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Human Rights and the Environment: the national experience in South Asia and Africa

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1. Introduction

This report is produced as a part of joint OHCHR-UNEP initiative on human rights and the environment. This project seeks to review the implementation of Agenda 21 with regard to the promotion and protection of human rights. The 1972 Stockholm Declaration proclaimed that man's natural and man made environment are essential to his well-being and to the enjoyment of basic human rights-even the right to life itself. In 1986, the United Nations General Assembly recognised the relationship between the quality of human environment and the enjoyment of basic human rights [UNGA resolution 2398 (XXII) 1986]. The 1992 Rio Declaration emphasised sustainable development and environmental protection. Moreover, Agenda 21 called for the fulfilment of basic needs, improved living standards for all, better protected and managed eco-systems and a safer, more prosperous future.

This report examines the development of human rights and the environment in three South Asian countries during the last 10 years. It outlines the main provisions in the Constitution of these countries focusing on human rights and the environment. It also examines substantive and procedural rights which can be used to protect these two areas. This report analyses the case law of these three countries and considers the human right implications of decisions relating to the environment and vice-versa. In addition, this part of the report considers the participation of non-state actors in the judicial process through public interest litigation (PIL). Moreover, this report briefly examines the development of case law and legislation on human rights and the environment in two African countries during the last decade.

Due to the length of the report, it will neither touch upon the general debate on the nature of relationship between human rights and the environment nor will it mention various international and regional agreements dealing with these two areas. Moreover, this report will not discuss the legal systems of South Asia, the history of the constitutional/legislative provisions and public interest litigation. However, a detailed bibliography will be annexed to this report.

The nature of environmental and human rights problems is similar in all South Asian countries. However, this report will not detail the nature of each of these environmental and human rights concerns. Such common concerns include water pollution (lack of control on the pollution of rivers, irresponsible construction of dams and barrages, lack of access to drinking water free from toxin or other contaminants, increased use of agro-chemicals/pesticides, storage and transportation of dangerous goods in package forms and pollution due to noxious liquid substances); degradation of marine and coastal resources (heavy metal contamination by industrial affluent, dumping of land based solid waste into the sea; heavy coastal construction, inland mining, poor land use practices, over fishing, destructive fishing techniques, shrimp cultivation); loss of coastal habitats and deforestation (substantial loss of mangrove forests, unplanned commercial fisheries); land based pollution (rapid industrialisation, mining, logging, firewood collection, livestock grazing, land degradation, hazardous waste, waste water disposal); water logging and salinity (rapid spread of irrigation, indiscriminate use of agro-chemicals, over exploitation of ground water); and air pollution (rapid and unplanned urbanisation, industrial pollution, increasing transport, domestic refuse, coal consumption, energy use pattern, fly-ash).

2. Constitutional aspects in India, Pakistan and Bangladesh

India, Pakistan and Bangladesh use various constitutional rights to protect the environment and human rights. The right to life, a fundamental right, has been extended to include the right to a healthy environment. The right to healthy environment has been incorporated, directly or indirectly, into the judgements of the court. 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 Constitution of Bangladesh or Pakistan does not provide any 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 right to property, have been analysed to determine their application in the protection of the environment and human rights. The discussion shows that most litigations are brought against public authorities, which include various ministries of Central government, federal bodies (in Pakistan and India), local authorities and public owned companies.

2.1. The Right to Life

2.1.1. India

Environmental deterioration could eventually endanger life 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. [1] 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. Firstly, any law affecting personal liberty should be reasonable, fair and just. [2] Secondly, the Court recognised several unarticulated liberties that were implied by article 21. [3] 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. [4]

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.' 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....'. Therefore, protection of natural environment and compassion for living creatures were made the positive fundamental duty of every citizen. Both the provisions substantially send the same message. Together, they highlight the national consensus on the importance of the protection and improvement of the environment. The wordings of the articles show that the nature of such obligation under the state policy is non self-executing.

The following discussion shows how the courts have dealt with human rights and the environment during the last decade. 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*. [5] 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*, [6] 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 could no longer rest 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*. [7] The case concerned the deterioration of the world environment 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 achieve this goal through national policy and to restore the quality of environment.

In another case, [8] the Supreme Court dealt with the problem of air pollution caused by motor vehicle operating in Delhi. It was a public interest petition and the court made several directions towards 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. [9]

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 1980's. [10] However, in a restrictive decision in 1993, the court held that it is not feasible or appropriate to guarantee article 41 as the country lacked the economic capacity and development to honour such guarantee. [11] However, in *Kirloskar Bros. Ltd v. ESI Corporation* [12] the court opined that the expression 'life' assured 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 the workmen. In this case, the court used right to life to protect the health of the workmen by providing them with medical facilities and health insurance. The right to livelihood lost its battle to economic development in several cases dealing with rights of indigenous people during the 1980's. [13] However, in 1992 [14] 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. [15]

The third aspect of the right to life is the application of public trust doctrine to protect and preserve public land. [16] This doctrine serves two purposes: it mandates affirmative state action for effective management of resources and empowers the citizens to question ineffective management of natural resources. [17] Public trust is being increasingly related to sustainable development, the precautionary principle and bio-diversity protection. Moreover, not only can it be used to protect the public from poor application of planning law or environmental impact assessment, [18] it also has an intergenerational dimension. [19]

When the Indian courts applied the public trust doctrine, they have considered it not only as an international law concept, but also as one which is well established in their national legal system. [20] Accepting public trust doctrine as part of common law, the Indian Courts have applied this explicitly in three recent cases, one in 1997 [21] and two cases in 1999. [22] This concept has not been applied in any environmental litigation in Pakistan or Bangladesh. However, their 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* [23] 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* [24] and *Th. Majra Singh* [25] the court reconfirmed that the public trust doctrine 'has grown from article 21 of the constitution and has become part of the Indian legal thought process for quite a long time.'

