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Linking Human Rights, Development, and Environment: Experiences from Litigation in South Asia

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LINKING HUMAN RIGHTS, DEVELOPMENT, AND ENVIRONMENT: EXPERIENCES FROM LITIGATION IN SOUTH ASIA

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ABSTRACT

Despite having several procedural routes to bring actions in the court, public interest litigation seems to be the often-used tool used by the community groups in India, Pakistan and Bangladesh to protect the environment. In recent years, the decisions of the courts integrate both social and ecological concerns with particular attention to questions of distributive justice, community empowerment and democratic accountability. While public interest litigation is sometimes criticized as nothing more than 'tokenism', the judiciary in these three South Asian countries has taken a forward-looking approach by relaxing standing of community groups and applying international environmental principles. With the increase of large infrastructure projects (e.g. dams) and privatization of natural resources (e.g. water, gas/oil), it is pertinent to examine the role of litigation in the protection of environment. This paper discusses three issues: the growth of public interest environmental litigation in India, Pakistan and Bangladesh; human rights, environment and development discourse; and the approach of the judiciary. The paper concludes that access to courts may not ensure a just substantive outcome. The substantive right to a healthy environment, as interpreted by the judiciary, needs to be strengthened with adequate information and participation of affected communities to protect the environment. Participation of affected parties is crucial to make the linkages between social, environmental and developmental concerns, and examples from all three countries show that a strong procedural regime is lacking.

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I. INTRODUCTION

In India, Pakistan and Bangladesh, public interest litigation (“PIL”) was prompted initially by the human rights, poverty and development concerns rather than the ideas of conservation and protection of the environment.¹ In the 1970s and 80s, the focus of many cases was on poverty and inequality of human beings, and the court was determined to provide justice to people who were socially or economically disadvantaged.² Judicial activism was prominent in India where the judiciary allowed disadvantaged communities to access the courts through ‘social action litigation’.³ To some, the PIL has provided “judicial remedies for people’s maladies” as it has “converted the court into a critic of government, into a fount of information, into a forum of national debate and into an agency of reform.”⁴

There are several academic writings on the definition, history and development of PIL in India,⁵ Pakistan⁶ and Bangladesh.⁷ The definition of what constitutes “public interest” is vague,⁸ and its meaning depends on how the judiciary interprets it. It is, however, clear from the history of the development of PIL that the lack of adequate remedies from the government agencies forced the people to bring

1. See JONA RAZZAQUE, PUBLIC INTEREST ENVIRONMENTAL LITIGATION IN INDIA, BANGLADESH AND PAKISTAN 35-47 (Eric C. Orts & Kurt Deketelaere series eds, Kluwer 2004).

2. See SANGEETA AHUJA ET AL., PEOPLE, LAW AND JUSTICE: A CASEBOOK OF PUBLIC INTEREST LITIGATION 1-14 (2nd prtng. 1997).

3. Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, in JUDGES AND THE JUDICIAL POWER: ESSAYS IN HONOUR OF JUSTICE V.R. KRISHNA IYER 289-315 (Rajeev Dhavan et al. eds., Sweet & Maxwell 1985).

4. SHRISH MANI TRIPATHI, THE HUMAN FACE OF THE SUPREME COURT OF INDIA: PUBLIC INTEREST LITIGATION IN THE APEX COURT 47, xi (1993).

5. Abdus Sattar Qureshi, *Foreword* to SYED IQBAL HADI RIZVI, PUBLIC INTEREST LITIGATION LIBERTY AND JUSTICE FOR ALL ii-vi (1991); see also AHUJA, *supra* note 3. See generally SHYMAN DIVAN & ARMIN ROSENCRANZ, ENVIRONMENTAL LAW AND POLICY IN INDIA (Oxford Univ. Press 2001) (1991).

6. See MANSOOR HASSAN KHAN, PUBLIC INTEREST LITIGATION: GROWTH OF THE CONCEPT AND ITS MEANING IN PAKISTAN (1993); WERNER MENSKI ET AL., PUBLIC INTEREST LITIGATION IN PAKISTAN (2000).

7. See PUBLIC INTEREST LITIGATION IN INDIA, PAKISTAN AND BANGLADESH (S. Hossain, Malik & Musa eds., 1997); N. AHMED, LITIGATING IN THE NAME OF THE PEOPLE: STRESSES AND STRAINS OF THE DEVELOPMENT OF PUBLIC INTEREST LITIGATION IN BANGLADESH (1999).

8. AHUJA, *supra* note 3.

legal action in the court. In these three countries, PIL is a recognized legal mechanism for the enforcement of constitutionally guaranteed rights involving questions relating to public interest.⁹ Though its beginning was humble, PIL started to have a serious effect on the lives of the general people. It is a form of legal proceeding in which redress is sought in respect of injury to the public in general and where there may be no direct specific injury to any individual member of the public.¹⁰ This type of litigation is essentially a cooperative or collaborative effort on the part of the petitioner, the State or public authority and the court.¹¹ The purpose is to secure observance of constitutional or legal rights, benefits and privileges conferred upon vulnerable sections of the community and to reach social justice to them.¹² Originating in the United States, PIL is an imported concept that has been accommodated differently in India, Pakistan and Bangladesh.¹³ PIL differs from ordinary litigation on two fronts: the manner in which the petition is brought and the subject matter of the petition.¹⁴ The common law system, the religion,

9. In *People's Union for Democratic Rights v. Minister of Home Affairs*, 1985 A.I.R. 268 (Del.), Justice Kirpal said: "... public interest litigation is not that type of litigation which is meant to satisfy the curiosity of the people, but it is a litigation which is instituted with a desire that the Court would be able to give effective relief to the whole or a section of the society." Cassels has identified four characteristics of PIL: Liberalisation of *locus standi*, procedural and remedial flexibility and ongoing judicial participation/supervision, and creative and active interpretation of legal and fundamental rights. Jamie Cassels, *Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?*, 37 AM. J. COMP. L. 495, 498 (1989).

10. S. J. Sorabjee, *Introduction to Judicial Review in India*, 4 JUD. REV. 2 126-129 at 128 (1999).

11. See *Bandhua Mukti Morcha v. Union of India*, 1984 A.I.R. 802 (S.C.) 811.

12. See *People's Union for Democratic Rights v. Union of India*, 1982 A.I.R. 1473 (S.C.) 1477-78; see also Md. Z. M. Nomani, *The Human Right to Environment in India: Legal Precepts and Judicial Doctrines in Critical Perspective*, 5(2) ASIA PAC. J. OF ENVTL L. 113, 120 (2000).

