Structural Remedies:
Structural Injunctions and Continuing *Mandamus*

I. INTRODUCTION

Structural remedy is a type of remedy that involves the Court's active participation in remedying a wrong: the Court not only declares an action unlawful but also supervises the process of rectification by the wrongdoer. 'Structural injunction' is the term used in the USA and Canada, while in South Africa and some other countries it is called 'structural interdict.' In India, Pakistan, Bangladesh and Philippines a similar remedy is continuing *mandamus*. *Mandamus* (Latin, meaning "we command") is a type of writ issued by the court to direct a public body to do something which it is required by law to do. It is one of the five kinds of writs contemplated in the constitution of Bangladesh.[1] 'Continuing *mandamus'* means a writ of *mandamus* which remains open even after the court has declared the impugned act illegal. The court chooses not to finally dispose of the case and assumes a supervising/monitoring role to ensure compliance with its orders.

Irrespective of the expression used, the remedy operates in the same way everywhere: directives are addressed to public officials to remedy a wrong, the case remains open for any period of time, and the court engages in ongoing supervision.

It is distinct from the traditional remedies such as declarations, recommendations, damages or prohibitory injunctions, which are sometimes viewed as weak remedies, especially in countries where law enforcement is relatively lax.

The concept of continuing *mandamus* is still nascent in Bangladesh. The first express use of the term was made in the case of *Human Rights and Peace for Bangladesh vs. Bangladesh* (Writ Petition no. 3503 of 2009)[2]. The High Court Division of the Supreme Court of Bangladesh issued a number of directions regarding conservation of rivers in Bangladesh and declared that the writ would remain open as continuing *mandamus*. The writ petition is still pending. Successive writ benches of the High Court Division have monitored, and are still monitoring, the progress of implementation of the court's directives.[3]

In the present essay the author discusses the rise of structural injunctions in the U.S.A., the South African constitutional mandate of structural interdict and its application, the origin and development of the concept of "continuing *mandamus*" in India through the Supreme Court cases, and the Bangladeshi experience in applying continuing *mandamus*. The usual criticisms of structural remedy are also briefly discussed. In conclusion, the need for our Appellate Division's ruling on the scope and application of continuing *mandamus* is emphasized.

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[1] Article 102, Constitution of Bangladesh

[2] Reported in 29 BLD (2009) 479

[3] Addressed more elaborately in Section V below

II. THE RISE OF STRUCTURAL INJUNCTION IN THE USA

The genesis of structural remedies is generally attributed to the United States Supreme Court's ruling in *Brown v. Board of Education (Brown I)*[4] in 1954. A short background is warranted. In 1896 the U.S. Supreme Court ruled in *Plessy v. Ferguson*[5] that racially segregated public facilities (in this case separate railway carriages for the white and coloured races) were constitutionally valid so long as the facilities were equal. The ruling established the "separate but equal" doctrine, sanctioning laws that prevented black people from sharing the same buses, schools and other public facilities as white people.

The doctrine held sway for the next six decades, until class action lawsuits began to be filed on behalf of black schoolchildren and their parents. One of these lawsuits, *Brown v. Board of Education*, would become the most famous. A plaintiff named Oliver Brown filed a class action suit against the Board of Education of Topeka, Kansas when his daughter, Linda Brown, was denied access to Topeka's all-white schools. The federal district court upheld the segregation of the public schools under the "separate but equal" doctrine of *Plessy*, holding that 'equality of treatment was accorded when both races are provided substantially equal facilities'. Brown appealed to the Supreme Court. When Brown's case and four other cases related to school segregation first came before the Supreme Court in 1952, the Court combined them into a single case under the name *Brown v. Board of Education of Topeka*.

A unanimous decision was reached in 1954, and the Court ruled that racial segregation of children in public schools violated the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution, which laid down that no state could "deny to any person within its jurisdiction the equal protection of the laws." The Court concluded that separating children on the basis of race created dangerous inferiority complexes that adversely affected black children's ability to learn. The Court declared that racial segregation in schools was "inherently unequal" and was thus always unconstitutional.

In the subsequent cases of *Brown II*[6], *Green v. County School Board* (1968)[7] and *Swann v. Charlotte-Mecklenburg* (1971)[8] the Court ordered the states to dismantle segregation and integrate their schools. The federal district courts were given authority to supervise the desegregation process. The district courts required the school authorities to submit specific desegregation plans to remedy the situation. It entailed "thoroughgoing organizational reform", and it was a "total transformational process in which the judge undertook the reconstruction of an ongoing social institution."[9] In the decade that followed the courts issued structural orders in a number of school desegregation cases, e.g. *Missouri v. Jenkins*,[10] *Columbus Board. of Education v. Penick*,[11] *Milliken v. Bradley*[12] and *Keyes v. Sch. Dist.*[13] The process is still on.

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[4] 47 U.S. 483 (1954)
[5] 163 U.S. 537 (1896)
[6] Brown v. Board of Education, 349 U.S. 294 (1955)
[7] 391 U.S. 430 (1968)
[8] 402 U.S. 1 (1971)
[9] Owen M. Fiss, Foreword: The Forms of Justice, 93 HARV. L. REV. 1, 2–3 (1979)
[10] 515 U.S. 70, 78–80 (1995)
[11] 443 U.S. 449, 453, 455 (1979)
[12] 418 U.S. 717, 739 (1974)
[13] 413 U.S. 189, 194 (1973)

Thus instead of merely ruling that the racially segregated school system was in contravention of the Constitution, and then leaving it in the hands of the educational authorities to remedy the situation, the court ingeniously devised structural injunction as an entirely new species of judicial remedy. Through a series of successive orders the court provided concrete solutions to institutional defects which resisted other pressures to change.[14] The structural injunction remedy is a hybrid consisting of receiverships, selected and assembled mandated policy reforms, continuing judicial supervision, information-gathering, and various types of dispute resolution outside the courtroom.[15]

Since then the U.S. courts employed structural injunctions to reform state prisons. *Hutto v. Finney*[16] was the first successful lawsuit filed by an inmate against the prison system of Arkansas. The case went on for nearly a decade, from 1969 through 1978. The trial court issued periodic directives to the Department of Correction to improve conditions of its prison system and to file reports on the progress. After repeated failures on the part of the authorities the court imposed a number of specific restrictions: it limited the number of inmates who could be confined in each cell, required that each prisoner be given a bunk, discontinued the grue diet, and limited isolation sentences to thirty days. It is generally recognized that without such specific intervention the prison system might never have changed. The Supreme Court upheld the trial court’s rulings and also fined the Department of Correction $20,000 because of the prison officials’ unwillingness to remedy the unconstitutional prison conditions.[17]

Today the federal judges control some 600 school districts, prisons in about 30 states (while suits are pending in 11 more states), 270 local jails (with hundreds of cases pending), and a number of mental health systems, public housing, legislative apportionment plans, welfare programs and state fishery departments.[18]