2.2.2 Bangladesh

The Constitution of Bangladesh does not explicitly provide for the right to 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 the life liberty, body, reputation, or property', unless these are taken in accordance with law. It added that the citizens and the residents of Bangladesh have the inalienable right to be treated in accordance with law. If these rights are taken away, 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 right to a safe and healthy environment. [26] 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* [27] has reiterated Bangladesh's commitment in the 'context of engaging concern for the conservation of 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, 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 [28] expanded the fundamental 'right to life' to include anything that affects life, public health and safety. It 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 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 case [29] presently pending before the High Court deals with commercial shrimp cultivation and its adverse effect on the socio-economic 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 the government orders regarding commercial shrimp farming frustrated the spirit of Environmental Policy 1992 and breach of article 32 of the Constitution. [30]

2.3.3 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 [31] decided that the 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 electro-magnetic field or any other such hazards which may be due to installation and construction of any grid station, any factory, power station or such like installations. In this case [32] Salem Akhtar, J. commented that

"Under our Constitution, article 14 provides that the dignity of man and subject to law, the privacy of 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, [33] a human right 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 has a larger concept which includes the right of enjoyment of life, maintaining adequate level of living for full enjoyment of freedom and rights.' In another human rights case [34] against cigarette companies, the petitioner sought a ban on cigarette commercials on television. In his view, the western companies were unable to sell cigarettes in their own countries and they were aiming at the developing countries. He added that they were using the advertising to that end and this has resulted in catastrophic calamities in the form of cancer and heart disease. [35] The Supreme Court stated that the citizen could get protection under article 9 because right to life includes quality of life as well.

Article 9 was explained again in the *Salt Miners Case* [36] where the petitioner sought to enforce the right of the residents to have clear and unpolluted water. They contended that if the miners were allowed to continue their activities, which were extended in the water catchment area, the watercourse, reservoir and the pipelines would get contaminated. The Court held in favour of the petitioner and said that if the water becomes contaminated, it would cause serious threat to human existence and the general public would be under serious threat. The Court gave a broad meaning to the word life and stated that:

"The word 'life'...can not be restricted to a vegetative life or mere animal existence. In hilly area 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 persons residing in another part of the country where water is in abundance, does not have such right. The right to have unpolluted water

is the right to every person wherever he lives."

The cases discussed above show that the Pakistan judiciary has firmly established a right to healthy environment. [37]

2.4 Right to Equality

The Constitution of India and Bangladesh provides that all are equal before the law and shall be accorded equal protection of the law. Equality before law means that, among equals, law shall be equal and shall be equally administered. 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. According to the Indian Constitution, article 14 states that: 'The State shall not deny to any person equality before the law or the equal protection before the laws within the territory of India.' If article 14 is infringed, it can have an impact on the environment and human rights. The urban environmental group frequently takes resort to article 14 to quash 'arbitrary' municipal permissions for construction that are contrary to development regulations. Article 14 can be used to challenge government sanctions for mining and other activities with high human rights and environmental impact, where the permissions are arbitrarily granted without adequate consideration of environmental impacts. [38]

Article 25 of the Constitution of Pakistan deals with right to equality. It states that all citizens are equal before law and are entitled to equal protection of law and that there shall be no discrimination on the basis of sex alone. 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 law. The principle requires that no person or class of persons shall be denied the same protection of law which is enjoyed by other persons in like circumstances in their lives, liberty and property and pursuit of happiness. [39] Right to equality along with the right to life can guarantee the right to a healthy environment. [40]

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

2.5 Right to Property

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 has the overall ownership over the land. Property right begins where the government's right to interfere ends. This is, in another word, 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. [41] This amendment was due to multiple lawsuits against different government agencies by the indigenous people. These tribal people were being evicted from their own property as their lands were being used for other development projects. [42] Article 42 of the Constitution of Bangladesh provides that subject to any restriction imposed by law, every citizen shall have the right to acquire, hold, transfer or otherwise dispose of the property. [43] 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'.

It shows that, in India, Pakistan and Bangladesh, the constitutional definition of property is very restricted. The article relating to property right provides 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 the Parliament will not have unfettered power to impose any restriction it chooses. In spite of the conservative meaning, there is a scope 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. Though property right has not been considered thoroughly in any public interest cases, this right could be used for the protection of the

environment and for sustainable development.

3. Legislative aspects

3.1 Substantive law

The national legislation in India, Pakistan and Bangladesh is sectoral and human rights and the environment are dealt with by separate legislation. However, framework environmental legislation in recent years took account of human health and safety aspect and sustainable development. The general environmental framework laws [44] tend to be enabling in nature and mainly charge a competent national authority to provide more specific guidelines and regulations in future.

In Pakistan and Bangladesh, these framework laws deal with water and air pollution and regulate, to certain extent, hazardous waste. In Pakistan, the Environmental Protection Act 1997 (hereafter, 1997 Act) acts as a framework law and techniques such as penalty and sanction, and international environmental principles such as the precautionary principle and polluter pays principle have been applied to implement the law. [45] 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 substance, waste, adverse environmental effect, air pollutant and biodiversity. It sets up a high powered Pakistan Environmental Protection Council, Pakistan Environmental Protection Agency and Provincial Environment Protection Agency with wide ranging powers.

In Bangladesh, the perfect example of framework law is the recent Bangladesh Environment Conservation Act 1995. [46] This Act was created to provide for conservation and improvement of environmental standard and to control and mitigate pollution of the environment. 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 person as the public demand. [47] The Environmental Conservation Rules 1997 determine the standards of air quality, water quality, noise quality, motor vehicle exhaust quality and sewer and waste discharge quality. The rules and procedures of EIA are also guided by the Environment Conservation Act 1995 and the Rules of 1997.

