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Manuscripts submitted for publication must be in three copies, double-spaced typescript or electronic print-out on A4 size (8.5"×11") white sheets with margins of 1" on all sides and pages consecutively numbered. The manuscript should have a title-page with the title of the article and the author's name, designation and contact address. The author's name or anything that may identify the author should not appear anywhere in the text paper. An abstract in English must be provided within 200-300 words at the beginning of the article. Submissions should be addressed to the Editor in Chief, Rajshahi University Law Journal, Faculty of Law, University of Rajshahi, Rajshahi 6205, Bangladesh.

How Lawfare and Public Interest signify in Defending Liberal Standing Rules in Challenging Environmental Decisions: A Study on Australia and Bangladesh

Md Atiqur Rahman*
Md. Mahfuzur Rahman**

Abstract: Both Australia and Bangladesh have judicial systems that allow for the judicial review of government decisions on environmental issues. The fundamental distinction between the jurisdictions is that in Australia, statutes confer upon courts the power of judicial review to justify executive actions relating to environment. Conversely, no statute proffers the power of judicial review upon the Bangladeshi courts to validate government decisions pertaining to environment. Courts in both countries primarily hinge upon the standing rules that control who is permitted to present an application before courts when it comes to the practice of the power of judicial review, stressing that the aggrieved person should have locus standi. This study analyzes the way to understand how courts in both jurisdictions expand standing rules in justifying executive decision on environmental issues contributing to advance public interest rather than incite lawfare. The central hypothesis of this study is that the liberal interpretation of standing rules serves the purpose of providing systematic and crucial information to the government aims to hold decision-makers accountable for making judgments on matters of national environmental significance. Ultimately, this safeguards public interest instead of triggering lawfare.

Keyword: Public Interest, Environmental Issues, Courts, Lawfare, Judicial Review

1. Introduction

In Australia, central government's decisions on the 'protected matters'¹ outlined in parts '6–9'² of the *Environment Protection and Biodiversity*

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¹ Under the Environment Protection and Biodiversity Act, 1999 (Cth) 'protected matters' refer to the matters on national environmental significance and the environment of Commonwealth land. The eight matters—world heritage properties, national heritage places, wetlands of international importance (listed

Conservation Act, 1999 (Cth) (EPBC Act) can be challenged before court. The only avenue to challenge government decisions, under the EPBC Act, is judicial review,³ which can be brought under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (AD(JR) Act).⁴ The meaning of the 'persons aggrieved' in the AD(JR) Act for the purposes of the application of that Act, is extended by s 487 of the EPBC Act to providing legal legs to any person aggrieved, instead of traditional common law principles of the persons with special interests in the subject matter of the suit, to sue challenging the executive decision. The court primarily hinges upon the standing rules that control who is permitted to present an application before courts when it comes to the practice of the power of judicial review;⁵ reflecting that the 'persons aggrieved' should have standing.⁶ However, the statutes that discuss the rights of judicial review do not necessarily outline the precise meaning of 'persons aggrieved'.⁷

Unlike Australia, Bangladesh lacks any specific legislation that empowers judiciary to conduct a judicial review of government decision pertaining to environmental issues. The process in the jurisdiction is entirely driven by the multiple judicial precedents that

under the Ramsar Convention), migratory species protected under international agreements, listed threatened species and ecological communities, Commonwealth marine areas, the Great Barrier Reef Marine Park, and nuclear actions (including uranium mines) bear national environmental significance which are protected by the EPBC Act. Protected matters also encompass to actions that have an impact on the environment on Commonwealth land, and to actions taken by the Australian Government, and Australian Government agencies which are likely to have a significant impact on the environment. See 'Local Government and Australian Environment Law-DAWE, available at <https://www.awe.gov.au/environment/epbc/>, accessed 20 October 2023

² Parts 6–9 of the EPBC Act provides for the assessment and approval of actions impacting on matters of national environmental significance.

³ Chris McGrath, 'Myth Drives Australian Government Attack on Standing and Environmental Lawfare', *Environmental and Planning Law Journal*, Vol. 33, 2016, PP. 3,7

⁴ Lee Godden and Jacqueline Peel, 'The Environment Protection and Biodiversity Conservation Act 1999 (Cth): Dark Sides of Virtue', *Melbourne University Law Review*, Vol. 31 (1), 2007, PP. 106, 132

⁵ Chris Hilson and Ian Cram, 'Judicial Review and Environmental Law— Is There a Coherent View of Standing?' *Legal Studies*, Vol. 16 (1), 1996. P.1

⁶ Gerry Bates, *Environmental Law in Australia*, Lexis Nexis Butterworths, 2019, 794.

⁷ *Ibid.*

interpreted standing rules liberally empowering third party to approach court against an executive decision that potentially causes harm to the environment. Although Australian legislature confers courts the power of judicial review, the scope of challenge is still confined;⁸ and even today judicial interpretation of standing provisions in environmental legislation can leave plaintiff powerless to pursue remedies.⁹ A number of mention-worthy 'judicial pronouncements'¹⁰ in the jurisdiction attempted to ensure environmental justice and lenient interpretation of locus standi to widen significantly, whenever the environment becomes an innocent victim. Globally, court's liberal approach on standing rules in environmental litigations has been strongly castigated, sounding the fear of so called 'lawfare' by various influential quarters such as 'parliamentarians and ministers',¹¹ 'adverse media comment'¹² even by the 'Attorney-General'¹³ (AG), making the issue more contextualized and prompting the current research.

This study analyzes the way to understand how courts in both jurisdictions expand standing rules in justifying executive decision on environmental issues contributing to advance public interest rather than incite lawfare. This paper commences by examining evolution of the concept of standing rules, tracing its development from the application of common law principles pertaining to 'special interests' to the adoption of the 'persons aggrieved' test in the Australian legal system. Then, it delves into the development of the regulatory framework governing environmental public interest litigations in Bangladesh, focusing on the evolution of standing rules exploring how

⁸ Lee Godden, Jacqueline Peel and McDonald, *Environmental Law*, Oxford University Press, 2nd ed, 2019, P. 146.

