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PUBLIC INTEREST ENVIRONMENTAL LITIGATION AND ENFORCEMENT OF RIGHT TO ENVIRONMENT IN BANGLADESH: A COMPARATIVE STUDY FROM THE GLOBAL INTERSECTING APPROACH

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Abstract: In absence of a specific right to environment in international human rights instruments, international and regional courts investigate into the existing human rights norms in international instruments to prove the existence of a right to environment. This global trend of intersecting different human right norms to assemble a right to environment is mistaking the conceptual framework of right to environment resulting the national courts to adopt a disfigured approach to protect the right to environment. Bangladesh, not going a different way, is merely following the global trend of intersecting approach. This approach neither recognizes an inclusive right to environment nor offers a comprehensive alternative to the right to environment. Instead, it results in a multiplicity of judicial proceedings, disharmony in judicial interpretations, conservative attitude of court in dealing with environmental claims ensuing the right to environment as a subsidiary right etc. for bringing forth several complexities in the understanding and application of a right to environment. This paper will precisely describe the procedural history of public interest environmental litigation in Bangladesh in order to show how the intersecting approach has become a frequently used tool for enforcing a right to environment in the country. It will also foreground a discussion surrounding the global trend of reading together multiple enumerated human rights in international instruments in order to cobble together something resembling a right to environment and how this approach is contradictory to the fundamental nature of human rights. It will also discuss how the Supreme Court of Bangladesh is missteering by following the global trend of interpreting different constitutional fundamental rights together to assemble a right to environment. By examining the contemporary judicial approach of intersecting different existing fundamental rights to create a right to environment, this paper will argue for an emerging necessity for a judicially enforceable and comprehensively defined right to environment in the Constitution of Bangladesh.

Keywords: Right to Environment, Public Interest Environmental Litigation, Intersecting Approach, Human Rights Norms, Right to Environment and Sustainable Development Nexus, Bangladesh
Research Area: Environmental Law
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1. INTRODUCTION

The 15th Amendment to the Constitution of Bangladesh (hereinafter: Constitution) in 2011 incorporated in its Article 18A the constitutional recognition, though not judicially enforceable, for the protection and improvement of environment and biodiversity.[1] This can be identified as a groundbreaking success of continued efforts by some *pro bono* Non-Governmental Organizations (hereinafter: NGOs), lawyers, and civil society members working on the protection and improvement of environment. The constitutional recognition, however, is not producing the intended outcome as still a petitioner with an environmental claim cannot

seek the protection of Article 18A. Fundamental Principles of State Policy(hereinafter: FPSP) in Part II comprising Article 8 to Article 25 are set forth to be the guiding principles for the interpretation of the Constitution and other laws and not to be enforceable before a court.[2] In absence of a specific enforceable environmental right, the Supreme Court of Bangladesh has been intersecting different constitutional fundamental rights such as right to life, right to protection of law etc. to enforce the environmental claims.

While there have been some successful environmental litigations approbating the environmental claims, the question of the existence of a right to life remains still unsettled. Having been persuaded by environmental NGOs as well as lawyers in several public interest litigations (hereinafter: PIL), the Supreme Court of Bangladesh has extended the meaning of right to life to include a pollution free healthy environment for the comprehensive enjoyment of life. This interpretation of right to life cannot comprehensively address a right to environment, given that a right to environment stands as an independent and inherent right with some significant issues included with it. Much difference has not been seen after the insertion of Article 18A in the Constitution. Taking into account the judicial interpretations to date along with the Article 18A may form the groundwork for the understanding of a subsidiary right to environment in Bangladesh. But a fully-edged right to environment is far from being reached. Before insertion of Article 18A, the demand was to insert an Article on the right to environment in Part III of the Constitution comprising fundamental rights with full enforcement.[3]Article 18A may play a merely decorative role in the Constitution, it is not satisfying the intended purpose. A petitioner with an environmental claim still has to seek the remedy under the provisions of fundamental rights, such as right to life, right to protection of law etc. particularly after successfully convincing the court that his claim falls within the scope of any of the fundamental rights.

The intersecting approach for a right to environment adopted in Bangladesh is not a problem with Bangladesh only, this trend is apparent in many international and regional environmental litigations. In absence of a specific right to environment in international human rights instruments, international and regional courts investigate into the existing human rights norms in international instruments to prove the existence of a right to environment. This approach is mistaken for many reasons as human rights are universally recognized to be inherent and to exist independently. Thus, the existence of human rights does not derive form the wording of international instruments nor State constitutions. This global trend is mistaking the conceptual framework of right to environment resulting in the national courts to adopt a disfigured approach to protect the right to environment. Bangladesh, not going a different way, is merely following the global trend of intersecting approach. This approach neither recognizes an inclusive right to environment nor offers a comprehensive alternative to the right to environment. Instead, it results in a multiplicity of judicial proceedings, disharmony in judicial interpretations, conservative attitude of court in dealing with environmental claims ensuing the right to environment as a subsidiary right and so forth.

In these circumstances, a separate right to environment in Part III (Fundamental Rights Part) of the Constitution, comprehensively defined and judicially enforceable, may be a solution to many ongoing environmental problems in Bangladesh.

This paper will give a precise background of the public interest environmental litigation (hereinafter: PIEL) in Bangladesh in order to demonstrate how intersection approach has become a frequently used tool for the protection and preservation of environment in Bangladesh. It will also foreground a discussion surrounding the global trend of reading together multiple enumerated human rights in international instruments in order to cobble together something resembling a right to environment and how this approach is contradictory to the fundamental nature of human rights. It will also discuss how the Supreme Court of Bangladesh has missteered by following the global trend of interpreting different constitutional fundamental rights together to assemble a right to environment. By examining the contemporary judicial approach of intersecting different existing fundamental rights to create a right to environment, this paper will argue for an emerging necessity for a judicially enforceable and comprehensively defined right to environment in the Constitution of Bangladesh.

