59] Repealed through Proclamation Order No. IV of 1985.

[60] The Supreme Court is located in the capital city of Dhaka and consists of two divisions, HCD and the Appellate Division. The HCD is the appellate forum for cases progressing from the lower courts nationwide and it also maintains original jurisdiction to hear writ petitions. The Appellate Division is the court of last resorts and may be considered to be the functional equivalent of the US Supreme Court or the House of Lords in the UK.

[61] The High Court Division (HCD) was diffused into firstly four and subsequently seven permanent benches, in Dhaka, Jessore, Comilla, Rangpur, Chittagong, Barisal and Sylhet districts.

[62] Previously all litigants gathered in the Supreme Court located in the capital to appeal cases but the complicated administrative structure would pose major complications in initiating claims in the new permanent benches. It could also potentially give rise to multiplicity of claims and determination of territorial jurisdiction of cases, especially admiralty cases. *See Anwar Hossain Chowdhury v. Bangladesh* (1989) 41 DLR (AD) 165.

chief justice deemed fit.[63] Thirdly, an overnight decentralization would be tantamount to annihilating the practice of hundreds of lawyers that had built up in the capital city of Dhaka with no transitional measures in place. The best lawyers and the legal support and resources available to them had been historically based in Dhaka. The usual practice was for clients to travel to Dhaka to seek representation for filing writs in the HCD or to appeal cases from the respective districts courts.[64] Devolution would not only threaten this practice, it would also mean that the short- and medium-term local capacity of both lawyers and judges based in their respective districts to deal with these cases would be limited. Finally, local resource, facility, and infrastructure issues would need to be dealt with and allocated if judges and judicial officers were to be transferred out to the various districts. It was unlikely this could happen within a reasonable time as these efforts required significant investment of both finances and time, especially in places in need of construction of physical infrastructure or allocation of alternative locations to accommodate the new courts.[65]

Given these difficulties, it seems decentralization was accompanied by very little aforethought over practical transitional matters. Although the government tried to portray the efforts as a benevolent gesture of "taking justice to the doorsteps of the poor," the practical implications of permanent decentralization were likely to pose grave and uncertain challenges. The complete lack of consultation with the legal community and failure to elicit public opinion also threatened the legitimacy of this decision. Although various lawyers of the Supreme Court Bar Association (SCBA) expressed concern over these measures, the Chief Justice continued to endorse decentralization in favor of the military-backed government.[66] With no support from the Chief Justice, a

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[63] *See* CONST. OF THE PEOPLE'S REPUBLIC OF BANGL. Nov. 4, 1972, art. 100.

[64] These are trial courts or local courts of first instance that are located in the districts. There are 64 districts in Bangladesh. Some districts, depending on size have more than one district court and therefore more than one bar association.

[65] Interview with Dr. Kamal Hossain, Senior Advocate (Sept. 11, 2013) (on file with author).

[66] The actions of the Chief Justice could be argued to have been partly motivated by self-interest. The relationship between the Chief Justice and the President was based on mutual political patronage. This is most manifest in the President's decision to change the retirement rules of chief justices in order to accommodate the sitting Chief Justice Mr. F.K.M.A Munim. The incumbent chief justice could only serve three years or up to the age of 62 years, whichever was earlier. However, this was rule was repealed by virtue of Proclamation Order No. IV of 1985. As a result, the incumbent remained loyal to the president, and in defiance of his own constituents continued to support the decentralized permanent Circuit benches, later renamed Sessions of the HCD. *See* Sara Hossain, *Confronting Constitutional Curtailments*, *in* ROUTLEDGE HANDBOOK

seriously aggrieved SCBA mobilized their national counterparts i.e. the district bar associations in protest.

The decentralization project due to its undemocratic implementation was perceived as a ploy to undermine the political power of the bar through physical dispersion, posing a near-existential threat to the legal profession.[67] The dissatisfaction with the regime's direct interference with the law profession and failure to reach an amicable solution on decentralization resulted in six years of direct action between 1982 and 1989. Throughout most of this campaign, the lawyers demanded resignation of the Chief Justice. Despite prolonged absence from presiding in court during 1987, the Chief Justice refused to resign unless asked to do so by the president.[68] During this time, the government also relentlessly pursued many lawyers through arrests,[69] harassment[70] and raids[71] and other strategies to suppress the movement.

Following what was widely perceived to be dubious elections between 1986 and 1988, the previously suspended constitution under martial law was restored by the regime.[72] In 1988, through the

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OF SOUTH ASIAN POLITICS: INDIA, PAKISTAN, BANGLADESH, SRI LANKA, AND NEPAL 193, 201 n.6 (Paul R. Brass ed. 2008).

67 *See* Huq, *supra* note 9, at 92.

68 The lawyers even went as far as forming a committee consisting of Dr. Kamal Hossain, Showkat Ali Khan, Amirul Islam, Abdul Baset Majumder, Alimuzzaman Chowdhury which drafted and attempted to personally deliver a letter demanding his resignation and expressing disapproval on behalf of all the lawyers. Several attempts were made to deliver it in April 1988, but since there were police deployed outside the Chief Justice's office, the lawyers were repeatedly refused entry.

69 In October 1982, twelve lawyers of the Supreme Court were arrested for carrying out protest activities under the auspices of the Supreme Court Bar Association. Police personnel forced entry into the office of the Supreme Court Bar Association and carried out searches and seized documents. *See* Supreme Court bar Association, Resolution dated 18 October 1982. In November 1987, the leaders of the Lawyers' Movement, Advocates Shamsul Haque Chowdhury and Ishtiaq Ahmed were arrested and detained up to March 1988. *See* Supreme Court bar Association, Resolution dated 12 and 26th November 1987 and various resolutions up to 8 March 1988. The same documents also refer to the lack of access to adequate medical services for Shamsul Haque Chowdhury on 24 February 1988.

70 Dr. Kamal Hossain was not allowed to travel abroad to participate in an international conference. *See* Supreme Court bar Association, Resolution dated 9 March 1988.

71 Raids in the residences of Advocates Aminul Haque, Alimuzzaman Chowdhury, Sirajul Islam Khan (then Bar President) and Kabirul Haider. *See* Supreme Court bar Association, Resolution dated 9 November 1987.