⁹ *Supra* note 6, P. 813

¹⁰ See *Australian Conservation Foundation Inc vs. Commonwealth of Australia* (1980) 28 ALR 257; *Onus v Alcoa of Australia Ltd* (1981) 36 ALR 425; *Booth vs. Bosworth* (2001) 114 FCR 39.

¹¹ Mathew Groves, 'Lawfare and the Enemy within Our Public Law', *Australian Institute of Administrative Law Forum*, Vol. 90, 2017, P. 32

¹² *Supra* note 8, P. 142

¹³ Annika Reynolds, Andrew Ray and Shelby O'Connor, 'Green Lawfare: Does the Evidence Match the Allegations? — An Empirical Evaluation of Public Interest Litigation under the EPBC Act from 2009 to 2019', *Environmental and Planning Law Journal*, Vol. 37 (4), 2020, P.497; See also, George Brandis, "Green Lawfare" and Standing: The View from within Government, *Australian Institute of Administrative Law Forum*, Vol. 90, 2017, P. 12

the absence of special legislation on judicial review in environmental matters has influenced this evolution. After that, the research explores the intricacies of judicial review, scrutinizing its extent and constraints. Subsequently, the essay discusses the phenomenon of a liberal interpretation of standing rules, examining its potential to instigate 'lawfare' and enhance the promotion of transparency, accountability, integrity, and rigor within the environmental decision-making process, hence expanding access to justice. The conclusion covers arguing that the liberal interpretation of standing rules serves the purpose of providing systematic and crucial information to the executive decision-maker aims to hold decision-makers accountable for making judgments related to matters of national environmental significance, ultimately safeguarding the public interest instead of triggering 'lawfare'.

2. Standing Rules in Australia

2.1 *Locus Standi*

Locus standi means the legal capacity to challenge an act or decision.¹⁴ It is derived from Latin *locus standi*, literally referring to a place to stand on, or in, but it has come to refer to the recognition of the rights of a person to lawfully bring an action before a court to enforce law. The legal test for standing at common law shows strong ties between the person and the cause of action.¹⁵ Alternatively, it empowers the person deprived of justice from actual or threatened violations of a legal right or legally protected interest, for bringing an action for judicial redress, meaning judicial redress is available only to person who has suffered legal injury. However, this is a rule of ancient vintage and it arose during an era when private law dominated the system and public law had not yet been born.¹⁶

The common law gradually took the concept, and the prime purpose of the rule is to eliminate the filibusters and busybodies to ensure legal action for the legally injured person is properly and efficiently

¹⁴ Bideh Upadhyay, *Public Interest Litigation in India: Concepts, Cases, Concerns*, Lexis Nexis Butterworths, 2007. P. 15

¹⁵ Brendon Murphy and Jeffrey McGee, 'Lawfare, Standing and Environmental Discourse: A Phrenetic Analysis', *University of Tasmania Law Review*, Vol. 37 (2), 2018. PP. 131, 147

¹⁶ *Supra* note 14, P. 16

conducted.¹⁷ The rule functions like the first-stage filter that can deny access to potential litigants unless they are fits in the legal matter to be brought before the court. The traditional concept of a legitimate or special interest has been precisely defined around private economic and property interests which echoes the first evolutionary stage of environmental law and governance.¹⁸ What constitutes 'legitimate interests' or 'special interests' in considering the plaintiff's *locus standi* in judicial review cases is a relevant question that relates to environmental issues and how the standing rules have been widened by the legislature and the judiciary in Australia in case of environmental review litigations.

2.2. Special Interest or Legitimate Interest

The common law rules relating to standing are complex, yet the field of occupant law may reshape them.¹⁹ Under common law principle, courts previously had introduced a number of tests to ascertain the applicant's legitimate or special interest bringing the suit. The precise nature of these tests has always been obscure for which the outcome of applying them to individual case has barely been surmised. The type of the case sets the court's approach to legitimate interest. For instance, in a declaration or injunction suit, the court will ascertain whether the plaintiff had a personal interest in the subject matter of the suit, but in the prerogative writs of *certiorari* and prohibition, the plaintiff did not necessarily have a direct or special interest. Where legislation is silent about who has the right to enforce the breaches of environmental legislation, common law principles will fill the lacuna.²⁰

The environmental groups or organizations with a proximate and enduring concern either with the subject matter of the litigation or with those persons who would have standing are in the privileged by the court. Mere organizing together does not constitute cognizable interest. Individuals, in order to have standing, must show a greater interest in the decision than other members of the general public. Where the right enjoyed is a public right in nature, to demonstrate special interest, plaintiff requires to prove that the person has suffered particular

¹⁷ *Supra* note 6, P. 792

¹⁸ *Supra* note 8, PP. 151-152

¹⁹ *Supra* note 15, P. 147

²⁰ *Supra* note 6, P. 793

damage different from and greater than that suffered by the general public.²¹

However, the judicial review litigations on environmental issues always bring forth tangled condition, only those actors with a special interest, in the sense of being directly linked to the particular dispute, have standing in the common law.²² This dilemma is illustrated by *Gibbs J in Australian Conservation Foundation Inc vs Commonwealth of Australia* (ACF Case),²³ when he comments:

I would not deny that a person might have a special interest in the preservation of particular environment. However, an interest, for present purposes, does not mean a mere intellectual or emotional concern. A person is not interested within the meaning of the rule, unless he is likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest, if his action succeeds or to suffer, other than a sense of grievance or a debt for costs, if his action fails. A belief, however, strongly felt, that the law generally, or a particular law, should be observed, or that conduct of particular should be prevented, does not suffice to give its possessor locus standi. If that were not so, the rule requiring special interest would be meaningless. Any plaintiff who felt strongly enough to bring an action could maintain it.²⁴

The Court unearthed the special interest of the North Coast Council (NCC) in the case of *North Coast Environment Council Inc v Minister for Resources*.²⁵ The Court conducted a thorough examination of specific attributes of the NCC, including the duration of its existence, the factors that led to its establishment such as sand mining, forestry, and woodchip exports from the Coffs Harbour region, and the NCC's objectives, which encompassed the advancement of conservation efforts in the North Coast. The Nature Conservation Council of New

²¹ Martin Führ, Betty Gebers, Thomas Ormond and Gerhard Roller, 'Access to Justice: Legal Standing for Environmental Associations in the European Union' in David Robinson and John Dunkley (eds), *Public Interest Perspectives in Environmental Law*, Wiley Chancery, 1995, PP. 72, 94

²² *Supra* note 15, P. 48.

