"ALL CITIZENS ARE EQUAL BEFORE LAW AND ARE ENTITLED TO EQUAL PROTECTION OF LAW"-ARTICLE 27 OF THE CONSTITUTION OF THE PEOPLE'S REPUBLIC OF BANGLADESH ● dslawdesk@yahoo.co.uk

LAW WATCH

MARINE FISHERIES LAW

Adopting the precautionary principle

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THE precautionary principle is a well-recognised concept in the realm of international environmental law. The principle is a manifestation of the maxim in dubio pro natura which means "in doubt, in favour of nature." The precautionary principle means the incorporation of caution in the decision-making process to prevent human activities from adversely affecting marine species and marine environment, even if there is no conclusive scientific proof linking those activities to the damage. The origin of this principle could be traced back to mid-1960s in Germany where the principle was applied in relation to pollution level. It first found its way into international law and policy as a result of German proposal made to the international North Sea Ministerial Conference in 1984. The concept of precaution received wide acceptance in international legal sphere through the UN Conference on Environment and Development held in Rio Conference in 1992. Principle 15 of Rio Declaration that deals with implementation of a precautionary approach has become a legal norm since then.

Although the principle originated in the context of marine pollution, it is now applied across the entire range of international law. When maximum sustainable yield (MSY) approach of fisheries management was failing to effectively manage international fisheries, international community moved to sustainability approach and the precautionary principle was introduced into fisheries management.

A number of international fisheries instruments including multilateral and regional fisheries treaties have incorporated this principle with a view to ensuring proper conservation of marine fisheries and marine biodiversity. The 1995 UN Fish Stock Agreement, a legally binding instrument for management of straddling and highly migratory fish stocks, and the 1995 FAO Code of Conduct for Responsible Fisheries, a non-binding legal instrument on fisheries management, have explicitly incorporated the precautionary principle. As Bangladesh has ratified the former and signed the latter, it bears the obligation to adopt the principle in the regulatory frameworks for the exploitation, management and conservation of marine fisheries. However, the existing regulatory frameworks for marine fisheries in Bangladesh do not adequately reflect the precautionary principle which has already attained the status of customary international law. All states and non-state entities, e.g. corporations, NGOs, regional fisheries management organisations, etc. are obliged to comply with the principle to ensure environmental protection.

In Bangladesh, the Protection and Conservation of Fish Act, 1950 and the Marine Fisheries Ordinance, 1983 are two key laws dealing with the regulation of marine fisheries. The Protection and Conservation of Fish Rules, 1985 and the Marine Fisheries Rules, 1983 are two sets of Rules issued by the government for the implementation of the 1950 Act and 1983 Ordinance respectively. The National Fisheries Policy, 1998 and the National Fisheries Strategy, 2006 provide guidelines for the regulation of fisheries activities. The Department of Fisheries issues administrative orders time to time with a view to ensuring proper conservation of marine fisheries and marine ecosystem. The Ministry of Environment and Forests and the Department of Environment also have jurisdiction to issue rules, policy and administrative orders pertaining to marine environment.

Except for the Marine Fisheries Sub-strategy under the National Fisheries Strategy, 2006, the legal and policy documents pertaining to regulation of marine fisheries do not reflect the precautionary principle. This 2006 Strategy with its eight sub-strategies was framed to help implement the National Fisheries Policy and to offer support to guide the sector. The Marine Fisheries Sub-strategy says that a marine fisheries management plan will be prepared based on existing information as a precautionary measure. However, the marine fisheries management plan has not been prepared till date.

The decision-making process in fisheries management is also preventive and not precautionary. In July 2013, when the government decided to issue 25 new fishing licenses to trawlers for fishing in the EEZ, concerns were raised by many as to the merit of this decision of issuing new fishing licenses without conducting survey on the amount of stock. This decision by the government was considered to be a serious breach of precautionary norm as experts had been warning the government against a threat of overfishing in the Bay for quite a long time.

