

Environment and Sustainable Development in Bangladesh: A Legal Study in the Context of International Trends

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Abstract

This paper attempts to focus on environment and sustainable development in Bangladesh. The research will be based upon theoretical sources and empirical data. An environment is a set of natural, artificial or man-made, physical, chemical and biological elements that make the existence, transformation and development of living organisms possible. The appearance of the environmental law arose from the need to conserve the environment in order to avoid its destruction and, as a result, the danger that an adequate quality of life might disappear. By conservation we understand all those measures that are necessary to preserve the environment and natural resources. In modern times human development corresponds to the concept of sustainable development and environment. It is a transverse theme derived from joint consideration of the issue of the environment and environmental protection, and of all that concerns production in the development of a country or nation. It is a noble journey to make the constitution a weapon in as much as the environment should be fit for human development so that productive activities may meet present needs without compromising those of future generations. The environment is an independent value and needs as strict protection as other commonly agreed values such as the right to property or the right to life and health. The principal objectives are to study:- To explain come to an understanding of origin and growth as to the concept of environment and sustainable development in domestic and international laws and to show the rationality of enlisting the right to the environment as a basic right in the constitution that would help to protect this value from the detrimental activities of private entities and also states and also to show the rationality of institutional development

Keywords: Environment, Sustainable Development, Bangladesh, International, public interest litigation, Legislative Framework

Introduction

Nature is the common heritage of mankind to preserve this heritage mankind must make constant efforts. Pollution marks the man's failure to do so. Man's greed attacks nature, environment and ecology and wounded nature back lashes on the force (Krishna Iyer) An environment is a set of natural, artificial or man-made, physical, chemical and biological elements that make the existence, transformation and development of living organisms possible. An ecosystem is a basic unit of interaction of living organisms with each other and with the environment in a particular space. An ecosystem constitutes essential element in the environment, and therefore all ecosystems received legal regulation in the law of natural resources. The appearance of the environmental law arose from the need to conserve the environment in order to avoid its destruction and, as a result, the danger that an adequate quality of life might disappear. (Rostron and Jackson, 2001)By conservation we understand all those measures that are necessary to preserve the environment and natural resources. In modern times human development corresponds to the concept of sustainable

development and environment. It is true that the conception of ideal development converge with environmental, economic, social and cultural factors. (Bass, 2005) It is a transverse theme derived from consideration of the issue of the environment and environmental protection, and of all that concerns making in the development of a country or nation. Endeavours to relate environment to constitution or legal connotation together with development is a mark of a new cycle in achieving sustainability of a country's model of development. (Richardson and Christine Bae, 2005) It is a noble journey to make the law a weapon in as much as the environment should be fit for human development so that productive activities may meet present needs without compromising those of future generations. The environment is an independent value and needs as strict protection as other commonly agreed values such as the right to property or the right to life and health. Hence the objectives of this article are:-

- (i) To explain the origin and growth as to the concept of environment and sustainable development in domestic and international laws;
- (ii) To show the justification of considering the right to the environment as a basic right in the constitution that would help to protect this value from the detrimental activities of private entities and also states;
- (iii) To show the rationality of institutional development in this issue

Historical Expedition of a Universal Concept

Sustainable development is to harmonize the fulfillment of human needs with the protection of the natural environment so that these needs can be met not only in the present, but in the indefinite future. The World Commission on Environment and Development (WCED) in 1987 released the Brundtland Commission Report, title being "Our Common Future", which placed the concept of sustainable development on the international agenda, where it was envisaged that human survival and well being depends on succeed in elevating sustainable development to global ethic (World Commission on Environment and Development, 1987) The connection between environment and development was first made in 1980, when the International Union for the Conservation of Nature published the World Conservation Strategy and used the term sustainable development. The concept came into general usage following publication of the 1987 report of the Brundtland Commission (former the World Commission on Environment and Development). Having been set-up by the United Nations General Assembly. According to Brundtland Report sustainable development is defined in the following manner: "sustainable development is development that meets the needs of the present generation without compromising the ability of future generations to meet their own needs." This set out two fundamental principles of intergenerational and intragenerntional equity and contains the two key concepts of needs and limits

(I) The concept of needs in particular, the essential needs of the world are poor to which overriding priority should be given.

(II) the idea of limitations imposed by the state of technology and social organization on the environment's ability to meet present and future needs.