13. C. D. Cunningham, *Public Interest Litigation in Indian Supreme Court: A Study in the Light of American Experience*, 29 J. OF INDIAN L. INST., 494, 496-97 (1987); see also M. Cappelletti, *Vindicating the Public Interest through the Courts: A Comparativist's Contribution*, in ACCESS TO JUSTICE, VOL. III: EMERGING ISSUES AND PERSPECTIVES 513 (M. Cappelletti and B. Gerth eds. 1979); M. Lau, *Islam and Judicial Activism: Public Interest Litigation and Environmental Protection in the Islamic Republic of Pakistan*, in HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION 285- 301 (Boyle and Anderson eds. 1996).

14. The court, while dealing with the PIL petition, departs from the strict rules of adversarial procedure. The relief may be sought by a larger body and is not for

socio-economic background as well as an active judiciary of these three countries play an important part in the development of PIL. Within these three countries, the influences of these factors are evident in the way the courts deal with standing issues, apply procedural laws, interpret various "public interest" grounds and offer various remedies tailored for each case scenario. This is more so in the cases linking human rights, environment and development issues.

It is against this background that this article aims to explore the development of Public Interest Environmental Litigation ("PIEL") in India, Pakistan and Bangladesh (section 2). Section 3 and 4 then examines the human rights and development discourse in the environmental cases before the court, and the approach adopted by the judiciary while deciding the PIEL.

II. THE GROWTH OF PIEL IN INDIA, PAKISTAN AND BANGLADESH

There is more than one reason to use litigation in order to protect the environment in these three countries. First, there is a lack of developed administrative and quasi-judicial (e.g. alternative dispute resolution) institutions to attend to the matters of public concern. Second, the lack of effective remedies in the existing environmental legislation. Third, public officials and agencies are not capable of policing the environmental system due to insufficient funds, inadequate staff and lack of expertise. Fourthly, the agencies in charge of protecting the environment may be unwilling to bring action against the violators due to political pressure. The development of PIEL was also influenced by the increasing number of non-governmental organizations working to improve human rights or environmental degradation. Weak legislation to cope with the rapid degradation of the environment, along with the various innovative remedies available from the judiciary of these three countries, expedited the use of PIL for environmental protection.

In India, Pakistan and Bangladesh, PIEL aims to create accountability of executive actions to the people through a judicial process. Through PIEL, various government agencies are pulled together as respondents creating a process of co-ordination; and their overlapping mandates are sometimes resolved with mandatory judicial di-

the specific benefit of the petitioner. The nature of the relief asks the court to consider those empowered by the political, administrative and legal process. *See AHUJA, supra* note 3, at 412-426.

rections. It targets the gaps in the law, the inconsistency in the regulatory regime between law, policies, and institutional framework.¹⁵ The PIEL is sometimes used to educate other actors and organs of the state, and keep them informed about new situations requiring actions.¹⁶ In recent years, the decisions of the courts integrate both social and ecological concerns with particular attention to community empowerment and democratic accountability.¹⁷

From the perspective of these three countries, the judiciary developed the PIEL with the help of a number of innovative measures: e.g. relaxing of standing, interpreting the law in a manner congenial to environmental protection, framing various remedies, and applying international environmental law in the national legal system. In addition, the public can play a greater role in taking these environmental concerns to the court and dealing with environmental issues. From civil society's point of view, PIEL means awareness of the people and making environmental justice accessible to the common people and, thus, enhancing their participation in environmental decision-making. From the government's point of view, PIEL helps them to share their liability burden with the real polluters. And, from the legislator's point of view, PIEL gives them an opportunity to amend the environmental legislation to cope with modern and complex environmental problems.¹⁸

At this stage, it is important to note the procedure that allows the communities to access to national courts through PIL in order to protect their environment. In the three South Asian countries, there are both civil (e.g. representative suits, class action) and criminal (e.g. public nuisance, negligence) procedural rights that allow aggrieved individuals and communities to bring action in the lower courts.¹⁹ These cases can be brought against any polluting individual, com-

15. See Parvez Hassan & Asim Azfar, Comment, *Securing Environmental Rights through Public Interest Litigation in South Asia*, 22 VA. ENVTL. L.J. 215, 220-21 (2004).

16. See Mohiuddin Farooque et al., *Public Interest Litigation as an Educational Process* (unpublished manuscript, on file with the Fordham Environmental Law Review); See also *Litigation as Education*, BELA NEWSLETTER, Vol. 4, 1996 at 1 (on file with the Fordham Environmental Law Review).

17. See KHAN, *supra* note 7, at 7; see also NAIM AHMED, PUBLIC INTEREST LITIGATION: CONSTITUTIONAL ISSUES AND REMEDIES 67-75 (1999).

18. See generally Research Foundation for Science, Technology and Ecology v. Ministry of Agriculture, (1999) 1 S.C.C. 655 (referring to a patent for basmati rice in India).

19. See RAZZAQUE, *supra* note 2, at ch. 5.

pany or factory, as well as against the public bodies. In order to bring these actions, there is no need to show breach of fundamental rights. However, long delays, higher costs and low levels of monetary compensation work as a disincentive for the community groups to bring actions in the lower courts.²⁰ On the other hand, the higher court provides relaxed time limits, liberal standing rules and a number of innovative directions ready to be used in environmental matters. Comparing to the civil and criminal procedural routes, the writ petition is cost effective and the court is willing to provide “complete justice.” However, communities and individuals can only bring an action in the higher courts if there is a breach of a fundamental constitutional right.

The right to environment is not a constitutional right in these three countries and the judiciary has interpreted that the constitutional right to life includes the right to a healthy environment. This interpretation by the court has allowed the communities to access to higher court through PIL. In India, the state has a duty to protect and preserve the ecology – this is part of the directive principle of state policy and not a fundamental right.²¹ The Supreme Court of India interpreted the right to life guaranteed by Article 21 of the Constitution to include the right to a healthy environment.²² Right to life has been used in a diversified manner in India to incorporate the right to a healthy environment. It includes, e.g., the right to survive as a species, quality of life, the right to live with dignity and the right to livelihood.²³ In Bangladesh, the Constitution does not explicitly provide for the right to a healthy environment. Article 31 and 32 together incorporate the fundamental “right to life.”²⁴ The Supreme Court

20. *See id.* at 229-230.

