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Liability Regime under Environmental Laws of Bangladesh : A Critical Review

Meher Nigar *

Abstract

Environmental protection becomes a matter of urgency rather than a matter of acceptability. Therefore, environmental legislations all over the world are enacted to protect the environment and maintain the natural balance for the benefit of present and future generations. Bangladesh is in no exception to this trend. Bangladesh adopted special environmental Act, the Environment Conservation Act, 1995 which establishes a liability regime for environmental damage. This article reviews the liability provisions incorporated in the environmental laws in Bangladesh. This study finds that despite covering different types of liability, the implementation condition of these provisions is not promising. Among many other reasons, the inherent limitations in implementing civil liability for environmental damage, conflicting and vague provisions prevalent in the penal provisions in environmental laws, lack of political commitment of the government, absence of public education and awareness are viewed as the main causes of failure. This write-up suggests an integrated and comprehensive strategy to be adopted at policy and action level to overcome this situation.

Keywords : *Liability Regime, Environmental Laws, ECA, Civil Liability, Criminalliability*

1.0 Introduction

Industrial and commercial activities generating environmental pollution are often associated with the risk of contaminating environmental media and degrading ecosystems, causing human health problems, damaging property, and affecting biodiversity. In a mature environmental regulatory system, this risk translates into the legal liability risk of the owners and operators of such activities for the consequences of damaging the environment (Organization for Economic Co-operation and Development [OECD], 2012). Bangladesh, as other countries, developed environmental regulations to protect environment and to hold the polluters liable which may involve not only an economic cost for the party responsible, but civil, or even criminal liability.

Legal liability can be an effective approach to resolving environmental issues and minimizing environmental impacts by making polluters responsible for the

* Assistant Professor
Department of Law
Premier University, Chittagong, Bangladesh
email: mehernigar_law@puc.ac.bd, Cell: +880-1554332302

damage their activities cause to the environment. Liability refers to the condition of being actually or potentially subject to a legal obligation (Hossain, 2004, p.463) of doing or not doing a particular thing, failure to perform of which may cause the causer of damage pay for it. Thus, if a liability clause is added to any regulation, potential polluters would face the prospect of paying for restoration or compensation of the damage they caused (European Commission [EC], 2000) and this liability provision would play a deterring role in matter of the activities that affect the environment. Focusing on this factor, the Bangladesh Environment Conservation Act, 1995 establishes a liability regime for environmental damage. Though, there are a number of laws in Bangladesh covering the protection of different sectors of environment, e.g. fisheries, wildlife, etc., this article will cover particularly the Environment Conservation Act, 1995 (hereinafter referred to as ECA) as in Bangladesh, 'Environmental Law' means mainly the Environment Conservation Act, 1995 and the Rules made thereunder (The Environment Court Act, 2010, s.2) [1]. The objective of this research is to reconsider the liability laws in the environmental laws of Bangladesh. To this end, this write-up will attempt to give a brief idea about the concept of 'environmental liability' in legal context; examine the legal provisions forming liability regime in different environmental legislations of Bangladesh with prime focus on ECA and will also attempt to evaluate the effectiveness of the present liability laws to ensure environmental justice.

2.0 Environmental Liability: a Conceptual Analysis

Liability connotes exposure to legal redress once responsibility and injury arising from a failure to fulfill that legal responsibility have been established (Sands, 2003, p.873). 'Liability' is defined in Black's Law Dictionary (9th edition) as "the state of being bound or obligated in law or justice to do, pay or make good something". Traditionally, the concept of 'liability' provides a mechanism to compensate for harm that has occurred. Environmental liability, under environmental law, aims at making the causer of environmental damage (the polluter) pay for remedying the damage that he has caused (EC, 2000). That means, mainly the 'polluter pays' principle is integrated into the development of liability and redress rules for environmental harm. In this connection, a framework of the concept of 'liability' is established by the Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (ELD), which is based on the 'polluter pays principle', according to which the polluter pays for the prevention and remediation of environmental damage. The White Paper on environmental liability as presented by the European Commission covers the types of environmental damage for which liability is suitable. According to this paper (EC, 2000), not all forms of environmental damage can be remedied through liability. For the latter

to be effective, i) there needs to be one or more identifiable actors (polluters); ii) the damage needs to be concrete and quantifiable; and iii) a causal link needs to be established between the damage and the identified polluter(s). Therefore, liability can be applied, for instance, in cases where damage results from industrial accidents or from gradual pollution caused by hazardous substances or wastes coming into the environment from identifiable sources.

Rules of liability and compensation for damages to the environment establish an incentive to prevent harm and also may require restoration (Sands, 2003, p.454). In the case of environmental issues, while the basic framework for the development of a liability and redress regime can be the same as in traditional liability regimes, the traditional conceptual framework for liability differs to some extent in addressing different dimensions of such broad-ranging environmental issues (Cullet, 2007). Under environmental law, liability rules may be applied with different forms. They may be a form of economic instrument which provides an incentive to encourage compliance with environmental obligations (Sands, 2003, p.869). They may also be used to impose sanctions for wrongful conduct, or to require corrective measures to restore a given environmental asset to its pre-damage condition (Sands, 2003, p.869). Depending on the various purposes served by the liability rules, the concept of liability under environmental law, embraces different categories, such as, civil liability, criminal liability, strict liability, fault-based liability, corporate liability etc.

