LAW *in-depth*

TRANSNATIONAL ENVIRONMENTAL LAW

Polluter pays principle and its limitations

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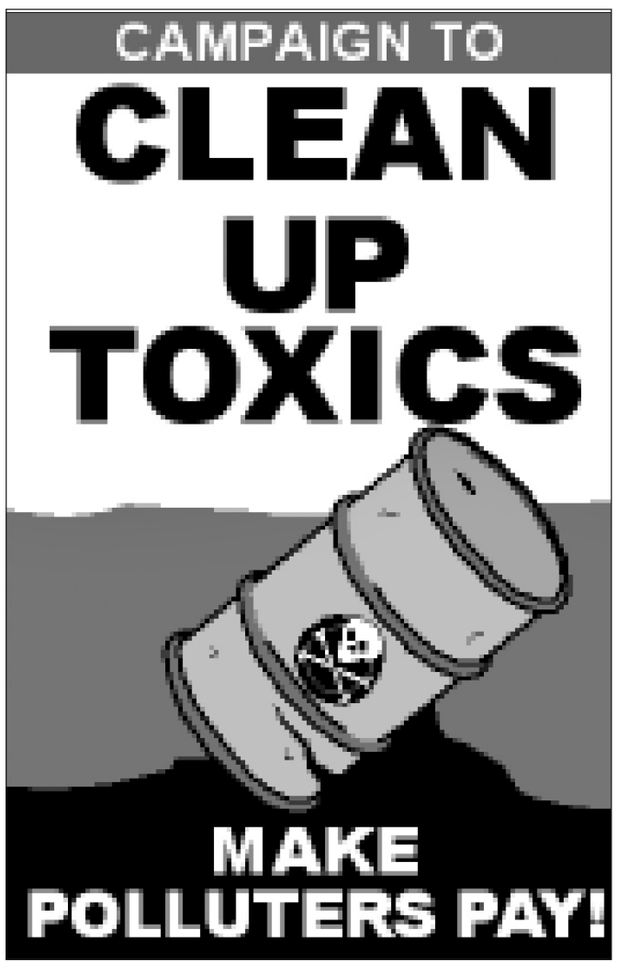


"POLLUTER Pays Principle" has become a popular catchphrase in recent times. 'If you make a mess, it's your duty to clean it up'- this is the main basis of this slogan. Polluter Pays Principle recognises that the polluter should pay the costs for such measures as are necessary to eliminate the environmental pollution created by him or to reduce its amount so as to comply with the required standards. It should be mentioned that in environmental law, the 'polluter pays principle' does not refer to "fault." Instead, it favours a curative approach which is concerned with repairing ecological damage.

The Organisation for Economic Co-operation and Development (OECD) first endorsed the concept of Polluter Pays Principle in 1972. Before that, the Paris convention 1960 and the IAEA liability convention 1963 tried to promote 'the Polluter Pays concept' in order to secure sufficient compensation from the polluter for the victims. We should keep it in mind that this principle is not a new concept; it can find a source far back in legal history. Among the ancient scholars, Greek philosopher Plato fist recognised the concept of Pollution Prevention Pays. He said "If anyone intentionally spoils the water of another ... let him not only pay damages, but purify the stream or cistern which contains the water... "[The Dialogues of Plato: The Laws, vol. 4, book 8, section 485(e), translated by Jowett B, Oxford: Clarendon Press (4th ed.), 1953.] Plato recognised that water could be both privately and commonly owned; compensation would be payable by the water-polluter in both event, and this person could further be required to rectify the damage done. Basically, Polluter Pays Principle is an up-to-date reformulation of an idea that has been around some time. But the modern Polluter Pays concept was developed by the OECD during the 1990s and was first widely discussed in the United Nations Conference on Environment and Development held in Rio de Janeiro of Brazil in June 1992. The most extreme example of this principle in practice is the American "Superfund' legislation.

The polluter pays principle is basically regarded as a principle of domestic law rather than an international law; but it is often incorporated into international agreements. For example, Article 2 of the OSPAR Convention for the protection of the marine environment of the north-east Atlantic (1992) requires contracting parties to:

'Apply the polluter pays principle, by virtue of which the costs of pollution prevention, control and reduction measures are to be borne by the polluter.'

