

## ACCESS TO ENVIRONMENTAL JUSTICE: ROLE OF THE JUDICIARY IN BANGLADESH

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### GENERAL INTRODUCTION

In Bangladesh, justice, judiciary and the rule of law are bound together as an integrated whole. Similar to other common law countries with written constitution, neither the Constitution nor the judiciary is supreme and the Supreme Court is the final interpreter of law. Like USA<sup>1</sup>, there is always check and balance between the two organs of the state. The function of the judiciary includes the enhancement of rule of law, to promote the fundamental rights, and to administer the law impartially between citizen and state and between citizen and citizen. The judiciary can mould principles of law and give them a sense of coherence and direction. The degree of radicalism of the judiciary, however, is limited both by the system of appointment by the government of the day, and by the desire of judges to reflect the values of their particular jurisdiction. Since the judges in Bangladesh are not involved in electoral politics, they are more willing than other body of the government to take unpopular decisions beneficial in the long run. With the expansion of the meaning of right to life to accommodate environmental protection, the court created an expectation on the

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<sup>1</sup> In the USA, the Constitution separates power among the judiciary, executive and the legislature, and no branch has the absolute sovereignty over the other. Moreover, the Congress has the authority to curb the power of the judiciary. On the other hand, in theory, the British Constitution has been one of complete, absolute and unified parliamentary sovereignty and the judges are not exempt from this sovereignty. The fundamental right and the rule of law have restricted the over-empowering notion of sovereignty of Parliament. Since joining the European Union however, the Parliament is no longer sovereign as validity of its law can be challenged in the courts on the grounds of non-conformity with European law. Therefore, the British Courts can refuse to apply British Acts if not in compliance with EU regulations.

general public that judiciary would take more prominent position in deciding environmental cases.

The following discussion focuses on four main areas where the judiciary is active in accommodating environmental protection. Some Indian environmental cases have been mentioned in order to compare the performance of our judiciary. The article then examines areas that could be incorporated to facilitate environmental justice and the concluding remarks focus on strengthening regulatory, institutional and alternative dispute settlement mechanisms to ensure effective participation of all environmental stakeholders.

### CONSTITUTION AND ENVIRONMENTAL PROTECTION

Neither the fundamental rights<sup>2</sup> nor the preamble<sup>3</sup> or the state policies<sup>4</sup> in Bangladeshi Constitution mention any right to healthy and clean

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<sup>2</sup> The fundamental rights are directly enforceable in the court and consistently used in Bangladesh, Pakistan and India to protect the environment. Some related rights that are used for the protection of environment are: right to life (Art. 31), liberty (Art. 32), equality (Art. 27) while fundamental principles of state policy such as guarantee of human rights and freedom (Art. 11), steady economic growth (Art. 15), improvement of the standard of living (Art. 16), improvement of public health (Art. 18) could be used innovatively for similar purposes.

<sup>3</sup> The Preamble of the Constitution states that it shall be the fundamental aim of the State to realise a socialist society in which the constitutionalism, rule of law, fundamental human rights and freedom, equality and justice would be ensured. Any legislation and interpretation of the Constitution should follow the preamble.

<sup>4</sup> State Policies, such as Art. 11, guarantees, *inter alia*, fundamental human rights and freedoms and respect for the dignity and worth of human persons. Art. 15 asserts the fundamental responsibility of the State to attain, through planned economic growth, a constant increase of productive forces. It also includes a steady improvement in the material and cultural standard of living of the people with a view to securing to the citizens, *inter alia*, the provisions of basic necessities of life. Art. 16 added the radical transformation of the rural areas through the promotion of agricultural revolution, rural electrification, development of cottage industry and other industry. It also asserts the improvement of public health to remove the disparity in the standards of living between the urban and the rural areas. Art.18 mentions state's duty to improve the public health. Although these principles are related to universally recognised human rights and there is

environment.<sup>5</sup> The approach adopted in Bangladesh is two folded. The lawyers want to amend and develop the existing fundamental rights in order to pressure the government to implement the environmental policies. On the other hand, acknowledging that state policies are not directly enforceable in court, the judiciary stressed the need of harmonious interpretation to accommodate environmental protection. This attitude was reflected in the Flood Action Plan (hereafter, FAP) case,<sup>6</sup> where the judiciary adopted a holistic approach, and while interpreting the fundamental rights, took account of the policy statements, preamble and other provisions of the Constitution. Both the High Court and Appellate Division expanded the meaning of fundamental right to life to include protection and preservation of the ecology and right to have pollution free environment.<sup>7</sup> However, the

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nothing to relate them directly to environmental protection, these can be used in a favourable manner by the environmentalists.

- <sup>5</sup> The preamble and the state policies have entrenched basic human rights and are silent about the protection of the environment. The state policies can not be enforced directly. However, the directive principles in the Indian Constitution imposed a direct responsibility to the people and the state to protect and improve the environment.
- <sup>6</sup> In *Dr. Mohiuddin Farooque vs Bangladesh*, 49 (1997) DLR (AD) 1 and *Dr. Mohiuddin Farooque vs Bangladesh*, 48 (1996) DLR (HCD) 438 the legality of an experimental structural project of the Flood Action Plan was questioned. Co-ordinated by the World Bank, the project was mainly to plan, design or undertake construction of dams, barrages and embankments and flood control. According to the petitioner, FAP is an anti-environmental and anti-people project.
- <sup>7</sup> The Appellate Division in *Dr. Mohiuddin Farooque vs Bangladesh*, 49 (1997) DLR (AD) 1, stated: 'Article 31 and 32...encompass within its ambit, the protection and preservation of environment, ecological balance free from pollution of air and water, sanitation without which life can hardly be enjoyed. Any act or omission contrary thereto would be violative of the said right to life.' (Para 101, Chowdhury J.). The High Court Division [48 (1996) DLR (HCD) 438] states: 'right to life...includes the enjoyment of pollution free water and air, improvement of public health by creating and sustaining conditions congenial to good health and ensuring quality of life consistent with human dignity.' In India, this right has been extended to include right to have a balanced ecology [AIR (1985) SC 652], right to healthy environment [AIR (1987) AP 171], right to have pollution free air and water [AIR (1990) SC 1480 and AIR (1991) SC 420] and right to livelihood [AIR (1986) Del 180].

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 has been spent and that the project has been partially implemented. However, from the judgement, it is not clear how much environmental damage the court was prepared to tolerate in the name of development.

Right to property, another fundamental right, implies that an owner is entitled to non-interference in the enjoyment of the property in question, in particular, non-interference by the government.<sup>8</sup> The environmentalists believe that a balance between individual ownership and community interests can help to create, interpret and apply property rules effectively to protect ecology. This, in effect, would harmonise enjoyment of our resources today and preservation of resources for our own future enjoyment and for the enjoyment of our descendants.<sup>9</sup> Moreover, the concept of stewardship or trusteeship is well-established in common law and could be an useful avenue to protect natural resources and public land.<sup>10</sup> In three Indian cases,<sup>11</sup> the

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<sup>8</sup> Art. 42 of the Bangladesh Constitution deals with fundamental right to property. This individual right guaranteed through the Constitution is a private property right and the owner has the overall ownership over the land. Property right begins where the Government's right to interfere ends. The restrictive nature of this right makes it harder to apply this fundamental right to protect environment.

