

India, Pakistan, Bangladesh

Human Rights and the Environment

– National Experiences –

by Jona Razzaque *

Introduction

This article examines the development of human rights and the environment in three South Asian countries during the last 10 years.¹ It outlines the main provisions in the Constitutions of these countries that focus on human rights and the environment. It also examines substantive and procedural rights which can be used to protect these two areas. This Article analyses the case law of these three countries, and considers the human right implications of decisions relating to the environment and *vice versa*. The Article also considers the participation of non-State actors in the judicial process through public interest litigation (PIL).²

The nature of environmental and human rights problems is similar in all South Asian countries. However, this Article will not detail the nature of each of these environmental and human rights concerns.³ Such common concerns include water pollution (lack of control over the pollution of rivers, irresponsible construction of dams and barrages, lack of access to drinking water free of toxins or other contaminants, increased use of agrochemicals/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 effluent, dumping of land-based solid waste into the sea, heavy coastal construction, inland mining, poor land use practices, overfishing, destructive fishing techniques, shrimp cultivation); loss of coastal habitats and deforestation (substantial loss of mangrove forests, unplanned commercial fisheries); land-based pollution (rapid or unplanned 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 agrochemicals, over-exploitation of groundwater); and air pollution (rapid and unplanned urbanisation, industrial pollution, increasing transport, domestic refuse, coal consumption, energy use patterns, fly-ash).

Constitutional aspects in India, Pakistan and Bangladesh

India, Pakistan and Bangladesh use various constitutional rights to protect human rights and the environment. The right to life, a fundamental right, has been extended to include the right to a healthy environment. The right to

a healthy environment has been incorporated, directly or indirectly, into court judgments. In India, the State has a duty to protect and preserve the ecosystem. This is a part of the directive principles of State policy, and not a fundamental right. On the other hand, the Constitutions of Bangladesh or Pakistan provide no direct protection of the environment. In India, Pakistan and Bangladesh, the fundamental right to life has been expanded 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 the right to property, have been analysed to determine their application in the protection of the environment and human rights. The discussion shows that most litigation is brought against public authorities, which include various central government ministries, federal bodies (in Pakistan and India), local authorities and publicly-owned companies.

The right to a healthy environment in India

Environmental deterioration could eventually endanger the lives of present and future generations. Therefore, the right to life has been used in a diversified manner in India. It includes, *inter alia*, the right to survive as a species, quality of life, the right to live with dignity and the right to livelihood. In India, this has been expressly recognised as a constitutional right. However, the nature and extent of this right is not similar to the self-executory and actionable right to a sound and healthy ecology prescribed in the Constitution of the Philippines.⁴ Article 21 of the Indian Constitution states: 'No person shall be deprived of his life or personal liberty except according to procedures established by law.' The Supreme Court expanded this negative right in two ways. First, any law affecting personal liberty should be reasonable, fair and just.⁵ Second, the Court recognised several unarticulated liberties that were implied by Article 21.⁶ It is by this second method that the Supreme Court interpreted the right to life and personal liberty to include the right to a clean environment.⁷

In addition, the Constitution (Forty-second Amendment) Act 1976 explicitly incorporated environmental protection and improvement as a part of State policy. Article 48A, a Directive Principle of State Policy, provides that: 'The State shall endeavour to protect and improve the environment and safeguard the forests and wildlife of the country.'⁷ Moreover, Article 51A(g) imposes a similar responsibility on every citizen 'to protect and improve the natural environment including forests, lakes, rivers and wildlife, and to have compassion for living creatures...'.⁷

* The author is a lecturer in the Department of Law at Queen Mary College, University of London, UK, and Outreach Co-ordinator of the Environmental Law Foundation, also in London. Please email any comments to jrazzaque@hotmail.com.

Therefore, protection of natural environment and compassion for living creatures were made the positive fundamental duty of every citizen. Both the provisions substantially give the same message. Together, they highlight the national consensus on the importance of protecting and improving the environment. The wording of these Articles show that the nature of such obligation under State policy is non-self-executing. (This means that although the provisions of the Indian Constitution do not require any separate legislation and the nature of the obligation is direct, State policies are not, on their own, judicially enforceable. Once the petitioner goes to court to remedy a breach of fundamental right, the court takes account of State policies. Article 37 of the Indian Constitution states: 'The provisions contained in this part (Part IV) shall not be enforceable by any court, but the principles laid down therein are nevertheless fundamental in the governance of the country and it is the duty of the State to apply these principles in making laws.')

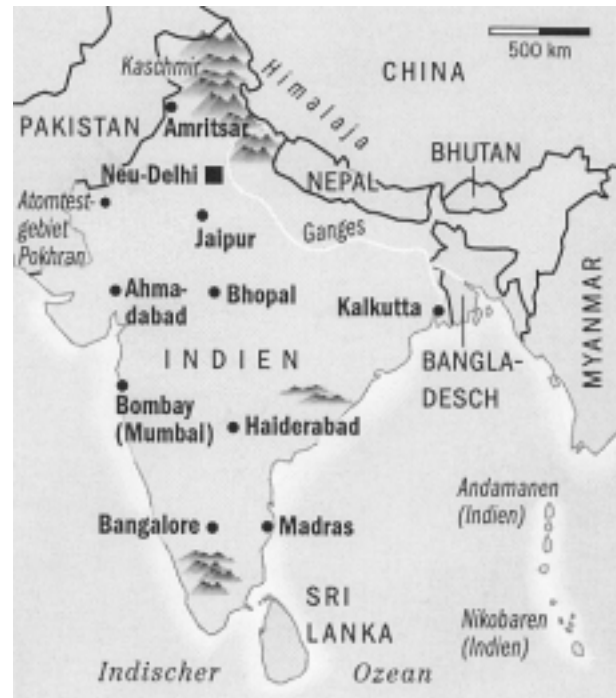
The following discussion shows how the courts have dealt with human rights and the environment during the last decade. The link between environmental quality and the right to life was first addressed by a constitutional bench of the Supreme Court in the *Charan Lal Sahu Case*.⁸ In 1991, the Supreme Court interpreted the right to life guaranteed by Article 21 of the Constitution to include the right to a wholesome environment. In *Subash Kumar*,⁹ the Court observed that 'right to life guaranteed by Article 21 includes the right of enjoyment of pollution-free water and air for full enjoyment of life.'

Through this case, the court recognised the right to a wholesome environment as part of the fundamental right to life. This case also indicated that the municipalities and a large number of other concerned governmental agencies would no longer be content with unimplemented measures for the abatement and prevention of pollution. They may be compelled to take positive measures to improve the environment. This was reaffirmed in *M.C. Mehta v. Union of India*.¹⁰ The case concerned the deterioration of the environment worldwide and the duty of the State government, under Article 21, to ensure a better quality of environment. The Supreme Court ordered the central government to show the steps they have taken to restore the quality of environment through national policy.

In another case,¹¹ the Supreme Court dealt with the problem of air pollution caused by motor vehicles operating in Delhi. It was a public interest petition, and the court made several demands of the Ministry of Environment and Forests. Decisions such as this indicate a new trend of the Supreme Court to fashion novel remedies to reach a given result, although these new remedies seem to encroach on the domain of the executive.¹²

Another expansion of the right to life is the right to livelihood (Article 41), which is a directive principle of State policy. This extension can check government actions in relation to an environmental impact that has threatened to dislocate the poor and disrupt their lifestyles. A strong connection between Article 41 and Article 21 was established in the 1980s.¹³ However, in a restrictive decision in 1993, the court held that it is not feasible or appro-

priate to guarantee Article 41, since the country lacked the economic capacity and development to honour such a guarantee.¹⁴ However, in *Kirloskar Bros. Ltd v. ESI Corporation*¹⁵ the court opined that the term 'life' as used in Article 21 has a much wider meaning, which includes a right to livelihood, better standard of living, hygienic conditions in the workplace and leisure facilities, and opportunities to eliminate sickness and physical disability of



Courtesy: Welt Jahrbuch 2000

working people. In this case, the court used right to life to protect the health of working people by providing them with medical facilities and health insurance. The right to livelihood lost its battle to economic development in several cases dealing with the rights of indigenous people during the 1980s.¹⁶ However, in 1992¹⁷ the court re-examined its earlier orders. Guided by the positive obligations contained in Article 48A and 51A(g), the court ordered adequate compensation and rehabilitation of the evictees.¹⁸

The third aspect of the right to life is the application of public trust doctrine to protect and preserve public land.¹⁹ This doctrine serves two purposes: it mandates affirmative State action for effective management of resources, and empowers citizens to question ineffective management of natural resources.²⁰ Increasingly, public trust is being related to sustainable development, the precautionary principle and biodiversity protection. Moreover, not only can it be used to protect the public from poor application of planning law or environmental impact assessment,²¹ it also has an intergenerational dimension.²²

When the Indian courts applied the public trust doctrine, they considered it not only as an international law concept, but also as one which is well established in their national legal system.²³ Accepting public trust doctrine as part of common law, the Indian Courts have applied this

explicitly in three recent cases, one in 1997²⁴ and two in 1999.²⁵ This concept has not yet been applied in any environmental litigation in Pakistan or Bangladesh. However, its successful application in India shows that this doctrine can be used to remove difficulties in resolving tribal land disputes and cases concerning development projects planned by the government. In *M.C. Mehta v. Kamal Nath and Others*²⁶ the court added that '[it] would be equally appropriate in controversies involving air pollution, the dissemination of pesticides, the location of rights of ways for utilities, and strip mining of wetland filling on private lands in a State where governmental permits are required.' In both *M.I. Builders Pvt. Ltd*²⁷ and *Th. Majra Singh*²⁸ the court reconfirmed that the public trust doctrine 'has grown from Article 21 of the constitution and has been part of the Indian legal thought process for quite a long time.'