21. *See* INDIA CONST. art. 48A, part IVA. Amended by the Constitution (Forty Second Amendment) Act, 1976 (imposing responsibility on every citizen to protect, safeguard and improve the environment).

22. *Subhash Kumar v. State of Bihar*, (1991) 1 S.C.C. 598 (holding that right to life guaranteed by article 21 includes the right of enjoyment of pollution-free water and air for full enjoyment of life).

23. *See, e.g., Charan Lal Sahu v. Union of India*, (1990) 1 S.C.C. 1480; *M.C. Mehta v. Union of India*, (1998) 9 S.C.C. 589; *Kirloskar Bros. Ltd. v. ESI Corp.*, (1996) 2 S.C.C. 682.

24. BANGLADESH CONST. art. 31 (stating that every citizen has the right to protection from “action detrimental to the life liberty, body, reputation, or property” and 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); *id.* at art. 32 (“No person shall be deprived of life or personal liberty save in accordance with law”).

highlighted that the constitutional “right to life” does extend to include right to a safe and healthy environment²⁵ and include anything that affects life, public health and safety.²⁶ In Pakistan, right to life is guaranteed by Article 9 of the Constitution and was confirmed by the Supreme Court in *Shehla Zia’s case*²⁷ decided that right to life includes right to live in unpolluted environment. Furthermore, in several human rights cases, the Supreme Court of Pakistan emphasized that the right to life would include ‘adequate level of living’,²⁸ and ‘quality of life’.²⁹ The judiciary of Pakistan firmly established right to safe and unpolluted drinking water as part of right to life.³⁰ However, the nature and extent of this right are not similar to the self-executory and actionable right to a healthy environment prescribed in the Constitution of the Philippines or South Africa.³¹ That means in the absence of any explicit right to a healthy environment in the Constitution, the community or individual affected by an adverse environmental decision will have to depend on a liberal interpretation of ‘right to life’ by the judiciary.

III. THE HUMAN RIGHTS, ENVIRONMENT AND DEVELOPMENT DISCOURSE

The recent trend of case law suggests that it is difficult to have a clear-cut division between human rights cases and environmental

25. See *Farooque v. Bangladesh*, 49 D.L.R. (A.D.) 1 (App. Div. of Sup. Ct. of Bangl. 1996) (holding that it is a breach of statutory duty to fail to mitigate air and noise pollution caused by motor vehicles in Dhaka city).

26. See *Farooque v. Bangladesh*, 48 D.L.R. 438 (High Ct. Div. of Sup. Ct. of Bangl. 1996) (holding that right to life includes the enjoyment of pollution free water and air, improvement of public health).

27. *Zia v. WAPDA*, P.L.D. (1994) S.C. 693, 712 (Sup. Ct. of Pak. 1994).

28. *The Employees of the Pakistan Law Commission v. Ministry of Works*, (1994) S.C.M.R. 1548 (Pak.).

29. *Amanullah Khan v. Chairman, Medical Research Council*, (1995) S.C.M.R. 202 (Pak.); See also *Pakistan Chest Foundation v. Government of Pakistan* (1997) C.L.C. 1379 (Pak.).

30. *General Secretary, West Pakistan Salt Miners Labour Union (CBA) Khe-wara, Jhelum v. The Director, Industries and Mineral Development*, (1994) S.C.M.R. 2061 (Pak.).

31. EARTHJUSTICE, ENVIRONMENTAL RIGHTS REPORT: HUMAN RIGHTS AND THE ENVIRONMENT, (2007), <http://www.earthjustice.org/library/references/2007-environmental-rights-report.pdf>.

cases.³² Moving away from the sectoral litigation of the 80's, the 90's categories of PILs in India became more sophisticated and dealt with complex areas of waste management, biodiversity, water management and relationship between labour rights and environmental rights.³³ In Bangladesh and Pakistan, the PILs dealt with general aspects of environment, such as air or water pollution or challenging big development projects as well as waste management and urban pollution. The judiciary of these two countries is strongly guided by their attitude towards human rights and concentrates on further exploring the fundamental right to life.

During the 1980s and 90s there was an influx of litigation in the Indian courts dealing with water, mining and forest conservation.³⁴ In several cases in the 80s, the court dealt with development activities (e.g. mining, construction in forest lands, large dams)³⁵ that had adverse impacts on environment and human livelihood. Similarly, in the 90s, the courts dealt with development activities such as mining and quarrying, forest conservation, development projects and environment, litigation concerning big dams.³⁶ More recent PIEL in India dealt with town planning,³⁷ aquaculture,³⁸ and coastal zone development.³⁹ Some of the recent issues in Bangladesh that interlink

32. Jona Razzaque, *Human Rights and the Environment in South Asia*, in 32/2 ENVIRONMENTAL POLICY AND LAW 99-111 (2002).

33. RAZZAQUE, *supra* note 2, at ch. 1.

34. ARMIN ROSENCRANZ AND SHYAM DIVAN, ENVIRONMENTAL LAW AND POLICY IN INDIA (2001).

35. *Kinkri Devi v. State of Himachal Pradesh*, A.I.R. 1988 Him. 4; *Banwasi Seva Ashram v. State of Uttar Pradesh*, A.I.R. 1987 S.C. 374; *Society for the Protection of the Silent Valley v. Union of India*, A.I.R. 1992 S.C. 920.

36. Mining Activities: *Godavaram Thirumulpad v. Union of India*, (1998) 9 S.C.C. 672. Forestry conservation: *Environmental Awareness Forum v. State of J and K*, (1999) 1 S.C.C. 210. Development projects and environment: *Mehta v. Kamal Nath*, (1996) 9 S.C.A.L.E. 141; *Mehta v. Union of India (Re: Inder Mohan Bensiwal and Re: Bharat Petroleum Corporation Ltd)*, (1999) 6 S.C.C. 236; *M.I. Builders Pvt. Ltd v. Radhey Shyam Sahu*, A.I.R. 1999 S.C. 2468; *S. Jagannath v. Union of India*, (1997) 2 S.C.C. 87. Dams and environment: *Tehri Bandh, Virodhi Sangarsh Samiti and Others v. State of Uttar Pradesh*, (1991) 1 S.C.C. 44; *Narmada Bachao Andolan v. Union of India*, A.I.R. 1999 S.C. 3345.

