



## LAW vision



## LAW week



## TRANSNATIONAL ENVIRONMENTAL LAW

# The precautionary principle: Evolution of the old paradigm

BARRISTER ABU HENA MOSTOFA

N recent years, a theory called the 'Precautionary Principle' aimed to guide human activities for the prevention of environmental hazards surfaced in the arena of transnational environmental law. The essence of the precautionary principle is: "If you have a reasonable doubt that something terrible might be going to happen to the environment, you have an obligation to prevent it even in the presence of deficient scientific evidence. It means the state has an obligation to avoid environmental damage by vigilant forward planning and blocking the flow of potentially harmful activities." It should be noted that the precautionary principle was originally designed to prevent environmental hazard but it is now widely used where there exists imminent threat of harm to human, animal or plant health.

The contemporary precautionary principle was originated in German domestic law in the 1970s and 1980s and it is fast gaining ascendancy in Transnational Environmental Law since then. It was subsequently incorporated into a number of regional environmental agreements in Europe. Over the past two decades, it has been incorporated into approximately twenty international environmental treaties and agreements. It has been cited in more than sixty decisions of the European Union courts. Furthermore, Article 174 of the Treaty of European Community, added in 1993, makes the precautionary principle one of the guiding principles of EU environmental law. The principle though still evolving has gradually been assimilated into various transnational laws.

The 'precautionary principle' in some international treaties and agreements

Montreal Protocol on Substances that Deplete the Ozone Layer, 1987: 'Parties to this protocol... determined to protect the ozone layer by taking precautionary measures to control equitably total global emissions of substances that deplete it...'.

Third North Sea Conference, 1990: 'The participants... will continue to apply the precautionary principle, that is to take action to avoid potentially damaging impacts of substances that are persistent, toxic, and liable to bioaccumulate even where there is no scientific evidence to prove a causal link between emissions and effects.'

Transboundary Watercourse Convention 1992: 'Action to avoid the potential transboundary impact of the release of hazardous substances shall not be postponed on the ground that scientific research has not fully proved a causal link between those substances, on the one hand, and the potential transboundary impact, on the other hand.'

The Rio Declaration on Environment and Development, 1992: 'In order to protect the environment the Precautionary Approach shall be widely applied by states according to their capabilities. Where there are threats of serious or irreversible damage, lack of full

scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.'

Framework Convention on Climate Change, 1992: 'The Parties should take precautionary measures to anticipate, prevent or minimise the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost.'

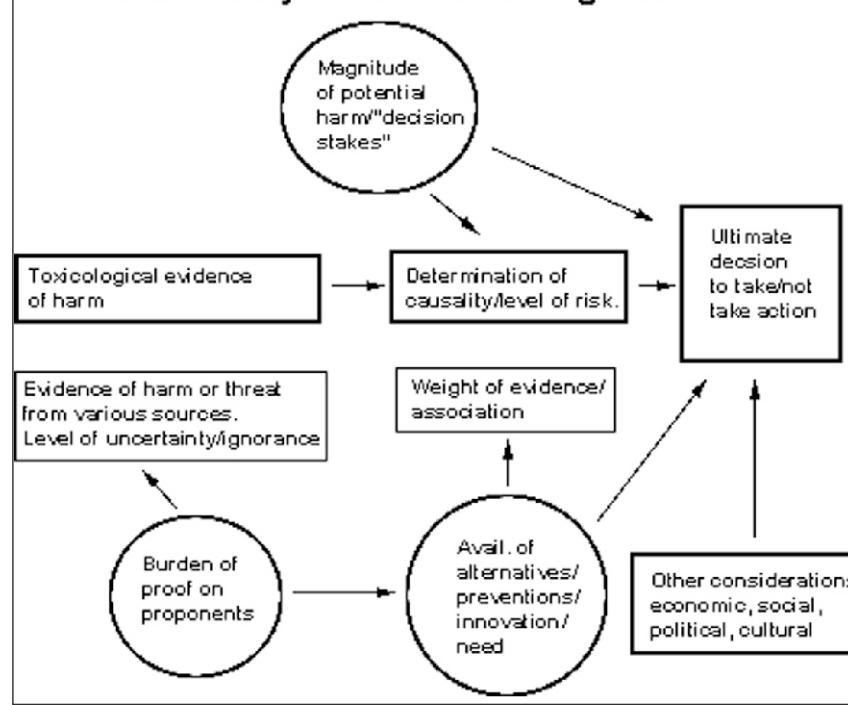
Treaty on European Union (Maastricht Treaty), 1992: 'Community policy on the environment... shall be based on the precautionary principle and on the principles that preventive actions should be taken, that the environmental damage should as a priority be rectified at source and that the polluter should pay.'