It should be mentioned that EC adopted the Polluter Pays Principle in 1973.It was stated in the EC recommendation (Council Recommendation 75/436/EURATOM, ECSC, EEC of 3 March 1975, Annex, para 2 OJL 169, 29.6.1987.p.1.):

'Natural or legal persons governed by public or private law who are responsible for pollution must pay the costs of such measures as are necessary to eliminate that pollution or to reduce it so as to comply with the standards or equivalent measures laid down by the public authorities.'

More recently the polluter pays principle has also been adopted in other environmental treaties, including the ASEAN Convention 1985, the Alps Convention 1991, the UN/ECE Transboundary Waters Convention1992, the OSPAR Convention 1992 and the Baltic Sea Convention 1992.

In recent days, the polluter pays principle is seen as 'a way of internalising pollution-related costs within the context of the economic rationality of the enterprise'. Furthermore, under this principle it is not the responsibility of government to meet the costs involved in either prevention of environmental damage, or in carrying out remedial action, because the effect of this would be to shift the financial burden of the pollution incident to the taxpayer. But State practice does not support the view that all depollution costs should be borne by the polluter, particularly where transnational dispute is involved.

It is true that polluter pays principle has a positive effect to reduce pollution. The principle seems quite relevant for pollution that occurs during industrial activity, although it remains inefficient in the case of historical pollution. Legal theorists discovered few loopholes of this rule. The flaws are as follows:

(a)Ambiguity still exists in determining 'who is a polluter'. In legal terminology, a 'polluter' is someone who directly or indirectly damages the environment or who creates conditions relating to such damage. Clearly, this definition is so broad as to be unsupportive in many situations. For example, Mr.Aryaan owns a BMW .If his BMW emits harmful gas in the atmosphere, he will be directly liable for the emission .Furthermore, the manufacturer of the vehicle will be indirectly liable for committing ecological damage too and so the retailer of the vehicle and the fuel supplier, and the government who created 'conditions relating to the damage' by building roads and neglecting public transport regulations.

(b)It is extremely difficult to make a polluter to pay 'the depollution cost' particularly where environmental damage arises from several simultaneous causes or from a number of consecutive causes or when several companies operate on one or several states and has equal contributions to the same pollution. Furthermore, the use of elaborate technology, dangerous processes, and toxic materials makes the 'fact-finding process' difficult. Because, the potential long-term effects of the incident, huge number of victims, medical causation are extremely difficult to ascertain.

(c)The responsibility to repair pollution lasts for the long period, and it does not disappear easily after depolluting events intervene. The prevention costs remain a charge for the polluter for life, although he has few means to control it. Moreover, in order for an industrial disaster to occur, 'a great amount of resources is initially required to create and implement the technology which, in turn, necessarily involves multiple actors. This makes the allocation of fault in a traditional legal process all the more difficult, making it easier to shift blame from shoulder to shoulder indefinitely.'

(d)Time always remains a crucial factor in resolving the ecological dispute. Where multi-territorial environmental dispute involves innocent victims, mostly those living in a developing country with limited resources do not have unlimited time. International tribunals are not always happy with their apt performance in providing judgment for transnational environmental dispute.

(e)It is not always an easy job to make the polluter pay for committing ecological damage where multi-territorial or single jurisdiction is involved. In many cases, in order to avoid liabilities, the company responsible terminates its activities or transforms or may simply disappear. In many cases, identified polluter loses his capacity to pay due to bankruptcy or insolvency. Today, the environmental regulations do not offer a solution in such cases. Therefore, an unequivocal transnational treaty is essential for resolving legal problems which exist in the realm of Polluter Pays Principle.

Despite the fact that Polluter Pay Principle was publicised by early conservationists as a means to reduce ecological pollution, still many consider it as a 'vague idea'. Some put forward their argument that under this principle a polluter fulfils his obligations when he pays at least some of administrative expenses of the agencies who regulate pollution activities ('Exxon Valdez' case is the best example of this criterion of Polluter Pays Principle. In 1989, an oil tanker owned by Exxon spilled out over 300,000 barrels of crude oil into the sea and caused significant environmental hazard. Exxon was forced to pay $125 million in fines to the federal government and the state of Alaska and $900 million into a fund for environmental projects controlled by government, habitat protection, and scientific research, among other things). Others argue that it can only be satisfied by polluters when they will pay the total depollution cost. And the rest support the view that tax (like 'Carbon Taxes') should be legitimised on the users of the natural resources that cause atmospheric hazards.

The author did his graduate and post graduate legal degrees from United Kingdom .Right now he is working with several Ngos who primarily work with environmental issues .