The right to a healthy environment in Bangladesh

The Constitution of Bangladesh does not explicitly provide for the right to a healthy environment either in the directive principles or as a fundamental right. Article 31 states that every citizen has the right to protection from 'action detrimental to 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, compensation must be paid. Article 32 states: 'No person shall be deprived of life or personal liberty save in accordance with law'. These two Articles together incorporate the fundamental 'right to life'. The following discussion suggests that this right to life includes the right to a healthy environment capable of supporting the growth of a meaningful 'existence of life'.

In 1994, a public interest litigation was initiated before the Supreme Court dealing with air and noise pollution. The Supreme Court agreed with the argument presented by the petitioner that the constitutional 'right to life' does extend to include the right to a safe and healthy environment.²⁹ In a recent case, the Appellate Division and the High Court Division of the Supreme Court have dealt with the question in a positive manner. The Appellate Division, in the case of *Dr. M. Farooque v. Bangladesh*³⁰ has reiterated Bangladesh's commitment in the 'context of engaging concern for the conservation of the environment, irrespective of the locality where it is threatened' (Afzal, CJ, para. 17). This was a full court consensus judgment and the court decided:

'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, and sanitation, without which life can hardly be enjoyed. Any act or omission contrary thereto will be violative of the said right to life.' (Chowdhury, J, Para. 101)

The High Court Division, in the same case,³¹ expanded the fundamental 'right to life' to include anything that affects life, public health and safety. This 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.' The court added that, if right to

life means the right to protect the health and normal longevity of any ordinary human being, then it could be said that the fundamental right to life of a person has been threatened or endangered.

These two cases show that the courts are willing to establish the right to a clean environment. Another case³² presently pending before the High Court deals with commercial shrimp cultivation and its adverse effects on socioeconomic development and on sustainable development. According to the petitioner, commercial shrimp cultivation involves the 'usage of various chemicals and saline water' which 'eventually makes the soil infertile and unsuitable for soil cultivation... [I]t further damages the environment by causing stunted growth of the trees or their death, reducing the grazing areas for cattle by increasing water logging, and adversely affecting the size of the open water fish catch as a result of the dumping of chemicals into the river... shrimp cultivation will cause irreparable ecological and environmental damage to the community and to the livelihoods of the inhabitants of the said area.' The petitioners submitted that government orders regarding commercial shrimp farming frustrated the spirit of Environmental Policy 1992 and breached Article 32 of the Constitution.³³

The right to a healthy environment in Pakistan

Article 9 of the Constitution of Pakistan states that no person shall be deprived of life or liberty save in accordance with the law. The Supreme Court in *Shehla Zia's case*³⁴ decided that Article 9 includes 'all such amenities and facilities which a person born in a free country is entitled to enjoy with dignity, legally and constitutionally'. The petitioner questioned whether, under Article 9 of the Constitution, citizens were entitled to protection of law from being exposed to hazards of electromagnetic fields or any other such hazards which may be due to the installation or construction of any grid station, factory, power station or similar installation. In this case,³⁵ Salem Akhtar, J., commented that

'Under our Constitution, Article 14 provides that the dignity of man and, subject to law, the privacy of home shall be inviolable. The fundamental right to preserve and protect the dignity of man and right to "life" are guaranteed under Article 9. If both are read together, question will arise whether a person can be said to have dignity of man if his right to life is below bare necessity line without proper food, clothing, shelter, education, health care, clean atmosphere and unpolluted environment.'

The Pakistan Law Commission Case,³⁶ a human rights case, dealt with the meaning of Article 9 of the Constitution. The Supreme Court of Pakistan held that: 'Article 9 of the Constitution which guarantees life and liberty according to law is not to be construed in a restricted and pedantic manner. Life is a larger concept, which includes the right of enjoyment of life, and maintaining an adequate level of living for full enjoyment of freedom and rights.' In another human rights case³⁷ against cigarette companies, the petitioner sought a ban on cigarette commercials on television. In his view, Western companies were unable to sell cigarettes in their own countries, and they were aiming instead at developing countries. He added that they were using advertising to that end, and this has resulted in

catastrophic calamities in the form of cancer and heart disease.³⁸ The Supreme Court stated that citizens could expect protection under Article 9 because right to life also includes quality of life.

Article 9 was explained again in the *Salt Miners Case*³⁹ where the petitioner sought to enforce the right of the residents to have clear and unpolluted water. They contended that if miners were allowed to continue their activities, which extended to the drinking water catchment area, the watercourse, reservoir and the pipelines would become contaminated. The Court found in favour of the petitioner, and said that if the water was contaminated, it would pose a serious threat to human existence. The Court gave a broad meaning to the word 'life' and stated that:

'The word "life" ... cannot be restricted to a vegetative life or mere animal existence. In hilly areas where access to water is scarce, difficult or limited, the right to have water free from pollution and contamination is a right to life itself. This does not mean that persons residing in another part of the country where water is in abundance do not have such a right. The right to unpolluted water is a right of every person, wherever he lives.'

The cases discussed above show that the Pakistan judiciary has firmly established a right to a healthy environment.⁴⁰

The right to equality in India, Pakistan and Bangladesh

The Constitutions of India and Bangladesh provide that all people 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. 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. Article 14 of the Indian Constitution states that: 'The State shall not deny to any person equality before the law or 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. It can be used to challenge government sanctions for mining and other activities with high environmental/human rights impact, where permissions are granted arbitrarily without adequate consideration of possible environmental impacts.⁴¹

Article 25 of the Constitution of Pakistan deals with the right to equality. It states that all citizens are equal before the law and are entitled to equal protection of the law, and that there shall be no discrimination on the basis of sex alone. The Constitution of Bangladesh provides similar rights to the citizens. Article 27 provides that all citizens are equal before the law and are entitled to equal protection of the 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, property and pursuit of happiness.⁴² The right to equality, along with the right to life, can guarantee the right to a healthy environment.⁴³

The right to equality before the law does not require that all persons must be treated in exactly the same way. What is required is that the justification for differentiation must be legitimate. So far, in Bangladesh and Pakistan,

there has been no application of this fundamental right for the protection of environmental human rights. Although it is unlikely that this provision will be used on its own, it can help to strengthen a claim based on the right to life or the right to property.

The right to property in India, Pakistan and Bangladesh

A right to property implies that an owner is entitled to non-interference in the enjoyment of his property, in particular, non-interference by the government. The individual right guaranteed through the Constitution is a private property right. The owner of, say, some land, has overall ownership over it. Property rights begin where the government's right to interfere ends. This is, in other words, known as individual autonomy.

In India, this right 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 advantages of other fundamental rights.⁴⁴ This amendment was due to multiple lawsuits being brought against different government agencies by indigent peoples, who were being evicted from their own property as their lands were taken over and used for other development projects.⁴⁵ 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 his own property.⁴⁶ Article 23 of the Pakistani Constitution asserts 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.'

This shows that, in India, Pakistan and Bangladesh, the constitutional definition of property is very restricted. The articles relating to property rights provide that no property shall be compulsorily acquired, nationalised or requisitioned, save by lawful authority. The restriction put on the right to transfer property has to be reasonable, so that Parliament does not have unfettered power to impose any restriction it chooses. In spite of the conservative meaning, there is a way of using this provision effectively in the protection of the environment. This work could effectively be done by the promulgation of land management laws and through the judiciary's balancing act between individual property rights and community interest. Although property rights have not been considered thoroughly in any public interest cases, this right could be used for the protection of the environment and for sustainable development.

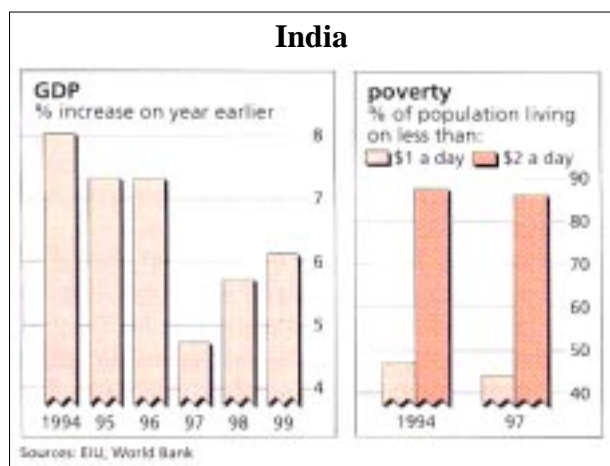
Legislative aspects

Substantive law

The national legislation in India, Pakistan and Bangladesh is sectoral, and separate legislation deals with human rights and the environment. However, in recent years environmental legislation has taken account of human health and safety aspects, and sustainable development. General environmental laws⁴⁷ tend to be enabling in nature and most charge a competent national authority with

providing more specific guidelines and regulations in future.

