

Star LAW analysis



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## Legal meaning of sovereignty

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We always use the term "sovereignty" of a state. What do we actually mean by that expression? The word "sovereign", according to its dictionary meaning, is "a person exercising supreme authority". Accordingly, "sovereignty" of a state means its unrestricted power within the territory both internally and externally. In other words the powers of a state are not controlled by any other state or entity.

### Definition of sovereignty

French Philosopher Jean Bodin (1530-1596) attempted to define sovereignty by describing it as absolute and perpetual power of a State. International Law author Brierly in his book "Law of Nations" defined it as "absolute and illimitable". All these definitions mean that a state has the full capacity to govern a territory with complete freedom including its competence to establish relations with other States.

In the Wimbledon Case (1923), the Permanent Court of International Justice considered that one of the ingredients of sovereignty was to right and competence to enter into international agreements with other entities. Judge Huber in the Island of Palmas Case (1928) noted that "sovereignty in relation to a portion of the surface of the globe is the legal condition necessary for the inclusion of such portion of territory of any particular case".

The Treaty of Westphalia of 1648 gave approval of nation-states with centralised national governments and under the Treaty, the defining characteristic of sovereignty has always been the state's capacity to make authoritative decisions regarding the people and resources within the territory. This system began in Europe and it was taken up around the world and it lasted until the UN was set up in 1945.

### Test of existence of sovereignty

Mere declaring a state within a territory does not confer sovereignty. It has to be seen whether that state has the unfettered power to exercise its authority not only in domestic affairs but also in foreign affairs. For example, a new state "Manchukuo" was declared after Japan occupied a province in China in 1931. Although Japan immediately recognised it, international community found that the authority of "Manchukuo" was controlled by Japan. The League of Nations, the predecessor of the UN, constituted a Commission to find out facts of the nature of authority of the new state to determine the existence of sovereignty.

The Commission led by Lytton came to the following view: "In the government of Manchukuo, Japanese officials are prominent and Japanese advisers are attached to all important departments. Although the Premier and his Ministers are all Chinese, the heads of the various Boards of General Affairs, which is an organisation of the new state

vested with the greatest measure of actual power, are all Japanese". This implied that the new state "Manchukuo" was virtually under Japan and could not exercise freely its power. It meant that "Manchukuo" lacked sovereignty.

At the birth of sovereign Bangladesh on December



### In search of sovereignty!

16, 1971, it was widely reported that there was a proposal from India to appoint Indian advisers to all departments and ministries in Bangladesh government. The India's proposal possibly originated from a concern that the administrative machinery of the new government of Bangladesh might not be able to handle the gigantic task of rehabilitation and reconstruction of the war-ravaged country.

However, Bangladesh government rejected the proposal on the ground that the acceptance of such proposal might give impression to other states that Bangladesh was not a sovereign entity but a "satellite of India". Furthermore, Bangladesh government had an abundant supply of good, efficient and experienced Bangladeshi officers who had sound academic records both from local and foreign universities. They were as good as Indian advisers, if not in some cases better in

quality than Indian advisers.

### Is power under sovereignty unlimited?

The simple answer is in the negative because at present sovereignty is restricted by the rules of international law. Under international law, it is commonly acknowledged that sovereignty implies dual responsibility: externally, to respect the sovereignty of other states, and internally, to respect the dignity of all the people within the state.

The concept of sovereignty under the Westphalian system has undergone a change. At the heart of this conceptual approach is a shift in thinking about the essence of sovereignty, from control to responsibility of states. Even the strongest supporters of state sovereignty will admit today that no state holds unlimited power to do what it wants to do within its territory.

States exist and interact with other states and interna-

tional organisations. They enter into treaties and agreements with other entities and are bound by them. This means that States themselves surrender some portion of their sovereignty by agreeing to be bound by the provisions of a Treaty/Agreement. If they are in breach of the provisions, other states may not cooperate and may impose boycott or sanctions on the recalcitrant state.

The global environment is a complex and multi-faceted one. There are many global and regional issues that cannot be handled by one state. For example, issues, such as international disorder, global terrorism, flow of refugees, fluctuations of global economy, security of food, export of man-power, elimination of poverty, environmental degradation, prevention of floods and drought, trafficking of women and children, smuggling of drugs, prevention and control of deadly diseases need active cooperation and support of other states and international organisations. The cooperation and assistance may only come if a state conduct itself within the confines of international or regional system, governed by rules of law.

