REVIEWING *the views*

Environmental destruction and MNCs accountability

FAYAZUDDIN AHMAD

THE Growth of Multinational and Transnational Corporations (MNCs) are reflective of the trend towards Globalisation and a globalised economy which is taking place. The power of MNCs is evident by their incomes which is much higher than the GDP's of most states. In fact in the mid 1990s the majority of the 100 largest economies were corporations. The Bhopal Gas Tragedy brought to the forefront the extent of damage, especially with respect to environment, that can occur because of the activities of large corporations and the subsequent process to make them accountable illustrated the problems of multinational litigation. Besides the activities of Union Carbide which caused unimaginable disaster in Bhopal and the Asbestos case in Africa, other MNCs which deal in oil , pharmaceuticals, car production and nuclear energy , have put the world at risk during the course of their existence.

Appeal 'for' and 'of' MNCs

There are many incentives because of which corporations aim to structure themselves as MNCs. The United Nations Conference on Trade and Development (UNCTAD) in its report 'World Investment Report 2007: Transnational Corporations, Extractive Industries and Development', showed that Governments continue to adopt measures to facilitate Foreign Direct Investment (FDI). This included lowering corporate income taxes and expanding promotional efforts. For the MNC, it assists in their expansion, enables entry into foreign markets, access to international resources, tax exemptions due to foreign investment, favourable production conditions in foreign countries and also a system of patent laws which promote the firms competitive advantages by granting them a monopoly for the exploitation of that advantage for a specific period of time. Efficiency seeking motives apply mainly to investments in the processing or early manufacturing stage where MNCs seek to exploit differences in costs of production between countries.

Regulating MNCs and TNCs

Regulating the activities of multinationals is challenging because of jurisdiction issues and applicability of laws and courts of the different countries involved. In the case of national regulation, the main legal issue is that the MNC operates across the limit of National Legal Jurisdiction. The differences in the regulatory practices of different countries are often exploited by these corporations for their own benefit and may result in situations where regulation exclusively within the territorial jurisdiction of the regulating entity may be ineffective. A possible solution for national regulation is the adoption of Multilateral Regulation which would recommend reducing the role of national regulatory barriers and promoting the adoption of common tax laws and universal standards.

Liability for environmental damage

There is a strong relationship between MNCs and the environment and often they are largely to blame for environmental degradation and pollution. This was evident in the reports by the Secretary General of the Commission of Transnational Corporations (CTC) which focused on national legislation and corporate environmental management, information disclosure relating to environmental measures, hazardous technologies as well as strengthening environmental institutions, laws and regulations. MNCs usually comprise of companies or other entities established in more than one country and whose ownership may be private, state or mixed. In such a scenario, one or more of these entities may be able to exercise a significant influence over the activities of others and the degree of autonomy within the enterprise may vary. There exist a number of 'Soft' regulatory initiatives to assess MNCs performance and obligations, including the OECD Guidelines on MNEs and the UN Global Compact. However, these are inadequate to combat powerful MNCs who engage in environmentally harmful activities.

Liability in the law of tort

There exist rules which provide compensation in the form of monetary damage to individuals who have been harmed by wrongful acts of others. In systems based on common law, these rules form the law of torts. Vicarious Liability in Tort Law may be defined as liability imposed by the law upon a person as a result of 3 possible scenarios: tortuous act or omission by another, relationship between the actual tortfeasor and the defendant whom it is sought to make liable, and some connection between the tortuous act or omission and that relationship. Tort liability is generally based on some notion of 'fault'. A person is not subject to known exceptions generally liable in tort, except where he has intentionally or negligently caused some loss or damage to the plaintiff. In the case of Joint liability, the parties liable are jointly at fault, whereas in the case of vicarious liability, one person compensates another for loss not due to his fault. At times vicarious liability seems to run counter to two principles of tort law, namely, a person should only be liable for loss or damage caused but his own acts or omissions and secondly that a person should only be liable where he has been at fault. One is not liable for acts or omission, instead a corporation is liable to pay damages for the results of an act or omission and the function of the law is to decide when it bears a sufficient responsibility for the results of the acts or omissions to justify the imposition of liability.