In Pakistan and Bangladesh, these framework laws deal with water and air pollution and regulate, to a certain extent, hazardous waste. In Pakistan, the Environmental Protection Act 1997 (hereafter, the 1997 Act) acts as a framework law and uses techniques such as penalties and sanctions. International environmental principles such as the precautionary principle and polluter-pays principle have been applied to implement the law.⁴⁸ The precautionary approach is clear in the definition of pollution where measures can be taken if there is a *likelihood* of damage to the environment. The 1997 Act is the principal statement of



Pakistan's national commitment in this area. This Act defines pollution, hazardous substances, waste, adverse environmental effects, air pollutants and biodiversity. It gives the Pakistan Environmental Protection Council, Pakistan Environmental Protection Agency and Provincial Environment Protection Agency wide-ranging powers.

In Bangladesh, a perfect example of framework law is the recent Bangladesh Environment Conservation Act 1995.⁴⁹ This Act was created to provide for the conservation and improvement of environmental standards and to control and mitigate environmental pollution. The Act integrates 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 can be recovered from such persons as are deemed to be responsible for the pollution.⁵⁰ The Environmental Conservation Rules 1997 determine the acceptable standards of air quality, water quality, noise levels, motor vehicle exhaust emissions and the quality of sewer and waste discharge. The rules and procedures involved in environmental impact assessment (EIA) are also guided by the Environment Conservation Act 1995 and the Rules of 1997.

The implementation of framework laws is not promising, since pollution standards are set by various government agencies. Moreover, these agencies are in charge of implementing the laws, not the aggrieved citizens. Only in certain cases do citizens have access to justice through environmental legislation. For example, in Bangladesh,

the Directorate of the Environment identified in 1989 some 903 polluting companies. However, no action was taken against them.⁵¹ Similar is the case of river encroachment and public park encroachment where several cases are pending before the court.⁵² Moreover, at least in two cases⁵³ in India, the polluting party was charged with contempt of court for not implementing the judgments of the court. There is an increase of contempt petition⁵⁴ by the aggrieved parties, as polluting parties often do not implement the court's directions.

Procedural law

Procedural rights

The scope of access to environmental information and public participation in decision-making is limited in these three countries, with several regulations guiding EIA procedures.⁵⁵ Some provisions in the framework legislation deal with access to environmental information.⁵⁶ Provisions for complaints from 'any person' under environmental legislation⁵⁷ and Asian Development Bank (ADB)-funded development projects show the increased public participation in decision-making.⁵⁸ However, there is no general duty imposed on the State to collect environmental information.

Standing in the court

Once the applicant is in the court with a claim in the public interest, the most important question for the court to decide is whether the applicant should be allowed access to the judicial process. Unlike Indian courts,⁵⁹ the Bangladeshi and Pakistani courts apply an 'aggrieved persons' test,⁶⁰ which means a right or recognised interest that is direct and personal to the complainant. In India, the Constitution does not provide any specific test for standing to enforce fundamental rights: instead, Indian courts apply the 'sufficient interest' test. Absence of any specific rule of standing is one of the reasons for the development of PIL in India. On the other hand, the Constitution of Pakistan and Bangladesh does include a specific test to determine standing in writ petitions.

Although in the 1990s the judiciaries of Bangladesh⁶¹ and Pakistan⁶² 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 controversy, and could lead to very expensive litigation over legal procedure when resources could be better spent on fighting individual cases. For example, environmental groups, who may not have any direct connection with the event in question, may seek to undertake the litigation. The uncertainty in the nature of this test makes it difficult to have homogeneity in PIL decisions. There is no clear and practical guide for identifying cases in which a particular interest will give standing to a plaintiff to complain. This adds to the length and cost of litigation.

Procedural remedies

The most common remedies offered by the court are directions, injunction⁶³ and civil and criminal damages.⁶⁴ Though *suo motu* actions have not been taken by the court in India⁶⁵ and Pakistan,⁶⁶ the judiciary in Bangladesh has

initiated *suo motu* action in at least one case related to human rights.⁶⁷ The Indian judiciary has made several successful directions to create experts and special committees in several environmental litigation.⁶⁸ Moreover, the Indian courts have made several directions on unconditional closure of tanneries and relocation,⁶⁹ payment of compensation for reversing damage caused,⁷⁰ payment of costs of the remedial measures,⁷¹ necessary measures to be adopted by the relevant Ministry to broadcast information relating to the environment in the media,⁷² attracting the attention of the government where there is a need for legislation,⁷³ and setting up a committee to monitor the directions of the court.⁷⁴ There is ample opportunity for the judiciaries of Bangladesh and Pakistan to make a similar sort of innovative direction in human rights and environmental cases.⁷⁵

Legal aid

In Bangladesh, the Legal Assistance Act 2000, which deals with legal aid, contains nothing on the protection of the environment, human rights or even on public interest litigation. However, it does state that legal assistance will be offered to those who cannot afford legal fees. In Pakistan, the government has established a free legal aid committee in 1999. However, there is no legislation to guide the granting of such legal aid.⁷⁶ In India, legal aid is used mainly in criminal cases; however, in certain cases it is possible to use it in public interest cases.⁷⁷

Case law concerning human rights and the environment

The recent trend of case law suggests that it is difficult to make a clear-cut division between human rights cases and environmental cases. In most public interest litigation, both issues are argued and decided. As the 1980s case studies in India show, the various categories of PIL covered mainly air, water, mining or forest conservation. In the 1990s, the categories became more sophisticated and dealt with more complex areas, such as waste management, the protection of biodiversity, access to environmental information, groundwater management and the relationship between labour rights and environmental rights. In Bangladesh and Pakistan, public interest cases dealt with general aspects of the environment, such as air or water pollution, or challenging new development projects, as well as complex aspects, such as waste management and urban pollution. The following discussion shows that the categories of PIL in the latter two countries primarily deal with human rights-related issues and concentrate on exploring the fundamental right to life.

During the 1990s, the Indian courts⁷⁸ dealt with mining and quarrying, forest conservation, water pollution, gas leak disasters, development projects and the environment, hazardous waste emissions from industries, litigation concerning the building of dams, protection of livelihood, the construction of bridges and environmental degradation. At the same time, the courts dealt with the protection of wetlands, air pollution, air and water pollution, noise pollution, pollution from animal slaughter-houses, access to environmental information, trade and environ-

ment, the relocation of labour after the closure of polluting factories, groundwater management and development, and the management of city sewerage systems. In 2000, there are some public interest environmental cases where the Supreme Court dealt with water pollution, noise pollution and coastal zone development. All these decisions, in some way or other, established the legal human right to a healthy environment.

In Bangladesh,⁷⁹ the first public interest environmental litigation (PIEL) case was based on noise pollution caused by election canvassing. However, the most prominent case concerned the Flood Action Programme, a foreign-aided development project, and its harmful effects on the people and the environment. There are cases of industrial and urban development, unplanned rural development, oil and exploration planning, lease of open river (when the fishing rights of navigable stretches of rivers are leased out to organisations/people by the government), urban air pollution, and the need for the government to oppose pollution. In Pakistan,⁸⁰ the first PIEL case concerned development projects and the environment. Other PIEL cases have involved water pollution, urban development and the environment, air pollution, the conservation of forest resources, and general environmental pollution. Most of these decisions dealt with human health and the environment.

Sustainable development and national application

In India, Pakistan and Bangladesh, three basic elements of implementing sustainable development can be identified: sustainable and equitable utilisation of natural resources, integration of environmental protection and economic development, and the right to development. To some extent anthropocentric, the definition of sustainable development in India, Pakistan and Bangladesh integrates a quality of life that is economically and ecologically sustainable.

India, although case law has failed to produce a clear definition, did manage to produce an applicable definition of sustainable development. During the 1980s, most Indian cases were concerned with the cancellation of mining leases and the closure of national development projects. In 1994, the Supreme Court of India directly mentioned the principle of sustainable development, trying to balance this with the related social, economic and ecological aspects.⁸¹ The 1990s definition of sustainable development emphasised the relationship between development and environment, and finding a balance between the two. More sophisticated challenges came about when the Indian courts were asked to deal with polluting industries such as leather factories,⁸² to prevent industry/building encroaching on wetlands,⁸³ and to preserve forests and vegetation.⁸⁴ It gave priority to sustainable use of natural resources, and to the right to a healthy environment for present and, to a certain extent, future generations. National environmental policy and legislation reflect the concern for a balance between development, planning and the environment.⁸⁵

Unlike the Indian judiciary, there are only a few cases

where the Bangladeshi courts dealt with conservation and the equitable utilisation of natural resources.⁸⁶ While dealing with development projects, a similar approach has been adopted by the Bangladeshi judiciary.⁸⁷ In the *FAP case*,⁸⁸ the court directed the concerned authority, the Ministry of Irrigation, Water Development and Flood Control, that no 'serious damage' to the environment and ecology had been caused by the Flood Action Plan (FAP) activities, though the threshold of 'seriousness' was not ascertained. The High Court declined to interfere with the FAP project, since foreign assistance was involved, and the whole project was meant to be for the public benefit. Moreover, the court took account of the substantial amount of money that had been spent and the work that had been partially implemented.

