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Judicial Activism and Human Rights in South Asia: A Comparative Study of Bangladesh, India and Pakistan

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Abstract:
This paper aims to evaluate the effectiveness of judicial activism in ensuring accountability and human rights which contribute to ensuring good governance in South Asia focused on Bangladesh, India, and Pakistan. Recently, the doctrine of judicial activism is practicing in South Asia but predominantly in India. In South Asia, it has gained momentum in changing society due to the failure of representative institutions (Islam, 2018). Some contemporary case laws of Bangladesh, India and Pakistan have been analyzed in this paper and it has been found that the judicial system and judicial activism of South Asia have several limitations. However, the judiciary of India is comparatively more effective and independent in ensuring individual rights than Bangladesh and Pakistan's judiciary. Human right is one of the crucial and pressing issues throughout the world and South Asia is not out of them. The findings of this paper would be helpful for taking new policies of selected countries. This is a comparative and descriptive case study and is based on secondary sources of data and information.
Keywords: Judicial Activism, Bangladesh, India, Pakistan, Human Rights.
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Introduction:
Human right is one of the crucial and pressing issues throughout the world and South Asia is not out of them. This paper aims to evaluate the effectiveness of judicial activism in ensuring accountability and human rights which contribute to ensuring good governance in South Asia focused on Bangladesh, India, and Pakistan. Recently, the doctrine of judicial activism is practicing in South Asia but predominantly in India. In South Asia, it has gained momentum in changing society due to the failure of representative institutions (Islam, 2018). Some contemporary case laws of Bangladesh, India and Pakistan have been analyzed in this paper and it has been found that the judicial system and judicial activism of South Asia have several limitations. However, the judiciary of India is comparatively more effective and independent in ensuring individual rights than Bangladesh and Pakistan's judiciary.

Introduction:
Judiciary is the '*sine qua non'* for any state to ensure, human rights, rule of law, good governance and accountability of the perpetrators. Lack of accountability encourages misuse of power, violation of human rights, rule of law, and corruption which are the most critical issues and problems throughout the world. To ensure accountability, rule of law, and human rights many national and international legal instrumentalities and institutions have been established. Judicial activism is one of them, which are practicing globally (Mollah, 2014). Recently, the doctrine of judicial activism is also practicing in South Asia but predominantly in India. In South Asia, it has gained momentum in changing society due to the failure of the representative institutions (Islam, 2018). Violation of human rights is happening in several forms such as arbitrary arrest and detention, violence against women, acid throwing, rape and killing, extrajudicial killing, punishment and killing by *fotwa*[1], deprivation of life and liberty, violation of child labor rights, violation of minority rights, violation of refugee rights, trafficking women and children, violation of environmental rights and so on. This paper aims to evaluate the effectiveness of judicial activism in ensuring accountability and human rights which contribute to ensuring good governance in South Asia focused on Bangladesh, India, and Pakistan. This paper explicates the role of judicial activism which practice in Bangladesh, India, and Pakistan in the forms of public interest litigation (PIL), and *suo-moto*[2] rule to protect and promote individual rights against misappropriation of the government or any other private power.

1. Judicial Activisms:
The concept 'judicial activism' is a much pronounced and popularly used term in legal and political studies. However, many of us do not know the real meaning of it. Simply put, judicial activism depicts the pro-active role played by the judiciary in ensuring that the rights and liberties of citizens are protected. Through judicial activism, the court moves beyond its normal role of a mere adjudicator of disputes and becomes a player in the

[1] Fatwa is an Islami Shariah term that is used to settle disputes of Muslims who believes in Islam as a religion.
[2] The terms Judicial Activism, PIL and *Suo Moto* have been operationalized latter.

system of the country, laying down principles and guidelines that the executive must carry out.[1] One of the meanings of judicial activism is that the function of the court is not merely to interpret the law but to make it by imaginatively sharing the passion of the Constitution for social justice (Saha, 2008). Black Law Dictionary defines it "as a philosophy of judicial decision making whereby the judges allow their personal views about public policy, among other factors, to guide their decisions"(Cited in Kamal, 2009).

The doctrine of judicial activism advocates the basing of decisions not on the judicial precedents but on achieving what the court perceives to be for the public welfare, or what the court determines to be fair and just on the facts before it.[2] It has been characterized as a legitimate activity of a Court of Law for the implementation of public interest for which people in general or class of the group have financial or some enthusiasm by which their lawful rights or liabilities are influenced. By exercising judicial activism, the Supreme Court is ensuring rule of law, making government officials more responsible, accountable, transparent, and efficient (Mollah, 2014). It connotes that the judiciary, being sentient of existing socioeconomic realities, voluntarily implements social justice. In this process, the judiciary looks at the interest of the public or groups. The aggrieved person doesn't need to have to appear before the court directly for remedies. Any person or organization can be applied for remedies to the HCD/SC on behalf of the aggrieved or vulnerable group of society (Ullah, 2018). Therefore, this approach of the judiciary would be an easy and effective mechanism for ensuring social justice rather than another traditional approach of judicial review. Besides, judges can act as guardians of the vulnerable people of the society for protecting and promoting their rights through judicial activism (Hoque, 2011).

2. History of Judicial Activism in South Asia:

The concept of judicial activism is popularly used currently throughout the world, however, the origin and practice of this doctrine is still a debating issue. So far it has been discovered that it is an Anglo-American concept. Some scholars think the foundation of the concept 'judicial activism' laid on English law at the time of 1607-1608, there had been disagreement between the ***King James and the CJ Coke of England***, on authorizing the transferring of a case to the king (Youxing and Qureshi, 2020). CJ Coke said that the law is superior, paying little respect to whether the ruler isn't under man; be that as it may, he will be under the law and God. In like way, King James couldn't ensure the capacity to constrain evaluates on import and admission since CJ Coke articulated it as unlawful and attested that the parliament was the primary pro to take the decisions of driving charges (Youxing and Qureshi, 2020). On the other hand, some scholars think the doctrine 'judicial activisms' started from the celebrated American case of ***Marbury v. Madison*** in 1803, where John Marshal declared that "US Supreme Court has the power to judicial review and proclaim a law repugnant to the Constitution is void if there is a conflict between a law made by the Congress and the provisions of the Constitution, the court must enforce the Constitution and ignore the law" (Lal, 2004; Munir, 2007). This trend has been continuing in later centuries, it ripped with the decision of ***Brown v. Board of Education***. The Supreme Court also crafted a policy to govern race relations in the future (Munir, 2007). In recent decades, the American practice has been a speculative counterpart of public interest litigation (PIL) in the judicial system of other countries. However, the South Asian manifestation of PIL is distinguished from the Anglo-American experience, especially in India. Upendra Baxi (1985) uses the term social action litigation (SAL) to emphasize the very different historical triggers, institutional settings, and conceptual groundings of PIL in the Indian context (Baxi, 1985; cited in Khan, 2014). The root of judicial activism in India is very difficult to find. However, the history of judicial activism can be traced back to 1893, when Justice Mehmood of the Allahabad High Court delivered a dissenting judgment that implanted the seed of judicial activism in India (Diva Rai, 2020). Later, initiatives of PIL found in the late 1970s in Indira Gandhi's declaration of emergency rule, the judiciary encouraged litigation concerning the interests of the poor and marginalized, and to do so loosened rules and traditions related to standing, case filing, the adversarial process, and judicial remedies (Gauri, 2009). During this time, the lack of education for many rural Indians meant that most people were unaware of their legal rights, and lawyers working on their behalf were few and far between. Many citizens were expecting the Supreme Court to intervene. The Court failed to do so and instead capitulate Indira Gandhi's autocratic tendencies (Holladay, 2012). Subsequently, in 1976, ***Mumbai Kamagar Sabha vs. Abdulbhai*** case was initiated wherein an unregistered association of workers was permitted by Justice Krishna Iyer to institute a writ petition under Article 32 of the Constitution for the redress of common grievances (Diva Rai, 2020). The first reported case of PIL, in 1979, focused on the inhuman conditions of prisons and under-trial prisoners (Diva Rai, 2020).In Hussainara ***Khatoon vs. the State of Bihar***, the PIL was filed by an advocate based on the news item published in the Indian Express, highlighting the plight of thousands of under-trial prisoners languishing in various jails in Bihar. These proceedings led to the release of more than 40,000 under-trial prisoners. The right to speedy justice emerged as a basic fundamental right that had been denied to these prisoners. The same set pattern was adopted in subsequent cases (Diva Rai, 2020).

