LAW VISION

The Children Act 2013: A milestone of child protection

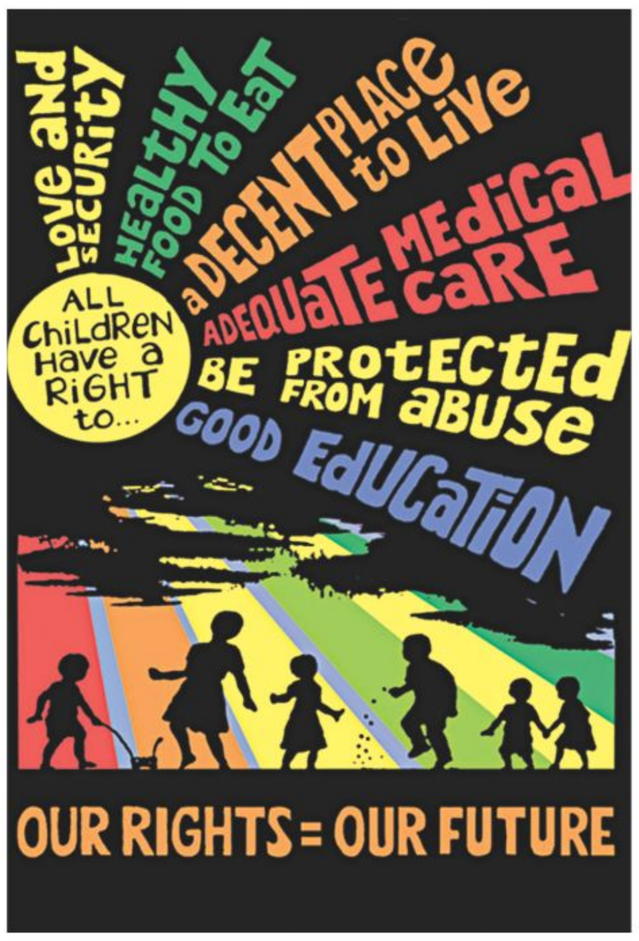
DR. NAHID FERDOUSI

THE first expression of international concern about the protection of children came in 1923 through "Geneva Declaration" under the aegis of League of Nations. After the establishment of UNO in 1945, children were included in human rights agenda and various instruments for their protection. Like many countries in the world, Bangladesh formally focused its attention on children protection in the Constitution of Bangladesh and customary laws from the very beginning of its independence. But there is no special children justice law and no positive legislation having opportunities for physical, moral and intellectual development of children. After 42 years of liberation of Bangladesh, the law has not substantially been changed to protect children. Though the Children Act 1974 and the Children Rules 1976 are considered as the basic law for children justice, these are not comprehensive and in conformity with the Convention on the Rights of the Child (CRC) of 1989 and the other international standards. Consequently, children suffer adversely from existing laws. It is a great challenge to ensure the overall improvement of the children justice system through a specific child-oriented law in Bangladesh.

In this context, the Government of Bangladesh passed of the Children Act 2013 on the basis of the CRC that Bangladesh ratified long ago (The Convention on the Rights of the Child (CRC) 1989 came into force on 2 September, 1990 in Bangladesh). However, in Bangladesh, the Children Act 2013 is a positive step and it is a great milestone for the protection of the rights of the child in all sphere of life. The numbers of vital issues on child rights have been dealt with in the Act. Furthermore, the Act recognises some organisations and members and mentions about their responsibilities for protection of the best interest the children. The main issues of the new Act are presented below:

Harmonised with the CRC: The Children Act, 2013 is based on the CRC and has referred to the CRC in the preamble and replaced the Child Act 1974. As a result of this development, children in Bangladesh will have the opportunities to be treated fairly both under the national and international laws.

Internationally recognised definition for a child: Due to the differences in ages of children, they were denied fair justice. This discrepancy has been addressed in the Children Act, 2013. In the Act, the age of the child has been increased from 16 to 18 years. So, child age has been fixed up to 18 years.