In Pakistan, the Environment Protection Act 1997 defines and mentions 'sustainable development' on several occasions.⁸⁹ The Supreme Court of Pakistan indirectly applied the concept of sustainable development while dealing with the construction of a high-voltage electricity grid station, which was likely to cause a serious health hazard to the local people.⁹⁰ In this case, the court balanced the safety and welfare of citizens and the importance of commerce and industry. In the court's view, 'a method should be devised to strike [a] balance between economic progress and prosperity, and to minimise possible hazards. In fact, a policy of sustainability should be adopted.' The court appointed an independent commissioner to study the scheme, planning, devices and techniques related to the project and to examine whether there was any likelihood of adverse effects being caused to the health of local residents.

Intergenerational equity and national application

In India, this principle has been considered as part of achieving sustainable development. However, the nature of the right and how to achieve it have not been discussed by the courts. Indian courts have only rarely mentioned the necessity of preserving the environment for the present generation as well as for future generations. For example, in the cases dealing with areas of reserved forest, the court decided the case based on the needs of the present generation and the rational use of natural resources. Therefore, the vertical application of equity has been established. Moreover, the notion of equity has been connected with the concept of public trust, and depends on people's right to enjoy a healthy environment. In Pakistan, this principle has not been specifically applied in any case. On the other hand, in Bangladesh, although pleaded, the court did not

apply this principle on the grounds that neither the Constitution nor the national legislation of Bangladesh explicitly mentions this principle.

In India, the *Vellore Citizen's Welfare Forum*⁹¹ recites the Brundtland Commission's definition of sustainable development 'which meets the needs of the present without compromising the ability of the future generations to meet their own needs'. In *People United for Better Living in Calcutta v. State of West Bengal*,⁹² it was stated that: 'the present-day society has a responsibility to posterity for their proper growth and development so as to allow posterity to breathe normally and live in a cleaner environment and have consequent fuller development.'⁹³ In the *S. Jagannath* case the court, while dealing with commercial shrimp farming, held that a strict environmental test is required before permission will be granted for the commencement of such farming operations in fragile coastal area. It added that there must be a compulsory environmental impact assessment carried out, which would consider intergenerational equity and the cost of rehabilitation.⁹⁴

In Bangladesh, two cases in 1995 and 1996 mentioned intergenerational rights but did not establish the precise nature of this right.⁹⁵ In *M. Farooque v. Bangladesh and Others*⁹⁶ the petitioner submitted that they represented not only the present generation but also the generations yet unborn. The court, however, did not agree. The petitioner mentioned the *Minors Oposa* case, in which the twin concepts of 'intergenerational responsibility' and 'intergenerational justice' were presented by the plaintiff minors (represented by their respective parents) to prevent the misappropriation or impairment of the Philippines rain-forest. The minors asserted that they represent the present generation as well as generations yet unborn. This case was distinguished from the one to be decided by the Bangladeshi court. In the Bangladeshi court's view, the minors were allowed to stand before the court because 'the right to a balanced and healthful ecology' was a fundamental right in the Constitution of the Philippines. Several laws in the Philippines declare the policy of the State to be the conservation of the country's forest 'not only for the present generation but for the future generation as well'. The Constitution of Bangladesh does not expressly provide any such right.⁹⁷

The precautionary principle and national application

The precautionary principle and national application

In India, most of the cases in the 1990s dealt with the definition of the principle. Adopted to prevent inter-jurisdictional damage, the Indian court decided that the



A peat-lined tributary of the Yarghoon Rive near Lashkargahaz, North West Frontier Province, Pakistan (elevation 3,649 meters)
Courtesy: Ramsar

burden of proof would shift and the allegation would require to be proved beyond reasonable doubt. Applying as part of customary law the court, in some cases, wanted to avoid the stringent rules and procedures of evidence and causation. This principle has also been applied as part of sustainable development in some Indian cases. The following discussion shows that, in Bangladesh, the court examined the seriousness of environmental damage to determine whether there is any need to take a precautionary approach. However, the threshold of such damage was not examined, neither was it accepted as part of customary law. This also shows that in Pakistan, human rights and human health were given priority to apply this principle.

In 1996, the Indian court laid down the meaning of the precautionary principle (PP).⁹⁸ It stated that environmental measures, adopted by the State government and statutory authorities, must *anticipate*, prevent and *attack* the causes of environmental degradation. Following the definition provided in the Rio Declaration, the court stated that where 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. The court again followed the 'anticipate, prevent and attack' approach in the *M.C. Mehta case*.⁹⁹ In this case, the precautionary principle was invoked to prevent construction within one kilometre of two lakes located near Delhi, and the principle was accepted as a part of the law of the land.

Thereafter, in the *Taj Trapezium case*¹⁰⁰ the Supreme Court ordered a number of industries in the area surrounding the Taj Mahal to relocate or introduce pollution abatement measures in order to protect the Taj Mahal from deterioration and damage. Following the decision of the *Vellore Citizens Case* and the *Indian Council for Environmental Legal Action Case*,¹⁰¹ the Supreme Court described the PP as an environmental measure which must 'anticipate, prevent and attack' the causes of environmental degradation. In the *S. Jagannath case*,¹⁰² the precautionary approach was relied on to curtail commercial shrimp farming in India's coastal areas. Commercial users of agricultural lands and salt farms were discharging highly polluting effluents, and causing water pollution. The normal traditional life and vocational activities of the local population in these coastal areas were being seriously hampered. In the *M.C. Mehta (Tanneries) case*¹⁰³ this principle was used when the court wanted to relocate 550 polluting tanneries operating in Calcutta.

A recent application of the PP is found in *Suo Motu Proceedings in Re: Delhi Transport Department*¹⁰⁴ where the Supreme Court dealt with air pollution in New Delhi. In the Supreme Court's view, the precautionary principle, which is part of the 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, 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,¹⁰⁵ and added that principle is entrenched

in the Constitution as well as in various environmental laws.¹⁰⁶ In *Th. Majra Singh v. Indian Oil Corporation*¹⁰⁷ it was held that the court could only examine whether or not authorities have taken all precautions with a view to see that laws dealing with environment and pollution have been given due care and attention.¹⁰⁸ In *A.P. Pollution Control Board v. Prof. M.V. Nayudu (retd.)*¹⁰⁹ the Supreme Court (SC) commented that, although PP is accepted as part of international customary law, it is still evolving, and applies according to the situation and circumstances of each case. The SC also stated that the burden of proof in environmental cases is reversed and 'burden as to the absence of injurious effect of the proposed action is placed on those who want to change the status quo.'¹¹⁰

In Bangladesh, in the *Radioactive Milk case*,¹¹¹ the petitioner, a potential consumer, submitted the writ petition in the public interest, stating that the consumption of an imported food item containing radiation levels higher than the acceptable limit was injurious to public health and was a threat to the life of the people of his country. A potential customer's right to file a suit has been recognised by this case. The court simply assumed that such injuries either had occurred or were 'likely to occur' and proceeded to issue remedial directions. In the *Flood Action Plan case*,¹¹² 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 PP and did not in the end bar the development project.

In Pakistan, the application of the PP is found in *Shehla Zia v. WAPDA*¹¹³ where citizens against the construction of an electricity grid station in a residential area sent a letter to the Supreme Court. Their letter asked two questions: (i) whether any government agency has a right to endanger the life of citizens by its actions without the latter's consent; and (ii) whether zoning laws vest rights in citizens which cannot be withdrawn or altered without the citizens' consent. The SC commented that:

'The precautionary policy is to first consider the welfare and safety of human beings and the environment and then to choose a policy and execute the plan which is best suited to resolving the possible dangers, or take alternative precautionary measures to ensure safety. To stick to a particular plan on the basis of old studies or inconclusive research cannot be said to be a policy of prudence or precaution.'

The *Salt Miners case*¹¹⁴ involved the rights of residents to have clean and unpolluted water. The Supreme Court, by taking into account the level of danger that people in the relevant area were exposed to, ordered that all mining activities should make procedural changes to the satisfaction of the court-appointed commission to prevent the pollution of the reservoir, stream and catchment area. In the *Environment Pollution in Balochistan case*¹¹⁵ the Supreme Court took account of a news item which contended that certain businessmen were planning to purchase coastal areas of Balochistan, a province in Pakistan, and turn the area into a dumping ground for waste material. The authorities were ordered by the court to insert a clause in the allotment letter/licence/lease that the allottee or tenants shall not use the land for dumping, treating, burying or destroying, by any means, waste of any nature, including any form of industrial or nuclear waste. These three cases specifi-

cally applied a precautionary approach, though the court never mentioned the principle itself.