The maritime area of Bangladesh has increased over the last few years through two successful boundary litigations with two neighbouring countries India and Myanmar. Now, the government of Bangladesh is mulling over new development plans for the marine fisheries sector. However, the government focuses generally on the exploitation of maximum benefits from the sea rather than the conservation of marine fisheries and marine biodiversity. Without conserving marine fisheries and marine biodiversity, the development in marine fisheries sector will not be sustainable in the long run. Therefore, it is about time the government of Bangladesh revised the age-old legal and policy frameworks for marine fisheries with a view to incorporating the precautionary principle not only in the substantive provisions, but also in the decision making process.

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The illegalities of enemy turned vested property

LAW OPINION

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THE law of enemy property has a long and complex history in Bangladesh. Although it originated from the emergency laws promulgated during the India-Pakistan war in 1965, its legacy even continued in independent Bangladesh till recent years. After Independence in 1972, the Bangladesh (Vesting of Property and Assets) Order (P.O. 29 of 1972) was promulgated. By this Order, all properties situated in the former East Pakistan which had previously belonged to the Pakistan government, became vested in the government of Bangladesh including properties that were 'vested in or managed by any Board constituted by or under any law with effect from 26 March 1971'. Thus amongst other properties, the enemy properties that were vested in the Custodian during Pakistan period became vested in the government of Bangladesh in the same right with which the properties were initially vested in the Pakistan government.

When the properties had vested in the Pakistan government, they were vested for limited purpose and without extinguishing altogether the title of the owners during emergency. As the Bangladesh government had no larger right over those properties than that of the Pakistan government, it was only natural that it should initiate restoration of those properties once the immediate purpose of vesting had been served. Even if it could be assumed that there was no obligation on the Pakistan government to restore the properties taken as 'enemy property' that could not free the Bangladesh government from this obligation as the owners of such properties could never be legally considered as 'enemies' of the newly independent Bangladesh, which had a very different alignment with India. Therefore a clear obligation lay upon Bangladesh after its emergence as an independent sovereign to return the enemy turned vested properties to their original owners. It could not assume full ownership over those properties, let alone adding new properties to the existing list of enemy properties. However unfortunately not only has there been lack of any successful attempt to restore the properties, there had been large scale new additions to these properties under the pretexts of various laws and administrative circulars during different government regimes.

In 2001, the Vested Property Return Act was enacted which promised to return these properties to their original owners. But this Act is deeply flawed and unfortunately has failed to meet its promises.

The term 'returnable property' has been defined by the Act as those properties which had been enlisted by the government as vested properties under the vested property laws and which were under the possession or control of the government immediately before the promulgation of the Act.

Legally, any property that were vested after the Vesting Order of 1972 cannot be termed as vested property, as none of the vested property laws mentioned in the Act which were passed after the 1972 Order, authorised in effect any 'new' vesting of property. However the Act did not make any distinction as to whether the returnable properties were vested upon the government before or after the 1972 Order. Hence, properties which were taken over by the Pakistan government as being enemy properties and properties the owners of which were most illegally ousted from their possession during the period subsequent to our independence, both have fallen under the same criteria of 'returnable properties', and the deprived owners with no fault of their own, had to go through series of hurdles with no guarantee of actual return of their properties.

Another significant drawback of the Act is to exclude a large number of properties from being enlisted as returnable properties under Section 6. According to this section, properties that had been permanently disposed of or leased out by the government to any organisation or individual cannot be returned. Thus the Act, which apparently promised to redress the grievances of those whose properties were illegally taken by the government, had in effect legalized all the permanent disposal of those properties over which the government had never acquired any lawful title.

Again, the entire process of hearing of an application for return of vested properties under the 2001 Act is clogged with so many provisions that it is almost like a civil suit for declaration of title. Separate vested property tribunals have been created for hearing these claims, and submitting original documents of title is only the first stage of the process and it includes even hearing of witnesses from both sides. Usually it takes more than 3/4 years to get a decree of return and that also is subject to appeal to the vested property appellate tribunals. Even when a decree has been passed for return of the property to the owner, the file would go to the office of the Deputy Commissioner who would then take steps to execute the decree. Thus although the Act was passed in 2001, till date none of the properties has been reported to have been actually returned to its owner.

