

International Environmental Law Committee Newsletter

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CHAIR'S MESSAGE

Vail Thorne
*Chair, International Environmental
Law Committee*
vthorne@na.ko.com

This issue of the International Environmental Law Committee Newsletter focuses on Asia. We have three very interesting articles, from China, India and Pakistan. The authors are experts in the field and know what is happening locally on the ground in those countries. The China article addresses the growing influence of European environmental law in that country. The India article examines India's proactive judiciary and its influence on local environmental law. Our last article discusses the *Shehla Zia* case in Pakistan and its implications for environmental law in that country. I hope you find the articles to be informative and provocative.

I want to thank, on behalf of all Committee members, each author who contributed an article to this issue of our Newsletter. They are: Richard J. Ferris, Jr. of Holland & Knight, LLP; Rajinder Sharma of Coca-Cola India; and Dr. Parvez Hassan of Hassan & Hassan. Each author put a lot of thought, preparation and work into their respective contributions.

We are always in search of good articles for our newsletter. If you are interested in publishing an article, please contact Jane Luxton, our Vice Chair, Newsletter. She can be reached at jluxton@kslaw.com. We also want to hear from you on

whether the newsletter is meeting your needs. Please let us know any thoughts you may have on this subject.

CHINA'S INCREASING FOCUS ON EUROPE: TRENDS AND IMPLICATIONS FOR THE DEVELOPMENT OF CHINESE ENVIRONMENTAL LAW

Richard J. ("Tad") Ferris Jr.
Holland & Knight LLP

Introduction

China's review and acceptance of European influences on Chinese environmental law and policy are increasingly evident. Rumors abound concerning the rise of European influence in China, largely driven by increasing interactions between China and the European Union (EU), EU member nations and other European countries. This article seeks to provide a baseline for further discussion of the implications of this rising influence. In preparing this article, the author draws from his work with his colleagues and the Chinese government on legislative initiatives over the past decade, as well as recent discussions with Chinese lawmakers.

Section one summarizes information received from Chinese government officials on influences they perceive that help drive Chinese lawmakers to look to European environmental initiatives as models for their own rulemakings. Section two of the article focuses on

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how China's lawmaking process has evolved to require consideration of examples of legal initiatives in other countries over the past decade. Section three provides specific examples of Chinese environmental rulemakings that are influenced by legal initiatives in Europe and section four looks at future trends in European influence in Chinese rulemakings.

I. Perspectives on What is Driving the Growth of European Influences on Chinese Environmental Law

Chinese lawmakers and senior officials describe a wide array of reasons for the increase in influence of European initiatives on law in China. These reasons range from highly personal and subjective explanations, to objective descriptions of policies that foster closer relations between China and Europe. Of course, the factors influencing China's increasing use of European models for law and policy initiatives are too numerous and complex to examine comprehensively in this short summary. However, an overview of selected influences described by Chinese officials is helpful to further study and tracking of this trend. Of the factors that Chinese government officials described to us, the following were commonly included in the discussions.

Overall Facilitation of Visits from China to Europe

One of the most frequently raised explanations for enhanced influence of EU initiatives on China's law and policy is the ready access to EU member countries that Chinese officials enjoy. The officials typically contrast this with the increasing obstacles that such officials experience in arranging visits to the United States. Simply put, it is far more difficult for Chinese government delegation members to obtain visa and other documentation for travel to the United States than it is for similar visits to jurisdictions within the EU. When combined with other types of support for increased EU-China exchanges, such as those recounted below, the combination of factors provides fertile ground for the growth of pro-European influences within Chinese environmental law and policymaking circles.

Support for Legal and Technical Exchanges

Chinese law and policymakers point to extensive support for legal and technical exchanges apparently sourced from the EU and EU Member States. The infusion of financial support often facilitates helpful discussions and exposes the Chinese lawmakers and supporting technical advisors to useful models. In the area of electronic product recycling and take-back, the EU supported European visits by at least two Chinese delegations over the past two years, including one in January 2005. The delegation members included the key drafters of China's proposed rule on the take-back and recycling of electrical and electronic equipment, described below. In October 2004, the EU supported a Chinese delegation visit to Europe with the purpose of studying European experience in the area of food and beverage regulation.

Support for Personnel Exchanges

Chinese officials have pointed to the growing number of EU and EU member-state delegations that Chinese government organizations receive on legislative and related technical issues. They have also highlighted the expanding presence of EU and EU member-state officials as visitors at their agencies to offer input on "how the European Commission" or "how particular EU member states" approach particular legislative or related technical issues.

Political Initiatives

Of particular note in our discussions with Chinese officials was the frequency with which particular political agreements and other initiatives on both sides are raised as drivers for enhanced EU-China cooperation and the influence of EU environmental initiatives on Chinese law and policy. Particularly influential agreements and other initiatives mentioned by the Chinese officials we spoke with include:

- *Green Diplomacy Network*. Established in 2002, this is a Network of "environmental experts" within EU foreign ministries for, among other objectives, promoting the use of the EU's diplomatic

resources to support environmental objectives that bring the EU messages on these objectives to third parties all over the world. Link: http://europa.eu.int/comm/environment/international_issues/green_diplomacy_en.htm

- *Transfer of Primary Responsibility for EU-China Project Assistance from the European Commission (EC) in Brussels to Delegation of the EC to China*. As part of the broad reform of the EC's external assistance programs, China was one of the first jurisdictions in which management responsibilities for cooperative projects were transferred from the EC in Brussels to the EC Delegation in Beijing. According to the EC Delegation in Beijing, "a substantial part of the EU-China assistance co-operation budget is allocated to environmental support programmes in China in response to the clear wish among policymakers in China to learn from EU experience" (*see, e.g.,* Delegation of the EC to China at http://ww.delchn.cec.eu.int/en/eu_and_china/Dialogues.htm#env). In turn, Chinese officials have commented that having the "center of gravity" for EC project assistance in Beijing greatly enhances the engagement of key government representatives in EU-China projects. Ongoing or recently completed EU-China environmental projects include:
 - EU-China Liaoning Integrated Environmental Programme (<http://www.eu-liep.org>).
 - EC-China Environmental Management Cooperation Programme (<http://emcp.acca21.org.cn>).
 - EU-China Panam Integrated Rural Development Project (<http://www.pirdp.org>).
 - EU-China Natural Forest Management Project.
 - Energy/Environment Programme (www.energyandenvironment.org).
 - EU-China Vehicle Emission Control Co-operation Project (completed).
 - EU-China Capacity Building for Municipal Solid Waste management Reform in China (completed).

- *EU-China Agreement on Environmental Protection.* On Nov. 12, 2003, then EC Environmental Commissioner Margot Wallström and Minister Xie Zhenhua of China’s State Environmental Protection Administration concluded an “Agreement on Strengthened Environmental Cooperation” that focuses on climate change, biodiversity conservation, water resources management, and related capacity building activities. Chinese officials we spoke with highlighted the fact that the Agreement presents the EU and China with additional opportunities to engage on these and any other environmental topics of interest.