Unlike in the Indian Supreme Court, the Supreme Court judges of Pakistan and Bangladesh have not applied the precautionary principle as an international customary law. However, all three judiciaries agree that the Rio Declaration has persuasive and binding value, and both Pakistan and Bangladesh signed the Declaration. But at the same time, the judiciary of Pakistan and Bangladesh believe that an international agreement between nations, if only signed by one country, is always subject to ratification, and can be enforced as a law only when legislation is formally passed by the country in question through its legislature. Although much recent environmental legislation has incorporated the precautionary principle, the courts in Bangladesh and Pakistan 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 PP when there was a threat of serious and irreversible damage. Moreover, a strong form of the PP was evident where the court shifted the burden of proof on to the polluter.

The polluter-pays principle and national application

In India, the principle of absolute liability has been applied in pollution cases to determine environmental liability, and has been applied against public bodies.¹¹⁶ This arose from the tort concept of 'strict liability' and does not allow any exception. Cases mentioned have taken action against the government as well as against private corporations or companies.¹¹⁷ Most of the time, this has been defined as an integral part of sustainable development.¹¹⁸ The Indian Court has applied the polluter-pays principle (PPP) in cases related to accidental pollution and environ-

stan and in Bangladesh, the threshold of liability is less than absolute and exceptions, such as due diligence, are allowed.¹²¹ Unfortunately, there is no application of this principle in the case laws of Pakistan and Bangladesh.

Conclusion

The discussion above has showed that, in India, Pakistan and Bangladesh, there is no right to environmental information or right of public participation in decision-making. There is a need for a coherent overall environmental policy and proper implementation procedure through environmental impact assessment, and a central organ for policy development and monitoring. The governments in these countries may be willing to create a set of environmental principles that would show how governments should act while taking a decision.¹²² There should be a specific Act or guidelines to deal with the availability of environmental information, outlining which information is available and how to go about asking for it from the government, from private individuals and from companies.¹²³

It should also be noted that, except in India,¹²⁴ there are no guidelines regarding cost and expenses, nor there is any special fund to deal with PIL. Instead of costs following the event, proper guidelines could be laid down for 'public interest' costs and advocates' fees in PIEL. Courts should follow similar guidelines to define public interest. A legal aid option may not be suitable in environmental litigation, taking into account current financial constraints. However, special funds for PIL petitions could be created in the same way as compensation or sustainable funds. In addition, the absolute liability of parties would be much preferred in cases where polluting companies continue to pollute.

In applying international environmental principles in national law, the judiciary of these three countries, in some cases, assumed them to be part of achieving sustainable development. The reason for this could be that sustainable development itself is a huge concept, which can be defined in many ways. In defining sustainable development, the relationship between development and environment received priority. At the same time, the court considered possibilities for the conservation of natural resources and the right to live in a healthy environment. Unlike intergenerational equity, the application of intragenerational equity was frequently applied. Although the judiciary mentioned this principle of equity, it was not made clear how the court wants to implement this. On the other hand, the precautionary principle is a much more integrated concept in national law, but its application in Bangladesh and Pakistan cases has been negligible. However, in India, the judiciary has adopted both the preventive approach and the precautionary approach. The

PPP has been used vigorously in India,¹²⁵ unlike in its neighbouring countries where this principle has not been used at all. Perhaps this was not because of a lack of en-



Filipino volunteers work on road construction in Bangladesh (UN Photo)

Courtesy: IYV2001

mental damage caused by industrial waste¹¹⁹ and has ordered compensation for the damage caused as well as the obligation to pay for preventive control.¹²⁰ Both in Paki-

thusiasm for the PPP, but because of a lack of suitable cases presented before the court.

The above discussion has showed that there is a judicially-created right to a healthy environment in these three countries. The human rights approach is being successfully used as a tool in public interest cases in India, Pakistan and Bangladesh. In India, the human right to environment has been preferred and adopted both by environmental lawyers and by the judiciary. With a long history of public interest litigation, constitutional approval and challenge through different types of environmental cases, the situation in India is now much improved. Right to life, or as it is termed by environmentalists, the right to a clean/healthy environment, has come a long way. As for Bangladesh and Pakistan, most public interest cases began in the early 1990s, and the whole concept is not yet fully developed. Therefore, the decisions of these judges are strongly guided by their attitude towards human rights. What is lacking in these three countries is the second generation right similar to the one in the South African Constitution.¹²⁶

Notes

¹ This article is part of a consultation document presented at the OHCHR-UNEP Joint Initiative on Human Rights and the Environment (Geneva, 14-16 January 2002).

² This article will not touch upon the general debate on the nature of the relationship between human rights and the environment, nor will it mention various international and regional agreements dealing with these two areas. See: M. Fitzmaurice (1997) 'The Contribution of Environmental Law to the Development of Modern International Law', J. Makarczyk (ed.) *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski*, The Hague, Kluwer, pp. 909-914 and 922-925. P.E. Taylor (1998) 'From Environmental to Ecological Human Rights: A New Dynamic to International Law', *Georgetown International Environmental Law Review* 10, 309-395. Moreover, this article will not discuss the legal systems of South Asia, the history of constitutional/legislative provisions, or public interest litigation. See: S. Hossain, S. Malik and B. Musa (eds) (1997) *Public Interest Litigation in South Asia*, UPL; S. Ahuja (1997) *People, Law and Justice: A Casebook of Public Interest Litigation*, Volumes 1 and 2, Orient Longman, Delhi.

³ See the GEO 2000 report prepared by UNEP, at www.unep.org. Also see R.B. Jain (1994) 'Conflict and Co-operation on Environmental Issues in South Asia', *Journal of Bangladesh Institute of International and Strategic Studies* 15(1), 37-59.

⁴ Section 16, Article II of the 1987 Constitution, states: 'The State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature'. This right, along with the right to health (section 15) defines a balanced and healthful ecology; *Minors Oposa v. Sec. of the Department of Environment*, 33 ILM 173 (1994). See also A.G.M. La Vina (1994) 'The Right to a Sound Environment in the Philippines: The Significance of the Minors Oposa Case' *RECIEL* 3(4), 246-252.

⁵ *Maneka Gandhi v. Union of India*, AIR 1978 SC 597, 623-624. *Francis Coralie Mullin v. The Administrator, Union Territory of Delhi*, AIR 1981 SC 746, 749-750.

⁶ Directive principles (DPs) such as equal pay for equal work, free legal aid, the right to a speedy trial, the right to livelihood, the right to education and DPs relating to the environment (Article 48A) are read in conjunction with fundamental rights.

⁷ P. Leelakrishnan (1992) *Law and Environment*, Eastern Book Company, India, Chapter 10, pp. 144-152.

⁸ *Charan Lal Sahu v. Union of India* AIR 1990 SC 1480.

⁹ *Subhash Kumar v. State of Bihar* AIR 1991 SC 420/1991 (1) SCC 598.

¹⁰ (1998) 9 SCC 589. In *K. Ramakrishnan v. State of Kerala* (AIR 1999 Kerala 385) the court held that smoking in public places causes a positive nuisance.

¹¹ *M.C. Mehta v. Union of India* (1991) AIR SC 813 (Vehicular Pollution Case); (1992) Supp. (2) SCC 85; (1992) Supp. (2) SCC 86; (1992) 3 SCC 25.

¹² A. Rosencranz et al. (1993) 'Region/Country Report: South Asia: India', *Yearbook of International Environmental Law* 4, 415-419.

¹³ *Olga Tellis v. Bombay Municipal Corporation*, AIR 1986 SC 180: In the court's view, 'Deprive a person of his right to livelihood and you shall deprive him

of his life ... Any person, who is deprived of his right to livelihood except according to just and fair procedure established by law, can challenge the deprivation as offending the right to life conferred by Article 21.'

¹⁴ *Delhi Development Horticulture Employees' Union v. Delhi Administration, Delhi and Others* (1993) 4 Law Reports of the Commonwealth 182. Also in CLB (October 1994) 20, 1214-1215.

¹⁵ (1996) 2SCC 682. Similar view applied in *State of Punjab v. Ram Lubhaya Bagga* (1998) 4 SCC 117.

¹⁶ *Banawasi Seva Ashram v. State of Uttar Pradesh* AIR 1987 SC 374. See also *Olga Tellis v. Bombay Municipal Corporation* AIR 1986 SC 180, *Karajan Jalasay Y.A.S.A.S. Samity v. State of Gujarat*, AIR 1987 SC 532 and *Gramin Sewa Sanstha v. State of Uttar Pradesh*, 1986 (Supp.) SCC 578.

¹⁷ Reported in AIR 1992 SC 920.

¹⁸ A. Rosencranz (1993) 'Region/Country Report: South Asia: India' *Yearbook of International Environmental Law*, 434.

¹⁹ J. Razzaque (2001) 'Case Law Analysis: Application of Public Trust Doctrine in Indian Environmental Cases' *Journal of Environmental Law* 13(2), 221-234.

²⁰ C.M. Rose (1998) 'Joseph Sax and the Idea of the Public Trust' *Ecology LQ*, 351.

²¹ C. Redgwell (1999) *Intergenerational Trusts and Environmental Protection*, OUP, Oxford, p. 68.

