Law and Our Rights

"All citizens are equal before law and are entitled to equal protection of law"-Article 27 of the Constitution of the People's Republic of Bangladesh

Accountability of Judiciary

Its Linkage to the 13th Amendment of the Constitution

By Aabed Rahman

IN last couple of months much has been written, much debate has also taken place about the judicial system following some alleged decisions of our upper courts. None other than the Prime Minister and Home Minister had to face the charge of contempt of court for making comments on the functioning and some recent decisions of the upper courts.

This article is infact prompted by the speech of the Indian Prime Minister delivered last week in New Delhi on the occasion of the Golden Jubilee celebrations of the Supreme Court of India. The Indian Prime Minister expressed his anguish at the pendency and long delay in the disposal of cases. Describing the situation alarming, he suggested specific ideas to the judiciary like alternative dispute settlement mechanisms at all levels of the judiciary. He pointed out that arbitration can be an obvious choice for civil cases. He also emphasised the need for scraping or drastically simplification of outdated laws to remove delays and to make the ordinary litigant understand the processes of justice.

His government is also trying to ensure that the delays in the administration of laws are reduced so that women, children and weaker section of the society get the fruits of justice.

For better part, the Indian Prime Minister anncunced that a national Judiciai Commission would be set up that would recommend judicial appointment to the higher courts and draw up a code of conduct of ethics for the judiciary. He also disclosed his government's commitment to the independence of the judiciary.

On the other hand, the Chief Justice of India speaking on the same occasion said that a respected and independent judiciary and a respected strong Bar are indispensable for a democratic, accountable and transparent judicial system.

Flurry of public litigation and criticism of judiciary are regular features in India. Fortunately, Indian judicial system is receptive, tolerant and appreciative of all criticism about it. Just a few weeks ago, the Chief Election Commissioner of India also voiced concerns at the activism of judiciary in electoral politics. Unlike out country, no case of contempt of court was lodged against him or against anybody criticising the decisions or functioning of the judiciary in that country.

What to learn from others?

As a comparatively new country, we use to learn from countries like India and others on many issues, in particular, in formulating or enacting any new laws, policies in varied areas. This has been our national practice for years. There is nothing wrong in it. Incidentally, we learn less or take less example that is good in other countries. The successive governments in our country adopted policies not in view of national interest; but more in the interest of the party in power. The fact, however, all governments fail to recognise is that no party can remain in power for ever and that their own adopted laws go against them when they are no longer in power and sit in the opposition. That is why a law, a policy that is good for the whole nation is better for everyone. It is equally good for the party in power as well as parties in the opposition. This very fact of life is to be acknowledged and believed by all political parties. We are such an unfortunate nation that our politicians have just divided the nation on all issues. High Court and Supreme Court Bar Association is no exception to this vertical division. This division is also contributing to the alleged dubious role our judiciary is now playing.

In my earlier article published in the Daily Star in its issue of 22 November 1999 on the same subject, I tried to advocate that the problem that the judiciary is now facing or the criticism it is now receiving from many quarters is not wholly due to it's own fault. This problem emanates mainly from appointing judges in upper courts from political consideration. If that is to be stopped, perhaps judiciary can perform better than what it is doing now.

It seems that there is much to learn from the speech of the Indian Prime Minister in view of the on-going debate on the judiciary in our country. We also need to update and modify our outdated laws as per the need of the day. As also revealed by the Indian Prime Minister, perhaps a National Judicial Commission or a Supreme Judicial Council can also be set up in our country with the responsibility of recommending the appointment of judges for the upper courts based on the qualification, expertise, experience and professional integrity of the appointees. It can also draw up appropriate code of conduct of ethics for the judiciary. This way, perhaps nation can get better judges in our upper courts.

Implications of the 13th Amendment to the Constitution for the Judiciary

The much-talked about 13th Amendment to the Constitution has perhaps added new dimension to the on-going debate on the judiciary in the country. This amendment has made provision only for retired Chief Justices and other Supreme Court Judges to head the care taker government in the run up to the general elections. In the interest of the nation, this amendment should be re-amended. Political parties in power can think that if they can put their like minded judges in upper courts, in due course they might help them in general elections as head of a care taker government.

