LAW *vision*

Right to equality before law is a constitutional obligation

AL ASAD MD. MAHMUDUL ISLAM

IN a recent move to High Court Division under its special original jurisdiction in writ petition no 2060 of 2001, Bangladesh Legal Aid and Services Trust (BLAST), a leading NGO of the country working for the protection and promotion of human rights through legal aid services and public interest litigation and advocacy, prayed for the enforcement of the fundamental right guaranteed under Article 27 to equality before law against the discriminatory practice of non-collection of arrears of telephone bills from the Members of 5th and 7th Parliament by the Bangladesh Telegraph and Telephone Board (BTTB).

The petitioner, BLAST, argued that BTTB was bound by law to collect the arrears of telephone bill due with the Members of Parliament as like as they collect telephone dues from ordinary citizens-subscribers of telephones and failure of BTTB to perform such duty led to the denying and subverting and undermining of the right to equality before law. The respondent, BTTB, appeared by affidavit-in-opposition and argued that it did its best and was still trying to realise the outstanding phone bills from the Members of Parliament. BTTB, however, said that it could not take the drastic and harsh action as per the concerned law against the member of 5th and 7th Parliament. After hearing from both parties, on 27 April of 2006 the Honourable High Court Division directed the BTTB to take appropriate measures to realise the outstanding phone bills of defaulting Members of Parliament within a period of six months and issued the following eight observations:

1.Bangladesh is a sovereign democratic republic, governed by the government of laws and not of men.

2.The people of Bangladesh are the owners of the state, and all functionaries and members of all services must serve their cause and only in their interest.

3.The law is not a respecter of persons, it does not discriminate between the ordinary citizens and functionaries of the state, however high and mighty they may be.

4.The privileges of the functionaries of the state are not allowed because they occupy such an exalted and high position but only so that they can perform their functions better in the interest of the people.

5.The government is an agent and a trustee for and on their behalf.

6.The honourable Members of Parliament are bound by the laws enacted by themselves just like any common citizens of this country.

7.Telephone bills owed to the BTTB is a debt to the country and the concerned authorities are obliged to realise their dues from the defaulting Members of Parliament past and present just like any other defaulting subscribers of telephones of this country. Otherwise the concerned authority shall be liable for dereliction of their duties.

8.If the Honorable Members of Parliament fail to pay their telephone bills in spite of issuance of notice to pay, the concerned authorities would be obliged to take action against them in accordance with the law for the time being in force in Bangladesh.

It is reported in the daily newspapers that following the direction of the High Court Division many Members of Parliament made payment to their due telephone bills and BTTB took legal actions including filing suit against many of those Members of Parliament who were still defaulter of such telephone bill. I believe this public interest litigation shall act as a catalyst for the enforcement of article 27 towards equality before law in our country.

In fact, Article 27 of the constitution does not speak about the right to equality before law alone, it includes right to equal protection of law too. It means every person is equal in the eye of law of the land and shall be treated equally in every function of the state and shall not be discriminated against on ground of religion, race, caste, sex, political belief, wealth, power, and other differences that might appear. With this notion, Article 28 of the constitution reinstates and elaborates the foregoing principle of right to equality before law, it says: (1) the state shall not discriminate against any citizen on grounds of religion, race, caste, sex or place of birth; (2) women shall have equal rights with men in all spheres of the state and of public life; (3) No citizen, on grounds only of religion, race, caste, sex, or place of birth be subjected to any disability, liability, restriction or condition with regard to access to any place of public entertainment or resort, or admission to any educational institution. Article 29 guarantees equality of opportunity in public employment.

Of course, right to equality means right not to be discriminated against. But it does not prohibit the state to give additional privilege to the backward section for their advancement. Article 14 of the constitution says that it shall be a fundamental responsibility of the State to emancipate the toiling masses -- the peasants and workers -- and backward sections of the people from all forms of exploitation. Accordingly, Article 28(4), 29(3) authorise the state to make special provisions in favour of women or children or for the advancement of any backward section of citizens. They empower the government to introduce quota system in public service, to allocate extra fund and to adopt programme for particular social and cultural group, for the language, religious and ethnic minorities. It is often regarded as positive discrimination. This type of positive discrimination results in the development of the country. Because driving to the mainstream puts them on equal footing, equal platform and level the ground enabling them to the enjoyment of other rights.

However, enforcement of right to equality before law does not only mean to look at people of different walks of life equally in policing and dispensing justice between and among them for punishing criminal activities and disposing of civil disputes or for controlling the law and order situation of the state. It encapsulates the whole activities of the state -- economic, social and political. State is required to reflect the principle of right to equality in its every action and omission, in its every service delivery system. State must comply with its obligation to people's right to equality before law in framing laws, policies and administering laws through its functionaries and agents.