- *EU Support for Law and Capacity Building Programs.* The EU has invested significant resources in projects aimed at supporting and assisting with the evolution of China’s legal system. While these projects do not focus on environmental issues, they provide vehicles for the fostering of European legal concepts and models in Chinese government organizations, as well as exposure of Chinese authorities to European legal experts and legislative authorities. Chinese officials have indicated to us that the combined effect of the law and capacity-building and environmental programs provides them with a favorable impression of and ready access to European legal models and approaches. Ongoing EU-China law and capacity building projects include:

- EU-China Legal & Judicial Co-operation Programme (www.lawprojectforum.org and www.legaljudicial.org)
- EU-China Training Program on Village Governance ([www.chinarural.org/euchina prog/](http://www.chinarural.org/euchinaprog/))
- EU-China Intellectual Property Rights Co-operation Programme (http://www.european-patent-office.org/intcop/ipr_china/).
- China-EU Public Administration Programme (www.cepa.net.cn).

- *EU-China Policy Dialogues and Agreements.* Chinese officials we speak with do not appear to focus on one particular bilateral policy dialogue or agreement when discussing the topic of China-EU

relations. However, these officials have commented that the dialogues and resulting agreements appear to them to be frequent, generally cast in a non-adversarial light, and cover issues that they perceive as helpful to China.

- The European Commission completed a Policy Paper, entitled “A maturing partnership—shared interests and challenges in EU-China Relations” in October 2003. (http://europa.eu.int/comm/external_relations/china/com_03_533/com_533_en.pdf). This paper addresses the EU’s comprehensive plan on raising the EU profile in China, including the strengthening of policy dialogues with China to foster understanding of regulatory frameworks in the EU and in China. These regulatory frameworks include those in the communications, “information society,” environment, and energy areas.
- China’s Ministry of Foreign Affairs prepared a similar paper, simply called “China’s EU Policy Paper,” also in October 2003. (<http://www.fmprc.gov.cn/eng/wjzb/zjzg/xos/dqzzywt/t27708.htm>). This paper addresses China’s goals for EU-China relations, including, along with a number of more political aims, increasing cooperation on personnel exchanges, sharing technical and policy information, and enhancing dialogues on legislation.
- The European Commission completed a Framework Agreement for Establishing Industrial Policy Dialogue Between the Commission of the European Community and the Government of the People’s Republic of China in October 2003. (See http://europa.eu.int/comm/external_relations/china/intro/ipd_291003_en.pdf). The Agreement addresses a number of “common interest” issues, including discussing the strategy of EU-China cooperation in the field of industrial policy and enabling businesses and other interested parties from both sides to contribute activity to the EU-China Dialogue.

Growing Importance of the European Market and European Law Models for Chinese Industry

The market potential of the European Union is not lost on Chinese leaders, just as Chinese market opportunities are not lost on European leaders. The 2005 population of the European Union is estimated at 460 million. The population of the United States for 2005 is estimated to be 295 million. While these numbers alone are insufficient bases for investment policies, the growing purchasing power of the EU has contributed to China's increased focus on laws and policies that draw from European models. Such laws and policies, Chinese leaders increasingly perceive, may facilitate Chinese companies' entry into the European market. Additionally, such leaders often point to the potential for "advanced" foreign laws (often referred to as standards) to improve the technological level of Chinese industry.

II. Lawmaking in China

It would be incorrect to assume that China's receptivity to foreign legal models is a phenomenon of the last five years or so. In fact, a number of laws issued in the past two decades encourage the adoption of international standards.

These include the Standardization Law of the People's Republic of China, enacted Dec. 29, 1988, which specifies in Article 4: "the State shall actively encourage the adoption of international standards." On Dec. 9, 1993, the State Economic and Trade Commission, State Planning Commission, State Science and Technology Commission and State Technology Supervision Agency, issued "Several Regulations Promoting the Adoption of International Standards and Advanced Foreign Standards." In the environmental sector, the State Environmental Protection Administration issued on April 1, 1999, the Environmental Standards Management Measures. These Measures provide in Article 17(1)(iv) that Chinese regulatory bodies may use existing international standards and standards of developed countries when formulating certain new environmental standards.

Despite the plentiful legal bases for the adoption of foreign standards, it was not until Chinese lawmakers at the National People's Congress (NPC) directed their staff to actively look to foreign law models that the adoption of such models increased. This was largely because the concept of using foreign laws as models for Chinese laws remained quite politically sensitive during the 1990s in China. Hence, senior-level (*e.g.*, NPC) support was necessary to increase such activities.

Legislative staff in the Environmental Protection and Natural Resource Conservation Committee at the NPC were among the first officials directed to make an official inquiry into non-Chinese legislative models. In 1995, the staff reviewed foreign legal models during the process of revising China's Water Pollution Prevention and Control Law. NPC lawmakers at the time were anxious to identify means to quickly introduce foreign experience into the Chinese lawmaking process. Since 1995, although this approach has not been written into law as an "official" lawmaking procedure, research on foreign experience on particular subjects addressed in draft laws is increasingly seen as a necessary means to enhance the likely support within the NPC or agency for a legislative or rulemaking proposal.

Bilateral financial and training programs have also contributed to the growth in China's familiarity with and acceptance of foreign legal examples, particularly European models. Over the past few years, a number of European governments, such as Italy and Germany, have provided bilateral support to train Chinese law drafters from various agencies. For example, through the World Bank Institute, the Italian government provided a series of training courses for national and provincial officials. The topics of the training courses included sustainable development, enforcement indicators, and economic incentives for environmental protection.

III. Specific Examples of European Law and Policy Influence

To illustrate the growth in China's focus on European law and policy, we provide below specific examples of

Chinese environmental rulemakings that are influenced by legal initiatives in Europe.

Take-back and Recycling of Waste

The National Development and Reform Commission (NDRC) drafted the “Management Regulations on the Recycling of Used Household Electronic Products and Electronic Products” in 2004 and submitted them to the State Council for promulgation. These Regulations, because they reflect key aspects of the European Directive 2002/96/EC on Waste Electrical and Electronic Equipment (WEEE Directive) are often referred to as “China WEEE.” In 2003, then Ministry of Foreign Trade and Economic Cooperation (MOFTEC) circulated among Chinese agencies a Chinese translation of the European WEEE Directive. NDRC reportedly used the translation as a key reference document.

China WEEE proposes the take-back and recycling of certain waste electrical and electronic equipment. China WEEE would initially cover the following product categories: televisions, washing machines, refrigerators, air conditioners and computers. The State Council will likely issue China WEEE some time in 2005.

Restriction of Hazardous Substances

The Ministry of Information Industry (MII) initiated the drafting of “Management Methods for Pollution Prevention and Control in the Production of Electronic Information Products” (Methods) in 2002. The Methods reflect many aspects of Europe’s Directive 2002/95/EC on the Restriction of the Use of Certain Hazardous Substances in Electrical and Electronic Equipment (RoHS Directive). As a result, the Methods are commonly referred to as “China RoHS.” MOFTEC circulated a Chinese translation of the European RoHS Directive in 2003 and MII reportedly drew inspiration from this translation.