2. BACKGROUND OF THE PUBLIC INTEREST ENVIRONMENTAL LITIGATION (PIEL) IN BANGLADESH

Public Interest Litigation, shortly called PIL, has developed to be the most effective way to provide accessible remedies in environmental degradation in Indian Sub-continent. It is the most frequently used strategy to realize environmental rights in Bangladesh. Generally defined, PIL is the litigation in the interest of the Public. The development is owed to numerous mechanisms such as the relaxing of *locus standi*, *suo moto* actions, interpreting the law congenial to environmental protection.

Primarily only an aggrieved party could seek a remedy, others not personally affected were unable to go before courts as proxies for the victim or aggrieved party. If there was no personally affected individual at all, generally, there would be nobody to seek remedy against certain actions, even if these actions were in violation of law.[4]But from the case study, we see that in course of time the Supreme Court of Bangladesh changed its view and the question of *locus standi* was settled. For the first time, *locus standi* was relaxed in *Kazi Mukhlesur Rahman v. Bangladesh* in 1974 (popularly known as *Berubari Case*), which is considered as the starting point of PIL in Bangladesh.[5] The Court decided that the question is not whether there is right to sue but whether the petitioner is competent to claim a hearing

However, the process of development of PIL was thwarted when the constitutional order was disrupted by *coup d'état* in 1975 and 1982 owing to intermittent de-clothing of the constitutional jurisdiction of the superior judiciary in Bangladesh. After democracy resumed in 1991, over the years, with the contribution of, inter alia, *Dr. Mohiuddin Farooque v. Bangladesh and others* [6] (hereinafter: Radiated Milk Case) and *Dr. M.Farooque v. Bangladesh*[7](hereinafter: *FAP-20 Case)*, PIL has evolved into an effective tool to control acts of environmental degradation in Bangladesh. These cases will be discussed in detail later.

With its own growth, the concept of PIL got more enriched. Public Interest Environmental Litigations (PIEL), simultaneously, gathered its own strength and equipped a stream of cases to knock the door of the court in the form of PIL. PIEL had its own role to play as well in the development of PIL. A good number of environmental as well as large-purpose NGOs actively sought PIL to establish an environmental claim and resulted in the recognition of both PIL and PIEL. Remarkably, judges appreciated the efforts of environmental lawyers in a number of occasions.[8]

Bangladesh Environment Lawyers' Association (hereinafter: BELA), Bangladesh Poribesh Andolon (BAPA), Poribesh Andalon Bangladesh (POBA), Bangladesh Environment Network (BEN) etc. are working hard to bring strong judicial pressure on broadening the understanding of right to environment in Bangladesh. Additionally, many large general-purpose NGOs also now have environmental components e.g. Bangladesh Legal Aid and Services Trust (hereinafter: BLAST) and Ain o Salish Kendra (ASK).

BELA, amongst others, has been playing a significant lead role in contesting environmental issues in Bangladesh. Since its inception in 1992, BELA has been involved in plenty of environmental litigations under the representation of Dr. Mohiuddin Faroque (sometimes spelt as Dr. M. Faroque) and some other prominent environmental lawyers of Bangladesh. After *Radiated Milk Case* and *FAP-20 Case*, BELA has been contesting in 20 environmental litigations of which The Supreme Court pronounced judgments in 11 litigations and 9 litigations are pending.[9] In addition, BELA provides legal assistance in environmental matters to other organizations. In addition to BELA, BLAST has been contesting in a wide range of litigations. 2 environmental litigations of BLAST have been disposed of and 11 are pending before the Supreme Court.[10]Though the flow of environmental cases has been reduced due to the establishment of a separate Environmental Court (Hereinafter: ENC) in 2010, the ENC has been designed to address some specific issues. Consequently, the substantial number of environmental claims remain outside the scope of environmental claim. Notwithstanding how much power is given to the ENC, a right should be derived from and protected by the constitution. Additionally, the ENC is being debated for a lot of procedural issues, such as restricted cognizance taking power, limited jurisdiction to redress a claim etc. As a consequence, in absence of a specific constitutional environmental right, still, petitioners seek remedy before the Supreme Court of Bangladesh in the form of PIEL.

NGOs and lawyers have been playing their role substantially by bringing the environmental issues before the court in the form of PIEL under the possible existing provision of the Constitution. In a number of opportunities, the judiciary, however, has missed out on the opportunity to further substantiate the right to environment although many constitutional interpretations have come with the hands of PIEL.

3. UNDERSTANDING OF RIGHT TO ENVIRONMENT AND GLOBAL INTERSECTING APPROACH

The general understanding of right to environment is ever evolving. The Stockholm Declaration 1972 for the first time denoted a person's mandatory stake in the environment. The

Stockholm Declaration signified on the "adequate conditions of life, in an environment of a quality that permits a life of dignity and wellbeing". It also acknowledged the present generation's "solemn responsibility to protect and improve the environment for present and future generations". The Declaration, though, moulted the right to environment under other fundamental rights such as freedom and equality, it formed a stepping stone for a broad understanding of right to environment. In its simplicity, this Declaration contained all the elements for the combination of ecological and human rights approaches to the question of environmental protection. It recognized that the enjoyment of freedom and equality among human beings is inseparable from the preservation of an environmental quality which permits human dignity and human welfare.[11]