The introduction of a civil liability regime under environmental law, offers a more comprehensive approach to addressing the consequences of environmental damage (Cullet, 2007). Civil liability schemes have traditionally been used to compensate for injury to property and persons. Environmental damage has, over time, become another increasingly acceptable form of damage. Under environmental law, civil liability arises when an individual's conduct fell below the objective standard of a reasonable person (Hossain, 2004, p.463) for which remedies can be awarded either to compensate for the personal injury or property loss arising from the environmental harm, or else to compensate for the environmental harm in itself (Cullet, 2007). This kind of liability is distinguished from criminal liability where the redress is given in the form of punishment, e.g. fine, imprisonment etc. for committing environmental crime. In fact, 'environmental crime' referred to those activities which cause exceptionally serious nature of environmental damage. The ILC Draft Code of Crimes against the Peace and Security of Mankind, 1996 identifies widespread, long-term and severe environmental damage as a crime against the peace and security against mankind (The Draft Code of Crimes against the Peace and Security of Mankind of 1996, Art.20 [g]). The Directive 2008/99/EC on the Protection of the Environment Through Criminal Law (2008) adopted by the

European Union restated the same view by requiring Member States to criminalize conduct which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants. So, the conducts covered by the Directive mostly are those which are so serious in nature and effects that they may cause substantial damage to the environment. However, that does not mean that any act that constitute any severe damage to environment violating any obligation as enumerated in any international environmental agreement; or by breach of the domestic legislation in various jurisdictions that regulate the environment. Rather, these acts must be defined as environmental crime either by the convention or by the domestic legislation, as the case may be. Several existing international agreements criminalized certain activities, such as, illegal fishing, trade of endangered species, CFC smuggling, illegal logging, and the unsanctioned dumping of wastes which remain the subject of environmental criminal liability (Qudah, 2014). In international law, criminal liability for environmental damage has been developed generally requiring the signatory states to implement domestic regulatory schemes that punish prohibited acts that are originally addressed in the convention (Qudah, 2014). Consequently, national law is imposing criminal liability on those who pollute and perform acts damaging to the environment (Kiss & Shelton, 2007, p.148). Penal sanctions can range from fines for petty offences to imprisonment for more serious crimes.

One much practiced form of liability under environmental law is fault-based liability. In this case, it is necessary to show that an obligation was violated and that harm resulted from the violation (Kiss & Shelton, 2007, p.20). Fault exists when one fails to perform a duty or observe a standard (Kiss & Shelton, 2007, p.20). In fault-based liability, generally the causer of damage is exempted from liability if he shows that he has taken necessary and practicable measures to prevent such damage, i.e., exercised due diligence (Shaw, 1997, p.593) [2]. In a word, in order to impose an obligation to cease a harmful activity or repair harm caused, the degree of fault on which the obligation is premised must be determined. Environmental law at the same time recognizes 'No fault liability' (Bangia, 1969, p.320). There are situations where a person may be liable for some harm or damage caused as a consequence of deleterious effects of lawful acts, that is, liability without fault (Kiss & Shelton, 2007, p.19). This kind of liability may entail either strict or absolute liability. Strict liability is accompanied by certain exclusions such as war or acts of God (Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal, 1999, art.4); or terrorism or exceptional unforeseen natural disaster (Kiss & Shelton, 2007, p.26); whereas, there is no such exempting exceptional circumstances available in absolute liability. Under environmental law it is very rare to invoke absolute liability unless specifically prescribed by any specific law.

'Corporate liability', which is comparatively a recent development in environmental law, is developed to regulate the acts of a corporation. A corporation that exposes threat to environment by using hazardous materials or substances and thereby fails to observe the objective standard of environment obligation is bound to come under the arena of environmental issues and liabilities (Chouhan, Priyadarshi, 2011). Whether corporate entities can be penalized, civilly or criminally, varies among nations (Cho, 2000/2001). The concept of corporate liability is based on the theory of vicarious liability as it is held liable for the acts and omissions of the natural persons it employs (Chouhan, Priyadarshi, 2011).

Environmental law adopted the concept of liability with different dimensions conforming to different factors of environmental damage. All sorts of liability concepts can be regarded as tools stimulating a better implementation of existing regulatory instruments. But what circumstances hit which kind of liability totally depends on the relevant provisions specified in particular statutory instruments; for example, the Convention on International Liability for Damage Caused by Space Objects, 1972 provides for absolute liability for damage caused by space objects on the surface of the earth or to aircraft in flight (article II), but for fault liability for damage caused elsewhere or to persons or property on board a space object (article III) (Shaw, 1997, p.593).