37. *Citizen, Consumer and Civic Action Group v. Union of India*, A.I.R. 2002 Mad 298.

38. *Madireddy Padma Rambabu v. The District Forest Officer*, A.I.R. 2002 A.P. 256.

39. *Goa Foundation v. Diksha Holdings Pvt. Ltd*, A.I.R. 1992 S.C. 920; *MVP Social Workers Association v. Visakhapatnam Urban Development Authority*, A.I.R. 2002 And. 195.

human rights, development and environmental concerns are flood action plan,⁴⁰ shrimp farming,⁴¹ and urban development.⁴² In Pakistan, the first reported PIEL was initiated in a case concerning development projects and environment.⁴³ Other PIEL involved mining concession,⁴⁴ human health,⁴⁵ and oil spill.⁴⁶ In many of these cases, the court either directed the government bodies to take action as it breached a constitutional fundamental right, or set up a committee to monitor the situation and report back to the court for further action.⁴⁷

Large-scale infrastructure projects that displace indigenous people from their land and adversely affect the natural resources are an issue where the Supreme Court had to balance the development aspects, human rights and the environmental concerns. One example of such ongoing disputes⁴⁸ where the legality of dams was challenged is the construction of Narmada dam. The Indian Government's plan is to build 30 large, 135 medium, and 3000 small dams to harness the waters of the Narmada and its tributaries. The government agencies claimed that this plan would provide large amounts of water and electricity that are required for the purposes of development. Amongst the 30 large dams planned for the Narmada, the Sardar Sarovar dam is the largest. The Government claims that the multi-purpose Sardar Sarovar Project (SSP) would irrigate more than 1.8 million hectares and provide water in the drought prone areas in Gujarat. The opponents counter that the benefits of the dam, with a pro-

40. Farooque, 49 D.L.R. (A.D.) 1; Farooque, 48 D.L.R. 438.

41. Khushi Kabir and others v. Government of Bangladesh (W.P. No. 3091 of 2000). Bangladesh Environmental Lawyers Ass'n v. Bangladesh (WP No. 1162 of 1998).

42. Summary of Farooque v. Bangladesh at Bangladesh Environmental Lawyers Association, List of Public Interest Litigation (PIL) of BELA, <http://www.belabangla.org/html/pil.htm>.

43. See Shehla Zia, P.L.D. (1994) S.C. 693; see also Parvez Hassan & Azim Azfar, *Securing Environmental Rights Through Public Interest Litigation In South Asia*, 22 VA. ENVTL. L. J. 215, 216 (2004) ("landmark decision in Shehla Zia v. WAPDA").

44. Asfand Yar Khan v. Chief Commissioner, Islamabad Capital Territory, Islamabad, 1996 S.C.M.R. 1421.

45. Gen. Sec'y, W. Pakistan Salt Miners Labour Union (CBA) Khewara, Jhelum v. Dir., Indus. and Mineral Dev., Punjab, Lahore, 1994 S.C.M.R. 2061.

46. Dr Amjad H Bokhari v. Federation of Pakistan (Constitutional Petition 45/2003) available at <http://www.elaw.org/resources/text.asp?ID=2277..>

47. See RAZZAQUE, *supra* note 2, at ch. 5.

48. See *id.*

posed height of 136.5 m (455 feet), are grossly exaggerated. According to the Narmada Bachao Andolan, a group established to protect the river and the people living on the basin, the project would displace more than 320,000 people and affect the livelihood of thousands of others and destroy the local environment.⁴⁹

In 2006, the Supreme Court of India considered the issue of relief and rehabilitation of landless community living around the area of the Narmada dam.⁵⁰ This was not the first time the Court dealt with the SSP. In 1979, the Narmada Water Disputes Tribunal held that submergence must not happen before rehabilitation of the affected people is complete.⁵¹ In 2000, the Supreme Court held that the construction of dam (up to 90 meters) should proceed immediately. Any further raising of the height can proceed only in 'pari passu' with the relief and rehabilitation process and once the relevant government agencies (e.g. relief and rehabilitation sub-group and environment sub-group of Narmada Control Authority) give their consent.⁵² The Supreme Court also added that the displacement of tribal people does not "*per se* result in the violation of their fundamental or other rights" including Article 21 (i.e. right to life) of the Constitution of India. This 2000 decision also sidelines the environmental implications of the Narmada dam and found the environmental impact assessment satisfactory.⁵³ The court did not apply precautionary principle on the ground that the application of that principle is restricted to polluting industries.⁵⁴ The majority judgment wanted the project to finish 'at the earliest' and throughout the judgement, the judges praised the positive impact of dams on food security and national

49. Narmada Bachao Andolan v. Union of India, A.I.R. 2000 S.C. 3751.

50. Narmada Bachao Andolan v. Union of India, Writ Petition (Civil) No.328, reproduced at <http://narmada.aidindia.org/content/view/49/26> (last visited Sept. 26, 2007). For more information on the Sardar Sarovar project, see Patrick McCully, *Sardar Sarovar Project (SSP): An Overview*, <http://www.narmada.org/sardar-sarovar/imoverview940525.html> (last visited Nov. 13, 2007).

51. "In no event shall any areas . . . be submerged under the Sardar Sarovar unless all payment of compensation, expenses and costs as aforesaid is made for acquisition of land and properties and arrangements are made for the rehabilitation of the oustees therefrom in accordance with these directions and intimated to the oustees." Final Order & Decision of the Narmada Water Dispute Tribunal, cl. XI, subcl. iv(6)(ii) (Dec. 12, 1979), available at <http://mdmu.maharashtra.gov.in/pages/projectrelatedrehab/nwdtawardShow1.php>.

52. Narmada Bachao Andolan, A.I.R. 2000 S.C. 3751.

53. *Id.* at 95-96, 129-130.