[1] As stated by Justice A. M. Ahmadi, dimensions of judicial activism, retrieved from http://www.iosworld.org/J_ahmedi.htm>accessed on 25th August 2012.
[2] Law Dictionary-Judicial Activism, Retrieved from: http://www.answers.com/topic/judicial-activism.

Thus, the Supreme Court issued several landmark social justice causes in the 1980s and early 1990s, including key rulings on the rights of prisoners, bonded laborers, pavement dwellers, and children (Gauri, 2009). By the middle of the late 1990s, the range of issues the courts were addressing had expanded to include complex environmental concerns, such as urban pollution and solid waste disposal, as well as explicitly political issues, such as official corruption and elections (Gauri, 2009).

In Pakistan, the judiciary takes a long time in post Independence era followed by the well-established Anglo Saxon principle of judicial restraint and stuck to the rule of 'aggrieved person' to knock on the door of the Courts(Ullah, 2018). The judicial restraint, due to the English traditions, repeated promulgation of the Martial Laws, and the constitutional emergencies did not attract them to judicial adventurism (Ullah, 2018). Pakistan, in particular, has witnessed a burgeoning of PIL since the appointment of Iftikhar Chaudhry as the chief justice of the Supreme Court in 2005 by General Pervez Musharraf Chaudhry's appointment led to constitutional crises arising from the court's challenges to the political legitimacy and survival of Musharraf's military regime, as well as the democratic governments succeeding it (Khan, 2014). The root of judicial activism or public interest litigation (PIL) in Pakistan goes back to the late '80s in the case of ***Benazir Bhutto* v. *Federation of Pakistan*** (PLD,1988) (Munir, 2007). The rampant breach of fundamental rights by the public authorities led the Courts to play an active role and protect the vulnerable people of Pakistan against inefficient, corrupt, incompetent, and ineffective public functionaries. The broader and wider interpretation of the right to life, under Article 9 of the Constitution of Pakistan, helped the Courts create and discover new fundamental rights emanated from it. Similarly, softening the restrictive rules of locus standi provided a passage to claim newly emerged fundamental rights. The Supreme Court, in the ***leading case of Tariq Transport Company***, expressly stated, while emphasizing on the rigid principle of locus standi, that it was a basic principle that a person seeking judicial review of administrative or quasi-judicial action must show that he had a direct personal interest in the act(Ullah, 2018). This restricted view of the court was sustained till 1988. The restricted view of *locus standi* has been changed in the ***case of Mohammad Javid Malik*** the doctrine of Public Interest Litigation was discussed and in ***Mohammad Yaqoob*** the Lahore High Court observed that "with the development of the new concept of public interest litigation in the recent years, a person could now invoke the constitutional jurisdiction of the superior Courts even if he was not an aggrieved party" (Ullah, 2018).

The *Darshan Masih* case was a pure PIL case on behalf of bonded laborers in the brick kiln industry, which addressed the issue of plights and miseries of suppressed bonded laborers of bricks kiln (Khan, 2014). A bonded laborer of brick kiln sent a telegram to Chief Justice of the Supreme Court, praying him to emancipate them from such cruel and inhuman practice. It was the first example of epistolary jurisdiction exercised by the apex Court. While admitting that it never happened already, the Court converted the telegram into a writ and called up the relevant parties, along with some amicus curie (Ullah, 2018). It set a precedent for what was to become the *suo motu* jurisdiction of the constitutional courts, through which the courts empowered themselves to take cognizance of matters addressed to them through letters and informal complaints, as well as on their own motion (Khan, 2014). Public Interest Litigation got the momentum when the catalyst of the 'Quetta Declaration' was signed by the Judges of the Supreme Court and the Higher Courts. It was a Scheme for the Protection of Rights of all Classes' specially the deprived ones, allowing the use of umbrella of Public Interest Litigation. Under the Declaration, many social action groups, independent of the traditional "aggrieved person" who had suffered the loss, brought several cases in the constitutional Courts. In fact, that was the beginning of public interest litigation, regarding environmental protection in the Higher Courts of Pakistan. Thus, gradually, the contours of *locus standi* were not only expanded from 'aggrieved party' to 'any person', interested to protect the fundamental rights of the weak strata of the society, but the Courts even went on one step further to take ***suo moto*** actions like the Human Rights Case of Balochistan,1994 (Ullah, 2018). In fact, it was the Quetta Declaration that provided impetus ushering the Courts to exercise such jurisdiction. Subsequently, the higher judiciary of Pakistan was invigorated; therefore, the Supreme Court and all the High Court consistently showed their concern and sensitivity to the disadvantaged people (Ullah, 2018). The combination of activism and populism that has marked the behavior of Pakistan's Supreme Court since 2005 has tapped into the desire of Pakistanis to see the executive held accountable for its venality, abusiveness, and incompetence (Niaz, 2020). Developing and applying the rules and principles of Public Interest Litigation, now the Higher Judiciary of Pakistan protected environmental rights, prisoners' rights, pensioners' rights, children and women rights.

In Bangladesh, judicial activisms or public interest litigation (PIL) is not defined directly in any statute, act, or provision of the Bangladesh Constitution. It has been interpreted by judges to consider the interest of the public at large. However, in Bangladesh, the constitution has not only guaranteed fundamental rights and their judicial enforcement[1] but also sufficiently empowered the High Court Division of Supreme Court to enforce them through appropriate directions or order to any person or authority including public functionaries.[2] Besides,

[1] Article 44(1) of Bangladesh Constitution.
[2] Article 101(2) of Bangladesh Constitution.

the Constitution of Bangladesh incorporates 23 rights (both civic and political called fundamental rights) in Part III, Articles 27–44. When these rights are violated by any public or private individual or authority, human right is violated. Article 8 of the Universal Declaration of Human Rights enumerates that everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.[1] Similarly, for the protection of these fundamental human rights of the citizen, Article 44(1) of the Bangladesh Constitution guarantees the right to move the High Court Division (HCD) of the Supreme Court (Mollah, 2008). By protecting the fundamental rights of the citizen, the judiciary ensures human rights. The High Court Division of Bangladesh has also been given the power to issue appropriate writs to remedy a legal wrong or to enforce the legal obligation.[2] Thus, judicial activism is permitted indirectly by the Constitution of the Republic of Bangladesh. Judicial activism or PIL was introduced for poor, socially vulnerable, backward, and minority groups who have faced limited access to courts or failed to get judicial remedies due to lack of legal knowledge and consciousness.

The vulnerable peoples of society are always affected by the stronger of the society and deprived of their rights of life, liberty, property, and many other basic human rights. However, PIL is an approach where any conscious person, lawyer, lawyer association, or human rights defender organizations can fight on behalf of aggrieved persons and even Supreme Court can take PIL cases based on newspaper reports issuing *sou moto* rule. Though the judicial activism role of judges is started more than 50 years ago in the USA and UK, however, this concept emerges as a very rising and strong landmark concept of social action or public interest litigation in the Indian subcontinent around the 1970s. In the context of Bangladesh, PIL is introduced in the 1990s, but primarily it was rejected by the court due to lack of recognition of *Locas standi.*[3] In Bangladesh, the case of ***Kazi Mukhlesur Rahman V. Bangladesh*** (1974)[4] was first denied by the High Court of Bangladesh on the ground of *locus standi*. Later it was recognized by the Appellate Division of Supreme Court in the case of ***Dr. Mohiuddin Farooque v. Bangladesh & others*** (1995).[5] Primarily this case was also denied by the High Court Division of Supreme Court (Writ Petition No.998/94). In this case, the Appellate Division of the Supreme Court of Bangladesh takes a farm stand on the modern liberal trend of Public Interest Litigation leaving aside the traditional view of *locus standi*. It (the Supreme Court) decides to interpret the term 'a person aggrieved' in a liberal mood and with a progressive attitude and thus widens the writ Jurisdiction of the High Court conferred on it by Article 102 of the Constitution of the People's Republic of Bangladesh.