In a democratic country where establishment of rule of law forms one of the constitutional goals, enforcement of right to equality before law is always deserved from the state functionaries, especially from persons in authority and responsibility of the governmental office. They are entitled to give effect to the people's right to equality before law. Law as an embodiment of people's will serves only the cause of public and their interest and no other else. Hence, enforcement of people's right to equality before law is always regarded as a primary task for every government for ensuring and establishing rule of law, fundamental human rights.

How far Bangladesh, as a democratic republic, protects and promotes this right to equality before law? Before looking into the existing reality to the state endeavour , we must note the full fledged commitment of our Constitution to the right to equality before law.

If we look at the preamble of our constitution we see, its third para explicitly outlines the aim of the state. It promises us that the fundamental aim of the state shall be to realise the democratic process of a socialist society, free from exploitation -- a society in which the rule of law, fundamental human rights and freedom, equality and justice, political, economic, and social -- will be secured for all citizens. Article 8 speaks about "democracy and socialism meaning social justice" as one of the four fundamental principles of state policy. Again Article 11 says, "The republic shall be a democracy in which fundamental human rights and freedom and respect for the dignity and worth of the human person shall be guaranteed." Last but not the least, as per Article 19, (1) the state shall endeavour to ensure equality of opportunity to all citizens, (2) the state shall adopt effective measures to remove social and economic inequality between man and man to ensure the equitable distribution of wealth among citizens, and of opportunities in order to attain a uniform level of economic development throughout the Republic.

Thus we have seen that it is a recurrent theme of our constitution to ensure economic, social and political justice, fundamental human rights through providing equal opportunity, conferring equal privilege and imposing equal liabilities and to endeavour to remove social, economic and political inequality, violation of fundamental human rights through taking care of the needs of the weak, poor and backward sections of people.

In order to the furtherance of the aim and objective of the state and to give effect to the provision of the fundamental right to equality before law as stated in article 27, 28 and 29, Article 44 guarantees the right to move the High Court Division under Article 102. In spite of it, we are far away from the establishment of this right. It is because of the fact that, a large number of people still do not know about their rights guaranteed by the Constitution, by different statutes and international human rights treaties. Though very few know about these rights, they do not have an access to justice. The increasing disparity between the poor and the rich is also posing serious threat to the realisation of right to equality before law for each and everybody.As a result, if we look at the practice of the state functionaries and state run organisations, we get very horrible depiction of unequal treatment between the rich and the poor, the powerful and powerless, the men and women, politician and non-politician. Rampant corruption, nepotism, misuse of public money and property, abuse of power have given rise of serious mistrust in the function of the state. Today the state functionaries are accused of biasness to the powerful, rich, and corrupt.

Under these circumstances, we need to take judicial, legislative and administrative reformations for the fulfilment of people's right to equality before law. Without ensuring people their right to access to justice, reforming the criminal justice system, incorporating Right to Information Act, appointing an independent ombudsman and establishing an independent human rights commission, the right to equality before law shall not be enforced. Government is under constitutional obligation to respond positively to these issues for the complete fulfilment of the right to equality before law.

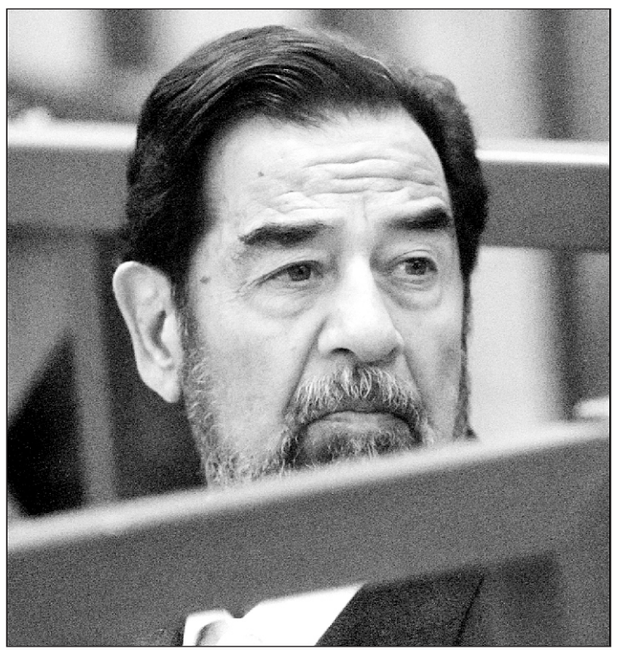
The writer is an assistant researcher to Public Interest Litigation and Advocacy Cell, Bangladesh Legal Aid and Services Trust (BLAST).