<sup>9</sup> This can be achieved by empowering citizens to protect their established property uses either through nuisance suits or participatory regulatory procedures. Furthermore, it can be achieved by reasserting public ownership of certain natural resources such as the public lands and wildlife; and the dissemination of factual information about land distribution patterns to educate the public about who benefits and who loses if individual property right is established.

<sup>10</sup> The ancient Roman Empire developed the doctrine of public trust which means that certain common properties such as rivers, seashore, forests and the air were held by government in trusteeship for the free and unimpeded use of the general public. The legal system of Bangladesh is based on English Common law and therefore, public trust doctrine would be part of its jurisprudence. For useful case reference: *M.C. Mehta vs Kamal Nath* (1997) 1 SCC 388.

<sup>11</sup> *M. C. Mehta vs Kamal Nath* (1997) 1 SCC 388. The case dealt with lease of a forestland by the government to a private company for development

court applied the notion of public trust in protecting and preserving the natural resources. In the view of the court, the public trust doctrine primarily rests on the principle that certain resources like air, sea, waters and the forests have such a great importance to the people as a whole that it would be unjustified to make them a subject of private ownership. The state is the trustee of all natural resources, which are in nature meant for public use and enjoyment. Public at large is the beneficiary of the seashore, running waters, air, forests, and ecologically fragile lands. The state as a trustee is under legal duty to protect the natural resources. The Indian court considered this principle as international concept well established in their national legal system. Though its status as a customary norm or even as a commonly recognised principle of international law is uncertain,<sup>12</sup> it could help the Bangladeshi court to save the encroachment of open public space, public park and river.

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purposes. In the Supreme Court's view, the public trust doctrine could be applied in controversies involving air pollution, the dissemination of pesticides, the location of rights of ways for utilities, and strip mining of wetland filling on private lands in a state where governmental permits are required. Also see, *M.I. Builders Pvt. Ltd vs Radhey Shyam Sahu*, AIR (1999) SC 2468 and *Th. Majra Singh vs Indian Oil Corporation* AIR (1999) J & K 81. In both cases, the court acknowledged that the state is under an obligation to see that forests, lakes, wildlife and environment are duly protected. The court also noted that the doctrine of public trust has grown from Article 21(right to life) of the Constitution.

<sup>12</sup> The definition is unclear, the type of the nature protected by public trust, and what constitutes public trust obligations. Moreover, the judge's intervention in environmental policy making is also vehemently objected by legislature and elected representatives. For arguments in favour of and against public trust doctrine, see: J.L. Sax, "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention", 68 (1970) Michigan Law Review 471; H. C. Dunning, "The Public Trust: A Fundamental Doctrine of American Property Law", 19 (1989) Environmental Law 515; D.P. Gionfriddo, "Sealing Pandora's Box: Judicial Doctrines Restricting Public Trust Citizen Environmental Suits" 13 (1986) B.C. Environmental Affairs Law Review 439; A. Rieser, "Ecological Preservation as a Public Property Right: An Emerging Doctrine in Search of a Theory", 15 (1991) Harvard Environmental Law Review 393; David Vander Zwaag, "The Concept and Principles of Sustainable Development: 'Rio Formulating' Common Law Doctrines and Environmental Laws", 13 (1993) Windsor Yearbook of Access to Justice 39.

### STANDING IN THE COURT

Once the applicant is in the court with a claim in public interest, the most important question for the court is to decide whether the applicant should be allowed access to the judicial process. The traditional rule of standing suggests that judicial redress is only available to persons who have suffered a legal injury by reason of violation or threatened violation of his right or legally protected interest by the impugned action of the state or a public authority. This restricted rule of the standing has been suggested by the Constitution,<sup>13</sup> and the court's cautious approach is evident in several cases.<sup>14</sup> In the 90's, however, the judiciary offered a liberal view of standing and stated that 'aggrieved party' should mean a party who, even without being personally affected, has sufficient interest in the matter in dispute.<sup>15</sup> This test have

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<sup>13</sup> Art. 102 of the Constitution suggests the 'aggrieved person' test whereby the applicant has to be directly affected by the action. On the other hand, the 'sufficient interest' test is less individualistic and tends to characterise the applicant as representing an individual or a class whose substantive claims prevail over particularised aggrieved person test. The plaintiff is able to secure redress for claims having no direct, genuine effect on him/her.

<sup>14</sup> *Kazi Mukhlesur Rahman vs Bangladesh*, 26 (1974) DLR (SC) 44 the court held: 'It appears to us that the questions of *locus standi* does not involve the court's jurisdiction to hear a person but of the competency of the person to claim a hearing, so that the question is one of discretion which the court exercises upon due consideration of the facts and circumstances of each case.' *Dada Match Workers Union vs Government of Bangladesh*, 29 (1977) 29 DLR (HCD) 188, in the opinion of the court, the 'person aggrieved' test requires a person/applicant to be directly affected by the action. *Bangladesh Sangbadpatra Parishad Case*, 43 (1991) DLR (AD) 126 the Appellate Division dismissed the petition holding that the association had no *locus standi* as the petitioner was not espousing the cause of 'a downtrodden and deprived section of the community unable to spend money to establish its fundamental rights and enforce its constitutional remedy'. Recently, in *Saiful Islam Dilder vs Govt of Bangladesh*, 50 (1998) DLR 318, the court held that the term 'aggrieved' does not extend to a person who is an interloper and interferes with issues which do not concern him. The applicant is the Secretary General of the Bangladesh Human Right Commission which did not, per se, give him sufficient ground to hold that he has sufficient interest in the field.

<sup>15</sup> See especially: *M. Farooque vs Bangladesh* (FAP case), 49 (1997) DLR (AD) 1 and *Saiful Islam Dilder vs Bangladesh*, 50 (1998) DLR (HCD) 318.

been used in two public interest cases, one dealing with human rights and the other dealing with environmental cases.<sup>16</sup> Therefore, it is difficult to say how the court in general will react to other environmental public interest cases. In India, however, the approach is much more liberal as they apply the sufficient interest test.<sup>17</sup>

### REMEDIES PROVIDED BY THE JUDICIARY

While dealing with environmental matters, the most common remedies that are offered by the court is injunction, declaration and, civil and criminal damages.<sup>18</sup> The judiciary of Bangladesh, in at least four environmental cases, granted injunctive relief to reduce environmental harm or pollution.<sup>19</sup> Though the court in India has taken *suo motu*

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<sup>16</sup> FAP case (Environmental case): The Appellate Court commented that an aggrieved person need not suffer directly. It added that in case of violation of fundamental rights affecting particularly the weak, downtrodden or deprived section of the community or that there is a public cause involving public wrong or public injury, any member of the public or an organisation, whether being a sufferer himself or not, become a person aggrieved if it is for the realisation of any if the objectives or purposes of the constitution. However, in *Saiful Islam Dilder* case (Human Rights case), having applied the court the liberal 'aggrieved person' test, the court did not grant standing to the applicant, a human right activist.