3.0 The Bangladesh Environment Conservation Act (ECA), 1995 and Environmental Liability

In Bangladesh, the concept of environment protection through national efforts was first recognized and declared with the adoption of the Environment Policy, 1992 which is thought to be an authoritative statement of Bangladesh's commitment to improving of environment and mitigation of other environment related problems through regional and global co-operation. It covers 15 sectors including land, health, water, fisheries, forest and biodiversity, population, awareness, research and legal framework, etc. A set of Acts, rules and policies are prevalent in Bangladesh to deal with environment problem which includes; Penal Code, 1860, Criminal Procedure Code, 1898, the Forest Act,1927, the Bangladesh Wildlife Preservation Act,1974, Motor Vehicle Ordinance, 1983, Bricks Manufacturing and Brick Kilns Establishment (Control) Act, 2013, the Protection and Conservation of Fish (Amendment) Act, 1984, the Building Construction Act, Hazardous Wastes and Ship Breaking Management Rules 2011, Bangladesh Environmental Conservation Act (ECA), 1995, Bangladesh Environmental Conservation Rules (ECR), 1997, the Environment Court Act, 2010, etc. Of them, the Environment Conservation Act is considered as a framework environmental law in Bangladesh, as a significant number of laws is century-old and cannot cater to the need of the day [3]. Moreover, while the

national environmental legal instruments in Bangladesh are mainly sectoral and different components of the environment are dealt with by separate legislation; such as, Biodiversity laws, Forest Policy, fishing policy, wild life conservation etc., the ECA, 1995 is a comprehensive law that focuses on 'conservation' and 'pollution –control approach'. With overriding effect (The Environment Conservation Act [ECA],1995, s.2A) over all other sectoral environmental laws, it is the first law to address the environmental issues in a comprehensive and scientific way. This Act is supplemented by Environment Conservation Rules, 1997.

While ECA defines conservation of environment as improvement of the qualitative and quantitative characteristics of different components of environment as well as prevention of degradation of those components (ECA, 1995, s.2), the Rules established certain standards set forth in the Schedules for various components of environment. Any activities that exceed that permitted parameter are considered as injurious to environment causing environmental damage. To deal with the adverse effects of environmental damage caused by different negative human-induced activities, this Act establishes a liability framework in compliance with the mandate of the Rio Declaration to which Bangladesh is a signatory [4]. This part of the write-up first reviews the scope of the liability referring to the factors that need to be considered when developing a liability regime and then covers the underlying principles that provide the basis for the development of liability framework. This section also covers the types of liability addressed by this Act.

3.1 Scope of the principle of liability under the Act

In general, liability is related to the occurrence of damage (Sands, 2003, p.103). Though there are several environmental laws in different countries that contain a specific definition of environmental damage, the ECA, 1995 does not expressly define environmental damage, using the term 'pollution' instead. Even so, the Act regulates liability for environmental damage in its section 7, which states that all the persons which may even be a company or corporation, whose any act or omission is causing or has caused direct or indirect injury to the ecosystem, person or group of persons shall be held liable for compensating the same or taking corrective measures or for taking both. Accordingly, this Act gives a person or group of persons including any company, association or corporation (whether incorporated or not), who may be affected or likely to be affected as a result of pollution or degradation of the environment, the right to proceed for the remedy of the damage or apprehended damage (ECA, 1995, s.2,8). That means liability regime under ECA covers every damage caused from environmental degradation or pollution (ECA, 1995, s.8) or any direct or indirect injury to the ecosystem or persons or group of persons (ECA, 1995, s.7).

To determine the scope of liability, the definition of 'environment' and 'pollution' given in section 2 of the ECA must be taken into consideration. S.2 defines 'environment' as the inter-relationship existing between water, air, soil and physical property and their relationship with human beings, other animals, plants and micro-organisms. 'pollution' means:

contamination or alteration of the physical, chemical or biological properties of air, water or soil, including change in their temperature, taste, odor, density or any other characteristics ……..which destroys or causes injury to public health or to commercial, industrial, agricultural or other activity or …….causes injury to air, water, soil or different forms of life (ECA,1995, s.2).

So, activities that contaminate or alter the usual composition or characteristics of any component of the environment cause environmental pollution arising liability. The ECA identifies some acts as injurious to environment for which a person shall be held liable; these are, activities of any industry, factory, company, industrial units which will discharge gaseous pollutants and liquids (ECA,1995, s.12); vehicles emitting smokes injurious to environment(ECA,1995, s.6); manufacturing, sale of articles injurious to environment, such as, polythene (ECA,1995, s.6A); accidental discharge of environmental pollutants in excess of the limit prescribed by the rules (ECA,1995, s.9); etc. In addition to these, by an amendment in 2010, activities like cutting or razing hills (ECA,1995, s.6B); stockpiling, supply, transport disposal or dumping of hazardous wastes (ECA,1995, s.6C); environmental pollution by ship-breaking hazardous wastes (ECA,1995, s.6D); wetland filling (ECA,1995, s.6E) are taken as issues to arise liability of a person. But the Government, Director General or any other person of the Department is exempted from any civil and criminal liability for any action which caused or is likely to cause injury to any person, if such action is taken in good faith (ECA, 1995, s.18).