Another matter that merits attention is that fundamental human rights cannot be denied by states to their own nationals. The 1948 UN Universal Declaration of Human Rights has become a part of customary international law. It has been seen that respect for human rights is now a subject of international concern. No longer a state can legitimately argue that violation of human rights within its territory is simply a matter of domestic jurisdiction or an internal matter. This is because individuals are no more "objects" of international law but are considered as "subjects" of international law. Individuals can now lodge a complaint against their own states to the UN Commission of Human Rights.

There are circumstances when the UN or any regional organisation such as NATO may intervene if a state grossly violates fundamental human rights or commits genocide or crimes against humanity. For example the US-led armed forces attacked former Yugoslavia in 1998 to prevent genocide and "ethnic cleansing" of Albanians in Kosovo by Serbian authorities under former President Slobodan Milosevic. Such intervention is known as humanitarian intervention. It means that the international community will no longer ready to permit gross abuse of human rights in a state. It has become now an international responsibility to ensure that genocide or gross violations of basic human rights do not take place anywhere in the world.

### Conclusion

Sovereignty is now understood as embracing responsibility and not control and unfettered power. Sovereignty as responsibility has become the minimum content of good international citizenship. Under emerging international law, sovereignty is no more the exercise of unlimited power over its citizens and resources but is limited to state's actions consistent with the principles and purposes of the UN Charter (Articles 1 and 2 of the Charter).

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Star LAW review



## TRANSBOUNDARY ATMOSPHERIC POLLUTION

# Legal problems and remedies

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THE material wealth of the Industrial Revolution brought with it a less desirable side effect - air pollution. In the last twenty years the dimensions of the air pollution problem have changed considerably. High smokestacks and unfavourable meteorological conditions plus increased pollution levels have made a local problem into transboundary one. Thus air pollution challenges nations sharing common borders to balance economic needs with protecting citizens and the environment across jurisdictions. Transboundary air pollution is a particular problem for pollutants that are not easily destroyed or react in the atmosphere to form secondary pollutant. In many instances transboundary air pollution is not limited to the territory of just one state; very often it is spread to an undetermined number of states or other territories beyond the limits of the territory where the pollution originated.

The term 'transboundary' is inextricably bound up with the term 'jurisdiction' and 'control'. Therefore, the main international legal problems those are common to each 'long range transboundary air pollution' that -

(a) Each and every pollution has its origin within the area under the jurisdiction of one state and

(b) Its deleterious effects are extended beyond the limits of that jurisdiction.

However, this view is purely based on the bilateral

conception of transboundary environmental interference. But there is an alternative view. The alternative view maintains that the occurrence of environmental interference in international areas is also included in the term of 'transboundary', irrespective of whether such interference has its origin in the territory of a state or in an international area. However, an occupying power can be held liable if it is in physical control of the territories it has unlawfully invaded and occupied. Thus, Iraq has been held liable for setting fire of oil wells and causing environmental damages during the occupation of Kuwait in 1990-1991.

It is well known that courts of law had never faced any difficulties in dealing with damages caused by air pollution when both the source of pollution and damaged property are located within their respective jurisdiction. But the problem becomes more complicated when air pollution crosses the boundaries between states. The existing principles of international law applicable to the transboundary pollution have mainly developed on the basis of bilateral relations between neighbouring states and laws relating to this matter are still in incubation-pot. However, nobody would deny that some of the principles, applicable in this field have been "taken over" from "general principles of law". Thus, the award in the notorious Trail Smelter case based on the principle that "no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the

territory of another or the properties or persons therein...". is a principle of international law as well as of the law of the United States. Interestingly enough, the same maxim was used in the 'St.Helen's case (in UK). However, in the precedent-setting 'Smelter' case, US government sued the Canadian smelter Company, resulted in the doctrine that in cases of transborder damage, the polluter must pay.

The arbitration arose from claims involving transboundary air pollution by a smelter factory located in Canada about 20 kilometres north of the US boundary. The factory was roasting sulphur-bearing ores and emitting sulphur dioxide fumes into the air. This caused damage to privately owned agricultural and forestlands near the township of Northport USA. After both the Canadian and US Governments presented their evidence to the Tribunal in January of 1938, the Tribunal decided that the Government of Canada should pay the United States US \$78,000 for damage. The tribunal had also decided that the Trail Smelter should refrain from causing any future environmental damage. However, the International Law Association (ILA) and the Institut de Droit International (IDI) have considered this matter later and both of the organisations have adopted resolutions on the subject.