In Bangladesh, the Supreme Court plays its judicial activism through *Suo Moto* (by own initiatives) rule and by PIL. *Suo Moto* means on its own motion or initiative, without external promoting or explicit demand. This is the way where the judiciary plays its pro-active role by Supreme Court based on media reports or informed by any other ways. For instance: In Bangladesh, judicial activism started functioning for the first time in 1992 when the High Court Division issued a *suo- motu* (by own initiatives) rule in the case of ***State v DC, Satkhira***[6] based on a newspaper report. On 6 October 1992, a news item under the caption *"Sab Mamla Hote Abbahoity, Athocho Baro Batshor Jabod Jailey"* (Released from all cases, yet has been kept in Jail for twelve years) was published in the Daily Ittefaq (Bengali daily newspaper).In this case, it was disclosed before the Court that Nazrul Islam was arrested by implicating him twelve criminal cases and he was detained for eleven years.[7] The High Court Division in its judgment declared the detention of Nazrul Islam was illegal and without jurisdiction. The Court directed the government to inquire as to whether any other person like Nazrul Islam was being held and the persons responsible for such illegal detention were to be brought into the book.[8] Thus, the judiciary exercises the power of judicial activism and ensures rule of law through protecting individual rights on the one hand and on the other hand it ensures accountability of the government.

Public Interest Litigation:

The words `*public interest*' refers to the common interest which is essential for the well being of people and the word '*litigation*' means a legal action following all procedures within, initiated in a court of law to enforce a right

[1] Article 8 of the Universal Declaration of Human Rights, online available at: http://www.un.org/en/documents/udhr/index.shtml
[2] Article 102(2) of Bangladesh Constitution.
[3] Locus standi is a legal phrase referring to whether someone has the right to be heard in court. Normally an aggrieved person or organization has the rights to file a case before a court with a view to getting remedies. However, in PIL any person or organization can move on behalf of an affected person or where public interest is affected by government or any other bodies. In the case of *Mohiuddin Farooque v. Bangladesh & others* (FAP-20 case, Civil Appeal No. 24 of 1995), Supreme Court extends writ jurisdiction through which voluntary societies, representative organisations, trade unions and constitutional activists and individuals having no personal interest in the cause would be able to test the validity of a law or an action of a public official affecting the general public by making the power of judicial review of the Supreme Court on their own standing.
[4] 26 DLR (AD) 44, 1974.
[5] FAP-20 case, Civil Appeal No. 24 of 1995.
[6] 45 DLR, 1993; 643-44.
[7] Ibid.
[8] Ibid.

or seek a remedy.[1] Public interest litigation is the practice of the power by the predominant judiciary, for example, high court's and the supreme court particularly for social change and to stop the social treacheries to the specific people or the gathering or general society everywhere and safeguard their major rights, public interest litigation is the device for the unprivileged and hindered gatherings of the general public to oppose animosity over their essential rights.

Thus, the expression `Public Interest Litigation' means those litigations executed for the benefit of the public or amputation of some civic grievance. PIL refers to that activist jurisprudence that allows any person without being aggrieved to activate the judicial method to pursue a public cause or the rule of law and allows the court to provide unorthodox remedies (Hoque, 2011). In PIL it is not necessary to introduce it in a court of law by the aggrieved party. It can be initiated by any other private party on behalf of the injured person. Such injury may arise from a breach of a public duty or due to a violation of some provision of the Constitution. Public interest litigation is the device by which public participation in judicial review of administrative action is assured.[2] PIL is the power given to the public by courts through judicial activism[3]. However, the person filing the petition must prove to the satisfaction of the court that the petition is being filed for public interest and not just as frisky litigation by someone. Such cases may take place where the victim does not have the necessary resources to introduce litigation or his freedom to move court has been suppressed or encroached upon.[4]

Judiciary in Bangladesh playing a vital role in protecting human rights in various ways such as by protecting the rights of under-trial prisoners, controlling abuse of government power, upholding national interest, controlling illegal enforcement of extrajudicial arbitration, punishment, and killings, and protection of minorities rights, etc. Some evidence and examples have been analyzed below.

From the above review of origin and development of the concept 'judicial activism,' it has been uncovered that it has first used in UK and USA but not in this name. Later it has been popularly used since 1960 in the USA and then extended developing world especially in India since the late 70s, Pakistan in the late 80s, and Bangladesh in the late 90s through numerous challenges of *locus standi*. This is a great weapon of the judiciary to punish power abusers and ensure the rights of citizens in South Asia.

3. Human Rights

The origin and definition of human rights (later used as HR) are a product of a philosophical debate that has raged for over two thousand years (Heard, 1997). There is no universal definition of HR. Generally, HR is the rights of a person by which simply he or she is treated as a human being. In other words, HR represents those rights that allow one to enjoy leading a life in dignity as a human being without considering any geographical or ethnic origin boundary (Ahmed, 2013: 88; UDHR, 1948; OHCHR, 2014). According to Donnelly (1989:17), "Human rights refers to a social choice of a particular moral vision which deserve the minimum requirements of a life of dignity." Article 1 of the UDHR (1948) enumerated that-

> *"All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood"* (Article 1, UDHR 1948).

The declaration has a total of 30 articles that encompass all the aspects of human life to protect and promote the fundamental rights of the individual, including social, economic, civic, political, and cultural rights. For instance, Article 25 (1) of the declaration highlights on-

> *"Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control"* (Article 25, UDHR 1948).

Besides, various scholars and theorist of Human Rights expressed their own views about human rights with varieties and diversities from ancient times like- Aristotle, John Locke, Hobbes, and Rousseau. However, few recent scholars' views have been analyzed to make a theoretical framework. The basic rights of a human being according to Rawls (1993; cited in Slye, 1994:1572) is:

> 1)*The right to life and security; 2) the right to personal property; 3) elements of the rule of law; 4) liberty of conscience; 5) freedom of association, and 6) the right to emigrate.*

Nobel laureate Amartya Sen (2004:319-20), have been identified six elements of the theory of human rights:

> i) *Human rights primarily relates to ethics; ii) Human rights involve with individual freedom-freedom*

[1] For detail see Kamal Uddin Khan, 2009. Public interests litigation and judicial activism, available at: http://www.airwebworld.com/articles/index.php? article=1531.
[2] Retrieved from: http://www.ngosindia.com/resources/pil.php. Accessed on 01.05.2011.
[3] The expression `Judicial Activism' signifies the anxiety of courts to find out appropriate remedy to the aggrieved by formulating a new rule to settle the conflicting questions in the event of lawlessness or uncertain laws. Black Law Dictionary defines it as a philosophy of judicial decision making whereby the judges allow their personal views about public policy, among other factors, to guide their decisions. The Judicial Activism in India can be witnessed with reference to the review power of the Supreme Court under Article 32 and I (belt Courts under Article 226 of the Constitution particularly in Public Interest Litigation. See Kamal, 2009; Ibid.
[4] Retrieved from: http://en.wikipedia.org/wiki/Public_Interest_Litigation, accessed on 01.05.2012.

of social security and employment opportunity; iii) Human rights relates to safeguarding individual freedoms; iv) Human rights require dignity of persons without discrimination and monitoring of violations; v) Human rights recognize economic and social rights of individuals, and finally vi) Human rights are associated with the free flow of information and access to justice globally.

Therefore, there is no concrete consensus among scholars regarding what would be the exact parameters of human rights concepts and theories. However, few basic elements of human rights can be identified from the above brief analysis as human rights include-

1. The right to life, liberty, property, dignity, and security of an individual;
2. Civic and political rights of individuals;
3. Rule of law;
4. Liberty of conscience;
5. Access to information and justice globally;
6. Freedom of association, etc.