<sup>17</sup> Article 32 and Article 226 of the Indian Constitution do not mention as to who can apply for enforcement of fundamental rights and constitutional remedies. While applying the 'aggrieved person' test, the court was only honouring tradition. Therefore, public interest environmental litigation flourished in the absence of any constitutional restriction.

<sup>18</sup> In India, the court applied absolute liability in cases of environmental pollution. In *Oleum Gas Leak* case, AIR (1987) SC 1086, the Supreme Court while allowing the fertiliser plant to restart ordered the management to deposit a sum of Rs. 20,00,000 by way of security for payment of compensation claims made by the gas victims in this case. For Bangladesh and in Pakistan, the court has not awarded compensation or damages to any environmental victims.

<sup>19</sup> *Sharif N Ambia vs Bangladesh and Other* (unreported W.P. No. 937 of 1995): the High Court Division, after issuing a show cause notice, granted an *ad interim* injunction on the construction of a 10 storied market in violation of the Dhaka Master Plan causing environmental obstruction to its neighbourhood. In *Dr. M. Farooque, BELA vs D.G. Bangladesh Medical and Dental Association* (unreported WP No. 1783 of 1994): The petitioner submitted that the people of the country would suffer, especially the

actions,<sup>20</sup> no such action has been taken by the Bangladeshi judiciary in any environmental case.<sup>21</sup> The Indian judiciary has made several successful directions to create experts and special committee in several environmental litigation.<sup>22</sup> Moreover, the Indian courts made several directions on unconditional closure of tanneries and relocation,<sup>23</sup> payment of compensation for reversing the damage,<sup>24</sup> to pay the costs required for the remedial measures<sup>25</sup> necessary measures to be adopted by the relevant Ministry to broadcast information relating to environment in the media,<sup>26</sup> attract the attention of the Government

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poorest who rely on the public health facilities, because of the unlawful strike and the failure of the authorities to restore the same. There is a constitutional breach of duty to ensure health services and medical care to the general public. The court issued mandatory injunction compelling BMDA to call off a national strike. Also: *M. Farooque vs Bangladesh* (unreported W.P. 92/1996): Injunction on government body to prevent them from releasing radioactive milk in open market. *M. Farooque vs Bangladesh* (unreported W.P. No. 948/1997): Injunction on government body to prevent them from filling up public lake as they deviated from the Master Plan.

<sup>20</sup> In order to provide complete justice (Article 226), the court in India took account of letter [1990 (Supp) SCC 77; 1994 (2) SCALE 25], memorandum [O.P. No. 6721 of 1992, Kerala], and newspaper article [AIR 1992 Pat 86; W.P. No. 22598 of 1993, Madras]

<sup>21</sup> The judiciary, however, took *suo motu* action in human rights cases. For example: *State vs Deputy Commissioner, Satkhira*, 45 (1993) DLR (HCD) 643. The court acted on a basis of a report published in a daily newspaper about a detention and ordered the authority to produce the detainee before the court. Though the judiciary has the duty to provide complete justice, this power has not been used as seen in India and Pakistan.

<sup>22</sup> For example: in India, special committee was created to monitor air quality and traffic congestion [(1998) 9 SCC 93], the court directed to the archaeological survey to set up automatic monitoring system [(1998) 3 SCC 381]; the court directed the subordinate green bench to monitor the compliance of the previous order [(1997) 2 SCC 411 and (1998) 9 SCC 448].

<sup>23</sup> *M.C. Mehta (Calcutta Tanneries Matter) vs Union of India*, (1997) 2 SCC 411.

<sup>24</sup> *M.C. Mehta vs Kamal Nath and Others*, (1997) 1 SCC 388; *Vellore Citizen Welfare Forum vs Union of India*, (1996) 5 SCC 647;

<sup>25</sup> *Indian Council for Enviro-Legal Action vs Union of India*, (1996) 3 SCC 212

<sup>26</sup> *M.C. Mehta v. Union of India* AIR, (1992) SC 382.



where there is a necessity of legislation,<sup>27</sup> set up a committee to monitor the directions of the court.<sup>28</sup> There is ample opportunity for Bangladesh judiciary to make the similar sort of innovative direction<sup>29</sup> and to take *suo motu* action in environmental cases.

#### NATIONAL APPLICATION OF INTERNATIONAL ENVIRONMENTAL LAW

National courts' decision can promote the application of internationally recognised environmental principles in several ways.<sup>30</sup> By applying an international environmental principle, national courts implement it in that individual case. Moreover, if courts implement international norms with sufficient regularity, national courts' decision could have a deterrent effect; they could help shaping future conduct. Finally, through their decisions, national courts can help incorporate international norms into national law, thereby supplementing or even correcting the work of legislatures. As the following discussion would

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<sup>27</sup> *Research Foundation for Science, Technology and Ecology and Others vs Ministry of Agriculture and Others*, (1999) 1 SCC 655: the matter dealt with Indian challenge to grant of patent for 'Basmati Rice' in USA. The Attorney general submitted that the Govt. of India has already taken steps to challenge the grant of patent. Moreover, the preparation of the Bio-diversity Act is also under preparation. The public interest litigation was moved to the court so that the government takes necessary steps. That purpose has been served.

<sup>28</sup> *M.C. Mehta vs Union of India and Others*, (1998) 9 SCC 93.

<sup>29</sup> One example of such directions could be *Dr Mohiuddin Farooque Vs. Bangladesh* [unreported WP No. 92 of 1996]. The case concerned the release of radioactive dried milk in the open market. The petitioner sought to enforce Art. 31 (right of protection of law) and Art. 32 (no person shall be deprived of life or personal liberty). A potential consumer filed the writ petition in the High Court Division to prevent the release of dried skimmed milk powder contaminated with high radio activity imported by the Danish Condensed Milk, Bangladesh from Estonia. The petitioner submitted the writ petition in public interest stating that the consumption of the imported food item containing radiation level higher than the acceptable limit is injurious to public health and is a threat to the life of the people of the country. The High Court made some directions to the Atomic Energy Commission and Customs Authority regarding the process of sampling and testing of radiation in the dried milk in order to avoid future anomaly.

<sup>30</sup> For general discussion: D. Bodansky and Jutta Brunnee, "The Role of National Courts in the Field of Environmental Law", 7:1 (1998) RECIEL 11 at 13.

show, the Indian court has considered some commonly recognised principles as customary law whereas their status in international law is uncertain and, thereby, made the precautionary principle, polluter pays principle and sustainable development directly applicable. On the other hand, the court in Bangladesh does not mention these principles directly. The national courts could be cautious to take a bold approach, sometimes, due to lack of familiarity with its rules and legal status. The indeterminacy of many international environmental norms and restrictive standing rule pose potential obstacle to their successful application in these domestic courts.