72 These elections were held in an effort to restore civilian rule, negotiate peace and address the resistance which the regime faced from different quarters around the country. However, the government was widely criticized for the elections due to the lack of participation of other parties and perceived fairness of the process. The Jatiyo Party founded by President Ershad won with majority seats in the parliament, severely antagonizing the other political parties who questioned the legitimacy of the government. Although the Awami League did participate in the

Constitution (Eighth Amendment) Act 1988, the decentralized HCD was constitutionalized.[73] The amendment established six permanent benches outside Dhaka and authorized the president to govern their territorial jurisdiction. Through this, the decentralized permanent benches were granted a fixed territorial jurisdiction and treated as sessions of the HCD outside Dhaka; while the HCD in the capital maintained residual jurisdiction.[74] The amendment, made at the height of contentious episodes both within the bar and other groups whose discontent with the regime had been growing since the early eighties, paved the way for the lawyers to frame their discontent into credible legal arguments. It gave them the opportunity to "speak law to power"[75] through what is now famously known as the Eighth Amendment case.

1. Speaking Law to Power: Anwar Hossain Chowdhury v. Bangladesh[76]

In 1988, a group of lawyers filed a writ petition challenging the actions of a court officer. The petitioner of the case was not allowed to swear-in affidavits in Dhaka. The court officer refused on the ground that the principal writ petition filed by the petitioner had been transferred to one of the permanent benches outside Dhaka, pursuant to the Eighth Amendment to the Constitution. As a result, the constitutionality of the amendment was challenged.

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elections in 1986, there were general discontent and serious questions regarding the fairness of the elections. Disenchanted with the government they eventually joined the other factions in the movement for democracy. ZIRING 1994, *supra* note 6, at 197-98, 209; Sara Hossain, *Confronting Constitutional Curtailments*, *in* ROUTLEDGE HANDBOOK OF SOUTH ASIAN POLITICS: INDIA, PAKISTAN, BANGLADESH, SRI LANKA, AND NEPAL, *supra* note 66, at 195.

[73] Original Article 100 of the Constitution of Bangladesh 1972 reads "Seat of the Supreme Court. The permanent seat of the Supreme Court shall be in the Capital, but sessions of the High Court Division may be held at such other place or places as the Chief Justice, may with the approval of the President, from time to time appoint." This was amended to reflect and perpetuate the decentralized structure and also granted powers to the President, in consultation with the Chief Justice, to assign areas of jurisdiction for these permanent benches. CONST. OF THE PEOPLE'S REPUBLIC OF BANGL., Nov. 4, 1972, preamble, art. 25, art. 100. The amended article also declared Islam as the state religion among other things. CONST. OF THE PEOPLE'S REPUBLIC OF BANGL. Nov. 4, 1972, art. 100, *amended by* The Eighth Amendment Act of 1988.

[74] Sara Hossain, *Confronting Constitutional Curtailments*, *in* ROUTLEDGE HANDBOOK OF SOUTH ASIAN POLITICS: INDIA, PAKISTAN, BANGLADESH, SRI LANKA, AND NEPAL, *supra* note 66, at 195.

[75] *See generally* Richard Abel, *Speaking Law to Power: Occasions for Cause Lawyering*, *in* CAUSE LAWYERING 69 (Austin Sarat & Stuart Scheingold eds., 1998).

[76] *Anwar Hossain Chowdhury v. Bangladesh* (1989) 41 DLR (AD) 165

Most of the petitioning lawyers were involved in the protests and actively participated in the ongoing campaigns against the establishment. According to Dr. Kamal Hossain, there were cautious calculations among his colleagues about several factors including their ability to locate a suitable petitioner willing to challenge the state, the timing of filing the petition and whether under the circumstances the judiciary would be willing to review the case at all.[77] However, over the lifespan of the movement and given the efforts of the lawyers to co-opt other members from the legal community, they were able to assess that most of the judges of the Appellate Division of the Supreme Court would likely support their cause even though the chief justice remained pro-regime.

In *Anwar Hossain Chowdhury v. Bangladesh,*[78] the main argument advanced against the unconstitutionality of the amended Article 100 was based on the basic structure doctrine,[79] akin to *Originalism* in American constitutional discourse, claiming that the framers of the Constitution intended to grant the HCD with plenary jurisdiction throughout the country in order to ensure uniform application of laws. It was argued that the eighth amendment destroyed the basic structure of the constitution by dispersing the plenary judicial power of the HCD. It also posed significant difficulties in determining territorial jurisdictions for existing cases, especially with regards to admiralty cases.

The HCD summarily dismissed the initial petition. However, the Appellate Division for the first time in Bangladesh's constitutional history by a 3-1 majority held a constitutional amendment to be unconstitutional.[80] The judgment recognized the judiciary as a basic and

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[77] Interview with Dr. Kamal Hossain, *supra* note 66.

[78] *Anwar Hossain Chowdhury, supra* note 62. Petitioning lawyers in this case included eminent jurists such as Dr. Kamal Hossain, Barrister Amirul Islam, Syed Ishtiaq Ahmed, Mahmudul Islam, Zakir Ahmed, and Kazi Shahabuddin Ahmed. In addition Asrarul Hossain and Khondker Mahbubuddin Ahmed, also highly respected senior lawyers, were enlisted as *amicus curiae.*

[79] The *Anwar Hossain Chowdhury* case was seemingly influenced by the Indian decision that first developed the basic structure doctrine in *Kesavananda Bharati v. State of Kerala* AIR 1973 SC 1461.

[80] *Anwar Hossain Chowdhury, supra* note 62. The Court only declared the Eighth Amendment unconstitutional insofar as the article concerned decentralization; it is important to note that the petition of the lawyers did not address and accordingly the Court did not, of its own initiative, consider the issue of declaring Islam as the state religion. The lawyers probably made careful considerations and made a strategic choice of addressing the issue that affected them the most. Addressing decentralization had more chances of ensuring unity and therefore success, while addressing religion may have divided the same group of people including the judges when they reviewed the case therefore reducing chances of success. Although, it can be speculated that the court could have taken a proactive approach and addressed the original constitutional basis of

structural pillar of the constitution that is fundamental to its entire configuration. The Court acknowledged the undemocratic nature of implementing decentralization in the absence of consultation with any stakeholders, lawmakers and the public. It also expressly recognized the legitimacy of the lawyers' movement.[81] Thus, the Supreme Court on finding that the permanent benches in practice reduced the quality of justice terminated them and transferred all the judges back to Dhaka, thereby restoring the plenary powers of the HCD.