Sustainable development has rapidly become past of popular concept. However, there are substantial controversies as to how to translate it into practice and develop standards as indicators to assess whether it is being achieved. It has been suggested that the core of mainstream sustainability thinking has become the idea of three dimension: environmental sustainability, social sustainability and economic sustainability (Arvind, 2007) Sustainable development is a metafix that will knife every body from the profit minded industrialist and risk minimizing substance farmer to the

equity, seeking social worker, the pollution concerned, the growth maximizing policy maker, the goal oriented bureaucrat, and therefore, the vote counting politician(Lele,1991)The common among these interpretations is the multi dimensional nature of sustainable development.It has been increasingly recognized that a comprehensive approach to sustainable development should encompass environmental sustainability(requiring development to be based on biotic capacity and minimal non,renewable resources),economic sustainability means (implying the impossibility of never ending economic achievements based on natural resources and the need for incorporating environmental costs into consumer prices),social sustainability highlighting the need for citizen participation in environmental governance and cultural sustainability emphasizing changes based on core cultural values and acceptance of cultural differences. (Haque,1999)

To put the word in the path of sustainable development, The United Nations Conference on Environment and Development (UNCED) popularly known as Earth Summit was the most important and largest UN conferences ever held.

The Major achievements of Earth Summit are the following document: Towards achieving sustainable development the Rio Declaration states that "Human beings are at the center of concern for sustainable development and are entitled to a health and productive life in harmony with nature.The principle of state responsibility is reiterated in principle 2 which is based on the Roman maxim *sic utro et alienum non caedas* (one must use his own right so as not to injure others)which means that do not behave in a way that hurts your neighbour is a guiding principle for preventing pollution and environmental damage between nations.This doctrine has been recognized and reiterated by the International Court of Justice in the case principle 3 states right to development and integration of environmental protection and development as significant principle of Sustainable development and affirms the spirit of global partnership and the precautionary principle and polluter pays principle It calls upon the states to develop nations laws regarding liability and compensation for victims of pollution and other environmental damages and envisages the Environmental Impact Assessment (EIA) as a national instrument in matters which adversely affect the environment Thus this declaration guides the behaviour of nations towards sustainable development.

The convention on Bio-Diversity and the Convention on climate change both recognize the interdependence of humanity and the entire natural world and envisage a holistic approach to environment protection

The preservation of the environment becomes a reality of day. Insertion of the environment into development creates a new concept to introduce environmental factors. Environmental sustainability is the ability of the environment to keep it up for proper functioning indefinitely. This involves meeting the present needs of humans without doing any harm to the welfare of future generations. The aim of environmental sustainability is to minimize environmental degradation, and to stop and reverse the processes they lead to. An unsustainable situation takes place when natural capital (the sum total of nature's resources) is used up faster than it can be replenished. Sustainability requires that human activity only uses nature's resources at a rate at which they can be replenished naturally.

Theoretically, the long term result of environmental degradation would be local environments that are no longer able to sustain human populations to any degree.Such degradation on a global scale could imply extinction for humanity.(Krishna Iyer, 1999) Sustainable development does not focus solely on environmental issues. In wider sense sustainable development policies comprises three general policy areas: economic, environmental and social. In support of this, several United Nations texts, most recently the 2005 World Summit Outcome Document, refer to the

"interdependent and mutually reinforcing pillars" of sustainable development as economic development, social development, and environmental protection.

The Universal Declaration on Cultural Diversity elaborates the concept by stating that "---- cultural diversity is as necessary for humankind as biodiversity is for nature", it becomes "one of the roots of development understood not simply in terms of economic growth, but also as a means to achieve a more satisfactory intellectual, emotional, moral and spiritual existence". In this vision, cultural diversity is the fourth policy areas in the sustainable development.

Sustainable Development is not an abstract concept but still remains a bit ambiguous one, as a huge number of views come under its shadow. The concept has included notions of weak sustainability, strong sustainability and deep ecology. Different conceptions also reveal a strong tension between ecocentrism and anthropocentrism. Thus still the concept remains vague in terms of definition and contents and contains debates as to its precise definition. (Razzaque, 2002)

Over the past few decades numerous incredible and devastating events have focused the domestic and global attention to the impending danger of environmental devastation, the depletion of resources and a massive extinction of species issues as such climate change, trends in global warming, ozone depletion and massive deforestation, desertification, toxic wastes and loss of biological diversity have resulted in increasing global awareness of the problems facing the planet earth. The global concern has been aptly echoed in the preamble assertion made at the Earth Summit in the year 1992. Even the 1992 Rio Declaration of the UN environment programme adopted a more nuanced approach, where 1997 Nairobi Declaration refers to International Environmental Law aiming at sustainable development (Brimine and Boyle, 2002).