²² The intergenerational dimension deters the present generation from lessening the quality of natural resources and prevents the future generation 'from altering that use no matter how pressing the public need'. Redgwell (see above), p. 63.

²³ The Indian Courts adopted a similar innovative approach when they established the 'polluter-pays' principle as a part of their national legal system. For example: *Indian Council for Enviro-Legal Action v. Union of India* (1996) 3 SCC at 247.

²⁴ *M.C. Mehta v. Kamal Nath and Others* (1997) 1 SCC 388.

²⁵ *Th. Majra Singh v. Indian Oil Corporation* AIR 1999 J&K 81; *M.I. Builders Pvt. Ltd v. Radhey Shyam Sahu* AIR 1999 SC 2468.

²⁶ (1997) 1 SCC 388.

²⁷ *M.I. Builders Pvt. Ltd v. Radhey Shyam Sahu* AIR 1999 SC 2468.

²⁸ *Th. Majra Singh v. Indian Oil Corporation* AIR 1999 J&K 81.

²⁹ *Dr. M. Farooque v. Secretary, Ministry of Communication, Government of the People's Republic of Bangladesh and 12 Others (Unreported)*. This case involved a petition against various ministries and other authorities for not fulfilling their statutory duties to mitigate air and noise pollution caused by motor vehicles in the city of Dhaka.

³⁰ (1997) 49 Dhaka Law Reports (AD), p. 1. The legality of an experimental structural project of the huge Flood Action Plan (hereinafter, FAP) in Bangladesh was questioned. The petitioner alleged that FAP is an anti-environment and anti-people project, and that it is adversely affecting and injuring over a million people by displacing them, and by damaging the soil and destroying the natural habitat of fish, flora and fauna.

³¹ (1996) 48 Dhaka Law Reports, p. 438.

³² *Khushi Kabir and Others v. Government of Bangladesh and Others*. (W.P. No. 3091 of 2000).

³³ In a similar case in India (*S. Jagannath v. Union of India* (1997) 2 SCC 87) the court, while dealing with commercial aquaculture farming, held that strict environmental tests are required before permission will be granted for such farming to take place in fragile coastal areas. It added that a compulsory environmental impact assessment (EIA) must be carried out which would consider intergenerational equity and rehabilitation cost.

³⁴ PLD 1994 SC 693, 712.

³⁵ *Shehla Zia v. WAPDA* (PLD 1994 SC 693).

³⁶ *The Employees of the Pakistan Law Commission v. Ministry of Works* 1994 SCMR 1548.

³⁷ *Amanullah Khan v. Chairman, Medical Research Council* 1995 SCMR 202. See also *Pakistan Chest Foundation v. Government of Pakistan* (1997) CLC 1379.

³⁸ Similar arguments were put forward by the *Thailand Restriction on Importation of Importation and Internal Taxes on Cigarettes (Thai Cigarette Case)* Panel report adopted on 7 November 1990, BISD/37/S/200. Also, in the *Voyage of Discovery Case* (W.P. No. 4521 of 1999) in Bangladesh, the petitioners (Bangladesh Cancer Society, Bangladesh Anti-drug Federation, Consumer Association of Bangladesh, Welfare Association of Cancer Care and Work for Better Bangladesh) argued that the activities of British American Tobacco violated the law of the country (Tobacco Products Control Act 1988 and Ordinance of 1990) and governmental health policy. The court granted a stay on all campaign activities of the *Voyage of Discovery*. See *Prof. Nurul Islam (Cigarette Advertising Case) v. Bangladesh* 52 DLR 2000 413. In India, *K. Ramakrishnan v. State of Kerala* (AIR 1999 Kerala 385) the court held that smoking tobacco in any form in public places is illegal, unconstitutional and violates Article 21. Smokers pose a serious threat to the lives of innocent non-smokers who are exposed to tobacco smoke, thereby violating their right to life guaranteed under Article 21 of the Constitution of India.

³⁹ *General Secretary, West Pakistan Salt Miners Labour Union (CBA) Khewara, Jhelum v. The Director, Industries and Mineral Development, Punjab, Lahore* 1994 SCMR 2061.

⁴⁰ Note that the Pakistani judiciary has consistently mentioned and applied Indian cases where the Indian judiciary has prioritised environmental and human rights aspects. For example, *General Secretary, West Pakistan Salt Miners Labour Union (CBA) Khewara, Jhelum v. The Director, Industries and Mineral Development*, Punjab, Lahore 1994 SCMR 2061. In *Shehla Zia v. WAPDA* (PLD 1994 SC 693), the Supreme Court applied Indian cases such as: *R.L. & E.K. v. State of UP* (AIR 1985 SC 652) and *M.C. Mehta v. Union of India* (AIR 1988 SC 1115 and AIR 1988 SC 1037).

⁴¹ A. Rosencranz *et al.* (eds) (2001) *Environmental Law and Policy in India*, OUP, New Delhi, p. 53. According to Rosencranz, urban environmental groups frequently resort to Article 14 to quash 'arbitrary' municipal permissions for construction that are contrary to development regulations.

⁴² *Jibendra Kishore v. East Pakistan* 9 DLR (SC) 21.

⁴³ *Dr. M. Farooque v. Bangladesh* (1997) 49 DLR 1.

⁴⁴ This right was deleted from the list of fundamental rights by the 44th Constitutional Amendment Act of 1978 in April 1979.

⁴⁵ *Banawasi Seva Ashram v. State of Uttar Pradesh* AIR 1987 SC 374.

⁴⁶ The property right was considered in *Dr. M. Farooque v. Bangladesh* (1996) 48 DLR 438.

⁴⁷ For example, the Indian Environment Protection Act 1986, the Pakistan Environment Protection Act 1997 and the Bangladesh Environment Conservation Act 1995.

⁴⁸ The preamble of the Act states that it provides for the protection, conservation, rehabilitation and improvement of the environment, and for the prevention and control of pollution and the promotion of sustainable development.

⁴⁹ Act No. 1 of 1995. The original Act is in Bengali. The unofficial English text is produced in M. Farooque and S. R. Hasan (eds) (1996) *Laws Regulating Environment in Bangladesh*, Dhaka, BELA, pp.720-728.

⁵⁰ Section 9 of the Environment Conservation Act 1995. Provision in India and Pakistan provides the agency or board with the same power and incorporates the 'polluter-pays' principle.

⁵¹ M. Ullah (1999) *Environmental Politics in Bangladesh*, CFS, Dhaka, pp. 153-161.

⁵² *Buriganga river encroachment and Osmany Uddyan development project*. J. Razzaque (1998) 'Country Report: Bangladesh' *Yearbook of International Environmental Law* 9 and 10 (1999).

⁵³ 'Delhi allows Polluting Industries to Reopen', Environment News Service, 17 January 2000. See <http://ens.lycos.com/ens/jan2000/>. 'India's Supreme Court Bans Delhi Industrial Water Pollution', Environment News Service, 27 January 2000. See <http://ens.lycos.com/ens/jan2000/>.

⁵⁴ *Environment Awareness Forum v. State of J and K* (1999) 1 SCC 210; *Centre for Environment Law, WWF v. Union of India* (1999) 1 SCC 263; T.N. Godavaram Thirumulpad v. Union of India AIR 1999 SC 43, *Workmen of M/S Birla Textiles v. K.K. Birla and Others* (1999) 3 SCC 475 and *Narmada Bachao Andolan v. Union of India* AIR 1999 SC 3345.

⁵⁵ In India: The Indian Environment Protection Act 1986 and Rules 1992; The Industries (Development and Regulation) Act 1951; The Environmental Clearance Notification Act 1993. In Bangladesh: Environment Conservation Act 1995 and Rules 1997. In Pakistan: Environment Protection Act 1997.

⁵⁶ Section 20 of Environment Protection Act 1986 (anyone can receive information, report and details on environmental pollution). In Bangladesh: Rule 15 of the Bangladesh Conservation Rules 1997 (any person or organisation can apply to the Directorate for reports or statistical data on water, waste, air or noise). In Pakistan, sections 6 and 12(3) of the 1997 Act (subject to some restrictions, the federal environmental protection agency will provide environmental information to the public). The Freedom of Information Ordinance 1997 of Pakistan does not deal with environmental information. For an overview, see S.K. Ishaque (1997) 'Freedom of Information or Protection of Information?' *PLD Journal* 22.

⁵⁷ In India: Section 19(b) of the Environment Protection Act 1986; National Environment Appellate Authority Act 1997. In Bangladesh: National Environment Management Action Programme (NEMAP); Section 17 of the Forest Act 1927; Section 8 of Bangladesh Environment Conservation Act 1995; Rule 5 of Bangladesh Environment Conservation Rules 1997. In Pakistan: The NWFP Salinity Control and Reclamation of Land Act 1988 (The government may, on its own motion, or on the application of any person, direct the authority to frame schemes for the control of salinity and reclamation of land in any local area or part thereof); Section 4(2) of the Pakistan Environment Protection Act 1997 (The Pakistan Environment Protection Council, on the request of any person, can direct the federal agency to prepare, submit, promote or implement projects for, *inter alia*, the prevention and control of pollution).