Protection of child victims and witnesses: For the first time, the Act has a provision for child victims and witnesses cementing legal instruments for their protection, including compensation for victims. For children in conflict with the law, the law reinforces the importance of the children justice system meaning that children accused of petty crime, particularly children living on the streets will no longer be unnecessarily detained.

Appointment of probation officer: According to the Act, the government will appoint one or more Probation Officer/s in the district, upazila and metropolitan areas.

Child help desks in the police station: As per the Act, under the Ministry of Home Affairs, Child Help Desks will be formed in police stations all over the country. An officer, ranked sub-inspector or above, will look after the desk. The Act specifies responsibilities of the designated police officer.

Child-friendly arrest procedure: According to the Act, whatever the circumstance is, child aged below nine cannot be arrested. If a child above nine is being arrested, law enforcers cannot apply handcuffs and rope around waist to the child.

Single charge sheet against children: The Act specifies about submitting charge sheet against children. According to the Act, a single charge sheet consisting of adults and children cannot be submitted.

Juvenile Court at district level: According to the Act, at least one juvenile court will be formed in district or metropolitan area. If a case is filed against a child, whatever crimes s/he committed, the juvenile court will try him/her.

Constitute National Child Welfare Board: Under the Act, a National Child Welfare Board will be formed. The minster of the Ministry of Social Welfare will be the chairperson of the board. Boards at the district and Upazila levels will also be formed. District Commissioner and Upazila Nirbahi Officer (sub-district executive officer) will be the presidents of the boards respectively.

Alternative preventive measures: As per the Act, it states that the police officer or juvenile court can look for alternative preventive measures during any stages of the formal judicial system. It has also been mentioned in Act that there will be a monitoring process for checking, whether the directed alternative measures have any positive impact on the child's behaviour.

Provision of sentence: The Act proposed for highest five years imprisonment and Taka one lakh fines for any cruelty on children as well as giving a guideline for bringing up the children in a conducive atmosphere.

Responsibility of media: Media is prohibited to publish articles, photographs and information that go against a child under trial in this Act.

Well-being of the children: This Act encourages family based care and protection considering best interest of the child and meaningful child participation.

However, it can be said that the Children Act, 2013 will cover lacunas of earlier Children Act, 1974. Now we need to create proper awareness and execution about the new Act. We hope, a child-friendly justice system by the proper implementation of the Children Act 2013 would be started as soon as possible in Bangladesh.

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BOOK REVIEW

A study on TRIPS implications and challenges for LDCs

MD. JOBAIR ALAM *and* MOHAMMAD A SAYEED

THE emergence of the TRIPS (Agreement on Trade-Related Aspects of Intellectual Property Rights) represents a global solution to the concerns of protecting intellectual property rights (IPRs). To many, the TRIPS approach of globalising the higher standards of intellectual property is however found to animate some in-built controversies. The major controversy surrounding the TRIPS is directed at its ramifications of disregarding the "North South divergent perspective" on the scope of protecting IPRs.