Environment From Legal Viewpoint

Environmental law comprises those substantive, procedural and institutional rules of international law which have as their primary objective the protection of the environment. Dictionaries define environment as the objects or the region surrounding any thing. (Murray *et al*, 1991) Accordingly the term encompasses both the features and the products of the natural world and those of human civilisation. At international level, for the first time, the United Nations Conference on human environment held at Stockholm in 1992 distinctly elucidated the concept of environment. It recognized that the environment is not limited to water, air, soil and wildlife etc which needs protection, but also includes factors deteriorating it like poverty, under development, urbanization, deforestation, population explosion and analyzed the inter-relationship between people, resources environment and development (Dhyani, 1993) the Stockholm Conference gave a dynamic and purposive meaning to environment, broader than ecology which was mainly used with reference to air, water, soil, planet and wildlife. Attempts were made at national and international level to integrate society science, technology, development and law for the well being of the mankind giving rise to a new environmental jurisprudence. In 1989, the need for establishing the effective decision making and enforcement machinery to safeguard earth's atmosphere from hazards human activities was emphasized in the Haque Declaration on Environment. United Nations Environment Programme (UNEP) the principal United Nations body in the field of Environment.

During World Climate Conference, (1997) in Kyoto Protocol necessitated the industrialized nations to lessen their average yearly emission of green house gases to save the earth from potentially shocking global warming. In 2002 during Malmo Ministerial Declaration role of private sector and non government was highlighted so as to create better institutional and regulatory

capacities to build a human, impartial and helpful global society cognizant of the need for human dignity for all.

With emphasis coming from international scenario and due to increasing awareness, rationalization of impact and the severity of pollution and environmental degradation, many countries of the world have taken this area with utmost seriousness. States have started overhauling their internal regulatory mechanisms for maintaining and controlling environment pollution. Some of the states have established specialized courts to meet the urgent and emergent need of the hour to provide environmental justice in each and every case dealing with newly emerging various kinds of environmental wrong

Declaration as to environment, as being common heritage of mankind has brought with it the need to determine its legal form of protection, both internationally and nationally. The concerning law first appears internationally as one of the basic contents of the 1972 Stockholm Declaration of the United Nations Conference on the Environment. In the thirty eight years since it was proclaimed, the subject has undergone enormous changes, but the most fundamental elements of the issue are concentrated in this general declaration. Its analysis is a departure point for the formulation of the different problems posed by the consecration of the right to a suitable environment. As we understand them these definitions and their logical consequences are significant incorporation to the national constitution in the way of environmental promotion and protection. This has happened in different parts of the world. Constitutional sanctions in different parts of the world since the primary recognition under international law have consecrated the protection of the environment that begun in Stockholm.

The contents are completed with the World Charter on Nature (UN, 28/10/82), an international document detailed the obligations of states and various other authorities, groups and individuals. However, the obligatory nature of these principles is accompanied by regional instruments, of which we wish to highlight the following:

- (i) The African charter on the rights of man and peoples (1981), whose art. 24 express that: "All peoples have the right to a satisfactory and global environment which is suitable for their development".
- (ii) The Additional Protocol to the American Convention on Human Rights, whose art. 11 reads: "Right to a healthy environment. 1. Every person has the right to live in a healthy environment and to enjoy essential public services. 2. The contracting States commit themselves to promoting the protection, preservation and improvement of the environment".

Environment Under The Constitutional in Bangladesh

Bangladesh has adopted constitutional rights to protect the environment and human rights like India, and Pakistan. The right to life, a fundamental right, has been extended to the right to a healthy environment. The right to healthy environment has been incorporated, directly or indirectly, into the judgments of the court. In India the nation have taken responsibility to protect and preserve the ecosystem. This is a part of the directive principles of state policy and not a fundamental right. The Constitution of Bangladesh and Pakistan does not provide any direct protection of the environment. But the fundamental right to life has been explained to include, *inter alia*, right to liberty, livelihood, healthy/clean environment or protection against degrading treatment. Two more constitutional rights, the right to equality and right to property, have been

analysed to determine their application in the protection of the environment and human rights. (Razzaque,2002)

The Right to Life Entails Protection and Promotion of Healthy Environment

The fundamental rights, the preamble or the state policies of Bangladeshi constitution do not clearly provide for the right to healthy and clean environment. But Article 31 of the Bangladesh Constitution provides that 'every citizen has the right to protection from 'action detrimental to the life liberty, body, reputation, or property', unless these are taken in accordance with law. It added that the citizens and the residents of Bangladesh have the inalienable right to be treated in accordance with law. If these rights are taken away other than legal process, compensation must be given. Article 32 stated that, "No person shall be deprived of life or personal liberty saves in accordance with law". These two articles together incorporate the fundamental 'right to life'. This concept 'right to environment included in the right to life' has come up in a public interest litigations taken place in the discussion, debate and demnad after long time we adopted the constitution.

Dr. M. Farooque v. Secretary, Ministry of Communication, Government of the People's Republic of Bangladesh and 12 Others was brought before the Supreme Court as Public interest litigation that dealt with air and noise pollution in 1994. The Supreme Court accepted the argument presented by the petitioner that the constitutional 'right to life' does extend to include right to a safe and healthy environment. Public interest litigation (PIL) for environmental protection has assumed great importance today, in the context of a global movement for the preservation of the environment – remarks Mr. Justice Umesh Chandra Banerji of Indian Supreme Court.