Implementation of framework laws is not promising as the pollution standards are being set by various government agencies. Moreover, the agencies are in charge of implementing it, not the aggrieved citizens. Only in limited cases, do citizens have access to justice through environmental legislation. For example, in Bangladesh, the Directorate of Environment has identified some 903 polluting companies in 1989. However, no action was taken against them. [48] Similar is the case of river encroachment and public park encroachment where the cases are pending before the court. [49] Moreover, at least in two cases [50] 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 petition [51] by the aggrieved people, as the polluting parties are not implementing the court's decision.

3.2 Procedural law

3.2.1 Procedural rights

The scope of access to environmental information and public participation in the decision making is limited in these three countries with several regulations guiding the procedures of environmental impact assessment. [52] Some provisions in the framework legislation deal with access to environmental information. [53] Provisions for the complaints from 'any person' under the environment legislation [54] and the Asian Development Bank (ADB) funded development projects show the increased public participation in the decision-making. [55] However, there is no general duty on the state to collect environmental information.

3.2.2 Standing in the Court

Once the applicant is in the court with a claim in public interest, the most important question for the court is to decide whether the applicant should be allowed access to the judicial process. Unlike Indian courts, [56] the Bangladeshi and Pakistani courts apply 'aggrieved person' test, [57] 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 and Indian courts apply the 'sufficient interest' test. Absence of any specific rule of standing is one of the reasons behind the development of PIL in India. On the other hand, the Constitution of Pakistan and Bangladesh does suggest a specific test to determine standing in writ petitions.

Although in the 1990's, the judiciary of Bangladesh [58] and Pakistan [59] offered a liberal view of standing, there is no guideline for public interest cases. The uncertainty regarding who may or may not have standing could cause particular controversy. It could lead to very expensive litigation over mere procedure when the resources could be better spent on the merits. There may be groups, not having the relevant relationship, but with a more general objective, that may seek to undertake the litigation. The uncertainty in the nature of this test makes it difficult to have homogeneity in the PIL decisions. There is no clear and practical guide for identifying the cases in which a particular interest will give standing to a plaintiff to complain. This adds to the length and cost of the litigation.

3.2.3 Procedural Remedies

The most common remedies that are offered by the court are directions, injunction [60] and civil and criminal damages. [61] Though *suo motu* actions have been taken by the court in India [62] and Pakistan, [63] the judiciary in Bangladesh initiated *suo motu* action in at least one case related to human rights. [64] The Indian judiciary has made several successful directions to create experts and special committees in several environmental litigation. [65] Moreover, the Indian courts have made several directions on unconditional closure of tanneries and relocation, [66] payment of compensation for reversing the damage, [67] payment of costs required for the remedial measures [68] necessary measures to be adopted by the relevant Ministry to broadcast information relating to environment in the media, [69] attracting the attention of the Government where there is a necessity of legislation, [70] setting up a committee to monitor the directions of the court. [71] There is ample opportunity for the judiciary of Bangladesh and Pakistan to make a similar sort of innovative direction in human rights and environmental cases. [72]

3.2.4 Legal Aid

In Bangladesh, the Legal Assistance Act 2000, dealing with legal aid, contains nothing on the protection of environment, human rights or even on public interest litigation. However, it mentioned that legal assistance would be offered to those having socio-economic problems. In Pakistan, the Government has established the free legal aid committee in 1999. However, no legislation is there to guide such legal aid. [73] In India, legal aid is used mainly in criminal cases, however, it may be possible to use it in public interest cases. [74]

4. Case law concerning human rights and the environment

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

During the 1990's, the Indian courts [75] dealt with mining and quarrying, forest conservation, water pollution, gas leak disaster, development projects and environment, hazardous wastes from industries, litigation concerning big dams, protection of livelihood, construction of bridges and environmental degradation. At the same time, the court 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 environment, relocation of labours after closure of polluting factories, groundwater management and development, management of city sewerage system. In 2000, there are a few public interest environmental litigations where the Supreme Court dealt with water pollution, noise pollution and coastal zone development. All these decisions, in some way or

other, established a human right to healthy environment.

In Bangladesh, [76] the first public interest environmental litigation (PIEL) was based on noise pollution created through election canvassing. However, the most prominent case concerned the Flood Action Programme, a foreign aided development project, and its harmful effect on the people and the environment. There are cases on industrial and urban development, unplanned rural development, oil and exploration planning, lease of open-river, urban air pollution, and the need for the government to oppose unchecked pollution. In Pakistan [77], the first PIEL concerned development projects and environment. Other PIEL involved water pollution, urban development and environment, air pollution, conservation of forest resources and general environmental pollution. Most of these decisions dealt with human health and the environment.

5. Sustainable Development and national application

In India, Pakistan and Bangladesh, three basic elements of implementing sustainable development could 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.

In India, although the case law failed to produce a clear definition, it did manage to come out with an applicable definition of sustainable development. During the 1980's, most of the Indian cases were concerned with the cancellation of mining leases and closure of national development projects. In 1994, the Supreme Court of India directly mentioned the principle of sustainable development and tried to balance the social, economic and ecological aspects. [78] The 1990's definition of sustainable development emphasised the relationship between development and environment, and a balance between the two. More sophisticated challenges were made where the Indian courts were asked to deal with polluting industries such as the leather factories, [79] to prevent encroachment of wetlands [80] and to preserve forests and vegetation. [81] It gave priority to sustainable use of the natural resources and to a right to a healthy environment for the present, and to a certain extent, to future generations. The national environmental policy and legislation reflect the concern for a balance between development, planning and environment. [82]

Unlike the Indian judiciary, there are only a few cases where the Bangladeshi court dealt with conservation and equitable utilisation of natural resources. [83] While dealing with development project, a similar approach has been adopted by Bangladeshi judiciary. [84] In *FAP case*, [85] the court directed the concerned authority the Ministry of Irrigation, Water Development and Flood Control, that no 'serious damage' to the environment and ecology is caused by FAP activities, though the threshold of the seriousness was not ascertained. The High Court declined to interfere with the FAP project as foreign assistance was involved and the whole project was meant to be for the benefit of the public. Moreover, the court took account of the substantial amount of money that had been spent and the work that had been partially implemented.