The above discussion make it clear that general principles of international environmental law provides strong support for the view that customary international law prohibits states from causing significant environmental damage from transboundary atmospheric pollution. However, international treaty practice dealing with long-range transboundary pollution is not yet abundant and applicable multilateral treaties are also not numerous. Their provisions are very often of a hortatory character. But, as long as the courts, compare national norms and let themselves be guided by the more favourable law principle, it seems possible to reach an adequate judgement anyhow. However, the rules of both international and national law are not robust enough to protect the injured individual. Therefore, a rule is needed mainly to compensate for serious harm. For this purpose more detailed standards are required to implement a fully preventive approach. However, now we are going to point out few problems that courts are facing in order to provide remedies for long-distance offences. These are as follows:

### Problem of burden of proof

Within national arena of laws, only facts in narrow sense have to be proved and this rule is based on 'iura novit curia'-principle. However, this principle is not applicable in the settlement of dispute under international environmental law and international public law. But according to experts, this problem can be solved by using the principle de lege ferenda. It should be mentioned, in this case,

scientific and technical evidence is necessary.

### Problem of determining damage

Under international law of torts, all injuries inflicted are to be compensated in all possible form (restitutio in integrum). Where material damage is inflicted, a status quo ante has to be restored. "Since it is often impossible to restore the impaired section of the environment, a secondary compensation claim must be acknowledged besides the primary restitutio in integrum." However, it should be noted that most problems regarding restitution (primarily arise from the analogous claims under international law and private law) still remained unsolved.

### Problems regarding 'equal access' policy

A transboundary claimants should be accorded equal access and non-discriminatory treatment in the prevention, reduction, and control of transboundary harm. But the equal access policy has not become part of international law yet. International policy declarations, including the Stockholm and Rio Declarations, do not explicitly refer to equal access or non-discrimination.

### Problem of the 'Choice of Law' doctrine

A claim for transboundary environmental damage may involve events and persons in several countries. The question which legal system should determine liability and other issues, is always produce unpredictability, ambiguity, and increase the expense of transboundary litigation.

### Procedural problems of legal protection

According to the international law, an injured individual can only claim compensation from a foreign state by the way of diplomatic protection through his/her own state. Such type claim is termed as 'espousal claim'. It is still uncertain whether it is possible for an injured individual to use this 'mechanism of ambassadorial shield' with out seeking national legal remedies. These and numerous other questions require answers.

Apart from legal issues, it is well known that any measures concerning transboundary air pollution control depend on international co-operation. The first response to combat air pollution internationally was the UN Economic Commission for Europe's 1979 Convention on Long-Range Transboundary Air Pollution. The ECE convention is the first international agreement adopted in this field. But this convention and other international treaties do not contain binding provisions prescribing concrete norms for abatement and enforcement measures and it fails to provide guidelines for the settlement of disputes.

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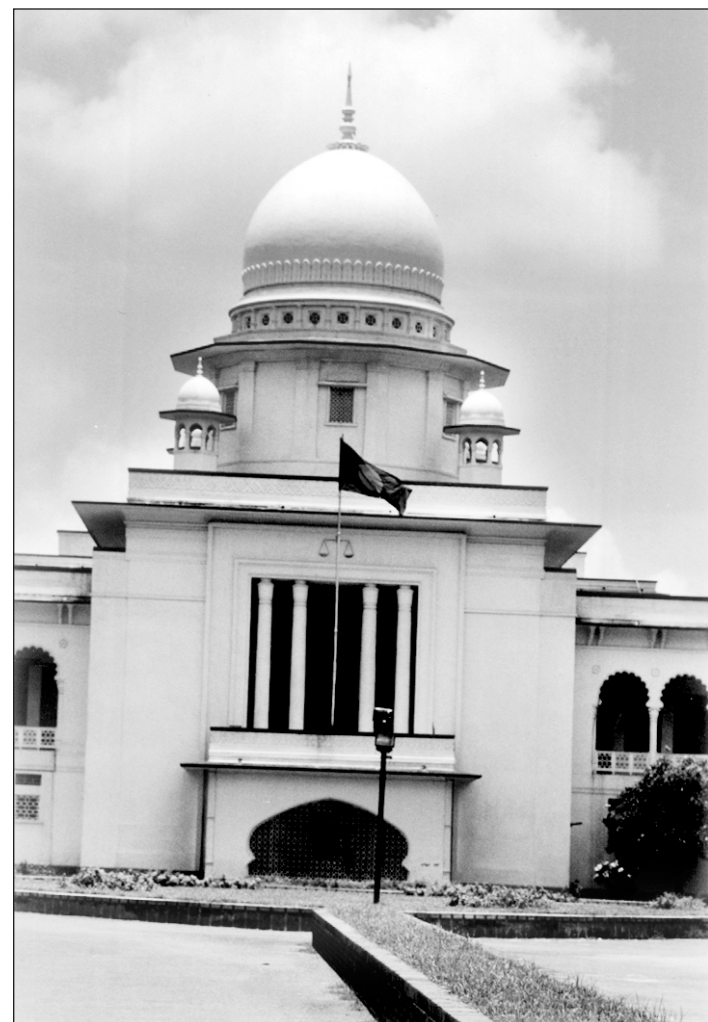
## Politicisation of Judiciary: An 'immoral' practice