As in the European RoHS Directive, “China RoHS” would ban 6 substances from specified electrical and electronic products as of July 1, 2006. Going beyond the European RoHS, however, China RoHS contains

provisions addressing issues such as toxic substance, country-of-origin, and “safe-use period” marking and labeling. MII plans to issue China RoHS by the end of 2005.

Emissions Standards

The State Environmental Protection Administration (SEPA) drew directly from Europe’s Directive 70/220/EEC on the Approximation of the Laws of the Member States Relating to Measures to be Taken Against Air Pollution by Gases from Positive-Ignition Engines of Motor Vehicles (and subsequent amendments) (including Euro 1-4 Standards) when developing national vehicle emissions standards. The European standards are reflected at the national level in SEPA’s laws addressing such standards for a wide range of vehicle types. As a result, local governments are adopting these European-influenced standards, as well. A prime example of this trend is Beijing.

Examples of laws and guidance documents drawing from the European Directives include: “The Public Announcement Implementing Light –Duty Vehicle Emission Control Standards” issued June 18, 2004 and “The Reply Letter on Advanced Implementation of National Vehicle Emission Standards (Phase II) in Beijing” issued July 23, 2002.

The Beijing government is implementing national “Phase III” emission standards for all types of vehicles in 2005 and will implement “Phase IV” standards for all types of vehicles in 2008. These standards would be virtually identical to the Euro 3 and 4 standards, respectively. Beijing is also planning to implement national, proposed “Phase IV” emission standards for all types of vehicles in 2008. These standards would be largely identical to the Euro 4 standards.

Registration, Evaluation and Authorization of Chemicals

Chinese rulemaking activity in the chemicals area has been intense in the last few years, focusing on the registration of new chemical substances, with the entry into force of the “Regulations on Environmental Management of New Chemical Substances” on Oct. 15, 2003. Chinese rulemakers have been

watching Europe's efforts to develop the Proposal on the Registration, Evaluation, and Authorization of Chemicals (REACH Proposal) for some time now.

While, as of this writing, no official Chinese version of a "REACH" Proposal exists, it is likely that the Proposal will serve as inspiration to more than one of the Chinese agencies that have claim to regulatory authority over the registration, evaluation, or authorization of chemicals.

Energy Efficiency

Chinese agencies involved in energy-efficiency rulemakings reportedly have used Europe's Proposal for a Directive on Establishing a Framework for the Setting of Eco-design Requirements for Energy-Using Products (EuP Proposal) as a key reference in their rulemaking work. National Development and Reform Commission (NDRC) law drafters, in particular, commented that they "closely reviewed" the EuP Proposal when drafting China's energy efficiency regulations, including related labeling and certification measures. Chinese agencies are considering whether to develop a comprehensive enabling regulation on energy efficiency issues, for which the EuP Proposal (or final Directive) reportedly will be one of the major references.

Examples of laws that Chinese law drafters report were influenced by the EuP Proposal include the "Catalogues" for the products covered by the "Management Methods on Energy Efficiency Labeling." The Management Methods on Energy Efficiency Labeling were issued Aug. 13, 2004 and entered into force March 1, 2005 for certain products.

End of Life Vehicle Take Back and Recycling

The Ministry of Commerce (MOFCOM) is developing a "Trading Policy for Automobiles." Such Policies are akin to "White Papers" and contain policy proposals that may form the basis for future agency rulemakings. The drafters of the Policy reported that it is likely that the Policy will be issued in 2005.

The MOFCOM drafters of the Policy reportedly were significantly influenced by their review of and information on the European Directive 2000/53/EC on End-of life Vehicles (ELV Directive). The Policy focuses on automobile trading issues, including the trading of used automobiles and automobile parts. However, the Policy also covers a primary focus of the ELV directive: collection, treatment and recovery of used automobiles.

IV. Future Trends

Our discussions with China's law drafters at national agencies indicate that the growth in influence and acceptance of European law and policy models will continue. In a television program broadcast in 2005 for the Chinese Spring Festival or New Year, received by over 50 million Chinese citizens, the broadcasters read a New Year greeting from French President Chirac. While seemingly unrelated to the issue of the adoption of foreign legislative models, Chinese officials believe that such overtures greatly speed a feeling of mutual trust and warmth between peoples.

Chinese rulemaking initiatives evidence the far-reaching implications of increased synergy between China and the European Union. Among other considerations, stakeholders that advocate changes in Chinese rulemakings may face increased challenges where they oppose adopting European models. Further, United States or other stakeholders that design products or adopt standards based on measures that are not consistent with or conflict with European approaches may increasingly experience competitive or market disadvantages. Obviously, this trend bears careful consideration.

Richard ("Tad") Ferris is a partner in the Business Section at Holland + Knight LLP. Tad's practice focuses on Chinese and other Asian regulatory issues. In particular, Tad leads the firm's China regulatory and government relations practice and divides his time between Beijing and Washington, D.C. Tad can be contacted at tad.ferris@hklaw.com.

JUDICIAL ENVIRONMENTAL ACTIVISM – LESSONS FROM INDIA

Rajinder Sharma
Division Counsel
Coca-Cola India

*(With editorial assistance from Vail Thorne,
Senior Environmental, Health & Safety
Counsel, The Coca-Cola Company)*

India's Environmental Tradition

India has a long religious and social tradition of respect for the environment. Major schools of Indian philosophy believe in the concept of unity of life – “Atmavat Sarvabhuteshu” or “as to oneself, so towards all beings,” and “Vasudhaiva Kutumbakam” or “the whole world is like a family.” The concept of respect for the environment also is deeply ingrained in major Indian religions like Buddhism, Jainism and Hinduism. India's father of the nation, Mahatma Gandhi, observed: “The Earth has enough for everyone's need but not for everyone's greed.”

Modern India and Environmental Crisis

However, India's 20th century experience spawned unintended environmental conditions and pressures. A population explosion occurred in India, caused by, among other things, dramatic improvements in health care. This resulted in increased pressure on the land. State-sponsored industrial, irrigation and power projects, all designed to take care of the needs of India's teeming masses, also led to environmental degradation. In the 20th century, India followed the model of big, bigger, biggest. This all led to significant pollution and destruction of India's land, water, air and other natural resources.

A number of societal contradictions contribute to India's environmental problems:

1. While there is awareness of environmental issues among India's elite, there is almost no awareness among the ordinary people;

2. The poverty faced by many in India's society brings forth a stark conflict between the need for immediate survival and the need to preserve the environment for future generations;
3. Significant environmental degradation and impacts in small, defined areas are at times tolerated so that far larger areas or cities may benefit, based on the concept of the “greater good;”
4. With limited financial resources, the pursuit of industrial development in India has meant that very few resources are left to address environmental issues; and
5. India, being a vibrant and representative democracy, at times finds itself in the grip of “politics” where the government is unable to enact or enforce measures regarding long-term environmental interest and go against the immediate interests of powerful concerns.