The 13th Amendment of the Constitution seems to be discriminatory as it has barred other distinguished citizens of the country from heading a caretaker government. Why should only the retired Chief Justices and Supreme Court Judges head the care taker government when there are a number of other equally, if not more, eligible, qualified and respected eminent citizens in the country for the same job? The proposed re-amendment to the 13th Amendment of the Constitution should authorise the President to choose anybody eligible and qualified in his view and opinion from any sphere of the society to head the care taker government. This can perhaps also discourage the party in power to appoint judges from alleged political consideration.

However, if the judges are appointed through the proposed National Judicial Commission or Supreme Judicial Council based purely on their professional qualification, expertise and integrity, the question of favouritism will not arise. The political parties should also be prepared to go to power in a free an fair elections only with the popular support and mandate and with any favour or fear from the care taker government.

The issue of separation of judiciary from administration is also linked to ensuring accountability of the judiciary. In order to keep the democracy moving, this is to be done as early as possible. As a pre-election promise, it is heartening that the government is working on the issue. The nation hopes that this sees light soon and the government fulfills its electoral promise well ahead of the next general elections. While we talk about accountability and transparency of judiciary, sincere efforts should be made to facilitate the process of separation of the judiciary from the administration.

On the other hand, our judiciary should learn to be more tolerant and receptive of constructive criticism about its overall state of affairs. It should have reconciliatory attitude. It should bear in mind that, judiciary, is like other organs of the state and has not come from the blue. It is expected to be accountable and transparent. In fact, the nation looks to the judiciary as last resort. This popular credence should be upheld and must not be floundered. Judiciary should steer the rule of law in the country and should hold the candle to the best.

The writer is a Delhi based Bangladeshi Researcher

Right to Housing and the Saga of Forced Eviction

By A.H. Monjurul Kabir

IN the recent past, the Government of Bangladesh was in an euphoric mood of demolition and eviction. After the sordid and inhuman eviction of the commercial sex workers from country's the biggest and century old brothel Tanbazar, Narayangonj on 24 July 1999, they decided to crackdown on the unfortunate victims of poverty, thousands of slum dwellers of Dhaka. On 8 August 1999, they demolished Titipara basti (slum) and other installations adjacent to Gopibagh railline with the proclaimed objective of improving the deteriorating law and order situation of the country. As a direct consequence of this action, thousands of people became homeless and vulnerable to all other obvious stigma. The government did this without resorting to any rehabilitation scheme that might help them immediately and without adequate notice as required by law. Three leading legal aid and human rights organisations, Ain O Salish Kendra, Odhikar and Bangladesh Legal Aid and Services Trust filed a writ petition in the High Court Division of the Supreme Court praying for restoration of their (slum dwellers) homes and huts from where they have been evicted upon the declaration of the whole sale eviction to have been done without legal authority more so, without providing any alternative accommodation.

The court vacated the order of stay granted earlier (dated 11.08.99) on the anti-slum drive of the government providing a guideline to it (the government) for rehabilitation of the slum dwellers in phases. The court also declared that the government should undertake a master plan or rehabilitation schemes or pilot projects for the rehabilitation of the slum dwellers and undertake eviction of the slum dwellers to the capacity of their available abode and with the option to the dwellers either to go to their village home or to stay back leading an urban life. The application was disposed of without any order as to costs. Justice Mohammad Fazlul Karim and Justice Md. Ali Asgar Khan delivered the verdict (Ain O. Salish Kendra and Others Vs Government of Bangladesh and others) on 23 August 1999. Dr. Kamal Hossain, Senior Advocate, Bangladesh Supreme Court, represented the petitioners. Mr.Mahmudul Islam, Attorney General of Bangladesh, appeared for the respondents.

The Petitioners' Views

The application has been moved for enforcement of fundamental rights of slum dwellers as guaranteed under Article 27, 31, and 32 of the Constitution of the People's Republic of Bangladesh that includes their right to life, liberty, livelihood etc. together with articles 7, 11, 15, and 19 in particular of the chapter of fundamental principles of state policy.