In Pakistan, the Environment Protection Act 1997 defines and mentions 'sustainable development' on several occasions. [86] The Supreme Court of Pakistan indirectly applied the concept of sustainable development while dealing with the construction of high voltage grid station which was likely to cause serious health hazard to the local people. [87] In this case, the court balanced the safety and welfare of the 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, device and technique related to the project and to examine whether there is any likelihood of adverse effect on the health of the residents of the locality.

6. Intergenerational Equity and national application

In India, this principle has been considered as a part of achieving sustainable development. However, the nature of the right and how to achieve it has not been discussed by the court. The part on the sustainable development showed that the court, only in some cases, mentioned the necessity of preserving the environment for the present generation as well as for the future generations. For example, in the cases dealing with reserved forest, the court decided the case based on the need of the present generation and 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 depended 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, though pleaded, the court did not apply this principle on the ground that neither the Constitution nor the national legislation of Bangladesh explicitly mentions this principle.

In India, the *Vellore Citizen's Welfare Forum* [88] recites the Brundtland Commission 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*, [89] it was stated that: "The present day society has a responsibility towards the posterity for their proper growth and development so as to allow the posterity to breathe normally and live in a cleaner environment and have consequent fuller development." [90] In *S. Jagannath* case, the court while dealing with commercial shrimp farming, held that a strict environmental test is required before permission is granted for the installation of such farming in fragile coastal area. It added that there must be a compulsory environmental impact assessment which would consider intergenerational equity and rehabilitation cost. [91]

In Bangladesh, two cases in 1995 and 1996 mentioned intergenerational rights but did not establish the precise nature of this right. [92] In *M. Farooque v. Bangladesh and Others* [93] the petitioner submitted that they represented not only the present generation but also the generation yet unborn. The Court, however, did not agree. The petitioner mentioned *Minors Oposa case* in which the twin concepts of 'intergenerational responsibility' and 'intergenerational justice' presented by the plaintiff minors represented by their respective parents to prevent the misappropriation or impairment of Philippine's rain forest. The minors asserted that they represent the present generation as well as generation yet unborn. This case was distinguished from the one to be decided by the Bangladeshi court. In the Bangladeshi court's view, the minor's standing before the court was allowed because 'the right to a balanced and healthful ecology' was a fundamental right in the Constitution of Philippine. Several laws in Philippine declare the policy of the State to conservation of the country's forest 'not only for the present generation but for the future generation as well'. The Constitution of Bangladesh, expressly, does not provide any such right. [94]

7. Precautionary Principle and national application

In India, most of the cases of the 1990's deal with the definition of the principle. Adopted to prevent the inter-jurisdictional damage, the Indian court decided that the 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 a 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 for a precautionary approach. However, the threshold of such damage was neither examined, nor was it accepted as a part of customary law. It also shows that in Pakistan, human rights and human health was given priority to apply this principle.

In 1996, the Indian court laid down the meaning of precautionary principle (PP). [95] It stated that environmental measures, adopted by the State Government and the 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 *M.C. Mehta case*. [96] 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* [97] 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 from deterioration and damage. Following the decision of *Vellore Citizen's Case* and *Indian Council for Enviro-Legal Action Case*, [98] the Supreme Court described the PP as environmental measures which must 'anticipate, prevent and attack' the causes of environmental degradation. In *S. Jagannath case*, [99] the precautionary approach was relied on to curtail commercial shrimp farming in India's coastal areas. The commercial user of agriculture lands and salt farms were discharging highly polluting effluents, and causing pollution of water. Normal traditional life and vocational activities of the local population of the coastal areas were being seriously hampered. In *M.C. Mehta (Tanneries) case* [100] 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* [101] where the Supreme Court dealt with air pollution in New Delhi. In the Supreme Court's view, the precautionary principle' which is a part of a concept of 'sustainable development' has to be followed by state governments in controlling pollution. According to the Supreme Court, the State government is under a constitutional obligation to control pollution and, if necessary, by anticipating the causes of pollution and curbing the same. The Supreme Court reaffirmed the customary status of the precautionary principle in another recent case [102] and added that principle is entrenched in the Constitution as well as in various environmental laws. [103] In *Th. Majra Singh v. Indian Oil Corporation* [104] it was held that the court could only examine as to whether authorities have taken all precautions with a view to see that laws dealing with environment and pollution have been given due care and attention. [105] In *A.P. Pollution Control Board v. Prof. M.V. Nayudu (retd.)* [106] the Supreme Court 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 wants to change status quo.' [107]

In Bangladesh, in *Radioactive Milk case*, [108] the petitioner, a potential consumer, submitted the writ petition in public interest stating that the consumption of the imported food item containing radiation level higher than the acceptable limit is injurious to public health and is a threat to the life of the people of the country. A potential customer's right to file a suit has been recognised by this case. The court simply assumed that such injury either had occurred or were 'likely to occur' and proceeded to issue remedial directions. In the *Flood Action Plan case*, [109] 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 bar the development project.

In Pakistan, the application of the PP is found in *Shehla Zia v. WAPDA* [110] where citizens having apprehension against the construction of a grid station in a residential area, sent a letter to the Supreme Court. Their letter took account of 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 citizen's consent. The SC commented that:

"The precautionary policy is to first consider the welfare and the safety of the human beings and the environment and then to pick up a policy and execute the plan which is more suited to obviate the possible dangers or make such alternate precautionary measures which may 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* [111] involved the rights of the residents to have clear and unpolluted water. The Supreme Court, by taking into account the seriousness of danger that the people in that area are exposed, ordered that all mining activities should take measures to the satisfaction of the court appointed commission which will prevent pollution of the reservoir, stream and catchment area. In *Environment Pollution in Balochistan case* [112] 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 grounds for waste material. The authorities were ordered by the court to insert a clause in the allotment letter/license/lease that the allottee or the tenants shall not use the land for dumping, treating, burying or destroying by any devise, waste of any nature including industrial or nuclear waste in any form. These three cases specifically applied a precautionary approach, though the court never mentioned the principle itself.