FACT *file*

Verdict against Saddam Hussein and co-accused was condemned

Amnesty International has condemned the Iraqi Appeal Court's decision on 26 December 2006 to confirm the death sentences on Saddam Hussein and two of his co-accused in the al-Dujail trial and said the court should have ordered a re-trial. The organization said it opposed the death penalty in all circumstances but it was especially egregious when this ultimate punishment is imposed after an unfair trial.

"The trial of Saddam Hussein and his seven co-accused before the Supreme Iraqi Criminal Tribunal (SICT) was deeply flawed and unfair, due to political interference which undermined the independence of the court and other serious failings," sad Malcolm Smart, Director of Amnesty International's Middle East and North Africa programme. "The Appeals Court should have addressed these deficiencies and ordered a fair re-trial, not simply confirmed the sentences as if all was satisfactory at the trial stage."



"It was absolutely right that Saddam Hussein should be held to account for the massive violations of human rights committed by his regime, but justice requires a fair process and this, sadly, was far from that, "said Malcolm Smart."The trial should have been a landmark in the establishment of the rule of law in Iraq after the decades of Saddam Hussein's tyranny. It was an opportunity missed."

Following the Appeal Court's decision, Saddam Hussein and two of his co-accused, are to be executed within 30 days. They were sentenced in connection with the killing of 148 people from al-Dujail village following a failed attempt to assassinate Saddam Hussein in 1982. One accused was acquitted and the four others received prison terms; however, the Appeal Court recommended that the sentence of one of these should be reconsidered by the SICT because it judged it to be too lenient, suggesting that a fourth defendant may also yet receive the death sentence.

The trial before the SICT, which began in October 2005 and concluded with the imposition of sentences on 5 November, was widely criticised due to political interference and the court's failure to ensure the safety of witnesses and defence lawyers, three of whom were murdered during the course of the proceedings, and for failing to establish an effective case against the accused.

Source: Amnesty International.

LAW *analysis*

Local implementation of international environmental norms

MD. SAIFUL KARIM

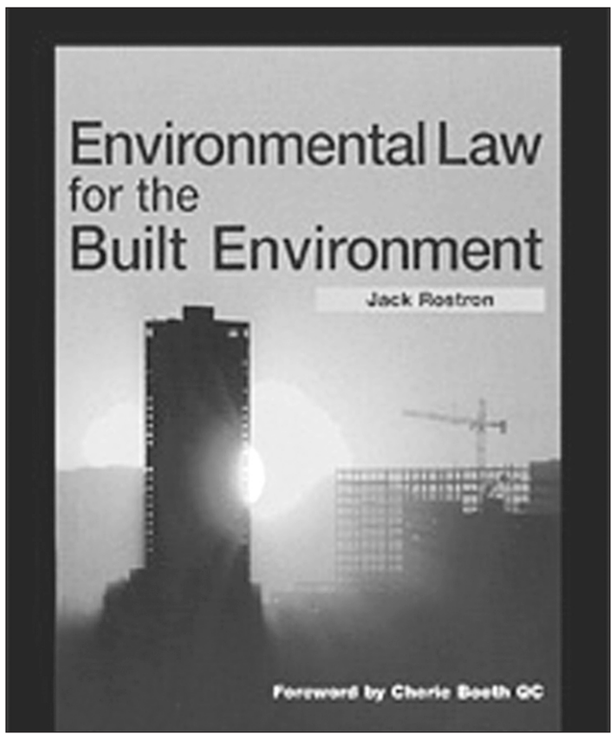
IMPLEMENTATION of international legal norms refers to the legislative, institutional and practical actions that states take to make international law operative in their national legal system. Implementation therefore establishes the relationship between the national and international legal systems. Compliance of international norms is the aim of establishing this link. Compliance is generally defined as the extent to which the behaviour of a state, party to an international treaty, actually conforms to the conditions set out in the treaty. Compliance may be divided into two heads such as compliance with the treaty's explicit rules and compliance with the treaty's objectives. On the other hand enforcement may be defined as "compelling of obedience" to law. In international law context enforcement means the measures taken to fuller implementation of international legal norms in domestic arena.

Domestic enforcement or compliance of environmental protection norms can be divided into two broad dimensions namely enforcement of national laws related to environment and establishing proper mechanism for enforcement of international environmental law. Both the dimensions are indivisibly interlinked with each other. International law is enforced in state territory by national law at the same time international law influences the progressive development of national environmental legal regime.