The application under Article 102 of the Constitution at the instance of the petitioners are directed against the demolition of basties (slums) of Dhaka city and eviction of the inhabitants contrary to the government's declaration of 1993 housing policy that has been repeatedly assured to be protected and promoted by the Prime Minister. The petitioner has further asserted that unless a creative programme is taken and slum dwellers are evicted phase by phase the whole sale eviction would not only deny dignity of inhabitants but would also amount to discriminations as has not been equally treated as the slum dwellers of Bhasantak. The petitioner by way of supplementary affidavit has further annexed the report published in November 1996, by Urban Poverty Reduction Project of the Ministry of Local Government and Rural Development and the Asian Development Bank wherein the number of basties in Dhaka City were shown in all around at 3007 and total number of families at 2,23,724 touching the populations about 11,33663 stating further that the said report was placed in the United Nations Conference on Human Settlements (Habitat-2) held in Istambul from 3-14th June, 1996 and accordingly sought for amendment of the prayer as to why the eviction of basti people in different parts of Dhaka city after demolition of all existing basties including some particular basties should not be carried out without following fair and reasonable procedure according to law, not be declared to have been made without lawful authority and to be of no legal effect as being unconstitutional and violative of the fundamental rights of the basti people guaranteed by the Constitution in Articles 27,31 and 32 there of.

Views of the Government

Recognising the reality that slums dweller are the distressed people uprooted by natural calamities and forced to live in such shanties (huts), the government has argued that nobody has the right to occupy, reside or stay on the lands belonging to the government and public authorities. These lands are used in public interest. But over years bastis have sprung up in the city of Dhaka over the land of the government and the public authorities creating manifold fold problems and the law and order situation also. The distressed and uprooted people have been residing in bastis and they are to pay rent to the mastaans who organise and manage the bastis and there are illegal electric, gas and water connections in the bastis. The criminals and drug traffickers offer safe place for concealing illegal arms and drugs in bastis. Newspapers published many reports of those heinous activities of the mastaans (hoodlums) taking shelter at the bastis.

The court has been also appraised that the governments and public authorities asked the slum dwellers to leave the place removing their shanties and huts but some people have left these basties and others are continued to stay there to be joined by new comers to the detriment and annoyance of the society disturbing the peace and tranquillity of the area.

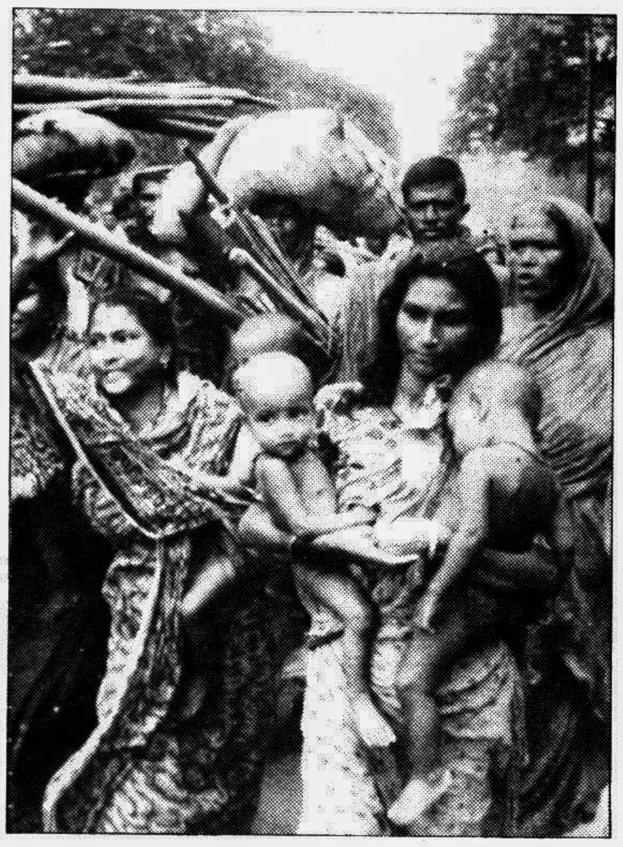
The government has asserted that it tries for rehabilitation of the distressed and uprooted people residing in the basties and the Government at the instance of the Krishi Bank carried on survey of 32 big basties and found 50,000 families where upon the Bank adopted a scheme of rehabilitation named 'Ghore Fera' that was inaugurated by the Prime Minister on 20th May 1999. In the process of this rehabilitation scheme the government, railway, public works department and Dhaka City Corporation have decided to clear the basties altogether with a view to rehabilitate the bonafide slum dwellers and to do away with the heinous activities carried on with the help of the mastaans (hoodlums) who were engaged in possessing illegal arms, manufacturing explosives and selling drugs to the innocent slum dwellers. The government has already sanctioned Tk. 5 crore under its nine projects to be spent in helping the evicted basti families. A consortium of commercial banks to extend easy loan to the evicted families of the slums' dwellers under the projects has also been formed.