Unlike Indian Supreme Court, the Supreme Court judges of Pakistan and Bangladesh did not apply the precautionary principle as an international customary law. However, all three judiciaries agree that the Rio Declaration does have persuasive and binding value and both Pakistan and Bangladesh did sign the Declaration. But at the same time, the judiciary of Pakistan and Bangladesh believe that an international agreement between the nations, if signed by one country, is always subject to ratification; and it can be enforced as a law only when legislation is made by the country through its legislature. Though most of the recent environmental legislation has incorporated the precautionary principle, the court 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 while there is 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 the polluter.

8. 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 the public bodies. [113] 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. [114] Most of the time, it has been defined as an integral part of sustainable development. [115] The Indian Court applied the polluter pays principle (PPP) in cases related to accidental pollution and environmental damage caused by industrial waste [116] and ordered compensation for the harm caused as well as the obligation to pay for the preventive control. [117] Both in Pakistan and in Bangladesh, the threshold of liability is less than absolute and exception, such as, due diligence is allowed. [118] Unfortunately, there is no application of this principle in the case laws of Pakistan and Bangladesh.

9. A brief look at African Countries

9.1 South Africa

The Constitution of the Republic of South Africa (Act 108 of 1996) was passed by the Constitutional Court on 4 December 1996, and took effect on 4 February 1997. Section 11 deals with the right to life which is a non-derogable right. Under section 24 of the South African Constitution, everyone has the right to an environment that is not harmful to health or well-being. It adds that the government must act reasonably to protect the environment by preventing pollution, promoting conservation, and securing sustainable development, while building the economy and society. [119]

Under the Constitution, the state has a duty to protect, promote, respect and fulfil socio-economic rights. [120] Section 24 demonstrates that 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 right to life. This is an absolute right and, in no way, qualified. Section 9(2) of the Constitution deals with right to equality. The Constitution defines equality to include 'the full and equal enjoyment of rights and freedoms.' It states that the State may take steps to protect or advance individuals or groups that have been disadvantaged by unfair discrimination with the aim of promoting the achievement of equality. Without access to education, sufficient food, health care and housing, poor people will not be able to participate equally in the social life of the country. [121]

To ensure that the environmental rights under the Constitution are fulfilled and that the government follows transparent and reasonable procedures, there are two more fundamental rights. Section 32 deals with right of access to information and section 33 deals with right to a just administrative decision. Section 32 can be used by the community groups to find out more about harmful industrial development which will have a detrimental effect on their life and well-being. These rights are not absolute and may be limited if the limitation is reasonable and justifiable in a democratic society based on human dignity, equality and freedom (section 36 of the Constitution).

In order to effectively protect environmental rights, the government has passed National Environment Management Act 1998 (NEMA) which creates a set of environmental principles that show the government how it should act. It defines sustainable development and says that the public must be actively involved when decisions are made to affect the environment. It also asks the government to examine all environmental impact before going ahead with any development. The government has also passed the promotion of Access to Information Act 2000. It outlines which information would be available and how to go about asking for it from the government and from private individuals. NEMA has several provisions dealing with what information one is allowed to get dealing with environment and public health. There are some provisions which are similar to Access to Information Act and the new law will replace those provisions of NEMA. In case of any unclear provision, NEMA will still be important.

Public participation in the decision making is another important area. The Promotion of Administrative Justice Act 2000 explains what the constitutional right to just administrative action means. This new law states that administrative action which may negatively affect rights of individuals must follow fair procedures. It also states that the government has the discretion to

decide if a public enquiry should be held in cases where administrative action negatively affects people's rights. It can also allow individuals to make written comments if it decides that it is appropriate. Another way of public participation in the decision making is when an environmental impact assessment is required. NEMA says that there must be an environmental impact assessment before any activity or development that needs permission by law and may significantly affect the environment. There are also regulations under the Environmental Conservation Act 1989 which states that certain activities must have impact assessments before they begin.

NEMA's guidelines also include the right to be consulted before the environment can be harmed. It adds that all important aspects of the environment that might be affected by a development must be studied before it happens. It also states that the polluter must pay for the harm done to the environment and that there must be fair access to environmental resources. Moreover, women and other vulnerable and disadvantaged groups must be helped to get involved in decisions about their environment. In *The Director, Mineral Development Gauteng Region and Sasol Mining (pty) Ltd v Save the Vaal Environment and others*, [122] the Supreme Court of Appeal held that before a permit is given for mining, the government must be prepared to listen to the views of people concerned about potential environmental impacts. The kind of environmental concerns that can be raised include destruction of plants and animals, pollution, loss of jobs and small businesses and property values. Government must make sure that development which meets present needs must not compromise the needs of future generations.

Section 25 of the Constitution deals with right to property which includes land rights. It aims to protect an individual's property rights and to promote land reform. This right is still a hotly debated issue due to the property imbalances in South Africa after the apartheid. Under section 25(1), the property rights may not be interfered with unless it is done under a 'law of general application'. Therefore, it protects the property rights of named or easily identifiable individuals or groups. Section 25(1) also prohibits the arbitrary deprivation of property. The Interim Protection of Informal Land Rights Act 1996 allows for the protection of certain rights to and interests in land, where these are not properly protected by law. Informal rights to land mean the use, occupation or access to land following the practice of a tribe or indigenous law. This includes areas where land was held in trust by the South African Development Trust and previous lands. No person or community may be deprived of this land right without consent. Appropriate compensation must be paid if the person or community is deprived of land.