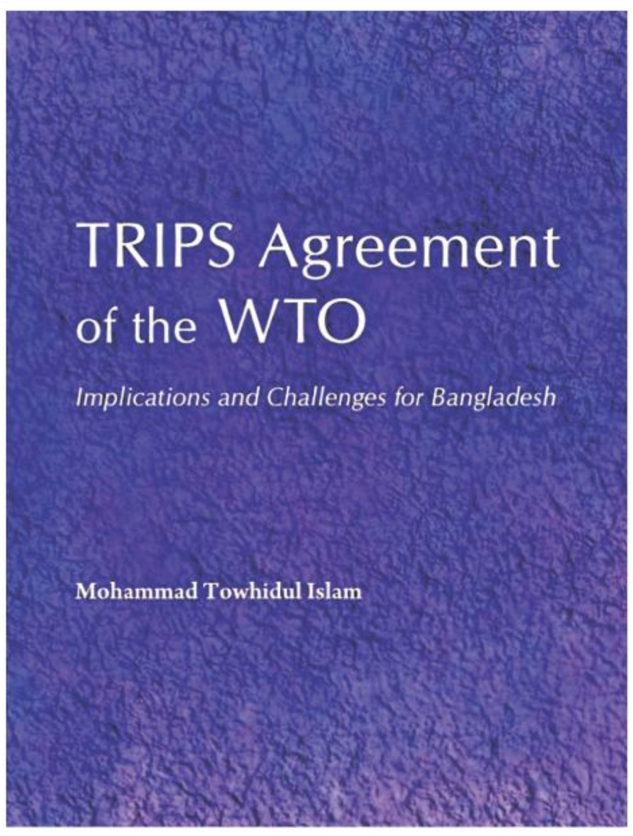
During the TRIPS negotiation, the IPRs-using developing and least developed countries (LDCs) vigorously protested the uniform and strict IPRs protection under the TRIPS by arguing that such stringent standard-settings would harm their development prospects. Interestingly, the drafting of the TRIPS reconciled such concern by including a range of safeguards and options that the WTO members can exploit in their implementation of the Agreement. The conclusion of the TRIPS thus results in pushing the developing countries and LDCs to what Carolyn Deere calls "a second battle"—the battle of exploiting the flexibilities of the TRIPS.

With this sense of combating the battle, the developing countries and LDCs are trying to reconstruct their government regulation by relying on the objective and principles of the TRIPS that recognise the link between protection of IPRs and promotion of social and economic welfare. As a member of LDCs, Bangladesh is also in the need of proper strategy and policy arrangement for tailoring the implementation of the TRIPS in response to national economic and social priorities.

Considering the gravity of this fact, Dr. Mohammad Towhidul Islam, an Associate Professor of Law at Dhaka University, has recently accomplished a scholarly research on TRIPS implications and challenges that Bangladesh may supposedly face as a member of LDCs. His newly published book *TRIPS Agreement of the WTO: Implications and Challenges for Bangladesh (published by Cambridge Scholars Publishing, UK)* is the outcome of this research. This book is indeed a timely response to the demand of relocating the dream and dilemma of Bangladesh in the context of TRIPS. In essence, the book is built upon the promise of implicating IPRs linkage to trade in general, and assessing their impacts on agriculture, public health and economic development of Bangladesh in particular.

In this book, the author performs a deeper analysis of the TRIPS components, IPRs related treaties and IPRs laws of Bangladesh with a view to proposing a suitable avenue to reach in the progressive and public interest-oriented regime of intellectual property rights. By indentifying the gaps or constraints either in TRIPS or in Bangladesh IPRs laws, this book asks for fruitful reforms in the national IP regime, and offers possible ways to reduce the problems of international regulatory capture. As such, the most important feature of this work is that it possesses the potentials of influencing the policy framework for Bangladesh in protecting IPRs from people's perspective.

To map the baseline of determining TRIPS implication and challenges, this book begins in chapter one with an illuminating discussion on defending and discarding the TRIPS protectionism of IPRs in terms of trade liberalising features of the WTO. In this chapter, Dr. Islam becomes quite argumentative to defy the view that the TRIPS features occur with the WTO's neo-liberalising approach of freeing the trade of IPRs goods. In contrast, he thus goes to argue that *"[t]he monopolisation of IPRs in the owner's hand, together with the restriction of comparative advantages leads to trade*



protectionism and appears to clash with the free trade principle of the WTO." In addition, this chapter also clarifies the relation between justificatory theory and monopolization, and examines the relevancy of these theories in protecting IPRs in the context of developing countries and LDCs. The second chapter of this book is designed to revisit the problems and politics of international regulatory regime of IPRs, starting from the WIPO regime to the WTO. Offering a critical analysis of various regimes of IP protection, this chapter tends to present a picture of how the IPRs protection finds places in LDCs that have nothing to do with the protection of inventions but appropriate IPRs for meeting survival needs.

