

Human Rights Approach to Environment Protection: An Appraisal of Bangladesh

Badsha Mia^{*}, Kazi Shariful Islam

School of Law, Britannia University, Paduar Bazar, Bishaw Road, Comilla, Bangladesh

^{*} E-mail of the corresponding author: badsha_law@yahoo.com

Abstract

The need for effective protection of the global environment is nowadays incident. National and international communities search for instruments as effective as potential to stop or rather slow the destruction of the environment. While the predominant human rights approaches to environmental protection are currently based on public regulation by imposing duties, there have been a new human rights approach emerging based on each individual's right to a certain quality of environment, which supposes connections between environmental protection and human rights. The well-established national and international systems of human rights guarantees have been increasingly used as an effective instrument for environmental protection. The purpose of this article is to introduce current National and International approaches to the links between human rights and environmental protection and examine how these human rights approaches are applied in the Bangladesh.

Keywords: Right to a healthy and sound environment, human rights, protection, Legislation.

1. Introduction

The environmental protection is a concerned phenomenon for Bangladesh. The International environmental law is comparatively a new branch of Public International law. It is a growing field of law that is setting the legal standards to deal with various global environmental issues. It encompasses a separate body of law for the protection of the environment (Patricia & Boyle, 1992). At the global level, the main thrust on universal commitment to combat environmental issues emerged out of the Stockholm Declaration on Human Environment in 1972. Over a period, environmental concerns have moved rapidly towards the top of the world's political and economic agenda. But since 1972, the attitude and approaches of developed and developing countries have undergone a sea change. Developing countries considered environmental protection a luxury that only developed countries could afford. Alleviating poverty, satisfying the basic needs and improving standard of living of people were their priority areas. Environmental protection appeared at the bottom of their agenda. Developed countries, on the other hand, wanted 'global action' towards environmental protection, notwithstanding the fact that they were the main contributors to environmental damage and wished to continue their development and thereby assault on the environment. Such attitudes and general differences in approach characterized the debate at the 1972 Stockholm Conference. These debates led to the establishments of the UNEP. Today, the developing countries also recognize the relevance of environmental issues, having faced the conspicuous evidence of climate change, soil erosion, and deforestation. They are also concerned about the rapid population growth and its effect on the environment.

Contemporary environmental issues, such as, depletion of the stratospheric ozone layer, climate change and the loss of bio-diversity can have global ramifications or at least consequences transcending national boundaries. Global environmental problems can only be solved by involving the international community (Anita, 1999). As Weiss aptly notes, "no one country or even group of countries has the capability to protect the environment over time by its own isolated efforts (Edith, 1993). For this reason also, developing countries are now recognizing environmental protection as essential for sustainable economic development and not as an alternative to it (Nazma, 1993).

Bangladesh, like many other developing countries, has now recognized the necessity of moving environment up on the agenda. Bangladesh is facing wide ranging environmental problems such as industrial and municipal pollution, air pollution, land degradation, deforestation, etc. All have been caused by anthropogenic interventions in the natural and self-sustaining cycles such as rapid industrialization, urbanization and pressure of rising population. But the existing regulatory arrangements and institutional frameworks for enforcement are both inadequate and ill-equipped to resolve the burgeoning environmental problems in Bangladesh.

2. Right to a healthy and sound environment:

The Constitution of Bangladesh does not provide any direct protection to the environment. Neither the fundamental rights, nor the state policies expressly mention any right to a healthy and sound environment. Article 31 states 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 (Art. 31).' It added that the citizens and the resident of Bangladesh have the inalienable right to be treated in accordance with law. If these rights are taken away, compensation must be paid. Article 32 states, "No person shall be deprived of personal liberty given in

accordance with the law” (Art. 32). These two articles together incorporate the protection of right to life. The next question peeps into mind is whether the ‘right’ to life includes the right to an environment capable of supporting the growth of meaningful ‘existence of life’ and includes the right to a healthy environment?.

In two famous cases the Appellate Division and the High Court Division had adopted a holistic approach. The Appellate Division in the case of *Dr. Mohiuddin Farooque vs. Bangladesh* has been expounded that ‘articles 31 and 32 of our Constitution protect right to life as 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 ‘protection of right to life’. The High Court Division in the case of *Dr. Mohiuddin Farooque vs. Bangladesh and others* (Dr. Mohiuddin Farooque vs. Bangladesh, 1996) stated that right to life includes right to fresh air and water and a situation beyond animal existence in which one can expect normal longevity of life (Habib, 2006). It is necessary to mention that both the cases were Public Interest Litigation. So, as per case laws, it appears that right to healthy environment has now become a fundamental right. But it had not been easy to place environmental right at the same footing of fundamental right because our judiciary had the procedural disadvantage to enforce these rights. Until 1994, Bangladesh had no reported case decided by the Supreme Court on environmental issues. The first such case was filed in January 1994 by BELA. After that numerous PIL were filed for protection of environment, public health, preservation of pollution, etc, but all remain pending for decision. In none of the cases the question of ‘locus standi’ arose.