Where the tort in question is or is based on negligence it is necessary to show that the defendant has actually authorized, assisted or procured the negligent mode of performing the act in question, and not merely that he has authorized, assisted or procured the act. Tort systems may replace fault-based liability with strict liability since strict liability is assigned without proving fault such as negligence or tortuous intent. This does make sense since the interest of safeguarding the public and providing adequate compensation outweighs the interest of establishing any form of fault of the defendant. Such policy considerations lie behind the judgment in Rylands vs. Fletcher which established strict liability in respect of non natural land uses in the UK. It seems that strict liability would be an automatic prerequisite of any environmental liability regime.

In litigation involving MNC liability, once the question of jurisdiction has been answered in favour of impeding the foreign parent company, the extent of its responsibility for the acts of its local subsidiary or branch will depend on the applicable principles of law concerning corporate group liability. In many cases concepts of contractual or tortuous liability will suffice to establish the liability of the parent company without the need to resort to liability based on control.

Forum Non Conveniens

The doctrine of Forum Non Conveniens allows the court to stay the proceedings where an adequate alternate forum exists and where certain other criteria are met. It was originally invoked to protect the defendant from being harassed by a plaintiff choosing a genuinely inappropriate or inconvenient forum. This doctrine has been heavily criticized as it has become a device for parent companies to escape liability for tortuous acts committed abroad and it operates to prevent parent companies from being held accountable. The question of a convenient venue for litigation involving the activities of MNCs becomes important when the events leading to the dispute have occurred in a foreign host jurisdiction, at the hands of a subsidiary but the plaintiff is seeking to carry out the litigation process before the forum jurisdiction of his or her choice.

Polluter Pays Principle

This Polluter Pays Principle states, 'the costs of pollution should be borne by the person responsible for causing the pollution'. This concept can be applied to cases where environmental harm is caused by the conduct of hazardous industrial activities or the diffusion of environmentally harmful products or waste. However, in such cases, the compensation depends on the level of knowledge the corporation had regarding the potential danger of its activities. A thorough civil liability regime would include the Polluter Pays Principle and the Precautionary Principle because liability would ensure that operators bear the costs of any damage done. Also, the fear of being held liable and probability of paying compensation may encourage corporations to take steps to prevent any disaster which is reflective of the precautionary principle.

The government, the environment, and the corporation

The government exists for the benefit of the community rather than for private advantage since governmental action determine important aspects of public and private well being. Potential liability may influence the conduct of government policy, particularly where heavy costs may be incurred by one course of action. Due to many reasons, including sovereign immunity, the focus on the liability of officials for wrongful acts was and is inadequate to account for the full extent of government liability.

Principle 13 of the Rio Declaration on Environment and Development calls on states to co-operate in developing liability and compensation rules for environmental damage caused by activities both within and beyond their areas of territorial jurisdiction or control. Thus, the state is vital regarding liability of MNC'S. Very often they may reduce adverse environmental consequences by using superior technologies and management practices than smaller domestic companies. (UNCTAD, 'World Investment Report 2007') In some cases hazardous and polluting activities have been exported from home countries to lesser developed countries precisely to avoid strict regulated at home. Though Alternate Dispute Resolution (ADR) may be a good alternative to settle disputes without incurring the high legal costs and without spending years in the litigation process, in order to set precedence, a legal judgment may serve as a warning towards MNCs to make sure that they act responsibly.

The Global community will need to develop a strong network of environment management devices to deal with issues of environmental harm by MNCs and TNCs. Such a system would employ mechanisms of regulation, taxation and criminal sanctions. Civil liability and tort law can be called upon to play a contributory role. (Anderson 2002) Struggles in determining jurisdiction will call for international law to investigate concepts like global jurisdiction, and establishment of courts that have the power to deal with TNCs and different states, and most importantly, with 'Transnational liability'. Finally, the implementation of Hard Laws and Strict Liability at the global level cannot be underestimated as part of the process to achieve environmental protection.