Therefore, if any one of the above-mentioned rights including the fundamental rights of a person is to be considered as violation of human rights. To protect and promote human rights, judicial activism plays a vital role to make sure accountability and punishment for the offenders.

4. Judicial Activism and Human Rights in South Asia: Bangladesh, India, and Pakistan

South Asia has been experiencing an unprecedented wave of judicial activism in recent decades. The expansion within constitutional fundamental rights has broadened the scope of public interest litigation "PIL" in almost every sphere of life. Frequent exercise of judicial powers by the Supreme Court of Bangladesh, India, and Pakistan more specifically "*Suo Moto*" (action on court's own motion) jurisdiction is seen to be overtaking all kind of matters e.g. political, social, economic, women and children rights, prisoner's rights, environmental rights, and foreign direct investment. The Apex Courts of the selected three countries have delivered several hundred judgments under PIL and *suo moto* jurisdiction within the last few decades in South Asia. Few case laws have been discussed below.

4.1 Protection of Women Rights:

Violence against women is one of the brutal forms of violation of human rights. It has been happening in various ways in South Asia. Violation of women's rights through extrajudicial or traditional arbitration (by fatwa) is one of them. Judiciary is now very proactive to protest extrajudicial punishment and killing through its judicial activities. In an earlier section, it has been stated that through public interest litigation or *sou moto* rule, the judiciary protects the rights and liberty of vulnerable, poor, minorities group of society. Some case examples are analyzed below.

In Bangladesh, a series of incidents of violence took place on women and girls in the name of 'fatwas' by traditional dispute resolution processes (arbitration/shalish), often involving village matbars(leaders) and religious leaders reported by the various daily newspaper in Bangladesh.[1] These incidents had reportedly resulted in women and girls in villages across the country being caned, beaten, lashed, or otherwise publicly humiliated within their communities. Ain-o-Salish Kendra (ASK), Bangladesh Legal Aid and Services Trust (BLAST), BRAC, Bangladesh Mahila Parishad (BMP), and Nijera Kori, brought a PIL case ***BLAST and others Vs Bangladesh*** in 2009.[2] They challenged the authorities' failure to address extrajudicial punishments imposed by *shalishes*[3] in the name of fatwas, opinions that are supposed to be issued by Islamic scholars. While many of these incidents go unreported, ASK has assembled news reports of at least 330 such incidents in the last 10 years. These private punishments significantly harm women's and girls' lives and health instead of intervening and taking active measures to prevent these abuses, the Bangladesh authorities have been mute bystanders. The High Court division of the Supreme Court issued its verdict in the case on July 8, 2010, criticizing the Bangladesh government for not protecting its citizens, especially women, from cruel, inhuman, and degrading treatment or punishment. In a landmark judgment for women's rights, the High Court declared that:

"*Imposition and execution of extra-judicial penalties including those in the name of execution of Fatwa is bereft of any legal pedigree and has no sanction in-laws of the land."*[4]

In this case, the Court cited the constitutional mandate of equality and the state's international human rights treaty obligations to ensure women's right to live free from violence. The Court further directed the law enforcing agencies, Union Parishads and Pourashavas (municipalities) to take preventive measures against the issuing of such "fatwas" in their concerned areas and to take legal steps for prosecution in case of such

[1] See the report of ASK: http://www.askbd.org/web/wp-content/uploads/2010/11/fatwa_judgement.pdf. Accessed on 6th September 2012.
[2] *BLAST and Others v Bangladesh,* Writ Petition No.5863 of 2009.
[3] Traditional dispute resolution methods.
[4] *BLAST and Others v Bangladesh,* Writ Petition No.5863 of 2009.

occurrences, as appropriate.[1] They also directed the Ministry of Local Government to inform all law enforcing agencies, Union Parishads, and Pourashavas of the unconstitutional nature of such penalties. In a particularly significant step, they directed the Ministry of Education to introduce educational materials in the syllabi of all educational institutions particularly in madrassah on the supremacy of the Constitution.[2] However, the incidence appeared again and the issue became especially burning when a *shalish* in Shariatpur district in the Dhaka division ordered 100 lashes in January 2011 for Hena Akhter, an adolescent girl, for an alleged affair, though by most accounts she had reported being sexually abused instead. She collapsed during the lashing and ultimately died.[3] The court further on February 2 and on May 12, 2011, orders directing the government to publicize as an urgent matter, through electronic and print media, that extrajudicial punishments are unconstitutional and punishable offenses and no punishment, including physical violence and/or mental torture in any form can be imposed or inflicted on anybody in pursuance of the fatwa." The court further held that fatwas can be issued only by "properly educated persons" and clarified that even where issued, they are not binding and cannot be enforced.[4] In this way, the court gave another judgment on 13th January 2011 to protest and prohibit corporal punishment imposed on school children by teachers in the case of ***BLAST v Ministry of Education.***[5]

Apart from these, incidences of violence against women and children are continuing in Bangladesh. Most of the human rights defenders organizations are solely dissatisfied with the role of government. In an interview of Human Rights Watch, it has been found that 29 women in 2020 during the Corona pandemic from six of the eight divisions of Bangladesh were survivors of gender-based violence, including acid attacks. The government has made addressing acid violence a priority, but these cases shed light on the underlying systemic barriers that still prevent even these survivors from gaining legal recourse and protection.[6]

In India, Supreme Court judgments in PIL cases have not only been influential in promoting awareness about women's issues but have also been instrumental in the creation of policy and organizations devoted to women's development initiatives (Dasgupta, 2002). It was in the early 1990s that the Supreme Court ordered the creation of the National Commission for Women (NCW) under the National Commission for Women Act of 1990. By January of 1992, the Commission was functioning at what the government deemed full capacity. The Supreme Court has declared **in *Delhi Domestic Working Women's Forum vs. Union of India & Others* [1994**(4) SCALE 608], that it is necessary to ensure the protection of women by the National Commission for Women due to the high incidence of violence against women of especially poor socio-economic status and women who belong to disadvantaged minority groups(Dasgupta, 2002). These victims usually have neither the time nor the means to secure justice for themselves using the civil court system, and it is for the sake of women belonging to the weaker sections of the population that the Commission has been established (Dasgupta, 2002). Compensation to victims of sexual assault is a practice that has gained much recent attention due to a ruling handed down by the Supreme Court in January of 2000. In this case, a ruling by the Calcutta High Court was upheld in which it ordered Rs.10 lakh (one million rupees or roughly $22,000 at the time of the award) in compensation to a Bangladeshi tourist who was gang-raped by railway employees at Howrah railway station in Calcutta. The Supreme Court agreed that all people on Indian land are entitled to the same fundamental rights as any Indian citizen unless there is somehow a breach of national security involved (Dasgupta, 2002).

In another case of ***Vishaka and Others versus State of Rajasthan and Others*** **(1997**) in India, the Supreme Court declared sexual harassment in the workplace to be unconstitutional. This case was filed by several social activists and NGOs spurred on by the brutal gang rape of a female social worker in a Rajasthani village. In this case, Chief Justice Verma declared that sexual harassment in the workplace is a violation of the fundamental rights of gender equality and the right to life and liberty under articles 14, 15, and 21 of the constitution (Dasgupta, 2002). Besides, he practices article 19 (1) (g), which protects the right to practice any profession or to carry out any occupation, trade or business,' is also violated when there is an incident of sexual harassment. Justice Verma states that the fundamental right guaranteed in article 19 depends on the assumption of a 'safe' working environment. He also goes on to explain that the:

> *'primary responsibility for ensuring such safety and dignity through suitable legislation, and the creation of a mechanism for its enforcement, is of the legislature and the executive'(Dasgupta, 2002).*

More recently, in a Mumbai High Court, public interest litigation won a judgment in 2016 that was in favor of improving "women prisoners' access to abortion" and "strongly affirmed women's rights to abortion as an aspect of the fundamental right to live with dignity under Article 21" (Stevenson, 2019).