### **SUSTAINABLE DEVELOPMENT AND ITS APPLICATION IN THE NATIONAL COURT**

In South Asia, sustainable development<sup>31</sup> reflects the principle of sustainable and equitable use of natural resources and its integration in the domestic legal system. Sustainable development according to IUCN means 'achieving a quality of life or standard of living that can be maintained for many generations because it is socially desirable, economically viable and ecologically sustainable.'<sup>32</sup> As an umbrella

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<sup>31</sup> The Brundtland Report defined sustainable development as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'. WCED: Our Common Future (Brundtland Report) London 1987, p.43. On the other hand, criticising this definition, World Conservation Strategy: *Caring for the Earth* defined sustainable development as: 'improving the quality of human life within the carrying capacity of supporting ecosystems.' This definition, according to Ben Boer, is anthropocentric. See: B.W. Boer, "Implementing Sustainability", 14 (1992) Delhi Law Review, p. 6. According to G. Handl: the essence of this concept is rather living off nature's 'income' than squandering its 'capital'. G. Handl, "'Environmental Security & Global Change: The Challenge of International Law", (1990) YIEL at p. 24.

<sup>32</sup> IUCN-The World Conservation Union, Guide to preparing and Implementing National Sustainable Development Strategies and Other Multi-sectoral Environment and Development Strategies, prepared by the IUCN's Commission on Environmental Strategies Working Group on Strategies for Sustainability, the IUCN Secretariat and the Environmental Planning Group of the IIED, pre-publication review Draft 1993, p.6. According to the definition: 'Socially desirable', meaning fulfilling people's cultural, material and spiritual needs in equitable ways; 'economically viable' meaning paying for itself, with costs not exceeding income; and

concept,<sup>33</sup> it tends to reconcile the conflicting goals economic development and environmental protection.<sup>34</sup> For South Asian countries, the conflict between trade, environment and development is a very crucial one and becomes apparent when people oriented development programme clashes with environment.<sup>35</sup> Uncertainty in definition, inherent vagueness, and status and contradictory objectives make it difficult for this concept to achieve a definitive role in international environmental law. The uncertainty lies mainly in relation to the elements of sustainable development and the apparent contradiction between the objectives of development and of environmental protection.

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‘ecologically sustainable’ meaning maintaining the long term visibility of supporting ecosystems.

- <sup>33</sup> The principle of sustainable development has been linked to various other concepts, such as, intergenerational and intra-generational equity, principle of integration, sustainable use of natural resources and biological diversity.
- <sup>34</sup> The 1972 Stockholm Conference sets out the general obligation to preserve the environment and recognises the necessity of economic growth. It acknowledges the need to provide assistance to developing countries to enable them to meet their obligations towards the environment and, on the other hand, to secure their right to development. Principle 4 of Rio Declaration states that ‘in order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and can not be considered in isolation from it.’ Principle 13 of 1972 Stockholm conference and 1982 World Charter for Nature called for an integrated and co-ordinated approach taking into account of the economic development. At the same time, the Rio Declaration states the ‘right to development’ which has recently been recognised by the General Assembly. According to many academics: this article, which requires to be read with article 4, is a part of a ‘bargain’ struck between developing and developed countries. The same bargain is evident in the language of the climate change convention. For GA Resolution, See: 28: 1 (1998) Environmental Policy and Law at p. 51.
- <sup>35</sup> For example: FAP project in Bangladesh and Narmada Dam Project in India. For an useful insight on how this clash affect environment: R. Khan, ‘Sustainable Development, Human Rights and Good Governance- a Case Study of India's Narmada Dam’, in K. Ginther, E. Denters and P. Waart (eds), Sustainable Development and Good Governance, Kluwer, Netherlands, 1995.

In Bangladesh, the judiciary has applied sustainable development in an indirect manner and gave priority to a development project funded by international donors.<sup>36</sup> To some extent anthropocentric, the definition of sustainable development integrates a quality of life that is economically and ecologically sustainable. Though the national environmental policy and legislation reflect the concern for a balance between the trade, development and environment, no cases has been decided on this issue. In India, however, the case law did manage to come out with an applicable definition of sustainable development.<sup>37</sup> It emphasised the relationship between development and environment, and a balance between the two. More sophisticated challenges were made where the court was asked to deal with pollution from leather industries or tanneries, to prevent encroachment of wetlands or to preserve forests and vegetation.<sup>38</sup> In most cases, the Indian Judiciary

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<sup>36</sup> *M. Farooque V Bangladesh* (unreported WP no. 998 of 1994): The petitioner alleged that FAP is an anti- environment and anti- people project. It was added that FAP was adversely affecting and injuring more than a million people by way of displacement, causing damage to soil and destruction of natural habitat, of fishes, flora and fauna. Moreover, it was creating drainage problem that threatened human health and worsened sanitation and drinking water supplies and thus, causing environmental hazards and ecological imbalance. 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. the court directed the concerned authority, in this case, the Ministry of Irrigation, Water Development and Flood Control, that no 'serious damage' to the environment and ecology is caused by FAP activities. The threshold of the seriousness was not ascertained. The court gave priority to the development project.

<sup>37</sup> In 1994, court directly mentioned the principle of sustainable development and tried to balance the social, economic and ecological aspect of sustainable development. *Law Society of India vs Fertilisers & Chemicals Travancore Ltd.*, AIR (1994) Ker 308 at 360.

<sup>38</sup> Sustainable forest management: *Hyderabad Abrasives and Minerals vs State of A.P.* 1990 Forest Law Times, 119; *Yaswant vs State of U.P.*, AIR 1988 All 121. See generally: P. Leelakrishnan, "Law and Sustainable Development in India", 9:3 (1991) *Journal of Energy and Natural Resources Law*, at p. 195. Restriction on mining operation causing ecological hazard: *Rural Litigation and Entitlement (RL &E) Kendra, Dehradun vs State of UP and others*, (1987) 1 SCR 637; *Kinkri Devi vs State of HP*, AIR (1988) HP 4. Sustainable use of natural resources: *Attakoya Thangal vs Union of India*, 1990 KLT 580 at 583.

gave priority to sustainable use of the natural resources, to preservation of biological diversity and to right of healthy environment for the present, and to certain extent, to the future generations. In recent Indian cases, the focus was on inter-generational and intra-generational equity, the need to balance between development and environment, and integrating the concept of sustainable development in the matters related to development, trade, forest and fisheries. Having said that, the court is not willing to interfere when issues concerned policy decisions or political matters, even though it relates to public interest. Cases, such as the *Silent Valley*, the *Tehri Bandh*, or *Sachidanand Panday* show that the court would be reluctant to apply the balancing act and would favour the development project.<sup>39</sup>

#### INTERGENERATIONAL EQUITY AND ITS APPLICATION IN NATIONAL COURT

Prof. Weiss's definition of inter-generational and intra-generational equity has been examined and developed by several other international and regional instruments.<sup>40</sup> This principle assures each generation the right to receive the planet in no worse a condition than received by the

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Leather industries were closed in favour of environment: *Vellore Citizen Welfare Forum* AIR (1996) SC 2715 and (1996) 5 SCC 647.