Later, the understanding of right to environment was not notably furthered at Rio Conference 1992.The Rio Conference on environment and development ended up with a Declaration which substantially departed from the idea of a link between human rights and environmental protection.[12]The Rio Conference insisted on the economic issues associated with climate change and overlooked the human rights implications of it. The Council of Europe adopted a Manual on Human Rights and the Environment in 2005 which takes stock of the growing jurisprudence of the ECHR on the subject and lays down a set of general principles which have a direct impact on the adjudication of environmental claims which are based on specific Conventional rights such as the right to life, property, a fair hearing, as well as private and family life.[13]In 2015, the inclusion of human rights in the Preamble to the Paris Agreement is a step forward as it is the first binding global environmental treaty to include a specific provision on human rights, however, it is being argued as incommensurate with the scale and urgency of climate change.[14]In addition, the Paris Agreement is being argued as a new avenue for human rights-sustainable development nexus – optimistic for global environmental movement.[15]Yet, there was also a disappointment because the reference was only in the preamble and not in the legally binding portion of the Agreement.[16]Though international instruments do not contain any specific right to environment expressly, the right to environment at the interventions of the courts emerged with far-reaching implications. The question whether existing human rights norms are the proper legal tools for dealing with the increasing degradation of the environment has now become timely.[17]

While climate change and environmental degradation may have plenty of human rights inferences, such as, immature death, destruction of livelihoods, diseases, displacement, adversities on biodiversity and so forth, the right to environment encompasses something unique that cannot be seen from the silos other human rights perspectives. The discourses surrounding nature and society divide, indigeneity, participation and intergenerational equity place it outside the purview of other human rights. There is a general agreement that viewing environmental protection through a human rights lens leads States toward choices that promote human dignity, equality, and freedom while simultaneously improving environmental policies.[18] Anyone looking for a clear articulation of a human right to an environment under enumerated human rights in international and regional conventions, however, is destined for disappointment.[19] Invoking human rights in an era of environmental crisis raises the question

of whether there is a relevant human right to invoke, given that there is no specific right to environment either in the existing international human rights instruments or in the international environmental conventions.[20]

Of course, even in the absence of a specific right to environment, it is possible to read together multiple enumerated rights in the international human rights instruments to cobble together something resembling a right to environment.[21] Something akin to a right to environment emerges at the intersection of some or all of the rights to life, property, food, water, culture, and health.[22]The trend in apparent in international and regional litigations. In 1989 in Loizidou v. Turkey, the European Court of Human Rights (hereinafter: ECHR) recognized in its jurisprudence the relationship between the protection of human rights and the environment and indirectly the degradation of the environment affects human rights.[23] In Loizidou v. Turkey, the ECHR stated to refer the European Convention of Human Rights that "The Convention is a living instrument which must be interpreted in the light of the current conditions in which it is well established in the case-law of the Court". This relationship has become a preoccupation of the international community, which has realized that environmental degradation affects the community and, consequently, its rights to a clean environment. [24]Afterwards, the ECHR examined an impressive number of complaints in which individuals have stated that a violation of one of their Conventional rights has led to the emergence of negative environmental factors[25]. Similarly, the Inter-American Commission on Human Rights has recognized a direct relationship between the quality of the environment in which persons live and enumerated human rights.[26] In 2001 in *Mayagma Sumo Awas Tigni Community v. Nicaragua, the* Inter-American Court of Human Rights, in spite of the lack of any express reference to communal property in the text of American Convention on Human Rights, interpreted the right to property as inclusive of the customary community entitlement of the indigenous people to use their ancestral land for agriculture and hunting, and to have it respected against the environmentally and culturally destructive project of commercial logging.[27]The African Commission on Human and Peoples' Rights in *Soc. and Econ. Rights Action Centre v. Nigeria* in 2001 concluded that an environment degraded by pollution and defaced by the destruction of all beauty and variety is as contrary to satisfactory living conditions and development as the breakdown of the fundamental ecological equilibria is harmful to physical and moral health.[28]

The right to environment that emerges at the intersection of enumerated human rights norms, however, are tentative and contrived leading to many complexities.[29]In the language of Rebecca Bratspies, "perhaps the greatest flaw" in this approach is that "it creates a temptation to view human rights as emerging from international law and also to believe Conventions create rather than ratify human rights. This kind of analysis lends itself to the conclusion any right not enumerated does not exist."[30]Bratspies further claims that this approach puts environmental rights in tension with other human rights and inadequately confronts the so-called environmental Kuznet curve —an economic theory that suggests a priority of economic development over environmental protection.[31]

Human rights are not created by the words enshrined in the international conventions nor they are emerged of court rulings interpreting a convention or constitution. Instead, human rights exist inherently independent of codification and/or rectification.[32] The inherent and independent characters of human rights have been widely recognized in international human rights instrument including the 1948 Universal Declaration of Human Rights, two human rights covenants in 1966 and almost by all the UN agencies. If there should exist a right to environment it must exist independently without the intersection of rights to life, property, food, water, culture, health etc.

As discussed earlier, discourses surrounding nature and society divide, indigeneity, participation, intergenerational equity, horizontal and vertical responsibility in environmental claims etc. place it outside the purview of other human rights Though a right to environment has not been expressly recognized in international instruments, some issues associated with the right to environment have been widely discussed and accepted in different international and regional conventions and to academics. These issues highly demonstrate how a right to environment is naturally distinct from other human rights and why there should be existence of a separate right to environment.