The problem of enemy property as it stands currently will probably exist for a prolonged period within the present legal and bureaucratic processes. The only plausible solution to this would be to create a stronger pressure group collectively with the representation from the civil society and rights movements, to break the chain of illegality and injustice that is being endured and practiced in Bangladesh in the name of 'enemy turned vested properties'.

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HUMAN RIGHTS RIGHTS ADVOCACY

To foster the status of ESC rights

MUHAMMAD OMAR FARUQUE

ACCORDING to the World Bank, Bangladesh has recently achieved a momentous hallmark of shifting its image of 'lower income country' to 'lower-middle income country'. Bangladesh graduated last year along with three other countries, i.e. Myanmar, Kenya and Tajikistan. We celebrate as the decades-old lower income stigma has come to an end with a remarkable improvement in higher per capita income coupled with a stable economic growth. By overcoming the fixed threshold of $1,045, Bangladesh maintained a per capita income of $1,080 to achieve this goal.

With this noteworthy advancement in the field of economics, question arises, how far Bangladesh is considering Economic, Social and Cultural (ESC) rights that were time and again neglected on the plea of so-called 'State's resource constraint'? How sincerely the government is reconsidering its pledge to a socialist society, free from exploitation by ensuring fundamental human rights, economic and social justice as set forth in the preamble of the Bangladesh Constitution after achieving unprecedented economic advancement? On this outset, sharing the same economic footing with three aforementioned countries, let us critically and comparatively analyse how far Bangladesh is pursuing these goals.

The Constitution of Bangladesh does not recognise some human rights like right to food, clothing, shelter, education and medical care as the 'fundamental rights'. While adopting the 1972 Constitution, it was practically done because in the 1970s the newly independent country lacked sufficient resources with fragile economy. However, it categorically accommodated all of the rights in the non-judicially enforceable part of 'Fundamental Principles of State Policy (FPSP)', specifically in Article 15. It has manifestly been mentioned that it is the State's responsibility to attain a steady improvement through planned economic growth with a view to securing such basic necessities of life.

However, the constitutional jurisprudence regards FPSPs akin to a number of goals, which the State tries to achieve one by one with its headway of economic capability. The State applies these principles as 'ideals' in making and interpreting laws and it revisits the principles to reconsider whether the State can afford any of the rights from the list, to upgrade its standard into judicially enforceable 'fundamental rights'. But the recent scenario of the Constitution is no short of a disaster leaving behind no room for such up-gradation of FPSPs into fundamental rights.

In the 15th amendment, by inserting Article 7B, the Parliament has restricted any kind of amendment (by way of insertion, modification, substitution, repeal or by any other means) in Part II of FPSPs, inter alia, leaving no scope open to upgrade any of the commitment mentioned in that Part.

Consequently, it will be impossible to seek economic rights 'as of right' even after achieving more economic solvency. If such status uplifting does not offer any 'advanced' guarantee of basic necessities, what would be the benefit for the marginalised people who do not even earn one third of our per capita? How will it mitigate, if not in large scale, the gap between classes of people in the journey of ensuring equality?

The countries that joined Bangladesh in the recent list seem far better in treating those socio-economic rights. Article 43 of the Kenyan Constitution (2010) has made the highest attainable standard of health, housing, adequate food of acceptable quality, and education being fundamental rights. And the State is bound to comply it as long as its resources permit (Article 20). Moreover, the State is obliged to give priority in allocating resources to ensure widest possible enjoyment of the rights to the marginalised. Otherwise, the State is bound to report the Court that the resources are not available. Undoubtedly, Kenya's approach is more humanistic in accommodating the rights with clear and unambiguous commitment.

The Tajik Constitution is one of the finest examples of ensuring basic human rights as judicially enforceable despite resource limitations over the years. They have ensured right to housing, free medical assistance and social security for old, ill, disabled people.

Though the jurists treat FPSP being a reflection of continuous journey of the State, the Bangladesh Constitution has turned it crippled and static that undermines the notion of Dr. Ambedkar, father of the Indian Constitution, who described FPSPs being novel feature of the Constitution!

Unless we can come up with a positive shift in 'rights assurance contents and processes' of socio-economic paradigm, attaining the status of 'lower-middle income country' would not benefit the poor.

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