2. *Significance of the Eighth Amendment Case*

a. Emergence of the Bar as a major power broker

The legal challenge against decentralization coupled with the political mobilization of lawyers played a significant role in catalyzing the national movement for democracy. By the time this case was argued in court, a substantial constituency of anti-government sentiment had built up[82] that eventually ousted the Ershad government. Analyzed through social movement literature, [83] Charles Tilly would probably deem the initial stages of this movement to be purposive as it was inward-looking. It only concerned the legal profession and the challenges the legal community faced due to decentralization. However, by articulating the basic tenets of constitutionalism in judicial terms and co-opting other actors, the movement turned outward-looking and causal. It converged with other protests from different quarters with the national democratic movement.

In the early eighties, the major political parties and civil society, though severely antagonized, had been weakened by military rule. Through their cause, the lawyers to a large extent not only mediated this weakness by catalyzing the debate around the need for democratic

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secularism; the judges were already on a revolutionary path by defying the pro-regime Chief Justice and the idea of considering religion may have divided and even delayed the ultimate decision.

[81] *Id.* at ¶ 254. The court referred to the Supreme Court Bar Association's resolutions which were presented to it, and noted the repeated protests to the Chief Justice and the President.

[82] The Ershad Government had antagonized not only opposition parties but by attempting large scale undemocratic reforms in other sectors such as education and labor, other segments such as students', teachers' and workers' associations were also aggrieved. *See* Huq, *supra* note 9, at 91-93.

[83] DOUG MCADAM, SIDNEY TARROW & CHARLES TILLEY, DYNAMICS OF CONTENTION 14-15 (2001).

processes, but were also at the forefront of creating a discursive space for the previously absent civil society. Over time the SCBA capitalized on political opportunities, employed various tactics, changed the rhetoric behind their protests and formed alliances with other groups opposing the regimes including political parties, student associations, doctors' associations and agricultural associations.[84]

Previously segmented actors including lawyers, judges, politicians, civil society members ordinarily divided in their ideologies united to achieve the common goal of establishing democracy.[85] The bar was perhaps the most natural mobilizing constituent for providing the necessary cohesion to unite different groups. The leaders of the bar commanded respect intellectually and professionally, having held previous ministerial positions and being active in politics since the seventies. In addition, having frequent contact with clients, intellectuals and advocacy groups by virtue of the law profession, the leaders of the bar were able to articulate a legal and political consciousness that enabled other constituents to participate in the political process. By 1989, several diffused pockets of contentious groups opposing military rule coalesced into one nationwide movement for democracy.

b. Judicial Empowerment

The Eighth Amendment case was a milestone for the Supreme Court for asserting its constitutional mandate. It significantly empowered the judiciary and had far-reaching implications for Bangladeshi constitutional politics. Supreme Court decisions after 1990 reflect a growing recognition among the judges about the past failings of the judiciary during military rule[86] and an increasingly liberal approach towards constitutional and social justice issues. In addition, the Supreme

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[84] *See* Supreme Court Bar Association Resolutions dated 7 and 14 June 1984; interview with Dr. Kamal Hossain, *supra* note 65.

[85] Aldon D. Morris & Suzanne Staggenborg, *Leadership in Social Movements*, *in* THE BLACKWELL COMPANION TO SOCIAL MOVEMENTS 171, 178 (David A. Snow, Sarah A. Soule & Hanspeter Kriesi eds., 2004).

[86] This is reflected in the Fifth Amendment Case where the Court once again declared martial law unconstitutional. *See Shahriar R. Khan v. Bangladesh* (1998) 18 BLD (AD). However, the Supreme Court has also been cautious in maintaining institutional harmony with other branches of government as reflected in *Mainul Hossain v. Sheikh Hasina* (2000) 21 BLD (HCD) 109 in which it dropping a contempt charge against the Prime Minister in the "greater interest of the country," thereby preventing a conflict between the Executive and the Judiciary.

Court expanded its rules on standing[87] and significantly consolidated its independence.

The development of constitutionalism through PIL has been largely successful in curbing executive transgression and securing a greater degree of autonomy for the judiciary. In *Ministry of Finance v. Md. Masdar Hossain and Others,*[88] the Court declared a formal separation of judiciary from the executive. This was followed by two more PIL cases initiated by lawyers in which the Court declared the Fifth[89] and Seventh[90] constitutional amendments to be unconstitutional invalidating prior martial law regimes. These latter cases indicate a progressive realization by the Supreme Court of its constitutional mandate, which in time gradually extended to social justice issues. As a result, the Supreme Court has rendered many notable decisions through liberal and creative interpretation of the constitution, including, environmental, preventive detention, and women's rights cases.[91] There

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[87] *See generally Farooque v Bangladesh, supra* note 53 (standing was expanded to cover any case in violation of any fundamental right of citizens, especially vulnerable and disadvantaged groups, or if there is public interest involving public wrong or public injury, any member of the public or an organization (irrespective of whether suffered directly as a result) may become a person 'aggrieved' for the purposes of instituting a PIL claim).

[88] (1999) 52 DLR (AD) 82. This was a class-action law-suit initiated by 223 judges of the lower judiciary against a discriminatory government order withdrawing judicial salary-related benefits. The Constitution mandates separation of judiciary from the executive in Article 22 and guaranteed functional independence of judges of all ranks including magistrates. CONST. OF THE PEOPLE'S REPUBLIC OF BANGL., Nov. 4, 1972, art. 22. Due to the legacy of magistracy inherited from the British Indian legal system, the magistrates' courts and the lower judiciary's autonomy had not been fully realized and they remained subject to executive control. The lower court judges were recruited through the public service commission and all related control over administration of the lower court was with the Executive. The administration consisted of both judicial service and civil service. In this case, the Supreme Court issued a twelve point directive regulating the appointment of judges, judicial services commission and judicial pay commission and formally separated the judiciary from Executive control under the doctrine of separation of powers.

[89] *Bangladesh Italian Marble Works Ltd v. Bangladesh* (2010) 62 DLR (HCD) 70. The Fifth Amendment was enacted during military rule between 1975-1979. During this period the military government amended the Constitution to validate all the laws and orders created during this time in order to legitimize the undemocratic regime. This was held unconstitutional by the Supreme Court.

[90] *Siddique Ahmed v. Bangladesh*, (2010) WP No. 696. The court held the second martial law regime (1982-1986) to be unconstitutional. During this period the military government amended the Constitution with the intention of legitimizing the regime by validating all the laws and orders created during this time under undemocratic conditions. This reflects a major shift in attitude since the Court's refusal to review, and hold the Fourth Amendment to the constitution to be unconstitutional on the same basis earlier in *Hamidul Huq Chowdhury v. Bangladesh* (1981) 33 DLR (HCD) 381.