Under ECA, 1995, to hold a person liable, apprehension of damage is enough and actual damage is not necessary. Because section 8 of the Act clearly states that a person affected or likely to be affected as a result of pollution or environmental degradation may approach the Director General (DG) for remedy of the damage or apprehended damage. So, liability tools under this Act are both reactive and proactive in nature.

3.2 Principles underlying the development of a liability regime

Establishing a liability regime for environmental problems, through national legislation, is an inevitable issue now a days. But what is necessary to ensure that while developing a liability regime in domestic laws, it must reflect the basic principles of general environmental law developed in international arena. The Environment Conservation Act, 1995 integrates the precautionary principle

to develop its liability regime for environmental issues (Razzaque, 2002). Under section 8 of the Act, a person is entitled to apply before the competent authority (the DG) for remedy of an apprehended damage and to take precautionary measures appropriate to this situation. Besides, section 9 reflects precautionary principle by requiring a person to take preventive measures to control or mitigate environmental pollution caused by excessive discharge of environmental pollutants even when the consequences of those activities are likely to occur.

Though 'Polluter pays principle' (PPP) is the main guiding principle basing the liability regime of different national environmental laws, the Environment Conservation Act,1995 in Bangladesh does not incorporate this principle in strict sense. The main objective of PPP is to allocate economic obligations in relation to environmentally damaging activities (Faruque, n.d.). This principle is now widely applied in the environmental regulations of many developed countries as an economic instrument of internalizing the economic costs of pollution control, clean up and protection measure which is realized through taxation and charges (Faruque, n.d.). The ECA does not incorporate PPP in its popular form rather adopts it in its general, literal form. Literally, "polluter pays" means 'he, who pollutes, will pay' and ECA applies this principle by compelling the polluter pay for remedying or mitigating those activities that cause injury to the environment or a person or group of persons. Besides, PPP is practiced by imposing penalties as fine for offences prescribed by section 15 of the Act.

3.3 Types of liability addressed by this Act

Acceptance of civil and criminal liability simultaneously is a very distinguishing feature of ECA. Civil liability is used in connection with compensation of damages. Under this Act, sections 7 8 contain provisions for remedying the damage caused to the eco-system or to the environment or to a person or group of persons. In addition to these, in cases of discharge of excessive pollutants, the expenses incurred on remedial measures to control and mitigate environmental pollution can be recovered from the person responsible as the public demand (ECA, 1995, s.9). So, mainly sections 7-9 form the environmental civil liability regime. Under this law, civil liability has two sources: strict liability and fault-based liability. The Act applies strict liability where, due to an accident or other unforeseen incident, the discharge of any environmental pollutant occurs or likely to occur in excess of the limit prescribed by the rules (ECA, 1995, s.9). Section 7 of the Act hits fault-based liability for direct or indirect injury to the eco system or to a person or group of persons. Fault exists in case of violation of any provision of this Act or the rules made thereunder or a direction issued under section 7 (ECA, 1995, s. 15B).

The ECA, 1995 provides for the criminal liability of a company vicariously on its

owner, director, manager, secretary or agent of the company when such company violates any provision of this Act or the rules or fails to comply with an order or direction (ECA 1995, explanation to s.16). Section 16 incorporates fault-based criminal liability for companies where the determining factor of liability is guilt on the part of the agent that caused the damage. It imposes vicarious liability with defenses that such violation or failure was beyond his knowledge or that he exercised due diligence to prevent such violation or failure. Section 6 of the Act describes another case of vicarious criminal liability where for the operation of all vehicles emitting smoke or gas injurious to health or environment, the owner shall be held liable (though sometimes both the driver and the owner shall be penalized). Besides, criminal liability arises from the commission of those criminal acts that are enlisted in section 15 of the Act. Section 15 specifies certain situations, the violation or non-compliance of which or the activities specified in the section are defined as offences and the section imposes punishment for these offences which may include imprisonment or fine or both.

4.0 Liability Provisions in other Environmental laws of Bangladesh

Bangladesh is an active participant of the present movement of the World Community to fight environmental challenges. To this end, many national laws are enacted on sectoral basis to protect environment. Though ECA, 1995 has been enacted as an umbrella environmental legislation, other environmental laws also play role for overall environmental conservation of the country. They vary in their importance, effectiveness, level of commitment in the field of environmental protection. However, though ECA prevails over all other laws relating to environment that are prevalent in Bangladesh, a glimpse over liability clauses incorporated in different environment related laws will help to give a brief idea about the overall liability regime for environmental damage in Bangladesh.