²³ (1980)146 CLR 493.

²⁴ *Ibid*, 531; *Supra* note 15, PP. 148-149

²⁵ (1994) 36 ALD 533.

South Wales, with its non-profit membership structure, is recognized for its involvement in many activities pertaining to environmental conservation in the region, including the filing of proposals and initiatives. Although the Court acknowledged that the determination of whether North Coast met the criteria of the special interest test is a matter of contention, ultimately the NCC was deemed to be a party that had suffered harm.²⁶

The case of *North Queensland Conservation Council v Executive Director of Queensland National Parks and Wildlife Service* has established that the plaintiff must possess an interest that beyond that of an average member of the community.²⁷ Following the ACF case ruling, the Federal Court has examined various factors that may be deemed as constituting a 'special interest' which includes the organization's size, the cause it supports, the level of governmental recognition it receives, as well as the organization's capacity and integrity in representing the public interest.²⁸ The utilization of terms such as 'aggrieved', 'interested', 'affected', or those with a 'proper interest' are dependent on the observed progression when matching the concepts of special interest in common law with the more comprehensive statutory standing test.²⁹

2.3. Person Aggrieved

The matter of standing, specifically in relation to public interest litigation, has been a substantial obstacle for environmental claimants in numerous jurisdictions, and continues to provide a challenge. The significance of standing rules lies in their ability to illustrate the substantial impact that procedural rules can exert. When individuals are unable to initiate legal proceedings, it results in inadequate protection of the environment.³⁰ As the *entrée* to the legal system, standing rules signify an individual's of initiating or going through litigation. It both affords litigants the opportunity to engage in court action and presents an opportunity of tempering law by convincing the

²⁶ *Supra* note 8, PP. 153-154.

²⁷ *Ibid* 155; See also [2000] QSC 172.

²⁸ *Supra* note 15, P. 149

²⁹ *Supra* note 8, P. 153

³⁰ Lee Paddock and Others, *Compliance and Enforcement in Environmental Law*, Edward Elgar Publishing, 2011, P. 297

adjudicators and influencing the environmental decision-making.³¹ The AD(JR) Act includes standing provisions that have historically employed the commonly used 'person aggrieved' criterion.³² When analyzing the meaning of terms like 'person aggrieved' or 'persons having their rights adversely affected', it is crucial to refer to the statutory provisions governing the relevant rights.³³ Section 5 of the AD(JR) Act indicates that 'a person aggrieved' may seek judicial review of Commonwealth decision-making. 'A person whose interests are adversely affected' is also counted as a person aggrieved.³⁴ Section 487 of the EPBC Act provides an expanded interpretation of the phrase 'persons aggrieved' specifically in relation to petitions for judicial review under ss 5-7 of the AD(JR) Act.³⁵ The addition of s 487 expands the scope of the standing rules beyond the traditional common law stance granting standing to individuals or organizations with a vested interest in the environment, such as those involved in research, environmental protection, and conservation allowing third party with a potential direct or private interest in the proceedings to participate.³⁶

The AD(JR) Act provides a broader interpretation of the term 'person aggrieved' in the context of the EPBC Act. This interpretation establishes a stronger connection with individuals and organizations that have been actively involved in environmental protection, conservation, or research activities in Australia during the two years leading up to the challenged decisions. Remarkably, this particular provision of the EPBC Act appears to extend beyond the criteria acknowledged by the Federal Court of Australia. In this case, it is not necessary to establish a direct correlation between the subject matter under litigation and the actions of the plaintiff, instead a broad environmental concern seems to be adequate.³⁷ The EPBC Act provides recognition to environmental organizations and individuals who have actively engaged in environmental matters, granting them the right to seek judicial review.³⁸

³¹ Riley Sophie, 'From Smart to Unsmart Regulation: Undermining the Success of Public Interest Litigation', *Environmental and Planning Law Journal*, Vol. 34 (4), 2017, PP. 299, 307-08

³² *Supra* note 8, P. 157

³³ *Supra* note 6, P. 812

³⁴ *Ibid*, P. 809

³⁵ *Supra* note 15, P. 151

³⁶ *Ibid*.

³⁷ *Supra* note 6, P. 817

³⁸ Bruce Lindsay and Hanna Jaireth, 'Democracy and the Environment', *Technical Paper 8, Australian Panel of Experts on Environmental Law*, April 2017, P. 21

Under the EPBC Act, the first case— *Booth v Bosworth*³⁹—invoked the more open standing regime where the plaintiff i.e., Dr. Booth was successful in being granted standing. In the subsequent phase of the case, it is determined that the plaintiff's standing is not a matter of dispute. This is due to the fact that the respondents do not contest the standing of Dr. Booth, who is selected as an interested party. *Justice Branson* observed that Carol Booth's academic qualifications, work experience, and voluntary conservation activities met the requirements set forth by the EPBC Act for standing. The judge further noted that Booth's efforts to challenge both private actions and governmental decisions that have negative environmental consequences highlight the significance of broadening the standing rules. This expansion allows a diverse range of individuals to participate in environmental law decisions made by the court. The aforementioned phenomenon pertains to the ability of external entities to expand the limits of environmental legislation.⁴⁰ Understandably, standing rules may also be subject to a liberal interpretation. The utilization of community members as surrogate regulators for enforcing environmental laws is a sophisticated and potentially effective approach to regulation fostering transparency, honesty, and objectivity in the decision-making process, making it a viable policy instrument within contemporary legal systems.⁴¹ These are the way how, in Australia, with the enactment of the EPBC Act and liberal interpretation of the standing rules in multiple cases pave the way for the members of the community to challenge the government decisions under the EPBC Act. Now take a look how the concept of standing rules has been developed in Bangladesh in environmental review litigations.