Like these many other crucial issues of women are taken into consideration by the Supreme Court of India.

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[1] Ibid.
[2] Ibid.
[3] See Human Right Watch article on 'Bangladesh: Protect Women Against 'Fatwa' Violence -Despite Court Orders Government Has Failed to Intervene'. Weblink: http://www.hrw.org/news/2011/07/06/bangladesh-protect-women-against-fatwa-violence.
[4] Ibid.
[5] Writ Petition No.5684 of 2010.
[6] See more at: https://www.hrw.org/news/2020/10/29/bangladesh-pivotal-moment-stop-violence-against-women

For instance, in a dowry case, ***Sarita versus Delhi Administration and Others****(1987)*, a woman wrote a letter to the Supreme Court that after two months of her marriage her husband's family pressurize for money from her parents. She also disclosed the letter that her life had been threatened, she could not afford a lawyer, and the Delhi Police refused to help. The Court took up the matter and issued notice to the Commissioner of Police in Delhi giving him one week to conduct an inquiry and get back to the Court with the results. He was also instructed to provide the petitioner with all 'necessary and adequate' police protection [1987(1) SCALE 403]. In an order dated exactly seven days from the date of the original order, the Delhi Police found the authenticity of the said allegation and took appropriate action accordingly. Then the Supreme Court directed the Delhi District Legal Aid and Advice Board to take necessary steps in favour of Sarita [1987(1) SCALE 555]. In a plethora of cases such as ***Peoples Union for Democratic Rights v. Union of India*** (AIR 1982 SC 1473), ***Randhir Singh v. Union of India***(AIR 1982 SC 879), **Sanjit Roy v. State of Rajasthan** (AIR 1983 SC 328), ***Uttarakhand Mahila Kalyan Parishad v. State of Uttar Pradesh*** (AIR 1992 SC 1695), and ***Mackinnon Mackenzie and Co. Ltd. v. Andrey D â Costa*** (1987 AIR 1281), etc cases Judiciary has played an active role in enforcing and strengthening the constitutional goal of "equal pay for equal work" enshrined in Article 39(a), which implicit in Article 14 and 16 of the Constitution. The court has brought equal remuneration within the contours of the fundamental right of equality (Anuradha, 2020).

In Pakistan, the status of women is the worst situation in South Asia. The European Parliament reported that Pakistan is ranked by the Global Gender Gap Index 2018 as the sixth most dangerous country in the world for women and the second-worst in the world (ranked 148th) in terms of gender equality. The number of recorded cases of sexual crimes and domestic violence is rapidly rising.[1] The NGO White Ribbon Pakistan reports that 47034 women faced sexual violence, over 15000 cases of honor crimes were registered, and more than 1800 cases of domestic violence and over 5500 kidnappings of women took place between 2004 and 2016. According to media reports, more than 51241 cases of violence against women were reported between January 2011 and June 2017. Conviction rates, meanwhile, remain low, with the accused in just 2.5 % of all reported cases ultimately being convicted by the courts.[2]

Even within the judicial system, women are deprived and discriminated. For instance, in 1974 the first woman, Khalida Rashid Khan, was appointed as a judge in Pakistan. She was appointed as an anti-corruption judge in 1974, she was then elevated to the High Court in 1994; and in 2003 she was nominated as permanent judge elected by the General Assembly of the United Nations (Holden, 2017). While her career is undeniably a success for a country that does not score highly in gender equality, many among the judiciary itself maintain that judge Rashid's nomination to the General Assembly of the United Nations had the hidden objective of not allowing her to access the Supreme Court of Pakistan. Similarly, in another case, a female judge, Rukhsana Ahmed, was terminated on medical grounds in 2010 (Holden, 2017). This was apparently because she used to decide cases on merit.

The Cases of ***Safia Bibi and Lal Mai*** are another brutal example of a violation of women's rights by the Pakistan Shariat Court. In this case, Safia Bibi was a blind girl who alleged that she was raped. Two days before delivering the child, her father filed an official complaint about the rape to the police station. The accused rapist claimed that Safia was of "loose virtue." Safia was convicted of Zina under the Hudood Ordinance (Islamic Shariah Principles) and was sentenced to 15 lashes, three years imprisonment, and a fine of 1000 rupees because she could not produce the required four male witnesses of the crime (Kirmani, 2000). When news of this particular case was made known, there was a national and international outcry. The Federal Shariat Court dismissed the case as a result. However, the alleged rapist never spent one day in prison because of "insufficient evidence" (Kirmani, 2000). Hundreds of cases like ***Safia Bibi's and Lal Mai's*** have been filed since the passage of the Hudood Ordinance and in fact, more than half of the women in prison in Pakistan have been convicted of "crimes" under the repressive and regressive Hudood Ordinance (Kirmani, 2000). Therefore, the legal system itself is discriminatory for women in Pakistan.

The current practice in Pakistan is that at least one woman should be appointed as a judge at the level of each District and Sessions Court, and women judges are preferentially appointed to Family Courts (Holden, 2017). As mentioned earlier, it is sometimes a source of surprise among the international audiences to know that in countries with a Muslim majority the appointment of women judges is not very recent and has indeed increased dramatically during the past twenty years (Holden, 2017). Recently, Pakistan has taken considerable steps in the legislative domain to improve the status of women. For example, the Criminal Law (Amendment Act), 2004, has facilitated the prosecution of "honor killing" cases; the Protection of Women from Domestic Violence Act, 2005, protects women from domestic violence i.e. stove burning and torture, etc; the Protection of Women (Criminal Law Amendment) Act, 2006, has attempted to remove lacunae in the law about the arrest and punishment of women in Zina cases; and the Protection Against Harassment of Women at the Workplace Act,

[1] https://www.europarl.europa.eu/doceo/document/E-9-2020-001583_EN.html
[2] Ibid

2010, protects working women from sexual harassment (Ranjah and Cheema, 2014). Like these some other initiatives can be mentioned here, The Women in Distress and Detention Fund (Amendment Act) 2011 to provide financial and legal help to distressed women languishing in various jails of the country; Domestic Violence (Prevention and Protection) Act, 2012 is leaping forward to the women empowerment in Pakistan and it is said that it is the most progressive act which is relating to the violence committed in the four walls of the house; National Commission on The Status of Women Act, 2012 promoted the legal, economic, political and social rights of women which constitution of Pakistan has bestowed them (Ranjah and Cheema, 2014).

The Supreme Court of Pakistan also is working proactively for protecting and promoting women's rights now**.** One of the most celebrated cases regarding women's rights in Pakistan is Hafiz Abdul Waheed (2004). It has settled the controversy about the right of an adult girl to marry by her own free will and without the consent of wali once for all (Ranjah and Cheema, 2014). The Supreme Court held that the marriage was not illegal on account of the alleged absence of a wali's consent. The court relied on several judgments of the Federal Shariat Court specifically holding that an adult sui juris Muslim girl can contract a valid nikah on her own (Ranjah and Cheema, 2014). The above case law reveals that the superior judiciary has been reasonably consistent in promoting and protecting the rights of women within the constitutional framework. It has seemed to follow a progressive interpretation of Islamic law by playing Ihsan to serve maslahah as pointed out by Iqbal (2010, 197). Recently Chief Justice (CJ) of The Peshawar High Court (PHC) took a ***suo motu*** notice on a television report on disallowing women to cast their vote during by-elections in Pakistan (Awan, 2014). The CJ of PHC directed the election authorities for withholding the results in two constituencies. He also directed to arrest the responsible people who barred the women to poll their vote in the election (Awan, 2014). On the next hearing, the PHC being dissatisfied with the turnout of ladies at polling stations directed the Election Commission of Pakistan (ECP) to conduct the re-election at more than 54 polling stations (Awan, 2014). The PHC further suspended the election held in two constituencies namely NA.5 and NA 27 (Awan, 2014).The court directed the ECP to forward an immediate summary to the GOP suggesting the drastic changes in the Representation of the People Act 1976 (Awan, 2014). It has been directed that such changes should introduce strict punishment for the people preventing females to cast their vote and as well ensure a certain minimum percentage of female voters in the general and by- elections. The PHC also issued direction of a similar nature to the GOP to table a bill in the parliament and amend above mentioned Act to ensure female participation in the election (Awan, 2014). In recent days the Chief Justice (CJ) of Pakistan has taken *sou motu* notice of several of issues being happening in the country. The CJ has taken action on various cases in recent months like that of Zainab Rape Case in Kasur, Asma Murder Case in Mardan, Naqeebullah Mehsood Murder Case in Karachi, etc.(Youxing and Qureshi, 2020).