The subsequent three chapters of the book offer sector-wise examinations of TRIPS implications in the fields of agriculture, public health and economic development. The third chapter deals with protection of IPRs in agriculture by means of plant varieties protection. It examines relationship between the TRIPS and agriculture from the perspective of conflicting trends between the IPRs-owning countries that favor bio-prospecting of natural resources and the IPRs-using developing countries and LDCs, where the use of natural resources is a traditional practice. The forth chapter focuses on the patenting provisions of the TRIPS in relation to pharmaceuticals and examines its implications on public health. In particular, it investigates whether patenting in pharmaceuticals brings any positive result or deteriorates public health in countries like Bangladesh that have capacity constraints to afford patented medicine.

The series analysis of the TRIPS ends with chapter five which highlights TRIPS impact on or prospects for economic development. And finally, chapter six of the book concludes the study with a summary of recommendations for making balance between private sector-investment and public interest concern of IPRs, especially in the context of LDCs. In essence, this chapter provides a way forward to guard against the TRIPS vulnerability to the practice of private monopolization, and offers a policy framework for the promotion of public goods in the countries like Bangladesh.

In the breadth of all these chapters, the author's insight of the TRIPS implications has been uniquely nourished in the cram of political pragmatism coupled with a deeper sense of human rights and altruism. This has been reflected in the author's finding for Bangladesh that *"although the present IPRs laws concur with the TRIPS and sometimes exceed its mandate, they do not take into account the general consumption needs of the great majority of the poor people living therein."* Again, the recommendation of the author for LDCs that they should press for the reframing of intellectual property in the human rights paradigm does also signify the truth of this claim.

Arguably, the most important contribution of this book remains with the fact that it is founded upon the objection to the applicability of "TRIPS' one-size-fits-all approach" compulsorily for all countries. The themes and structure of the book is however formulated with a conscious compromise between total rejection and strict compliance with the components of the TRIPS. As such, while this work demands constructive governmental regulation of exploiting the TRIPS flexibilities in one hand, it urges for a further negotiations by forming an alliance to raise concerns regarding the fulfillment of developmental needs of LDCs on the other.

Interestingly, the metaphor of this approach seems to speak so much for the governments of LDCs to behave like the "Machiavellian king" possessing the nature of both the lion and the fox -- the governments of LDCs should be as powerful as the lion to combat the anomaly of international regulatory capture, and at the same time they should be as careful as the fox to formulate national policy for exploiting the TRIPS flexibilities with the best of their bounds.

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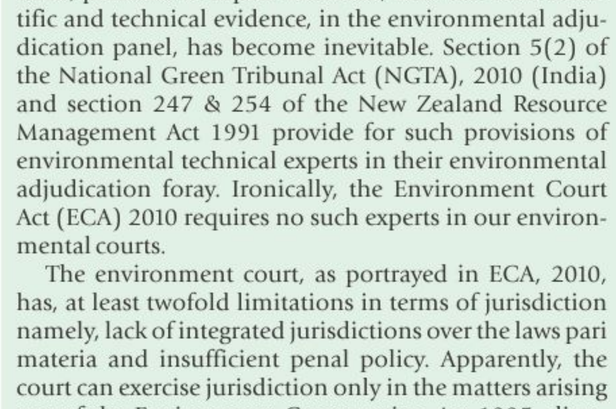
LAW WATCH

Reflections on environmental adjudication regime



MD. AHSAN HABIB

DUE to a peculiar geo-economic stand Bangladesh is facing a double jeopardy in terms of environmental vulnerability i.e. effect of global climate change coupled with the maladies annexed with indiscriminate industrialisation and urbanisation. Against this backdrop, only a dynamic, inclusive and effective environmental governance regime can strike a balance between economic development and ecological order. Environment court, as a tool of environmental governance in the context of Bangladesh, must be designed in such a way which can overcome the traditional procedural drawbacks of civil or criminal courts and play an innovative role as a means to reach the end of transcendent environmental justice.