3.1 Right to Environment as a Collective Right

As introduced by *Karel Vasak*, he categorized the right to environment as a collective right apart from the traditional economic, social and cultural rights, and civil and political rights. [33] *Vasak's* interpretation puts "the right to a healthy and ecologically balanced environment" into the third generation of human rights. According to *Vasak*, "collective rights are those which can be exercised only with the co-operation of a group."[34] An individual, however, is not deprived of his individuality and each right simultaneously continues to be an individual right.[35]*Vasak's* interpretation led to some international and regional instruments to recognize collective environmental rights. The Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters in Europe to establish a number of rights of the public (individuals and their associations) with regard to the environment.[36] United Nations Declaration on the Rights of Indigenous People has overreaching implications for indigenous collective environmental rights.[37] Banjul Charter on Human and Peoples in Africa recognizes the collective right of all people to a general satisfactory environment favorable to their development.[38]

3.2 Intergenerational Equity

We have seen that Stockholm Declaration acknowledged the intergenerational equity by stressing on present generation's responsibility to protect and improve the environment for present and future generations. Intergenerational equity is a concept that bridges the members of the present generation and with other generations, past and future, in terms of owning and exploring the natural and cultural environment of the Earth. It urges that we inherit the Earth from previous generations and have an obligation to pass it on in reasonable condition to future generations.[39]It is apparent that though the concepts of collective right and intergenerational equity exist independent of each other, in the environmental context they share some elements

in common and cannot be exercised without the functional protection of other one. Intergenerational equity and intragenerational equity are linked in this context.[40] We hold the natural and cultural environment of the Earth in common with other members of the present generation as well as future generations.[41]When environment of a particular region or country is affected in any way, it affects collectively and individually all members of present generation of that region and it passes on the consequence to the forthcoming generations. When right to environment is extensively referred and gradually accepted as a collective right, it includes the collective interest of present generation as well as future generations. After the Stockholm Declaration, there have been some international instruments in the last few decades that have contained language indicating either a concern for sustainable use of the environment or a concern for future generations.[42]The 1972 London Ocean Dumping Convention, the 1973 Convention on International Trade in Endangered Species, and the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage include a concern for future generations. [43] A comprehensive right to environment, however, is inclusive of intergenerational equity, even if the language of the right to environment is not articulated to explicitly refer it.

In addition to these, there are some other issues like horizontal and vertical responsibility in environmental claims, participatory rights etc. Included in a right to environment.

4. ENFORCEMENT OF RIGHT TO ENVIRONMENT AND PIEL IN BANGLADESH

As discussed above, the global trend of intersecting a set of human rights to create a right to environment has been booming in the environmental litigations in Bangladesh. Though no specific reference has been found from ECHR litigations or Inter-American Commission on Human Rights except some decisions of Indian Supreme Court in the early environmental litigations in Bangladesh, lawyers and environmental NGOs those brought environmental claims before the Supreme Court of Bangladesh have grabbed the idea of global intersecting approach.

Having been persuaded by environmental NGOs and lawyers, the Supreme Court of Bangladesh has pronounced many judgments concerning the protection of environment and biodiversity till date. While litigating environmental issues, the judiciary in Bangladesh appears to follow the global trend of cobbling together the existing enumerated human rights. The judicial interpretation of right to environment is supposed to have experienced two phases. The first phase should have ended once the Constitution incorporated Article 18A in 2011. In pre-Article 18 phase, the judiciary seemed to depend on provisions of Fundamental Rights given in Part III of the Constitution, especially provisions of right to life and right to protection of law, to assemble a right to environment.[44]However, after the incorporation of Article 18A in 2011, no significant decision has been noticed concerning the environmental issues from the Supreme Court of Bangladesh. Only one decision has been given in post-Article 18A phase where Article 18A was not a much help. The decision will be discussed later. In post-Article 18A phase, the judiciary still remains dependent on the provisions of Fundamental Rights,

though Article 18A eases the way of interpretation by functioning as a guiding principle, provided that Article 18A was intended to function as a guiding principle only.

In response to an environmental claim, the Supreme Court of Bangladesh seems to frequently resort the provision of right to life given in Article 32 of the Constitution. Article 32 of the Constitution reads "No person shall be deprived of life or personal liberty save in accordance with law".[45] In other cases, the Supreme Court resorts other provisions of Part III comprising fundamental rights, particularly those closely related property, profession and human wellbeing. In most of the environmental litigations, lawyers or petitioners played a lead role to convince the judiciary that right to life guaranteed in the constitution is not limited to the mere protection of longevity of life but it extends to many issues for the full enjoyment of a comprehensive life.

4.1 Right to Environment Under the Canopy of Right to Life

In 1996, *Dr. Mohiuddin Farooque v. Bangladesh and others* (as referred "Radiated Milk Case") involved a petition against the consumption of food items containing radiation levels above the approved limit.[46] The Court agreed with the petitioner and extended meaning of the right to life to include a right to a decent environment. The court held that:

> "Right to life is not only limited to the protection of life and limbs but extends to the protection of health and strength of workers, their means of livelihood, enjoyment of pollution-free water and air, bare necessaries of life, facilities for education, development of children, maternity benefit, free movement, maintenance and improvement of public health by creating and sustaining conditions congenial to good health and ensuring quality of life consistent with human dignity"[47]

In *Radiated Milk Case*, the court held that the State is bound to protect the health and longevity of the people living in the country as of right to life guaranteed under Article 32 and right to protection guaranteed under Article 31 The court held that right to life equates to protection of health and normal longevity of man free from threats of man-made hazards and the court can enforce the provision of right to life to remove any unjustified threat to the health and longevity of the people.[48]

After the *Radiated Milk Case* of 1996, one of the most landmark cases in the history of both public interest litigation and environmental protection was pronounced in 1998, namely, Dr. *M.Farooque v. Bangladesh*[49] *(referred as FAP-20 Case).FAP-20 Case* questioned the legality of an experimental structural project of the huge Flood Action Plan (FAP) in Bangladesh. The petitioner alleged that FAP is an anti-environment and anti-people project. That FAP is adversely affecting and injuring more than a million people by way of displacement, causing damage to soil and destruction of natural habitat, of fishes, flora and fauna.[50] In *FAP-20 Case*, the Supreme Court held that the protection and preservation of environment, ecological balance, freedom from pollution of air and water, and sanitation, without which life can hardly be enjoyed, are within the ambit of the constitution of this country. The court refers Articles 31 and 32 of the Constitution to include the protection and preservation of environment, ecological balance, free from pollution of air and water, sanitation

without which life can hardly be enjoyed. Any Act or omission contrary thereto will be violative of the said right to life. In *FAP-20 Case,* one progress can be seen from the Radiated *Milk Case* that the court extended the meaning of right to life to include the protection and preservation of environment, ecological balance, free from pollution of air and water and also considered the displacement, causing damage to soil and destruction of natural habitat, of fishes, flora and fauna as contrary to the right to life.[51]