54. *Id.* at 95-96.

economy.⁵⁵ The Supreme Court, in May 2006, dismissed the PIEL filed by an activist group and upheld the government decision to go ahead with the construction even though the progress on rehabilitation is not satisfactory and the construction of the dam was outpacing the rehabilitation process.⁵⁶ The Supreme Court took this decision despite major unresolved issues on resettlement, the environment, and the project's costs and benefits. It seems that the Court's decision is more to do with the nature of the infrastructure project which, once finished, will have a long-term impact on the economy (e.g. food security, water supply, hydro-electric power) of the country. While the court is not saying that displacement of the tribal people is a breach of their fundamental right to life, the court is saying that the construction can go ahead along with rehabilitation. However, when inadequate rehabilitation process is challenged, the court did not penalize government agencies for failing to rehabilitate before raising the height of the dam.⁵⁷

While deciding a case, the court also considers the issue of funds required for the development project or activity. The funding of these projects could come from the foreign donors, international credit agencies, national agencies or multinational companies. An example of a case where the court took account of the funding issue was the Flood Action Plan (FAP) case in Bangladesh. As an aftermath of two consecutive floods in Bangladesh in 1987 and 1988, the World Bank co-ordinated this long-term flood control programme. This project was mainly to plan and undertake the construction of dams, barrages and embankments and flood control including watershed management. The petitioner challenged one of the 15 supporting studies of FAP, which aimed at experimenting the concept of "compartmentalisation,"⁵⁸ which has never been tested anywhere else and at 'controlled flooding' in two areas of Bangladesh. In the

55. *Id.* See also Friends of the River Narmada, *The Order of the Supreme Court in the Narmada Case Highlights, Comments, and Analysis*, <http://www.narmada.org/sardar-sarovar/sc.ruling/nba.comments.html#judgments> (last visited Nov. 13, 2007) (critiquing Supreme Court decision).

56. Narmada Bachao Andolan, *supra* note 51.

57. K. Ramachandra, *Sardar Sarovar: An Experience Retained?*, 19 HARV. HUM. RTS. J. 275 (2006).

58. 'Compartmentalisation' means surrounding of specific areas by embankments with gated or ungated openings through which in and outflow of floodwater can be controlled. Inside the compartment, a system of channels and *khals* has the function of transporting the water to the sub compartments constructed within a big compartment.

writ petition to the court, petitioner on behalf of Bangladesh Environmental Lawyers Association (BELA), a non-governmental organization, alleged that the activities of FAP would adversely affect and injure more than a million people by way of displacement, causing damage to soil and destruction of natural habitat, of fishes, flora and fauna. The petitioner added that no proper environmental impact assessment has been undertaken in relation to FAP projects which would cause significant adverse effect on the environment. 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.⁵⁹ The court directed the concerned government authority that no 'serious damage' to the environment and ecology should be caused by FAP activities; however, the threshold of the seriousness was not ascertained.⁶⁰

It appears that, in a litigation that brings development, human rights and environment concerns, the court will consider the nature of the project or activity and the impact that project will have on the national economy. While the court may not suspend the development project or activity, the court may restrict the way resources are being utilised or developed. For example, in relation to the export products, the court has considered the issue of 'dollar economy' and its impact on the country. In a case on shrimp cultivation in India,⁶¹ the petitioner alleged that the intensive and semi-intensive type of prawn farming was affecting the ecologically fragile coastal areas. The petitioner asked the court to consider the traditional access of fisherman from the village to the beach which has been restricted, the increased salinity of water and adverse effect on land, destruction of mangrove forest, and degradation of fragile coastal land—all due to the shrimp cultivation.

In response to an argument by the government that shrimp is a lucrative export product and has earned foreign exchange for the country, the Supreme Court held that:

Even if some of the shrimp culture farms which are polluting the environment are closed, the production of

59. The judgment by the High Court was given on Aug. 8, 1997.

60. See *Farooque v. Bangladesh*, 47 D.L.R. (A.D.) 998.

61. See *Jagannath*, (1997) 2 S.C.C. 87.

shrimp by environmentally friendly techniques would not be affected and there may not be any loss to the economy specially in view of the finding given by NEERI (National Environmental and Engineering Institute of India) that the damage caused to ecology and economics by the aquaculture farming is higher than the earnings from the sale of coastal aquaculture produce.⁶²

Thus, the court asks the government authority to take due account of the damage caused to the fragile coastal ecosystem and long-term sustainability.

Moreover, the Supreme Court added that: "there must be a compulsory environmental impact assessment which would consider inter-generational equity and rehabilitation cost."⁶³ The assessment must take into consideration the inter-generational equity and the compensation for those who are affected and prejudiced. The court then ordered the government agency to take necessary measures to protect the ecologically fragile coastal areas and demolish any shrimp culture industries within the CRZ (Coastal Regulation Zone). Any "compensation amount recovered from the polluters shall be deposited under a separate head called 'Environment Protection Fund' and shall be utilised for compensating the affected persons and also for restoring the damaged environment." However, judgments from the court alone are not enough - there is a need for effective enforcement of regulations as well as dissemination of information and economic incentives.⁶⁴

IV. ENVIRONMENTAL LITIGATION: APPROACH OF THE JUDICIARY

The Supreme Court of these three countries is the final interpreter of law and this is entrenched in their written Constitution. The functions of the judiciary are to enhance the rule of law, to promote the human rights and to administer the law impartially at the horizontal (i.e. between individual and state) and vertical (i.e. between indi-

62. *Id.* at para. 51.

63. *Id.* at para. 50.

64. L. Hein, *Toward Improved Environmental and Social Management of Indian Shrimp Farming*, 29 ENVTL MGMT 3, 349-59 (2002).

viduals) levels.⁶⁵ Along with the balancing act that the court performs, the judiciary of these three countries has also liberalized access to justice mainly in three ways: creating innovative orders and directives, widening the standing of people to access the court and applying international environmental principles at the national level.

The most common remedies that are offered by the court are directions, injunction and civil and criminal damages.⁶⁶ There is also possibility to initiate *suo motu* action by the higher courts.⁶⁷ These three countries follow an adversarial system, and therefore, the loser pays the winner's costs. However, the judiciary can apply their discretion to minimise the cost of the petitioner (e.g. community groups, environmental activist, non-governmental organisations) in a PIEL. The judiciary has the power to create experts and special committees to assist the court and monitor the progress of the decisions taken by the court.⁶⁸ The judiciary can also order the closure and relocation of polluting industries,⁶⁹ and payment of compensation for reversing the damage caused by development activities to the environment and human health.⁷⁰

The judiciary of these three countries has allowed individuals and community groups to challenge decisions made by the government agencies or activities of multinational corporations.⁷¹ In widening the access to the judicial process, the Indian courts apply 'sufficient

65. Sir M. Tikaram, *Independence of the Judiciary and Public Accountability*, in LEGAL VISIONS OF THE 21ST CENTURY: ESSAYS IN HONOUR OF JUDGE CHRISTOPHER WEERAMANTRY 317- 332 (A. Anghie and G. Sturgess, eds. 1998).