Given the scientific overtones of environmental violations, presence of expert members, who can treat scientific and technical evidence, in the environmental adjudication panel, has become inevitable. Section 5(2) of the National Green Tribunal Act (NGTA), 2010 (India) and section 247 & 254 of the New Zealand Resource Management Act 1991 provide for such provisions of environmental technical experts in their environmental adjudication foray. Ironically, the Environment Court Act (ECA) 2010 requires no such experts in our environmental courts.

The environment court, as portrayed in ECA, 2010, has, at least twofold limitations in terms of jurisdiction namely, lack of integrated jurisdictions over the laws pari materia and insufficient penal policy. Apparently, the court can exercise jurisdiction only in the matters arising out of the Environment Conservation Act 1995, disregarding a bulk of environmental laws. An integrated jurisdiction over all environmental laws is required for the coherent dispensation of justice. A harmonious reading of section 2© of the ECA 2010 read with section15 of the Environment Conservation Act 1995, substantiates that the court can impose the maximum penalty of taka ten lac both for natural and juristic persons irrespective of the gravity of offence or torts. The NGTA of India provides for maximum penalty of 10 crore and 25 crore rupees for a natural person and legal person respectively.

Given the success of environmental public interest litigations in Bangladesh, a forum having the power of judicial review and whose raison d' etre would be environmental adjudication might have been successful in environmental statesmanship. The New South Wales environment court posses the power of judicial review as per the provisions of the NSW LECA, 1979. The New Zealand Environment court is a court of record. Our environment court neither has the power of judicial review nor is a court of record.

As per section 4 of the ECA, 2010 the joint- district judges are persona designata in the environmental courts as judges. Remarkably, their role as part-time judges in environment courts ipso facto proves the 'window dressing approach' of the government towards environmental governance regime. Given the deadlock of cases in civil courts, a joint-district judge cannot perform functions of both offices i.e. as a civil court judge and a judge of environment court unless he is Dworkin's 'Hercules'.

Section17 of the ECA, 1995 read with section 6(3) and 7(4) of the Environment Court Act 2010 transpires that a court cannot take cognizance of a cause on the basis of averments made by an aggrieved person without previous authorization of an executive i.e. the inspector of the DoE. This is a clear legislative hegemony to executive over the judiciary, necessarily resulting in bar to access to justice.

In this era of epistolary jurisdiction in environmental governance, procedural requirements to access to justice e.g. rule of standing have undergone epoch-making liberalization. The statute of New South Wales provides "any person" may sue to restrain a violation of the environmental law (McAllister 2009, 64). More interestingly, Philippines new rules for environmental cases provides "any Filipino citizen" to sue for the enforcement of any environmental law "in representation of others, including minors or generations yet unborn" (Philippines/Rules, rule 2, sections 4 and 5). In view of these provisions, the provision of executive intervention in access to justice process, in the ECA, 2010 seems to be anachronistic.

Section 14(1) and 14(6) of the ECA of 2010 have respectively provided for application of CPC, 1908 and CrPC, 1898 to the trial and disposal of environmental suits and cases. Both of these procedural laws have been identified as inaccessible, non-participatory, protracted and expensive. Remarkably, the NGT Act, 2010 of India respectively provides in section 19(1) and 19(3) that the Tribunal is not bound by the procedure laid down in CPC or CrPC and the rules of evidence contained in the Indian Evidence Act 1872. Apparently the Indian legislation has provided for a 'wiggle room' to the tribunal in following orthodox procedures for the sake of transcendent environment justice.

The ECA has made no reference to the peremptory norms of international environmental law e.g. the principle of sustainable development, intergenerational equity, polluter pays principle and precautionary principle. These principles are in the core of the environmental jurisprudence worldwide. Section 20 of the NGTA (India) has made express reference to these principles and requires the tribunal to apply them in adjudication. Express legislative adoption of these principles could have been used as beacon-lights by the environment court, given the 'pipeline' environmental jurisprudence of Bangladesh.

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