Cartagena Protocol on Biosafety, 2000: 'In accordance with the precautionary approach the objective of this Protocol is to contribute to ensuring an adequate level of protection in the field of the safe transfer, handling and use of living modified organisms resulting from modern biotechnology that may have adverse effects on the conservation and sustainable use of biological diversity, taking also into account risks to human health, and specifically focusing on transboundary movements.'

Stockholm Convention on Persistent Organic Pollutants (POPs) 2001: 'Precaution, including transparency and public participation, is operationalised throughout the treaty, with explicit references in the preamble, objective, provisions for adding POPs and determination of best available technologies. The objective states: 'Mindful of the Precautionary Approach as set forth in Principle 15 of the Rio Declaration on Environment and Development, the objective of this Convention is to protect human health and the environment from persistent organic pollutants.'

The precautionary principle is not really a new concept. According to the legal historians this concept was first evolved in Germany in the 1930s. In Germany this concept is called 'vorsorgeprinzip', which means 'foresight principle' or 'precaution principle'. Apart from this, the concept of precautionary principle can find a source far back in legal history in 1854. In 1854, Central London faced worse kind of cholera outbreak. John Snow, a London physician, investigated the outbreak and on 7 September 1854, he recommended the removal of the 'Broad Street' water pump on the grounds that there was 'no... cholera... except amongst persons, who were in the habit of drinking the water of the (Broad Street) water pump'. The Public authorities removed the pump handle the next day to

## A Precautionary Decision-Making Model



prevent further infection from that contaminated water source. Dr. Snow tried to establish a chain of causation between the polluted water and cholera by producing epidemiological maps of disease and its possible causes. But his evidence was not regarded as 'proved beyond reasonable doubt'. The story of John Snow and cholera is regarded as a classic case of precautionary principle. Because it contains several of the key elements of precautionary principle i.e. scientific uncertainty, ignorance and policymaking (D. Gee, Financial Times (London), U.S. ed. 2, 16 December 1999, p. 14).

The modern precautionary principle is based on the common-sense notion that 'it is better to be safe than sorry' or 'prevention is better than cure' in regulating health and environmental risks under conditions of inherent uncertainty. In essence the Precautionary Principle means where an activity threatens wildlife, the environment, or human health, protective measures should be taken even in the absence of full scientific certainty. The precautionary principle has three core elements: (1) the threat of harm, (2) uncertainty, and (3) precautionary action. Therefore, the precautionary principle should be invoked when:

There is good reason to believe that detrimental effects may occur to human or to the environment;

The finest obtainable scientific advice cannot assess the risk adequately. This requirement does not exclude the needs for some scientific basis for predicting the possibility of harmful effects of an act.

Where acting promptly will diminish potential damage in the presence of 'reasonable grounds for concern'.

We should keep it in mind that there is no universally accepted definition of the precautionary principle. Therefore considerable debate always exists as to what the precautionary principle means, and how it can be implemented. However, in law, the precautionary principle has been defined as 'where there is uncertainty as to the existence or extent of risks to human health, the institutions may take precautionary measures without having to wait until the reality and seriousness of those risks become fully apparent (Artegolan GmbH v. Commission, Case T-74/00, 2002 E.C.R. II-4945).'

Another standard legal definition can be found in Rio Declaration which states "in order to protect the environment, the precautionary approach shall be widely applied by States according to their capacity. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation (Principle 15, Rio Declaration-1992)". This definition explicitly shifts the emphasis to the protection of the ecosystem in any circumstances where there would appear to be a clash between environmental protection and scientific uncertainty.