<sup>39</sup> *Tehri Bandh Virodhi Sangarsh Samiti vs The State of UP* (WP. No. 12829 of 1985): the court dealt with Tehri Hydro electric power project. *Society for the Protection of Silent Valley vs Union of India* (Unrep): concerned construction of hydro-electric dam. *Sachidanand Pandey vs State of West Bengal*, AIR (1987) SC 1109: concerned a development project within the zoological garden. *Prof. Sergio Carvalho vs The Staff of Goa and Three others*, (1989) 1 GLT 276. In all these cases, the court decided not to interfere on the ground either that the court does not have required expertise, or that the government took account of all aspects of environment or that policy decisions should not be adjudicated in the court.

<sup>40</sup> The vertical and horizontal effect of such partnership have been examined in various international instruments such as, the Stockholm Declaration, the Rio declaration, the Biological Diversity Convention and the Climate Change Convention; and in ICJ Cases, such as the *Nuclear Test Case II*. In applying the principle in national court, such as in the *Minors Oposa vs Secretary of the Department of Environment and Natural Resources (DENR)*, 33 ILM 173 (1994), the court directly applied the principles of intergenerational equity with an intention to clarify the position of this principle in the international arena.

previous generation, and views the environmental and resource conservation obligations of the present generation from that perspective.<sup>41</sup> This implies that we have a duty to defend and improve the environment for present and future generations and to use natural resources in a manner that ensures the preservation of ecosystem for the benefit of present and future generations. At a national level, it implies fairness between groups of people in a society, in terms of access to common natural resources, such as clean air and water in national watercourses and the territorial sea.<sup>42</sup> A few Constitutions<sup>43</sup> impose a constitutional duty on the citizens to protect and maintain the eco-systems and natural resources for the benefit of present and future generations. At the same time, in the form of 'constitutional directives', direct the state to protect and enhance the quality of the environment for the benefit of both generations.<sup>44</sup> The Constitution of Bangladesh does not mention this principle directly. If we consider the spirit of the Constitution, it would be easier to apply this principle in the domestic legal system.

In India, this principle has been considered as a part of achieving sustainable development. However, the nature of the right and the way to achieve it have not been discussed. The part on the sustainable

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<sup>41</sup> A. E. Boyle, Book Reviews of Edith Brown-Weiss, "In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity" New York, 1989 in 40 (1991) International Comparative Law Quarterly, 230-231.

<sup>42</sup> Ben Boer, "Implementation of International Sustainability Imperatives at a National level" in K. Ginther, E. Denters and Paul De Waart (eds) Sustainable Development and Good Governance, Kluwer, Netherlands, 1995 at p.115.

<sup>43</sup> For example, see provisions in the Constitutions of Namibia, Islamic Republic of Iran, Papua New Guinea, the Philippines and Vanuatu. Reprinted in F.M. Ksentini, Human Rights and the Environment: Progress Report, UN Doc. E/CN.4/Subsidiaries.2/1992/7 (2 July 1992). Also see UN Doc. E. CN.4/Sub2/1994/9 (6 July 1994)

<sup>44</sup> Section 16, Article II of the Constitution of Philippines provides that: 'the state shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature'. Article 48-A of the Indian Constitution states that 'the State shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country.'

development showed that not in all cases the court mentioned the necessity of preserving the environment for the present generation as well as for the future generations. For example, in the cases dealing with reserved forest, the court decided the case based on the need of the present generation and rational use of natural resources. Therefore, the vertical application of equity has been established. Moreover, the notion of equity has been connected with the concept of public trust and depended on people's right to enjoy healthy environment. On the other hand, in Bangladesh, though pleaded, the court did not apply this principle on the ground that neither the Constitution nor the national legislation of Bangladesh explicitly mentions this principle. Two cases in 1995 and 1996 mentioned the intergenerational rights but the court did not establish the precise nature of this right.<sup>45</sup> In *M. Farooque V. Bangladesh and Others*,<sup>46</sup> the petitioner BELA submitted that they represented not only the present generation but the generation yet unborn. The Court, however, did not agree with the petitioner. The petitioner mentioned *Minors Oposa case* in which the twin concepts of 'intergenerational responsibility' and 'intergenerational justice' presented by the plaintiff minors represented by their respective parents to prevent the misappropriation or impairment of the Philippines rain forest. The minors asserted that they represent the generation as well as generation yet unborn. According to the Bangladeshi court, the minor's standing in the *Oposa case* was allowed because 'the right to a balanced and healthful ecology' was a fundamental right in the Constitution of the Philippines. Several laws in the Philippines declare the policy of the State to conservation of the country's forest 'not only for the present generation but for the future generation as well'. Constitution of Bangladesh, expressly, does not provide any such right

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<sup>45</sup> W.P. no. 300 of 1995 where the children have sued the government in order to prevent the vehicular pollution since they are the front line victim of severe noise and smoke emission. In W.P no. 278 of 1996, a group of children under the age of 10 have sued the government to bring back the Bangladeshi children used as camel jockeys in the United Arab Emirates and who are kept under nourished and bound by forced labour and to prevent further kidnapping and abduction of children from Bangladesh.

<sup>46</sup> 49 (1997) DLR (AD). See especially: Mustafa Kamal J. in p.16, para. 53. For the judgement of *Minors Oposa Case*, see 33 (1994) ILM 173.

### THE PRECAUTIONARY PRINCIPLE AND ITS APPLICATION IN NATIONAL COURT

The precautionary principle provides guidance in the development and application of international environmental law where there is scientific uncertainty. The purpose is to encourage the decision-makers to consider harmful effects of their activities on the environment before they pressure those activities.<sup>47</sup> A fundamental change lies in the shifting of burden of proof. Traditionally, burden of proof lies with the person opposing an activity to prove that it does or is likely to cause environmental damage. While the precautionary approach is applied, this would shift the burden of proof and require the person who wishes to carry out an activity to prove that it will not cause harm to the environment. It means that the polluter, or the polluting state has to establish that their activities and the discharge of certain substances would not adversely or significantly affect the environment before they were granted the right to release the potentially polluting substances and carry out the proposed activity.<sup>48</sup>

Precautionary principle is considered in Bangladesh as a guiding non-binding principle for policy making. The use of this principle in the substantive law of these three countries is quite frequent<sup>49</sup>. Therefore,

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<sup>47</sup> The Stockholm declaration 1972 and the Rio declaration 1992 both recognised the urgent need to safeguard the natural resources. These documents agreed that there is a need to adopt cost-effective measure to reduce environmental damage.