Bangladesh adopted a number of laws for water resources management, which includes the Bangladesh Water Act, 2013; the National River Protection Commission Act, 2013; the Mega city, Divisional Town and District Town's Municipal Areas including County's all the Municipal Areas' Playground, Open Space, Park and National Water Reservoir Conservation Act, 2000; the Ground Water management Ordinance, 1985; the Territorial Waters and Maritime Zones Act, 1974, etc. All these laws deal with protection and conservation of water and water resources and some of them contain liability clause. For example, section 29 of the Bangladesh Water Act of 2008 mandates criminal liability in case of violation of any provisions of this law and penalty extends to five years imprisonment or with ten thousand taka (10,000) fine or with both. Besides, to preserve healthy environment in city areas, penal provision has been developed

stating that any person including the private individual and company, is penalized for five years imprisonment or fifty thousand taka as fine if they are involved with illegal occupation of open space, playground etc (The Mega city, Divisional Town and District Town's Municipal Areas including County's all the Municipal Areas' Playground, Open Space, Park and National Water Reservoir Conservation Act, 2000, s. 8). A more express provision is found in the Territorial Waters and Maritime Zones Act, 1974 which states that the Government may, with a view to preventing and controlling marine pollution and preserving the quality and ecological balance in the marine environment in the high seas adjacent to the territorial waters, make such rules and take such measures as it may deem appropriate for the purpose and any contravention of these measures or rules shall be punishable with imprisonment which may extend to one year or with fine which may extend to five thousand Taka (s.8). For the protection and conservation of fishes penal liability is incorporated in the Protection and Conservation of Fish Act, 1950. It is stated that any activities that contravene the rules or measures taken for the protection and conservation of fishes shall be punishable with rigorous imprisonment for a term which shall not be less than one year and may extend to two years, or with fine which may extend to five thousand Taka, or with both (the Protection and Conservation of Fish Act, 1950, s.5).

In this connection, it is worth to mention the Wildlife (Preservation and Safety) Act, 2012 (hereinafter referred to as the Wildlife Act) which has been enacted aiming to conserve bio-diversity, forest and wild life. Under this Act, some acts are made punishable as an offence; such as, hunting wild animal without a license (Wildlife Act, 2012, s.36); transferring wild animal, meat, or uncured trophy, part of wild animal through gift, sale, without registration certificate (Wildlife Act, 2012, s.34) ; entrance into sanctuary (an area where capturing, killing, shooting or trapping of wildlife is prohibited) (Wildlife Act, 2012, s.15); importing and exporting wild animal without CITES (the Convention on International Trade in Endangered Species of Wild Fauna and Flora) certificate or license (Wildlife Act, 2012, s.28); killing tiger, elephant , cheetah, lam cheetah, hoolock, samber deer, crocodile, gharial, whale or dolphin etc(Wildlife Act, 2012, s.37); killing birds or migratory birds (Wildlife Act, 2012, s.38); and abetting and instigating such offences (Wildlife Act, 2012, s.41). For these offences, the Act prescribes specific punishments with imprisonment and fine, which is one year in minimum and twelve years in maximum for imprisonment and in case of fine, the maximum amount is fifteen lakh Taka depending on the nature of the offence (Wildlife Act, 2012). This Act prescribes criminal liability though in some specific offences the Act states for compensation through mediation (Wildlife Act, 2012, s.43).

Due to rampant environment pollution as well as use of arable land and forest

degradation by brick kilns, Bangladesh adopted the Brick Manufacturing and Brick Kilns Establishment (Control) Act, 2013. The law has introduced tougher regulations for brick production, including a provision of trial for offences under the penal code. Previously, offences were tried under the environment court. It prohibits establishment of brickfields in residential, protected, commercial and agricultural areas, and also in forests, sanctuaries, wetlands and Ecological Critical Areas (ECAs). Any brickfield establishment in these prohibited areas would be treated as a criminal offense, according to the law. For setting up a brickfield in residential, protected or commercial locations, the maximum punishment would be five years imprisonment or Tk. five lakh in fines, or both. For setting up a brickfield in forests – private or public – sanctuaries and wetlands, the punishment would be one year's imprisonment or Tk.100, 000 in fines (the Brick Manufacturing and Brick Kilns Establishment [Control] Act, 2013, s.18). Under the law, anyone found guilty of using low-quality coal containing low sulphur would have to pay a maximum fine of Tk 50,000 (Brick Kilns Act, 2013, ss.7&17). However, the standard of coal wasn't clearly defined in the law. Besides, using firewood, and sands, soil collected from agricultural land or other sources (as prohibited under this Act) for manufacturing bricks shall be penalized with varying degrees of punishment for the offenders to be determined by the nature of the offences involved (Brick Kilns Act, 2013, ss.5,6,15&16).

The brick-making industry is one of the fastest-growing industries in Bangladesh and it is one of the largest sources of greenhouse gas emission. Hence, to save air, air pollution and bio-diversity this law plays significant role. The Motor Vehicles Ordinance, 1983, on the same ground contains provision stating that whoever allows or lets out a motor vehicle for use in any public place, the smoke of which would constitute a health hazard, shall be punishable with fine which may extend to two hundred Taka (the Motor Vehicles Ordinance, 1983, s.150).