4.2 Right to Secure Life:

Right to secure life and liberty are inalienable rights of human beings. But these rights are violating in globally including Bangladesh, India and Pakistan through arbitrary arrest, detention and extra judicial killing which is another form of grave violation of rule of law and human rights. Rule of law does not permit any exercise of power arbitrarily or punished any person without fair trial by court. However, persistent abuse of power and authority by the law enforcing agencies resulting extra-judicial killing of the citizens in the name of cross-fire/encounter giving rise to gross violation of fundamental rights. There are lot of incidence of extra judicial killing have been taken place in Bangladesh, India and Pakistan in various times by law enforcing agencies in the name of crossfire or encounter. These are the grave violation of fundamental rights of citizens which need to get proper judgment by courts. In Bangladesh, Odhikar reports that 4,002 extrajudicial killings have taken place in Bangladesh between 2001 and June 2020, which includes 1,015 cases since the start of the 2018 anti-drug crackdown.[1]

To combat this problem public interest litigation case filed by NGOs and the High Court take first initiative in the case of ***BLAST and Others Vs Bangladesh and Others (1998)***[2] the petitioners referred to incidents of gross abuse of power, including allegations of custodial death, torture and inhuman treatment, especially the **killing** of a young student, **Rubel**, in remand after arrest under Section 54 of the CrPC. The petitioners argued that the Court should enunciate safeguards to prevent or curtail police abuse of powers and arbitrary actions by Magistrates, which constitute violations of citizens' fundamental rights to life and liberty, to equal protection of law, to be treated in accordance with the law and to be free from cruel, inhuman and degrading treatment and punishment as guaranteed under articles 32, 27, 31, 33 and 35 of the Constitution. The High Court initially issued a Rule Nisi, and upon full hearing delivered judgment on 07.04.2003, observing that Sections 54 and 167 of the CrPC are not fully consistent with constitutionally guaranteed freedoms and safeguards. The Court laid down a comprehensive set of recommendations regarding necessary amendments to both sections of the CrPC, along with the Police Act, The Penal Code, and the Evidence Act, and directed that these should be acted upon

[1] Retrieved from- https://www.ucanews.com/news/extrajudicial-killings-are-no-mark-of-a-civilized-society/89057#
[2] Writ Petition No. 3806 of 1998; High Court Division of the Supreme Court of Bangladesh.

within six months. It also laid down a set of fifteen guidelines concerning the exercise of powers of arrest and remand including no police officer shall arrest anyone under Section 54 for the purpose of detention under Section 3 of the Special Powers Act, 1974. And the police officer arresting under Section 54, or the Investigating Officer taking a person to custody or the jailor must inform the nearest Magistrate about the death of any person in custody in compliance with these recommendations. The person arrested shall be furnished with reasons of arrest within three hours of bringing him/her to the Police Station.[1]It was a landmark verdict of the High court which may a strong arm to protect citizen rights from the illegal and abusive intervention of the police. But the detention and arrest by using the special power act are continuing in Bangladesh to ensure political motive. This is the limitation of the judiciary that the verdict should be implemented by the government but in practice, the government violates the directions of the court.

In another case of ***ASK, BLAST and Karmojibi Nari Vs. Bangladesh and others(2009),***[2] the court issued a Rule Nisi returnable within four weeks on 29.06.2009 calling upon the respondents to show cause as to why the extra-judicial killing in the name of cross-fire/encounter by the law enforcing agencies should not be declared to be illegal and without lawful authority and why the respondents should not be directed to take departmental and criminal actions against persons responsible for such killing. Though 4 years have been passed, however, the case is still pending and the result is not available.

Thus, it is clear to us that the judiciary is not so proactive to protect and promote individual rights from abuse of executive power which are the essential ingredients of rule of law. Because extra-judicial killing is a grave violation of human rights and only one case has been filed by human rights defender organization and it is still pending the final hearing and verdict. Therefore the problem of delay and disposal of cases should be removed from the judiciary in Bangladesh and government has to be more active in this regard.

In India, extra-judicial killings in the form of fake encounters are an attack on the Fundamental Rights guaranteed under Article 14 which grants the right to equality, and Article 21 that protects life and personal liberty.[3] Every person is entitled to a fair investigation and trial under Article 14 and Article 21 of the Constitution. It has been held by the apex court in the year 1978 that any state action which is against principles of natural justice is violative of Article 21. In fake encounters, the police assume the role of the judiciary and the executioner without giving a proper chance to the accused to be heard at an appropriate judicial forum, thereby violating the principle of *Audi Alteram Partem*. In a 2009 Supreme Court judgment, it was held that fairness, justice, and reasonableness constitute the essence of the guarantee of life and liberty as enshrined in Article 21 of the Indian Constitution. In our criminal justice system, the accused is an individual who is pitted against the might of the state. The investigating agencies, adjudicating authority and jail authorities are all institutions of the state. Therefore, an accused should be punished only after he has gone through the entire legal process and has been proven guilty beyond a reasonable doubt.

In the case of E. P. Royappa, the Supreme Court had categorically held that arbitrary acts of the State are in stark contravention of Article 14. When the police force arbitrarily resorts to encounters without any fair justification, it denies the accused the protection of the law that he is entitled to under Article 14. Media reports point out that very rarely have encounter killings been carried out against the most wanted and powerful criminals of the state. Thus, encounters have been used as an instrument of the state against the vulnerable sections of society. It has been indicated that since May 2017, half of those killed in encounter killings in the U.P. were Muslims, and the other half largely comprised of backward castes.[4]

The Supreme Court came down heavily on the police officers indulging in such flagrant practices and issued guidelines that prescribe a procedure for the investigation of deaths by the encounter. However, these have still not prevented law enforcement agencies from carrying out these killings. The perpetrators have largely been able to get away with these killings because it is the police that investigates itself and it does so with a biased approach. The Supreme Court guidelines mandate that an investigation on allegations of fake encounters has to be carried out by a separate team of C.I.D. or by a police station other than the one involved in the said encounter. In cases where the authorization of such fake encounters comes from the people in power, the investigation is usually tampered with because the C.I.D. and the other police stations come under the State Government, which thwarts a fair investigation in such cases. Notably, out of the 74 magisterial inquiries against U.P. police officers in cases of encounter killings, the police have filed a closure report in 61 cases, acquitting the police personnel.[5]

The police have also been seen to be protecting its officers by not initiating proceedings against them. Section 197 of the Code of Criminal Procedure, 1973 (CrPC) requires the sanction of competent authority before

[1] For details Please see Odhikar Human Rights Monitoring Report July 2012.
[2] Writ Petition No. 4152 of 2009. Cited in AKS: http://www.askbd.org/web/?p=1506. Accessed on 6th September 2012.
[3] All these cases related to India have been collected from: https://www.jurist.org/commentary/2020/07/akshat-bhushan-extrajudicial-killings-and-police-impunity/
[4] Retrieved from: https://www.jurist.org/commentary/2020/07/akshat-bhushan-extrajudicial-killings-and-police-impunity/
[5] Ibid.

initiating a criminal case against any public servant.[1] However, the Supreme Court in 2006 made it very clear that there is no need to take prior sanction for prosecuting a public servant where the act has been carried out for personal benefit.[2] The police officers have often been found to conduct such killings by taking money from rival gangs or on the orders of their political bosses. The immunity that is provided in Section 197 of CrPC is only applicable to acts done in pursuance of official duty. Even in 2019, a three-judge bench of the Supreme Court differentiated between official acts and acts which are done under the garb of official duty for personal benefit. The Court went on to hold that acts done for personal benefit do not warrant a prior sanction under Section 197 of the CrPC to initiate criminal proceedings against a public servant.