3. Standing Rules in Bangladesh

3.1 Statutes Pertaining to Environment

In Bangladesh, the principal legislation relating to environment is *Bangladesh Environment Conservation Act, 1995* (BEC Act). Bangladesh government formulated *Environment Conservation Rules* in 1997 (ECR) under s 20 of the BEC Act. Moreover, under the *Environment Court Act, 2010*, Bangladesh government established environment courts, special magistrate courts and environment appeal court. According to s 12 of

³⁹ (2001) 114 FCR 39.

⁴⁰ *Supra* note 8, PP. 157-158

⁴¹ *Supra* note 3, P. 5

BEC Act, *Director General of the Department of Environment* (DGDoE), following the rules 6–8 enunciated in the ECR has the capacity to issue environmental clearance certificate to industrial establishments in Bangladesh or any projects undertaking. Unlike Australia, the above-mentioned Acts or rules contain no provisions of empowering individuals to approach courts for judicial scrutiny against the clearance certificate issued by the DGDoE under s 20 of the BEC Act.

3.2 Judicial Intervention

Modification of the traditional requirement of standing allows general public to participate in justice delivery system. The need seems more pressing in a country like Bangladesh where the largest segment of the people are either ignorant of their rights or too poor to approach the court.⁴² The existing environmental legislations are without required efficiencies,⁴³ and puts Bangladesh's higher judiciary to come up with multiple groundbreaking decisions, outlining liberal interpretation of the constitutional requirement of 'aggrieved person' in connection with litigation filing, besides interpreting and recognizing the rights of the people to sound environment as a constitutional right to life.⁴⁴ Weaker legislative framework, along with the numerous innovative remedies from the higher judiciary of Bangladesh, try coping with the rapid degradation of the environment by expediting the third party of community participation in environmental litigations and creating accountability of executive actions to the people through a judicial process.⁴⁵

The judicial system of Bangladesh owes its origin to the adjudicative tradition of ancient India, which is decisively influenced by the common law system during British rule in India. Bangladesh is formerly known as East Pakistan, became independent in 1971 and

⁴² Po Jen Yap and Holning Lau, *Public Interest Litigation in Asia*, Taylor and Francis Group, 2010, P. 59

⁴³ Jona Razzaque, 'Linking Human Rights, Development, and Environment: Experiences from Litigation in South Asia', *Fordham Environmental Law Review*, Vol. 18 (3), 2007, PP. 587,590

⁴⁴ 'Public Interest Litigations (PILs)', BELA, available at <http://belabangla.org/what-we-do/public-interest-litigations-pils/>, accessed on 05 October 2023.

⁴⁵ *Supra* note 43, P. 590

adopted by an executive order all pre-existing laws and judicial institutions of the defunct East Pakistan. The constitution of Bangladesh enacted the structure of the judiciary which is composed of three adjudicative bodies: higher judiciary, subordinate judiciary and specialized tribunals. In Bangladesh higher judiciary refers to the Supreme Court (SC) of Bangladesh, which consists of the Appellate Division (AD) and the High Court Division (HCD).⁴⁶ The AD is the constitutional court having, no original jurisdiction, appeal, revision, review and advisory jurisdiction.⁴⁷ The HCD, also as constitutional court, has multiple jurisdictions including the jurisdiction over interpretation of the constitution, the determination of the constitutionality of parliamentary Acts and executive orders.⁴⁸

In Bangladesh, the standing rules has been liberally interpreted, for the first time, by the SC of Bangladesh in the case of *Kazi Mokhlesur Rahman vs Bangladesh and another*⁴⁹ (Kazi Mokhlesur Rahman Case). Although the plaintiff is unsuccessful in the case and the case is not related to environmental issues, the springboard for the liberalization move is the momentous in that case. In the aforementioned case, the highest court acknowledged that the issue of *locus standi* pertains to the competence of an individual to seek a hearing, rather than the court's jurisdiction to grant one; and consequently, the court exercises its discretion in determining whether to grant a hearing based on a thorough evaluation of the specific facts and circumstances of each case.⁵⁰

However, the judicial system of Bangladesh has both civil and criminal procedural rights. The aggrieved individuals and communities therefore have the opportunity to bring actions in the courts, established under the *Environment Court Act, 2010*, which require no assertion of infringing of fundamental rights, enshrined in the Bangladesh constitution,⁵¹ of the Plaintiff. To challenge any executive

⁴⁶ M Rafiqul Islam, 'The Judiciary of Bangladesh: Its Independence and Accountability' in HP Lee and Marylin Pettard (eds), *Asia-Pacific Judiciaries: Independence, Impartiality and Integrity* Cambridge University Press, 2017, PP. 35-36

⁴⁷ Articles 103–106, *The Constitution of the People's Republic of Bangladesh*.

⁴⁸ *Supra* note 46, PP. 35-36

⁴⁹ 26 DLR 44.