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LAW *alter views*

Of 'Struggle' and 'War': A rejoinder

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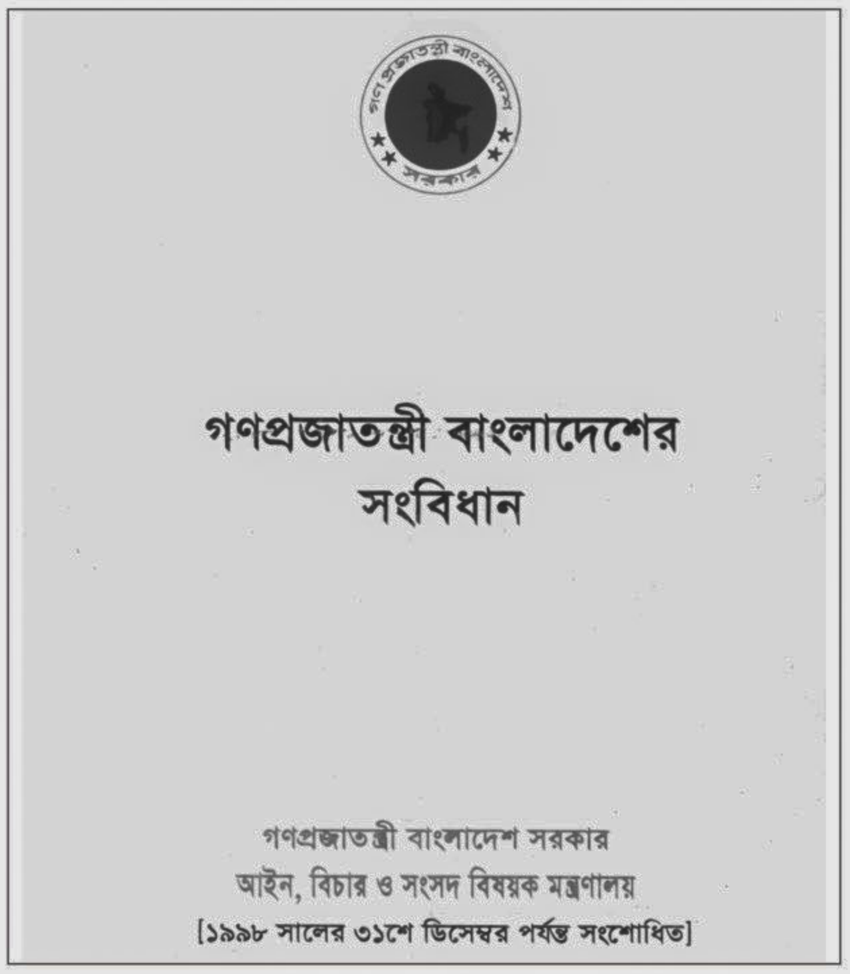
IT is interesting to find that my view on the first paragraph to the preamble of our constitution, published in an earlier issue of this page, has drawn the attention of M. Jashim Ali Chowdhury, *prima donna* of Law & Our Rights page in recent past, connoisseur of thousand years' Bangalee Nationalism! He has expressed his alternative views regarding my write-up in 27th March issue of Law and Our Rights. It seems to me that he has not read my write-up with enough open-mindedness and objectivity, rather on preconceived notion of things and with spectacular genuflection sticking to the original preamble he concluded"if amendment is needed, that is the revival of original constitution in toto, nothing else".

Perhaps he failed to understand the total import of my article. Let me clarify my position as against some of his unfounded allegations:

(1) I did not impliedly support "anti-liberation aggression (a clear demagogy) on the constitutional philosophy", as he alleges. Rather I expressly disapproved the said amendment, as I framed the hypothesis of my write-up against its propriety. He might have been led to such a comment based on my writing that"If grammatical construction of the first paragraph to the preamble is adopted, which records only that part of the struggle that occurred 'having proclaimed the independence', it makes sense that the change of 1977 was correct insofar as it termed that part of the struggle as war".

Does above statement mean that I supported that change? I tried to say that the change of 1977 grammatically makes sense as it termed a particular portion of struggle as 'war', given the time frame indicated by the signpost of 26th March. I still persist in my proposition.

Thanks for adding a new disjunctive conjunction to the dictionary, and also for admitting that Bengali text of the relevant portion of the preamble, which is the preferred authentic text, clarifies the basis of my comment on the first paragraph to the original preamble. Doesn't it mean that he thinks a change of at least the Bengali text? Please look at the original and the amended first paragraph of the preamble and compare them.



I wanted to say that after proclamation of independence, we were engaged in concrete 'Liberation war', not in vague 'struggle'. The author misconstrued the historic speech of Bangabandhu delivered on 7th March, 1971. For strategic reasons, Bangabandhu used the word 'struggle' although he was seriously urged by his people to declare independence perforce leading to a war. Once it started, it attracted international law of war, application of international humanitarian law and law of state succession. Identifying history of this period as mere 'struggle' may prove counter-productive, for it would give way to anti-liberation elements of this country who hitherto preferred to term the glorious war as 'internal strife'.