In 2003, *Dr. M. Farooque v. Secretary, Ministry of Communication, Government of the People's Republic of Bangladesh and 12 Others*[52] (hereinafter: Air and Noise Case) involved a petition against various ministries and other authorities for not fulfilling their statutory duties to mitigate air and noise pollution caused by motor vehicles in the city of Dhaka.[53] The petitioner argued that although the Constitution does not contain any specific right to a safe and healthy environment, this right is inherent to the right to life. The Court agreed with the petitioner. This case identified many issues of environmental degradation, pollution of natural resources on which the survival of life is dependent.[54]

4.2 Right to Environment as A Subcomponent of Other Fundamental Rights

In addition to right to life, the court interpreted the environmental issues under the spectrum of several other fundamental rights e.g. protection of law under Article 31, right to property under Article 42, equality before law under Article 27 and freedom of profession and occupation under Article 40. In *Radiated Milk Case,* the petitioner sought the protection against radiated and contaminated food under the constitutional protection of law given in Article 31. Article 31 safeguards all people living within the territory of Bangladesh from an action detrimental to the life, liberty, body, reputation or property of any person. The Court in *Radiated Milk Case* interpreted Article 31 that contaminated food and drink, be it imported or locally produced, undoubtedly affects health and threatens life and longevity of the people. In *FAP-20 Case,* the court interpreted freedom of profession and occupation under Article 40 to mean a profession not detrimental to life and health. In this case, the court also upheld the people's right over their own property under Article 42.

4.3 Intergenerational Equity and Collective Right

In *Radiated Milk Case,* the court recognized the collective nature of environmental claims by recognizing the petitioner as a prospective consumer of imported radiated milk having a direct interest in the matter in dispute.[55] In the Air and Noise Case, the court granted the petitioner's claim being seriously concerned and aggrieved by air and noise pollution.[56]However, the petitioners had to prove their interest in the dispute in order to prove their right to sue in environmental claims.

Though in previous cases the court recognized the environmental rights as collective rights, the concept of intergenerational equity was non-existent. In 2004, however, in *Bangladesh Paribesh Andolan and another v. Bangladesh (hereinafter: National Assembly Area Case)* questioned the legality of construction of residences for Speaker and Deputy Speaker of the Parliament within the National Assembly Area violating the original plan. The place comprises a park and open space that is the only open space for people living surrounding

the National Assembly area. In this case, the court observed that the "right to have open space, parks, waterbodies, etc. are rights accruing to Nature and the Environment, which it is the bounden duty of the State to preserve for the sake of future generations." [57] The court also stressed on the attachment of local community and local inhabitants with an open space, park, school, lake etc. and ruled that the Government cannot do anything detrimental to the benefit of local community in these components. This case indicates a progress from previous cases as the court could successfully address intergenerational equity.

4.4 Post-Article 18A Phase

Only one decision has been disposed of by the Appellate Division of the Supreme Court of Bangladesh Article 18Awas inserted in the Constitution in 2011, namely, *Metro Makers and Developers Limited and others v. Bangladesh Environmental Lawyers' Association (BELA) and others* (hereinafter: *Flood zone Case*). *Flood zone Case* questioned the legality of Sub-Flood Flow Zone, known as SFFZ, of Dhaka Metropolitan Development Plan (DMDP) for the Dhaka city on the plea that it involves issues for the protection and preservation of environment. The petition was filed in 2004 and the High Court Division of the Supreme Court of Bangladesh pronounced its decision in 2005 declaring the Sub-Flood Flow Zone illegal and against the right to protection of law under Article 31 of the Constitution. In the appeal, the Appellate Davion sustained the trial court's decision in 2013. The Appellate Division declined to intersect Article 18A as the petition was filed before the Article 18A was incorporated into the Constitution.[58]

5. ASSOCIATED CHALLENGES OF INTERSECTING APPROACH TO THE RIGHT TO ENVIRONMENT IN BANGLADESH AND CONCLUDING REMARKS

Part III of the Constitution of Bangladesh that comprises fundamental rights does not contain any environmental rights, the only provision dealing with environmental protection is Article 18A of the Constitution of Bangladesh, which talks about the protection and improvement of the environment. The provision talks about safeguarding the natural resources, bio-diversity, wetlands, forests and wild life for the present and future citizens, thus recognizing the concept of intergenerational equity. The judicial enforcement of Article 18A, however, was taken away under the Article 8 of the Constitution read with the decision given the *Kudrat-E-Elahi Panir v. Bangladesh*, popularly known as Fundamental Principles of State Policy case.[59]As set forth in Article 8, Article 18A will have some interpretative implications only while litigating environmental claims. [60] In the absence of adequate recognition of environmental protection as a right itself, the environmental lawyers seem to strive for a guarantee in the judicial pronouncements. For individuals with environmental claims, the right to life seems to be the most useful option with a chance of success, particularly considering the successful extension of its ambit to include environmental claims.[61]As observed from all cases mentioned, the petitioners must pass the *locus standi* argument in order to establish that their environmental claims trigger the scope of right to life or right to protection of law under Part III of the Constitution. Therefore, it is evident that Article 18A will not be pleasing the purpose of protecting environment and biodiversity as petitioners will always have to enforce their environmental claims under the provisions of fundamental rights in Part III.