⁵⁰ *Ibid*, P. 17

⁵¹ Articles 26- 47(A), *The Constitution of Bangladesh*.

actions under article 102 (1) of the Bangladesh constitution, plaintiff requires to show their fundamental rights infringed. Right to environment is not the fundamental right in Bangladesh constitution. Nonetheless, the SC of Bangladesh in the case of *Dr. Mohiuddin Farooque v Bangladesh, represented by the Secretary, Ministry of Irrigation, Water Resources and Flood Controls and Other* (Mohiuddin Farooque Case)⁵² established that any action or failure to act that undermines the safeguarding and preservation of the environment, ecological equilibrium, and the absence of air and water pollution, as well as the provision of sanitation necessary for a decent quality of life, will be considered a clear infringement upon the right to life as enshrined in articles 31 and 32 of the Constitution of Bangladesh. Hence, any individual has the right to seek legal remedy from the HCD for such violations. Moreover, the verdict of the case provided the most liberal view of the standing rules. In the judgement, *Latifur Rahman J* opined:

The Constitution of Bangladesh recognizes the welfare of the people in unambiguous terms. The court must liberally construe the question of standing. This relaxation of the strict rules of *locus standi* can be expanded in two ways—representation standing and citizen standing. The former relates to the standing in a matter pertaining to a legal wrong or injury caused or threatened to be caused to persons, who by reasons of utter helplessness or disability or economic inability cannot move the court for relief. The latter relates to standing in a matter in which breach of public duty results in violation of the collective right of the public at large. In this case, the appellant is not moving this application as people of the locality being poor and economically crippled cannot file the application before the court, but by this action of the respondents a public wrong or public injury is causing damage to environment and human health in Bangladesh in which specific field 'BELA' is actively associated. Thus, I find that this organization has got sufficient interest in the matter and question of standing must be liberally construed in the context of our constitutional scheme and objectives as indicated above.⁵³

⁵² 49 DLR 1.

⁵³ *Ibid*, P. 75

In the case of *Dr. Mohiuddin Farooque, Secretary General, Bangladesh Environment Lawyers' Association (BELA) vs Bangladesh and Others*⁵⁴ the Court recognized the standing of the petitioner i.e., BELA (an advocacy group in the field of environment in Bangladesh) by granting specific privileges and asserting that the petitioner, BELA, has the freedom to report instances of violations of any sections of the Act and its corresponding Rules to the attention of the HCD.⁵⁵ The higher judiciary in Bangladesh empowered individuals and community groups in many other ways to challenge the decisions made by the government on environmental issues, and provided the liberal interpretation of standing rules which further allows the potential parties to bring cases where their environmental rights are breached by the development projects or activities.⁵⁶

4. Judicial review: Scope and Limitation

Judicial review proceeding serves as a mechanism to hold regulatory bodies accountable for their judgments pertaining to environmental matters. The process offers guidance aimed at facilitating improved decision-making in the future. The primary objective of judicial review is to offer a framework for contesting the actions of decision-makers that deviate from legal requirements and established procedures.⁵⁷ This framework facilitates the establishment of mechanisms by which governmental entities can be held accountable to legal standards and to the individuals subject to their authority. Public authorities often make decisions that have environmental implications, such as those related to public hearings and planning. These judgments are susceptible to legal scrutiny through the process of judicial review.⁵⁸ Alternatively, it concentrates upon scrutinizing the validity of a decision.⁵⁹ The primary

⁵⁴ 55 DLR 69.

⁵⁵ *Ibid*, P. 61

⁵⁶ *Supra* note 46, PP. 600-601

⁵⁷ Sarah Wright, 'Holding Regulators to Account in New South Wales Pollution Law: Part 2— The Limits of Judicial Review and Civil Enforcement', *Australian Institute of Administrative Law Forum*, Vol. 87, 2017, P. 46

⁵⁸ Alan Murdie, *Environmental Law and Citizen Action*, Taylor and Francis Group, 2009, P. 83

⁵⁹ *Supra* note, P. 146

function of the court in the context of judicial review is not to make determinations regarding the acceptability of environmental impacts or other matters pertaining to the evidentiary assessment of a project's impacts. The court is tasked with determining whether judgments made by the executive decision-maker adhere to the technical legal criteria of the decision-making process.⁶⁰

The process of judicial review prevents a reassessment of a development project based on its substantive qualities. The courts are at risk when they prioritize the notion that it is an area in which a judge in judicial review will not intervene. The court's role is limited to assessing whether the decision-maker's actions are in accordance with the law, rather than reassessing the decision-maker's discretion and replacing it with a fresh decision.⁶¹ The primary objective of legal review is to uncover pertinent facts and raise objections to a judgment, rather than fulfilling its intended goal of evaluating and enhancing decision-making processes in accordance with legal principles.⁶²

However, judicial review proceedings can be initiated on three distinct grounds: legality grounds, process grounds, and rationality grounds. Legal reasons encompass instances where legislation is misinterpreted or a statutory obligation is violated. The plaintiff achieved the greatest success in judicial review by relying on the most valid and appropriate application of legislative requirements since this delineates the most clearly defined framework for lawful decision-making. The concept of process grounds of review pertains to the violation of statutory procedures and procedural fairness. It is important to note that standing and procedural fairness are distinct matters, and the restriction of procedural fairness has a substantial impact on the extent to which judicial review can be exercised.⁶³ Although some instances of

⁶⁰ *Supra* note 3, P. 6

⁶¹ *Supra* note 57, P. 49

⁶² Graeme Samuel, Independent Review of the EPBE Act, Final Report, October 2020, P. 10

⁶³ Nicola Silbert, 'Challenging Decision: Environmental Non-Government Organizations' Use of Judicial Review under the Environment Protection and Biodiversity Conservation Act 1999 (Cth), *Environmental and Planning Law Journal*, Vol. 35 (6), 2018, PP. 714, 720-721

procedural injustice are noted, the court displayed hesitancy in intervening with the matter at hand. Regarding minor procedural unfairness, recently, in the case of *Polaris Coomera Pty Ltd vs Minister for the Environment*,⁶⁴ Rangiah J noted:

Even if it is assumed that the delegate denied the applicant procedural fairness in the manner alleged, that denial would have no difference to the outcome of the decision...the grant of relief under section 16 of the ADJR Act is discretionary, and the court would refuse relief where the error is immaterial.⁶⁵

The rationality basis for reviewing decisions typically involves assessing whether the decision-maker has duly considered pertinent variables. Additionally, such reviews regularly scrutinize the decision-making process for any failure to address concerns connected to ecologically sustainable development and the precautionary principles. The fluidity of rationality grounds in legal contexts is largely contingent upon the subjective judgment and discretionary authority of decision-makers. Consequently, the likelihood of a plaintiff's success in a judicial review based on the basis of legality is significantly higher compared to other grounds of review.⁶⁶

