"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 VISION

Making a case for Environmental Rule of Law in Bangladesh

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The global report on environmental rule of law (2019) reflects a sorrow state of enforcement of laws in Bangladesh despite the two hundred pieces of legislation that the country has on environment. The environmental law framework in Bangladesh fails to underscore the key elements of environmental rule of law in making, enacting, and enforcing laws concerning environment. Bangladesh ranked 162nd out of 180 countries in the 2020 Environmental Performance Index (EPI). As per the EPI report, Bangladesh scored only 29 out of 100 based on a range of sustainability indicators. The Environmental Democracy Index (2015), that tracks national progress in promoting environmental democracy in law and practice, designated the position of Bangladesh to 'fair or limited' in terms of enactment and practices of environmental laws.

Despite having quite a good number of environmental laws, there remain challenges in implementing them, including, among others, lack of specificity, procedural complexities, lack of accountability, partisan state machineries, and the absence of environmental consciousness among the common people. The environmental laws lack clarity in terms of their content and fail to integrate the concept of power to be exercised with responsibility within them. This write-up identifies the underlying factors that hamper the proper implementation of environmental laws as set out below.

Enormous power to the executive without responsibility

The environmental laws of the country make room for the exercise of enormous power by the executive authorities without assigning any responsibility and accountability for their failures. The Bangladesh Environment Conservation Act 1995, being the parent law concerning environment, provides ample power to the director general (DG) of the Department of Environment. The long list of functions by the DG does not have any accompanying liability in case of negligence or failure to perform the tasks mentioned. The ample power without any accountability leaves room for abuse that not only portrays the executive syndrome in law-making but also hampers the proper enforcement of the laws. The executive-centered law making also reflects the colonial legacy that Bangladesh bears in its law making till to date. Such wide and unfettered power also contradicts with the rule of law that envisions the absence of arbitrariness in the making and implementing of laws. It is apprehended in the context of Bangladesh that, the DG without being accountable, may go beyond the purview of the authority without being held accountable. While the executive has a vital role in enforcing laws, their performance has often been questioned that hampers institutional integrity.

Immunity of the implementing stakeholders

Most of the environmental laws contain saving clauses that provide safeguards to the implementing stakeholders if they commit any offences or fail to perform their roles duly. For example, section 18 of the Environment Conservation Act provides safeguards to the Government, Director General, or any other person of the Department for any action which caused or is likely to cause injury to any person, if such action is taken in good faith under this Act or rules; and in any event, no civil or criminal case or other legal proceeding may be instituted against them in connection with the so-called good-faith actions or omissions. The concept of good faith refers to acts done with due care and attention. The elements of due care and attention can only be measured by the subjective satisfaction of the authority. Such subjective satisfaction of the authority based on good faith clause may lead to abusive and discriminatory practices. The good faith clause may be used as a shield to justify their actions even if they commit any irregularities leading to malpractices and injustice to the environmental litigants. It is noted that the term good faith is so wide and vague that the extent of its application remains uncertain. The good faith clause also provides favourable treatment to the implementing stakeholders of the law which goes against the constitutional stipulation of equality before law. In our culture, where law is frequently used to serve the interests of the influential people, such kind of saving clauses may provide unchallenged room for exploitation primarily grounded in laws. Consequently, the ultimate objective of a law that is to serve justice remains unfulfilled which gradually leads to a culture of lawlessness.

The elements of environmental rule of law should be integrated in the domestic laws not only to combat the non-compliance of environmental laws but also to address the gaps between environmental laws on paper and in practices.

Barriers to access to environmental justice

The Environment Court Act 2010 that provides for judicial fora to settle exclusively environmental disputes, takes a restrictive approach to access environmental justice. According to section 6(3) of the Act, the Special Magistrate Court is barred to take cognisance of an offence except on the written report of an Inspector of the Department of Environment (DoE). Again, under section 7(4), the Environment Court is barred to receive any claim for compensation except upon written report of the inspector. However, the court can directly receive a case from private persons without such prior authorisation if the magistrate or the court respectively is satisfied that the inspector has not taken any necessary steps within sixty days of request by the aggrieved person. Alternatively, if there is reasons for taking cognisance of such complaint, the court or magistrate may, after giving the inspector reasonable opportunity of being heard, directly take cognisance of the offence or direct the inspector for investigation in appropriate case.