RIGHTS *investigation*

No proper accommodation for children in prison

As there is no separate room or cell for accommodate the children and child accused, then children have to stay with their accused mother in the same cell in the prison. Children accused of crimes are being kept with convicts and on-trial prisoners despite the fact that it is against law in different prisons or sub-jails. It also noted the deplorable lot of children of female inmates staying with their mothers. In this situation these children are grooming up with the criminal mothers and also with criminal mentality. Children living in jail become more vulnerable to diseases due to the poor living condition there. Overcrowded prisons, lack of proper ventilation, poor food and inadequate medical facilities make the situation worse and horrible for the children. This is the condition of the jails in Meherpur, Kushtia. There is no arrangement for children's recreation in the jails.

A group of child journalist of Shishu Prokash, which is an initiative of Mass Line Media Centre and UNICEF made inquiry about the prison conditions for children in different districts. The report notes that police is unaware of the rights of children and sometimes send the children to jail by registering them as over 18 years old. Moreover, they do not spare the children from physical torment and even physically abuse them while in custody. However, majority of the children are arrested under special laws such as the Special Powers Act, the Narcotics Control Act and so on, the report says. It also mentioned use of children in armed combat by the political parties during strikes and other activities. The report says till they are 18 years old children need to be protected from the harsh laws. Hundreds of juveniles are illegally detained in Bangladeshi prisons in violation of the Children Act of 1974 and Bangladesh's obligation as a party to

the United Nations Convention on the Rights of the Child. According to a list prepared by the Dhaka Central jail authorities in December 2003, there were at least 108 juvenile delinquents being held in Dhaka Central Jail instead of correction centres.

Section 2(f) of the Children Act of 1974 provides that any person below 16 years is a juvenile and must be sent to a "certified home or approved home or to the custody of a relative or other fit person". However, age verification has never been taken seriously in the administration of juvenile justice. Often, police increase the age of a juvenile while producing before a court to avoid so called legal complications. Even when the court orders to send the juveniles in correction centres, court orders are ignored and children continue to be detained in prison. The mal-treatment of the juveniles in Bangladesh are in contravention of international standards on administration of juvenile justice and in particular articles 37, 40 and 39 of the United Nations Convention on the Rights of the Child. Hence it is expected that the concerned authority should properly investigate the matters and take steps accordingly.

A group of child journalists from Shishu Prokash, Meherpur, Kushtia

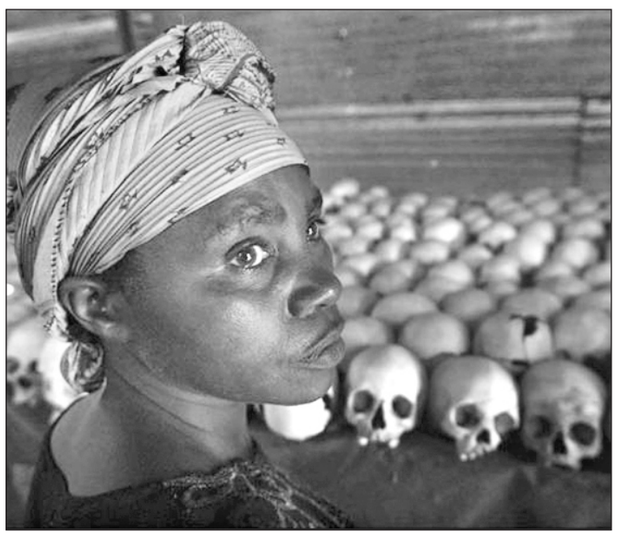
RIGHTS *monitor*

Rwanda Genocides: Killing of survivors threatens justice

RWANDAN police and judicial authorities must ensure prompt and effective law enforcement to deal with recent killings of participants in the justice system for genocide known as gacaca, Human Rights Watch said in a report published.

The 20-page report, Killings in Eastern Rwanda, documents two incidents in late November 2006 in which 13 persons were killed. On November 19, genocide survivor Frederic Murasira was killed in the commercial centre of Mugatwa in eastern Rwanda. Within hours, residents of a nearby village inhabited by genocide survivors killed eight Mugatwa residents who apparently had played no part in the murder. The victims included children aged three, six, eight and 13, as well as two women and a 70-year-old man. One suspect has surrendered to police and has been arrested for the killing of Murasira, and several others have been detained for the reprisal killings.