Edgar's study on early EPBC Act judicial review proceedings resulted in a conservative interpretation of the criteria for judicial review. He contended that the inclusion of extended standing for third parties, coupled with a failure to screen out unsuitable cases, has led to the grounds for review being utilized as a gatekeeper in judicial review proceedings.⁶⁷ The limited role of court in a judicial review proceeding is regarded in the case of *Wilderness Society Inc vs Hon Malcolm Turnbull, Minister for the Environment and Water Resources*, the full Federal Court at the beginning of its judgment stated:

[I]t is necessary to stress that the Federal Court has no jurisdiction to consider the merit or the wisdom of any decision of the Minister. The sole concern of the Federal Court in this

⁶⁴ [2021] FCA 254.

⁶⁵ *Ibid*, P. 110

⁶⁶ *Supra* note 63, PP. 721-722

⁶⁷ *Ibid*, P. 723

matter, both before the primary judge or on appeal, was the legality of the decisions made by the Minister that were the subject of the proceeding before the primary judge.⁶⁸

Despite the expanded standing granted under section 487 of the EPBC Act, numerous impediments have been identified. This observation highlights the significant limitation placed on third parties in their capacity to effectively contest unfavorable or illegal decisions within the EPBC framework.

The primary issue lies in the limited scope of judicial review, which restricts the ability to challenge administrative judgments through technical cause of action. Furthermore, the ability of third parties to argue against the lack of merit in a decision is significantly impeded. For instance, upon the sanctioning of the Shenhua Watermark Coal Mine in the Liverpool Plains of New South Wales, a strong negative reaction is observed among local farmers and community groups. The individual expresses a strong opinion regarding the imprudence of constructing a mine on valuable agricultural land. However, due to the constraints imposed by the court review procedure, they are compelled to explore alternative avenues for legal challenge, focusing on identifying potential errors within the legal framework. Numerous instances have demonstrated that when decision-makers prioritize conforming to the prescribed criteria in their articulation of sound justifications, the available grounds for judicial review are often insufficient to establish a reasonable likelihood of success.⁶⁹

The case of *Australian Conservation Foundation Inc vs. Minister for the Environment*⁷⁰ (Carmichael Coal Mine Case) is a classic reference of the limitations of judicial review. While providing reasons for judgment Griffiths J observed:

On a judicial review application, the Court cannot step into the shoes of the Minister and decide for itself whether Adani's action should be approved and if so, what conditions should

⁶⁸ (2007) 166 FCR 154.

⁶⁹ *Supra* note 3, P. 13

⁷⁰ [2016] FCA 1042.

apply. The Parliament has conferred that task and responsibility on the Minister and the Minister alone. This Court's function on a judicial review is significantly more limited, confined as it is to a review of the legality, and not the merits, of the Minister's decision. Ultimately, it is the Minister who must accept responsibility and be accountable for the merits of his decision.⁷¹

While the federal government lacks the authority to prevent, assume control over, or dismiss lawsuits initiated by citizens, it does possess the ability to render their substantial impact void. In the context of a successful judicial review, it is typically anticipated that the conclusion will involve the administrative decision in question being remitted to the original decision-maker for revision in conformity with the applicable legal framework. In instances pertaining to development projects, it is typically observed that the topic of the proceedings is permitted to advance unhindered, as long as the proponent and the government decision-maker comply with the prescribed procedural prerequisites. The Carmichael Coal Mine case resulted in the proposal to overturn the increased standing clause of the EPBC Act, which subsequently led to a surge of lawsuits by various individuals and organizations, causing concerns among the legal community.⁷²

5. Lawfare or Public Interest

Lawfare, a term derived from the combination of 'law' and 'warfare', has been in usage since the 1950s.⁷³ It refers to the strategic utilization of legal methods to subjugate and govern indigenous populations through coercive measures.⁷⁴ In the environmental context, it refers to a

⁷¹ *Ibid*, P. 4

⁷² Andrew Macintosh, Heather Roberts and Amy Constable, 'An Empirical Evaluation of Environmental Citizen Suits under the Environmental Protection and Biodiversity Conservation Act 1999 (Cth)', *Sydney Law Review*, Vol. 39 (1), 2017, PP. 85, 87

⁷³ Orna Ben-Naftali, Michael Sfard and Hedi Viterbo, *The ABE of the OPT: A Legal Lexicon of the Israeli Control over the Occupied Palestinian Territory*, Cambridge University Press, 1st ed, 2018, P. 243

⁷⁴ John L Comaroff, 'Colonialism, Culture, and the Law: A Foreword', *Law and Social Inquiry*, Vol. 26 (2), 2001, PP. 305-306

purported technique employed by public interest litigants, particularly Non-Government Organizations (NGOs), aimed at impeding and prolonging the progress of significant development initiatives.⁷⁵ In Australia, the concept of 'lawfare' and the discourse surrounding strategic litigation gained widespread attention following the legal challenge to the approval of the Carmichael Coal Mine in 2015 which initiated by a litigant representing public interests, highlighted the contentious issue of legislative standing rules within the state apparatus.⁷⁶ Consequently, there has been a growing effort to address what is perceived as 'vigilante litigation' or 'lawfare'.⁷⁷ In subsequent developments, the legal actions initiated by neighborhood environmental organizations prompted the federal government to popularize the term 'green lawfare', which subsequently gained significant traction and is frequently echoed in media discourse.⁷⁸

Subsequently, the court, in collaboration with the environment ministry, nullified the approval of the coalmine. In response, the federal administration focused on the expansion of the standing rule and initiated a public criticism. The AG publicly expressed concerns about the liberal standing rules, highlighting the potential for radical green activists to employ vigilante litigations in order to impede essential economic activities. He apprehended that s 487 of the law may inadvertently facilitate the actions of radical activists who disrupt and sabotage significant economic projects through aggressive litigation tactics.⁷⁹ This situation has resulted in an increase in politically motivated disputes within the court system, ultimately limiting the ability to address environmental challenges.⁸⁰

⁷⁵ Reynolds, Ray and O'Connor (n 13) 499.