66. RAZZAQUE, *supra* note 2, at ch. 5.

67. The constitutional provisions of India, Pakistan and Bangladesh allow the higher courts to initiate action on its own without any formal petition. These are commonly known as *suo motu* actions. *Suo motu* actions are taken if the matter is of public importance. The court, in various occasions, has taken account of a letter and newspaper article.

68. See, e.g. M.C. Mehta v. Union of India (Taj Mahal Case), (1998) 9 S.C.C 93 (in India, a special committee was created to monitor air quality and traffic congestion). See also U.C. Gogol v. State of Assam, (1998) 3 S.C.C 381 (the court directed the subordinate green bench to monitor the compliance of the previous order); M.C. Mehta v. Union of India (Calcutta Tanneries Matter), (1997) 2 S.C.C 411 and (1998) 9 S.C.C 448.

69. E.g., M.C. Mehta v. Union of India, (1997) 2 S.C.C. 411.

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

71. See RAZZAQUE, *supra* note 2, ch. 1 (discussing examples of cases on mining and quarrying, forest conservation and infrastructure projects).

interest' test for standing to enforce fundamental rights.⁷² 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 suggest a specific test to determine standing in writ petitions⁷³ – but the judiciary has given a liberal interpretation of the test.⁷⁴ This liberal standing rule allows potential parties to bring cases where their human and environmental rights are breached by development projects or activities.

In addition, the judiciary in these three countries is active in applying various internationally recognized environmental principles such as sustainable development,⁷⁵ polluter pays principle⁷⁶ and precautionary principle.⁷⁷ In India, the application of general principles of

72. See INDIA CONST. art. 32, art. 226 (neither mention any 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 a more liberal “sufficient interest” test.

73. See BANGLADESH CONST. art 102 (stating that the aggrieved person test is followed in order to decide the standing in the High Court); see also BANGLADESH CONST art 104 (which does not provide any specific test if the matter is before the Appellate Division of the Supreme Court); PAKISTAN CONST. art 184 (which does not provide any specific test if the issue is of public importance and if the matter is handled by the Supreme Court); PAKISTAN CONST. art. 199 (which 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).

74. Farooque, 49 D.L.R. (A.D.) 1; Benazir Bhutto v. The Federation of Pakistan, P.L.D. (1988) S.C. 416 (Political case); Darshan Masih v. State, P.L.D. (1990) S.C. 513 (Human rights case).

75. Applying as part of customary law, the court followed 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. Jona Razzaque, *Background Paper 4: Human Rights and the Environment: The National Experience in South Asia and Africa*, JOINT UNEP-OHCHR EXPERT SEMINAR ON HUMAN RIGHTS AND THE ENVIRONMENT, January (2002). available at <http://www.unhcr.ch/environment/bp4.html>.

76. In India: M.C. Mehta v. Union of India and Others, A.I.R. 1987 S.C. 1086, Vellore Citizen's Welfare Forum, A.I.R. 1996 S.C. 2715; M.C. Mehta v. Kamal Nath and Others, (1997) 1 S.C.C. 388, 414. There is yet no application of this principle in the case laws of Pakistan and Bangladesh.

77. In India: M.C. Mehta (Taj Trapezium Case) v. Union of India, (1997) 2 S.C.C. 353; Vellore Citizen's Welfare Forum, (1996) 5 S.C.C. 647; Indian Council for Enviro Legal Action v. Union of India, (1996) 3 S.C.C. 212, 247; S. Jagannath v. Union of India and Others, (1997) 2 S.C.C. 87; Suo Motu Proceedings in Re: Delhi Transport Department, (1998) 9 S.C.C. 250. In Bangladesh: Dr Mohiuddin

international law, to a certain extent, surpassed the international standard. For example, in applying the polluter pays principle, the standard of absolute liability was used. At the same time, the judiciary, in some cases, applied these principles as if they are part of the customary international law. In doing so, the judiciary is making their choice by a process of value judgments that are influenced by their assessment of what is best for the community.⁷⁸ In Bangladesh and Pakistan, the judiciary is taking a cautious step. In deciding the PIEL, the judiciary of these two countries is most likely to apply the international environmental principles which have been integrated into the national law.

With the expansion of the meaning of right to life to accommodate environmental protection, discussed in section 2, an expectation has been created that judiciary would take more prominent position in deciding environmental cases. The degree of activism of the judiciary depends, to a large extent, on the system of appointment of the judges and the desire of judges to reflect the values of their particular jurisdiction. Since the judges in India, Pakistan and Bangladesh are not involved in electoral politics, they are more willing than other public bodies to take unpopular decisions beneficial in the long run.

The development in the PIEL in India shows that the judiciary expanded the meaning of fundamental rights, and, in several cases,⁷⁹ read unenforceable directive principles of state policy into Article 21. The Supreme Court of India made several directions which indicate a new trend of the judiciary to fashion novel remedies to reach a given result, although these new remedies may sometimes encroach on the domain of the executive.⁸⁰ The judicial activism in India, Pakistan and Bangladesh can be justified on the ground that there is a judicial vacuum and the court has all the power to fill up the gaps in the law. However, the proactive role of the judges is sometimes criticised: the central issue is perhaps the non-accountable nature of

Farooque v. Bangladesh (Radioactive Milk case), W.P. No. 92 of 1996. In Pakistan: Shehla Zia v. WAPDA, P.L.D. 1994 SC 693.

78. Judge Weeramantry, Closing address, Report of the Regional Symposium on the Role of the Judiciary in Promoting the Rule of Law in the Area of Sustainable Development, Colombo, Sri Lanka, July 4-6, 1997.

79. See R.L. Kendra v. State of Uttar Pradesh, A.I.R. 1985 S.C. 652; T. Damodar Rao v. Municipal Corp. of Hyderabad, A.I.R. 1987 A.P. 171; Koolwal v. Rajasthan, A.I.R. 1988 Raj. 2; Kinkri Devi v. State of Himachal Pradesh, A.I.R. 1988 H.P.

80. M.C. Mehta v. Union of India, A.I.R. 1991 S.C. 813 (Vehicular Pollution Case).

the judges and their eagerness to decide the social and political issues.