[91] *See BLAST v. Bangladesh* (2008) 60 DLR (HCD) 234; *BLAST v. Bangladesh* (2007) 57 DLR (HCD) 11; *Bangladesh* (2006) 11 MLR (AD) 237; *BLAST v. Bangladesh* (2003) 55 DLR (HCD)

were also a number of *Suo Motu* judicial interventions, which reflect the Court's activism and motivations for upholding public interest issues.[92]

IV. THE CHANGING ROLES OF BAR ASSOCIATIONS AND THE EMERGENCE OF NGOS

A. POST-1990 DEMOCRATIC TRANSITION AND IMPLICATIONS FOR CIVIL SOCIETY

Bangladeshi society has traditionally fostered a philanthropic environment with deep-rooted values of charity and voluntarism embedded in its culture through both religious and social influences.[93] These social and cultural dispositions were perhaps most prominent in the aftermath of the war in 1971. While popular as opposed to partisan mobilization around political agendas has been episodic, one would readily find many instances of popular mobilization drawing in both civil society members as well as people from all echelons of society in major crises, such as natural or manmade disasters to which Bangladesh is unfortunately a frequent victim.

Since 1991 with the opening up of democratic space, the nature of civil society advocacy for social causes has significantly strengthened. While on the political stage, dominated by the state and the political parties, claims can still be made for clientelistic and kinship-based relations;[94] the domain of civil society comprising student groups, labor unions, chambers of commerce, NGOs, media, professional, and other social organizations has largely gravitated toward filling the lacunas of the state. The civil society after democratic transition became increasingly vociferous in mediating and guiding the democratic discourse. However, this is not to say that the nature of democratic

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363; *BLAST v. Bangladesh* (2005) 25 BLD (HCD) 83; *Ayesha Khanam v. BLAST v. Bangladesh* (2002) 22 BLD (HCD) 206.

92 *Pereira v. The State* (2001) 53 DLR (HCD) 414; *Shiplu v. The State* (1997) 49 DLR (HCD); *State v. Deputy Comm'r, Satkhira* (1993) 45 DLR (HCD).

93 *See* Farhat Tasnim, *supra* note 44, at iv.

94 *Id.*; Habib Mohammad Zafarullah & Mohammad Habibur Rahman, *Human Rights, Civil Society and Nongovernmental Organizations: The Nexus in Bangladesh*, 24 HUMAN RIGHTS QUARTERLY 1011, 1023-24 (Nov. 2002); Ferdous Jahan, *Public Administration in Bangladesh*, CTR. FOR GOVERNANCE STUDIES, Working Paper 1 (Dec. 2006), *available at* http://research.brac.net/workingpapers/jahan_public_administration.pdf; Shantanu Majumder, *Outcome of Democracy in Bangladesh*, CTR. FOR THE STUDY OF DEVELOPING SOCIETIES (2005), *available at* http://www.democracy-asia.org/qa/bangladesh/Shantanu%20Majumder.pdf.

discourse and civil society has matured to the level of a fully developed democracy; problems still remain in that the line between civil and political society can often become blurred.

CSOs have been accused of partisanship, polarization, and engaged in advancing elite as opposed to the genuine interests of the groups they represent.[95] Secondly, it may be claimed that the domain of politics, business, and civil society is now undergoing a kind of cross-fertilization. Those engaged in intellectual professions or philanthropic activities, at least in the sense non-profit activities are understood today, were usually from a broad section of the intelligentsia comprising the educated and wealthy or upper-middle class. Traditionally, involvement in these types of activity would indicate a familial nexus where for example, it was common for those from families of politicians, bureaucrats, or lawyers to enter state, legal, or academic professions. The divide between these professions and businesses were more pronounced and visible. However, in recent years it is increasingly becoming common for political elites to include members from business backgrounds as well as those from the military or bureaucracy.[96] For the legal profession in particular, those from wealthy business families are increasingly traversing the world of law and politics—many with a view to use legal practice as an economic or political platform.

Therefore, it may be argued that the dominance of the political elites has, to some extent, weakened and polarized the civil society. Concomitantly, it has shifted the public interest orientation of the legal profession. Bangladeshi civil society is largely dominated by various groups including lawyers and other non-state actors such as NGOs, academics, and other non-profit welfare-oriented organizations. The boundary between their activities can often be porous, implicating significant overlap. [97] As a result, social justice work frequently requires strategic and concerted effort among these actors.

B. LAWYERS AND BAR ASSOCIATIONS

The legal training and traditions that lawyers and judges of Bangladesh follow have significantly impacted the way social justice lawyering has developed. The leaders of the Eighth Amendment

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[95] *See* ROUNAQ JAHAN, *supra* note 43, at 164-65.

[96] Majumder, *supra* note 94.

[97] Farhat Tasnim, *supra* note 44, at 12.

movement were from a generation where legal practice was inaccessible for most of the populace. Many of them were primarily British educated barristers or locally trained lawyers from influential families with access to economic, social or political capital— often in the form of wealth, reputation or involvement in government or civil service.

These first generation lawyers were part of a profession widely perceived as privileged in the social context of the colonial history of the Indian subcontinent. Post-war reconstruction and subsequent democratization in Bangladesh presented opportunities which propelled them to the task of nation building. Accordingly, they not only engaged in private practice but also became state functionaries. Historically, the old elite reigned supreme both professionally and politically. The old profession, therefore, was characterized by patriotism as well as an elite disposition dedicated to nation building.

The national movement for democracy in 1990 was a product of unity of the bar and the civil society.[98] However, participating in a social movement when passions are high and sustaining the same passion once the contentious moment is over is markedly different. Once the state apparatus became structurally democratic, there were major shifts in the characteristics of the bar. Although there are instances which do reflect its empowerment,[99] the role of lawyers underwent changes with increased politicization within the legal community. The lawyers' identity remains in a fluid state in democratic Bangladesh, increasingly shaped by political affiliations rather than a genuine commitment to ideals of social justice, rule of law or democracy. Since 1990, annual bar elections that

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[98] Interview with Dr. Kamal Hossain, *supra* note 65.