The Observations of the Court

The High Court Division of the Supreme Court has clearly tried in this case to strike a balance between social justice and administrative regime of the government. Two of the slum dwellers were parties along with the three non-government organisations as the petitioners and the sole object of the petition are to protect the slum dwellers' right to life, living, shelter, livelihood and to rehabilitate them physically and socially. Their such rights, according to the court, are in consonant with the fundamental state policy that in a democratic country in which the fundamental human rights and freedom and respect for dignity and the worth of human person shall be guaranteed and the responsibility of the state to attain through planned economic growth improving the material standard of living of the people making provisions for basic necessities of life including shelter, food, medicine, education etc. to secure the social welfare and associating in a suitable manner by realisation of fundamental rights to life and livelihood and to prevent eviction of dwellers of slums through a process which are not in accord with the existing legislative process. The inhabitants of any slum are the misfortunes of the society, homeless and provisionless, may be due to river erosion, flood, draught, natural calamity etc. and became floating rural population having no profession, no provision for food, shelter and being poverty stricken migrate to the urban area in quest of those necessities for their living on earth for breathing its fresh air. The impoverishment leads them to float and flock together in certain areas where vacant space is available and starts by constructing huts in slums engaging themselves in petty jobs.

"The government and the non-government organisations some times come to their succour in a very unplanned manner for their rehabilitation making some poor poorer and turning some poor idle into misguided terrorists/mastaans/drug traders / traffickers and violent armed cadres."-the court flatly remarks.

The Court has stated that our Constitution both in the Directive State Policy and in the preservation of the fundamental rights provided that state shall direct its policy towards securing that the citizens have the right to life, living and livelihood. Thus our country is pledge bound within its economic capacity and in an attempt for development to make effective provision for securing the right to life, livelihood etc. as to the fundamental state policy that is not enforceable and the fundamental rights. The Supreme Court of India in the case of Olga Talis Vs.Bombay Municipal Corporation (1985) 3 S.C.C 454 held that " Article 37 provides that the directive principles, though not enforceable by any Court are nevertheless fundamental in the governance of the country. The principles contained in Articles 39(a) and 41 must be regarded as equally fundamental in the understanding and interpretation of the meaning and content of fundamental rights. If there were an obligation upon the state to secure the citizens an adequate means of livelihood and the right to work, it would be sheer pedantry to exclude the right to livelihood from the content of the right to life. The state may not by affirmative actions, be compellable to provide adequate means of livelihood or work to the citizens. But any person, who is deprived of his right to livelihood except according to just and fair procedure established by law, can challenge the deprivation as offending the right to life conferred by article 21."



Destiny uncertain

The court has rightly indicated that as to the terrorists/mastaans/drug traffickers/drug traders, the government may arrange for combing operations when necessary and eradicate these evils from the society.

The Missing Links

Unfortunately the petitioners, the respondents and the judges have overlooked the international aspects of forced eviction and the right to housing. Such omission has turned the judgement into a mere piece of domestic adjudication. It is understandable that the government is reluctant to refer any international standard of housing or eviction as that might go against the contention of the government. Surprisingly, the petitioner too has not pursued the international aspects of such rights that would, no doubt, help them to demonstrate Bangladesh's obligation to conform to international standards. Around the globe, the judiciaries of many countries have started recognising international standards set by various instruments not only as a mere point of information or distant goals to be achieved but also as an active consideration of adjudication. As a result, judgements of domestic courts become a valued tool of reference and interpretation. It earns respect for the respective country. Sadly Bangladesh is trailing far behind the global trend.

In the whole judgement, the only element of international reference is that the Government of Bangladesh placed a report by Urban Poverty Reduction Project in the UN Conference on Human Settlement in June 1996. The judges, at one point, have observed that due to the unplanned manner of intervention for the rehabilitation of the poor slum dwellers by the government and the NGOs, some poor become poorer that also lead some of them to anti social activities. It appears that without proper justification and adequate corroboration, such sweeping remark has bound to devalue the objectivity of the judgement.

