LAW *opinion*

Towards an ideal Law Commission

S. M. MASUM BILLAH

LAW Commission signifies the strength of a legal system. Recently the Law Commission of Bangladesh has been reconstituted with a retired Judge from the Appellate Division of the Supreme Court, an academician and a Judge from the subordinate Court. With the changing circumstances the role of the Bangladesh Law Commission needs to be revisited and re-evaluated.

The Law Commission canvas

Law Commission is an independent body set up by Law Commission Act, 1996; to keep the laws of Bangladesh under review and recommend reforms when needed. It is not a sort of branch of the government for acting as legal adviser or as a drafting cell. One basic function of the Commission is to conduct this research and consultation, and make proposals for updating, improving and simplifying the laws.

The canvas of the Law Commission is pervasive. This statement is true when we consider that the Law Commission can also take steps *suo moto* apart from government's request. The legal grievances of our people, their fobs and sorrows, their pathos and bathos have to be objectively studied by it. The government should treat the suggestions of the Commission as the property of the nation irrespective of the fact that the decision-making forums rest with the judiciary, executive and deliberative wings whether they concern the economy, environment, science and technology or rearranging of national or regional priorities. One peculiarity of the Law Commission Act is that it has named the trend of economic and trade globalisation as one of the subterfuge of establishing the Commission. Splendid indeed!

The Commission reviews judicial administration to ensure that it is responsive so that delays are eliminated, arrears are cleared and disposal of cases is quick and cost-effective without sacrificing the cardinal principle that they are just and fair. The Commission seeks to simplify procedure to curb delays and improve standards of justice. It also strives to promote an accountable and citizen-friendly government which is transparent and ensures the people's right to information.

The guiding principle of the Commission can best be illustrated by resorting to the proposition made by Lord Chancellor Westbury in a 1863 speech. This is what he said "The statute book should be revised and expurgated, weeding away all those enactments that are no longer in force ... eliminating jarring and discordant provisions, and thus getting a harmonious whole instead of a chaos of inconsistent and contradictory enactments". A perusal of this speech would reveal the following four fold goals of a Law Commission; I. renovations (by weeding away obsolete enactments) II. order and symmetry (by arranging and classifying enactments) III. easy access to legislation (by consolidating the dispersed amendments together) and IV. harmony (by eliminating the discordant and jarring provisions of law). A systematic persuasion of these goals can obliterate the useless laws of the past, make the present organized and equip us to face the challenges of future.

The performance of the Law Commission

Over the time the Bangladesh Law Commission has made considerable recommendations to the government on points of legal reforms and research. It is true that the percentages of the implementation of the observations of the Commission are too meager. In the last caretaker regime, Law Commission was asked to give opinion on the point as to whether members of the caretaker government can be increased beyond 10. The Commission answered in the negative. But a hoax was played by bypassing this observation. Indirectly, assistants to the advisers were appointed which might not have been done directly. In 2006, Law Commission gave a practicable and suitable recommendation to review the legal education of Bangladesh, a neglected sector. The report is not even discussed let alone implemented. In this way Commission's intellect has not been used to best extent possible. Being discouraged perhaps, the performance of the Law Commission has not been vivid as we expected over the years.

Reflecting thoughts

A vibrant, seen and heard Law Commission speaks for a sound legal system. A focused institutional orientation of the Commission is required. For without such orientation it is apprehended that the Commission may culminate into a snail-motioned set up. It is true that success of a Law Commission depends upon bi-partite action and response on the part of the government and the Commission. A democratic government should actively response to the law proposals and opinions of the Commission which comes through intense interaction, debate and exhaustive research. Law which is reflective of public opinion can hardly be overlooked. Commission's sagacity and intellect is also pivotal for immunizing a convincing law. A Commission which receives allegiance from all quarters for its legal expertise can contribute confidently in the legal corpus of the country. In the past times, giant legal personalities were appointed in the Commission including normally a Chief Justice of the Country as Chair. It seems that a deviation has been made to this practice, of late. Nonetheless, the present Commission has been a juxtaposition from the higher judiciary, academia and the subordinate judiciary. Specially, it is expected that with the inclusion of Prof. Shah Alam, a leading legal academician and researcher of our country, the Commission would come into the right track and forward marvelous proposals of legal reforms. Following are some points which should be considered surrounding the Law Commission affairs:

1. Technologically advanced and well-equipped Law Commission is needed. Visiting the Commission's website the author had the impression that it is not regularly updated. Even the assumption of the office of new members of the Commission still is not mentioned there. It is the obligation of the government to decorate the Law Commission with necessaries as urged by the law. As the office Old High Court Building is fine but not finest.
2. Well, even if Law Commission's recommendations are not paid heed to, it has a great research value. The legal education of the country may be benefited from Commission's study. Specially, where the legal research has now been shifted to NGO focused job, Commission has a role to play to carry out substantive jurisprudential law investigation.
3. In countries like India law students get opportunity to work with Law Commission in terms of Internship. There is no reason why such novelty should not be opted in Bangladesh for the novice legal learners.
4. In order to make the Law Commission more vibrant, continuous and reliable permanent member of highest judicial and legal competence should be appointed apart from the members. In Indian Law Commission such is the prevalent culture.
5. Website development, updating and publishing of the Commission's work are important. It is good that the past reports of the Commission can be found in the Commission's website. But it cannot be traced that how many reports are accepted and implemented by the government. Above all dissemination of legal knowledge can also be an area where the Commission has a substantive role to play. Back in the history, Lord Macaulay's Penal Code were so widely circulated even in the height of those colonial days in 1840's that there is an adage like this "Every little herd boy carried a red umbrella under one arm and a copy of the Indian Penal Code with the other and thus its provisions were made known even to *pardanashin* ladies!" Discard this sarcasm, Commission's reports are important simply because it can also be referred to in judgment dispensation.

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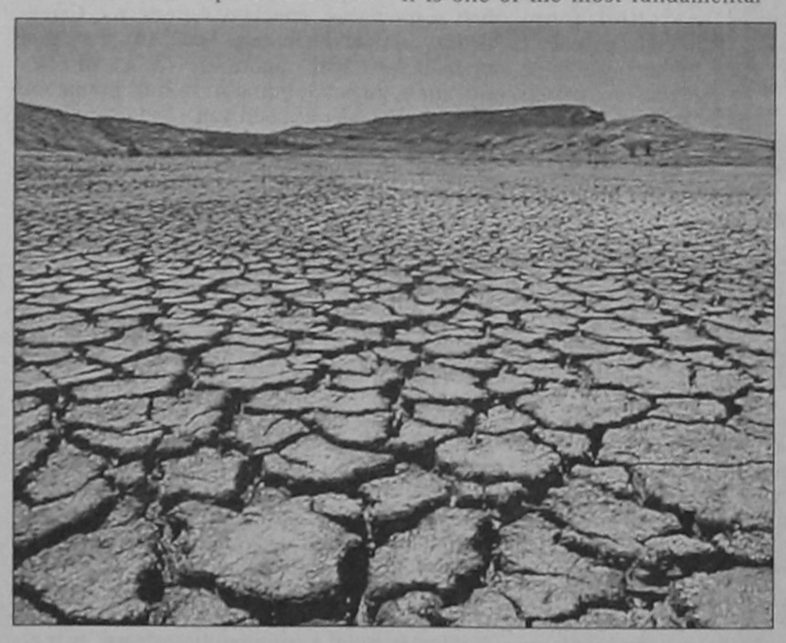
LAW *campaign*

Right to water

OLI MD. ABDULLAH CHOWDHURY

PEOPLE cannot live without water, and the daily toil involved in fetching it is a defining feature of poverty. Access to water is a human right and the cornerstone of development, underpinning every single one of the millennium development goals (MDGs). According to UNICEF only 80 per cent of the population in Bangladesh have access to safe drinking water. With the construction of Tipaimukh dam, there are wide-spread speculations that access to water would be further restricted in a large part of Bangladesh. Environmental experts are also



apprehending devastating effect on the environment in various parts of Bangladesh and India.

Water and international human rights conventions

It has been stated in Article 12 of International Covenant on Economic, Social and Cultural Rights (ICESCR), "The States Parties to the present Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." In 2000, the supervisory body of United Nations Committee on Economic, Social and Cultural Rights interpreted that the right to health includes access to safe drinking water and adequate sanitation.

Moreover, the Committee further recognised water itself as an independent right later in 2002. Drawing attention on a range of international treaties and declarations, it stated: "the right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival."

Furthermore, it has been stated in Article 14 (2h) of CEDAW, 'States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications." Both Bangladesh and India are parties to these international covenants and owe a responsibility to observe the endowed obligations.

Governmental obligations with regard to human rights can broadly be categorised as obligations to respect, protect, and fulfil. The obligation to respect requires that States Parties (that is, governments ratifying the treaty) refrain from interfering directly or indirectly with the enjoyment of the right to water. The obligation to protect requires that States Parties also prevent third parties from interfering in any way with the enjoyment of the right to water. The obligation to fulfil requires that States Parties adopt the necessary measures to achieve the full realization of the right to water.