<sup>48</sup> For a general discussion, see: O. McIntyre and Thomas Mosedale, "The Precautionary Principle as a Norm of Customary International Law" 9:2 (1997) Journal of Environmental Law, 221-241. J.Cameron and J. Abouchar, "The Status of Precautionary Principle in International Law" in D. Freestone and E. Hay (eds), The Precautionary Principle and International Law, The Hague, 1996; T. O'Riordan and J.Cameron (eds), Interpreting the Precautionary Principle, London, 1994); E.Hay, "The Precautionary Concept in Environmental Policy and Law: Institutionalising Caution", 4 (1992) Georgetown. International Environmental Law Review, 303-318 D. Freestone, "The Precautionary Principle" in R.Churchill and D. Freestone (eds), International Law and Global Climate Change London, 1991) pg.21.

<sup>49</sup> In Bangladesh, the Wildlife Acts, the Fisheries Act, and the Forest Act integrate the precautionary principle. The Bangladesh Environmental Conservation Act, 1995 integrates the precautionary approach as well as the polluter pays principle. Any person affected or *likely to be affected* from the pollution or degradation of environment, may apply to the Director



in deciding the cases, the judiciary in Bangladesh can apply this principle with considerable ease. In Bangladesh, the court examined the seriousness of environment damage to determine whether there is any need for precautionary approach.<sup>50</sup> However, the threshold of such damage was not examined, neither it was accepted as part of customary law. The Indian courts, in some cases, wanted to avoid the strict rules and procedures of evidence and causation, and applied precautionary principle as part of the customary law.<sup>51</sup> Unlike Indian Supreme Court, the judges of Bangladesh were not that enthusiastic to apply the precautionary principle as an international customary law. However, both the judiciaries agree that Rio Declaration 1992 does have a

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General for remedying the damage or *apprehended* damage. In cases of discharge of excessive pollutants, the expenses incurred to remedial measures to control and mitigate environmental pollution can be recovered from such person as public demand (section 9 of the Environment Conservation Act 1995). Moreover, the Director General has the power to adopt remedial and safety measures to prevent probable accidents (section 2(b) of the 1995 Act). Furthermore, a company would be liable for the violation of any provision of the Act. The burden of proof is shifted on them to show that they were ignorant of such contravention or exercised due diligence (section 16 of the Act).

<sup>50</sup> *Dr Mohiuddin Farooque vs Bangladesh and Others*, (WP No. 92 of 1996): In this case, the *locus standi* of a potential customer was acknowledged. The petitioner as a potential consumer filed the writ petition in the High Court Division to prevent the release of dried skimmed milk powder contaminated with high radio activity imported by the Danish Condensed Milk, Bangladesh from Estonia. A potential customer's right to file a suit has been recognised by this case. The court simply assumed that such injury either had occurred or were 'likely to occur' and proceed to issue remedial directions. In the *FAP case*, cited earlier, the court took account of the seriousness of damage that could be caused to the environment by the project. However, the court did not apply the precautionary principle and did not bar the development project.

<sup>51</sup> *Vellore Citizen's Welfare Forum*, (1996) 5 SCC 647 at 658; *Taj Trapezium case*, (1997) 2 SCC 353; *M. C. Mehta (Badkhal and Surajkhal Lakes Matter) vs Union of India*, (1997) 3 SCC 715; *S. Jagannath case*, (1997) 2 SCC 87; *M. C. Mehta (Tanneries) Case* (1997) 2 SCC 411: All these cases, in effect, stated that precautionary principle is considered as part of the land, that the allegation would require to be proved beyond reasonable doubt and that burden of proof would be shifted to polluting industries to show that there was no pollution.

'persuasive value' and both India and Bangladesh did sign the Declaration. But at the same time, the judiciary of Bangladesh believes that an international agreement between the nations, if signed by one country, is always subject to ratification; and it can be enforced as a law only when enacted through its legislature. Though most of the recent environmental legislation has incorporated the precautionary principle, the court can refuse to apply this principle if the matter in front of them does not deal with any of the legislation.

#### **POLLUTER PAYS PRINCIPLE AND ITS APPLICATION IN NATIONAL COURT**

The polluter pays principle (hereinafter, PPP) is used to prevent, control and reduce environmental harm. This principle expects polluters to bear the costs of measures carried out by the public authorities with respect to potential and actual environmental damage.<sup>52</sup> There is no uniform way to determine and the states are free to determine their own national standard. Generally, the public authorities set environmental standards. Therefore, it is only after these standards are set, the polluters will take steps to comply with them. It should also be noted that minimum pollution is allowed by the legislation. The Indian court applied absolute liability for the polluters to pay up the cost of pollution and adopted more stringent threshold of liability than required by international law.<sup>53</sup> Moreover, the Indian courts followed the 'clean up or close down' formula and believed that the industries should be liable to pay the social cost of carrying out inherently dangerous activities. Having examined the treatment of other principles by Bangladesh judiciary, it is unlikely that PPP will be treated as a part of customary international law. However, if any cases on this issue are

<sup>52</sup> H. Smets, "The Polluter Pays Principle in the Early 1990's" in Luigi Campiglio *et al.* (eds) The Environment After Rio: International Law and Economics 1994, at pp. 136-137; S.E. Gaines, "The Polluter pays principle: From Economic Equity to Environmental Ethos", 26 (1991) Texas International Law Journal, 463, particularly, at pp. 467-475.

<sup>53</sup> *M. C. Mehta vs Shriram Food and Fertilisers Industries (Oleum Gas Leak case)*, AIR (1987) SC 965; *UP Pollution Control Board vs M/S Modi Distillery*, AIR (1988) SC 1128; *Indian Council for Enviro-Legal Action vs Union of India (H-Acid case)*, (1996) 3 SCC 212; *Vellore Citizen's Welfare Forum vs Union of India*, AIR (1996) SC 2715; *M.C. Mehta vs Kamal Nath and Others*, (1997) 1 SCC 414; *M.C. Mehta (Tanneries) vs Union of India*, (1997) 2 SCC 411: all these cases dealt with the application of PPP, payment of the clean up cost and absolute liability of the polluters.

presented before the judiciary of Bangladesh, it should follow the absolute liability and should not allow any concession to the polluters, be it a company or a public body.

### **TOWARDS THE ROLE OF THE JUDICIARY**

The previous discussion showed that the judiciary is cautious in adopting a flexible standing and in applying the internationally recognised environmental principle. The fear may not be unfounded taking account of the fact that a very relax standing would open up the floodgate. Moreover, the anthropocentric approach of the judiciary is deep rooted and the unqualified right to environment has not been established. The express constitutional provisions in the Indian Constitution<sup>54</sup> have made the task of the environmentalists and of the court much easier. The trend in South Asia shows that the environmental activists continuously used the constitutional writ petition to protect the environment.<sup>55</sup> Along with the legal aid and the environment court, perhaps, it is the right time to have environmental protection integrated in the Constitution.