The judicial interpretation of the right to environment has been evasive and evidently very indirect. The court has had several instances to recognize the existence of a separate right to environment under the head of right to life, but our judiciary opted for an anthropocentric approach to right to environment either deliberately or unintentionally.

This attitude was reflected in the *Radiated Milk Case*. In the *Radiated Milk Case*, the court contributed in stretching the meaning of right to life from protection of life and limbs only necessary for full enjoyment of life to the inclusion of protection of health and normal longevity of an ordinary human being. The judgment referred to the protection of two vital elements of the environment, namely, water and air, however, there was no mention of the protection of environment and biodiversity as a whole. Although the protection of water and air received a rather neglectful mention, that took shelter under the broad phrase of "unjustified threat to the health and longevity of the people".[62]

In *FAP-20 Case*, where the judiciary adopted a holistic approach, and while interpreting the fundamental rights, taking account of the policy statements, preamble and other provisions of the Constitution. Both the High Court Division and Appellate Division expanded the meaning of fundamental right to life to include protection and preservation of the ecology and right to have pollution free environment.[63]The court assessed whether right to livelihood falls under the definition of right to life but similar to other cases did not speak anything about right to environment from the broad spectrum. The interpretation of the judiciary did not ponder on the comprehensive understanding of right to a healthy environment rather it merely talked about environmental and ecological damage. The court declined, however, to interfere with the FAP project as foreign assistance was involved and the whole project was meant to be for the benefit of the public. Moreover, it took account of the substantial amount of money that has been spent and that the project has been partially implemented. From the judgment, it is not clear how much environmental damage the court was prepared to tolerate in the name of development.[64] It also raises the concern that the illusion of the existence of right to environment under the canopy of right to life is misleading us. If there were constitutional guarantee of right to environment, could the court decline to interfere in the FAP project.

The judiciary could have utilized the *Air and Noise Case* brilliantly where the petitioners raised the ground of environmental protection. But unfortunately, the court did not delve into interpreting the issue of air pollution pertaining to the Constitutional rights and albeit a good number of environmental laws were mentioned, there was no analysis of the situation in the contrast with those laws. Rather, it is submitted that the focus was more emphasized on the Motor Vehicles Ordinance 1893. Ironically, the writ petition filed by an environment activist organization Bangladesh Environmental Lawyers Association (BELA) did not have a single mention of the word "environment". The interpretation of the court remained confined if not deviated within the boundaries of protection for human life. However, as compared to the previous two cases, a comparative development can be seen in this judgment of year 2002.

In all cases discussed, in absence of a specific environmental right, the petitioners purposefully attempted for the embodiment of right to environment under other broad constitutional rights those have already developed through judicial interpretation over the

years. While dealing with environmental matters, the most common remedies offered by the court were injunction, and declaration.[65] While granting relief in the foregoing cases, court seemed to be more conservative to grant civil or criminal damage or and take proactive action. Whether or not the *status quo* should be maintained in this regard is a different question altogether.

The judiciary stresses the need for harmonious interpretation of the Constitution to ensure environmental protection. Given the foregoing barriers in the legal system, litigation ought not to have been a viable option for environmental protection in Bangladesh.[66]The interpretation of a court is never inclusive. We see how court is progressively expanding the scope of right to life and protection of law under Article 31 and 32 to include environmental rights. In the course of progressive interpretation, however, the court is missing the harmony. In all of the cases mentioned, common stance of the court can be identified where the concept of "right to environment" for once has not been mentioned nor recognized. In spite of dealing with issues endangering the environment, the opinions of the judiciary found haven in the judicially enforceable right to life. Incidentally, the judiciary being motivated in defining the ambit of right to life, has not been so intrigued in exploring the recognition of right to environment itself under Article 32 of the Constitution of Bangladesh.

As discussed in section two in the part of global intersecting approach, the intersecting approach itself is contradictory to the basic nature of human rights. While this approach is booming in environmental litigations in Bangladesh, it is creating similar problems as it creates in the conceptual understanding of the right to environment from international perspective. This approach inadequately addresses right to environment resulting in tension with other enumerated human rights norms and letting environmental harms grow bigger in a vacuum. As we have seen that the Paris Agreement has expressly recognized a right to environment, though debated, the global intersecting approach is finding a way out for a separate right to environment. The circumstance suggests a bold step forward to considering an enforceable and comprehensive right to environment for Bangladesh.

Otherwise, if the approach of intersecting enumerated rights to cobble something that may resemble like a right to environment is taken for granted as the sole practice of protecting environmental rights in Bangladesh, a bunch of environmental claims will remain unheard, thus, unsolved. Without doubt, it is more desirable for any jurisdiction to develop laws, policies, and an enforcement climate that upheld wholesome environmental protection beyond court-mediated settlements.[67]

It can be concluded that if not today, it will be too late to consider a constitutional right to environment. A constitutional guarantee of a judicially enforceable and comprehensively defined environmental right may be an answer to a lot of ongoing questions related to country's numerous environmental disputes. Bangladesh is reportedly a leader in global environmental negotiations by adopting and implementing several proactive environmental policies, actions and initiatives. The necessity for a judicially enforceable and comprehensively defined right to environment is not a lame-fabricated claim, instead as timely as approaching storms of environmental problems in the country. While judiciary missed in a number of opportunities

to enforce a right to environment explicitly, the opportunity is not exhausted. The world is moving forward to the sustainable development-human rights nexus that may be stronger and wider than a mere human right to environment. In this circumstance, the Supreme Court of Bangladesh may play a proactive role by pressuring the government to enforce a separate right to environment and moving forward to judicial interpretation of sustainable development-right to environment nexus.