The question whether right to healthy environment is a fundamental right first arose in the famous FAP case (*Dr. Mohiuddin Farooque vs. Bangladesh, 1995*) where the legality of an experimental structure project of the huge FAP was challenged. The HCD initially rejected the petition on the ground that the petitioner (representing BELA) had no ‘standing’. The petitioner then preferred an appeal to the Appellate division where the court granted leave to decide the *locus standi* in PIL. Finally, in July the question of *locus standi* has been settled by the Appellate division holding that any member of the public suffering a common wrong, common injury or common invasion of fundamental rights of an indeterminate number of people or any citizen or an indigenous association exposing such cases has *locus standi*.

Before and after that BELA, ASK, BLAST, BNWLA, Bangladesh Mohila Ainjibi Samiti, Bangladesh Mohila Porishod and many public assisted persons brought PIL before the HCD for redress of the grievances of the deprived sections of the people. Since *locus standi* has been liberalized in 1996, some of the Public Interest Environmental Litigation has been disposed of by the HCD in 1997.

Through the judgment of these PILs, the right to healthy environment has got its status as fundamental rights and Bangladesh now, like many other developing countries, can enforce this right through PIL and other regulatory arrangements.

As mentioned above, there is no right to environment under the Constitution of Bangladesh. However, due to prolonged movement of civil society and environmentalists, provision on conservation and development of environment has been inserted in part of fundamental principle of state policy of the Constitution of Bangladesh through the 15th amendment. Obviously, this is a welcome development. But this provision imposes obligation on the State to protect and develop environment and to ensure conservation and security of natural resources, bio-diversity, wetland and wild lives (Art.18A). Thus, it does not establish right to safe environment for individuals, rather it is proclaimed as one of the fundamental principles of state policies which can be used as a guideline in interpretation of the Constitution and of the other laws of Bangladesh, shall be applied in making of laws and form the basis of the work of the State (Art.8(2)). This constitutional duty to protect environment can be borne by state, its agencies, individuals, and legal persons. The government of Bangladesh missed the opportunity to include the right to environment as a fundamental right, which has already been established through judicial interpretation.

3. Legislation Regulating Environment:

Like all other civilized nations, the People’s Republic of Bangladesh, as part of her environmental obligations has adopted a number of environmental instruments for the protection and conservation of environment (Hossain, 2004). Environmental Laws existed in the country right from the 19th century, although they remain unenforced to a large extent or were vaguely known to the people & the responsible public agencies. About 200 laws (excluding rules & bylaws) have so far been identified by BELA (Environmental Regulatory Regime in Bangladesh, 2004). The existence of all these laws & the number of public agencies, however failed to deliver to the nation what the legislation envisaged. Nonetheless many of the available laws & mechanisms remained unutilized, unexplored & barely expounded.

In pursuance of the Stockholm mandate, the Government of the People’s Republic of Bangladesh actively participated in the evolutionary process of protecting global environment. As a result, the first Environmental Pollution Control Ordinance was promulgated in 1977 and the Environmental Pollution Control Board was established. This board was later succeeded by what is now called the “Department of Environment”.

In 1989 the Ministry of Environment & Forest was established to address environment related issues. The Govt. drafted a national conservation strategy adopted the national environment policy of 1992 & revised the old law by enacting Bangladesh Environment Conservation Act 1995. The Dept. of Environment was also restructured. The National Environment Management Action Plan (NEMAP) has also been finalized by the Ministry of Environment with participation by some NGOs and other organizations (Islam, 2002). In addition, The Bangladesh Environment Conservation Rules 1997 was passed to supplement the Act. The Conservation Act and Rules was amended in 2000 and 2002 to include important provisions and to adjust with the changing circumstances. To create a separate forum, a separate legislation called Environment Court Act was also been enacted in 2000 with a view to setting up environmental courts in six divisions of the country. Apart from these legislations, there are some laws such as Environmental Pollution Control Ordinance, 1977, Territorial Water and Maritime Zones act, 1905, Agricultural Pesticides Ordinance, 1971, The Mines Act, 1924, the Paurashava Ordinance, 1977, Brick Burning Act 1989, Pure food Ordinance 1959, Marine Fisheries Ordinance, Forest Act & so on.