In Bangladesh, public interest litigation has proved itself to be the most effective one of all the environmental protection is a constitutional remedy and is invoked under Article 102 of the Constitution by filing a writ petition. environmental protection through PIL is a very recent development in our legal system. PIL on environmental issues are called public interest environmental litigation (PIEL). The first PIEL has been the *Dr. Mohiuddin Farooque V Bangladesh*

In this case the Supreme Court has recognized the right of 'any citizen' or any voluntary organization acting for citizen to file a writ petition seeking remedy where a public injury has been caused. This has opened a new avenue in the era of environmental law. Here the Court liberalized the concept of locus standi, o as to avoid social; catastrophe. Frequent resorts may be taken to PIL for environmental protection. Need it be mentioned that PIEL is an additional remedy of writ remedy available a 'person aggrieved'

"Articles 31 and 32 of our constitution protect right to life as a fundamental right. It encompasses within its ambit, the protection and preservation of environment, ecological balance free from pollution of air and water, sanitation without which life can hardly be enjoyed. Any act or omission contrary thereto will be violative of the said right to life."

The High Court Division in the same case explained 'right to life' in light of anything that affects life, public health and safety. The Honorable High Court expressed the view that right to life includes the enjoyment of pollution free water and air, improvement of public health by creating and sustaining conditions congenial to good health and ensuring quality of life consistent with human dignity.

Actually the courts are willing to establish the right to a clean environment. In the case of *Khushi Kabir and others v. Government of Bangladesh and others* the High Court Division deals with commercial shrimp cultivation and its adverse effect on the socio-economic development and on sustainable development. Shrimp cultivation will cause irreparable ecological and environmental damage to the community and to the livelihoods of the inhabitants of Khulna, The petitioners argued that the government orders regarding commercial shrimp farming frustrated the spirit of Environmental Policy 1992 and breach of article 32 of the Constitution. The petition alleged that if the area under Polder 22 is allowed for shrimp cultivation that would create environmental problems.

Equality before Laws: A Supportive Principle

The Constitution of Bangladesh provides that all are equal before the law and shall be accorded equal protection of the law. Equality before law means that, among equals, law shall be equal and shall be equally administered. There shall not be any special privilege by reason of birth, creed etc. (Mahmodul, 2006) Equal protection of law means that all persons in like circumstances shall be treated alike and no discrimination shall be made in conferment or imposition of liabilities. Equality before law is involved in the enforcement of law, while equal protection of law involves the validity of law but these are not independent or severable concepts in their application and will often be found to overlap each other

Article 27 of Bangladesh Constitution states that all citizens are equal before the law and are entitled to equal protection of law. The principle requires that no person or class of persons shall be denied the same protection of law which is enjoyed by other persons in like circumstances in their lives, liberty and property and pursuit of happiness Right to equality along with the right to life can guarantee the right to a healthy environment.

Article 27 does not guarantee absolute equality requiring the law to treat all person alike The principle of equality does not mean equality of operation of legislation upon all citizens of the state .All persons are not alike and nothing can be greater inequality than to treat un equal as equal. However, there is no application of this fundamental right for the protection of environmental human rights. It is unlikely that this provision will be used on its own; but could help to strengthen a claim based on the right to life or the right to property. According to the Indian Constitution, article 14 provides that, 'The State shall not deny to any person equality before the law or the equal protection before the laws within the territory of India.' If article 14 is infringed, it can have an impact on the environment and human rights. The urban environmental group frequently takes resort to article 14 to quash 'arbitrary' municipal permissions for construction that are contrary to development regulations. Article 14 can be used to challenge government sanctions for mining and other activities with high human rights and environmental impact, where the permissions are arbitrarily granted without adequate consideration of environmental impacts (Razzaque,2002⁹). In article 25 of the Constitution of Pakistan deals with right to equality. It states that all citizens are equal before law and are entitled to equal protection of law and that there shall be no discrimination on the basis of sex alone.

Right to Property Could Be Used as a Potential Tool

Right to property, another fundamental right indicates that an owner is entitled to non-interference in the enjoyment of his property in any lawful manner, in particular, non-interference by the

Government. Because of the restrictive nature of this right, it has not been used by the court to protect environment. The individual right guaranteed through the Constitution is a private property right. The owner has the overall ownership over the land. Property right begins where the government's right to interference ends. Article 42 of the Constitution of Bangladesh provides that subject to any restriction imposed by law, every citizen shall have the right to acquire, hold, transfer or otherwise dispose of the property.

