LAW OPINION

A RECENT INSTANCE OF JUDICIAL ACTIVISM

Few cautionary words

M SAQUIBUZZAMAN AND SAYERE NAZABI SAYEM

Judicial activism is a complex concept that can be both beneficial and risky. A few instances of judicial activism being truly beneficial are in order. In *Human Rights and Peace for Bangladesh v Bangladesh and others* (Turag River case), it was held by our High Court Division (HCD) that Turag River and all rivers in or flowing in Bangladesh will be considered legal entity. Similarly, in another instance, the HCD held pharmaceutical companies accountable by issuing a writ of mandamus to ensure service standards and reform medical care.

However, at times, the objectives of the Court may become challenging to decipher. An example is the case of *Islam Prodhan* v *Bangladesh, 75 DLR (2023) 1,* which addressed 'delayed' appeals filed under the labour law.

The HCD remarked, *"[t]he law and the Rules [..] give a clear picture that an appeal filed before the Labour Appellate Tribunal under section 217 has to be read with 219 (gha) which clearly prescribed that appeal if be filed out of time the reasons for delay must be stated with a prayer for condonation of the delay [..]."*

Admittedly, the decision has been taken with a noble intention of allowing delayed appeals of workers (submitted with a prayer for condonation of delay) before the Labour Appellate Tribunal. In a densely populated country such as ours, where access to justice is a significant concern for the rule of law, the decision *apparently* sets a refreshing example of judicial activism.

But concerns arise when the clear language of the law conflicts with the Court's interpretation. Section 217 of the Labour Act 2006 (BLA) clearly mentions that appeals must be filed within 60 days and no scope for condonation of delay is mentioned in the provision. In contrast, the Court, by interpreting several provisions of the Act and the 2015 rules, observed that condonation of delay beyond the time-limit mentioned in section 217 is in fact allowed. However, the authors submit that while it might be tempting to interpret the law differently, the judiciary ought to restrain itself in doing so.

Notably, the judgment indicates that section 5 of the Limitation Act 1908 applies to appeals under section 217. However, the Labour Act refers to the Limitation Act only in sections 135 and 172. As such, it is submitted that section 219 (gha) deals with condonation of delay *only* for appeals under sections 135 and 172 of the BLA, and not section 217.

Although *Islam Prodhan* is a relatively new judgment, it has been relied upon by a judgment passed on 28 February 2024 too, in *Writ Petition No. 1895 of 2023.* Hence, discussion on this matter is important as it is crucial to settle if *Islam Prodhan* offers the correct interpretation of the law.

In this connection, the case of *Jumma Masjid* v *Kodimaniandra* may be considered, where the Court refused to read an exception into the Transfer of Property Act 1882. The judgement referred to Lord Loreburn's opinion from *Vickers* v *Evans* (1910), where he said, "*we are not entitled to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself.*" Even domestic cases like that of *Md. Ismail* v *the State* 21 DLR (SC) 161, *Amin Jute Mills* v *Bangladesh* 29 DLR (SC) 85, *S.N. Kabir* v *Fatema Begum and Ors.* 15 BLC 585, and many others comply with the said rule.

Keeping that in mind, it is submitted that the judgments are presumably always expected to comply with the existing provisions of the laws as they are. Addressing gaps should only be considered by the legislature and amended accordingly, if at all needed.

The writers are Partner and Research Associate of Tanjib Alam and Associates, respectively.

LAW AND WAR

Environmental protection during armed conflicts

MD. NAFIS ANOWAR SANTO

The relationship between environmental protection and armed conflict is 'bi-directional'. The concern lies not only with how international law applies to military activities and their environmental effects, but also with how environmental risks can escalate threats to peace and security. This write-up aims to highlight the important rules in international law relating to environmental protection in armed conflicts.

Starting with the 1982 World Charter for Nature, which took a more general stance, asserting that nature must be protected from harms resulting from war or other hostile actions. It clearly states that military operations that are harmful to the environment should be avoided. Next, Principle 24 of the 1992 Rio Declaration can also be interpreted either as requiring states to respect existing international legal protections for the environment during armed conflict or as mandating active environmental protection per international law during such times.

The 1997 UN Watercourses Convention takes a distinct approach by explicitly referencing international humanitarian law. Article 29 states that international watercourses and related infrastructure must be protected following the principles and rules of international law applicable to both international and non-international armed conflicts.

Similarly, the International Law Commission (ILC) addressed whether environmental and other treaties remain valid during armed conflict in its 2011 Draft Articles on the Effects of Armed Conflict on Treaties. According to Article 3, the ILC affirms that armed conflict does not automatically suspend or terminate the operation of treaties. Consequently, the Draft Articles generally presume that environmental treaties remain in effect during times of war, unless a treaty explicitly states otherwise.

In fact, it is now a well-accepted principle of international law that the methods and means of warfare are not unlimited. They are restricted to activities necessary to achieve legitimate military objectives, must prevent unnecessary suffering and superfluous injury, and must comply with international law. This general prohibition also extends to prohibition against harming the environment. For instance, the 1996 Draft Code of Crimes against the Peace and Security of Mankind classified a war crime to include, among other acts, the use of methods or means of warfare that are intended or likely to cause extensive, long-lasting, and severe harm to the natural environment.