Although there are separation of powers among executive, legislature and the judiciary - activities of these bodies cannot be contained in watertight compartments.⁸¹ Therefore, it can easily be argued that there is nothing unconstitutional for judges to further invade the province of the executives. However, it is also argued that judges are ill equipped to deal with increasingly political arguments (especially cases where large infrastructure projects or privatisation decisions are challenged) put before them and to reach an informed decision. They are not elected by the people – thus, not accountable. The courts may misinterpret the political purpose of the development policy or activity. This criticism becomes more relevant when the judiciary is not entirely ‘separate’ from the executive or legislative body.

In India, there seems to be a dispute regarding the judiciary having too much power, which is known as the ‘government of the judiciary’. The examples of such intrusion can be found in the appointment and transfer of the judges⁸² and problems arising from service conditions.⁸³ It appears that the judiciary in India is trying to establish its independence by deciding cases concerning their own status. In Pakistan and Bangladesh, the appointment of the judiciary is still dependent on the liking of the executives and on the political will of the day. In Pakistan, it was not until 1996 that steps were being initi-

81. See generally, S.M. HASSAN TALUKDER, INDEPENDENCE OF JUDICIARY IN BANGLADESH: LAW AND PRACTICE (1994, Anindya, Bangladesh); M. ISLAM, CONSTITUTION OF BANGLADESH (1995, BILIA).

82. In the Supreme Court Advocates’ on Record Association v. Union of India, (1993) 4 S.C.C. 441, known as the “Second Judges” case, the Supreme Court decided that the last word in the matter of the appointment of any judge to the Supreme Court or any High Court must rest with the Chief Justice of India (CJI). Rao argues that the decision disregards the relevant provisions of the Constitution. P. C. Rao, *Use and Abuse of the Indian Constitution*, 38/1 INDIAN J. INT’L L. 799, 836-837 (1998).

83. Regarding the service conditions, the Supreme Court in All India Judges Ass’n v. Union of India, A.I.R. 1992 S.C. 165, gave directions to improve the service conditions of the members of the subordinate judiciary largely based on the recommendations of the Law Commission of India in 1958. In Ass’n and Others v. All India Judges’ Union of India and Others, A.I.R. 1993 S.C. 2493, the Supreme Court directed that the All India Judicial Service should be set up, raised the superannuation age of the judicial officers up to 60 years, uniformity in pay scales, grant of residence cum library allowance, provision of conveyance, in-service training etc. Rao, *supra* note 81, at 838.

ated for the separation of the judiciary from the executives in compliance with the Supreme Court's decision. The process is still not complete and is at different stages of progress.⁸⁴ The Constitution of Bangladesh also provides several provisions on the appointment of the judges. The Chief Justice and the other judges are appointed by the President, and any other additional judges are appointed with the advice of the Prime Minister.⁸⁵ Therefore, the appointment of the higher court judges depends on the executives.⁸⁶ Only recently, in early 2007, the Government of Bangladesh decided on the separation of judiciary from the executive arm.⁸⁷ Without separation from the executives, it remains difficult for the judiciary to decide a case in a neutral manner.

So far human rights and environmental issues are concerned, the judiciary's proactive role has benefited the community groups and environmental activists. What perhaps is required is a co-ordinated approach within the judiciary which will allow the judiciary to decide environmental cases in a homogenous manner. For example, in allowing standing to community groups in PIL, in applying international environmental principles and in deciding the cost order, judges need to follow similar guidelines in a consistent manner. At the same time, it should be noted that there is a shortage of expert judges to handle the increased number of environmental cases that links development and human rights issue.⁸⁸

84. J. Shafiur Rahman, STRENGTHENING THE JUDICIARY IN ADB, STRENGTHENING THE CRIMINAL JUSTICE SYSTEM (2006), <http://www.adb.org/Documents/Books/Strengthening-Criminal-Justice-system/chap01.pdf>.

85. BANGLADESH CONST. art. 95(1), art. 48(3), art. 98.

86. The appointment of the subordinate courts, i.e., courts which are not High Courts or Supreme Courts, are through the civil service cadre system and recruitment is conducted through the Public Service Commission (PSC). Asif Nazrul, *Deciphering Independence of Judiciary*, NEW AGE, Feb. 1, 2007, available at <http://www.newagebd.com/2007/feb/01/edit.html>.

87. Editorial, *Separation of Judiciary Becoming a Reality*, The Financial Express, Jan. 23, 2007, available at <http://www.ahrchk.net/ahrc-in-news/mainfile.php/2007ahrcinnews/1010/>.

88. UN Environmental Programme has identified the training of judges as a priority issue because "ensuring an informed and active judiciary is crucial to achieving the [Millennium Development Goals]" UNEP Judges Programme Webpage, http://www.unep.org/law/Programme_work/Judges_programme/index.asp (last visited Sep. 25, 2007).

V. ENVIRONMENTAL LITIGATION: CHALLENGES AND OPPORTUNITIES

While we examined some cases that require the effective balance of environment, human rights and development, the question remains: is litigation enough to create such balance? As seen above, the PIEL highlight some positive aspects including the power of the judiciary to monitor the execution of judgments.⁸⁹ However, there are critiques who believe that the only purpose served by a PIEL is to give the judiciary the freedom to impinge into the discretionary area of civil servants. In addition to this, when courts are inaccessible (in the sense, that the legal proceedings are expensive) to most people, PIEL is nothing more than 'tokenism'.⁹⁰ Critics highlight some negative aspects of PIEL: that legal processes in South Asia could be lengthy and time consuming; that there is no legal assistance to bring environmental cases in these three countries and no specific guidelines on cost order; that there is a lack of implementation of the PIEL judgments⁹¹ and inadequate penalty for 'contempt of court' (i.e. when the polluters or government agencies ignore the court's decision). It is also true that a PIEL does not change the policy of the government - public authorities are free to take the same decision over and again for any other similar situation. The above discussion shows that access to courts may not ensure procedural justice or a just substantive outcome. In addition to access to courts, other participatory tools (e.g. publicly accessible information, consultation with affected community groups) are required that will allow communities to participate during the decision making of any development project.

Therefore, one option could be to strengthen the litigation process by outlining guidelines for standing and cost order in PIEL and allocating legal aid for communities to bring environmental litigation. Moreover, there should be some detailed procedure to ensure post-decision monitoring which would reduce the number of decisions

89. Jona Razzaque, *Human Rights and the Environment: National Experiences*, 32 ENV'T POL'Y & L. 99 (2002).

90. S.P. SATHE, *JUDICIAL ACTIVISM IN INDIA: TRANSGRESSING BORDERS AND ENFORCING LIMITS* 224-27 (A.S. Nadkarni ed., 2002).