[99] The SCBA is generally critical and vocal about matters pertaining to appointment of judges. For example, the chief ujstice's candidacy for assuming leadership of the judiciary has occasionally sparked national controversy. The ruling executive usually appoints the incumbent chief justice. The process of being put forward for selection by the government is prescribed by the Constitution, which as a matter of convention is generally made according to the order of seniority. In 2010 when Justice ABM Khairul Haque was made chief justice overriding the general practice and superseding two other judges before him, the selection process received much criticism from the bar and media. Therefore, matters concerning judicial independence do come under significant scrutiny and face legitimate resistance from the bar. M. Abdul Latif Mondal, *Averting controversy in appointment of chief justice,* THE DAILY STAR (Oct. 20, 2010), http://archive.thedailystar.net/newDesign/news-details.php?nid=157772. Similar criticisms and protests surrounded the nomination of former Chief Justice K.M Hasan as the Chief Advisor during the caretaker government in 2006; ultimately resulting in Justice Hasan declining to take the position amidst the controversies. Joyonto Acharjee, *KM Hasan not willing to become chief adviser to the next caretaker govt,* BDNEWS24.COM (Oct. 15, 2005 6:00 PM), http://bdnews24.com/politics/2005/10/15/km-hasan-not-willing-to-become-chief-adviser-to-the-next-caretaker-govt.

are instrumental for positioning the lawyers as effective leaders of social and political movements are most contentious, occurring openly under the patronage of the political parties. Currently the leadership of the bar does not command the same respect as it did during the Eighth Amendment movement as the coalition of lawyers are fractured along political lines.

The requisite support structure[100] required for successful legal mobilization remains weak in Bangladesh when dealing with purely social justice issues, absent a political motive. Public interest initiatives driven by bar associations often tend to be under-resourced and inconsistent. The change in the nature of leadership from the bar has resulted in a dearth of committed social justice lawyers. Prior to democratic transition, social justice issues were addressed by the bar association or individual lawyers and later increasingly at the initiative of the court. In the absence of any concrete state-supported legal aid mechanism, these efforts were mostly ad hoc and inconsistent.

C. THE RISE OF CIVIL SOCIETY AND NGOS

Although the rights revolutions[101] initiated by the lawyers' movement transformed the court into an independent and powerful institution and empowered the bar politically, it also led to a fundamental shift in support structures for law forming new patterns of behavior for pursuing social causes. Post-1990 saw a radical liberalization of economic policies, especially when it comes to foreign aid. In the wake of Soviet implosion, significant international development projects for legal reform and empowerment were underway as a measure for promoting economic growth, good governance, and human rights protection. Bangladesh, which has been aid-dependent since its inception, already had a strong presence of NGOs mainly targeting poverty alleviation and aid distribution schemes. However as it transitioned into a democratic state, NGOs gradually began to lend themselves as powerful agents promoting legal empowerment through an NGO-inspired model of social justice lawyering. This also allowed for providing systematic and efficient organization of legal aid.

One of the pioneering efforts of providing legal aid through this model was initiated in 1978 by the Madaripur Legal Aid Association

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[100] EPP, *supra* note 19, at 3.

[101] *Id.*

(MLAA) founded by Advocate Fazlul Hoque. In its early years MLAA operated as a court-oriented legal aid group. However, since 1983 MLAA adopted "Shalish" or mediation as its primary *modus operandi* and an effective substitute for the slow and expensive formal judicial system. Mediation provided a systematic and an alternative approach to accessing justice for local indigent clients through MLAA's trained team of staff lawyers. This model has been replicated by other NGOs in subsequent years but its adoption as a national model is constrained by various practical matters such as funding, sustainability issues and increasing donor as well as national priorities towards developing formal institutions. Although largely successful, this operation caters to only one part of the country and is not a large-scale countrywide operation.

There are a number of other NGOs that provide legal services nationally. For example, Ain O Shalish Kendra (ASK) provides a variety of legal services including conducting litigation and mediation to the urban and rural poor. Bangladesh Legal Aid Services Trust (BLAST)[102] provides legal advice and assistance in criminal, civil, land, and constitutional law matters. BLAST has also engaged in significant public interest litigation on criminal justice,[103] economic and social rights, equality issues, [104] and women's[105] and children's[106] rights leading to some major landmark judgments. Bangladesh National Women Lawyers Association (BNWLA) works on women's rights issues including advocacy and litigation. Bangladesh Environment Lawyers' Association (BELA) works on environmental issues, which also includes advocacy and litigation. Ford Foundation funding was largely responsible for the initial economic support of some of these NGOs during the 1990s that allowed them to expand their work. Soon other donors followed suit including the Danish International Development Agency, Department for International Development (UK), Australian Agency for International Development, United States Agency for International Development.

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[102] BLAST was established in 1993 funded by Ford Foundation and managed by a Board of Trustees comprising eminent jurists, lawyers, and former judges of the Bangladesh Supreme Court. *See* Stephen Golub, *From the Village to the University: Legal Activism in Bangladesh*, *in* MANY ROADS TO JUSTICE, *supra* note 21, at 142.

[103] *BLAST v. Bangladesh* (2003) 55 DLR (HCD) 363.

[104] *BLAST v. Bangladesh* (2008) 60 DLR (HCD) 234; *BLAST v. Bangladesh* (2005) 25 BLD (HCD) 83.

[105] *Khanam v. Bangladesh* (2006) 11 MLR (AD) 237.

[106] *BLAST v. Bangladesh* (2005) 57 DLR (HCD) 11; *BLAST v. Bangladesh* (2002) 22 BLD (HCD) 206.

These legal aid NGOs helped create alternative means of dispute resolution and policy advocacy in an attempt to address some of the grave access to justice concerns in Bangladesh. It also indicates an alternative mode of advancing social justice work instead of the traditional PIL-centered western legal sites it is normally associated with.[107] These NGOs have been instrumental in the proliferation of the legal aid movement in Bangladesh. In recent years, even some of the large traditional developmental NGOs such as BRAC have set up legal assistance programs that cater to a larger section of the country. However, these organizations are not automatons and much of their success is driven by the individual personalities and their commitment to social justice.