In recent decades, however, some decline in the use of structural injunction has been noted. In some states the courts have relinquished their control over local school districts and have returned those districts to the control of local authorities.[19] The remedy of structural injunction has been attacked as being in violation of the constitutional principle of separation of power, because in the elaborate and protracted procedures the judges have to engage themselves in legislative and executive functions.[20]

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[14] See Nora Gillespie, “Charter Remedies: The Structural Injunction”, 11 *ADVOC. Q.* 190 (1989–1990)
[15] See Peter H. Schuck, *Suing Government: Citizen Remedies for Official Wrongs*, Yale University Press (1983)
[16] 37 U.S. 678 (1978)
[17] McClellan, Dorothy S. (July 19, 2018). “Finney v. Hutto aka Finney v. Hutto”, Encyclopedia of Arkansas.
[18] See Robert F. Nagel, “Controlling the Structural Injunction”, 7 *HARV. J.L. & PUB. POL'Y* 395 (1984)
[19] E.g. in *Freeman v. Pitts*, 03 U.S. 467, 471 (1992), the Court granted a Georgia school district local control; and in *Oklahoma City Board of Education v. Dowell*, 98 U.S. 237 (1991), the Court released the Oklahoma City school district from a desegregation decree. See *O’Shea v. Littleton*, 414 U.S. 488, 490–91 (1974) and *Rizzo v. Goode*, 23 U.S. 362, 372 (1976), where the remedy was refused by the U.S. Supreme Court. See also Russell L. Weaver, “The Rise and Decline of Structural Remedies”, 41 *San Diego L. Rev.* 1617 (2004), for a discussion on decline.
[20] See, e.g., Mishkin, “Federal Courts and State Reformers”, 35 *WASH. & LEE L. REV.* 949 (1978); Fuller, “The Forms and Limits of Adjudication”, 92 *HARV. L. REV.* 353 (1978); Robert F. Nagel, “Controlling the Structural Injunction”, 7 *HARV. J.L. & PUB. POL'Y* 395 (1984)

III. STRUCTURAL INTERDICT IN SOUTH AFRICA

Section 172(1)(b) of the South African Constitution provides as follows:

"172. Powers of courts in constitutional matters

1. When deciding a constitutional matter within its power, a court

    a. must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

    b. may make any order that is just and equitable, including

        i. an order limiting the retrospective effect of the declaration of invalidity; and

        ii. an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

Thus section 172(1)(b)(ii) gives the court power to suspend final judgment and allow the authorities concerned to remedy the situation. This is generally referred to as "structural interdict" in South Africa. In essence, structural interdict is the same as the American concept of structural injunction: both require the public officials violating a fundamental right to remedy the breach under the supervision of the court.

There are five steps common to structural interdicts in South Africa. [21] First, the court issues a declaration identifying how the government has infringed an individual or group's constitutional rights or otherwise failed to comply with its constitutional obligations. Second, the court mandates government compliance with constitutional responsibilities. Third, the government is ordered to prepare and submit a comprehensive report, usually under oath, to the court on a fixed date. This report, which should expound the government's action plan for remedying the challenged infringements, gives the state agency concerned the opportunity to choose how it intends to comply with the constitutional rights in question, rather than the court itself devising a solution.

Fourthly, once the required report is presented, the court evaluates whether the proposed plan sufficiently remedies the constitutional infringement. At this stage through the exercise of supervisory jurisdiction a dynamic dialogue between the judiciary and the other branches of government may be initiated on how to implement the plan. [22] This stage of the structural interdict sometimes also allows interested third parties to submit comments on the proposed plan, thereby opening up the dialogue to other members of South African society.[23]

The fifth and final step is a final order by the court if it approves the proposed plan. This final order integrates the plan and any court-ordered amendments. The government's failure to adhere to its plan after the final order would amount to contempt of court.

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[21] See Iain Currie & Johan de Waal, *Remedies*, in THE BILL OF RIGHTS HANDBOOK 217–19 (Iain Currie & Johan de Waal eds., 5th ed. 2005)

[22] See Marius Pieterse, "Coming to Terms with Judicial Enforcement of Socio-economic Rights", 20 *SAJHR* 383, 390 (2004).7

[23] See Mitra E. Badolahi, "Using Structural Interdicts and the South African Human Rights Commission to Achieve Judicial Enforcement of Economic and Social Rights in South Africa", *NYU Law Review*, Vol. 83, No. 5, 2008.

The South African High Courts have used structural interdicts in economic and social rights cases, involving children rights,[24] housing and evictions,[25] prisoners' rights,[26] health,[27] and welfare benefits,[28] as well as in some public interest cases, e.g. waste management by the Municipality,[29] protection of rail commuters,[30] juvenile offenders,[31] asylum seekers,[32] and so on.

In the *Grootboom* case[33] regarding children's rights the High Court found that the state authorities were obliged to provide the applicant children with shelter under the Constitution, but that the respondents had failed to do so and needed to do so immediately. The Court ordered that the respondents report back to the Court as to the implementation of its order within three months, and that the applicants deliver their comments on such report within one month thereafter.[34] In the case of *City of Cape Town v Rudolph & Others*[35] the High Court held that in light of the standards set in the *Grootboom* case the housing policies of the City of Cape Town had failed to fulfill its constitutional and statutory obligations. The Court accordingly ordered the City of Cape Town to comply with these obligations and produce a report within four months, detailing what steps it took to ameliorate the situation, and what future policies and programmes would be put in place to this end. In the *Treatment Action Campaign* case[36] a South African HIV/AIDS activist organization launched a constitutional challenge, demanding a program to make the drug Nevirapine available in the public health sector to prevent mother-to-child infection. The High Court ruled in favour of TAC, ordering that Nevirapine be made available to infected mothers giving birth in state institutions. The Court also ordered that the government present to the Court, within three months, an outline of how it planned to extend provision of the medication to its birthing facilities country-wide.[37]

In comparison, the South African Constitutional Court is less active in using structural orders. In *August & Another v Electoral Commission & Others*,[38] the Court found the Electoral Commission had violated South African prisoners' right to vote. The Court directed the Electoral Commission to make the necessary arrangements to enable prisoners to vote, requiring the Commission "to furnish an affidavit setting out the manner in which the order will be complied with" within two weeks. In *Sibiya & Others v Director of Public Prosecution, Johannesburg &*