BARRISTER M. MOKSADUL ISLAM

Probably we are the most politicised nation on earth. Beside the mainstream politics almost all of our institutions have also been politicised in the name of so called panel (white panel-backed by AL, blue panel-backed by BNP etc.). Although all these panels are not officially recognised as the wings of the political parties it is admitted fact that political parties play an active role in nominating the candidates for these associations under some kind of panel. Let us try to see to what extent our Judiciary is politicised. Bar (the lawyers) and Bench (the judges) are the two wings of Judiciary. Judging a Judge is always a risky business. However, to achieve a comprehensive discussion I, with due respect to our Judges, would seek a bonafide permission to say a few words about the Bench. Recently I received a visiting card of a sitting Judge of the lower Court and found that they also have Associations. Whether these Associations are politicised or not is really a very tough job to decide. I am not aware of any Association of the Supreme Court Judges. In the Supreme Court, however, there is allegation that successive government always try to influence the appointment of judges. Many argue that provision for Chief Advisor of None Party Care Taker Government, in many ways, is responsible for existing dwindling situation of our Judiciary.

Recently it is also seen that Judges after retirement are accepting high profile posts about which people are again a bit nervous. What about the Bars i.e. the Lawyer's Associations? Without any doubt whatsoever like other institutions Bar Associations of the country are also politicised under the guise of so called panels. The post of Presidency in the Supreme Court Bar Association has become an integral part of the national politics. If you want to be elected you must get support of one of the main political parties.

In the recently held Supreme Court Bar Association (SCBA) election a very senior lawyer who campaigned the entire year for the post of Presidency was dropped out of the race when he failed to secure support of the party he is associated with. For the last few years white-panels supported by AL are winning most of the Bar Association elections. It was not different in the Supreme Court Bar Association either. In this year's SCBA election last year's President reelected. His opponents vigorously campaigned against this repetition on the ground, allegedly, that last year he himself campaigned against repetition. The blue-panel supported another non-political senior advocate. He mainly campaigned against politicisation with the slogan that if he gets elected no political party would be able to dictate his agenda. Both the frontrunner candidates intermingled with others generously and ran a lively campaign. Supporters of the white-panel banked on the long and fierce speech delivered by the President recently in the felicitation of the Honourable Chief Justice of Bangladesh. Actually this speech has made him a hero in the eyes of many lawyers which proves the fact that the gap between the Bar and Bench is really massive and increasing. His opponents, however, campaigned against the said felicitation speech alleging that the President may have compromised his non-political stance. Central leaders of both the main political parties actively campaigned for their



### Victim of politics?

respective candidates.

Lawyer's profession is an independent one unlike many other professions. Then what is the force working behind the curtain that has politicised the Bar Associations? Actually all the lawyers are not politicised but only a fraction of it has political connection. One of the most important reasons is jobs in the office of the Public Prosecutor (in the lower Court) or Attorney General (in the Supreme Court). Those who work in the office of the Public Prosecutor or Attorney General should realise that they were given the said job to protect the interest of the 'State', not of any political party. The concept of State is much bigger than a 'political party'. Most of these law officers, who were appointed because of their apparent loyalty to the Government or with the help of other influential politicians, have mixed up 'State' with the Government i.e. the party in power.

Both the candidates contested for the President post under white and blue panel were undoubtedly competent for the said post. However the white-panel backed by the opposition won a sweeping victory with a repeated President. No matter who won this election, what this country needs is a Bar as such a Judiciary which would work beyond political or personal gain and for the people of this country only. Otherwise the much talked about 'separation and independence of Judiciary' would not even slightly change the prevailing confused state of the Judiciary.

Right to form an association is a fundamental right guaranteed under Article 38 of the Constitution. No one has any objection when a lawyer is actively participating in the national politics. However, no one wants to see a Judiciary (comprising of the Bar and the Bench) ignoring the national interest. All Lawyers' Associations should work to achieve a modern Judiciary with a clean environment in the Court Premises and should not become a wing of the national political parties. Article 38 states that "Every citizen shall have the right to form associations or unions, subject to any reasonable restrictions imposed by law in the interest of morality or public order". No 'moral' standard can possibly support politicisation of Judiciary. This restriction 'in the interest of morality' would require the Judiciary to be abstained from being politicised at the instigation of others and serve this nation in accordance with law and only in accordance with law.

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