"Killings of genocide survivors cost human lives and threaten the delivery of justice," said Alison Des Forges, senior Africa advisor to Human Rights Watch. "Prompt and effective law enforcement is the way to deal with this threat, not reprisal killings. Reprisal killings have been rare in the past, but if they become more frequent, they could spur a new cycle of violence." Gacaca jurisdictions, established to prosecute crimes committed during the 1994 genocide, have been trying suspects throughout Rwanda since July. Since that time, survivor groups have expressed alarm at attacks



on survivors and witnesses.

The suspect in the killing of the genocide survivor, once imprisoned on charges of genocide, had been provisionally released and was awaiting trial before a gacaca jurisdiction. The uncle of the victim is a gacaca judge who was reportedly prepared to make new accusations against the suspect. Rwandan officials have said that 16 genocide survivors were killed in 2005 and seven in 2006, but survivor groups estimate the number to be around 20 per year for the last several years.

In a second incident, a gacaca judge was murdered in Rwamagana district on November 23. Police promptly arrested three suspects. One, a half-brother of the victim, had reportedly tried unsuccessfully to get the murdered judge to quash genocide charges against him. Police shot and killed the three suspects the evening of their arrest. According to police authorities, the killings were in self-defense during an abortive escape attempt. Evidence from the scene and witness testimony suggest that the three may have been victims of extrajudicial execution. A police investigation of the killings that apparently cleared the officers leaves a number of important questions unresolved.

"An effective and independent investigation into these lethal shootings in custody is essential," said Des Forges. "In any society, deaths in custody at the hands of law enforcement must be subject to the highest scrutiny. Police officers as well as citizens must be held accountable if they commit crimes."

Source: Human Rights Watch.

LAW *week*

SC asks govt to submit amended CrPC by Feb 1

The Supreme Court (SC) ordered the government to submit an amended Criminal Procedure Code (CrPC) by February 1 to advance separation of the judiciary from the executive. It also asked the government to correct some 'erroneous' provisions in the four rules for judicial services by the same date. The seven-member full bench of the Appellate Division with Chief Justice Syed JR Mudassir Husain in the chair passed the order. The nine government officials, accused of distorting the 12-point SC directive given earlier for the separation, stood with their hands folded and sought the apex court's forgiveness as the proceedings began at 9:42am. After a while, they were however asked to sit down. Attorney General (AG) AJ Mohammad Ali said the rules for the judicial services have already been submitted to the court in affidavit. In reply, the bench said it has detected some errors in the rules and those need to be corrected. Mohammad Ali said the rules were promulgated in line with the court order. "One or two errors may be there, but there is no deviation from the court directives," Ali said. -*The Daily Star, January 22.*

M Aziz finally resigns

Justice MA Aziz resigned from the post of Chief Election Commissioner (CEC) citing a major political alliance's lack of confidence in him and to avert further political unrest in the country. Meanwhile, the Election Commission (EC) Secretariat issued a notification officially cancelling holding of the ninth parliamentary election. Aziz's departure ends his highly controversial 21-month stint in the office, during which he was forced to go on a leave of absence on November 22 after repeated demands for his resignation from Awami League (AL)-led alliance for failing to prepare a correct and updated voter list. His resignation follows the newly appointed caretaker government's announcement that reconstituting the problem-ridden EC is its top priority so that it can proceed with other electoral reforms, namely updating the voter list, and institutionalising the system of voter ID cards and transparent ballot boxes. Law Adviser Mainul Hosein told The Daily Star that the caretaker government decided to appoint a new CEC within a couple of days. It has been learnt that the new CEC will be selected from the bureaucracy. -*The Daily Star, January 22.*

BB plans to go tough against loan defaulters

Bangladesh Bank is actively considering tougher legal steps against bank loan defaulters, seeking cooperation of the finance ministry to amend the Representation of the People Order (RPO) 1972. The RPO that bars bank loan defaulters from contesting any election is needed to be amended as its arm does not reach the loan defaulters of financial institutions. The Election Commission had cancelled about 200 nomination papers on grounds of loan default while scrutinising the candidatures for the general election that was cancelled on Sunday, EC sources said. Some of them, however, were exempted on appeal. The central bank recommended the finance ministry to prepare the nomenclature of defaulters of financial institutions to prevent them from contesting the election. "The finance adviser has already discussed the issue with the law adviser," a highly placed official told the news agency. The decision came in line with the maiden speech of the chief adviser to the caretaker government to make election free from corrupt people and black money holders. The central bank also recommended the finance ministry to take up with the Ministry of Law to simultaneously dispose of the pending writ petitions regarding default loan cases of similar nature. Around 200 writ petitions are pending with the High Court seeking removal of the names from the defaulter list of the Credit Information Bureau (CIB) of the central bank, sources concerned said. Unb, Dhaka, January 23.