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[24] *Grootboom v Oosenberg Municipality* 2000 (3) BCLR 277 (C); *Centre for Child Law & Others v Member of Exec. Council for Educ., Gauteng, & Others* 2008 (1) SA 223 (T)
[25] *City of Cape Town v Rudolph & Others* 2004 (5) SA 39 (C)
[26] *Strydom v Minister of Corr. Servs. & Others*, 1998 SACLR LEXIS 50
[27] *Treatment Action Campaign and Others v Minister of Health and Others* 2002 (4) BCLR 356 (T)
[28] *Ngxuza & Others v Permanent Sec'y, Dep't of Welfare, E. Cape, & Another* 2001 (2) SA 609 (E)
[29] *Kenton on Sea Ratepayers Association and Others v Ndlambe Local Municipality*, ("KORSA"), 2017 (2) SA 86 (ECG)
[30] *Rail Commuter Action Group & Others v Transnet Ltd t/a Metrorail & Others* (No 1) 2003 (5) SA 518 (C)
[31] *S v Z* & 23 Similar Cases 2004 (1) SACR 400 (E) at 416–19
[32] *Kiliko & Others v Minister of Home Affairs & Others* 2006 (4) SA 114 (C)
[33] Supra, note 24
[34] But note that the Constitutional Court replaced the High Court's injunctive order regarding judicial supervision. Instead, it noted that South African Human Rights Commission ("SAHRC") had agreed to observe and report on the state's compliance. SAHRC's monitoring was ineffective, and ultimately no noticeable change occurred as a result of the Court's orders.
[35] Supra, note 25
[36] Supra, note 27
[37] On appeal, the Constitutional Court upheld the main findings of the High Court but again struck out the High Court's structural interdict.
[38] 1999 (3) SA 1 (CC)

Others (Sibiya 1)[39] the Constitutional Court set out to issue a structural interdict to ensure substitution of lawful punishments for the prisoners on death row (in an earlier case the Constitutional Court declared the death penalty inconsistent with the interim Constitution[40]). Finding the sentence-conversion process too slow, the Court on 25 May 2005 issued the following directions upon the respondents, retaining jurisdiction to "issue further directions in relation to supervision" of the execution of the order "as circumstances may require":

(1) take necessary steps to ensure that all sentences of death imposed before 5 June 1995 are set aside and replaced by an appropriate alternative sentence as soon as possible;

(2) report to the Court concerning all steps taken to comply with the above order by not later than 15 August 2005;

(3) include in the report detailed information about the prisoners;

(4) file appropriate affidavits with the Registrar of the Court not later than 15 August 2005.

The issue was conclusively resolved following a lengthy period of government reporting to Court, with a final judgment coming about in November 2006. The structural orders successfully brought about the desired outcome.

The Constitutional Court's most famous judgment, which involved a structural interdict, was the 2016 judgment in the case of *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others*.[41] The background of the case was that in 2009, during President Jacob Zuma's first term, his rural home at Nkandla was extensively renovated and upgraded at a cost of $23 million. Though the government said these were lawful security upgrades, it soon emerged that the upgrades included non-security features like a visitors' centre, an amphitheater, a cattle kraal, a chicken run and a swimming pool. The Public Protector began an investigation, and she found that some of the upgrades were unlawful and recommended that President Zuma pay back the money used for them and also reprimand the Ministers involved in the project. Zuma and his ANC government refused to act on it and claimed that the Public Protector's recommendations were not legally binding. Opposition parties, Economic Freedom Fighters (EEF) and Democratic Alliance (DA), filed two separate court applications in the Constitutional Court. The ANC-controlled National Assembly constituted an ad hoc committee to conduct a parallel investigative process led by Minister of Police, whose report, released in August 2015, purported to "exonerate" Zuma.

The Constitutional Court's unanimous judgment was delivered on 31 March 2016 by Chief Justice Mogoeng Mogoeng. The Court held that the Public Protector's recommendations were binding, and her recommendations must be implemented unless they were set aside by a court. Since President Zuma ignored the report, the Court held that he had breached the South African Constitution: "The President thus failed to uphold, defend and respect the Constitution as the supreme law of the land. This failure is manifest from the substantial disregard for the remedial action taken against him by the Public Protector in terms of her constitutional powers." The Court also found that the National Assembly had acted unlawfully by failing to implement the report. The Court directed the National Treasury to determine the costs of the non-security upgrades at Nkandla, and the proportion thereof to be repaid by Zuma, within 60 days. The

[39] 2005 (5) SA 315 (CC)
[40] *S v Makwanyane & Another* 1995 (3) SA 391 (CC)
[41] [2016] ZACC 11

President was ordered to make this repayment within a further 45 days and to “reprimand” the ministers who had overseen the building work.

The Nkandla judgment was hailed across the world as a robust voice of an independent judiciary: “…while the court verdict, delivered unanimously by a full bench, is a damning indictment of the executive, it is also a timely reminder that South Africa’s young democracy is a lot stronger than it is given credit for. Under immense strain, its checks and balances are working.”[42]

One of the advantages of the use of the structural interdicts in the Nkandla Judgment was that the Constitutional Court was able to assume supervisory role to ensure compliance of its orders. It also provided the EFF and the DA, the applicants, an opportunity to return to court and follow up on the declaratory orders imposed by the Court.[43]

As one commentator puts it, “Structural interdicts preserve the courts’ special role within South Africa’s fledgling democracy, since the supervisory portion of this remedy allows courts to inspect proposed plans and ensure that they are not constitutionally suspect. By providing the judiciary with an effective tool to remedy Bill of Rights violations, structural interdicts bolster the political and popular integrity of the South African courts.”[44]

IV. CONTINUING *MANDAMUS* IN INDIA

Over the last four decades or so, the mechanics of “Public Interest Litigation” or “PIL” has come to be documented as a distinguishing feature of the Indian judiciary, where the traditional requirement of *locus standi* is relaxed. Any citizen or consumer group or social action group can now approach the apex court of the country seeking redress where administrative action resulted in public injury. Closely connected with PIL is the writ of *mandamus* and its extended form, the “continuing *mandamus*”. We shall see below how continuing *mandamus* has been relentlessly used by the Indian Supreme Court in litigations concerning public interest.

The history of PIL in India began in December 1979 when a petition was filed in the Supreme Court in the name of a prisoner detained in the Bihar jail, Hussainara Khatoon, describing the inhuman conditions of the prisoners whose cases were pending in court.[45] The Supreme Court decided that the prisoners should receive free legal aid and speedy hearings, and directed the State Government to furnish relevant records, data and statistics within three weeks regarding location of the courts of magistrates and courts of sessions in Bihar and the total number of cases pending in those courts. The Court also directed the State of Bihar to furnish to court within three weeks particulars of the first information reports lodged and, where such cases had been pending investigation for more than six months, to furnish the reasons for such delay. The Court also

[42] The Guardian, 31 March 2016
[43] Following the judgment Zuma obtained a R7.8 million loan from VBS Mutual Bank to pay for the improvements to his homestead.
[44] Supra, note 23
[45] *Hussainara Khatoon v. State of Bihar*, A.I.R. 1979 S.C. 1360. The case was filed in the Supreme Court of India before the bench headed by Justice P. N. Bhagwati, who is generally credited with shaping up the concept of PIL in India.

asked Supreme Court Bar Association to appear and make its submission on the issue. This case eventually led to the release of more than 40,000 under-trial prisoners.

Thus the concept of continuing *mandamus* is as old as that of PIL. The Supreme Court began to retain jurisdiction and issue directives without disposing of the case. The Hussainara case set in motion a succession of further cases where final adjudication was put on hold until compliance with interim judgments and directives was ensured. However, the phrase "continuing mandamus" was not used.