Establishing a Basis for Judicial Intervention Regarding the Environment

Consistent with its pro-environment tradition, India took a number of steps to address the environment in the latter half of the 20th century. The Constitution of India was amended in 1976 to provide a basic legal focus on the environment. Article 48A of the Constitution now provides that “The State shall endeavor to protect and improve the environment and to safeguard the forests and wild life of the country.” Clause (g) of Article 51A states that it is the duty of every citizen of India “to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures.”

India's Union Parliament also enacted a comprehensive body of law addressing the environment. Specifically, the following national legislation now governs in India: (i) the Wild Life (Protection) Act, 1972; (ii) the Water (Protection and Control of Pollution) Act, 1974; (iii) the Air (Protection and Control of Pollution) Act, 1981; (iv) the Forest Conservation Act, 1980; and (v) the Environment Protection Act, 1986.

Catalyst for Judicial Activism

However, despite the passage of a comprehensive legislative framework to deal with environmental issues, government enforcement and public demand for action lagged in India for some time. But, then, the Bhopal Gas Leak tragedy occurred in 1984, where a Union Carbide plant leaked deadly chemical gas into the air killing thousands of Indian citizens. This single event catalyzed judicial and public sensitivity to environmental issues.

In *Enviro Legal Action v. Union of India*, the Supreme Court of India observed that:

Enactment of a law, but tolerating its infringement, is worse than not enacting a law at all. The continued infringement of law, over a period of time, is made possible by adoption of such means which are best known to the violators of law. Continued tolerance of such violations of law not only renders legal provisions nugatory but such tolerance by the enforcement authorities encourages lawlessness and adoption of means which cannot, or ought not to be tolerated in any civilized society When a law is enacted containing some provisions which prohibit certain types of activities, then it is of utmost importance that such legal provisions are effectively enforced.

The distinguished Indian legal scholar, Prof. (Dr.) Ranbir Singh, observed regarding the emergence of judicial activism relating to environmental enforcement:

Fortunately, . . . the trend has changed, and [in the environmental arena] the judicial policing is matched by [a] new activist stance and positive role, specially, after the Bhopal Gas Leak tragedy. This changed attitude and concern of the judiciary for protecting [the] environment has ensured a new kind of environmental justice and morality [found] in the provisions of the Constitution and the declaration of the judiciary . . . [that the right to a good] environment . . . [is] a basic fundamental right or human right (*M.C. Mehta v/s Union of India*, AIR 1989 SC 1086) enforceable in the administration and management of environmental justice.

Thus, the environmental jurisprudence now being created by India's judiciary, in particular the Supreme Court, consists of protective principles and values, and provides innovative remedies and strategies for resolving complex issues of environmental management and resource conservation, all in line with ancient Indian philosophy as well as modern internationally accepted principles of law and concern for the environment. This creative enterprise of the Indian judiciary is ongoing and still unfolding.

Justification of Judicial Activism

It is indeed unfortunate that India's government agencies have failed to effectively implement and enforce India's environmental laws. The scheme of existing Indian law, as far as enforcement is concerned, is that State Pollution Control Boards are established in every Indian State. At the national level, there is the Central Pollution Control Board. These Boards have the duty to set environmental standards which must be maintained, and to enforce the same. They are in a sense the government watch dogs who are meant to see that pollution or environmental degradation does not take place.

However, the State Pollution Control Boards have been remiss in the discharge of their duties in India. For example discharge of wastewater and other contaminants by industry has played havoc with the environment in India. The Boards have set environmental standards relating to industry, and thereafter provided "letters of permission" or permits requiring industrial facilities to take steps to prevent the emission or discharge of pollutants. After issuing such permissions, however, the State Pollution Control Boards often have not examined whether the permitted facilities are in fact employing pollution control devices, or whether they are in fact complying with applicable standards. If they do, the Boards often excuse non-compliant behavior. With small enterprises, the Boards frequently simply tolerate the discharge or emission of untreated pollutants into the environment and take no action at all, not even the issuance of "letters of permission."

This inefficient or ineffective enforcement of environmental laws has resulted in India's forests being

destroyed. Over 50 percent of India's water bodies also are polluted. And, industry has released hazardous substances into the soil and the underground water table, doing immense damage. As a result, environmentalists and people injured by environmental degradation in India have sought redress from the only Indian institution whose doors are always open to people seeking relief, namely India's courts.

There are certain specific features of the Indian judiciary that make it eminently suitable, more than other government institutions, to deal with significant environmental issues. As noted by Armin Rosencranz, Shyam Divan and Martha L. Nobel in their book *Environmental Law and Policy in India*, judges are not involved in or affected by electoral politics in India, as are members of the legislature and ministers of the executive who are drawn from the legislature. Therefore, judges are in a better position and often more willing to take decisions which may be immediately unpopular but beneficial in the long run. As in many other countries, Indian judges are institutionally insulated against external and political pressures, to which Indian legislators and government bureaucrats are constantly exposed.

Another advantage is that Indian judges are generalists and not specialists. As such, Indian judges tend to have a broader inter-generational vision of national policies and interests, as opposed to specialist government agencies charged with the responsibility of establishing or supporting large industrial and other economically beneficial developmental projects, many of which may have environmentally disruptive features that may be parochially ignored by such specialist government agencies.

Writ Jurisdiction and the PIL Innovation – the Door to Judicial Remedy in India

The Constitution of India enables Indian citizens to directly approach the High Courts of the Indian States and the Supreme Court of India to request that those courts exercise their writ jurisdiction. Writ petitions often are filed in the High Courts concerning pollution at the local level, but where more than one State may be involved, it is the Supreme Court that is increasingly dealing with environmental cases.

A petition under Article 32 of the India Constitution can be filed to enforce any so-called fundamental right. One of India's fundamental rights is that of protection of life and personal liberty incorporated in Article 21 of the Constitution. By a series of judicial pronouncements over the years, the boundary of this fundamental right to life and personal liberty has been expanded to environmental concerns. In *Subhash Kumar v/s State of Bihar*, the court observed that:

the right to live is a fundamental right under Article 21 of the Constitution and it includes the right to enjoyment of pollution-free water and air for full enjoyment of life. If anything endangers or impairs that quality of life in derogation of laws, a citizen has the right to have recourse to Article 32 of the Constitution for removing the pollution of water or air which may be detrimental to the quality of life.

The Supreme Court of India also relaxed a significant procedural hurdle in Indian courts known as "the rule of locus standi," thereby allowing the door of writ jurisdiction to open wide for environment-related cases. Prior to this, a petitioner was required to pass the test of locus standi and proof of injury was required at the threshold of the proceeding. However, taking a realistic note of Indian conditions, the Supreme Court adopted a liberal approach by relaxing the rule of locus standi and creating a new form of legal action in India, commonly known as public interest litigation (PIL) or social action litigation. There is near-complete academic agreement that this important procedural revolution regarding the rule of locus standi, the departure from the "proof of injury" requirement and the creation of PIL as a legitimate form of legal action in India laid the ground for the significant and aggressive involvement of India's higher judiciary on environmental issues.