The judiciary's good will would be of little use if the public does not have access to funding to move the petition. This includes the initial expenses of the applicant, the overall cost of the case, availability of legal aid and cost order of the court. At the moment, majority of the

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<sup>54</sup> The Constitution (42<sup>nd</sup> Amendment) Act 1976 explicitly incorporated environmental protection and improvement. Article 48A, a directive principle of state policy and not directly justiciable, states: "The State shall endeavour to protect and improve the environment and safeguard the forests and wildlife of the country." Article 51A (g) imposes a similar responsibility on every citizen "to protect and improve the natural environment including forests, lakes, rivers and wildlife, and to have compassion for living creatures....". Therefore, protection of natural environment and compassion for living creatures were made the fundamental duty of every citizen. Both the provisions substantially send the same message and highlight the national consensus on the importance of environmental protection and improvement.

<sup>55</sup> Favoursing the use of constitutional provisions, some Asian environmentalists argue that lack of developed procedural law in these countries paved the way for this resort. There are quite a few other supporting arguments, such as the nature of the legal system, non-implementation of the substantive law and lack of an integrated environmental management.

funding comes from private foundations and from foreign assistance. The unreliable nature of the source made it more important to have a state fund on environment. The Jatiya Sansad has just passed the Legal Assistance Act 2000.<sup>56</sup> It is not yet clear how much access to public funding is there for environmental litigation. The prospect of having to pay the other side is usually one of the greatest deterrents to litigants. Another problem area is the cost order of the court.<sup>57</sup> In most of the cases in India, the cost was decided in a case by case basis<sup>58</sup>. In Bangladesh, in two of the environmental litigation, the court disposed of the matter without any order regarding cost.<sup>59</sup> Moreover, 'no win no fee' could be an option to initiate or encourage more environmental litigation. This would allow the lawyers to take on cases without charging their clients. In a successful case, the other party is usually ordered to pay most of the lawyer's nominal fees. The client or the lawyer can also take out insurance to cover the risk of losing or having to pay the other side's cost. In that way, if the applicant loses the case, the insurance would cover the cost of the case. Though this system can help to reduce the number of unnecessary litigation and help the lawyers to accept cases with better chance to win, it has its own drawbacks.<sup>60</sup> To cope with that, a special fund for cases perceived as

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<sup>56</sup> Under the law, the state will finance lawyers for those who are needy, helpless and unable to get justice for various socio-economic reasons. Such people can apply for legal assistance from the state. A state financed panel of lawyers will come in aid to the deserving person after scrutiny of their applications by a committee. Source: The Daily Star (January 25, 2000). Website: [www.dailystarnews.com/](http://www.dailystarnews.com/).

<sup>57</sup> In adversarial system, the cost follows the event. Having said that, it much depends on the discretion of the court.

<sup>58</sup> In many of the public interest litigation, the court either did not make any cost order or the cost and the expenses of the inquiry were ordered to be paid by the respondents. For examples of some of these cases: S. Ahuja, People, Law and Justice: A Casebook of Public Interest Litigation, Vol. II, New Delhi, 1997.

<sup>59</sup> *Mohiuddin Farooque vs Bangladesh and others*, 48 (1996) DLR (HCD) 438 and *Bangladesh Environmental Lawyers' Association vs Election Commission and Others*, 46 (1994) DLR (HCD) 235.

<sup>60</sup> In UK, this system is being used in personal injury cases where the injury arises from exposure to toxins or pollution or injuries resulting from a one-off accident. The critics say that this system will destroy the chance of environmental test cases as most of the lawyers would not take such risk

plainly in the public interest could help to examine environmental test cases with complex points of law and to establish precedents.

It is hoped that once the separate environment court under the Environment Court Act 2000<sup>61</sup> start to function, the litigants would be more interested to give priority to the environment issue expecting a speedy outcome of the litigation. The court will certainly help to create more expert judges, ease the standing and provide a better and consistent case law. Therefore, it is expected that proper financial assistance will be offered to the judges for training and research. By encouraging more non-governmental organisations to be involved in the policy making and by appointing environmentally aware judges in the higher courts, the government can easily make the public interest environment litigation an interesting option for the general people. Following the example in India, the court should use their power<sup>62</sup> to appoint a commission to examine any person or environmental

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under the conditional fees system. Moreover, the insurance companies may not be willing to provide commercial cover with reasonable premiums. Most of the environmental lawyers would be unwilling to take such cases due to the high investigative costs, time taken and overall risk in terms of success.

<sup>61</sup> According to the Act, six environment courts shall be established in six divisional head quarters. All cases about conservation of environment, its further development, control and combat of environmental pollution shall be filed and dissolved in these courts. Any aggrieved person whose right has been infringed can directly file a suit in the Environment Court. Under the Act, Government will appoint a judge in Environment Court from the additional district judges with the permission of the Supreme Court. No case filed in the Environment Court shall be adjourned for hearing more than 3 times. Every suit shall be dissolved within a period of 6 months from the date of filing a suit. Any person may prefer an appeal to the High Court within 30 days from the date of pronouncement of the judgement. There is a provision for damages to be determined depending on the facts and circumstances of each case. The maximum level of fine and imprisonment is Tk.10 lacs and 10 years respectively. Moreover, the draft bill states that this court will be recognised as criminal court and it will enjoy all powers and jurisdiction like criminal court according to the Code of Criminal Procedure 1898. See, J.Razzaque, Region/Country Report: South Asia: Bangladesh' 9 (1999) Yearbook of International Environmental Law, 459-469.

<sup>62</sup> Section 75 of the Code of Civil Procedure (Act V of 1908)

disaster, to question the conflicting scientific reports,<sup>63</sup> to make a local investigation, to examine or adjust accounts or to make a partition. It should have more power to monitor the development of the case and to ensure that the directions are carried out.<sup>64</sup> Moreover, tortious claim and class suit<sup>65</sup> should be encouraged as there is an added advantage of monetary compensation and courts generally opt for detailed evidence.

Moreover, the NGOs involved in the environmental protection and public interest litigation can build a database of lawyers to provide free legal assistance, at least for the first consultation, to people who come with environmental problem. In that way, the general people would be aware of their environmental rights and the options available to them. At the same time, the lawyers would be able to participate more in the environmental protection, not to mention having a successful profession. Moreover, the court can ask amicus to provide them with supporting legal documents. In that way, the court will have some useful legal research prepared for them and, on the other hand, the NGOs would be able to introduce their own views for the knowledge of the court.<sup>66</sup>

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<sup>63</sup> There was a possibility in the case where the radioactive milk was questioned in the court.

<sup>64</sup> For example: in India, in the *Rural Litigation and Entitlement Kendra* case [AIR (1985) SC 652; AIR (1987) 1 SCR 637; AIR 1987 SC 359; AIR (1988) SC 2187 and AIR (1989) SC 594]: the case dealt with illegal limestone quarries which were posing considerable hazard to environment. The court appointed an expert committee to inspect the mines and submit report to the court. A working committee was set up to classify the mines. Based on the report, the court decided which mines should stop operating. The court ordered a monitoring committee to examine whether any mining operation was being illegally undertaken. The court ordered the government to establish an initial fund to set up the monitoring committee.