The next significant case was *Bandhua Mukti Morcha vs Union of India*.[46] An organization called Bandhua Mukti Morcha addressed a letter to a judge of the Supreme Court, complaining that a large number of labourers were working in the stone quarries of the district of Faridabad, Haryana under inhuman and intolerable conditions. The Supreme Court treated the letter as a writ petition and appointed a commission to inquire into the allegations. The allegations were subsequently confirmed by the commission after inquiry. At the direction of the Court a socio-legal investigation was also carried out, which suggested measures to improve the conditions of the mine workers. The government's objections that a letter addressed to court cannot be treated as a writ petition, or that the Court was not empowered to appoint any commission to investigate allegations contained in a writ petition, or that the reports of the commission were based only on *ex parte* statements which were not tested by cross-examination and therefore had no evidentiary value, were met with rejection. The Court held that a letter addressed by a member of the public informing the Court about violation of a fundamental right of a socially or economically disadvantaged class of persons may indeed be treated as a writ petition, and that the traditional adversarial system regulated by the provisions of Code of Civil Procedure and Evidence Act may be disregarded by a Court exercising writ jurisdiction. The Court may adopt any procedure necessary for securing enforcement of fundamental rights, including appointment of commissions for fact-finding purposes.

The court issued broad remedial orders, with directives to the State Government to constitute vigilance committees to abolish bonded labour, to identify and release bonded labourers and draw up a programme for their rehabilitation, to take steps to ensure payment of minimum wages, to organize periodic camps for educating the workmen about their rights and benefits conferred by social welfare and labour laws, and various other directives to guarantee safety standards and better working and living conditions of the workmen employed in the stone quarries and stone crushers in the state of Haryana. The Court assigned time limits for each task, and also appointed a Joint Secretary in the Ministry of Labour as a Commissioner and entrusted him with detailed duties to ensure compliance with the Court's directives and report back to the Court. This was one of the first instances of such Court appointments, which would subsequently become a characteristic feature in the cases under court supervision.[47]

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[46] 1984 AIR 802; (1984) 3 SCC 161

[47] However, in its next judgment in 1991 (*Bandhua Mukti Morcha v. Union of India and Others*, (1991) 4 SCC 17) the Court noted that compliance was not satisfactory. Contempt charges were brought, but the Court refrained from condemning the authorities. Instead, it noted that there were inherent institutional and administrative limitations for the Court to regulate such matters. The apex court, whose Registry was congested, was not in a position to conveniently monitor and keep track of the matters. Without making any specific orders upon the inaction the Court only called upon the Government to attend to the needs of the workmen.

It was not until the case of *Vineet Narain v. Union of India*[48] (also known as "Jain Hawala case") that the term 'continuing *mandamus'* was used for the first time, referring to the procedure of keeping the case pending while monitoring implementation of the Court's directives. The case was about failure of Central Bureau of Investigation (CBI) to carry out investigation regarding information obtained from 'Jain diaries' seized from a terrorist organization implicating high ranking politicians. The Court monitored and supervised the progress of investigation and passed numerous orders to ensure effective discharge of public duty by the CBI and other agencies. The Court also ordered constitution of a Central Vigilance Commission as an independent watchdog to monitor CBI's activities and gave it statutory status.

In *Vellore Citizen's Welfare Forum v. Union of India*[49] the Supreme Court directed the Central Government to constitute an authority to deal with tanneries and other polluting industries in the State of Tamil Nadu. The Court also directed the Chief Justice of Madras High Court to set up a Green Bench to deal with the case, instead of the Supreme Court itself monitoring the situation. Thus ongoing supervision by court in environmental matters had begun even before it was termed 'continuing mandamus' in the Jain Hawala case.[50]

In September 1995 T.N. Godavarman Thirumulpad, a member of the princely Nilambur Kovilakam family in the Malabar region of Kerala, initiated what turned out to be a landmark intervention by the Supreme Court of India to protect India's forests, one of the most protracted continuing *mandamus* ever issued.[51] Mr Thirumulpad was sad to see the destruction of immaculate wooded areas in the Nilgiris, Tamil Nadu. The State was unable to protect the areas. Trees were being felled and logs rolled down the mountain slopes and stacked along the highway for miles. He filed Writ Petition (Civil) No. 202 of 1995. On December 12, 1996, a bench led by Chief Justice J.S. Verma passed an interim order directing that tree-felling and non-forestry activity in forests be stopped. The path-breaking order re-defined the meaning of forests and extended protection to all areas with natural forests irrespective of their ownership. It was not about the Nilgiris forests anymore, it was about the forests of the whole of India. States were directed to form expert committees to identify forests as defined and file reports. At that stage, even the Supreme Court probably did not foresee that the matter would be kept open for about 20 years. More than a thousand interlocutory applications were filed, covering a spectrum of issues concerning forest protection, such as mining, tree-felling, management of Protected Areas and forest encroachment.

In the case of *Indian Council for Enviro-Legal Action v. Union of India*[52] the petitioner, an environmentalist group, filed a writ petition seeking prohibition on pollution caused by several chemical industrial plants in Bichhri village, Udaipur District, Rajasthan. The respondents operated these plants without permits which caused serious pollution of the environment. Toxic waste water was untreated and left to be absorbed into the earth polluting aquifers and the subterranean supply of water. The soil also became polluted and unfit for cultivation. Several people in nearby villages were alleged to have contracted diseases due to the pollution, some of

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[48] AIR 1998 SC 8
[49] (1996) 5 SCC 647
[50] The first such 'Green Bench' was born in Calcutta in the same year (1996) by the order of the Supreme Court. There were several others in several States, until the "National Green Tribunal" was established on 18th October, 2010 under the National Green Tribunal Act 2010.
[51] *T. N. Godavaraman v. Union of India*, (1996) 9 SCC 982
[52] 1996 SCC (3) 212

whom had died. The Court issued various interim orders to the respondents for 6 years, which were largely ignored. Finally in 1996 the Court held a final hearing and decisively declared the respondents' liability. The judgment directed the closure of the factories attached to the property of the polluter and directed the Ministry of Environment and Forests of India to recover the cost of eco-restoration from the industries held liable.

However, for 15 years thereafter the polluters pursued legal tactics to delay enforcement of the Court's 1996 judgment. As the Court commented in its 2011 judgment: "This is a very unusual and extraordinary litigation where even after fifteen years of the final judgment of this court the litigation has been deliberately kept alive by filing one interlocutory application or the other in order to avoid compliance of the judgment. The said judgment of this Court has not been permitted to acquire finality till date. This is a classic example how by abuse of the process of law even the final judgment of the apex court can be circumvented for more than a decade and a half."[53] The Court imposed a fine of almost Rs. 50 crores on Hindustan Agro Chemicals Ltd (HACL) for the remediation of over 350 hectares of land in Bichhri and for keeping the litigation alive for 15 years.