India's judiciary views the PIL form of legal action as an appropriate and efficient method for dealing with environmental cases because it is concerned with the rights of the community rather than the individual. Under a PIL, the court is able to look at petitions dealing with an environmental hazard or disaster from the point of view of an environmental problem to be solved, rather than an adversarial dispute between two parties. Further, it is possible for the court to address

and take care of the many interests that often go unrepresented in a legal action, like the many large classes of common people in India who for economic and other reasons do not have direct access to the courts. Finally, the PIL approach helps focus the courts on contradictions between the imperatives of economic development and the frequently contradictory interests of the environment.

The main characteristics of PIL and India's judicial approach to the same are worth enumerating here – a non-adversarial and problem solving approach, common appointment and participation of amicus curiae, frequent appointment of expert monitoring or investigative committees by the court, and the regular issuance of detailed orders (*e.g.*, in the form of continuous Mandamus under Article 32 and 226 respectively by the Supreme Court of India and High Courts of the States) to address or remedy the matter in question.

In dealing with PIL cases, India's courts realize that for various reasons governmental authorities in India often abdicate their role and do not enforce applicable environmental law. As a result, irresponsible industries often continue to pollute the environment. Therefore, when a PIL is filed, Indian courts frequently take action through their order authority to immediately stop further environmental damage and thereafter remedy environmental harm by industrial or other activity. This has resulted in India's courts retaining the environmental cases on their dockets for significant periods of times, and passing appropriate orders or issuing continuous mandamus from time to time. This also has, in effect, resulted in the Supreme Court and the State High Courts themselves monitoring the implementation of their judicial orders. In some instances, the courts establish expert monitoring committees to see to it that court directions are complied with, while in other cases, the parties are required to submit reports to the courts directly and monitor progress themselves.

Further Evolution of Environmental Jurisprudence in India

Another important judicial development in India is that the Supreme Court of India has held that both the

“Precautionary Principle” and the “Polluter Pays Principle” are essential features of “sustainable development” and are part of the environmental law of India.

The “Precautionary Principle” was held to mean in *Vellore Citizens' Welfare Forum vs Union of India*:

Environmental measures – by the State Government and the statutory authorities – must anticipate, prevent and attack the causes of environmental degradation. 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 ‘onus of proof’ is on the actor or the developer/industrialist to show that his action is environmentally benign.

The “Polluter Pays Principle” has been interpreted in India to mean that liability for harm to the environment extends not only to compensate the victims of pollution, but also to the cost of repairing the environmental degradation.

A third important legal concept embraced by the Supreme Court of India is the “Public Trust Doctrine,” held as inherently part of Indian law in *M.C.Mehta v/s Kamal Nath, 1997(1) SCC 388*. This Doctrine harkens back to the legal theory known as the “Doctrine of the Public Trust” developed in Ancient Roman jurisprudence and in English common law. According to this doctrine, as expounded in the Indian context by the Supreme Court, “the State is the trustee of all natural resources, which are by nature meant for public use and enjoyment. . . . [t]he State as trustee is under legal duty to protect the natural resources.” Not only that, the Supreme Court instructs that each generation holds the environment in trust for future generations. Therefore, the trusteeship duty devolves not only on the State, but also on all the Indian people collectively.

Consistent with the above-noted judicial developments, the Indian courts have departed from the practice of not themselves computing damages in environmental cases, and leaving the parties to make claims in tort by way of civil suits. Instead both the

State High Courts as well as the Supreme Court at times undertake the task of assessing the quantum of damages the polluter is required to pay. In assessing the extent of damage caused, the courts frequently appoint expert committees to examine and report about the extent of environmental and other damage caused and also the amount of money that is required to repair the damage and the extent of loss suffered by the people. In estimating, determining and levying damages, another factor which Indian courts keep in mind is the deterrent element. In other words, the amount should not be so small that a polluter considers the breach of law and payment of damages as the cheaper option than taking measures to control pollution by employing the requisite treatment technology and maintaining the same.

Indian judicial decisions and orders relating to environmental matters also have led to an issue of whether the courts are usurping the functions of the other government branches. The Supreme Court of India, however, explained in its *Enviro-Legal Action* decision:

A public interest litigation like the present, would not have been necessary if the authorities, as well as the people concerned, had voluntarily obeyed and/or complied with the [applicable environmental law] or if the authorities who were entrusted with the responsibility had enforced the [law]. It is only the failure of enforcement of [the law] which has led to the filing of the present petition. The effort of this Court while dealing with public interest litigation relating to environmental issues, is to see that the executive authorities take steps for implementation and enforcement of [the] law. As such the court has to pass orders and give directions for the protection of the fundamental rights of the people. Passing of appropriate orders requiring the implementation of the law cannot be regarded as the court having usurped the functions of the legislature or the executive. The orders are passed and directions are issued by the Court in discharge of its judicial function, namely, to see that, if there is a complaint by a petitioner regarding the infringement of any constitutional or other legal right, as a result of any wrong action or inaction on

the part of the State, then such wrong should not be permitted to continue.

As a result, it does not appear that India's judiciary will give up its role in enforcing India's environmental laws and protecting India's environment any time soon.

Impact of Judicial Environmental Activism in India

What has been achieved as a result of judicial intervention regarding environmental issues in India? Has court time been well spent? The answer is in the affirmative to both questions.

Firstly, India's courts have helped to remedy poor environmental performance in India and also to clean up environmental contamination in India that would have otherwise gone unaddressed. For example, without Supreme Court intervention, atmospheric pollution levels in India's capital city of Delhi would not have been addressed by prohibiting old, diesel-fueled vehicles from operating on city streets and by requiring the use of clean natural gas (CNG) by the large fleet of public transport vehicles, thereby providing relief to the entire population of the city.

India's judicial environmental activism also is the impetus for new legislation encouraging more effective and quicker executive resolution of environmental issues. For example, in 1995, India enacted the National Environment Tribunal Act (1995) extending the principle of no-fault liability beyond the compensation limits prescribed under the Public Liability Insurance Act (1991). The Act deals with, inter alia, compensation relating to accidents concerning toxic substances. The Tribunal set up under the Act has exclusive jurisdiction over claims of compensation in these circumstances. In addition, the National Environment Appellate Authority Act (1997) was enacted to enable the government to establish the National Environment Appellate Authority. The Authority is empowered to hear appeals challenging executive orders granting environmental clearance in designated sensitive areas where industrial activity is restricted under India's Environment Protection Act.

Lessons of Judicial Environmental Activism in India

What then are the lessons to be drawn from the activism of India's judiciary relating to environmental issues? Firstly, protection of the environment and the economic development needs of an underdeveloped country are not mutually exclusive and can be and must be harmonized, to ensure the immediate as well as the long-term interests of society. Secondly, there is a need for all countries, particularly developing ones, to enact comprehensive laws to protect all facets of the environment, which give both the judiciary as well as the public at large an effective weapon to protect the environment. Finally, the judiciary in developing countries may need to interpret the "right to life" broadly and recognize the importance of entertaining Class Action or Public Interest Litigation to further societal interests like protection of the environment. India's judiciary has proved that judges cannot and should not remain in an "ivory tower" confined to a narrow interpretation of the law. Rather, the courts can and should take a pro-active role in protecting the long-term interests of society, including maintaining a healthy environment.