Furthermore, the Wingspread group provides more acceptable definition of this principle in 1998. The Wingspread group (an international group of scientists, government officials, lawyers, and environmental

activists) defines the precautionary principle as "When an activity raises threats of harm to human health or the environment, precautionary measures should be taken even if some cause and effect relationships are not fully established scientifically. In this context the proponent of an activity, rather than the public, should bear the burden of proof. The process of applying the precautionary principle must be open, informed and democratic and must include potentially affected parties. It must also involve an examination of the full range of alternatives, including no action (Wingspread Statement on the Precautionary Principle, January 1998)."

According to Peter Montague, this definition of precautionary principle has four parts:

1. People have an obligation to take anticipatory action to prevent harm.

2. The burden of proof of harmlessness of a new technology, process, action, or chemical lies with the proponents, not with the general public.

3. Before using a new technology, process, or chemical, or starting a new activity, people have an obligation to examine 'a full range of alternatives' including the alternative of doing nothing.

4. Decisions applying the precautionary principle must be "open, informed, and democratic" and "must include affected parties."

Moreover, it is mentioned in Commission of the European Communities Report (Communication from the Commission on the Precautionary Principle/ Brussels, 02.02.2000 com (2000) 1). "Where action is deemed necessary, measures based on the precautionary principle should be, inter alia: 1. proportional to the chosen level of protection, 2. non-discriminatory in their application, 3. consistent with similar measures already taken, 4. based on an examination of the potential benefits and costs of action or lack of action (including, where appropriate and feasible, an economic cost/benefit analysis), 5. subject to review, in the light of new scientific data, and 6. capable of assigning responsibility for producing the scientific evidence necessary for a more comprehensive risk assessment."

We should bear in mind that in order to achieve sustainable ecological development, policies must be based on the precautionary principle. Environmental measures must anticipate, prevent and attack the causes of environmental degradation and 'lack of scientific certainty' should not be used as a ground for postponing measures to prevent ecological degradation (Bergen Ministerial Declaration on Sustainable Development in EC Region 1990, para 7, IPE (I/B-16-05-90)).

The author is an environmental activist and advocate Supreme Court, Bangladesh.

## EC goes all out for polls by 2008

Chief Election Commissioner (CEC) ATM Shamsul Huda said the Election Commission (EC) is going all out to hold the national election by 2008 and will complete necessary preparations within the next 18 months. The commission at an inter-ministerial meeting yesterday asked the Economic Relations Division (ERD) to approach the US, UK, Canada and Japan immediately for funds needed to prepare a voter list with photographs and national identity cards (ID). "There's no time to waste. The ERD will write to the four countries tomorrow [today] seeking financial assistance," the CEC told reporters after the meeting at the EC Secretariat conference room. The mega project might cost around Tk 400 crore, he said adding that the task of preparing the voter roll would have to be wrapped up within the 18-month time frame. Chief Adviser Fakhruddin Ahmed in his address to the nation said the ninth parliamentary election that was originally planned for January 22 would be held by the end of next year. - *The Daily Star*, April 16.

## Possessing illegal liquors Moudud remanded

A Dhaka court placed detained BNP leader and former law minister Moudud Ahmed on a four-day remand in connection with the case filed for smuggling in contraband foreign liquors and possessing those. Moudud, arrested by the army-led joint forces from his Gulshan residence, was sued under Section 25 (B) of the Special Powers Act, 1974 for bringing the foreign liquors, evading government tax. Police produced Moudud, who is also a member of the BNP Standing Committee, before the court of Metropolitan Magistrate MA Salam with a petition for a seven-day remand. If the charges against Moudud are proved, he will have to face a term of minimum seven years and maximum life term imprisonment or death penalty, legal experts said. Law enforcers are now quizzing the influential ex-BNP minister. Moudud is now under the custody of the joint forces, Gulshan police said. The forwarding report that the Investigation Officer (IO) of the case placed before the court said the accused has committed crime as he possessed foreign liquor and beer that he had smuggled into the country evading tax. - *Prothom Alo*, April 16.