So we can see that we have a large number of legislations but the laws are hardly used in consonance with their objectives but abused & misused to suit for various purposes. There is a gross inconsistency amongst the various components of the regulatory system. That is, policy legislation, institutional set & the traditional system & the values of the community.

4. Existing Avenues of Environmental Justice:

4.1 Environmental Court:

In pursuance of Environmental Conservation Act, all cases about conservation of environmental pollution would be filed & disposed of in these courts. Even if there are provisions in any other laws to take any action about environmental matters or indicate any specific courts for filing suit, any case about such matter may be filed in the Environmental Court as well (Razzaque, 2004). Any legal proceedings for trial of and compensation for an offence or both under the environmental law must be directly instituted at the Environment Court. Recently in 2010, The Environment Court Act 2010 has enacted which provides for setting up Environmental Court in every district headquarters.

4.1.1 Powers & Jurisdiction of Environmental Court:

The Environmental Court has both civil & criminal jurisdiction. While trying & deciding the compensation matters the court act as a civil court & follows the provision of code of Civil Procedure 1908. It can order any person to take preventive and remedial measures for the occurrence of an offence or an incident which caused or may cause environmental harm. It may fix a time to implement the order and may seek a report from the Director General or from an appropriate authority in this inspection. It has also power to issue interim orders, temporary injunctions Orders for *status quo*.

The court will be treated as criminal court in the case of lodging a complaint about an offence and trial and disposal of such an offence the provisions of the Code of Criminal Procedure 1898 shall be followed. It has extensive power for prosecution of environmental crime. Under the act, the court has the power to impose imprisonment and fine or both for the violations of the law (Sec.14(1)). The court can also pass order for compensation for environmental injury issue direction to the appropriate person not to continue the environmental wrong (Sec.14(1)). The court has power to order any person to do or not to do any act which constitute an offence. A specific performance is prescribed for the Environment Court for trial of its cases. It provides that the trial shall be concluded within 180 days. If a case is not disposed of within this time limit, Environment Court shall inform the Environment Appellate Court describing the reasons within 15 days of the expiry of time and dispose of the case within next 90 days. If the case is not disposed of after this period, lawyer can apply within 15 days to the Environment Appellate Court to transfer the case to another Environment Court (Sec.14(1)). If the case is then transferred to another court, it has to resolve the case within 90 days.

In case where the case is not dissolved within the prescribed time limit, the Environment Appellate Court will determine who is liable for it and will recommend the proper authority to take legal action against them. After getting such recommendation, the authority, within 60 days send a report to the Environment Appellate Court.

Again, according to the Environment Court Act 2010, some special magistrates can be appointed to try the environmental offences where the punishments not exceed five years of imprisonment or 5 lacs taka fine. The violation of an order of the court constitute of a separate offence and a punishment up to five years of imprisonment or 5 lacs taka fine or both can be imposed by the court (Sec. 8(1)). The court should be disposed of the case within 180 days after getting the complaint. If a case is not disposed of within this time limit, Environment Court shall inform the Environment Appellate Court describing the reasons within 15 days of the expiry of time and dispose of the case within next 90 days. If the case is not disposed of after this period, the Director or lawyer can apply within 15 days to the Environment Appellate Court to transfer the case to another Environment Court. If the case is then transferred to another court, it has to resolve the case within 90 days (Sec. 10(5)).

Provisions have been made to form Environment Appellate Court to hear appeals from the Environment Courts. Any party, aggrieved by the verdict of Environment Court relating to any judgment, decree of compensation, acquittal or cancellation of any suit may appeal to the Environment Appellate Court.

4.1.2 Weakness of the Court:

The judges of the Environment Court do not have special knowledge or training on environmental law or science. But expert knowledge is specially required for the determination of level of pollution which can constitute a violation of environmental law (Faruque, 2007).

- The court has no *suo moto* power to take up a matter of environmental pollution and investigate it.
- In Bangladesh, most of the environmental case has been filed by NGOs as PIEL. For example, BELA has instituted more than 40 cases on environmental issues. But NGOs have no access to the environment court. As many NGOs have expert knowledge on environment, recognition of their standing in the environment court can greatly enhance the effectiveness of the court.
- There are few expertise, logistic support and resources in the Department of Environment.

4.2 Public Interest Litigation:

Public Interest Litigation, as it has developed in recent years marks a significant departure from the traditional judicial system. It is one of the most frequently used and important legal strategies to realize our environmental rights in Bangladesh. It is instituted before the High Court Division through writ petition to challenge the action of the public bodies or individuals violating environmental law.