In India, the right to property was formally removed from the fundamental rights in 1979. This right is now protected by article 300A of the Constitution and does not have the same procedural remedies of other fundamental rights. In article 23 of the Pakistani Constitution provides that 'every citizen shall have the right to acquire, hold and dispose of property in any part of Pakistan, subject to the Constitution and any reasonable restrictions imposed by law in the public interest'

It is very much clear that the constitutional definition of property is restricted and specified. The concerning right provides that no property shall be compulsorily acquired, nationalised or requisitioned except by lawful authority. The restriction put on the right to transfer property has to be reasonable in order that the Parliament would not have unfettered power to impose any restriction it chooses. In spite of the traditional approach of this right, there is a scope of applying this provision effectively in the protection of the environment. Though property right has not been considered thoroughly in any public interest cases, this right could be used for the protection of the environment and for sustainable development.

Enforcement Mechanism Under Legislative Framework: Substantive and Procedural Aspect

The national legislations of Bangladesh concerning human rights and the environment are dealt with by separate legislation. It is notable that framework environmental legislation in recent times gave importance on human health and safety aspect and sustainable development. The universal environmental framework laws tend to establish and to charge a competent national authority to provide more specific strategy and regulations in future. In Bangladesh, these framework laws deal with water and air pollution and regulate, to certain extent, hazardous waste.

In Bangladesh, the ideal example of framework law is the recent Bangladesh Environment Conservation Act 1995. This Act was enacted to provide for conservation and improvement of environmental standard and to control and mitigate pollution of the environment. The Act combines the precautionary approach as well as the polluter pays principle. In cases of discharge of excessive pollutants, the expenses incurred on remedial measures to control and mitigate environmental pollution could be recovered from such person as the public demand. The Environmental Conservation Rules 1997 determine the standards of air quality, water quality, noise quality, motor vehicle exhaust quality and sewer and waste discharge quality. The rules and procedures of environmental impacts assessment (EIA) are also guided by the Environment Conservation Act 1995 and the Rules of 1997.

Implementation of framework laws is not promising as the pollution standards are being laid down by various government agencies. Moreover, the agencies are in charge of implementing it, not the aggrieved citizens. Only in limited cases, citizens have access to justice through environmental legislation. For example, in Bangladesh, the committee of Environment has identified some 903 polluting companies in 1989. However, no action was taken against them. (Ullah, 1999) Similar is the case of river encroachment and public park encroachment where the cases are pending before the court.

Procedural Right: Inadequate Remedies

Environmental pollution in the trial information and public participation in the decision making is limited in Bangladesh with several regulations guiding the procedures of environmental impact assessment. Some provisions in the framework legislation deal with access to environmental information. There is no general responsibility of the state to collect environmental information. The most common remedies that are offered by the court are directions, injunction and civil and criminal damages. The judiciary in Bangladesh initiated suo motu action in at least one case related to human rights. The judiciaries of some other nations has made several successful directions to create experts and special committees in several environmental litigation. There is ample opportunity for the judiciary of Bangladesh make a similar sort of innovative direction in human rights and environmental cases.

Common Law Remedies

Most of the environmental wrongs fall under the purview of torts-laws. Man made environmental hazards are the result of negligence or trespass or they are based on the doctrine of nuisance. Thus a suit for compensation may be brought for environmental wrongs by invoking the common law principles of negligence, nuisance, strict liability, vicarious liability and trespass. But regrettably enough, in our legal system, hope for remedy under tort laws is often bound to be frustrated.

Statutory Remedies

Environmental pollution on the nature of private nuisance can be prevented under the codified tort principles in Bangladesh. Environmental wrongs may be redress by invoking section 91 of the Code of Civil procedure 1908 which provides that a suit for declaration or for injunction or for other appropriate relief may be instituted by the attorney general

or with his consent, by two or more persons for removing a public nuisance or any other wrongful act affecting or likely to affect the public. This section encourages community proceedings and is very simple to invoke. But it is also of less use in Bangladesh so far as the environmental protection. However, one may also get relief against environmental wrongs under sections 133 and 144 of the Code of Criminal Procedure 1898, (Cr.P.C). Section 133 empowers a magistrate to issue a conditional order for removal of nuisance. India has made very successful and landmark use of this section for the protection of the environment. In a case brought under this section of Indian Cr.P.C, The Supreme Court of India affirmed the citizen right to get a public nuisance removed and directed the municipality (wrong doer) to stop affluent of the alcohol plant from flowing into the nearby street. Similarly, we can also make a good use of this section on environmental issues. On the other hand, section 144, of the Code of Criminal Procedure (Cr.P.C) empowers the court to issue order absolute at once in urgent cases of nuisance or apprehended danger.