V. A SECOND WAVE OF PUBLIC INTEREST PRACTITIONERS

A. LAW AND DEVELOPMENT/POLICY PRACTITIONERS

A survey of events in Bangladesh reveal two waves of public interest lawyering. The first consisted of dissidents—lawyers taking risks, engaging in direct action, challenging the state and building the authority of law. The second consisted of younger lawyers who addressed social injustices by simultaneously tackling injustices and enhancing institutional access for the citizenry that is normally deprived of the most basic fundamental rights like economic empowerment and education. To these lawyers, factors impeding access to justice, the lack of legal aid and awareness were by themselves social justice concerns that needed to be addressed through institution-building and institution-strengthening measures. Instead of an isolated field, these practitioners perceive the law to be integral to the broader development discourse. Accordingly, many lawyers were and continue to be closely involved with the legal aid movement. Most of them have been active in human rights work both inside and outside the courtroom deploying various strategies to guide public interest discourses. Their actions are inspired by several factors perceived to be contributing to a problematic justice system. These include for example, the lack of awareness of basic rights, distance and expenses to travel to and from the court and judicial delays

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[107] *See* Hershkoff, *supra* note 23.

in a heavily backlogged court system.[108] In addition, "the absence of accountability of the legal profession and rudimentary systems of professional monitoring and perception of corruption in at least the lower tier of the judiciary"[109] further undermines the confidence in the formal legal system.

The failure of traditional development efforts towards poverty eradication, in part, inspired the establishment of several legal aid NGOs aiming to make the justice system more accessible.[110] Further, the advocacy generated by these social justice practitioners operating within the realm of law and development, significantly influenced the establishment of large-scale reform projects and key justice sector institutions such as the Judicial Administrative Training Institute, the Law Commission of Bangladesh and the National Human Rights Commission etc. Recently, significant donor funding has also diverted to the state-run legal aid models such as the National Legal Aid Services Organization (NLASO). This is a positive step towards the development of state-run institutions, which are designed to be more sustainable than funds-dependent NGOs.

Many of these practitioners are involved in advisory roles within NGOs and foreign donor organizations. On the one hand, they drive advocacy and dialogue and on the other they use the courts as a forum for contestation when necessary. An early example of such a lawyer includes the late Advocate Salma Sobhan, one of the founders of ASK and a dedicated human rights lawyer, whose efforts led to many successful law reform campaigns.[111] ASK, now under the leadership of Advocate Sultana Kamal, went on to address many social justice issues.[112] ASK along with BLAST, BNWLA etc. were also at the forefront of the women's rights movement in Bangladesh and have made

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[108] By the latest account, the number of backlogged cases nationally is close to 2.3 million cases. Ashutosh Sarkar, *Backlog of cases*, THE DAILY STAR (Mar. 18, 2013), http://archive.thedailystar.net/beta2/news/backlog-of-cases/.

[109] Shahdeen Malik, *Access to Justice: A Truncated View From Bangladesh, in* COMPREHENSIVE LEGAL AND JUDICIAL DEVELOPMENT 93, 96 (Rudolph V. Van Puymbroeck ed., 2001).

[110] *Id.* at 94.

[111] Salma Sobhan even went on to win the US Lawyer's Committee Human Rights Award. Salma Sobhan awarded Human Rights Award, HUMAN RIGHTS FIRST, http://secure.humanrightsfirst.org/about_us/award_dinners/2001_dinner/sobhan.htm (last visited Jan. 30, 2014).

[112] Public Interest Litigation, AIN O SALISH KENDRA (ASK), http://www.askbd.org/web/?page_id=668 (a list of PIL cases filed by ASK).

significant contributions to legal reform, including crucial pieces of legislation such as the Domestic Violence Act 2010.

BLAST was founded by a collaborative effort of first and second generation lawyers. Ford Foundation initially approached Dr. Kamal Hossain, one of the leaders of the Eighth Amendment movement, whose vision led to the mobilization of other eminent lawyers and judges as trustees of BLAST. Fazlul Huq of MLAA and Dr. Shahdeen Malik (see below) were instrumental in setting it up and translating Dr. Hossain's vision into reality.[113] Barrister Sara Hossain is currently leading the NGO and has been involved in many successful PILs on various social justice issues including women's rights.[114] While the Legal Aid movement was advancing, the campaign for environmental justice also made significant progress through the contributions of the late Dr. Mohiuddin Farooque, a Supreme Court lawyer and founder and Secretary General of BELA.[115]

Interestingly, many of these lawyers are foreign trained – mostly in Britain – but a small segment has been trained in the former Union of Soviet Socialist Republics. The Cold War hegemonic efforts of both the United States and Union of Soviet Socialist Republics also extended to Bangladesh in the form of promoting educational scholarships, although United States was a less common destination for legal education. The legal training in the United Kingdom consisted of an undergraduate LL.B with a post-graduate vocational training at the end of which graduates would be called to the bar as *Barristers* affiliated with their respective inns of court. The USSR training, on the other hand, was a mostly multidisciplinary graduate degree over several years consisting of various modules of philosophy, jurisprudence, and other social sciences. This latter group is heavily involved in academia and policy work as well as the courts. This includes for instance, Professor Shah Alam and Professor Mizanur Rahman, who were previously in academia but have been subsequently appointed as chairman of the Law Commission and Human Right Commission of Bangladesh respectively and; Dr. Shahdeen Malik, who is simultaneously involved in legal practice, civil society activities, academia and research. In addition to initially setting

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[113] Golub, *supra* note 102.

[114] BLAST vs. Bangladesh (63 DLR 1); Adv Salauddin Dolan vs. Bangladesh (63 DLR 80); Rayana Rahman vs. Bangladesh (63 DLR 305).

[115] *Farooque v Bangladesh*, *supra* note 53 (establishing that non-governmental organizations (NGOs) have legal standing to enforce environmental laws). This was a positive step for environmental justice but it also expanded general rules on standing of NGOs as petitioners for PIL.

up BLAST, he has conducted numerous PILs in a wide range of issues including access to justice, habeas corpus, and extra-judicial killings.[116]

B. STRATEGIES AND TACTICS

These practitioners, irrespective of their educational backgrounds share some common qualities. In addition to their main fields of work, they undertook separate initiatives to promote legal aid and invested their social and legal capital in furthering social change. They were instrumental in employing the rhetoric of human rights to recognize access to justice as an essential precondition for development. Thus, they were able to bring issues such as the rule of law, independence of judiciary, due process, equality, and non-discrimination to the forefront of the national policy agenda.