The careful reading of both the provisions indicate that the functioning of the environmental courts is dependent on the written report of an inspector of the Department of Environment since the primary responsibility to file a suit/ case and investigation thereof is vested upon DoE. It is noted that though the Environment Conservation Act 1995 allows person or group of persons to file suit for any grievance under the Act, the Environment Court Act has failed to recognise the common people's right of access the Environment Courts directly by requiring a non-judicial authorisation. In addition to the Environment Court Act, most of the environmental laws also impose bar in case of taking cognisance of environmental offence by the court while requiring permission of an executive body before going to the court. It is argued that such kind of bar restricts the access to justice of the environmental litigants. Such restriction contradicts with the equality protection clause and right to fair trial guaranteed under the Bangladesh Constitution. In the case of *Srikakulam Sravanthi* v. *Srikakulam Anasaravalli Kumar* (2018), two significant components of 'access to justice' have been identified which are: (i) strong and effective legal system with rights, enumerated and supported by substantive legislations; (ii) useful and accessible judicial/ remedial system easily available to the litigant public. Here it is argued that the environmental laws in Bangladesh fail to address both the components of access to justice while violating the norms of rule of law.

The implications of aforesaid provisions lead us to believe that the Act has curtailed common people's right to sue in such a way which might make them reluctant to come to the Court for environmental loss and damage. Reportedly, there are only 7002 cases pending before three environment courts of the country where only 388 cases have been filed under the Environment Conservation Act of 1995 (Prothomalo, March 13, 2021). While the judiciary is struggling with huge backlog of cases (3.7 million cases till 2020), the low frequency of environmental cases indicates an uneven situation. The intervention of the Department of Environment not only fails to redress the grievance of the environmental litigants effectively but also creates a bar to avail justice from the court resulting in poor disposal of cases by the environment court.

It will not be out of place to note that the Department of Environment is more interested in settling disputes through mobile court. During 2015-2020, the DoE filed 8756 cases through the mobile court. It is noted that the mobile court in most of the cases imposed fine only while punishing the accused with lesser penalty of not exceeding two years prescribed under the Mobile Court Act 2009. It is alleged that most of the polluters get themselves released while appealing against the mobile court decisions. A report by Bangladesh Law Commission referred that the sessions judge's courts,' being the regular judicial forum, have cancelled the judgments given by additional district magistrates of Dhaka on appeals against mobile court verdicts in 98 percent of the cases. This indicates the absence of due process and lack of application of judicious mind in deciding cases by the mobile court. The functioning of the mobile court has also been questioned by the High Court Division since it contradicts with the constitutional rights to fair hearing, due process of law, and natural justice. Considering the nature of environmental wrongs, the decision of mobile court is proven to be less effective with little impact on the prevention of environmental pollution. The above discussion indicates that the forum to avail environmental justice is not only restrictive and cumbersome but also ineffective and impractical while leaving a chunk of environmental offences unreported.

Why we need environmental rule of law

As per the first global report on Environmental Rule of Law by UN Environment (2019), the environmental rule of law refers to the adoption of fair, clear, and implementable laws that adhere to the principle of equality and non-discrimination, accountability to the law, participation in decision making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency. The core elements of environmental rule of law include: (i) law should be consistent with fundamental rights; (ii) law should be inclusively developed and fairly effectuated; and (iii) law should bring forth accountability not just on paper, but in practice. It is noted that environmental rule of law provides clear pathways to avail environmental justice and sets a framework for implementing stakeholders to act responsibly and behave sustainably. While complying with the environmental rule of law, it is submitted that all restrictions under the environmental laws of Bangladesh should be debarred for the common people to ensure their effective access and participation before the court. It is recommended that the case filing system be liberalised by permitting any person aggrieved including any representative body or organisation to bring a suit/case in the Environment Court directly without any intervening authority. The power of the executive authority should also be accompanied with responsibility while making them accountable in case of non-compliance. Lastly, the elements of environmental rule of law should be integrated in the domestic laws not only to combat the non-compliance of environmental laws but also to address the gaps between environmental laws on paper and in practices.