In the case of *M. C. Mehta v. Union of India*,[54] M.C Mehta, an environmental activist, agitated by the unchecked air pollution and its hazardous impact on the health of residents of Delhi, filed a PIL in 1985. Based on the opinion of the Ministry of Environment and Forests the Court acknowledged that heavy vehicles including trucks, buses and defense vehicles were the main contributors to the air pollution problem. A series of directions were passed as continuing *mandamus*, including orders relating to periodic vehicle emission checks, establishment of an expert committee to review solutions for controlling pollution, use of unleaded fuel, conversion of government vehicles into CNG, phasing out of diesel buses, ban on certain fuels, and many such aspects, in an effort to limit pollution. Deadlines were set for compliance, and reports were ordered to be submitted. However, the government had been extremely slow in responding to the orders. This was hence an extremely difficult case to implement, although the pollution levels went down to some extent and Delhi's air quality improved.[55] Similar efforts were made by several High Courts in an attempt to restrict local vehicular air pollution with ongoing monitoring.[56]

PUCL v. Union of India[57] is another one of the long drawn-out *mandamus* cases, and one of the most successful PILs. The case asked for the Supreme Court's ruling on matters regarding the right to food in India. It asked the Supreme Court whether Article 21, which bestowed the right to life and liberty, encompassed the right to food. Concerns were raised about the food grains rotting in the Government godowns while thousands still died of starvation. The scope of the case was later expanded to cover a wide range of related issues, including urban destitution, the right to work, starvation deaths, maternity entitlements and even broader issues of transparency and accountability.

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[53] *Indian Council for Enviro-Legal Action v. Union of India & Others*, (2011) 12 SCC 764
[54] AIR 2002 SC 1696, also referred to as "the Delhi Vehicular Pollution Case"
[55] World Bank "For a Breath of Fresh Air - Ten Years of Progress and Challenges in Urban Air Quality Management in India", June, 2005
[56] Gitanjali Nain Gill, "Human Rights and the Environment in India: Access through Public Interest Litigation", Environmental Law Review 14.3 (2012): 200-218
[57] 2007 (12) SCC 135

The Court gave numerous orders over the course of more than a decade, and monitored compliance by various authorities and agencies. The main object sought to be achieved was to alleviate the hunger of the masses of impoverished citizens who were suffering from chronic starvation. The Supreme Court sought to achieve this by explicitly establishing a constitutional human right to food and determining basic nutritional food for the poor. Orders were passed directing authorities to ensure that food was provided to the aged, infirm, disabled, destitute women, destitute men who were in danger of starvation, pregnant and lactating women and destitute children. The Court installed commissioners and entrusted them with the task of monitoring implementation of the Court's interim orders, investigating violations of the orders and demanding amends, and submitting regular reports to the Court.

The Court also deployed another tool: regular publication of its orders. It directed its orders to be widely publicised through radio, television and permanent displays. Attention of the media was drawn. The general public was made aware. Soon the right to food campaign became an immense national movement. Public opinion played a crucial role in motivating government action. The government took up the challenge and enacted National Food Security Act 2013. Thus the Court, the commissioners and the public all worked in tandem in extracting the government initiatives. The case is generally viewed as a largely successful judicial venture in achieving the desired outcome.[58] Relentless monitoring through institutional mechanism and engagement with key allies in the civil society were the decisive factors for its success.

Continuing *mandamus* remains an effective tool in India in PIL matters, despite establishment of a National Green Tribunal in 2010. The Tribunal is India's first dedicated environmental court with a wide jurisdiction to deal with not only violations of environmental laws, but also to provide for compensation, relief and restoration of the ecology in accordance with the 'Polluter Pays' principle and powers to enforce the 'precautionary principle'. India is the third country following Australia and New Zealand to have such a system. The National Green Tribunal maintains a 'fast-track' procedure, disposing off the cases within six months. The commencement of this Tribunal is a giant step forward towards achieving environmental democracy in India.

V. THE BANGLADESHI EXPERIENCE

In Bangladesh, the decision in *Dr Mohiuddin Farooque vs. Bangladesh*[59] relaxed the requirement of filing application by a "person aggrieved" as contained in Article 102 of the Constitution of Bangladesh. The Appellate Division held that:

> "… when a public injury or public wrong or infraction of a fundamental right affecting an indeterminate number of people is involved it is not necessary, in the scheme of our Constitution, that the multitude of individuals who have been collectively wronged or injured or whose collective fundamental rights have been invaded are to invoke the jurisdiction under Article 102 in a multitude of individual writ petitions, each representing his own portion of concern. In so far as it concerns public wrong or public injury or invasion

[58] See, e.g. General Assembly, Interim report of the Special Rapporteur on the right to food, A/68/288 (August 8, 2013)

[59] (1997) 49 DLR (AD) 1

of fundamental rights of an indeterminate number of people, any member of the public, being a citizen, suffering the common injury or common invasion in common with others or any citizen or an indigenous association, as distinguished from a local component of a foreign organisation, espousing that particular cause is a person aggrieved and has the right to invoke the jurisdiction under Article 102."[60]

Since then numerous PILs have been filed in the High Court Division by many individuals and several rights groups, including Bangladesh Legal Aid and Services Trust, Ain O Salish Kendro, Human Rights and Peace for Bangladesh, Bangladesh Environmental Lawyers Association and Bangladesh National Women Lawyers Association. Like in India, it is within the realm of PILs that the doctrine of continuing *mandamus* flourished.

The first glimpse of the Supreme Court's monitoring function was seen, albeit fleetingly, in the separation of judiciary case.[61] The case concerned a writ petition filed by 223 subordinate judges, seeking appropriate orders which would have the effect of separating the judiciary from the executive branch of the government as required by Article 22 of the Constitution. The High Court Division passed its judgment in 1997 and issued appropriate directives, against which the government filed an appeal. The Appellate Division partly reversed the High Court Division's judgment but affirmed the basic decision for separation of judiciary. The government dilly-dallied for the next eight years. The Supreme Court of its own motion repeatedly brought the matter in its cause list and chided the government for its failure to enforce the judgment, and urged the concerned ministries to take necessary steps. This robust judicial involvement ultimately led to the separation of judiciary from the executive arm of the government in 2007.

In the case of *Faustina Pereira v. State*[62] (also known as "the Prisoners case"), a petition was filed challenging illegal detention of foreigners in several jails. The Court made the rule absolute and directed the Superintendent of Central Jail to release the foreign prisoners. The Court also directed the Ministry of Home Affairs to arrange for the prisoners' shelter until repatriation. The Superintendent of Central Jail, Dhaka was directed to report about the release of the prisoners within three months. The Inspector General of Prisons was directed to furnish particulars of remaining foreign prisoners and also to report within seven days as to the steps taken for their release. These directions to submit time-bound reports, even after passing the final judgment, heralded a shift in judicial approach towards the provision of structural remedy.