## Judiciary separation

### Govt given 3 weeks for the last time

The Supreme Court (SC) granted the government three weeks for the last time to complete the separation process of the judiciary. Granting the time, Chief Justice Mohammad Ruhul Amin said, "...this is (time extension) for the last time." A seven-member full bench of the SC headed by the chief justice also directed the government to inform it about the completion of the process by May 6 and fixed May 7 for the next hearing of the case. Attorney General (AG) Fida M Kamal explained to the court the reason the government was seeking more time. He said a file related to the separation of judiciary is awaiting approval by the chief adviser (CA) and after the CA's approval, the file would be sent to the president for his approval. The AG submitted a prayer requesting four weeks' time extension while it was mentioned in a letter of finance division that the government needed eight weeks' time to complete the process. When the court yesterday asked the AG to explain why the government needed eight weeks for the task, the AG prayed only for four weeks' time. The court then granted three more weeks as final time. - *The Daily Star*, April 17.

## Arafat released after quizzing over graft

Arafat Rahman, younger son of former prime minister Khaleda Zia, was released after intelligence officials interrogated him about his and his aides' alleged involvement in fetching a huge amount of money from different sectors by using clout. Intelligence sources said the joint forces arrested Arafat, nicknamed Coco, after they found evidence of his involvement with corruption. Joint forces arrested Arafat and quizzed him since his arrest. He was neither handed over to police nor produced before a court. The sources also said Arafat was grilled about a string of issues including his control over setting up advertisement billboards in the capital through his advertisement firm Advance Ad, his local and foreign bank accounts and investments. Advance Ad allegedly monopolised outdoor advertisement by using political clout and deprived the Dhaka City Corporation of huge amount of revenues. Last month, the office of the firm was raided twice. - *The Daily Star*, April 17.

## Case against Tarique stayed for 6 months

The High Court (HC) stayed for six months the proceedings of Tk 1 crore extortion case against former prime minister Khaleda Zia's son and BNP Senior Joint Secretary General Tarique Rahman. The HC bench that passed the order also rejected Tarique's bail prayer and issued a rule on the government asking it to explain within four weeks why the case against Tarique should not be quashed. Advocate TH Khan moved for Tarique while Deputy Attorney General Abdur Rouf moved for the state in the case in which Tarique has been charged for extorting Tk 1 crore from Al-Amin Construction. Owner of the construction firm Amin Ahmed, who got BNP nomination from Noakhali for the stalled January 22 election, filed the case against Tarique with Gulshan Police Station on March 8, a few hours after the joint forces arrested Tarique at his mother's Dhaka Cantonment residence. Legal experts said if the government appeals in the Supreme Court for vacating the HC stay order and obtains it, the case may proceed again. The investigation officer of the extortion case submitted the charge sheet against Tarique and his close aide Mian Nuruddin Apu on March 18. - *The Daily Star*, April 18.

## EC to talk reforms with civil society on April 26

The Election Commission (EC) will hold a dialogue with civil society groups on April 26 seeking opinions on the proposed electoral reforms. "A daylong discussion will be held with civil society groups and personalities. Those who are involved in election-related activities will be invited to the discussion," Election Commissioner Brig Gen (retd) M Sakhawat Hossain told reporters at his office. He hoped that a large number of civil society groups and personalities will attend the discussion at the National Economic Council auditorium. After the talks with the civil society groups and personalities, the EC will sit with the editors of different newspapers and senior journalists seeking their opinions on holding a free and fair election, Sakhawat said. The EC, however, could not finalise the schedule for talks with political parties as the government is yet to decide about the withdrawal of restriction on indoor politics. "We will sit with the political parties as soon as the government withdraws the restriction," Sakhawat said. - *Prothom Alo*, April 18.

## Cop jailed for not producing case evidence

A sub-inspector (SI), Zahid Hossain, has been sentenced to two years' rigorous imprisonment and fined Taka 5,000 as he failed to produce required evidence in a case he filed against some Awami League (AL) leaders. SI Zahid lodged an FIR (first information report) with Rupsha Police Station on January 7 accusing 22 leaders and activists of AL, BCL and Juba League for damaging cars during a countrywide blockade at Kudir Battala area under Rupsha upazila. On January 15, SI Sadhan Kumar Das of Rupsha Police Station, also the investigation officer (IO) of the case, submitted charge sheet against 19. Judge SM Masudul Huq of Speedy Trial Tribunal (STT) acquitted all the 19 accused as neither SI Zahid nor the IO could produce any evidence and prosecution witness during the trial. According to the judgment, SI Zahid, now attached to Police Super's office, will have to suffer six more months' rigorous imprisonment, in default, of paying the sum. The STT judge also directed the Inspector General of Police and Khulna Police Super to take departmental action against the IO. - *The Daily Star*, April 18.