91. Jona Razzaque, *Environmental Human Rights in South Asia: Towards Stronger Participatory Mechanisms*, in *ROUNDTABLE ON HUM. RTS. AND THE ENV'T* (2004), available at http://www.cleanairnet.org/caiasia/1412/articles-58293_Jona.doc.

that are not being implemented (or being implemented in violation of the court order). At the same time, there needs to be strong procedural rights: right which will allow communities to access the court as well as participate in the policy (e.g. national environment policy, water policy, energy policy) and decision making process. While some development projects may consciously protect the environment and human well beings, there are examples of development projects and activities which negate the people's right to participate in the decision making and reach a decision which is not inclusive, transparent and accountable.

Such adequate, timely and effective participation may potentially enhance public trust of government decision-making - thus reduce litigation, and serve to co-ordinate and reconcile various environmental strategies.⁹² Strong participatory provisions could strengthen partnership and collaboration between government agencies, the private sector and civil society leading to the effective implementation of the government's environmental agenda.⁹³ However, the government authorities (in particular, the executive organs) may be tempted to decide on the development policies and infrastructure projects without adequate consultation with the affected community.⁹⁴ Consultation process could be time consuming and may not be cost effective.

In these three countries, there are formal as well as informal procedures that allow people to participate in the decision-making process.⁹⁵ Though recent legislation (and guidelines) on environmental

92. William Murray Tab, *Environmental Impact Assessment in the European Community: Shaping International Norms*, 73 *TUL. L. REV.* 923, 953 (1999).

93. National Environmental Management Action Plan in Bangladesh could provide an example where such trust-building approach was adopted by the government agencies. A thorough consultation was carried out involving community groups, professionals and non-governmental organisations. Mahfuzul Haque, *National Environmental Management Action Program (NEMAP) in Bangladesh*, in *ENVIRONMENT AND SUSTAINABLE AGRICULTURE IN RURAL DEVELOPMENT* 192 (Md. Abdul Quddus et al. eds., 1996).

94. For example, the independent review of the Sardar Sarovar project, the Morse report, denounced the failure of the government (and the World Bank) to complete a comprehensive social and environmental impact study of the project and the lack of community participation in the planning process. B. Morse & T. Berger, *Findings and Recommendations of the Independent Review*, in *TOWARD SUSTAINABLE DEVELOPMENT? STRUGGLING OVER INDIA'S NARMADA RIVER* 371-80 (W. F. Fisher ed., 1995).

95. Formal procedures for participation in lawmaking include participation in the form of public consultation and citizen initiatives in the policy making. Infor-

impact assessment in India, Pakistan and Bangladesh provide provisions on consultation and public hearing, the specific implementation is left largely to the discretion of the relevant governmental agencies.⁹⁶ Interested members of the public may not be presented with opportunities to offer the type of inputs that they believe would be truly meaningful.

These participatory rights (e.g. consultation, public hearing,) should be backed up with equally strong and accessible information right. The earlier sectoral environmental legislation of India, Pakistan and Bangladesh hardly provides any provision on the access to environmental information. Provisions related to access to environmental information in these three countries are found in framework environmental legislation,⁹⁷ but they do not impose any duty on the state to collect or disseminate environmental information. India and Pakistan have legislation on access to information⁹⁸ – these laws do not contain any specific provision on environmental information. Whereas some Asian Constitutions provide a right to information,⁹⁹ there is no such provision in India, Pakistan or Bangladesh. Without adequate information, it is difficult for the community groups and individuals to challenge a development project, or participate effectively during the consultation.

mal methods include writing or calling elected officials, attending public hearings, commenting on agency rules, or lobbying on specific legislation. Benjamin J. Richardson & Jona Razzaque, *Public Participation in Environmental Decision-Making*, in ENVIRONMENTAL LAW FOR SUSTAINABILITY: A CRITICAL READER 165-194 (Benjamin J. Richardson and S. Wood eds., 2006).

96. Jona Razzaque, *Participatory Rights in Natural Resource Management: The Role of the Communities in South Asia*, in ENVIRONMENTAL LAW AND JUSTICE IN CONTEXT (J. Ebbesson & P. Okowa eds., Forthcoming 2008).

97. Environment (Protection) Act of India, No. 29 of 1986; India Code (1991) (amended 1991), available at, http://envfor.nic.in/legis/env/eprotect_act_1986.pdf; Environment Conservation Rules of Bangladesh (1997), available at http://www.moef.gov.bd/html/laws/env_law/178-189.pdf; Pakistan Environment Protection Act, No. 34 of 1997, available at, <http://www.cpp.org.pk/legal/Law-PEPA-1997.pdf>.

98. Right to Information Act, No. 22 of 2005 (Pakistan), available at <http://persmin.nic.in/RTI/RTI-Act.pdf>; Freedom of Information Ordinance, No. 44 of 2002 (Pakistan) available at http://www.crcp.sdnpk.org/ordinance_of_2002.htm.

99. For example, in Philippines and Thailand, the right to information is recognised in the Constitution. *The freedominfo.org Global Survey: Freedom of Information and Access to Government Record Laws Around the World* (2004), http://www.freedominfo.org/documents/global_survey2004.pdf.

These procedural tools (i.e. access to court, access to information and participation in the decision making process) are often linked to the discussion on environmental governance. At the heart of any 'good governance' is the engagement of public and inclusive decision-making process with transparent and accountable policies to reconcile differences among various interest holders (i.e. private sector, government agencies, community groups).¹⁰⁰ Strong procedural rights help to achieve a greater environmental protection at lower cost and more effective implementation of judicial and executive decisions. The above discussion shows that national legal frameworks of these three countries do not provide adequate mechanisms for access to information and participation. Even if there is an active judiciary (and their positive approach to environmental litigation), the judicial system is not always cost effective and legal aid is not developed enough to support environmental cases. Only the existence of strong procedural rights will ensure a balanced integration of human and environmental considerations in decisions involving development projects and, guarantee that environmental standards will be enforced.

100. See generally Francis N. Botchway, *Good Governance: The Old, the New, the Principle, and the Elements*, 13 *FLA. J. INT'L L.* 159 (2001).