The success of this kind of work requires employing various strategies and tactics. Often outcome of the lawyers' efforts rests on managing the delicate balance between advocacy and PIL. For instance, advocacy work entails interactions with a diverse set of stakeholders including state officials, judges and others. In politically-charged environments, maintaining a non-partisan conversation between these groups with competing ideologies could pose significant difficulties. The balance is often struck by ensuring bi-partisan participation[117] in order to ensure success both inside and outside the courtroom. Accordingly, regular conferences, seminars, and stakeholder dialogue continues to be an important way to familiarize stakeholders with potential reforms agendas. This type of interaction was especially useful in the early nineties as they made NGOs less of a foreign presence in Court to judges previously unfamiliar with their work. From a PIL perspective, this helps in both sensitizing the judiciary to novel issues and assessing the prospects for jurisprudential advances.[118]

NGOs such as ASK, BLAST, and others have employed full-time staff of lawyers in their respective chapters around the country. They often operate within and maintain links with national as well as regional and international networks, which help in resolving local disputes and advocating for policy reform. These types of initiatives may

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[116] *Idrisur Rahman v. Bangladesh* (2008) 60 (HCD) 714; *Advocate Ruhul Quddus v. Justice MA Aziz* (2008) 60 DLR 511; *The State vs. Roushan Mondal alias Hashem* (2007) 59 DLR 72.

[117] Helen Hershkoff & David Hollander, *Rights into Action: Public Interest Litigation in the United States*, *in* MANY ROADS TO JUSTICE, *supra* note 21, at 89, 90.

[118] Golub, *supra* note 102, at 134-35.

be compared, in terms of their efficiency structure and operation, to the likes of NAACP and ACLU in the United States. However, an apparent problem is the dependence on foreign funding. When their funds are exhausted, they generally have to be scaled down and are limited to locally supported initiatives which are ad hoc and inconsistent. Some lawyers in private practice, in response to flagrant abuse of human rights or specific public interest issues, often try to fill the gap by engaging in pro bono services. Others extend limited assistance through advisory roles to NGOs, involvement in the local community or due to particular issues being fervently covered by a consistently strengthening and emerging media.

NGOs make generous use of the media, both in connection with and independently of litigation in order to build constituencies, enhance public awareness by highlighting systemic problems and human rights abuses, which in turn generates pressure and encourages government response. Both print and electronic media regularly report important court cases, cover policy discussions, and, more recently, publicized mainstream development work on law and judicial reform.[119] In addition, it has introduced rights or constitutional rhetoric within the national discourse, which was fairly uncommon outside the legal community in Bangladesh unlike that of the United States for example.

Social justice lawyers, therefore, employ a combination of strategies including media, advocacy, resource-mobilization and litigation. However, assuming multiple strategic roles can often be counter-productive as they are required to simultaneously undertake various activities in addition to their main occupation. As a result, even though they are dedicated and heavily invested in their work, it affects the consistency of their efforts and limits their ability to contribute to policy reform, academia or otherwise provide a knowledge-based legacy from which future generations could learn. The critical mass needed for doing this kind of work as well as contributing to academia and policy prescriptions simply does not exist. Additionally, pre-litigation advocacy and litigation are often just the first step toward social change. These cases require post-litigation advocacy and enforcement. However, most of the time it is difficult to consistently advocate for a social cause after the litigation stage if, for instance, the lawyers' workload increases, a new issue comes up or in case of NGOs, the donor priority changes. As a

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[119] *See* Shakhawat Liton, *Judicial Reforms: Philippines Model*, THE DAILY STAR (July 9, 2011), http://archive.thedailystar.net/newDesign/news-details.php?nid=193430.

result, even though certain cases had positive outcomes, their enforcement will take a very long time.

C. NEXUS BETWEEN THE BAR AND CIVIL SOCIETY

The task of pursuing social justice both precedes and transcends PIL. Accordingly, the role of lawyers in Bangladesh is not merely inside the court but includes many other activities that are mostly outside it. Unlike developed democracies, the advocacy efforts cannot simply end with issue-specific campaigning but must also address systemic reform or attend to the enforcement needs of a particular issue in order to implement a particular law or a court decision. In this regard, lawyers are not alone in using the law to address social concerns.

Non-lawyers also use the law as part of an integrated strategy for establishing social justice. A good example of this is an NGO called Banchte Shekha, led by Angela Gomes who has worked for many years to build women's economic, organizational, and educational empowerment through awareness, training, and mediation. In a country of more than 150 million people where large sections of the population are living in poverty and rural areas, the number of lawyers serving this population is a meager forty-four thousand.[120] Therefore, where first-responders are concerned on legal assistance matters, they usually tend to be NGO staff (which could consist of both practicing and non-practicing lawyers as well as those who are not lawyers) or other non-lawyer social advocates and leaders in the community. These actors use the symbolic power and authority of law to settle local disputes, advocate or provide information, or assist those in need of alternative dispute resolution (ADR) sites. Often, this type of work might not even require adjudication by a formal court but it will have a positive impact on local communities, especially those living in remote or rural areas where access to legal services or advice is limited. The need for an actual trained lawyer and the interaction with the formal justice system will be a concern, if at all, at a much later stage.

When dealing with issues that do require access to the formal justice system, NGOs will normally work very closely with lawyers

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[120] Since no published figure from the Bar Council exists, this is an approximate figure based on interview notes with Zahirul Islam Khan, former Chairman of Human Rights and Legal Aid Committee of the Bangladesh Bar Council, internal UNDP reports prepared by the author during personal work experiences in Supreme Court and Bar Council related development projects between 2009-2011 (on file with author).

either through maintaining a panel of lawyers as part of their management, board or staff. In many cases there may not be any PIL at all, rather the task of advancing causes will require policy level advocacy by lawyers and ground level legal assistance through first-responders and NGO staff lawyers. Thus, there is a close nexus between social justice lawyers and other members of the civil society who often share the same goal and are part of the broader civil society.

The affiliation of lawyers with the civil society makes it relatively easy for them to mobilize resources from both communities, as opposed to someone strictly in legal practice or strictly involved with an NGO. However, a politicized bar and an often factious civil society may lead to competing ideologies playing out in unpredictable ways. For instance, various quarters of the civil society may often operate within individual *coteries,* where their support for certain issues would be based on their respective political agendas or priorities.[121] Often these groups may also disagree on their interpretations and degree of employing a human rights-based rhetoric as opposed to constitutional rights-based advocacy as the bar and the civil society tend to perceive the two types of advocacy very differently. Additionally, NGO-led initiatives often focus on specific issues in isolation instead of taking a political-economy approach to large-scale reforms. Moreover, development agencies typically rely on normative conceptions of the state apparatus as well as civil society, which often results in donor preference and project objectives dictating the causes to be pursued.[122]

While NGOs, media, and the human rights rhetoric have certainly inspired the second wave of lawyers and refashioned the use of PIL, the dependence on foreign funding is a constant threat to their sustainability. Although, Ford Foundation's departure resulted in a temporary funding vacuum that was quickly replaced by other donors, in most cases such discontinuity requires significant scaling down of operations or even changing the causes to be followed.[123] Nevertheless, since the nineties the growth of the legal aid movement has been

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[121] This is perhaps best-evidenced by the arrest of Adilur Rahman Khan, Secretary Odhikar (NGO). Although both bar and civil society protested for a comrade's arrest, their support was certainly quite cautious due to his domestically perceived links to the right wing opposition party BNP, largely through his previous affiliations with anti-government alliances and his role as Assistant Attorney General during past BNP regimes, http://newagebd.com/rssdetail.php?date=2013-08-13&nid=60760&nomobile=1#.UxDNqfmSx1Y

[122] *See* Farhat Tasnim, *supra* note 44, at 3.