In the case of ***Sunil Batra v. Delhi Administration****,* AIR 1978 SC 1675, the Court held that the writ of *habeas corpus* can be issued not only for releasing a person from illegal detention but also for protecting prisoners from barbarous and inhuman treatment. Similarly, the Court in several cases has affirmed prisoners' rights (*Charles Sobhraj v. Superintendent of Tihar Jail,* AIR 1978 SC 1514; *Shriniwas v. Delhi Administration,* AIR 1982 SC 1391; *D.S. Nakara v. Union of India,* (1983) 1SCC 304). [3]

In Pakistan, extrajudicial killings, custodial torture, enforced disappearances, and arbitrary arrests are all actions of a dysfunctional judicial system. According to Human Rights Watch (HRW) Report, 2018, police personnel in Pakistan killed about 2,000 people in 2015.[4] "Security forces committed serious violations during counterterrorism operations, including torture, enforced disappearances, and extrajudicial killings." The constant rise of rights abuses at the hands of the state, speaks volumes about the state of human rights in the country. Extra-judicial killing carried out by the police or any law-enforcing agencies is highly condemnable because it adversely affects faith in the system. It is not only violative of law but also a brutal and inhuman act. Such acts violate Article 9 of the Constitution which confers, protects, and preserves the life, liberty, and property of the citizens. In the case of *Mohtarma Benazir Bhutto & Another v President of Pakistan & Others* (PLD 1998 Supreme Court 388),[5] the Supreme Court declared that the Law of Nations does not allow killing even an enemy soldier except in battle and these incidents also tend to shake the legal framework of which in turn loses its trust in the judicial system. In the case of ***Iqbal Haider Vs Capital Development Authority***,[6] The Supreme Court of Pakistan declared that conversion of a Public Park into a commercial park by the Capital Development Authority violating the fundamental right enshrined in Art.26 of the Constitution was a question of public importance and not sustainable in the eye of the law, being contrary to law and violation of fundamental rights of common people.

The Supreme Court of Pakistan taking up public interest litigation (PIL) related to alleged extra-judicial killings of 8,257 persons[7] in Punjab during militancy, the families of some victims gathered at the Akal Takht, the highest temporal seat of the Sikhs, to pray for justice. The issue of extra-judicial killings was highlighted by human rights activist Jaswant Singh halra by getting records of unidentified bodies cremated in Amritsar and Tarn Taran districts from 1984 to 1993. Khalra was also kidnapped and killed by police later. Nearly 70 families from across Punjab prayed for success in the fresh legal battle they have initiated by knocking on the door of the apex court. "My three sons and husband were killed in just over a year. I have waited for 30 years for someone to tell me what happened to them," said Gurmej Kaur, 80, of Batala town in Gurdaspur district, who offered the ardaas.[8] "I did not know my parents were h killed in a fake encounter. I was a baby when my parents were killed. I grew up in an orphanage. I want to know the truth," said Tejvir Kaur, 25, of Nagoke village in Tarn Taran district. UK-based lawyer Satnam Singh Bains, who led the Punjab Documentation and Advocacy Project, a human rights organization that has mobilized the victims' families, said, "The PIL has identified thousands of missing people who were illegally cremated."The families came from all over Punjab with a renewed hope of justice in the wake of recent convictions of police officers by the CBI court in Mohali. This remains a critical issue for the children of the disappeared people as they struggled for two decades in the absence of even a death certificate which has deprived them of educational subsidies, their mothers of widow pension," he added.[9]

Therefore, it can be said that judicial activism against extrajudicial punishment and killing is rising in South Asia but in Bangladesh, the decisions of the apex court are not executed by the government. Besides, delay and disposal of cases is a big problem in Bangladesh and Pakistan but India is comparatively in a better position.

[1] Ibid.
[2] Ibid.
[3] Ibid.
[4] https://www.jurist.org/news/2019/01/pakistan-extrajudicial-killings-spark-outrage/
[5] Ibid
[6] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3380948
[7] https://www.hindustantimes.com/cities/extrajudicial-killings-in-punjab-sc-to-hear-pil-tomorrow-victims-kin-pray-for-justice-at-akal-takht/story-VrIwX6Nw9ThbpjyNa6Ng8H.html
[8] https://www.jurist.org/news/2019/01/pakistan-extrajudicial-killings-spark-outrage/
[9] Ibid.

4.3 Rights to Minorities:

Protection of minority rights also a fundamental state policy in Bangladesh, India and Pakistan. Despite constitutional assurances of equal protection, minorities, human rights activists, and journalists continue to face violence and persecution. Rape is used as a weapon to subjugate and terrorize minority's women. The attacks on Hindu temples, the destruction of Hindu deities, and the disruption of Hindu festivals are in direct violation of this basic constitutional guarantee of religious freedom (see annexes). Moreover, the recent passage of the 15th amendment to the Constitution, retaining Islam as the state religion, weakens the protection of religious freedom provided under Article 28.

Hindus and other minorities in Bangladesh face widespread persecution and religiously motivated violence. For example, the commission probing acts of violence during the 2001 elections has confirmed the role of political parties in the violence. It is now estimated that over 26,000 people participated in committing more than 18,000 crimes, the majority of them against Hindus. Of the 5,571 complaints lodged with the commission, 3,625 were probed, and they included 355 incidents of political murder, while 3,270 involved arson, rape, looting, and other crimes.[1]

The violation of minority rights has been happening since independence, however, what judicial activism or PIL intervention took place for combating this problem? After 42 years of independence, the ***High Court on 3rd March 2013 issued a suo moto rule-following*** newspaper reports regarding the incident of Activists of Jamaat-e-Islami and Islami Chhatra Shibir to set fire to the Hindu houses and temples in Noakhali hours after Jamaat leader Delwar Hossain Sayedee was awarded death sentence by the International Crimes Tribunal-1. The court ordered the government to undertake the repair of the houses of the affected Hindu families. It issued a rule asking why no orders should be given to take legal measures and arrest those responsible for the attacks. The court has asked the Senior Assistant Secretary of the Home Ministry, Inspector General of Police, the Deputy Commissioner and Superintendent of Police of Noakhali district, and Begumganj Police Station Officer-in-Charge to respond to the rule within 10 days. The court also directed the concerned authority to submit a report on the progress of their action over the court's direction.[2] It is a matter of hope that though the judiciary issued a *suo moto* rule after a long time since independence in the issue of violation of minority's issues but the light of expectation depends on the effectiveness of the executive branch. Until and unless the government takes effective measures to give adequate rehabilitation facilities of shelters, housing and religious temple, church, etc. Moreover, the judiciary should be more proactive so that PIL or *so moto* intervention initiates any public interest affected areas of the society.

The constitution of **India** provides for special rights to both linguistic and religious minorities "to establish and administer educational institutions of their choice" under Article 30. Hence no such law can be framed as may discriminate against such minorities with regard to the establishment and administration of the educational institutions vis-à-vis other educational institutions. Article 30 is a special right conferred on the religious and linguistic minorities because of their numerical handicap and to instill in them a sense of confidence. In the St Xavier's College case, the Supreme Court has rightly pointed out, "The whole object of conferring the right on the minorities under Article 30 is to ensure that there will be equality between the majority and the minority. If the minorities do not have such special protection they will be denied equality." In ***Ahemdabad St. Stephens College v. Government of Gujarat***[3], it was observed by the court that: "Every educational institution irrespective of community to which it belongs is a 'melting pot' in our national life" and that it is essential that there should be a "proper mix of students of different communities in all educational institutions." This means that a minority institution cannot refuse admission to students of other minority and majority communities.