Bangladesh adopted laws under its obligation to protect environment, to save bio-diversity and to give us a healthy life. Different laws are there to regulate different activities that are associated with the risk of causing injury to environment and human health. Though these laws are different in approach, subject-matter or scope, one thing is common to them. Liability developed under these laws are criminal in nature, that means, all the activities prohibited under these Acts shall be treated as criminal offence; whereas, ECA incorporates both civil and criminal liability. Like ECA, It incorporates fault-based criminal liability for companies holding the owner, director, manager, secretary or agent of the company liable with defenses that such violation or failure was beyond his knowledge or that he exercised due diligence to prevent such violation or failure.

5.0 Existing Liability Regime Concerns under ECA and other Environmental Laws

It is widely known that the ultimate purpose of imposing liability is to repair the damage to the legal property affected, but in the case of environmental damage, there are a number of complexities that cannot be resolved by civil law (Silva, 2011). Imposition of civil liability for environmental damage involves existence of certain conditions (EC, 2000); one such condition is a casual link between a polluting event and measurable damage. Considering this point, section 7 of ECA states that if it appears to the Director General (DG) that any act or omission of a person is causing or has caused direct or indirect injury to the ecosystem, person or group of persons, the firstly mentioned person shall be held liable for compensating the same or taking corrective measures or for taking both. The words 'appears to the Director General' used in section 7 shows that the DG will make this person liable only when he can establish a link between the act or omission of a person and the activities causing injury to the eco system or person or group of persons. Under this law, as 'person' means any individual(s) or even a company or corporation, in this point, sometimes liability is not a suitable instrument for dealing with pollution of a widespread, diffuse character, where it is complex to link the negative environmental effects with the activities of certain individual actors. Examples of such complexity might be agricultural practice, climate change brought about by CO2 and other emissions, forests dying as a result of acid rain and air pollution caused by traffic.

Civil liability involves providing compensation for environmental harm that requires that the damage should be quantified. In doing this, the concept of harm to the environment is often viewed with economic approach which includes market value, loss of income, and damage to moral, aesthetic and scientific interests (Kiss & Shelton, 2007, p.147). This economic approach makes it difficult to determine the economic value of intangible aspects of the environment, such as biological diversity, balanced ecosystems, etc (Kiss & Shelton, 2007). Under ECA, though activities injurious to environment or damage is the threshold to trigger liability, neither the Act nor the Rules of 1997 states about what constitutes damage or is yet to spell out the procedure to calculate environmental damage for the purpose of paying compensation (Hossain, 2004, p.509). However, considering the inherent complexities of compensating the damage to the environment, many states, by their national legislation, abides by the international principle of 'the polluter pays principle'(Silva, 2011). But the Environment Conservation Act, 1995 did not incorporate this principle in its true sense.

The ECA contains penal provisions for acts that violate legal provisions and

harm the environment. This Act develops criminal sanctions which would be applicable to both corporations and individuals (in the case of arrest) and the company's legal representatives or directors would be responsible for the actions taken by the corporations they represent. Section 15(1) states that for violation of a provision or for non-compliance of a direction or for the activities specified in the Table mentioned herein, a person shall be penalized to imprisonment or with fine or both. This section contains a Table describing 13 situations where a person can be awarded sanctions, depending on the nature of offence or number of occurrence of the same, for a term up to 10 years or fine not exceeding Tk. 10, 00,000 only. Though apparently, the extent of punishment may sound high, in the context of gravity of environmental issue, where the harm is irreversible in nature, the punishment may not be so high (Selim, 2010).

There is a big difference in the provision of punishment contained in ECA and other existing laws dealing with same types of offence. For example, the person in charge of the place of occurrence is bound to render assistance and cooperation as required by the Director General, in case of discharge of excessive environmental pollutants or a person operating any industry, activity, process or the person handling any hazardous substances shall be bound to render all assistance to the authorized person in discharging his duties (ECA,1995, ss.9&10). Failure to comply with this duty may result into awarding punishment of imprisonment not exceeding 10 years or fine not exceeding Tk. 10,00,000 only or both and for latter one, imprisonment not exceeding 3 years or fine not exceeding Tk. 3,00,000 only or both (ECA, 1995, s.15). On the other hand, prohibition to any government servant from discharging his lawful duties, not aiding any help willfully to a government servant, for which he is bound to help, and violation of any properly served order of government servant are offences under sections 186-188 of the Penal Code and provide punishment ranging from one month imprisonment or fine of Tk. 200 or both up to six months imprisonment or fine of Tk. 1,000 or both. Again, section 150 of Motor Vehicle Ordinance, 1983 provides punishment up to Tk 2,000 for emitting black smokes from a vehicle. Whereas, for similar offence under section 6 of ECA, 1995, a person can be awarded punishment up to 1 year imprisonment (in case of repeated offence) or fine of Tk. 10,000 or both (ECA, 1995, s.15). Though ECA is given overriding effect with all other laws, this kind of inconsistency creates confusion and contradiction at the time of trial in the court and it bars the smooth implementation of penal provision enumerated in the law.