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A DECADE OF SHEHLA ZIA

Dr. Parvez Hassan

Ten years ago in 1994, the Supreme Court of Pakistan was presented a unique petition: some residents of the capital, Islamabad, had approached the Court regarding the construction of a high voltage grid station by the Water and Power Development Authority (WAPDA) in a residential area of Islamabad. The residents of this neighbourhood, led by Ms. Shehla Zia, apprehended that the electro magnetic radiation of the grid station would likely be harmful for the health of the residents. The extraordinary aspect of this petition was that it sought the jurisdiction directly of the Supreme Court of Pakistan under Article 184(3) of the Constitution of Pakistan whereunder the Supreme Court can enforce the fundamental rights guaranteed to the people of Pakistan under the Constitution if such protection is a matter of "public importance." Ordinarily, the High Courts in the provinces are mandated to protect the fundamental rights of the citizens of Pakistan and it is only in exceptional circumstances that Article 184(3) can be invoked. The second unusual feature of this petition was that it did not pertain, strictly speaking, to any of the fundamental rights guaranteed by the Constitution. The claim was toward a right to a clean environment when the Constitution did not in any manner provide for such a fundamental right.

The Supreme Court of Pakistan in the *Shehla Zia* case¹ broke new ground: in an unprecedented judgment, it declared that the fundamental rights to life and dignity guaranteed by the Constitution, in fact, include and cover the right to a clean and healthy environment. This innovative interpretation of the rights to life and dignity has been the most salutary development to protect the environment and promote sustainable development in Pakistan. Ten years later, in 2004, we need to revisit this judgment and to assess its impact on the quest for environmental protection in Pakistan.

The author had the privilege of being the counsel to the petitioners in the *Shehla Zia* case. One of the greatest challenges in the case was to convince the Supreme

Court that a fundamental right guaranteed by the Constitution of Pakistan had been violated and that such violation was a matter of “public importance” for purposes of Article 184(3).

It was because of the United Nations Conference on the Human Environment (Stockholm Declaration) that nations started making commitments to environmental protection in their constitutions adopted or amended after 1972; these commitments included highlighting the importance of environment protection and proclaiming that natural resources are to be used in trust for future generations. Some constitutions include the right to a healthy environment as a fundamental right while some declare that the protection and defense of the environment and the promotion of the quality of life are a duty for all and for the States. The Constitution of India, for example, imposes a constitutional duty to protect the environment on the State². But, although the Constitution of Pakistan was adopted in 1973, one year after Stockholm³, and has specific Articles on Fundamental Rights dealing with the rights to equality, religion, association and property, there is no specific reference to environmental protection either as a fundamental right or as a principle of policy. In fact, the only reference to the environment is found in a schedule to the Constitution that provides “environment pollution and ecology” as a concurrent subject that can be legislated by both the Federal Government as well as by the provinces.

In the absence of a constitutional directive, *Shehla Zia* may have seemed an impossible challenge. But, public interest litigation had, by 1994, found its place in Pakistan following the earlier lead in India. Further, in expanding public interest litigation to environmental causes, the Indian superior judiciary had by then held that the right to life guaranteed as a fundamental right includes the right to a clean environment. In Pakistan, in addition to the right to life under Article 9, the Constitution also guarantees the right to dignity under Article 14. Pakistani courts follow their own precedents but it was fortunate that in *Shehla Zia*, it was accepted, as the author had contended, that the constitutionally-protected right to life and the right to dignity included the right to a healthy environment.

Another plausible reason for the favourable ruling was that the time had come for the courts to protect the people of Pakistan from the ever-increasing and totally neglected environmental degradation in the country. The Supreme Court was unmistakably influenced by the international developments in the field. The Stockholm Declaration of 1972 had been followed by the World Charter for Nature adopted by the U.N. General Assembly in 1982 and the Rio Declaration on Environment and Development adopted by the historic Earth Summit organized by the United Nations in 1992. Declarations, unlike treaties, are not formally signed or ratified by States and, therefore, are considered “soft law” and not binding as “hard law.” But for the first time, in *Shehla Zia*, the Supreme Court of Pakistan gave recognition to an international declaration, as opposed to a treaty, and applied its provisions as a binding force. The author took the Supreme Court through an extended personal report of Pakistan’s leadership, as the chair of the Group of 77, on behalf of the developing countries at the Rio Earth Summit in 1992, and of its role as one of the principal architects of the Rio success.

The next innovative response of the Supreme Court was that it adopted and applied the “precautionary principle” contained in the “soft law” of Principle 15 the Rio Declaration, 1992. Under the “precautionary principle,” scientific uncertainty is not to be used as a basis of failure to move forward with a proposed regulatory activity. The residents in the *Shehla Zia* petition claimed that the construction of the high voltage grid station in Islamabad might endanger their health and safety but there was no certainty that this would happen. While extensive scientific literature was produced to show the likelihood of harm, the respondent produced equally impressive scientific documentation to show that there would be no harm. In these circumstances, the petitioners invoked the precautionary principle covered in the Stockholm and Rio Declarations.

Courts, ordinarily, decide cases in the adversarial and confrontational posturing of the parties based on the evidence before them. In the *Shehla Zia* case, however, faced with the clash of scientific opinion and invocation of the precautionary principle, the Court

appointed experts to a technical commission to evaluate the contentions of the parties toward assisting the Court in a final decision. Pending the recommendations of such a commission, the Supreme Court stayed the construction of the grid station. The approach of appointing commissions to solve complex policy issues before the Court has been followed in subsequent environmental cases to great advantage.

Another important result in the *Shehla Zia* case was the recognition to involve public participation in decision-making. The Court directed that in future WAPDA would not construct a high voltage grid station any where in Pakistan without including full public disclosure and participation before a final decision.

The result in *Shehla Zia* was beyond the expectations of the petitioners and even its counsel.⁴ In one broad sweep, the Supreme Court had laid down law to be followed by all the Courts in Pakistan:

(1) environmental rights are covered in the rights to life and dignity guaranteed in the Constitution; (2) environmental rights are to be interpreted in accordance with developments at the international level; (3) commissions composed of technical experts may be established by courts in determining complex policy issues; and (4) public disclosure and participation are essential in decision-making by governmental agencies.

Shehla Zia has attracted a great deal of international attention and comment.⁵ It is included in the UNEP/ UNDP Compendium of Judicial Decisions on Matters Related to Environment: National Decisions compiled in 1998. It is also included in a recommended syllabus for the law schools of the Asia Pacific region in Asian Development Bank, Capacity Building for Environmental Law in the Asia and Pacific Region: Approaches and Resources (2002).