[123] BLAST is a good example where a temporary funding crisis led to significant scaling down in the late 2000s, http://www.blast.org.bd/content/anualreport/annual-report2009.pdf

exponential, which consequently generated pressure for reforming the formal justice system. Legal aid NGOs continue to provide remedial measures for state failures in addressing access to justice, while the activism of the judiciary and liberal rulings on social justice has enhanced the formal due process perception, often even compelling governmental reform.[124] However, these are temporary solutions which are not sustainable in the long term.

D. THE WAY FORWARD: SYSTEMIC REFORM AND LEGAL EDUCATION

The demographic distribution, social and economic orientation, and the still-continuing understanding of the legal profession as an investment or political platform already predisposes lawyers to fail to identify with the interests of the poor or disadvantaged. In addition, the traditional legal discourse in Bangladesh, like many of its South Asian neighbors, considers law to be autonomous and self-contained. The nature of legal education is generally based on a black-letter approach of expounding doctrine instead of examining social problems through interdisciplinary or empirical approaches. Local legal education lacks clinical training and professional responsibility components that are vital for preparing and motivating lawyers for social justice practice.

The number of lawyers admitted into the profession has been growing since the nineties, which includes both foreign-trained and local lawyers. In addition, the number of public and private educational institutions has also increased; many of whom despite resource constraints are producing competent candidates.[125] Pursuit of a British legal education continues as a matter of tradition and prestige, but of those returning, most tend to look to the profession for a return on their investment in very expensive foreign education or as a stepping stone to a political career. Thus there is a need for significant state investment in legal education, particularly clinical and ethical components.

Currently critical reflection and sensitivity on the legal needs of the poor comes from a small number of social justice lawyers who are involved in additional work outside of mainstream legal practice or they are non-practicing lawyers. Legal practice in Bangladesh is highly elite-driven and competitive with a relatively saturated clientele where the lawyers seldom have the time, sensitivity or economic inclination to look

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[124] Malik, *supra* note 109, at 96.

[125] *Id.* at 97.

outside the realm of practice. Even legal academia largely operates as an isolate with very little to offer in terms of critical thinking. Although occasionally on some issues there could be overlap in their work, these professional categories largely operate under different normative settings and economic conditions with very little mutual correspondence and reflexivity.[126] There is currently no medium for transposing the social justice lawyers' sensitivity to those in practice. There is no significant effort from the Bar Council or the associations in encouraging the lawyers in non-profit activities like pro bono representations. Again, significant state investment in legal education, systemic reform and depoliticization of the profession may address some these gaps.

Absent new directions in legal thought and initiative, the formal legal system will continue to be marginalized. These institutions require transformations that will restore citizen confidence. Alternative sites of dispute-resolution outside the court have become attractive but these are neither comprehensive nor sustainable. Nevertheless, if state-run institutions are strengthened and legal aid is made easily accessible to more people, it has the potential to generate demands for placing accountability and monitoring mechanisms within the judiciary and the legal profession.[127] Currently there are many legal and judicial reform programs, many of which have increasingly become state-institution focused. However, the lawyers being one of the most important constituents of that conversation have been marginalized. The few lawyers working within the civil society quarters, though really dedicated and resourceful, are too few in numbers. Therefore in order to reach a critical mass, the legal profession needs a systemic revival that is grounded in public service values and academic inclination.

VI. CONCLUSION

In Bangladesh, legal practitioners have played a central role in nation-building, state politics and administration for decades. Traditionally, prominent political leaders of Bangladesh and erstwhile India and Pakistan have emerged from the legal profession. Bangladeshi lawyers experienced a generational shift and formed new patterns of pursuing social causes. The first generation may be argued to have undergone a "legal revival" or rather a continuation of nationalist fervor

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[126] *See* Gandhi, *supra* note 34, at 108-10.

[127] Malik, *supra* note 109, at 96.

of anti-colonial sentiments, challenging the state through dissent and focusing heavily on building the authority of law. The second generation equipped with human rights and development rhetoric viewed the law as an essential prerequisite to human development, capacities and freedom. Accordingly, their work focused much more on enhancing access to justice for the poor by strengthening justice and legal aid institutions. Between these generations of lawyers they represent social and political movements, marginalized groups, and those engaged in institution-building.

The investment in legal development has led to the expansion of ADR models such as those of MLAA, in addition to extending the reach of legal services through first-responders. Actors operating within these alternative sites include both qualified (but often non-practicing) lawyers as well as concerned citizen advocates who use the authority and symbolic power of law to advance social causes. In most cases, they will resolve a dispute locally or advocate for protecting legal rights but these activities are often very unlikely to involve the formal courts.

This reflects a significant divergence between this model of pursuing social justice and the conventional Western conception of advancing social justice through PIL. Considering that informal mechanisms are central to enhancing access to justice for those most in need of it in Bangladesh and similarly-situated countries, should traditional categories of lawyering, social justice and public interest be revisited? Or will it be possible to subsume this manner of pursuing social justice within Sarat and Scheingold's definition of 'cause lawyering'? Redefining the parameters of lawyering for social justice may help provide a better understanding of the contextual realities and challenges to access to justice that impact the way social justice is pursued in many parts of the world.

It is also important to take into account the imposition of entire legal superstructures in countries like Bangladesh, which has resulted in the uncritical reproduction of institutions, processes, inherited doctrines and acculturated legal education and practice. Studying historical factors may help discern the continuities and variations between these colonial and post-colonial modes of practice.[128] Accordingly, legal scholarship focusing on the legal profession and social justice practitioners requires investigation of historical factors and their implications for future changes.

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[128] Robin Luckham, *supra* note 32, at 308.