Rights body concerned at deaths in army custody

Rights watchdog Ain o Salish Kendra (ASK) expressed grave concern at deaths of four people in army custody in 24 hours and demanded independent probe into and steps to stop recurrence of such deaths. Odhikar, another rights watchdog, also demanded independent inquiry into the killing of 19 people in the custody of army, police and Rapid Action Battalion (Rab) in last 10 days, and making public the inquiry reports. "We are deeply shocked as killing without trial in 'special drives' after forming 'special forces' in the name of law and order, instance of which was established earlier, did not stop even during the present caretaker government," ASK said in a statement. Number of deaths in Rab crossfire and deaths in army custody is on the rise although the government keeps on saying that it will remain cautious about protecting human rights, said the statement signed by ASK Executive Director Sultana Kamal. Quoting newspapers, ASK said five people were killed in army custody since the declaration of emergency. The rights watchdog noted that inhumane and extra-judicial activities like killing without trial are contrary to the present caretaker government's vow to eradicate all injustice, corruption and irregularities from the country.
-*Prothom Alo, January 23.*

Be honest and neutral or face punishment

Chief Adviser (CA) to the Caretaker Government Fakhruddin Ahmed in his first meeting with secretaries to the ministries warned them of severe punitive measures if they do not carry out their duties with sincerity, honesty and neutrality. Fakhruddin held a two hour-long meeting with the secretaries in Bangladesh Secretariat where he later spent hours in his own office. Cabinet Secretary Ali Imam Mazumdar said, "Politicisation of the administration is not a new phenomenon. We want to be liberated from this poisonous atmosphere." "Some people voluntarily get involved with politicisation, while others become victims of circumstances created by the politicisation," he said. Fakhruddin stressed, "Government officials have to remember that no political party is their master. They are the servants of the people's republic." Pointing out that tax paid by the citizens pay for government officials' wages and also runs the government, Fakhruddin said, "All officials have to ensure that the government services are delivered to the people's doorsteps." The newly appointed CA said he believed in those values while he was a public servant and hoped that the government officials will also be inspired by the values. -*The Daily Star, January 24.*

Government aims for anti-graft body overhauling

The caretaker government will amend the Anti-Corruption Commission (ACC) Act and is strongly considering reconstitution of the three-member anti-graft body that has remained non-functional since its formation in November 2004. "The previous government deliberately made a crippled commission which, we found, needs a total reform," said Communication Adviser Maj Gen (retd) MA Matin. He is one of the seven members of the committee formed at the first formal meeting of the advisory council on Monday to find ACC's legal, administrative and institutional flaws. While the committee, headed by Law Adviser Mainul Hosein, is yet to begin its work formally, its members have already started their individual studies. "When we start working together, we will share our observations and recommendations to yield the best output in terms of making the commission effective in combating corruption," a committee member told The Daily Star, seeking anonymity. The newly formed caretaker government led by Dr Fakhruddin Ahmed set curbing corruption as one of its prime pre-poll tasks. Following strong criticism and frustration from local and international experts over the ACC's failure to function, the caretaker government resolved to address the commission's institutional, legal or administrative flaws to make it functional. -*The Daily Star, January 24.*

Attorney general resigns

Attorney General AJ Mohammad Ali stepped down from the country's highest law officer's post in the wake of increasing demand for his resignation. "I have resigned and sent my resignation letter to the president," Mohammad Ali confirmed when The Daily Star contacted him over telephone. He, however, declined to disclose the reasons for his resignation. When journalists tried to meet Mohammad Ali at his office immediately after his resignation to verify the news and its reasons, they were told that he would meet them later on. But Mohammad Ali did not meet the reporters and sent an advocate instead, who told newsmen that the attorney general resigned on personal ground. Son of Bangladesh's first attorney general MH Khandakar, Mohammad Ali was appointed in the post on April 30, 2005 after the then attorney general, AF Hassan Ariff, resigned. Mohammad Ali was appointed additional attorney general on October 23, 2001. The Awami League and its allies in the grand alliance and a section of lawyers demanded Mohammad Ali's resignation from the post of attorney general, alleging his bias towards the BNP-led four-party coalition. -*The Daily Star, January 25.*

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