The continuous violence and crimes against the minorities that are Muslims, Sikhs, Christians have been popping up daily in India. This issue came up in the eighth session of the UN forum at Geneva. It was held in that section that the rights of minorities are in virtual collapse. The Supreme Court had also stated that the majority of the arrest and detention is illegal in ***Ram Narayan Agarwal vs the State of UP.***[4] About 1.8 million people who are in minority communities are tortured in police custody every year. The word murder of minorities has been replaced by the term encounter killings. Torture has increased to such a huge extent that it questions the credibility of the rule of law and criminal justice.

The Indian Constitution does not define the term minority but it defines minorities based on religion and language, their rights that have been laid down in part 3 of the Constitution are legally enforceable and the rights which have been laid down in part 4 of the Constitution are not legally enforceable by law. The Government of India set up the **National Commission on minorities in 2005.**[5] Jains joined the minority list in 2014. The issues

[1] See Odhikar Report on annual human Rights, 2011.
[2] The daily News today, March 4, 2013; Ensure minorities' life, property: HC. http://www.newstoday.com.bd/index.php?option=details&news_id=2338617&date=2013-03-04
[3] http://www.legalserviceindia.com/article/l93-minorities-rights.html
[4] https://blog.ipleaders.in/minorities-in-india-rights-and-legal-status/
[5] https://blog.ipleaders.in/minorities-in-india-rights-and-legal-status/

of minorities are dealt with by the Ministry of minority affairs and the ministry of home affairs in the Government of India. No doubt the constitution of India needs an amendment to take care of violence against minorities especially Muslims.[1] There is no specific protection for minorities in the Indian Constitution. The judiciary, police, and prosecution are not at all sensitized to this issue. Rajendra Sachar committee 2005 identified the disabilities that the Muslims in India face. The Christians and Sikhs are much smaller victims but they are still victims.

In Pakistan, minorities have regularly been hoodwinked into believing that their rights shall be guaranteed and protected by the state. As in ***Aslam khaki v. Senior superintendent of Police*** (Constitution petition no 43 of the year 2009),[2] the court passed a request which was hailed by critics and supporters alike as extending the rights of transsexuals, however, overlook transsexuals in the nation. The court stated: Needless to observe that eunuchs in their rights are citizens of this country and subject to the Constitution of the Islamic Republic of Pakistan, 1973, their rights, obligations including the right to life and dignity are equally protected. Thus no discrimination, for any reason, is possible against them as far as their rights and obligations are concerned. The Government functionaries both at federal and provincial levels are bound to provide them the protection of life and property and secure their dignity as well, as is done in the case of other citizens.

In 2014, The Supreme Court ordered the government to establish a National Council for the Rights of Minorities and set up a special Task Force.[3] In pursuance of the Supreme Court verdict, the government of Prime Minister Nawaz Sharif has commenced a process to establish the National Council on Minorities' rights. The government, in contravention of the terms of reference of the commission, finalized the entire process without consultation of the key stakeholders. They are neither representatives nor the minority groups themselves. Religious minority groups have termed such a move as undemocratic and unethical. To date, the commission is yet to be formally established. There are an estimated 500,000[4] 'third-gender' citizens in Pakistan including cross-dressers, transsexuals, eunuchs, hermaphrodites, and transvestites. Their rights are guaranteed on paper. But, members of the transgender community do not have these rights in practice. While the Supreme Court ordered that free education and free health care be guaranteed to the community, provincial departments have yet to implement this decision. The discrimination against the community is evident. In the flood of 2013, that devastated half of the KPK province, the community was left out of the aid efforts. They were denied access to Internally Displaced Person camps because of general prejudice, their non-conforming appearance, and their lack of proper identification documents. The court order and ruling had no bearing on the provincial administration that denied the community their right to being treated as equals. Forty-five transgender persons have been targeted in Khyber-Pakhtunkhwa since January 2016 alone.[5] Sexual violence against the community is completely overlooked by the authorities, despite repeated attempts at seeking help from the local police.

The violation of minorities' rights in all the countries is severe. In this case, even the judiciary is also reluctant. However, various human rights organizations and NGOs are active to protect and promote minority rights in Bangladesh, India, and Pakistan.

Besides, in South Asia, judicial activism is the most effective in protecting prisoners' rights, and environmental rights, especially in India. Though Bangladesh and Pakistan judiciary takes several initiatives many cases are still pending hearing and delivery judgments.

5. Concluding Remarks

From a review of the overall discussion and analysis, it has been found that there is a close relationship between 'judicial activism' and 'Human Rights'. Judiciary is a very vital institution of government that not only contributes to establishing rule of law in a country but also contributes to ensure and compel any public or private individual or organization to abstain from miss-use of power or any other forms of corruption to protect and promote individual rights, liberties, and properties in South Asia. Analysis of various case laws, it has been found that judicial activisms are one of the golden mean approaches in protecting various aspects of human rights such as- fundamental rights, the security of life, liberty and properties, rights of women and minorities, and overall protection of public interest. All those are the basis of rule of law and good governance of a country. In most cases, it has been found that judicial activism is such an approach where there is no need to file a writ by the affected person directly. Any person or organization has the right to writ on behalf of affected rights or public interest-related concerns. In this study, it has been found that a number of cases delivered by the judiciary for protecting and upholding human rights in Bangladesh, India, and Pakistan in the form of judicial activisms but most of the cases are initiated and filed by human rights organizations and legally conscious persons; and few initiatives are taken by the higher judiciary through *suo moto* provision. But it is a matter of sorrow that

[1] https://blog.ipleaders.in/minorities-in-india-rights-and-legal-status/
[2] https://ukdiss.com/examples/role-of-the-supreme-court-of-pakistan.php
[3] https://minorityrights.org/2020/06/02/minority-commission-pakistan
[4] https://www.refworld.org/docid/5978a8724.html
[5] https://www.refworld.org/docid/5978a8724.html

these initiatives are very limited in the context of a number of incidents are happening in Bangladesh and Pakistan. A lot of extrajudicial killing and punishment has been happening but the cases are limited. Similarly, violation of minorities rights in the forms of rape and killing, physically and sexually assault, kidnapping, schooling, voting, destroying and damaging houses, temples, and looted of gold and other ornaments are happening since the war of independence but the number of PIL or suo moto cases is limited. Even, verdicts of those cases are not implemented effectively in Bangladesh. The Federal Shariat Court is another obstacle in ensuring women's rights in Pakistan. Though the Indian judiciary is very effective to apply judicial activisms, however, delay and disposal of cases are some of the very crucial problems to discharge verdict in all three countries. Apart from this, deterioration of law and order, violation of human rights, corruption, arbitrary use of power by the law and order enforcing agencies are still continuing in South Asia like other developing countries of the world. Therefore, what measures can be taken to eradicate this problem. Along with judiciary existing other watchdog or regulatory public institutions like, Anti Corruption Commission, Human Rights Commission, CAG, Parliamentary committees, Ministry of Home Affairs, Ombudsman, etc. should be more proactive, independent, accountable, and transparent to ensure individual rights and interest from the illegitimate or arbitrary exercise of any executive or political power. Aside from this, NGOs, human rights defender organizations, civil society, and the initiatives of International Human Rights Organizations that are closely related to establish rule of law and national interest should be accepted and promoted by the government.

It needs to be mentioned that PIL does not work in isolation. It is a part of the greater movement for legal aid or a constituent of the greater theme of public interest law. So in the hand of the social activist lawyer, PIL is one of many strategies which the concerned citizens and activists in Bangladesh are now using in combination. There is a realization that is not a cure-all for all types of issues and problems. Retaining a close nexus with the press, the voluntary sector organization is increasingly using new strategies including publication, lobbying, and representation. The future of PIL in Bangladesh is very bright. Since PIL is an expression of social consciousness of the fortunate few, its progress is of our social responsibility.

Finally, the empowerment of affected people to exercise and insist on their rights is equally important for the establishment of rule of law and protecting human rights. In this regard, mass consciousness programs on human rights and rule of law can be taken by both public and private organizations and educational curriculum so that citizens might be aware of their rights, duties, and responsibilities to uphold national interest and rule of law.

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