Notes:

[1] Article 18A of the Constitution states to mean that the State shall endeavor to protect and improve the environment and to preserve and safeguard the natural resources, bio-diversity, wetlands, forests and wild life for the present and future citizens". The Constitution of the People's Republic of Bangladesh, art. 18A (Bangla.), http://bdlaws.minlaw.gov.bd/sections_detail.php?id=367&sections_id=41505.

[2] Article 8(2) of the Constitution states to mean that the principles set out in this Part (Part II comprising Fundamental Principles of State Policy from Article 8 to Article 25) shall be fundamental to the governance of Bangladesh, shall be applied by the State in the making of laws, shall be a guide to the interpretation of the Constitution and of the other laws of Bangladesh, and shall form the basis of the work of the State and of its citizens, but shall not be judicially enforceable. Cons. Art. 8(2) (Bangla.),

http://bdlaws.minlaw.gov.bd/sections_detail.php?id=367&sections_id=24556.

[3] Article 26 of the Constitution states to mean that all existing laws inconsistent with the provisions of this Part (Part III comprising Fundamental Rights from Article 26 to 47A) shall, to the extent of such inconsistency, become void on the commencement of this Constitution. The State shall not make any law inconsistent with any provisions of this Part, and any law so made shall, to the extent of such inconsistency, be void. Cons. Art. 26 (Bangla.), http://bdlaws.minlaw.gov.bd/sections_detail.php?id=367&sections_id=24574.

[4]Badsha Mia and Kazi Shariful Islam, *Human Rights Approach to Environment Protection: An Appraisal of Bangladesh*, 22 J. of Law, Policy and Globalization, 59, 60 (2014), https://www.iiste.org/Journals/index.php/JLPG/article/viewFile/11048/11349.

[5]Kazi Mukhlesur Rahman v. Bangladesh (1974)26 DLR (HCD) 44 (Bangla.).

[6]Dr. Mohiuddin Farooque v. Bangladesh and others (1996*)* 48 DLR (HCD) 438(Bangla.).

[7]Dr. Mohiuddin Farooque v. Bangladesh and others (1998) 50 DLR (AD) 84 (Bangla.).

[8] *See*Dr. Mohiuddin Farooque v. Bangladesh and Others (1998) 50 DLR (HCD) 84, 88 (Bangla.) accord Dr. Mohiuddin Farooque v. Bangladesh and Others (2003) 55 DLR (HCD) 69, 77 (Bangla.)

[9]Bangladesh Environmental Lawyers' Association, *Public Interest Litigation (PIL)*, Activities, http://www.belabangla.org/legal-notices/.

[10]Bangladesh Legal aid and Service Trust, *Right to Safe and Healthy Environment*, Issues, https://www.blast.org.bd/issues/environment.

[11] Francesco Francioni, International Human Rights in an Environmental Horizon, 21(1) European J. of Inter. L, 41, 43 (2010), https://academic.oup.com/ejil/article/21/1/41/363366.

[12]Id at 44.

[13]Id at 44.

[14] Sam Adelman, *Human Rights in the Paris Agreement: Too Little, Too Late?,* 7(1) Transnational Envir. L. 17, 17-26 (2018), https://www.cambridge.org/core/journals/transnational-environmental-law/article/human-rights-in-the-paris-agreement-too-little-too-late/DAAB2024F6454BE12B5B2AC3B34C6506.

[15]Sumudu Atapattu, *The Paris Agreement and human rights: is sustainable development the 'new human right'?* 9(1) J. of Human Rights and the Envir. 68, 69-78 (2018), https://www.elgaronline.com/abstract/journals/jhre/9-1/jhre.2018.01.04.xml.

[16] Megan Rowling, *Keep Human Rights in U.N. Deal to Secure Climate Justice: Robinson*, REUTERS, Dec. 8, 2015, http://www.reuters.com/article/us-climatechange-summit-rightsidUSKBN0TR29J20151208.

[17] Francioni, supra note 11, at 45.

[18]U.N. Docs. HRCOR, Rep. of the Human Rights Council, Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, U.N. Doc. A/HRC/31/52, para. 12 (2016), https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session31/Documents/A%20HRC%2031%2052_E.docx.

[19]Rebecca Bratspies, *Claimed Not Granted: Finding a Human Right to a Healthy Environment*, 26(263) *Forthcoming Law and Transnational Problems*, 263, 268 (2017).

[20]Id.

[21]Id.

[22]Hung v. Slovak (1997) I.C.J. 88, at 91.

[23]Oana M. Hanciu, Aspects Regarding the Relationship Between Human Rights And The Environment, 3 Law Review: Judicial Doctrine & Case-Law, 2073, 276 (2017) (Union of Jurists of Romania)

[24]Id at 278.

[25]Council of Eur. Manual on Human Rights and the Environment, Publishing, 8 (2012).

[26] Inter-Am. Comm'n H.R., Report on the Situation of Human Rights in Ecuador, OEA/Ser.L/V/II.96, doc. 10 rev. 1, ch. VIII, para. 2 (1997).

[27] Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Inter-Am. Ct. H.R., (Ser. C) No. 79 (2001), http://www.corteidh.or.cr/docs/casos/articulos/seriec_79_ing.pdf.

[28]*Soc. and Econ. Rights Action Centre v. Nigeria,* Afr. Comm'n H. Peoples' R. (2011), *Soc. and Econ. Rights Action Centre v. Nigeria.*

[29]Hanciu, supra note 21, 271.

[30]Bratspies, supra note 19, 271.

[31]Hanciu, supra note 21, 268.

[32]Id at 272.

[33] Karel Vasak, *Human Rights: A Thirty-Year Struggle: The Sustained Efforts to give Force of law to the Universal Declaration of Human Rights, in* UNESCO Courier 30:11, (1977).

[34]Karel Vasak, The International Dimensions of Human Rights, 18(Vol. 1 Philip Alston ed. 1982)

[35]Id

[36]U.N. Eco. Comm'n Eur. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (1998), http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf .

[37] U.N. Docs. United Nations Declaration on the Rights of Indigenous Peoples (2006), https://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf .

[38]Afr. Comm'n H. Peoples' R. African Charter on Human and Peoples' Rights, art 24, http://www.achpr.org/instruments/achpr/#a24.

[39] Sharon Beder, The Nature of Sustainable Development,Vic., (2nd ed. 1996), https://www.uow.edu.au/~sharonb/STS300/equity/meaning/integen.html.

[40]Edith B. *Weiss, Climate Change, Intergenerational Equity, and International Law,* 9 Vt. J. Envtl. L. 615-627 (2008), https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=2637&context=facpub.

[41]Edith B. Weiss, *Intergenerational equity: a legal framework for global environmental change, in* Environmental change and international law: New challenges and dimensions, 8 *(*Edith B. Weiss ed. 1992), http://www.vedegylet.hu/okopolitika/Brown%20Weiss%20-%20Intergenerational%20equity%20UN.doc.

[42] For a review of the extent to which international agreements concerned with conservation of natural and cultural resources contribute to the protection of future generations, *see E* Brown Weiss, "The Planetary Trust: Conservation and Intergenerational Equity," 11 *Ecol.* L. Q., 495, 540-563 (1984).

[43]Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft (1972), 26 U.S.T. 2403, T.l.A.S. No. 8165; Convention on International Trade in Endangered Species of Wild Fauna and Flora (1973), 27 U.S.T. 1087, T.l.A.S. No. 8249; Convention Concerning the Protection of the World Cultural and Natural Heritage (1972), 27 U.S.T. 37, T.l.A.S. No. 8226.

[44] Article 31 of the Bangladesh Constitution guarantees the right to protection of law. To enjoy the protection of the law, and to be treated in accordance with law, and only in accordance with law, is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Bangladesh, and in particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law. Cons. Art. 31 (Bangla.).

[45]Cons. Art. 32 (Bangla),

http://bdlaws.minlaw.gov.bd/sections_detail.php?id=367&sections_id=24580

[46]Dr. Mohiuddin Farooque v. Bangladesh and others (1996*)* 48 DLR (HCD) 438 (Bangla.).

[47]Dr. Mohiuddin Farooque v. Bangladesh and others (1996*)* 48 DLR (HCD) 438, 346 (Bangla.).

[48]Dr. Mohiuddin Farooque v. Bangladesh and others (1996*)* 48 DLR (HCD) 438, 244-345 (Bangla.).

[49]Dr. Mohiuddin Farooque v. Bangladesh and others (1998) 50 DLR (AD) 84, 87 (Bangla.).

[50]Dr. Mohiuddin Farooque v. Bangladesh and others (1998) 50 DLR (AD) 84, 93-94 (Bangla.).

[51]Dr. Mohiuddin Farooque v. Bangladesh and others (1998) 50 DLR (AD) 84, 87-88 (Bangla.).

[52] Dr. Mohiuddin Farooque v. Bangladesh and 12 Others (2003) 55 DLR (HCD) 69, 776-77 (Bangla.).

[53] Dr. Mohiuddin Farooque v. Bangladesh and 12 Others (2003) 55 DLR (HCD) 69, 77 (Bangla.).

[54] Dr. Mohiuddin Farooque v. Bangladesh and 12 Others (2003) 55 DLR (HCD) 69, 77-79 (Bangla.).

[55]Dr. Mohiuddin Farooque v. Bangladesh and others (1998) 50 DLR (AD) 84, 889 (Bangla.)

[56] Dr. Mohiuddin Farooque v. Bangladesh and 12 Others (2003) 55 DLR (HCD) 69, 70-71 (Bangla.)

[57]*Bangladesh Paribesh Andolan and another v. Bangladesh* (2006)58 DLR (HCD) 441, 444 (2006) (Bangla.)

[58] Metro Makers and Developers Limited and others v. Bangladesh Environmental Lawyers' Association (BELA) and others (2013) 65 DLR (AD) 98 (Bangla.)

[59]Kudrat-E-Elahi Panir v. Bangladesh (1991) 44 DLR (AD) 31(Bangla.)

[60]See supra note 2

[62] Dr. Mohiuddin Farooque v. Bangladesh and others (1996*)* 48 DLR (HCD) 438, 346 (Bangla.).

[63]*Dr. Mohiuddin Farooque v. Bangladesh and others (1998)* 50 DLR (AD) 84, 93-94 (Bangla.). The Appellate Division (1998) stated: "Article 31 and 32…[e]ncompass within its ambit, the protection and preservation of environment, ecological balance free from pollution of air and water, sanitation without which life can hardly be enjoyed. Any act or omission contrary thereto would be violative of the said right to life. (Para 101, Chowdhury J.). The High Court Division49 DLR (HCD) 278, 282 (1997) stated: "right to life…includes the enjoyment of pollution free water and, air, improvement of public health by creating and sustaining conditions congenial to good health and ensuring quality of life consistent with human dignity."

[64]Dr. Mohiuddin Farooque v. Bangladesh and others (1998) 50 DLR (AD) 84, 889 (Bangla.)

[65]*See* Dr. Mohiuddin Farooque v. Bangladesh and others (1998) 50 DLR (AD) 84, 889 (Bangla.) and Dr. Mohiuddin Farooque v. Bangladesh and 12 Others (2003) 55 DLR (HCD) 69, 70-71 (Bangla.)

[66] Md. Saiful Karim, Okechukwu Benjamin Vincents and Mia Mahmudur Rahim, *Legal Activism For Ensuring Environmental Justice, 7(1)* Asian J. of Comparative Law 13 (2012), https://eprints.qut.edu.au/61471/4/61471.pdf.

[67]Id at 20.

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