Traditional international law scholars consider state responsibility and dispute resolution by competent authority as the only way of enforcement of international environmental law. But like other branch of international law enforcement of international environmental low is also notoriously difficult as judicial dispute resolution in international arena entirely depends on the consent of the party to be sued. This deficiency of enforcement led some scholars to think international environmental law as a largely sanction-less creation "full of sound and fury, signifying nothing," the "jurisprudential equivalent of vapourware. " Some scholars go further and say "if international law stands at the vanishing point of law, then international environmental law, despite the repetitious tomes that appear on it, stands at the vanishing point of international law. It is a subject full of pious prescriptions but little bite." This difficulty led the global community to search alternative mechanisms for enforcement of international environmental law beyond the custody of old fashioned command and control approach.

Over the years a wide range of techniques and forms of enforcement evolved which include transmission of information, monitoring, verification, and inspection. Another commonly used mechanism is monitoring national compliance with the obligations undertaken under the environmental agreement by review mechanism which is primarily based on national self-reporting, although some conventions provide for independent means of gathering information. Another popular mechanism for obtaining participation and ensure compliance is "carrot and stick" approach. This mechanism is used in Montreal Protocol on Substances that Deplete the Ozone Layer under which trade restrictions can be imposed on imports to and exports from non-parties and a fund has been created to assist countries in complying with their obligations. Again Kyoto Protocol of United Nations Framework Convention on Climate Change provides a number of mechanism including cooperative implementation, emissions trading, and technology transfer to assist parties to meet their commitments.

Apart from these mechanisms, watchdog roles of non government organisations, scientific institutions, intergovernmental organisations, increasing public participation in environmental decisions making process are also playing a significant role in enforcement of international environmental law. In some cases for including all necessary players on board by divorcing orthodox command and control mechanism international environmental law created different types of mechanisms which I believe



have their own intrinsic exquisiteness. These mechanisms not only give us solution of some critical problems but also created progressive means of resource transfer and allocation to developing countries.

Using competent international financial institutions is another way of enforcement of international environmental law. For example, before financing a project, the World Bank considers potential environmental harm. Therefore for this purpose it has established policies and guidelines to review each project from an environmental perspective. In this respect it endeavours to ensure that each project affecting renewable natural resources does not exceed the regenerative capacities of environment. It refuses to finance the projects which will cause irreversible or severe environmental deterioration and projects which are implemented without acceptable mitigatory measures. Furthermore the World Bank will refuse to finance any project which breaches any international environmental agreement to which the member country concerned is a party. In addition to these it also will not finance any project that would significantly modify natural areas designated by international conventions as World Heritage Sites or Biosphere Reserves, or designated by national legislation as national parks.

In 1996 the World Bank approved disclosure of emissions data as an enforcement technique, stating that this technique is especially useful for developing countries that have weak enforcement of their environmental laws. Again The Global Environment Facility (GEF) established in 1991 to provide financing for incremental costs of projects with global environmental benefits in four areas: biodiversity, climate change, international waters, and the ozone layer. The World Bank, the United Nations Environment Programme (UNEP) and the United Nations Development Programme (UNDP) are the implementing agencies of the GEF and World Bank also act as trustee of this fund. By providing an economic incentive for developing countries to comply with international environmental treaties, the GEF is an example of global approach based on the principles of cooperation and global environmental partnership.

Disproving others' views not necessarily proves any one's own opinion. The skeptics of international environmental law themselves failed to come out with a reasonable and equally efficacious alternative of international environmental law for protection of global environment. So I believe legal researchers should try to find some amicable solutions of the problems rather relentlessly engaging them in identifying deficiency of international environmental law. If we evaluate the international environmental law from an orthodox parameter we will not do real justice to the system and people behind it. It is not a child's play to make an environmental legal order in a world of sovereign countries divided into several hundred political boundaries although natural environment knows no boundary.

We should be aware of how appreciably international environmental law influence national environmental protection system in last few decades. One glaring example can be that before 1972 United Nations Conference on Human Environment and Stockholm Deceleration on Human Environment how many countries had separate Ministry/Department/National Agency for environment and how many countries now have it? Now-a-days separate government agency for conservation of environment is a common trend all over the world which was totally alien in the vocabulary of public administration before Stockholm Declaration. In some countries whole environmental legal regime is a post Stockholm phenomenon and direct upshot of international environmental law movement. In this juncture I like to conclude with some words from Joel B. Eisen:

"The recent and rapid developments in international environmental law can influence our domestic system of environmental law. We should abandon any conceptual separation of the two bodies of law, and instead think of the two as having evolved into a new relationship in which international environmental law can and does play a role in the development and refinement of domestic law."

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