⁷⁶ GreenLaw, 'Submission to the EPBC Act Independent Review', 2020, P. 6.

⁷⁷ Godden, Peel and McDonald (n 8) 158.

⁷⁸ Rachel Pepper, 'Ms Onus and Mr Neal: Agitators in an Age of Green Lawfare', *Australian Institute of Administrative Law Forum*, Vol. 90, 2017, PP. 52-53

⁷⁹ *Supra* note 3, PP. 3-4

⁸⁰ Donald K Anton, 'Attorney-General George Brandis Trying to Close Doors on Environmental Challenge', *The Sydney Morning Herald*, Sydney, 23 August 2015, available at <https://www.smh.com.au/opinion/brandis-trying-to-close-the-court-house-doors-20150823-gj5k69.html>, accessed on 10 October 2023; See also, Lisa Cox, 'Claims Major Projects are Being Delayed by Environmental "Lawfare"

However, there are other studies that do not support the critics' argument against the expansion of the standing provisions of s 487 of the EPBC Act. Instead, these studies demonstrate that judicial review ultimately contributes to access to justice and serves the public interest, rather than promoting lawfare. The empirical review undertaken by the *GreenLaw* project, which operates within the *Law Reform and Social Justice Program* at the *Australian National University College of Law*, focused on public interest litigation in the Federal Court pertaining to environmental matters. The review spanned from 1 January 2009 to 31 December 2019. The report concluded:

This empirical review of all cases involving the EPBC Act from 1 January 2009–31 December 2019 demonstrates that public interest litigation is not being utilized to engage in lawfare. We found that the number of public interest cases is too low to be characterized as a flood of litigation or lawfare. We also found that the way the public interest litigation is engaging with court processes does not support the lawfare characterization. Public interest litigants are not filling vexatious cases, nor disproportionately utilizing interlocutory applications or interim injunctions to prevent commercial action... in reality, public interest litigation reflect the purpose of the EPBC Act and the Australian people's stake in the preservation and responsible regulation of matters of national environmental significance.⁸¹

In relation to legal challenges initiated by third parties against the determinations made by the environment minister, Graeme Samuel contended that the capacity of the general public to hold decision-makers responsible is a vital pillar of Australia's democratic system.⁸² Furthermore, he asserted that the judicial system possesses the ability to address frivolous or harassing lawsuits, and cases lacking a

Dismissed in New Research', *The Guardian*, London, 18 June 2020, available at <https://www.theguardian.com/australia-news/2020/jun/19/claims-major-projects-are-being-delayed-by-environmental-lawfare-dismissed-in-new-research>, accessed on 12 October 2023.

⁸¹ *Supra* note 76, P. 40

⁸² *Supra* note 62, P. 10

reasonable likelihood of victory can be dismissed at the first stage.⁸³ Therefore, the portrayal of third parties' legal activity as lawfare inaccurately depicts the significance of legal scrutiny within Australian society.

Describing judicial review litigations as crucial mechanisms for promoting equitable and consistent executive decision-making, thereby ensuring the accountability of executive decision-makers in line with democratic principles and norms in Australia,⁸⁴ a separate empirical study conducted by Annika Reynolds, Andrew Ray, and Shelby O'Connor analyzed Federal Court data from 2009 to 2019 to investigate the occurrence of tactical lawfare.⁸⁵ The study found no evidence of a significant influx of tactical litigations under the EPBC Act, nor did it identify instances of tactical lawfare; instead, the paper observed that courts are effectively utilizing existing regulations to dismiss inappropriate or frivolous proceedings, thereby preventing public interest litigants from abusing the court's processes, including the use of injunctions to disrupt or delay commercial activities in Australia.⁸⁶

In response to the assertions made by AG George Brandis regarding the anticipated rise of 'lawfare' in Australia, akin to the situation observed in the United States, and against the backdrop of the escalating political unrest in the country, which has been posing growing challenges to the functioning of the judicial system,⁸⁷ in an empirical research McGrath maintained:

The Attorney-General's wild claims that s 487 allows radical green activists to engage in vigilante litigations to stop important economic projects and claims of lawfare to justify the proposed repeal of s487 of the EPBC Act are simply not borne out by the data. Neither is the Minister's similar claim in his second reading speech that s 487 has now been distorted by bringing and threatening designed only to delay and frustrates

⁸³ *Ibid*, P. 11

⁸⁴ *Supra* note 13, P. 514

⁸⁵ *Ibid*, P. 501

⁸⁶ *Ibid*, P. 515

⁸⁷ *Supra* note 3, PP. 3-4

proponents. Experience over the first 15 years of the operation of the EPBC Act has shown that third parties rarely litigate and there has been no flood of litigation as a result of widening standing. The rate of judicial review by third parties under the EPBE Act is only slightly greater than half a percent of the total number of the referrals. This low rate of litigations indicates that the recent hullabaloo about lawfare under the EPBC Act is based on fiction rather than fact.⁸⁸

According to McGrath, the significance of judicial review litigations extends to safeguarding the environment, facilitating the attainment of sustainable development, enhancing the implementation of environmental legislation, and fostering sound decision-making by the government regarding actions that impact the environment.⁸⁹ These outcomes are instrumental in generating widespread public interest. The episode involving the dismissal of AG Christian Porter's claim of lawfare against mining firms by IMF Bentham, one of Australia's largest litigation finance companies, stands as a notable example of this phenomenon. According to a report, the research carried out by Vince Marobito, a professor of business law at Monash University, did not provide evidence in favor of the claim that there has been a significant increase in activist lawfare.⁹⁰

Contrary to the numerous assertions that litigation involving judicial review is vexatious, a substantial body of evidence overwhelmingly demonstrates the inaccuracy of such claims.⁹¹ Although policy makers and business interests have long been concerned about liberal standing rules and citizen suit activity imposing significant cost on society, the study suggests that these concern are ill-founded, at least in relation to the EPBC Act, no evidence of a flood of citizen suit activity.⁹² Regarding the so-called 'Green Lawfare' which termed as

⁸⁸ *Ibid*, P. 16

⁸⁹ *Ibid*, P. 5

⁹⁰ Ben Butler, 'Australian Litigation Funding Giant Rejects Christian Porter's "Lawfare" Claim', *The Guardian*, London, 14 November 2019, available at <https://www.theguardian.com/>, last accessed on 07 October 2023.