Moreover, the first treaty to establish specific rules for environmental protection from the consequences of military activities was the 1977 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques. This Convention aims to prevent the use of the environment as a means of warfare by prohibiting the deliberate manipulation of natural processes to produce phenomena such as hurricanes, tidal waves, or climate change. It prohibits parties from using environmental modification techniques for military or hostile purposes if such use results in widespread, long-lasting, or severe effects intended to cause destruction, damage, or injury to any other party.

Not to mention, the 1977 Additional Protocol I to the 1949 Geneva Conventions contains two explicit obligations aimed at protecting the environment, which may now reflect binding norms of customary international law. Article 35 prohibits the use of methods or means of warfare intended or expected to cause widespread, long-term, and severe damage to the natural environment. Similarly, Article 55 states that during armed conflicts, efforts must be made to safeguard the environment from such damage. This includes a ban on methods or means of warfare intended or likely to cause such harm, and that may endanger the health or survival of the civilian population. Article 55 also prohibits reprisals against the natural environment.

In addition to the specific provisions of international law, some examples of real-life incidents may clarify the matter more. For instance, the Iraq's invasion of Kuwait in August 1990 prompted the UN Security Council to consider, for the first time, state responsibility for environmental harm caused by unlawful military actions. In Resolution 687, Iraqi accountability was underscored under international law for, among other things, environmental damage and the depletion of natural resources resulting from its illegal invasion and occupation of Kuwait. Similarly, in February 1993, the UN General Assembly adopted a resolution affirming that wanton environmental destruction, when not justified by military necessity, clearly violates international law. Lastly, a significant recent development was the 2022 Draft Principles on the Protection of the Environment in Relation to Armed Conflicts. These principles aim to protect the environment before, during or after an armed conflict, as well as during occupation.

International law plays a crucial role in mitigating the environmental impacts of armed conflict by establishing legal frameworks and principles that protect ecosystems during wartime. The continued development and implementation of international legal norms are essential to ensure that environmental protection becomes an integral part of conflict resolution and peacebuilding efforts.

The writer is an LLM Candidate, University of Dhaka.

LAW VISION

Thinking about an 'ecocide' law

SABRINA SADIA RIA

The crime of 'Ecocide' has been proposed to be considered as the fifth international crime, along with genocide, crimes against humanity, war crimes, and the crime of aggression in the Rome Statute of the International Criminal Court by an expert panel in 2021. The proposed definition is *"unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts."*

An orgnanisation "Stop Ecocide International" urged that any state or group of states that has ratified the Rome Statute may propose an amendment to incorporate the crime of ecocide. In December 2019, the Republic of Vanuatu urged all states parties to consider adding a fifth crime of ecocide to the Rome Statute. On 20 June 2021, the then Bangladeshi Parliamentary Committee on the Ministry of Environment, Forests and Climate Change recommended drafting a new legal framework to codify ecocide, contemplating ecocide as destructive to humankind as genocide.

Now the crucial question arises, while Vietnam, Uzbekistan, France, Russia, Belgium, and a few other states have existing ecocide laws,

and similarly, Mexico, Netherlands, Italy, Brazil, UK have proposed the same, do Bangladesh need a separate ecocide legal framework? Prior to answering, a review of the existing environmental laws of Bangladesh is needed.

First, the Bangladesh Environment Conservation Act 1995 prohibits the cutting or razing of hills and filling or destroying wetlands. However, with an indistinct exception for "essential/ indispensable national interest", these prohibitions can be mitigated by the Government, ostensibly and statutorily legalising ecocide. For injury to ecosystems, civil liability lies based on the polluter pays principle (PPP) under the Act. In case of failure of payment, the Director General (DG) may file a compensatory claim suit or file a criminal case. The same Act also has some penalty provisions, but only for non-compliance with and violation of the legal directions. However, it is submitted that the penalties are not sufficient when the gravest harm in the nature of an ecocide is caused to the environment, since the penalties follow a range of imprisonment for a minimum of one year and a maximum of ten years, with or without fines. Notably, the Environment Court Act 2010, only provides the legal and jurisdictional procedures, and mechanisms for environmental justice processes.

Furthermore, the Wildlife (Conservation and Security) Act 2012, is the core legislation aimed at protecting biodiversity, forests, and wildlife. It lays down some punishment for destructive acts concerning wildlife conservation and protection. Notably, the Bangladesh Biodiversity Act 2017, was enacted after ratifying the Convention on Biological Diversity (CBD) in 1994 and provides sanctions as well to protect the biodiversity.

On the other hand, laws on marine environmental protection are even more insufficient as the Marine Environment Conservation Act has not been passed yet, although drafted in 2004. We do have the Bangladesh Water Act 2013, which provides directions for the preservation and protection of water resources and prescribes penalties for the perpetrators. The Protection and Conservation of Fish Act 1950 (East Bengal Act) and the Marine Fisheries Act 2020, are not enough to punish the perpetrators whose actions, intentionally or unintentionally, enormously imperil the marine environment.

Lamentably, the above-mentioned enactments are not adequate to combat ecocide. Therefore, ecocide needs international recognition in the Rome Statute, and Bangladesh needs an ecocide law to safeguard its environment.

The writer is official contributor and a student at the Department of Law, University of Dhaka.