A Brief International Perspective

The right to adequate housing receives clear recognition in many international instruments including the Universal Declaration of Human Rights (UDHR, Article 25(1)), the International Covenant on Economic, Social and Cultural Rights (ICESCR, Article 11(1)), the Convention on the Elimination of All Forms of Racial Discrimination (CERD, Article 5(e) (3)), the Convention on the Rights of the Child (CRC, Article 27), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, Article 14(2)), the Convention relating to the Status of Refugees (Article 21) etc.

The UDHR successfully attains the value of customary international law. Out of the multilateral treaties mentioned above, Bangladesh, so far, ratified the ICESCR, the CRC, CERD and the CEDAW where explicit recognition of the right to adequate housing has been granted.

Bangladesh ratified the ICESCR on 5 October 1998. Article 2(1) of the Covenant states that," Each state party to the present Covenant undertakes to steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures'. The Committee on Economic, Social and Cultural Rights has made it clear that the obligations of states parties include both obligation of conduct and obligation of results. The obligation of conduct means that a state has to undertake a specific step (act or omission). Obligation of result means attaining a particular outcome through active implementation of policies and programmes. However conduct and result can not be separated.

The right to adequate housing has attracted the attention of the Committee more than the other rights contained in the Covenant. The Committee has noted that, "the right to adequate housing can not be viewed in isolation from other human rights contained in the two international Covenants and other applicable international instruments. The Committee has also noted that, in addition to the full enjoyment of other rights - such as the right to freedom of expression, the right to freedom of expression, the right to freedom of association (such as for tenants and other community based groups), the right to freedom of residence and the right to participate in public decision making - is indispensable if the right to adequate housing is to be realised and maintained by all groups in society. Similarly the right not to be subjected to arbitrary or unlawful interference with one's privacy, family, home or correspondence constitutes a very important dimension in defining the right to adequate housing. (General Comment 4, Sixth Session 1991, UN document, HRI/Gen/1Rev.1, July 1994).

The Committee in its General Comments also stated that, " instances of forced eviction are prima facie incompatible with the requirements of the Covenant and can only be justified in most exceptional circumstances, and in accordance with the relevant principles of international law"

Better Late than Never

Through this case [(Ain O. Salish Kendra and Others Vs Government of Bangladesh and others, 19 BLD (HCD)(1999)], the Judiciary of Bangladesh, in fact, has ventured to step towards the justiciability of economic, social and cultural rights howsoever modest and indirect that might be. The court rightly points out," that the learned counsel for the parties also have not opposed the programme of rehabilitation but their grievance is as to means. Government may proceed with eviction process phase by phase giving reasonable time and rehabilitate the slum dwellers in the lights of the observation made above. In view of the admitted position, nothing should stand in the way of rehabilitation to secure the economic and social justice for all"

No matter how effective international mechanisms might be, and they are far from being sufficiently so at present, there is no substitute for a concerted domestic implementation initiative of national obligations about these rights.

Can the judiciary of Bangladesh lead us towards expanding the meaning of economic and social justice for all?

The writer, a British Chevening Scholar, is President, the University of Essex Amnesty International Society. The views expressed here is writer's own and should not be attributed to any organisation.

law watch

The Legacy Continues

By S. Rizwana Hasan

TWO years have elapsed, but he never came back in physic. Everyone at BELA waited for the hearty command of their comrade who they knew continued to guide them even from heaven. The struggle that he initiated for a better earth still continues as a legacy for BELA and BELA has chosen the same as the best appropriate way to honor its departed founder Dr. Mohiuddin Farooque, who passed away on 2nd December '97.

The last 2 years were truly years of remembrance. The remembrance continues as BELA faces new questions and situations to address. His voice echoes, the loving memories dominate and the success and teaching are counted before BELA steps ahead. He was never missing from the realm of BELA and the credit of the successes marked after his departure have rightly been deposited to his account that BELA is safeguarding with due respect.