Section 27 (1) (b) of the Constitution guarantees the right of everyone to have access to sufficient food and water. Section 28(1) (c) of the Constitution also gives children the right to basic nutrition. Access to water and sanitation facilities are connected and without proper water facilities, many sanitation facilities cannot operate properly. The environmental rights protected under the constitution are closely related to the right of access to sufficient water. The environmental rights place duties on the state to prevent pollution and ensure conservation of water resources. One of the central goals of the Government's water policy is to ensure equitable access by all South African's to the nation's water resources and to end discrimination in access to water on the basis of race, class or gender. [123] The National Water Act 1998 and Water Service Act 1997 deal with water policies and principles. The aims of the National Water Act are to meet the basic human needs of present and future generations, promote equitable access to water, facilitate social and economic development and reduce and prevent pollution of water resources. It establishes the national government as public trustee of the nation's water resources. This means that the government must ensure that water resources are conserved and used so that the public's water needs will be met now and in the future. It adds that most water use must be authorised through a system of licensing by the Minister of Water Affairs and Forestry. The Water Services Act 1997 is the other main law which implements the constitutional right of everyone to have access to sufficient water. One of its main aims is to give effect to 'the right of access to basic water supply and the right to basic sanitation necessary to secure sufficient water and environment not harmful to human health or well-being. [s. 2(a)]

Section 38 lists the people who have the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are (a) anyone acting in their own interest; (b) anyone acting on behalf of another person who cannot act in their own name; (c) anyone acting as a member of, or in the interest of, a group or class of persons; (d) anyone acting in the public interest; and (e) an association acting in the interest of its members.

9.2 Nigeria

Section 20 of the 1999 Constitution of Nigeria outlines provision for the state to protect and improve the environment and safeguard the water, air and land, forest and wildlife in Nigeria. An environmental right has been defined as 'the right of individuals and peoples to an ecologically sound environment and sustainable management of natural resources conducive to sustainable development.' Being part of state policy, this section is not justiciable. Section 33(1) states that 'every person has a right to life and no one shall be deprived intentionally of his life.' This right seems to protect the right of citizens against environmental degradation. Many argue that this right to life along with section 20 confirm a right to a healthy environment.

In *Gani Fawehinmi v. Abacha*, [124] the Court of Appeal held that the human rights in the African Charter on Human and People's Rights having been enacted into Nigerian national law, was superior to a decree. The African Charter 1981, article 24 proclaimed that the right to a satisfactory environment for development is a human right. This case held that article 24 of the charter can be relied upon by a Nigerian to enforce his environmental right instead of relying on section 20 of the 1999 Constitution which is not justiciable. [125] The court also recognised that environmental degradation can give rise to a violation of human rights. [126]

Cases related to human rights and environmental degradation are quite common in Nigeria, particularly in the area of oil exploration. [127] The provision in the Constitution presupposes that the Government of Nigeria should always take necessary precautions to protect the rights of the people in all policies formulated to exploit natural and human resources of the state. Several environmental legislation in the 1980's and 1990's deal with oil pollution, spillage and discharges. [128] Moreover, the Oil and Mineral Producing Areas Development Commission (OMPADE), a government body, has been established to compensate communities that have suffered ecological damage from mineral exploitation. There is also a Federal Environmental Protection Agency (FEPA) to monitor and evaluate overall environmental protection programme and provide solutions to ecological problems of exploration of oil and other minerals.

During the 1990's, the court has repeatedly dealt with human rights and the environment question in various oil litigation. [129] One such case is the *Kenule Beeson Saro-Wiwa, President of the Movement for the Survival of the Ogoni People (MOSOP) and Eight Others (unreported, 1995)*, [130] where the Ogoni people claimed that excessive oil exploration activities had destroyed agricultural land and oil spillage had destroyed a lot of flora and fauna in Ogoniland. It had also polluted many rivers in Ogoniland thereby causing death of many aquatic animals. The air and water pollution arising from gas flaring and oil spillage has always been making the area very hazardous for habitation. The environmental degradation resulted from despoliation was equally a factor which had adversely affected the economic potentials and manpower resources of Ogoniland.

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[1] 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 Right to Health (section 15) ascertains a balanced and healthful ecology. *Minors Oposa v. Sec. of the Department of Environment*, 33 ILM 173 (1994) See also, Antonio G.M. La Vina, 'The Right to a Sound Environment in the Philippines: The Significance of the Minors Oposa Case' (1994) RECIEL Vol 3, No.4, pg.246-252.

[2] *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.

[3] Directive principle such as equal pay for equal work, free legal aid, right to speedy trial, right to livelihood, right to education and DP relating to environment [Article 48-A] are read in conjunction with the fundamental rights.

[4] P. Leelakrishnan, *Law and Environment* (1992, Eastern Book Company, India) Chapter 10, pg.144-152.

[5] *Charan Lal Sahu v. Union of India* AIR 1990 SC 1480.

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

[7] (1998) 9 SCC 589. In *K. Ramakrishnan v. State of Kerala* [AIR 1999 Kerala 385] the court held that smoking in public places causes positive nuisance.

[8] *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.

[9] Armin Rosencranz et al, in 'Region/country report: South Asia: India' (1993) Yearbook of International Environmental Law, vol. 4. 415-419.

[10] *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.'

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

[12] (1996) 2SCC 682. Similar view applied in *State of Punjab v. Ram Lubhaya Bagga* (1998) 4 SCC 117.

[13] *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.