⁹¹ *Supra* note 63, P. 728

⁹² *Supra* note 72, P. 109

'inflammatory'⁹³ levelled by the industry, James Trazise, Australian Conservation Foundation policy coordinator argued 'the idea that vexatious litigations is rife under national environment law is not borne out by the evidence. There have been less than 50 public interest cases under the EPBC Act in 20 years'.⁹⁴

In Bangladesh, regarding the lawfare in environmental litigations the Supreme Court of Bangladesh in the Mohiuddin Farooque Case⁹⁵ held:

As to the apprehension of floodgate, the people as a whole is no doubt a flood and the constitution is the sluiceway through which the people control its own entry. Our courts will be prudent enough to recognize the people when the people appear through an applicant as also those who masquerade under the name of the people. Taking up the people's causes at the expense of his own is a rare phenomenon not a commonplace.⁹⁶

Thus, ignoring the eminence of so-called lawfare being triggered, the SC of Bangladesh recognized 'pollution free ecologically balanced environment as a right to life'⁹⁷ which can be constitutionally enforced under article 102(1) of the Bangladesh constitution, ensuring citizen's rights at large.

6. Conclusion

For resolving all kind of disputes courts are known as the last resort⁹⁸ as the administrative decision-makers must be in compliance with the technical legal requirements, not ignoring the established laws and

⁹³ Cristy Clark, 'The Government vs the Environment: Lawfare in Australia, The Conversation, available at <http://theconversation.com>, last accessed on 11 October 2023.

⁹⁴ Mike Foley, "No Checks, No Balances": Push for Change to Environment Laws', *The Sydney Morning Herald*, Sydney, 13 June 2020 available at <https://www.smh.com.au/politics>, accessed on 01 October 2023.

⁹⁵ 49 DLR 1.

⁹⁶ *Ibid*, P. 54

⁹⁷ *Ibid*, P. 102

⁹⁸ Ummei Tahura, 'Role of Clients, Lawyers, Judges, and Institutions in Hiking Litigation Costs in Bangladesh: An Empirical Study, *Asian Journal of Law and Society*, Vol. 9 (1), 2022, PP. 59, 76

principles yet making the decision making process.⁹⁹ Thus, the door of the courts should be more open and make it by far accessible for all.¹⁰⁰ The environmental rule of law and the best practice in decision-making and governance are the prerequisites for the access to just legal remedies in environmental matters.¹⁰¹ Obtaining a remedy or relief from a court may be moot if a person has no right to seek it in the first place. The permissibility of the law for a court in recognizing a person with sufficient interests in an environmental decision to commence proceedings can be an important point of contention early in environmental review litigations. The standing rules are intended to regulate the access to courts but the right of standing, at common law, is restricted to a person whose rights or interests are affected and he/she can turn to the courts for legal remedies.¹⁰²

Courts both in Australia and Bangladesh came up with lenient approaches for the persons aggrieved or special interest not been specifically defined, setting multiple yardsticks that varies case to case basis, in many judicial pronouncements to strengthen the environmental litigation processes by outlining guidelines for standing, paving the way for community groups, who do not have even direct stake or grievance, to challenge environment related executive decisions, if and when the decisions appear palpably made ignoring the legal procedures and established principles of natural justice. In Australia, the AD(JR) Act overlooked the possibility of opening the floodgate by the critics and stretched the definition of the standing further that the right, generally, to a 'person aggrieved', and under the EPBC Act, environmental organizations and persons with a record of involvement in environmental issues are expressly brought within the scope of standing to court judicial review,¹⁰³ that sparked flurry of controversies though. On the other hand, in Bangladesh, no statutes confer the power of judicial review upon the subordinate

⁹⁹ *Supra* note 3, P. 6

¹⁰⁰ *Supra* note 98, P. 76

¹⁰¹ *Supra* note 38, P. 24

¹⁰² *Ibid*, P. 21

¹⁰³ *Ibid*

courts,¹⁰⁴ challenging the decisions of the government bodies relating to environmental matters except for the constitution which vests power of judicial review only upon the HCD of the SC of Bangladesh. The Supreme Court of Bangladesh accredited the right of pollution free environment as a right to life, expanding standing for the third party, when the environment became victims of capricious decisions of the government bodies. This accreditation of the SC of Bangladesh is guaranteed under article 31 of the Bangladesh constitution, and it also can be enforced under article 102(1) of the constitution by way of judicial review. However, the argument about floodgate against the liberal standing will remain, but the wide standing for judicial review of government decisions in the courts is considered with high importance for promoting transparency and rigor in approvals, particularly for large projects involving huge financial interest of the government, protecting the entire community and the government by this green safety net of laws that allows independent scrutiny of government decisions.¹⁰⁵ Finally, the purpose of the EPBC Act in Australia and Supreme Court's verdicts in Bangladesh lie with the expansion of the standing rules that facilitate the access to justice and public interest litigations that are reflective to the preservation and responsible regulation of matters of national environmental significance, as well as to the promotion and preservation of public interests at large.

¹⁰⁴ According to article 114 of the Constitution of Bangladesh, in addition to the Supreme Court of Bangladesh, there will be subordinate courts, established under various statutes, including the environment courts, special magistrate courts and the environment appeal courts established under the *Environment Conservation Act 1995 and Environment Court Act, 2010*.

¹⁰⁵ *Supra* note 3, P. 17