The case of *Dr Mohiuddin Farooque vs. Bangladesh*[63] was probably the first case where the Court deliberately left the case open for monitoring purposes. The case concerned air and sound pollution by motor vehicles in Dhaka. Two writ petitions were filed in the High Court Division by two rights bodies, Bangladesh Environmental Lawyers Association and Bangladesh Legal Aid and Services Trust, pointing out that a large number of vehicles plying in Dhaka city were emitting hazardous smokes and using pneumatic and other high noise-making audible signals, and the government failed to enforce the relevant laws and policies in preventing such vehicular pollution, resulting in serious health and environmental hazards.[64] The Court noted that the government was aware of the acute pollution scenario and had already made some decisions/recommendations. The Court issued an eight-fold directive upon the respondents,

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[60] Per Mustafa Kamal J
[61] *Secretary, Ministry of Finance vs. Md. Masdar Hossain and others*, (1999) 52 DLR (AD) 82; 20 BLD (AD) 104
[62] 53 DLR (2001) 414
[63] 22 BLD (2002) 345
[64] Writ Petition No. 300 of 1995 and Writ Petition No. 1694 of 2000

which includes orders to remove electric, air and other loud and shrill horns within 30 days, conduct tests of vehicles within 6 (six) months and issue certificate of fitness, to convert all government-owned petrol/diesel driven vehicles plying in Dhaka into CNG-operated vehicles within 6 (six) months, to set up more CNG filling stations, to fit all motor vehicles from July 2001 with catalytic converter and diesel particulate filter by December 2002, to set Bangladesh standard for petroleum in accordance with the international standards, to phase out existing 2-stroke 3 wheelers by December 2002, and to impose ban on new licenses for 2-stroke 3 wheelers in Dhaka and cancel 9 years old licenses of baby taxis with immediate effect.[65]

Thus all the directions contained a time limit. Significantly, the Court declared that the writ petition "shall be deemed to be pending for the purpose of monitoring", and directed the respondents to "submit reports every six months of actions and results of the above directions to this court." These directions were expressed to be 'ad-interim directions' passed in response to the petitioners' interim applications for directions. Rules in the writ petition were not explicitly made absolute, but it seems that it was a full-fledged judgment, with a date of judgment being made at the top of the judgment (27 March 2002), which was subsequently reported in Bangladesh Legal Decisions.[66]

In the landmark case of *Human Rights and Peace for Bangladesh vs. Bangladesh and others*, which was filed challenging pollution of and encroachment into the rivers Burigana, Turag, Balu and Shitalakkha, the High Court Division by its judgment passed in June 2009 made the Rule absolute and gave the following directions:

a) To complete boundary survey of these four rivers according to the C.S. and R.S. maps by 30.11.2009;

b) To declare these rivers as "Ecologically Critical Area" by 30.11.2009 and to promulgate necessary guidelines within the next six months;

c) To construct boundary pillars and walkways/pavements and plant trees on the boundary within 30.11.2010;

d) To remove all structures situated within the rivers within 30.11.2010;

e) To establish a "National River Conservation Commission" within the next three months;

f) To excavate four rivers around Dhaka metropolis within two years and to remove polythene bags and other trash;

g) To immediately take necessary steps for disposal of pending court cases relating to environment;

h) To remove shops and other structures from all government lands situated on riverbanks, including Buckland barrage, within two years;

i) To dig Jamuna-Dhaleswari, Dhaleswari-Buriganga, Old Brahmaputra-Bangshi, Bangshi-Turag, Jamuna-Punglikhal, Turag and Tongi canals within the next five years.

All these directions were time-specific. The Court also declared that the case would remain open as "continuing mandamus", and fixed 15.12.2009 for the respondents to submit an initial report on compliance. The Court also said that the parties might seek guidance from the

[65] Judgment was passed by M.M. Ruhul Amin J, who later became the Chief Justice of Bangladesh
[66] *Supra*, note 65

concerned bench of the High Court Division in case any doubt arose regarding the above directives. The Court even caused a copy of its judgment sent to the Hon'ble Prime Minister of Bangladesh for her timely initiatives to save the rivers in and around Dhaka Metropolis.

In consequence of this verdict National River Conservation Commission Act 2013 was enacted, and the National River Conservation Commission came into being. However, the Commission was given only advisory functions, with the duty of recommending various actions to the government for protection of rivers but lacking the power to act for itself. In a later case the Court recognized this inadequacy and directed the government to make the Commission effective and independent.[67] This is yet to be done.

The four-river writ petition came up in the cause list of the High Court Division from time to time in different benches for the purpose of monitoring compliance and for further orders,[68] and the case became a truly *continuing mandamus*. Regrettably, however, compliance was lax with most of the directives. River grabbers proved to be powerful corporations/individuals capable of defying government orders. Sometimes even the authorities acted in collusion with these influential entities and allowed encroachment to the rivers.

Subsequently another writ petition was filed by Human Rights and Peace for Bangladesh for protection of Turag river[69], and the Court declared the Turag River a "legal person", noting similar developments in Colombia, India and New Zealand in which natural entities had been recognised as having legal personhood. The Court noted that the rivers were shrinking every day because of illegal construction on the riverbanks, and issued 17 specific directions to the government for protection of the Turag. The Court cited key international environmental principles, including the precautionary principle and the polluter pays principle, and declared them as the law of the land.[70] The Court appointed the National River Conservation Commission as the legal guardian (person in *loco parentis*), with legal responsibility to protect and conserve the rivers, saving them from pollution and encroachment. Detailed directions were issued with regard to augmenting public awareness and education regarding the rivers and the environment. The Court declared that the writ petition would remain open as "continuing mandamus".

In pursuance of these directives a judicial inquiry was held for ascertaining the river boundary and the places of illegal encroachment. The inquiry report showed that some big corporate

[67] Writ Petition no.13989 of 2016; judgment on 30.01.2019 and 03.02.2019 (published on HRPB's website)

[68] For example, on 11.09.2014 a bench presided over by Mr Justice Mirza Hossain Haidar passed the following further direction: "Having heard the learned advocate and considering the statements made in the application. We direct the Chairman, BIWTA (respondents No.9), Director General, Land Records and Survey Directorates (respondent No. 10) Director General, Department of Environment, (respondent No.11), Deputy Commissioner Gazipur (respondent No. 14) to submit a report outlining the demarcated boundary of the river Turag as demarcated by order of this Court in the instant continuous mandamous writ petition and clearly state whether M/S Lamisa Spinning Mills Ltd. Has encroached upon any portion of the Turag River and/or the said mills or any other person has have constructed any structure upon encroaching within the area finally demarcated as portion of Turag river surveyed by the authority pursuant to the direction of the High Court Division in the instant writ petition, without making any deviation to the final survey report submitted before this Court on 06.12.2009, which has been perused by us, within 04(four) weeks from date."