Furthermore, under sections 52 to 55 of the Specific Relief Act 1877 together with order 39 rules 1 and 2 of Code of Civil Procedure, steps for temporary injunctions can be taken in order to prevent environmental pollution, committed already or to be committed in future.

The Penal Code 1860, (as amended from time to time) is not an environmental legislation but it is providing punishments for environmental crime since nearly one and half century. It provides punishments for the following acts as specified in the law:

- (1) Whoever voluntarily vitiates the atmosphere in any place so as to make it noxious to the health of persons in general, dwelling or carrying on business in the neighborhood or passing along a public way
- (2) Whoever voluntarily corrupts or fouls the water of any public spring or reservoir so as to render it less fit for the purpose for which it is ordinarily used.
- (3) Sale or offer for sale of any article of food or drink which has been rendered noxious and adulteration of articles of food or drink intended for sale.
- (4) Public nuisance meaning any act or omission which causes any common injury, danger or annoyance to the public.
- (5) Adulteration of drugs or medicines so as to lessen their efficacy or to make it noxious and also sale of such drugs or medicines.

Locus Standi: Still Poses Uncertainty

If the application is placed before the court in the nature of public interest, the most important question for the court is to decide whether the applicant should be allowed access to the judicial process. The Bangladeshi courts apply 'aggrieved person' test, which means a right or recognized interest that is direct and personal to the complainant. The Constitution of Bangladesh does suggest a specific test to determine standing in writ petitions. Although in the 1990's, the judiciary of Bangladesh offered a liberal view of standing, there is no guideline for public interest cases. The uncertainty regarding who may or may not have standing could cause particular controversy. It could lead to very expensive litigation over mere procedure when the resources could be better spent on the merits. There may be groups, not having the relevant relationship, but with a more general objective, that may seek to undertake the litigation. The uncertainty in the nature of this test makes it difficult to have homogeneity in the PIL decisions. There is no clear and practical guide for identifying the cases in which a particular interest will give standing to a plaintiff to complain. This adds to the length and cost of the litigation. (Razzaque, 2002a)

Legal Aid: Could Play A Shining Rule

In Bangladesh, the Legal Aid Act 2000, dealing with legal aid, contains nothing on the protection of environment, human rights or even on public interest litigation. However, it mentioned that legal assistance would be offered to those having socio-economic problems. However, no legislation is there to guide such legal aid. Legal Aid is given in the case of civil, criminal and family matters to render justice to the people facing economic and social constraints. In the environment cases we also see that the general people are not able to prevent pollution and like activities harmful for public health and so on even in many cases the people are being deprived of legal counsel and remedy for financial impediments. It is obviously right that most of the efficient lawyer are out of reach of the people. In the above circumstances the fruits of the legal Aid should be utilized for the environmental protection.

Human Rights and Right to Environment: Overlapping Phenomena

Human rights are rights rooted appeal to human nature that which all human being have simply because they are humans. Human rights are those of legal and moral rights which can be claimed by any person for the very reason that he is a human being. These rights come with birth and are

applicable to all people throughout world irrespective of their race, colour, sex, language, or political or other opinion. These are, therefore, those rights that are inherent in human person and without which they can't live as human being. Jaques Maritain says

[---] the human person possess rights because of the very fact that it is a person, a whole a master of itself and its acts and which consequently is not merely a means to an end but end which must be treated as such----- these are things which are ought to man because of the very fact that he is man." (Hamid, 1994)

The concept of environmental rights is still evolving and its jurisprudence is still vague; lacking certainty in its definition, theoretical and conceptual framework. According to Shelton, environmental rights refer to the reformation and expansion of existing human rights and duties in the context of environmental protection-----these environmental rights will be closely aligned with the concepts of political participation and informed consent. Environmental rights denote procedural rights that are found in international instruments and are being applied to seek redress for environmental issues. These includes the freedom to information, the right to participate in the decision-making process, and other due process rights that are being increasingly used in relation to environmental issues. The right to a healthy environment on the other hand denotes the identification of a separate, independent human right, not dependent on the existing protected rights recognized in the international covenants. In essence, environmental rights refer to the rights to participate actively in environmental issues. Article 10 of the Rio Declaration aptly captures the essence of environmental rights thus:

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making the information widely available .Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

The recent trend of case law suggests that it is difficult to have a clear-cut division between human rights cases and environmental cases. In most public interest litigation, both issues are argued and decided. In Bangladesh, the public interest cases dealt with general aspects of environment, such as air or water pollution or challenging big development projects as well as complex aspects, such as waste management or urban pollution. The following discussion shows that the categories of PIL in Bangladesh primarily deal with human rights related issues and concentrate on further exploring the fundamental right to life in Bangladesh, the first public interest environmental litigation (PIEL) was based on noise pollution created through election canvassing. However, the most prominent case concerned the Flood Action Programme, a foreign aided development project, and its harmful effect on the people and the environment. There are cases on industrial and urban development, unplanned rural development, oil and exploration planning, lease of open-river, urban air pollution, and the need for the government to oppose unchecked pollution.