As we have discussed earlier, primarily only an aggrieved party was allowed to seek a remedy, others not personally affected were unable to go before courts as proxies for the victim or aggrieved party. If there was no personally affected individual at all, as a general rule, there would be nobody to seek remedy against certain actions, even if these actions were in violation of a law. But from the case study, we see in course of time how the HCD has changed its view and how the question of *locus standi* was settled. Now PIL is used as an effective tool to control acts of environmental degradation in Bangladesh. It has become so popular for several factors.

Firstly, in Bangladesh, like most other developing countries, the legal regime of environmental laws is weak and the laws are difficult to enforce and sometimes ambiguous. PIL has helped bridge this gap. Again, after the passing of the Environment Conservation Act 1995, it was widely expected that effective functioning of the environment court will not only ensure enforcement of environmental regulations but also punitive measures of the court will deter the potential wrong doers. But the environment court has also failed to deliver the stated goals for its in-built weaknesses. In absence of an effective environment court, Public Interest Environmental Litigation has become an effective tool to ensure environmental compliance.

Secondly, NGOs have no access to the courts, but many NGOs have expert knowledge on environmental laws. For this reason also PIEL (Public Interest Environmental Litigation) is popular amongst the NGOs or public interest groups for protecting collective rights. Over the years, environmental NGO, like BELA has initiated many PIEL against the environmental degradation also got favorable judgment in most cases.

Thirdly, PIEL is important where the government is not willing to promote or protect the environment. The Govt. may not be willing to prosecute those who violate environmental laws and at times the Govt. is a violator of environmental laws. In that case through PIEL, an injunction can be brought to compel or stop the Govt. from degrading the environment. In a word, PIEL fills in the gaps of law, the inconsistency in the regulatory regime between law, policies and institutional framework and enjoy law with morality. For the above mentioned reasons, PIEL has become most popular and easier way to get environmental justice.

Besides these two avenues of environmental justice, there is a provision of representative suit in the Code of Civil Procedure 1908, through which a representative on behalf of the affected people can move a petition to the court to vindicate their rights. But representative suit can hardly provide appropriate remedy for environmental wrong because the legal proceedings in the traditional system is usually a time consuming process as lower courts are overburdened and procedures are also complicated.

5. Recommendations:

5.1 National application of International Law:

National Court's decision can promote the application of internationally recognized environmental principles in several ways (Calcutta Taneries Matter vs. Union of India, 1997). By applying an international environmental principle, national courts implement it in the individual case. Moreover, if courts implement international norms with sufficient regularity national courts decision could have a deterrent effect; they could help shaping future conduct. Finally, through their decisions, national court can help incorporate international norms into national law, thereby supplementing or even correcting the work of legislatures.

5.2 Legal Aid:

General people do not feel interest to file a PIEL as they don't have access to funding to the petition. As it is a matter of public interest, no one will be interested to spend money from his own to initiate a proceeding, because it is expensive and involve substantial cost to bring proceeding.

In Bangladesh, the Legal Assistance Act 2000, dealing with legal aids, contains nothing on protection of environment, human rights or even PIL. If there would be an arrangement of legal aid for environmental matters, people will be interested to take action against wrongdoers of environment. Furthermore, NGOs involve in the environmental protection, can build a database of lawyers to provide free legal assistance, at least for the first consultation to people suffering with environmental problems. In that way, general people will be aware of their environmental rights and options available to them.

5.3 Public participation in decision making process:

In reality, the public does not have a true opportunity to take part in the decision making process. Access to information enables the citizens to participate meaningfully in decisions that directly affect their livelihood and to be able to monitor governmental and private sector activities. Public involvement and consultation in the decision making should not be a hollow promise. There should be a proper implementation procedure and overall coherent environmental policy guarantying timely and effective participation in the decision making process.

5.4 Access to information:

Adequate access to information strengthens participatory mechanism. Each individual should have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials activities in their communities and the opportunity to participate in decision making process. States shall facilitate and encourage public awareness and participation by making information widely available. It is also important to examine whether the state publishes periodic reports on the 'state on environment' and information related to environmental indicators.

5.5 Improving the role of judiciary:

A proactive and activist judiciary is essential for resolving environmental disputes. The judges should be more oriented towards judicial activism for promoting environmental justice in Bangladesh. Moreover, Judges should be given special training on environmental law and evolving environmental jurisprudence. They can be offered proper financial assistance for training and research. Furthermore, by encouraging more NGOs to be involved in the policy making and by appointing environmentally aware judges in the higher courts, the govt. can easily make the PIEL an interesting option for the general people.