Shehla Zia has been cited with approval in many subsequent cases both laterally in the Supreme Court and in the courts below. In *General Secretary Salt Miners Labour Union (CBA) Khewra, Jhelum v. The Director, Industries and Mineral Development, Punjab, Lahore*⁶, which came up for hearing in the

same year, the Supreme Court, citing *Shehla Zia*, stated that “The right to have unpolluted water is the right of every person wherever he lives”.⁷ This was another case in which the Supreme Court appointed a five-member Commission headed by the author to inspect the stream and reservoir supplying the Khewra region to ensure that water supplies were not being polluted by effluents of the mines operating in the areas and to recommend methods of preventing further damage. The Commission undertook a detailed visit of the area during which, apart from inspecting the site, it also conducted hearings involving the parties to the case, the mine operators and members of the general public in the area. In subsequent months, laboratory tests and maps of catchments areas were procured, and two lists were prepared, one to identify mines recommended for closure and the other for those which should be allowed to continue. The Commission kept the Supreme Court informed through interim reports and also submitted its final report. This case shows that with the help of multi-disciplinary and inclusive teams working against a background of court appointed deadlines, it is possible to make progress in contentious and technical issues. At the very minimum, research is done and all shades of opinion are considered, and all of this becomes a part of the public record that can be used when necessary and expedient. The media publicity that often accompanies court hearings in important matters also helps to focus attention on issues that might otherwise be neglected.

Notwithstanding these benefits, public interest litigation presents difficulties at various levels. From a jurisprudential point of view there is the concern that having cast away the burdens of traditional adversarial litigation the court must also do without its benefits. After all, adversarial litigation is meant to lead to a conclusive result on a matter that is fully argued on all sides. In a seminal public interest decision affecting bonded labour, *Bandhua Mukti Morcha v. Union of India*⁸, the Indian Supreme Court highlighted the problem of adequate representation that may lead to serious procedural mishaps:

Not infrequently public interest litigation affects the rights of persons not before the Court, and in shaping the relief the Court must invariably take

into account the impact on those interests. Moreover, when its jurisdiction is invoked on behalf of a group, it is as well to remember that differences may exist in content and emphasis between the claims of different sections of the group. For all these reasons the Court must exercise the greatest caution and adopt procedures ensuring sufficient notice to all interests likely to be affected.⁹

When it comes to relief, courts in the common law world are used to giving interlocutory orders and monetary judgments on a particular set of facts. In contrast, when multi-faceted and politically divisive issues such as environmental degradation are raised in public interest litigation, the challenge of rendering meaningful decisions that can be implemented in any reasonable time frame is not easy to discharge.¹⁰ Moreover, the question of the proper role of the courts in a representative democracy always casts a shadow when judges act to correct policy failures. Although the proverbial “floodgates” have not opened by the lowering of procedural hurdles, abuse of public interest litigation for private ends in Pakistan has been noted.¹¹

In spite of these drawbacks, public interest litigation is particularly suited to conditions in South Asia, a point made explicit by the Lahore High Court in *State v. M.D. WASA*¹²:

The rationale behind public interest litigation in developing countries like Pakistan and India is the social and educational backwardness of its people, the dwarfed development of law of tort, lack of developed institutions to attend to the matters of public concern, the general inefficiency and corruption at various levels. In such a socio-economic and political milieu, the non-intervention by Courts in complaints of matters of public concern will amount to abdication of judicial authority.¹³

In a country such as Pakistan, where environmental awareness is in its infancy and enforcement agencies find themselves short of both technical capacity and political support against competing interests, the courts sometimes provide the only effective forum for action.

For this to occur, not only must the judiciary have a keen appreciation of domestic and international ecological trends, but it also must have on hand a legal doctrine and method of intervention. The *Shehla Zia* case has provided the judiciary in Pakistan with such a frame of reference and thereby enabled many positive environmental initiatives in the country.¹⁴ Urban environmental management is an illustration of a domain where the courts are attempting to provide an effective check to widespread malpractices.¹⁵ In common with many developing countries, urban blight is endemic in Pakistan and a lack of proper planning and enforcement of rules has taken a familiar toll in the form of unauthorized construction of high-rise buildings, illegal conversion of amenity plots, and lack of potable water and sewerage. Due to the expansive definition of the “right to life” given by *Shehla Zia* and relaxed rules of standing, concerned citizen groups (particularly in the largest city of Karachi where all urban problems get magnified) have been able to mount successful challenges against the land mafia and planning authorities.¹⁶

The model of using expert commissions in complex issues also continues to be an effective device. Thus, in *City District vs. Muhammad Yusaf* (ICA No. 798 of 2002), the petitioners sought an environmentally appropriate solid waste disposal site in Mahmood Booti in Lahore. The Division Bench of the Lahore High Court appointed a Solid Waste Management Commission in February 2003 to look into the grievances of the petitioners, to review the suitability of the solid waste disposal measures in Mahmood Booti and to recommend remedial measures toward environmentally appropriate solid waste management. Following the lead of the Supreme Court in the *Khewra Mines* case,¹⁷ the Court appointed a Commission comprising government officials and city administrators, academics and scientists, parliamentarians, specialists, environmentalists and members of civil society. The Solid Waste Management Commission, chaired by the author, has already set up a sub-committee for hospital waste disposal under the Provincial Secretary, Health, who is in charge of all the public sector hospitals. It is also a reflection of the public-private sector partnership and harmonious working of the Commission that it

persuaded the City Government Lahore to arrange and finance the Environmental Impact Statement (EIA) of Mahmood Booti by NESPAK, a consultancy firm chosen by the Commission. Based on the EIA, the Commission filed its recommendations to the Court.

Similarly, in another petition, *Syed Mansoor Ali Shah v. Government of Punjab* (WP 6927 of 1997), Mr. Justice Muhammad Sair Ali of the Lahore High Court appointed, in July 2003, a Lahore Clean Air Commission, also chaired by the author and co-chaired by the Advocate General, Punjab, to recommend measures for the improvement of Lahore air quality. The Commission has set up sub-committees with respect to (1) clean fuel, (2) rickshaws, (3) public transport and (4) coordination with local councils. The Rickshaws sub-committee, for example, works under the chairmanship of the Provincial Secretary, Environment, and the Clean Fuel sub-committee works under the chairmanship of the District Coordination Officer, Lahore. All the oil companies have been invited by the Clean Fuel sub-committee to support the work of the Commission and some of their representatives recently attended a national workshop in Lahore convened by the Commission to formulate a joint strategy for air quality.

Shehla Zia has also enabled a direct petition before the Supreme Court and the Sindh High Court at Karachi in respect of the oil spill disaster in Pakistan's coastal waters in 2003. As *amicus curiae* appointed by the Supreme Court, the author's recommendations included the appointment of a commission under the chairmanship of a retired Chief Justice of Pakistan to handle the unprecedented issues presented in the petition before it.