⁵⁸ In Pakistan, *Tractbel Khaleej Power Project* (1996); *Proposed Fauji Kabirwala Power Project* (1995) and the *Ghazi Barotha Hydropower Project* (1995) and *Indus Grid Transmission Project* (1996); In Bangladesh, the *Forestry Sector Project in Bangladesh* (July 1996), *SEIA of the Islam Cement Project in Bangladesh* (1995), *Bangladesh Small Scale Water Development Sector Project* (1995), *The Meghnaghat Power Project* (1997) and *Sunderbans Biodiversity Conservation Project* (1998); In India, the *LPG Pipeline Project* (1997); *Balagarh Thermal Power Project* (1995) and the *Power Transmission Improvement (Sector) Project* (1998).

⁵⁹ Articles 32 and 226 do not mention any specific tests for standing. Following the UK courts, the Indian High Courts first applied the 'aggrieved persons' test. In the early 1970s, the Indian court adopted the 'sufficient interest' test.

⁶⁰ Constitution of Bangladesh, Article 102 states that the aggrieved persons test is followed in order to decide the standing in the High Court. Article 104 does not provide any specific test if the matter is before the Appellate Division of the Supreme Court; the Constitution of Pakistan Article 184 does not provide any specific test if the issue is of public importance and if the matter is handled by the Supreme Court. Article 199 states that if there is a breach of fundamental rights and the matter is questioned in the High Court, the standing issue would be decided by applying the 'aggrieved persons' test.

⁶¹ *M. Farooque v. Bangladesh* (FAP case) [49 DLR (AD)1997 1]; *Saiful Islam Dilder v. Bangladesh* [50 DLR (1998) 318].

⁶² *Benazir Bhutto v. The Federation of Pakistan* (PLD 1988 SC 416) (political case) and *Darshan Masih v. State* (PLD 1990 SC 513) (human rights case).

⁶³ The Constitutions of India, Pakistan and Bangladesh allow the higher courts to initiate action on their own without any formal petition. These are commonly known as *suo motu* action. For example: in India: *M.C. Mehta v. Union of India* (Taj Trapezium Case) (1997) 2 SCC 353; *M.C. Mehta (Calcutta Tanneries Matter) v. Union of India* (1997) 2 SCC 411; *Pravinbhai v. Gujarat* (1995) 2 GLH 352. In Bangladesh: *Sharif N Ambia v. Bangladesh and Other* (W.P. No. 937 of 1995); *Dr. M. Farooque, BELA v. D.G. Bangladesh Medical and Dental Association* (WP No. 1783 of 1994); *M. Farooque v. Bangladesh* (W.P. No. 948/1997).

⁶⁴ In India, *H Acid case* (AIR 1987 SC 1086).

⁶⁵ In order to provide complete justice (Article 226), the court in India took account of letters [1990 (Supp.) SCC 77; 1994 (2) SCALE 25], memoranda (O.P. No. 6721 of 1992, Kerala), and newspaper articles (AIR 1992 Pat 86; W.P. No. 22598 of 1993, Madras).

⁶⁶ *Suo motu* action is taken if the matter is of public importance (1994 ACMR 1028). The court, on various occasions, took account of a letter (PLD 1994 SC 693) and newspaper articles (H.R. case no. 31-K/92(Q)).

⁶⁷ *State v. Deputy Commissioner, Sathkira* 45 DLR (HCD) 1993.

⁶⁸ For example, in India, a special committee was created to monitor air quality and traffic congestion [(1998) 9 SCC 93], the court directed the archaeological survey to set up an automatic monitoring system [(1998) 3 SCC 381]; the court directed the subordinate green bench to monitor the compliance of the previous order [(1997) 2 SCC 411 and (1998) 9 SCC 448].

⁶⁹ *M.C. Mehta (Calcutta Tanneries Matter) v. Union of India* (1997) 2 SCC 411.

⁷⁰ *M.C. Mehta v. Kamal Nath and Others* (1997) 1 SCC 388; *Vellore Citizen Welfare Forum v. Union of India* (1996) 5 SCC 647.

⁷¹ *Indian Council for Enviro-Legal Action v. Union of India* (1996) 3 SCC 212.

⁷² *M.C. Mehta v. Union of India* AIR 1992 SC 382.

⁷³ *Research Foundation for Science, Technology and Ecology and Others v. Ministry of Agriculture and Others* (1999) 1 SCC 655.

⁷⁴ *M.C. Mehta v. Union of India and Others* (1998) 9 SCC 93.

⁷⁵ One example of such a direction could be *Dr Mohiuddin Farooque v. Bangladesh* (W.P. No. 92 of 1996). The petitioner submitted that the consumption of the imported food item containing radiation levels higher than the acceptable limit was injurious to public health and posed a threat to the life of the people of the country. The High Court made some directions to the Atomic Energy Commission and Customs Authority regarding the process of sampling and testing of radiation in dried milk, in order to avoid the same situation in future.

⁷⁶ A Women's Legal Aid Cell was established by the AGHS, a human rights non-governmental organisation in Pakistan. It handles the legal needs of Pakistani women seeking to divorce abusive husbands. See also www.lchr.org/121/pakistan0599.htm. Human Rights and Legal Aid, a Karachi-based human rights organisation, researches legal aid issues.

⁷⁷ The Bhagwati Committee report on legal aid, published in 1977, aimed at devising new legal techniques and methods to bring to the courts the problems of the poor, for example class actions, group interest litigation etc. See also the National Legal Services Authorities Act 1987.

⁷⁸ S. Ahuja (1997) *People, Law and Justice: A Casebook of Public Interest Litigation*, Volumes 1 and 2, Orient Longman, Delhi, and A. Rosencranz and S. Divan (eds) (2001) *Environmental Law and Policy in India*, OUP, India.

⁷⁹ Compendium of Summaries of Judicial Decisions in Environment Related Cases (SACEP, 1997, Colombo). J. Razzaque (2001) 'Public Interest Environmental Litigation in India, Bangladesh and Pakistan', PhD thesis, University of London.

⁸⁰ J. Razzaque (2001) 'Public Interest Environmental Litigation in India, Bangladesh and Pakistan', PhD thesis, University of London; A. Boyle and M.R. Anderson (eds) (1996) *Human Right Approaches to Environmental Protection*, Clarendon, Oxford.

⁸¹ *Law Society of India v. Fertilisers & Chemicals Travancore Ltd* (AIR 1994 Ker 308 at 360).

⁸² In the *Vellore Citizen Welfare Forum case* (AIR 1996 SC 2715); (1996) 5 SCC 647 the Indian court noted that although the industry generates foreign ex-

change and provides employment, the court, citing the principle of sustainable development, concluded that the industry has 'no right to destroy the ecology, degrade the environment and pose a health hazard'.

⁸³ In *People United For Better Living in Calcutta – Public and Another v. State of West Bengal and Others* (AIR 1993 Cal. 215), a petition was filed to prevent encroachment of wetlands in Calcutta. The Calcutta High Court observed that: 'there should be a proper balance between the protection of the environment and the development process: society should prosper, but not at the cost of the environment and in a similar vein, the environment should be protected but not at the cost of the development of society.' In the court's opinion, even if the government filed a report on the matter, only a portion of the wetlands should be available for development purpose.

⁸⁴ In *the Goa Foundation and Another v. Konkan Railway Corporation* (AIR 1992 Bom 471) the court held that 'no development is possible without some adverse effect on the ecology and environment, but the project cannot be abandoned, and it is necessary to adjust the interest of the people as well as the necessity to maintain the environment. A balance has to be struck between the two interests and this exercise must be left to the persons who are familiar with and specialise in this field.'

⁸⁵ In *Bombay Environmental Action Group & Another v. State of Maharashtra* (AIR 1991 Bom 301) the Court stated that 'the needs of the environment require to be balanced with the needs of the community at large and the needs of a developing country'. See also *Executive Engineer v. Environmental and E.P. Samiti* 1993 (1) KLT 800.

⁸⁶ *Bangladesh Environmental Lawyers Association (BELA) v. Ministry of Energy and Mineral Resources* (writ petition, filed on 17 November 1998) The government decision to lease out 15 oil and gas blocks out of 23 to foreign exploring companies was challenged in the High Court Division of the Supreme Court. It emphasised the need for a co-ordinated policy, guidelines and planning for maximum sustainable utilisation of natural resources. In *M. Farooque v. Bangladesh* (W.P. No. 948/1997), equitable use of natural resources was also on the agenda when the Bangladesh Environmental Lawyers' Association served legal notices against the authorities for their inaction in the illegal encroachment of public space.

⁸⁷ At least, in two cases, the court had to decide between unplanned development project and ecological protection. *Sharif N Ambia v. Bangladesh* (W.P. No. 937 of 1995) and *Khushi Kabir and Others v. Bangladesh* (W.P. No. 3091 of 2000).

⁸⁸ *M. Farooque v. Bangladesh* [49 DLR (AD) 1997], p. 1: the legality of an experimental structural project of the huge Flood Action Plan (FAP) in Bangladesh was questioned.