For better compliance, offences should have specific definition and interpretation. Section 15(1), states that violation of any other provision of this Act or a direction issued under the rules or obstructing the Director General or a person authorized by him in discharging his duties or intentionally delaying the discharge of such duty shall be penalized with imprisonment not exceeding

3 years or fine not exceeding Tk. 5,00,000 or both. But it is very unfortunate that frequently this kind of offence is committing by violating the provisions of the Act and frustratingly, this rate is higher in public sector where penalty cannot be imposed easily. So, this kind of penal sanction becomes soundless vessel. Furthermore, all directions or instructions issued by the concerned authority under this law are not similar in terms of importance and gravity (Selim, 2010). Punishment, therefore, for each violation under this sub-section should not be uniform. ECA, 1995, therefore, should have provision of specific punishment for specific offence and never inconsistent with the existing laws (Selim, 2010).

In addition to the abovementioned practical problems inherently associated with implementing liability provisions, there are some other factors that make it difficult to implement the liability provisions against the polluters. Lack of inter-sectoral coordination (Aminuzzaman, 2010) among the different bodies or agencies (DoE, the Ministry of Environment and Forests and line Ministries) assigned for implementing the environmental laws, absence of proper and regular monitoring of the inspection activities (Basak, 2007), the polluter-politicians nexus (Aminuzzaman, 2010), culture of impunity, lack of awareness about environmental rights and duties among the common people, etc. are also some of the prime reasons that contribute to the failure of holding the perpetrators accountable for environmental damage.

Enforcing environmental law is critical to ensuring that the regulated community complies with the mandates embodied in a statute (Hossain, 2004, p.465). The objectives of an effective enforcement program should be that the government must be able to achieve general environmental compliance through deterrence, can identify the environmental violators and can prosecute them diligently (Hossain, 2004, p.465). Bangladesh is far away from achieving these objectives. So, considering the cause-factors of its failure, the government should reassess the current environment pollution management policy with redefining the objectives and mechanism (legal, institutional) for achieving those objectives. The initiatives must begin by reexamining the liability regime of ECA itself. ECA provides for civil and criminal liability for environmental harm. Discussion made in this part shows that the criminal liability provisions in ECA have some loopholes. Though major amendments were made to these provisions in 2010, still it requires amendment to make these provisions more effective. Particularly, the punishments for some offences, like cutting hills, should be much higher. The existing confusions regarding the prescribed punishments for same kind of offence under different laws should be settled.

In civil liability, compensating environmental damage is complicated due to some practical problems. To face this problem, 'polluter pays principle' (PPP) can be an answer. The PPP is not new for Bangladesh. It was first mentioned in

the 1972 Stockholm Declaration Recommendation by the OECD Council on Guiding Principles concerning International Economic Aspects of Environmental Policies. Bangladesh is a signatory to the Rio Declaration, which clearly enunciates the PPP. Principle 16 of the Rio Declaration, 1992, states:

National authorities should endeavor to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.

The PPP is also the cornerstone of European Community Environmental Policy. The Indian government has embraced this principle in its 11th Five Year Plan in 2006, while Thailand adopted the same principle in 1992's Environmental Act and in its' environmental conservation strategies of the 8th Economic and Social Development Plan (Selim, 2010). Bangladesh, like other developed countries, can accept the 'polluter pays principle' in its true sense. It can start by figuring out how much pollution costs and by preserving data (pollution impact cost data and pollution management cost data) (Selim, 2010). Conducting research and thereby maintaining data is vital to fight any challenges as it shows us where we are and leads us where to go. On the basis of the data, government can develop a parameter for fixing the amount of compensation to be paid by the persons causing environmental damage.

A comprehensive and integrated strategy to be designed for coordinated action at the policy and program level which includes strong monitoring system, public education on environmental rights, self regulation and coordination of the bodies responsible for implementing the laws, etc. Moreover, access to courts on environmental issues must be easy and flexible as mere having law is not enough to protect our environment until and unless a setting supportive to reach the court for the purpose of seeking remedy against the offence is ensured to the common people.

6.0 Conclusion

Bangladesh has developed its own liability regime on environmental issues in the context of its endeavor to provide safe and healthy environment. Though some mechanisms, like civil liability and to some extent criminal liability play role to redress the environmental damage, the ultimate truth is that the condition is worsening. It indicates the fact that the present liability sector proves insufficient to hold the polluters liable and thereby to protect environment from degradation. As the existing system does not work for its purpose, there is a need for a comprehensive environmental liability regime with not only the potential but the pragmatism to effectively prevent further

environmental damage in the future. To this end, ECA needs to be revised towards a more stringent system including procedural and organizational specifications, providing a liberal standing before the court. The existing pollution management should be reassessed within a broader framework, by rethinking the current modes of operation employed by the regulatory stakeholders in line with the application of polluter pays principles.

Bangladesh is focusing on environmental issues more at present time than any other time before. Recently, by 15th Amendment, article 18A has been incorporated in the constitution of Bangladesh which ensures the right to safe environment for present and future generation of Bangladesh. With this constitutional mandate and international commitment, it is expected that Bangladesh will continue to work for a more effective liability regime for environmental damage and establish a successful and practiced system aiming at a sustainable protection of our environment.