The approach of resolving complex matters affecting society at large through the appointment of commissions comprising eminent leaders from all walks of life and with the relevant skills and backgrounds has been an important legacy of *Shehla Zia*. It is a welcome alternative to the adversarial and contentious approach typical of the litigational culture in Pakistan. The commissions work under the directions and with the authority of the Court. The Court eventually issues directions on the recommendations of the commission.

Outside the adversarial spotlight, the commission, guided by the technical and scientific expertise on it, seeks, develops and recommends a line of action in the best interest of the public good. This way, the commission can serve and assist the Courts in meeting the ends of justice expected of them. *Shehla Zia* has been of enormous importance to the efforts of environmentalists to provide a safe and healthy quality of life to our country. This candle lit in 1994, its glow continues to radiate hope in the years ahead.¹⁸

Dr. Parvez Hassan, B.A. (Punjab), L.L.B. (Punjab), LL.M (Yale), S.J.D. (Harvard), is Senior Partner, Hassan & Hassan (Advocates), Lahore, Pakistan. Dr. Hassan is the President, Pakistan Environmental Law Association (PELA). This article has been developed from the author's Presidential address at the First Annual Seminar of Pakistan Environmental Law Association held at Dr. Parvez Hassan Environmental Law Centre, University of the Punjab, Lahore, Pakistan, on March 14, 2004.

Notes:

1. *Shehla Zia and others v. Wapda*, PLD 1994 SC (Supreme Court of Pakistan) 693 (Pakistan).
2. Articles 48A and 51A were added to the Constitution of India by a constitutional amendment in 1976:

48A The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country.

51A It shall be the duty of every citizen of India – (g) to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures.

Nepal, Indonesia, Papua New Guinea also have constitutional commitments to protect the environment. The Constitution of Mali 1992 provides that, "Every person has a right to a healthy environment. The protection and defence of the environment and the promotion of the quality of life are a duty for all and for the State." Similar provisions exist in the Constitution of Congo, 1992 and the Constitution of Vanuatu, 1980.

3. Although Pakistan was to play a leading role in the Rio Earth Summit in 1992, it was barely visible in the United Nations Stockholm Conference on the Human Environment in 1972 for it had just come out of the trauma and shame of the war of secession that led to the creation of Bangladesh in 1971. This may also explain the absence of environmental provisions in the 1973 Constitution.
4. As Akhund and Qureshi note “The *Shehla Zia v. WAPDA* case sets out two of the most critical foundations of environmental law in Pakistan. First, by virtue of the broad meaning of the word “life” as contained in Article 9 of the Constitution, together with the requirement for dignity of man contained in Article 14, the fundamental right to an unpolluted environment has been established. Secondly, the case established the application of the precautionary principle where there is a hazard to such rights.” Nelma Akhund and Zainab Qureshi *You Can Make a Difference- A Lawyer’s Reference to Environmental Public Interest Cases in Pakistan* (IUCN, Karachi, 1998), at 13.
5. Okidi in particular notes how the case reinforces the need for lawyers to draw on international scholarship in presenting their cases: “This fact enjoys clear testimony in the opinion of the Supreme Court of Pakistan in *Shehla Zia v. WAPDA*, where the profuse citation of scholarly literature confirms the readiness of the national courts to draw on research results from various countries to support their decision. But it underscores one additional point, namely that the quality and wide acceptability of court decisions may also reflect the quality of the plaint and professional literacy of the counsel for the plaintiff. The easiest task for the courts is to follow precedents. However, it is the compelling quality and arguments in a plaint that may leave a court with no option but to set new precedents. In the above case, the counsel for the plaintiff assisted in the progressive development of environmental law,” Ben Boer, Koh Keng-Lian, C. O. Okidi and Nicholas A. Robinson, “Training the Trainers Program” (1999) 4 (2) *Asia Pacific Journal of Environmental Law* 175, at 181.
6. 1994 SCMR 2061.
7. *Id.*, at 2070.
8. AIR 1984 Supreme Court 802.
9. *Id.*, at 841.
10. The attendant factors that a court must consider have been described as requiring “more than legal scholarship and a knowledge of text book law. It is of the utmost importance in such cases that when formulating a scheme of action, the Court must have due regard to the particular circumstances of the case, to surrounding realities including the potential for successful implementation, and the likelihood and degree of response from the agencies on whom the implementation will depend. In most cases of public interest litigation, there will be neither precedent nor settled practice to add weight and force to the vitality of the court’s action. The example of similar cases in other countries can afford little support. The successful implementation of the orders of the court will depend upon the particular social forces in the backdrop of local history, the prevailing economic pressures, the duration of the stages involved in the implementation, the momentum of success from stage to stage, and the acceptance of the Courts actions at all times by those involved in or affected by it,” *id.*, at 843-844.
11. Menski notes in relation to a politician’s suit that “the Benazir Bhutto case [*Benazir Bhutto v. Federation of Pakistan*, PLD 1988 SC 416] demonstrates that we are now in a scenario in Pakistan (as in India) where people with money and power, and with the resources needed in order to approach the courts through normal litigation, have learnt to use public litigation techniques for their own benefit, but thereby also claim to defend the public interest....” See Werner Menski, Ahmad Rafay Alam and Mehreen Raza Kasuri *Public Interest Litigation in Pakistan* (Pakistan Law House, Karachi, 2000), at 124. On the menace of frivolous litigation, Menski points out that “Pakistani judges... have been concerned to keep the doors of the court open to genuine complainants, while shutting out those cases which deserve no hearing before the court,” *id.* at 128.
12. 2000 CLC 471 [Lahore].
13. *Id.*, at 475.
14. See Parvez Hassan, *In Pakistan, The Judiciary*

Leads the Way, The Environmental Forum, 15(1) January/February 1998, Environmental Law Institute, Washington, D.C. Menski makes the “poignant observation that today, South Asia leads the world in public interest litigation, not America or Europe”, see Menski *supra* note 11, at 109.

15. The author recently delivered a paper on “Urban Environmental Management in Pakistan” at the 2nd Colloquium on “Land Use for Sustainable Development” held at Nairobi, Kenya, on Oct. 4-7, 2004 under the auspices of the IUCN Academy of Environmental Law and the University of Nairobi.
16. See *Dr. Zahir Ansari v. Karachi Development Authority* PLD 2000 Karachi 168; *Shehri v. the Province of Sindh* 2001 YLR 1139.
17. *Supra* note 6.
18. Themes in this article have also been subsequently addressed in Parvez Hassan, *From Rio 1992 to Johannesburg 2002: A Case Study of Implementing Sustainable Development in Pakistan*, (2002) 6 *Singapore Journal of International & Comparative Law* 683-722 and in Parvez Hassan, *Securing Environmental Rights through Public Interest Litigation in South Asia*, Global Judges Symposium on Sustainable Development and the Role of Law, at Johannesburg, South Africa, Aug. 18-20, 2002, organized by the United Nations Environment Program (published as co-authored with Azim Azfar in 22.3 *Virginia Environmental Law Journal* 216-236 (2004)).

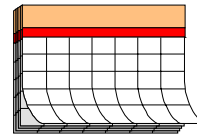
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