The total import of my article was, of course, to establish the glory of struggle, not war. I advocated for implanting the history of struggle more coherently in the preamble what I found to be lacking in the existing first paragraph, which glorifies the 'war' at the cost of 'struggle'. When I

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went back to the original preamble in search of the true spirit, I found that spirit was there, but the wording was a bit misplaced.

On the other hand, 1977 amendment, although sounds a bit correct in wording, did snatch away the very spirit (historic struggle for national liberation). Therefore, I suggested a draft that would more appropriately represent the spirit, and at the same time its wording would not be susceptible to any incongruity.

What I did not say perhaps was that 1977 amendment destroyed much than it produced. I was not unconscious of the motive that might have played catalytic in glorifying 'war' in place of 'struggle' in that amendment. That sort of change was neither a top priority of the then government, nor perhaps was it done with a pious motive to correct the apparent incongruity of wording. Certainly total omission of the word 'struggle' was unforgivable, I agree, but my proposition was that revival of the original first paragraph in toto with prevailing wording would leave a gap between the spirit and the language used.

(2) There is no question of 'mildly rebuking' or imputing anything like 'poor drafting skill' to the constitution makers. Dr. Kamal Hossains and Ambedkars are our legends. But what Mr. Chowdhury failed to appreciate is that, with due respect to the towering genius of the constitution-makers, a law student has a valid scope of reviewing and reassessing any part of the constitution in his academic zeal.

(3) His objection to 24 years' history of struggle and stretching it up to thousand years is based on fantasy and fraught with exaggeration. I have no objection to such a visionary zeal, but the question is, was that thousand years' struggle singularly for the cause of Bangalees? We may speak of Battle of Plassey or the Sepoy-mutiny, but they were not fought for Bangalee Nationalism. They were part of a common struggle of all the people in this subcontinent for an independent motherland. In 1947, our people erroneously thought that their efforts were ultimately paid off. Soon they realized the truth, and entered into a new phase of struggle that led to the war of 1971, and finally resulted in achieving a constitution of our own.

History of 1947-1971 is single-most important factor in the making of our constitution. Had there been a just constitution and a fair play of democracy in this period, the history might have been otherwise, maybe for better or the worst.

(4) The most surprising part of his write-up is that in his zeal to uphold 'struggle for national liberation', he does not hesitate to totally wipe-out the 'Liberation war' from our constitutional history. He has come out with some ridiculous and childish propositions. He is not ready to accept my comment that after 26th March what happened was "though struggle in general, was war in particular", whereas in turn he comments it as"though *prima facie* a war, it was a struggle in reality". What is the difference? Again he says"the 1971 war was not a mere armed rebellion, it was a mass upsurge for the fulfillment of a thousand years ...."

He perhaps introduced a neologism for our liberation war. If 1971 war was 'struggle' or 'mass upsurge', we have to invent new words and phraseology like 'struggle-criminal' in place of 'war-criminal', or we have to set up 'Mass Upsurge Crimes Tribunal' in stead of 'War Crimes Tribunal'.

(5) Yes, I deliberately refrained from attracting 'liberation' and 'independence' in my discussion. Because I recognize both in their true contents and maintain prejudice to none. They can be interchangeably used. Say of 'Liberation war' or 'struggle for independence'it adds nothing to the debate. Of course, I would say, the writer confined independence to its external aspect only. Sovereignty achieved through independence should be visualized from both internal and external dimensions.

(6) Finally, the writer has put a question mark about my allegiance! Ridiculous. The writer seems to be sub-consciously obsessed in some allegiance crisis, or he is in the habit of judging an academic analysis always in terms of allegiance. His gesture reminded me the 'EitherOr Doctrine' of President Bush. However, I am happy to answer the question that my allegiance is towards truth and objectivity.

Lastly, let me conclude with a positive note for the writer. I thank him, for he has exposed a true academic concern in favor of a true spirit. I found much consolation by his reference to the second paragraph of the preamble, which did justice to the term 'historic struggle for national liberation'. But by the same token, incongruity in the text of first paragraph in representing the much avowed spirit of struggle is not getting cured. Sustaining the original first paragraph in its existing form and shape may not pose any problem in its understanding for an omniscient pedagogue, but for we the commoners, whose domain is the law, original first paragraph must be suitably amended when it is revived.

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