- [14] Reported in AIR 1992 SC 920
- [15] A. Rosencranz, 'Region/Country Report: South Asia: India' (1993) Yb.I.E.L, at 434.
- [16] J. Razzaque, 'Case Law Analysis: Application of Public Trust Doctrine in Indian Environmental Cases' (2001) Journal of Environmental Law, Vol. 13: 2, 221-234.
- [17] C.M. Rose, 'Joseph Sax and the Idea of the Public Trust' (1998) 25 Ecology L.Q. 351.
- [18] C. Redgwell, *Intergenerational Trusts and Environmental Protection* (OUP, Oxford, 1999) at 68.
- [19] The intergenerational dimension deters the present generation to decrease the environmental quality of the natural resources and prevents the future generation 'from altering that use no matter how pressing the public need.' Redgwell, *ibid*, at 63.
- [20] The Indian Courts adopted similar innovative approach when they established 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.
- [21] *M.C. Mehta v. Kamal Nath and Others* (1997) 1 SCC 388.
- [22] *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.
- [23] (1997) 1 SCC 388.
- [24] *M.I. Builders Pvt. Ltd v. Radhey Shyam Sahu* AIR 1999 SC 2468.
- [25] *Th. Majra Singh v. Indian Oil Corporation* AIR 1999 J&K 81.
- [26] *Dr. M. Farooque v. Secretary, Ministry of Communication, Government of the People's Republic of Bangladesh and 12 Others (Unreported)* . The 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.
- [27] (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. That FAP is adversely affecting and injuring more than a million people by way of displacement, causing damage to soil and destruction of natural habitat, of fishes, flora and fauna.
- [28] (1996) 48 Dhaka Law Reports, p.438.
- [29] *Khushi Kabir and others v. Government of Bangladesh and others*. [W.P. No. 3091 of 2000].
- [30] 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 test is required before permission is granted for the installation of such farming in fragile coastal area. It added that there must be a compulsory environmental impact assessment which would consider intergenerational equity and rehabilitation cost.
- [31] PLD 1994 SC 693 at pg.712.
- [32] *Shehla Zia v. WAPDA* (PLD 1994 SC 693).
- [33] *The Employees of the Pakistan Law Commission v. Ministry of Works* 1994 SCMR 1548.
- [34] *Amanullah Khan v. Chairman, Medical Research Council* 1995 SCMR 202. See also, *Pakistan*

Chest Foundation v. Government of Pakistan (1997) CLC 1379.

[35] 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 November 7, 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 country's law (Tobacco Products Control Act 1988 and Ordinance of 1990) and government's 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 of tobacco in any form in public places is illegal, unconstitutional and violative of article 21. Smokers pose a serious threat to lives of innocent non-smokers who get themselves exposed to tobacco smoke, thereby violating their right to life guaranteed under article 21 of the Constitution of India.

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

[37] Note that the Pakistani judiciary has consistently mentioned and applied Indian cases where the Indian judiciary prioritised environmental and human rights aspects For example: Case *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 SC 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).

[38] A. Rosencranz et al (eds.), *Environmental Law and Policy in India* (Tripathi, India, 1991) pp. 60.

[39] *Jibendra Kishore v. East Pakistan* 9 DLR (SC) 21.

[40] *Dr. M. Farooque v. Bangladesh* (1997) 49 DLR 1

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

[42] *Banawasi Seva Ashram v. State of Uttar Pradesh* AIR 1987 SC 374.

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

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

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

[46] 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) *Laws Regulating Environment in Bangladesh* (Dhaka, BELA, 1996) p.720-728.

[47] Section 9 of the Environment Conservation Act 1995. Provision in India and Pakistan provides the same power to the agency or Board and incorporates polluter pays principle.

[48] Mahfuz Ullah, *Environmental Politics in Bangladesh* (1999, CFSD, Dhaka) at 153-161.

[49] *Buriganga* river encroachment and *Osmany Uddyan* development project. J. Razzaque, 'Country Report: Bangladesh' YbIEL (Vol.9) 1998 and (Vol.10) 1999.

[50] 'Delhi allows Polluting Industries to Reopen' Environment News Service, January 17, 2000.

<http://ens.lycos.com/ens/jan2000/> . 'India's Supreme Court Bans Delhi Industrial Water Pollution' Environment News Service, January 27, 2000. <http://ens.lycos.com/ens/jan2000> .

[51] *Environment Awareness Forum v. State of J and K* (1999) 1 SCC 210; *Centre for Environment Law, WWF I 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.

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

[53] Section 20 of Environment Protection Act 1986 [any one 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 the report or statistical data on water, waste, air or noise.] In Pakistan, section 6 and section 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. See generally: S.K. Ishaque, 'Freedom of Information or Protection of Information?' (1997) PLD (Journal) 22.

[54] 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.]

[55] 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, these are *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).

[56] Articles 32 and 226 do not mention any specific tests for standing. Following the UK courts, the Indian High Courts first applied the 'aggrieved person' test. In the early 70's, the Indian court adopted the 'sufficient interest' test.

[57] Constitution of Bangladesh, article 102 states that aggrieved person 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; 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 person' test.

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

[59] *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).

[60] The Constitution of India, Pakistan and Bangladesh allows the higher courts to initiate action on its 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 Vs. 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. 92/1996); *M. Farooque v. Bangladesh* (W.P. No. 948/1997)

[61] In India, *H-Acid* case (AIR 1987 SC 1086).

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

[63] *Suo motu* action was taken if the matter is of public importance (1994 ACMR 1028). The court, in various occasions, took account of a letter [PLD 1994 SC 693] and newspaper article [H.R. Case no. 31-K/92(Q)]

[64] *State v. Deputy Commissioner, Satkhira* 45 DLR (HCD) 1993

[65] For example: in India, special committee was created to monitor air quality and traffic congestion [(1998) 9 SCC 93], the court directed to the archaeological survey to set up 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].

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

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

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

[69] *M.C. Mehta v. Union of India* AIR 1992 SC 382.

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

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

[72] One example of such directions could be *Dr Mohiuddin Farooque v. Bangladesh* [WP No. 92 of 1996]. The petitioner submitted that the consumption of the imported food item containing radiation level higher than the acceptable limit is injurious to public health and is a threat to the life of the people of the country. The High Court made some directions to the Atomic Energy Commission and Customs Authority regarding the process of sampling and testing of radiation in the dried milk in order to avoid a future anomaly.

[73] There is Women's Legal Aid Cell established by the AGHS, a human rights non-governmental organisation in Pakistan. It handles the legal needs of Pakistani Women to handle, *inter alia*, the legal needs of Pakistani women seeking to divorce their abusive husbands. Website: www.lchr.org/121/pakistan0599.htm. Human Rights and Legal Aid, a Karachi based human rights organisation, researches on legal aid issues.