<sup>65</sup> These are actions prescribed by the Civil Procedure Code. Less used because of longer time frame, delays and cost. Moreover, it is sometimes difficult to narrow down the expansive issues of environmental damage.

<sup>66</sup> The amicus appears to have been originally a bystander who, without any direct interest in the litigation, intervened in his own initiative to make a suggestion to the court on matters of fact and law within his knowledge. An amicus brief should generally contain materials submitted to the court and are additional to that submitted by any other parties. It may support the argument of one party or indeed support the argument of one party in part and another party in part. See generally: E. Angell, "The Amicus

## CONCLUSION

Alternative dispute mechanism could be a viable option to encourage better protection of the environment. The court's cautious approach shows that the court would be unwilling to encourage more cases in the court.<sup>67</sup> Even though the environment court is likely to solve the environmental dispute, it would be based on criminal liability and there is an added question of cost and funding. Alternative dispute solution, such as mediation could provide a solution if the dispute is between local groups and big companies. Mediation,<sup>68</sup> in general, focuses on getting the parties together and explores the issues at stake. The mediator may only assist the parties in a problem solving process or can offer an opinion on the merits of the case. The parties then use the opinion to decide whether they want to compromise their position. If the case is of complex nature, the former method is followed. Unfortunately, neither the Environmental Conservation Act 1995 (and the amendment in 2000) nor the Legal Assistance Act 2000 proposes any integrated alternative dispute resolution mechanism.<sup>69</sup>

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Curiae Brief: American Development of English Institution", 16 (1967) International Comparative Law Quarterly, 1017; S. Krislov, "The Amicus Curiae Brief: From Friendship to Advocacy", 72 (1963) Yale Law Journal 694-721. Indian court appointed amicus curiae in *P. Navin Kumar vs Bombay Corporation and Indian Heritage Society vs Municipal Corporation of Greater Bombay* (1999) 4 SCC 120: [The writ petition before the HC sought to prevent the construction of a new public toilet block on the northern side of the Gateway of India and for the demolition of the existing oil toilet block.]

<sup>67</sup> There was a huge backlog of cases in the early 1998. There were reportedly 700,000 cases pending before various courts and among them, 70,000 cases were pending before the High Court (Bangladesh Observer, March 22, 1998).

<sup>68</sup> It allows parties to resolve disputes quicker, more efficiently and more privately than judicial process. Participation in the mediation does not waive the right to use more formal means of dispute resolution. If the environmental problem is of complex nature and settlement process is difficult because of the number of the parties, mediation would be a suitable option. Having said that, mediation could easily be a weapon to gain time and, hence, creating more pollution.

<sup>69</sup> For example: the legal aid movement in India projects two main goals. One sought to provide the socially and economically oppressed people with access to the formal legal system through free legal assistance and public interest litigation. And the second goal is to create an informal system of

There is also a need of strong and comprehensive regulatory framework.<sup>70</sup> The non-governmental organisation requires to work hand in hand with the government. They need to interfere more in the policy making and make the politicians aware of the loopholes in the environment. A central complaint body would be good solution to integrate all the conservation law. It would be easier if an environmental law reform body is there to help to formulate a comprehensive legislation and thus, assist the complaint body to work efficiently. In South Asia, incentive-based mechanism is applied only in India to encourage the implementation of environmental regulations. This mechanism can be applied through technology transfer, by providing concession in taxes and duties on import of goods helping to decrease pollution, by supporting the eco-labelling and thus creating more people's choice in buying goods and by facilitating common effluent treatment plants.<sup>71</sup> Though there is no such

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dispute resolution, aimed primarily at the problems and disputes of the poor who had been frustrated by the formal system. S. Singh, Legal Aid: Human Rights to Equality, New Delhi, 1996 at pp. 117-121. Moreover, in a recent amendment of the Civil Procedure Code, section 89 states the importance of arbitration, conciliation, *Lok Adalat* and mediation. This Amendment made in 1999 followed the format of US style institutionalised ADR process. The other changes involve settlement of litigation within 30 days in order to reduce the repetitive adjournments by lawyers of both sides.

<sup>70</sup> The main reasons for non-implementation of environmental regulations in South Asia are numerous. Lack of appropriate law and non application of it, conflicts between law and traditional practices, institutional weaknesses and inadequacy, leading to non enforcement and malpractice, outdated and inconsistent law, ignorance of objectivity of the law and absence of environmental quality standard, are to name the few. Dr. Mohiuddin Farooque and Dr. Saleemul Huq, "Regulatory Framework and Some Examples of Environmental Contamination in Bangladesh". Unpublished Paper collected from Bangladesh Environmental Lawyers Association, Dhaka, Bangladesh.

<sup>71</sup> In India, there are several incentive based mechanisms. For example, the Trade in Environmental Services Technologies (TEST) programme was created to improve environmental protection and productivity in Indian industries. TEST, an assistance programme between USA and India, is provided in the form of loans, conditional grants and technical assistance. Moreover, under the eco-labelling scheme, any product is made, used or disposed of in a way that significantly reduces the harm it would have otherwise caused to the environment would be considered as environmental friendly product.



broad incentive mechanism in Bangladesh, the recent example of the concession in duty on imported goods and the common forest management could provide examples of incentive-based approach.<sup>72</sup>

Moreover, different regulatory bodies, instead of co-operating with one another, appear to be at odds due to their lack of understanding and communications. The national officials are not always familiar with comprehensive definition of eco-management and might not see the need to co-ordinate related sectoral components. There is a lack of personnel, budgetary resources and motivation to enforce the existing legislation. Public consciousness and disciplines are not effective enough to force the political leaders to correct the damaging act to the environment. Sometimes, the government units, which are meant to be working together, are scattered in various buildings, distant from each other and located throughout the country. The Department of Environment can bring together the fragments of the authorities together to promulgate any environmental guidelines. Active consultation with each other in preparing any new environmental legislation can accommodate the complexity that environmental problems offer.

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<sup>72</sup> To reduce urban air pollution, the government in 1999 has offered a number of financial incentives for converting the four-stroke petrol and diesel-propelled autos to compressed natural gas (CNG)-driven ones. Registration and renewal fees of CNG vehicles would be reduced as part of the incentives, which also apparently aim at increasing the use of natural gas found in abundance in the country. Guidelines are being prepared for the assembling firms to take necessary measures in order to transform the four-stroke motors to CNG vehicles. J.Razzaque, "Region/Country Report: South Asia: Bangladesh' 9 (1999) Yearbook of International Environmental Law, 459-469. Moreover, under the Forest (Amendment) Act 2000, section 28A and B, the Government may assign any village community the right of management over any land which has been constituted as reserved forest. The community in charge of that forest would be responsible for the protection and improvement of such forest.