[69] Supra, note 69

[70] However, on appeal the Appellate Division held that the Court cannot declare a principle as the law: only the Parliament can do so. But the Court noted that if these principles were already recognized in our law, the Court's declaration was redundant [Civil Petition for Leave to Appeal no. 3039 of 2019].

entities were encroaching the river. These entities' subsequent appeal was dismissed by the Appellate Division.[71] While some of the encroachers were compelled to remove their structures from the river area, others are still sitting tight, ignoring the verdict. As revealed in a subsequent news report, most of the directives issued to protect the country's rivers from grabbing and pollution have largely remained ignored by the ministries and agencies concerned.[72]

The next relevant case was *Human Rights and Peace for Bangladesh v. Bangladesh*, popularly known as the "pure food case".[73] Amidst growing public concerns over the proliferation of adulterated foods in markets, a non-government organization filed the writ petition in the High Court Division in 2009. The Court directed the government to establish a Food Court in every district and metropolitan city across the country, and to appoint adequate number of 'public food analyst' in accordance with the Pure Food Ordinance 1959, within two years. The Court made the rule in the writ petition absolute, but left the case open and permitted the government to seek direction from the Court if needed.

Though delay occurred, eventually a new pure food regime was established as a direct consequence of the Court's judgment passed in the writ petition. New Food Safety Act 2013 was enacted, which repealed Pure Food Ordinance 1959. A new Food Safety Rules 2014 also came into being. Bangladesh Food Safety Authority (BFSA) was formed in 2015, with the duty to regulate and monitor the activities related to manufacture, import, processing, storage, distribution and sale of food. A number of public food analysts were appointed, and 71 1st class magistrates across the country were empowered to try offenses under the new Food Safety Act 2013.

But the government's efforts fell short of the demand of the day. Giving additional charge to the existing magistrates instead of establishing separate Food Courts and the lack of initiatives by BFSA have been criticized. Food adulteration continued.[74]

In another set of cases, sometimes referred to as the "fatwa cases"[75] which were filed challenging extra-judicial punishments in the name of execution of fatwa, the High Court Division made the Rules absolute and held that imposition of such extra-judicial punishments was illegal. The Court gave a few directions, including a direction upon the Ministry of Local Government to intimate to the law enforcing agencies and the local government units across the country that imposition of extra-judicial punishment is beyond the Constitution and is punishable under the law, a direction upon the law enforcing agencies and the local government units to take preventive measures so that extra-judicial punishments in the name of execution of fatwa do not happen in their concerned areas, and a direction upon the government to create awareness amongst people in this regard. The Court declared that in order to follow up the implementation of the directions of the judgment the Rules shall be treated as continuing mandamus.

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[71]/? Civil Petition for Leave to Appeal no. 3039 of 2019; judgment on 17.02.2020 (published on HRPB's website)
[72] New Age, March 07, 2020
[73] Writ Petition no.324 of 2009; judgment on 14.07.2009 (published on HRPB's website)
[74] See, eg. Rahman, Md & Sultan, Zakir & Rahman, Muhammad & Rashid, Mohammad, "Food Adulteration: A Serious Public Health Concern in Bangladesh", (2015) Bangladesh Pharmaceutical Journal. 18. 1. 10.3329/bpj.v18i1.23503.
[75] *Bangladesh Legal Aid and Services Trust and others vs. Government of Bangladesh*: Writ Petitions no. 5863 of 2009, 754 of 2010 and 4275 of 2010; judgment on 08.07.2010 (published in BLAST's website).

However, since then the cases never appeared in the list for hearing, and the status of implementation of the Court's directives are not known.

In the "tuition fees case"[76], two human rights organizations filed a writ petition challenging excessive imposition of charges in the name of admission fees or compulsory donations by the private educational institutions of all levels (primary, secondary, and higher secondary) as being inconsistent with the relevant laws and policies. They also challenged the failure of the concerned Ministries, directorates and educational boards to comply with their constitutional and statutory obligations to inquire into the allegations of fee increases and to take punitive measures against the wrongdoers. The High Court Division made the Rule absolute with a *continuing mandamus* upon Respondent No.1, Ministry of Education, to ensure that its policy regarding admission fees were being followed strictly and that educational institutions were not allowed to take steps prejudicial to the interest of the students generally.

The matter, however, was not subsequently brought up in the cause list of the High Court Division, and the status of the judgment's implementation remains doubtful.

In another writ petition[77] directions were sought from the High Court Division to ensure implementation of the provisions of the Building Construction Act 1952, the Building Construction Rules 1996 and the Dhaka Metropolitan Building (Construction, Development, Preservation, and Removal) Rules 2008 in order to evict/remove/demolish all unauthorized constructions, structures and occupations by land/building owners at the car parking spaces beside the main roads/streets of Dhaka City. The Court made the Rule absolute and directed the authorities to remove all such unsanctioned structures from designated car parking spaces. The Court treated the writ petition as "continuous mandamus" and directed the authorities to submit progress reports to the Court every three months.[78]

Thus the doctrine of continuing *mandamus* is now firmly rooted in Bangladesh. A considerable number of public interest litigations had been filed where the Court eventually made the Rules absolute but kept the matters alive under the doctrine of continuing mandamus for monitoring purposes. Subject-matter is varying, e.g. protection of Karnafuli river,[79] banning plying of Nosimons, Korimons and Bhotbhotis on highways,[80] protection of Sandha river,[81] arranging sufficient earthquake rescue equipment,[82] protection of Kuakata beach[83] and Cox's Bazar beach,[84] supply of potable and household water in Potia, Chittagong,[85] protection of Sal forest and forest rights of Garo tribes,[86] and so on. Continuing *mandamus* is now regularly issued by the High Court Division in public interest litigations.

[76] *Campaign for Popular Education (CAMPE) and Another v. Bangladesh*: Writ Petition no.312 of 2012; judgment on 14.11.2014 (published in BLAST's website).
[77] *HRPB v. Bangladesh*; Writ Petition no.13398 of 2015; judgment on 03.07.2019 (published on HRPB's website)
[78] Despite the requirement of submission of periodical reports, the writ petition never came up in the list after the judgment had been passed in July 2019.
[79] Writ Petition no.6306 of 2010; judgment on 16.08.2016 (published on HRPB's website)
[80] Writ Petition no.1613 of 2014; judgment on 25.01.2017, ibid
[81] Writ Petition no. 4242 of 2009; judgment on 14.03.2018, ibid
[82] Writ Petition no.9329 of 2008; judgment on 29.07.2009, ibid
[83] Writ Petition no.5162 of 2011; judgment on 18.01.2012, ibid
[84] Writ Petition no. 626 of 2011; judgment on 07.06.2011, ibid
[85] Writ Petition no. 440 of 2015; judgment on 26.11.2019
[86] Writ Petition no.1834 of 2010; judgment on 28.08.2019

VI. CRITICISMS OF STRUCTURAL REMEDY

There are several criticisms that are targeted against the doctrine of structural injunction or continuing mandamus. The first is that it violates the common law doctrine of *functus officio*, which means that once a court has passed a valid judgment or sentence after a lawful hearing, its duty or authority has come to an end. Functus officio lends finality to a legal proceeding by evidencing a decisive outcome. A valid and final verdict is the end of all judicial proceedings, from which point there is no turning back. Otherwise there would be no end to a proceeding, and enforcement or appeal cannot begin.