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GLOBAL LAW UPDATES

Climate litigation drags the UK government to court

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Recently, three UK students named Adetola Stephanie Onamade (23), Marina Tricks (20) and Jerry Amokwandoh (22), have sued the UK government for their action and/or inaction to effectively and convincingly act on the climate crisis. According to reports, the principal reason for this climate litigation is the belief that the UK government will not be able to meet the net zero goal by 2050 because the way the government has been supporting the carbon emitters of the economy, the figures can only be expected to rise. According to the students, a roadmap to reach this goal has not been sketched by the government and there remains a high possibility that they will fail to achieve the said target. Therefore, as Plan B (a legal charity) shall argue, this inability of the UK government to address the climate change is violating the students' human rights enshrined in the Human Rights Act 1998, particularly, the Students' rights to life, family life and the right not to be discriminated against, under articles 2, 8 and 14 of the Human Rights Act respectively.

This lawsuit has great similarity with the case *Family Farmers and Greenpeace Germany* v. *Germany* where three German families and Greenpeace brought a human rights lawsuit against the government for their inability to reduce GHG emissions by 40% (as promised). However, the court was hesitant to find that failure to meet such targets could constitute a breach of the human rights obligations.

Nevertheless, showing stark dissimilarity with the Farmers' case, young claimants of the case at hand, who come from regions such as Trinidad, Nigeria, and Ghana, are of the opinion that environmental harm is not shared equally by all countries and that, "Black, brown, indigenous communities are on the front end of this crisis." To a certain extent, these opinions and statements could not be truer because developed countries like the USA, who are responsible for almost 80% of global GHG emissions, are not being affected by climate change as much as the developing countries are being affected by the GHG emission that they were not even responsible for. Furthermore, on a number of occasions, developed countries like the UK have failed to honour their promise to cut down on shipments of plastic waste to developing countries indicating a lack of care for poorer countries and their environment (Karen McVeigh, The Guardian). Hence, it may be right to bring climate litigations as such, to hold those responsible for climate change accountable for their actions.

As of January 2020, 1,143 climate cases were filed in the USA, while 96 and 58 were filed in Australia and UK, respectively. While most claimants relied on constitutional and human rights laws to argue their cases, other cases fell under Private law, Company law-climate risk, and Planning and permitting. However, as much as these climate litigations are increasing every year, the success rate remains low. For example, Plan B, that argued a similar case in 2020 to prevent an extension of the Heathrow Airport, was unsuccessful. In that case, the Supreme Court was of the judgement that a third runway at the Heathrow would not be illegal, hence, planning permission could be sought.

Many would argue that the main reasons behind failure of such litigations are the lack of arguments delivered by the claimants to support their cases in court. However, it is felt that the main reason for such failures is the fact that courts may not be the right place to address climate change in the first place." Nevertheless, the landmark judgement given in the *Urgenda case* of the Netherlands in December 2019 gives some hope to those bringing climate litigations against governments as it "provides a clear path forward for concerned individuals in Europe – and around the world – to undertake climate litigation in order to protect human rights" (as per the United Nations (UN) High Commissioner for Human Rights, Michelle Bachelete). Particularly, this case has opened a new avenue whereby people have understood the use of multiple scientific reports and a science known as the Climate Attribution Science (CAS).

Essentially, CAS establishes the relationship between "anthropogenic emissions and specific extreme weather events". Therefore, development in this field will allow claimants to better identify and quantify the environmental impact of industrial projects, policies and laws. Furthermore, CAS can also be depended upon by people to show that not only can governments prevent climate change in their countries, but that the related extreme weather events can also be envisaged. This type of proof will become crucial in lawsuits arguing that corporations are failing to act in shareholders' best interests by failing to address the foreseeable threats imposed by the rising climate crisis.

Therefore, it may be safe to say that if Plan B can argue a clear case based on sufficient scientific reports and with reference to CAS, the students may successfully be able to sue the government for their negligence towards the current climate crisis. However, as mentioned earlier, previous records show that UK courts have always dismissed such climate litigations because according to them, UK has wide discretion to choose amongst the methods in which they wish to protect people's human rights.

Furthermore, replying to a pre-legal action letter delivered by the UK students, The Department for Business, Energy and Industrial Strategy has commented that such climate litigations are "pointless" because the UK government has in fact, published a roadmap to achieve the net zero goal by 2050 and is looking forward to publish a net zero strategy by November this year.

Be that as it may, if the students can successfully argue their case, it will be a landmark judgement like that of *Urgenda*and which will help the society achieve a greener environment for its future generations.

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