There are only a few cases where the Bangladeshi court dealt with conservation and equitable utilization of natural resources. While dealing with development project, a similar approach has been adopted by Bangladeshi judiciary. In *FAP case*, the court directed the concerned authority the Ministry of Irrigation, Water Development and Flood Control that no 'serious damage' to the environment and ecology is caused by FAP activities, though the threshold of the seriousness was

not ascertained. The High Court declined to interfere with the FAP project as foreign assistance was involved and the whole project was meant to be for the benefit of the public. Moreover, the court took account of the substantial amount of money that had been spent and the work that had been partially implemented.

In Bangladesh, two cases in 1995 and 1996 mentioned intergenerational rights but did not establish the precise nature of this right. In *M. Farooque v. Bangladesh and Others* the petitioner submitted that they represented not only the present generation but also the generation yet unborn. It is pertinent to mention here that, the Honorable Justice observed that: Although we do not have any provision like Article 48A of the Indian Constitution for the protection of environment, Article 31 and 32 of our constitution protect right to life as a fundamental right. It encompasses within its ambit, the protection and preservation of environment, ecological balance free from pollution of air and water, sanitation without which life can hardly be enjoyed. Any act or omission contrary thereto will be violate of the said right to life.

Environmental rights have been expressly recognized in and enforced in several jurisdictions. For example, in *Bombay environment Action Group Shyam H.K. Chainani Indian Inhabitant, Save Pune Citizen's committee V Pune Cantonment Board*, the court observed that people's participation in the movement for the protection of the environment can not be over emphasized

Precautionary Measure For Environmental Protection

The precautionary principle provides guidance in the development and application of international environmental law where there is lack of full scientific certainty where there are threats of serious or irreversible damage; lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation

As the precautionary principle is adopted in different international instruments and different states recognized the principle at national level, it can be said that precautionary principle has emerged as a customary rule of international law. Precautionary principle is applied by the Indian Court In *M.C.Mehta V Union of India* where the petitioner alleged that pollution in India is mainly on account of increase in the number of vehicles in the cities. The Court directed the Delhi Administration to furnish a complete list of prosecutions launched against heavy vehicles for causing pollution. Rules 115 (b), 126 and 127 of the central Motor vehicle Rules 1989 were to be made effective from 1 April 1991. The Court also directed the ministry of Environment and forests to find out the effectiveness of a device brought out and which would reduce the pollution content, if found effective to introduced the same as an inbuilt mechanism in every vehicle manufactured from 1 April or 1 July 1991 and to examine the adaptability of the device to already operating vehicles. A recent application of the Precautionary principles is established in *Suo Motu Proceedings in Re: Delhi Transport Department*. Where the Supreme Court dealt with air pollution in New Delhi. The Supreme Court said that the precautionary principle' which is a part of a concept of 'sustainable development' has to be followed by state governments in controlling pollution. According to the Supreme Court, the State government is under a constitutional obligation to control pollution and, if necessary, by anticipating the causes of pollution and curbing the same. The Supreme Court reaffirmed the customary status of the precautionary principle in another recent case and added that the principle is entrenched in the Constitution as well as in various environmental laws

In *Vellore Citizen Welfare Form V Union of India* The Supreme Court Observed that the relation between international law and municipal law .The Court observed that once a principle is accepted as part of customary international law, there would be no difficulty in accepting it as a part

of domestic law. The Court laid down three ingredients of the precautionary principles in the context of municipal law.

- (I) Environmental measures –by the State Government and the statutory authorities must anticipate, prevent and attack the causes of environmental degradation
- (II) When there are threats of serious and irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.
- (III) The onus of proof is on the actor or the developer/industrialist to show that his action is environmentally benign.

These principles have been reiterated in a number of environmental cases which came up before the court, viz Shrimp Culture case Calcutta Tanneries Case and the Taj Mahal case

The following discussion shows that in Bangladesh, the court examined the seriousness of environmental damage to determine whether there is any need for a precautionary approach. However, the threshold of such damage was neither examined, nor was it accepted as a part of customary law. It also shows that in Pakistan, human rights and human health was given priority to apply this principle.

In Bangladesh, in *Radioactive Milk case*, the petitioner, a potential consumer, submitted the writ petition in public interest stating that the consumption of the imported food item containing radiation level higher than the acceptable limit is injurious to public health and is a threat to the life of the people of the country. A potential customer's right to file a suit has been recognised by this case. The court simply assumed that such injury either had occurred or were 'likely to occur' and proceeded to issue remedial directions. In the *Flood Action Plan case*, the court took account of the seriousness of damage that could be caused to the environment by the project. However, the court did not apply the precautionary principle and did not bar the development Project.