In this regard the Canadian case of *Doucet-Boudreau v Nova Scotia (Minister of Education)* [87] is illuminating. Several French-speaking families applied for an order that French-language facilities and programs be provided at the secondary school level as required by section 23 of the Canadian Charter of Rights and Freedoms. The trial judge found a section 23 violation because the Province had failed to prioritize these obligations, and ordered "best efforts" to provide school facilities and programs. The judge used section 24(1) of the Charter to set deadlines and demand that the government report to him as construction of schools progressed. Section 24(1) dictates that the court will award a "remedy as the court considers appropriate and just in the circumstances."

The Province appealed the part of the order in which the trial judge retained his jurisdiction to hear reports. The obligation to report to trial court was disputed, as it was considered a violation of the doctrine of *functus officio*. The Nova Scotia Court of Appeal sided with the government and overturned the requirement of reporting, finding that the Charter does not extend a court's jurisdiction to enforce its remedies.

The Supreme Court of Canada allowed the appeal and restored the trial judge's remedial order. The majority held that courts must issue effective, responsive remedies that guarantee full and meaningful protection of Charter rights. The boundaries of the courts' proper role will vary according to the right at issue and may in some cases require the introduction of novel remedies. The Court found that the remedy in this case was properly judicial, supporting the rights of the parents while leaving the detailed choices of means largely to the executive. With regard to *functus officio*, the Court ruled that this common law principle cannot invalidate section 24, although it is an important consideration. The Court ultimately concluded that the doctrine of *functus officio* was not violated because the reports did not "alter a final judgment." While the judge could see reports, he could not change his decision to further define section 23.

There is no doubt that continuing *mandamus* impinges upon the doctrine of *functus officio* to some extent, inasmuch as the writ is allowed to continue for an indefinite period and does not come to an end even after the Rule is made absolute. However, like Canadian Supreme Court, our Appellate Division must decide how much weight should be given to this common law doctrine, and whether the doctrine should be allowed to hinder operation of the writ of *mandamus* where public interest is involved and where constitutional rights are concerned. As

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[87] [2003] 3 S.C.R. 3; 2003 SCC 62

we have seen, the Canadian Supreme Court ruled that the doctrine cannot invalidate the Charter rights. In another case Lord Atkins prudently observed, "finality is a good thing, but justice is better."[88]

The second criticism is that structural remedy inevitably involves judges in executive functions, often beyond the scope of their expertise and their assigned responsibility.[89] Enforcement is the province of the executive arm of the government. In monitoring implementation the Court often crosses into the territory of the executive. Also, if the judges make themselves busy with enforcement, traditional litigation will suffer.

Another criticism is that in showing judicial activism the Court frequently engages itself in policy making, which is the function of the political authority. Judges are not democratically elected – they should not take over the functions of the executive. It will infringe the principle of separation of power. As one commentator argued, if the judicial power were joined with the legislative and executive powers, judges 'might behave with all the violence of an oppressor.'[90]

VII. CONCLUSION

But these criticisms may be overcome, in the context of Bangladesh, if continuing *mandamus* is used properly and with appropriate judicial restraint. The author believes that using the writ of continuing *mandamus* in public interest litigations to accomplish judicial enforcement of Court's directives has much to commend it, not least in countries like Bangladesh where executive enforcement does not always meet the desired standard. The relative success of PILs and continuing *mandamus* in India may be a lesson for Bangladesh.

However, even in continuing *mandamus* cases compliance in Bangladesh has not been satisfactory, as has been noted above. In many such cases the matter did not in fact continue. After the judgment had been passed the petitioner never brought to the notice of the Court the respondents' failure to put into effect the Court's directives, nor did the Court of its own accord bring the matter on the list for monitoring or for passing further orders. Also, in most such cases, especially in the river protection cases, the wrongdoers/encroachers proved to be powerful enough to resist the Court's directives, often with the acquiescence of public officials. Thus a great tool for public redress is not being used as effectively as one would have expected.

Apart from the problem of implementation, there are several grey areas regarding the doctrinal formulation of the writ of continuing *mandamus*, and it is time that our apex court settled these issues once and for all. These are: what makes a particular writ of *mandamus* a continuing one? Does a writ of *mandamus* become continuing only when the Court in its judgment says so, or are there, or there should be, other factors? When should the Court issue continuing *mandamus* instead of simple *mandamus*: whenever the petitioner prays for it, or does the Court has a discretion? What are the criteria? If the Court issues time-bound directives should the writ be automatically treated as continuing even if the Court does not declare so?

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[88] *Ras Behari Lal v King Emperor* [1933] All ER Rep 723 at 726, 50 TLR 1
[89] See Robert F. Nagel, "Separation of Powers and the Scope of Federal Equitable Remedies", 30 *STAN. L. REV.* 661 (1978)
[90] Ibid, quoting THE FEDERALIST NO. 47, at 326 (James Madison) (J. Cooke ed., 1961))

Should continuing *mandamus* issue only in matters relating to public interest or should other matters be included?

Deciding to issue continuing *mandamus* instead of simple *mandamus* seems to be very crucial, because in case of continuing *mandamus* the Court can continue hearing the case even though the Rule has been made absolute. Non-compliance can be dealt with in the same case, without necessitating filing of separate contempt proceeding, which can sometimes be protracted and cumbersome.

There have been great many writ petitions where the rules have been made absolute and time-bound directions upon the government authorities have been issued, but the writ petitions have not been expressed to be continuing *mandamus*. Examples include: banning pharmaceutical companies producing life-saving drugs without quality assurances,[91] banning hill cutting in Chittagong,[92] preservation of residential character of Dhanmondi,[93] direction to establish civil and criminal courts and tribunals for prevention of oppression on women and children in Chittagong Hill Tracts,[94] direction to produce iodized salt in accordance with law,[95] direction to stop abusive exercise of power under sections 54 and 167 of the Code of Criminal Procedure,[96] and so on.

In all these cases the Rules were not declared to be continued. This ordinarily means that the case could not subsequently be reopened and the Court could not pass any order even if there were non-implementation by the respondents. How does the Court monitor and deal with non-compliance in such cases? Is the contempt proceeding the only avenue left? In case the petitioner does not initiate contempt proceeding, should the non-compliance go unnoticed and unpunished? Should the burden of filing contempt proceeding be imposed upon the petitioner in PIL matters, given that the petitioners in such cases are usually social action groups who have no personal benefit in the outcome of these cases?

These are the questions that must be settled by our Appellate Division. We await our apex court's intervention.

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[91] Writ Petition no. 6969 of 2016; judgment on 13.02.2017 (published on HRPB's website)
[92] Writ Petition no.6154 of 2011; judgment on 07.05.2018 (published on HRPB's website)
[93] Writ Petition no.1058 of 2011; judgment on 11.06.2012 (published on HRPB's website)
[94] Writ Petition no.606 of 2006; judgment on 24.02.2008 (reported in 61 DLR 109)
[95] Writ Petition no.1043 of 1999; judgment on 14.12.2004 (reported in 25 BLD 83)
[96] Writ Petition no.3806 of 1998; judgment on 07.04.2003 (reported in 55 DLR 363)