## Corresponding with the Law Desk

Please send your mails, queries, and opinions to: Law Desk, The Daily Star 19 Karwan Bazar, Dhaka-1215; telephone 8124944, 8124955, fax 8125155; e-mail dslawdesk@yahoo.co.uk, lawdesk@thedadilystar.net

## RIGHTS investigation



## VESTED PROPERTY ACT

# A story of deprivation and exploitation

DIPANWITA ROY

**P**AGOLNATH Suri had fled to India in fear of life when the liberation war erupted in 1971. Suri saved himself but could not protect his land property. "When I came back home after the independence, I found all my land property in state acquisition as those were declared enemy/vested property," recalls Suri, the then president of Shankhari Bazar Mechanics' Association in old part of Dhaka. Suri says, "I just wonder why did the government take away my land property and why was I declared an enemy of

the state?" Sons of Bikram Halder also share the same story. One-third of Bikram's property in Gopalganj went to state acquisition after his death under the same law. Bikram's younger son, Saikat, was studying in India when he died and this was cited as the reason why the government seized his property. "Why does the government claim stake in our ancestral property?" Bikram's elder son Dhiman wants to know. The stories Suri and Bikram share are not unique. Many families of the Hindu community have been deprived of their ancestral property after the liberation war.

Though renamed as the Vested Property Act in 1974, the law still retains the fundamental ability to deprive a Bangladeshi citizen of his/her property simply by declaring that person as an enemy of the state. Leaving the country through abandonment is cited as the most common reason for this, and it is frequently the case that Hindu families who have one or several members leaving the country (for economic as well as political reasons) have their entire property confiscated for being labeled as enemies. "After independence, a predominantly Muslim but secular Bangladesh should have had abolished this law. But the state renamed it as the Vested Property Act to acquire the property of the people from West Pakistan who had left after the war," explains Prof Abul Barakat of Dhaka University.

A comprehensive work was published in 1997 by Prof Barkat on 'Inquiry into Causes and Consequences of Deprivation of Hindu Minorities in Bangladesh through the Vested Property Act'. This demonstrated that 925,050 Hindu households (40 percent of Hindu families in Bangladesh) have been affected by the Vested Property Act. This included 748,850 families dispossessed of agricultural land. The total amount of land lost by Hindu households

as a result of this discriminatory act was estimated at 1.64 million acres, which is equivalent to 53 per cent of the total land owned by the Hindu community and 5.3 per cent of the total land area of Bangladesh.

The greatest appropriation of Hindu property took place immediately after independence during the first Awami League government (1972-75) and during the first period of the rule of Bangladesh Nationalist Party (1976-1980). Dr Barkat's work also showed that since 1948, 75 percent of land of religious minorities in East Pakistan and subsequent Bangladesh had been confiscated through provisions of the act. Dr Barkat also emphasised that less than 0.4 percent of the population of Bangladesh has benefited from the Vested Property Act, demonstrating that this law has been abused by those in power through corruption, with no demonstrated sanction to the population at large.

Successive governments promised to repeal the act, but to date, some 35 years after the independence, none has done so. The first government of Sheikh Mujibur Rahman had vowed to repeal any laws that contradicted the values of the newly liberated country. Even though the Vested Property Act was in clear violation of the non-communal constitution that had been established, the law was not repealed and confiscation of property continued unabated. The government of Awami League moved towards repealing the act through a majority vote of the national parliament in 2001 and introduction of the Vested Property Return Act (2001) in a session boycotted by the opposition BNP and Jamaat. But the law was never ratified or implemented either in the remainder of parliament nor by the next government of Abul Barakat of Dhaka University.

Much of the property of Hindu politician Dhirendranath Datta was confiscated by the government of Bangladesh after inde-

pendence in 1971 because Datta's body was never found after he was arrested by the Pakistan Army during the Bangladesh Liberation War. An affidavit that brought forward could not be confirmed that Datta had not voluntarily left the country. Even the family property of Nobel laureate Amartya Sen had been confiscated by the then Pakistan government. In 1999, the Bangladesh government announced that it was investigating