MDG and Water

The Millennium Development Goals (MDGs) are eight goals to be achieved by 2015 that correspond to the world's main development challenges. The eight MDGs break down into 21 quantifiable targets that are measured by 60 indicators. One of the MDGs is ensuring environmental sustainability. Target 7c of MDGs is to reduce by half the proportion of people without sustainable access to safe drinking water and basic sanitation. According to the report of UK Department for International Development (DFID), one in five South Asians (about 600 million people) still do not have access to safe drinking water.

Tipaimukh dam and the purpose

According to the website (http://www.neepco.gov.in/TpmHEP.html) of Indian government on Tipaimukh, the hydroelectric project would not only generate power, but also contribute in solving flood problems in the Barak valley in the State of Assam. As a result, fertile land in the plain shall become rice bound for entire north east part of India.

There are many controversies relating to Tipaimukh. However, adverse effects of the Tipaimukh dam may be staggeringly devastating and damaging for Bangladesh. Environmental degradation, economic crisis and hydrological drought will cause irreversible damage, particularly in the Sylhet region. Moreover, people living in Meghna basin would be affected largely. Tipaimukh is an impending threat to right to water hence existence of the large people of Bangladesh.

Engaging in dialogue

South Asia Water Initiative (SAWI) involves seven countries that share the waters draining from the Greater Himalayas. The countries are Afghanistan, Bangladesh, Bhutan, China, India, Nepal and Pakistan. SAWI is facilitated by the World Bank, and the primary aim is to encourage cooperative management of shared waters, which will in turn promote poverty reduction, low carbon growth and regional stability. DFID provided funding for this initiative and a forum like this could also help in solving the problem related to Tipaimukh dam. Sharing of water of Indus basin was negotiated between India and Pakistan with the assistance of the World Bank. Bangladesh should involve bi-lateral and multi-lateral agencies including UN in this negotiation process as well.

Conclusion

To recapitulate, involvement of the people of Bangladesh is of paramount importance in dealing with the issue of the dam. There had been an editorial published in The Daily Star (June 18, 2009) on fact-finding delegation to Tipaimukh; it pins down the need of providing adequate information to the people regarding the dam. In establishing the rights of people to water, there is no other alternative.

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FOR YOUR *information*

The Principle of Universal Jurisdiction

THE principle of universal jurisdiction is classically defined as 'a legal principle allowing or requiring a state to bring criminal proceedings in respect of certain crimes irrespective of the location of the crime and the nationality of the perpetrator or the victim'. This principle is said to derogate from the ordinary rules of criminal jurisdiction requiring a territorial or personal link with the crime, the perpetrator or the victim. But the rationale behind it is broader: 'it is based on the notion that certain crimes are so harmful to international interests that states are entitled and even obliged to bring proceedings against the perpetrator, regardless of the location of the crime and the nationality of the perpetrator or the victim'.

Universal jurisdiction allows for the trial of international crimes committed by anybody, anywhere in the world. This derogation is traditionally justified by two main ideas. First, there are some crimes that are so grave that they harm the entire international community. Secondly, no safe havens must be available for those who committed them. Even though these justifications may appear unrealistic, they clearly explain why the international community, through all its components states or international organizations must intervene by prosecuting and punishing the perpetrators of such crimes.

Universal jurisdiction is a matter of concern for everybody. Historically, universal jurisdiction can be traced back to the writings of early scholars of note, such as Grotius, and to the prosecution and punishment of the crime of piracy.

However, after the Second World War the idea gained ground through the establishment of the International Military Tribunal and the adoption of new conventions containing explicit or implicit clauses on universal jurisdiction. The Geneva Conventions of 1949 are paramount in this regard, providing in unmistakable terms for universal jurisdiction over grave breaches of those Conventions. International crimes were no longer to remain unpunished.

The idea that in certain circumstances sovereignty could be limited for such heinous crimes was accepted as a general principle. Later on, other international conventions and, to some extent, rules of customary law enlarged the principle's scope of application. This was confirmed by a number of cases, starting with the *Eichmann* case in 1961, the *Demanjuk* case in 1985,14 and more recently the Pinochet case in 1999 and the *Butare Four* case in 2001, emphasizing that universal jurisdiction could lead to the trial of perpetrators of international crimes. International law empowered and in certain cases mandated states to prosecute crimes that were regarded as harming the whole international community.

Nonetheless, implementation of the general principle remained difficult, as the principle of universal jurisdiction is an issue not only of international but also of national law. States are entitled to grant their own courts universal jurisdiction over certain crimes as a result of a national decision, and not only of rule or principle of international law. Consequently, the universal jurisdiction principle is not uniformly applied everywhere. While a hard core does exist, the precise scope of universal jurisdiction varies from one country to another, and the notion defies homogeneous presentation. Universal jurisdiction is thus not unique concept but could be represented as having multiple international and national law aspects that can create either an obligation or an ability to prosecute.

Source: www.icrc.org.