Unlike Indian Supreme Court the judges of Bangladesh Supreme Court did not apply the precautionary principle as an international customary law. However, judiciary of Bangladesh agree that the Rio Declaration does have persuasive and binding value and Bangladesh did sign the Declaration. But at the same time, the judiciary of Bangladesh believe that an international agreement between the nations, if signed by one country, is always subject to ratification; and it can be enforced as a law only when legislation is made by the country through its legislature. Though most of the current environmental legislation has incorporated the precautionary principle, the court in Bangladesh can refuse to apply this principle if the matter in front of them is not covered by any of the legislation. Most of the cases mentioned here were brought against public or government bodies and the courts applied the precautionary principle while there is a threat of serious and irreversible damage. Moreover, a strong form of the precautionary principle was evident where the court shifted the burden of proof on the polluter.

Legal, Constitutional and Institutional Framework: A Suggestive Overview

The above discussion shows the development of human rights and the environment in Bangladesh as being South Asian nation during the last few years. It outlines the main provisions in the Constitution of Bangladesh which enshrines human rights and the environment. We also observed substantive and procedural rights which can be used to protect these two areas. (Razzaque, 2005) We analysed the case law and considered the human right implications of decisions relating to the environment and vice-versa. In addition, we gave emphasized the participation of non-state actors in the judicial process through public interest litigation (PIL). From above discussion, we got a brief

overview of the development of case law and legislation on human rights and the environment in Bangladesh.

The nature of environmental and Human Rights problems in Bangladesh concerns include water pollution (lack of control on the pollution of rivers, irresponsible construction of dams and barrages, lack of access to drinking water free from toxin or other contaminants, increased use of agro-chemicals/pesticides, storage and transportation of dangerous goods in package forms and pollution due to noxious liquid substances); degradation of marine and coastal resources (heavy metal contamination by industrial affluent, dumping of land based solid waste into the sea; heavy coastal construction, inland mining, poor land use practices, over fishing, destructive fishing techniques, shrimp cultivation); loss of coastal habitats and deforestation (substantial loss of mangrove forests, unplanned commercial fisheries); land based pollution (rapid industrialisation, mining, logging, firewood collection, livestock grazing, land degradation, hazardous waste, waste water disposal); water logging and salinity (rapid spread of irrigation, indiscriminate use of agro-chemicals, over exploitation of ground water); and air pollution (rapid and unplanned urbanisation, industrial pollution, increasing transport, domestic refuse, coal consumption, energy use pattern, fly-ash).

The explosive growth of the global economy threatens the natural systems that sustain life on Earth. Despite some significant successes in reducing industrial pollution and increasing efficiency, globalization is devastating natural habitats, speeding global warming, and increasing air and water pollution. At the same time, due to the increasingly global nature of trade and business, traditional national environmental protection techniques have become less effective. So institutional development is important to support healthy economic growth, protect the environment, and create a more congenial life style whether nationally and internationally. Quality of life as a legal right that must be protected has meant a vast expansion in the sphere of human rights and fundamental freedoms protected by constitutional law. Its does not purport only to formulation of new human rights but also makes interesting contributions to the fresh organisational set-up, particularly in all that concerns the relationship between the ruled and the ruling. So, the necessity of the new institutions is felt in most branches of law together with reformulation and adoption of many of the more solid principles of its classic postulates. Constitutional acknowledgement of environmental protection is a primary responsibility of state to ensure environmental protection. The concept of sustainable development has to be incorporated in the basic law and a strong commitment has to be declared in this respect. The people at large have to be sensitized about environment and sustainable development so as to discharge international obligation arising out of international treaties and convention or otherwise.

Concluding Remark

The right to environment is comparatively a new idea. No other state in the world has recognised as an individual basic Human Right; rather they seek to consider it an ancillary of right to life; or at best adopted as directive principle of the state. So the countries wherein right to environment is contested, some other traditional Humans Rights have got their relevancy in the discussion. Even the judiciary of Bangladesh is still very much conservative in environmental issues. Of course the constitution itself has confined its scope to cover the environment issues. Hence in any particular case where the concerning parties has not argued on the basis of firm and proper relevant information, the court has very few opportunity to go beyond the literal and traditional meaning of the ordinary law and specially of the constitution. Moreover, courts in relation to environment have

not been established in every district. This is also a constraint for environmental protection. It is a matter of happiness the definition of the 'aggrieved person' has been widened substantially that opened up a new era for the constitutional history of Bangladesh, Even in one sense it can be termed as the constitutional amendment of the constitution. But still for the sake of globalisation and environmental issues, Bangladesh requires many changes and reforms in the constitutional framework like many other nations.

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