5.6 Public Awareness:

Absence of awareness about law and rights, specially laws relating environment, environmental rights and obligations, is a major problem which is yet to be resolved, although ignorance of law is no excuse. Awareness and education programs should be undertaken to make people aware about their environmental rights, which can also contribute in enhancing the courts effectiveness.

5.7 Recognition of the right in the Constitution:

The right to a sound and healthy environment should be incorporated in the Constitution of Bangladesh which will afford greater protection of environment and give a firm footing of the notion of environmental justice.

5.8 PIEL in Environment Court:

As we have discussed earlier, PIEL is commonly used as an effective tool to ensure environmental justice. But it is not always feasible for the general people or an NGO to file litigation in the HCD in which he does not have any interest. To promote environmental human rights, provisions can be made regarding filing PIEL in the Environment Court. If it can be done, people or NGOs will be able to take action against the environmental wrong- doers in each district headquarters.

6. Conclusion:

The concept of enjoying a sound and healthy environment as a human right is yet to be firmly grounded in our juridical landscape. Though we have a large number of legislations, but access to environmental justice is hampered due to the uncertainties or ambiguities in the provisions. Again, in our country, different regulatory bodies, instead of co-operating with one another, appear to be at odds due to their lack of understanding and communications. Environment Court has also failed to ensure environmental justice due to its in-built weaknesses. To enjoy environmental human rights in the true sense, it is obvious to amend the environment court against the polluters. But at the same time it is also necessary to strengthen the Department of Environment by expertise, logistic support and resources, to simplify the procedural complicity of environment court as well as to extend the scope of Public Interest Environmental Litigation.

References

- Patricia W. B & Alan E. B (1992) "*International Law and Environment*", Clarendon Press, Oxford.
Halvorsen A M , (1999) "*Equality among unequals in International Environmental Law: Differential Treatment for Developing Countries*", Westview Press p.1
Weiss E B , (1993), "*International Environmental Law: Contemporary Issues and the Emergence of a New World Order*",p.3

Heptula N . (1993), “*Environmental Protection in Developing Countries*”, 1st Edition (Oxford and IBH Publishing Co. Ltd., India).

Article 31 of The Constitution of The People’s Republic of Bangladesh.

Article 32 of The Constitution of The People’s Republic of Bangladesh.

Dr. Mohiuddin Farooque vs. Bangladesh & others (1996) 48 DLR 438.

Habib E , ‘*Public interest Environmental Litigation: A Tool to Ensure compliance and Enforcement*’ presented on the Fifth International Conference Environmental Compliance and Enforcement.

Dr. Mohiuddin Farooque vs. Bangladesh & others CA No. 24/1995.

Article 19(3) of the Constitution of Bangladesh.

Article 8(2) Of the Constitution of Bangladesh.

Hossain Iqbal Md , “*International Environmental Law Bangladesh Perspective*”, 1st edition, (Dhaka I).

Environmental Regulatory Regime in Bangladesh”, (2004) 1st Edition (BELA and Ford Foundation: Dhaka International University: Dhaka).

Islam N , (2002) ‘*The Broader Significance of the Environmental Movement in Bangladesh,*’ in Bangladesh Environment, Vol.1, Bangladesh Paribesh Andolon (BAPA) p.2.

Razzaque Jona, (2004) “*Public Interest Environmental Litigation In India ,Pakistan and Bangladesh*” (Kluwer Law International 396.

Section 14(1) of The Environment Court Act 2010.

Ibid

Ibid

Section 8(1) of The environment Court Act, 2010.

Section 10(5) of The environment Court Act, 2010.

Faruque, Abdullah Al., ‘*Functioning of Environment Court in Chittagong: A Critical Appraisal*’, presented on the seminar on Protection on Environment held at National Press Club Dhaka, 2007.

Calcutta Taneries Matter vs. Union of India (1997)2 SCC 411.

Abbreviations

1. UNEP =United Nations Environment Programme.
2. BELA = Bangladesh Environmental Lawyers Association.
3. PIL = Public Interest Litigation
4. FAP = Flood Action Plans
5. PIEL = Public Interest Environmental litigation
6. HCD = High Court Division
7. Art. = Article
8. ASK = Ain O Shalish Kendra
9. BLAST = Bangladesh Legal Aid Services and Trust
10. BNWLA =Bangladesh National Woman Lawyer’s Association
11. NEMAP = The National Environment Management Action Plan
12. NGOs = Non-Governmental Organizations.
13. Sec. = Section