[74] The Bhagwati Committee report on legal aid, published in 1977, aimed to devise new legal techniques and methods to bring to the court the problems of the poor, for example class actions, or group interest litigation etc. See also, National Legal Services Authorities Act 1987.

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

[76] Compendium of Summaries of Judicial Decisions in Environment Related Cases (SACEP, 1997, Colombo). J. Razzaque, 'Public Interest Environmental Litigation in India, Bangladesh and Pakistan'

(PhD Thesis, University of London, 2001)

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

[78] *Law Society of India v. Fertilisers & Chemicals Travancore Ltd.* AIR 1994 Ker 308 at 360.

[79] In *Vellore Citizen Welfare Forum case* AIR 1996 SC 2715; (1996) 5 SCC 647 where the Indian court noted that although the industry generates foreign exchange 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'.

[80] In *People United For Better Living in Calcutta- Public and Another v. State of West Bengal and Others* AIR 1993 Cal. 215: the 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: the society shall have to prosper, but not at the cost of the environment and in the similar vein, the environment shall have to be protected but not at the cost of the development of the society.' In the Court's opinion, even if the Government files a report, only a portion of the wetlands would be available for development purpose.

[81] 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 upon the ecology and environment but the project utility 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 and specialised in this field'.

[82] *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.

[83] *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 the 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 the 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 spaces.

[84] At least, in two cases, the court had to balance 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)

[85] *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.

[86] Sustainable Development, under section 2 (xiii), means development that meets the needs of the present generation without compromising the ability of future generations to meet their needs. The preamble of the Act states that the regulation is enacted 'to provide for the protection, conservation, rehabilitation and improvement of the environment, prevention and control of pollution, 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.

[87] *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, precautionary principle and right to healthy environment. The petitioner cited a number of Indian cases where the court faced with issues

related to environment and development.

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

[89] AIR 1993 Cal 215 at 227.

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

[91] *S. Jagannath v. Union of India* (1997) 2 SCC 87

[92] In W.P. no. 300 of 1995 where the children have sued the government in order to prevent the vehicular pollution since they are the front line victim of severe noise and smoke emission. In W.P no. 278 of 1996, a group of children under the age of 10 have sued the government to bring back the Bangladeshi children used as camel jockeys in the United Arab Emirates and who are kept under nourished and bound by forced labour and to prevent further kidnapping and abduction of children from Bangladesh.

[93] (1997) 49 DLR (AD) 1

[94] (1997) 49 DLR (AD), Mustafa Kamal J. in pg.16, para. 53. Also see South Asian Environmental Law Reporter Vol. 13 September 1994, Colombo, Sri Lanka, pp.113-145. For the judgment of *Minors Oposa* Case, see 33 ILM 173 (1994).

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

[96] *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.'

[97] (1997) 2 SCC 353.

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

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

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

[101] (1998) 9 SCC 250.

[102] *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: <www.supremecourtonline.com> .

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

[104] 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.

[105] The court applied the precautionary principle maintaining that it is a part of 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.

[106] (1999) 2 SCC 718; AIR 1999 SC 812: The case deals with setting up of an industry for production of castor oil derivatives.

[107] The SC (Para 37 and 39)

[108] *Dr Mohiuddin Farooque v. Bangladesh and Others*, WP No. 92 of 1996

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

[110] PLD 1994 SC 693.

[111] 1994 SCMR 2061.

[112] *Environment Pollution in Balochistan*, HR case No. 31-K/92(Q). See also, Compendium of Summaries of Judicial Decisions in Environment Related Cases (SACEP, Sri Lanka, 1997) at 80.

[113] 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.

[114] In *Vellore Citizen's Welfare Forum* AIR 1996 SC 2715: (1996) 5 SCC 647: This case deals with the environmental pollution and health hazard caused by the tanneries. The court affirmed the PPP as a rule of customary international law. In *M.C. Mehta v. Kamal Nath and Others* (1997) 1 SCC pg. 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.

[115] For example, in *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."

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

[117] 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 and for rights and benefits to be made available by them to their workmen.

[118] Section 16 of Environment Conservation Act 1995 and the Pakistan Environment Protection Act 1997.

[119] Section 24: Everyone has right to (a) to an environment that is not harmful to their health or well being; and (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

[120] In *Government of the Republic of South Africa v. Grootboom and others* [2000 (11) BCLR 1169 (cc)] dealt with right to adequate housing and shelter. The Constitutional court emphasised the need to have a close relationship between the right access to adequate housing and other socio-economic rights in the Constitution.

[121] *Minister of Public Works and Others v. Kyalami Ridge and Others* 2001 (7) BCLR 652 (cc)

[122] 1999 (2) SA 709 (A)

[123] White Paper on Water Policy for South Africa, 1997, para 2.1.4

[124] (1996) 9 NWLR part 475, p 710

[125] L. Atsegbua, 'Environmental Rights, Pipeline Vandalisation and Conflict Resolution in Nigeria' (2001) IELTR 89-92.

[126] *Kokoro-Owo v. Lagos State Government* (1995) 6 NWLR 760 at 765.

[127] Okonmah, P.D., 'Right to a Clean Environment: the Case for the People of Oil Producing Communities in Nigerian Delta' (1997) *Journal of African Law*, vol.41, 43-67.

[128] For example: Environmental Impact Assessment Decree No. 86 of 1995

[129] For case examples: J G Frynas, 'Legal Change in Africa: Evidence from Oil related Litigation in Nigeria.' (1999) *Journal of African Law*, vol. 43, 121-150.

[130] All nine activists of MOSOP was executed in 1995 on the decision of the court. A.A. Idowu, 'Human Rights, Environmental Degradation and Oil Multinational Companies in Nigeria: The Ogoniland Episode' (1999) *Netherlands Quarterly of Human Rights*, vol. 17/2, 161-184.