Notes

[1] Section 2 of the Environment Court Act, 2010 states that 'Environmental Law' means the Environment Court Act, the Environment Conservation Act and any other laws specified by the government of Bangladesh in the official gazette for the purposes of this Act and the Rules made there under. As the government of Bangladesh is yet to specify any other law as environmental law, it is the ECA, 1995 and the Rules, 1997 that are dealt with by the Environment Court.

[2] It is not well established that what facts constitute 'due diligence'. In specific cases,, such as the Convention on the Law of the Sea, 1982, for example, states that due diligence is established if the states are to take all measures that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities.

[3] The Penal Code, 1860; the Code of Criminal Procedure, 1898 are more than 100 years old laws. Because of the nature of the environmental problems under these laws, the slow and formalistic procedure of giving remedy, these laws can make little impact on the management of the modern environmental hazards.

[4] Principle 13 of the Rio Declaration, 1992 states that states shall develop national law regarding liability and compensation for victims of pollution and other environmental damage.

References

Aminuzzaman, S. M. (2010). Environment Policy of Bangladesh: A Case Study of an Ambitious Policy with Implementation Snag. Paper presented to South Asia Climate Change Forum organized by Monash Sustainability Institute, Monash University,

Australia. Retrieved February 25, 2013 from http://www.monash.edu.au/research/sustainability-institute/asia-projects/paper_salah uddin_aminuzzaman.pdf.
Bangia, R.K. (1969). The Law of Torts, Allahabad: Allahabad Law Agency.

Basak, B. K. (2007, November 10). Only adapting law is not enough to protect the environment. The Daily Star, p. 12.

Cho, B. S. (2000/2001). Emergence of an International Environmental Criminal Law?. Journal of Environmental Law and Policy, 19 (1), 11-49.

Chouhan, G., Priyadarshi, A. (2011). Corporate Environment Liability. Asian Law journal, 1(1), 1-13.

Cullet, P. (2007). Liability and Redress for human induced global warming: towards an international regime. Stanford Journal of International Law, 43A, 99-121.

Directive 2008/99/EC on the Protection of Environment Through Criminal Law, 2008.

European Commission. (2000). White Paper on environmental liability. Retrieved February 25, 2013 from

http://ec.europa.eu/environment/legal/liability/pdf/el_full.pdf.

Faruque, A. A. (n.d.). Application of Polluter Pays Principle as an Enforcement Mechanism. Paper presented in a seminar organized by the University of Chittagong, Chittagong, Bangladesh.

Hossain, Md. I. (2004). International Environmental Law: Bangladesh Perspective. Dhaka: Ain Prokashon.

Kiss, A., Shelton, D. (2007). Guide to International Environmental Law. Boston: Martinus Nijhoff Publishers.

Organization for Economic Co-operation and Development. (2012). Liability for environmental damage in Eastern Europe, Caucasus and Central Asia (EECCA): Implementation of good international practices. Retrieved February 19, 2013, from http://www.oecd.org/ env/outreach/ 50244626.pdf.

Qudah, H.(2014). Towards International Criminalization of Transboundry Environmental Crimes. Unpublished doctoral dissertation, Pace University School of Law, New York. Retrieved December 7, 2015 from http://digitalcommons.pace.edu/ lawdissertations/16/.

Razzaque, J. (2002). Human Rights and the Environment: the national experience in South Asia and Africa. Paper presented in a seminar Jointly of UNEP-OHCHR on Human Rights and the Environment. Retrieved February 17, 2013 from

http://www2.ohchr.org/english/issues/environment/ environ/bp4.htm.

Rio Declaration, 1992.

Sands, P. (2003). Principles of International Environmental Law. New York: Cambridge University Press.

Selim, S.(2010, January). The Polluter pays Principle. Forum (a monthly publication of the Daily Star, 3(1).

Shaw, M.N. (1997). International Law. New York: Cambridge University Press.

Silva, A.(2011). Legal liability for environmental contamination. Retrieved April 2, 2013 from

goodrichriquelme.com/wp-content/uploads/.../Environmental-liability.pdf

The Bangladesh Water Act, 2008 (Bangladesh).

The Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal, 1999 (not yet into force).

The Brick Manufacturing and Brick Kilns Establishment (Control) Act, 2013 (Bangladesh).

The Constitution of Peoples' Republic of Bangladesh, 1972.

The Draft Code of Crimes against the Peace and Security of Mankind, 1996.

The Environment Conservation Act, 1995 (Bangladesh).

The Environment Court Act, 2010 (Bangladesh).

The Mega city, Divisional Town and District Town's Municipal Areas including County's all the Municipal Areas' Playground, Open Space, Park and National Water Reservoir Conservation Act, 2000 (Bangladesh).

The Protection and Conservation of Fish Act, 1950 (Bangladesh).

The Territorial Waters and Maritime Zones Act, 1974 (Bangladesh).

The Wildlife (Preservation and Safety) Act, 2012 (Bangladesh).