⁸⁹ Sustainable Development, under section 2 (xiii), means development that meets the needs of the present generation without compromising the needs of future generations. The preamble to the Act states that the regulation is enacted 'to provide for the protection, conservation, rehabilitation and improvement of the environment, and for prevention and control of pollution and the promotion of sustainable development.' Moreover, there is a provision to create Provincial Sustainable Development Funds to assist projects designed to protect, conserve, rehabilitate and improve the environment. This fund would get grants from federal or provincial governments and would receive donations or other non-obligatory funds from foreign governments, national or international agencies or NGOs (non-governmental organisations).

⁹⁰ *Shehla Zia v. Pakistan* (PLD 1994 SC 693 at 710-711). The court, at the same time, took account of the persuasive and binding nature of Rio, the precautionary principle and the right to a healthy environment. The petitioner cited a number of Indian cases where the court was faced with issues related to environment and development.

⁹¹ *Vellore Citizens' Welfare Forum v. Union of India* (1996) 5 SCC 647 p. 658 paras 11-13,

⁹² AIR 1993 Cal 215 at 227.

⁹³ The Indian Court mentioned the *Minors Oposa* case [33 ILM 173 (1994)].

⁹⁴ *S. Jagannath v. Union of India* (1997) 2 SCC 87.

⁹⁵ In W.P. No. 300 of 1995, children sued the government in order to prevent vehicular pollution, since they are the main victims of severe noise and smoke emission. In W.P. No. 278 of 1996, a group of children under the age of 10 sued the government to bring back Bangladeshi children used as camel jockeys in the United Arab Emirates and who are kept undernourished and bound by forced labour, and to prevent the further kidnapping and abduction of children from Bangladesh.

⁹⁶ (1997) 49 DLR (AD) 1.

⁹⁷ (1997) 49 DLR (AD), Mustafa Kamal J. (p. 16, para. 53). See also *South Asian Environmental Law Reporter* 13, September 1994, Colombo, Sri Lanka, pp. 113-145. For the judgment of the *Minors Oposa* Case, see 33 ILM 173 (1994).

⁹⁸ *Vellore Citizen's Welfare Forum* (1996) 5 SCC 647 at 658, paras 11-13.

⁹⁹ *M.C. Mehta (Badkhal and Surajkund Lakes Matter) v. Union of India and Oths.* (1997) 3 SCC 715: 'preventive measures have to be taken keeping in view the carrying capacity of the ecosystems operating in the environmental surroundings under consideration.'

¹⁰⁰ (1997) 2 SCC 353.

¹⁰¹ *Vellore Citizen's Welfare Forum* (1996) 5 SCC 647; *Indian Council for Enviro-Legal Action v. Union of India* (1996) 3 SCC at 247.

¹⁰² *S. Jagannath v. Union of India and Others* (1997) 2 SCC 87.

¹⁰³ *M.C. Mehta v. Union of India and Others* (1997) 2 SCC 411.

¹⁰⁴ (1998) 9 SCC 250.

¹⁰⁵ *A.P. Pollution Control Board v. Prof. M.V. Nayudu* (1999) SOL case No. 53. The Pollution Control Board of Andhra Pradesh brought the case against an individual. Full report is at www.supremecourtonline.com.

¹⁰⁶ The court mentioned Articles 47, 48A and 51A(g) of the Constitution, the Water Act 1974 and the Environment (Protection) Act 1986, where both the precautionary and 'polluter-pays' principles and the special concept of onus of proof are implied. Having said that, the court accepted the observation supplied by the Vellore case that the precautionary principle is part of customary international law. It also accepted the view of the ILC report that the consequences of the application of the precautionary principle in any potential situation would be influenced by the circumstances of each case.

¹⁰⁷ AIR 1999 J and K 81: The petitioner submitted that the plant in question would be injurious to the health of the residents of the area.

¹⁰⁸ The court applied the precautionary principle, maintaining that it is part of the environmental law of the country. In favour of its argument, the court mentioned *Vellore Citizens' Welfare Forum v. Union of India* (1996) 5 SCC 647; AIR 1996 SC 2715; *Indian Council of Enviro-Legal Action v. Union of India* (1998) AIR SCW 3861; *M.C. Mehta v. Kamal Nath* (1997) 1 SCC 388.

¹⁰⁹ (1999) 2 SCC 718; AIR 1999 SC 812: The case deals with the setting up of an industry for the production of castor oil derivatives.

¹¹⁰ The SC (paras 37 and 39).

¹¹¹ *Dr Mohiuddin Farooque v. Bangladesh and Others*, W.P. No. 92 of 1996.

¹¹² *M. Farooque v. Bangladesh* [49 DLR (AD) 1997], p. 1.



A question of balance

Courtesy: The Economist

¹¹³ PLD 1994 SC 693.

¹¹⁴ 1994 SCMR 2061.

¹¹⁵ *Environment Pollution in Balochistan*, HR Case No. 31-K/92(Q). See also *Compendium of Summaries of Judicial Decisions in Environment Related Cases* (1997), SACEP, Sri Lanka, p. 80.

¹¹⁶ In the *H Acid* case (AIR 1987 SC 1086), the Supreme Court ordered the central government to issue orders against factories producing highly acidic waste.

¹¹⁷ The *Vellore Citizens' Welfare Forum* (AIR 1996 SC 2715) (1996 5 SCC 647) dealt with the environmental pollution and health hazards caused by tanneries. The court affirmed the 'polluter-pays' principle (PPP) as a rule of customary international law. In *M.C. Mehta v. Kamal Nath and Others* (1997) (1 SCC p. 414), the same view was adopted. It also endorsed the absolute liability regime laid down in the *H Acid* decision as an integral component of the PPP.

¹¹⁸ For example, in the Vellore decision, the court shifted the cost of remediation from the government to the polluting industries. It observed that: 'remediation of the damaged environment is part of the process of "sustainable development" and, as such, the polluter is liable to pay the cost to the individual sufferers as well as the cost of reversing the damaged ecology.'

¹¹⁹ For examples, see J. Razzaque (2001) 'Public Interest Environmental Litigation in India, Bangladesh and Pakistan', PhD thesis, University of London.

¹²⁰ In *M.C. Mehta (Tanneries) v. Union of India and Others* (1997) 2 SCC 411, the Supreme Court ordered that one who pollutes the environment must pay to reverse the damage caused by his acts. The court ordered the unconditional closure of the tanneries, and payment of compensation by them for reversing the damage caused and for rights and benefits to be made available by them to their workmen.

¹²¹ Section 16 of the Environment Conservation Act 1995 and the Pakistan Environment Protection Act 1997.

¹²² Governments of these three countries can easily follow the guidelines offered

in the Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters (Aarhus, Denmark, 23-25 June 1998). See www.unece.org/env/pp.

¹²³ Some legislation provides a right to require information from the government authority with the payment of a small fee. For example, in India, Section 20 of the Environment Protection Act 1986 enables people to receive information, reports and details on environmental pollution. Under the Bangladesh Conservation Rules 1997, rule 15 states that any person or organisation can apply to the directorate for a report or statistical data on any studies carried out on water, waste, air or noise. A nominal fee must be paid for such information. Similar provision can be found in Section 6 of the 1997 Pakistan Environment Protection Act.

¹²⁴ Order XLI, Rule 1 of the Supreme Court Rules 1966 states: 'Subject to the provisions of any statute or of these rules, the costs of and incidental to all proceedings, shall be at the discretion of the court. Unless the court otherwise orders, an intervener shall not be entitled to costs.'

¹²⁵ In the *H Acid case* (1996), the court applied the EC treaty and the binding obligation of the EC member states to follow PP and PPP. The Indian judges described it as a binding obligation, though not a signatory of that treaty. The Indian judiciary has taken a treaty approach, discarding its dualist approach. However, *Peralta* (ECJ) Case No C- 379/92 and *R. v. Secretary of Trade ex p. Duddridge* (*Independent*, 4 October 1994) (Divisional Court); *The Times*, 26 October 1995

(Court of Appeal) state that there is no binding obligation on the member states to abide by the PP or PPP under Article 130-r. Moreover, in *EC Measures covering Meat and Meat Products (Hormones)* WT/DS26/ARS/R, WT/DS48/AB/R (1998), the ECJ stated that it was unnecessary to decide whether the PP is customary or not. However, it has been applied as customary international law in the *Vellore Citizens Forum* Case in India. The question is whether, constitutionally, it is being applied properly. The added issue of definitional difficulty of these principles makes it harder to achieve homogenous application in the national law. According to Paul Bowden, instead of a 'top-down' process, a down-top' process is underway where domestic law is developing international law, not vice versa. However, according to Michael Anderson, this creative approach has made the best use of the PPP and put liability on the polluters, which was previously solely the State's liability (P. Bowden and M. Anderson, ILA Conference, 'The Use of National Courts in Human Rights and International Environmental Disputes', 26-29 July 2000).

¹²⁶ Section 24 demonstrates that the right to a healthy environment is part of the socio-economic right of South Africa. This second-generation right is often applied by the court to give a meaningful interpretation of the right to life. This is an absolute right and can in no way be qualified. This 1996 Constitution also ensures the right to information. The government has also passed the National Environment Management Act 1998 (NEMA) which creates a set of environmental principles to guide the government.