Dr. Mohiuddin Farooque (1954-1997)

BELA and Dr. Farooque are synonymous. The ideology for BELA is the vision of Dr. Farooque. The activism of BELA is the spirit of Dr. Farooque. The confidence of BELA is the benevolence of Dr. Farooque. All efforts of BELA have their foundation in the vision of this extra ordinarily humane personality who sought to protect the creature of Almighty and initiated a systematic movement with law as weapon for protection. He made the society aware about the beneficial impact of law and the strength of professional commitment. The courage of his bold person transformed into actions that in all cases revolved around the welfare of the distressed, disabled and the vulnerable community who could not speak for themselves. Any attempt in the judiciary to protect the interest of the thousands and million of poor and helpless people would inevitably tell us about his relentless effort to gain legal status for them.

Dr. Farooque sought to assist the community in gaining a meaning for life. He wished to ensure dignity and worth for everyone as committed in the Constitution of the People's Republic of Bangladesh. He unveiled the rich regime of environmental law that not only ensured the right of human beings but also the nature and its resources that support life on earth. He was dutiful and responsive to the needs of the present as well as the future generation. The trust that he held was the trust the Constitution bestows on us by requiring every citizen to maintain discipline, perform public duties and protect public property. The evolution of BELA would mark continuation of the inheritance of that trust and any progress made in that respect would and to the credibility of his philosophy.

On our part, we admit lack of experience but no negligence or leniency in fulfilling the organizational commitment , lack of wisdom but not enthusiasm in realizing his dreams, abundance of shortcomings but no lack of affiliation with the action agenda.

During his lifetime, he never wanted to grow older and disliked to introduce his father as " Late". Be assured that your troop at BELA would leave no stone unturned to keep you functionally alive and although your vision would mature, you would remain in their heart as the smiling and rejoicing "Farooque Bhai". We continue with the tasks you initiated and would not go to rest till the struggle against wrong and for right continues.

The writer is Manager, Programmes, BELA

African Children's Charter

A Welcome Step to Securing the Rights of Africa's Children

THE entry into force of the African Charter on the Rights and Welfare of the Child (African Children's Charter), within days of the 10th anniversary of the United Nations Convention on the Rights of the Child, is another positive step towards securing the protection of children's rights, Amnesty International said on 29 November..

"The human rights of African children are violated every day of their lives, with severe consequences which extend well beyond their childhood," Amnesty International said.

"The African Children's Charter provides a basis for the promotion and protection of the rights of children at the national and regional level." The Charter -- the first regional treaty on the human rights of the child -- was adopted by the Organization of African Unity in 1990. However, member states have been slow to ratify the treaty, and it was not until last month that the fifteenth country ratified the Charter, thereby allowing the treaty to enter into force.

The African Children's Charter codifies the responsibilities of the state, community and individual in the protection of the civil, cultural, economic, political and social rights of the child.

Amnesty International has continued to document abuses of children's rights in a number of African countries -- including the Democratic Republic of Congo and Rwanda -- perpetrated by both governments and armed opposition groups. Such abuses include torture and ill-treatment, rape, extrajudicial and arbitrary executions, "disappearances" and abductions, participation in armed conflicts, and permanent injuries sustained by children as a result of anti-personnel landmines.

It is estimated that 120,000 children under 18 years of age are participating in armed conflicts in the region, some as young as 7 and 8 years of age. Governments which ratify the African Children's Charter will be bound to ensure that no-one under the age of 18 is recruited into the armed forces or participates in hostilities.

States parties will be required to submit reports to an 11-member African Committee of Experts on the Rights and Welfare of the Child (the Committee), who will monitor compliance with the African Children's Charter. The Committee will be empowered to receive complaints from any person, group or non-governmental organization recognized by the OAU relating to any matter covered by the treaty. It will also be able to resort to any appropriate method of investigating matters falling within the ambit of the treaty. The Committee is expected to be elected at the OAU Summit next June, in LomÉ, Togo.

"Member states of the OAU should ensure that they nominate and appoint individuals who are independent and impartial and who have expertise in the area of children's rights," the organization urged.

"The OAU should also provide the Committee with sufficient resources so that it is able to begin functioning as quickly and as efficiently as possible." Amnesty International urges the remaining 37 states of the 53 member OAU to ratify the African Children's Charter as quickly as possible. Background Those governments which have ratified the African Children's Charter are Angola, Benin, Burkina Faso, Cameroon, Cape Verde, Lesotho, Malawi, Mali, Mauritius, Mozambique, Niger, Senegal, Seychelles, Togo, Uganda and Zimbabwe.

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