

Access to Environmental Justice

Role of the Judiciary in Bangladesh

Jona Razzaque

Bar at Law (non-practising), LLM (Kings College, London)

Ph.D. Candidate (University of London)

Contact Address

75 Brixton Hill

London SW2 1JE

United Kingdom

T: 00 +44 +208 671 1582

E-Mail: jrazzaque@hotmail.com

ABSTRACT

As an aftermath to the introduction of the Environment Court Bill 1999, this article aims to examine the role of judiciary in facilitating the access to environmental justice in Bangladesh. Most of the environmental cases are in the form of writ petitions covered by Article 102 of the Constitution and the court extended the meaning of 'person aggrieved' in a way favourable to people not technically aggrieved. The judiciary applied internationally recognised environmental concepts such as sustainable development, intergenerational equity and precautionary principle in the national court. Though the green bench extended the meaning of fundamental right to life to include right to healthful environment, the threshold of pollution and environmental damage remains undefined. Question of cost is unsettled as there is no separate fund or environmental insurance scheme, and without these, public participation can not be expected. Conditional fee may encourage more public involvement and facilitate the development of environmental test cases. A network of environmental lawyers should be created to provide *pro bono* legal assistance to protect public interest and should be willing to work as *amicus curiae*. In order to contain the number of environmental cases, the pollution laws should include incentive mechanisms. Alternative dispute settlement, such as mediation, should be encouraged to create a win-win situation.

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 legislature nor the judiciary is supreme and the court acts as the final interpreter of law. Like USA(1), there is always check and balance between the two organs of the state. The functions of the judiciary are to enhance the rule of law, to promote the fundamental rights and to administer the law impartially between citizen and state as well as between citizen and citizen. The judiciary can mould principles of law to give them a sense of coherence and direction. The degree of radicalism of the judiciary is limited both by the system of appointment by the ruling government, 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, an expectation has been created that judiciary would take more prominent position in deciding environmental cases. The first section of this article deals with four main areas where the judiciary is active in accommodating environmental protection. Some Indian environmental cases have been mentioned in order to compare and to develop the performance of our judiciary. The second section examines areas that need to be improved to facilitate environmental justice and the concluding remarks focused on strengthening regulatory, institutional and alternative dispute settlement mechanisms to ensure effective participation of all environmental stakeholders.

SECTION I

1. Constitution and Environmental Protection

The fundamental rights, the preamble or the state policies in Bangladeshi Constitution do not expressly mention any right to healthy and clean environment.(2) 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, the judiciary stressed the need of harmonious interpretation of the Constitution to ensure environmental protection. This attitude was reflected in the FAP case (3), 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.(4) However, the 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, it took account of the substantial amount of money that has been spent and that the project has been partially implemented. 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(5). Because of the restrictive nature of this right, it has not been used by the court to protect environment. However, 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(6). Moreover, the concept of stewardship or trusteeship is well established in common law and could be a useful avenue to protect natural resources and public land.(7) Only in one case in India(8), the court applied the notion of public trust in protecting and preserving the natural resources. In the view of the court, the state is the trustee of all natural resources, which are meant for public use and enjoyment, and it would be unjustified to make them a subject of private ownership. Public at large is the beneficiary of the seashore, running waters, air, forests, and ecologically fragile lands and the trustee is under legal duty to protect the natural resources. The Indian court considered this principle as international concept well established in their national system. Though its status as a customary norm or even as a commonly recognised principle of international law is uncertain(9), it could help the Bangladeshi court to save the encroachment of open public space, public park and watercourses.

2. Standing in the Court

Once the applicant is in the court with a claim in public interest, the most important question for the court is to decide whether the applicant should be allowed access to the judicial process. 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 standing rule(10) has been cautiously applied by the court in several cases.(11) 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. This test have been used in two public interest cases, one dealing with human rights and the other dealing with environment (12). 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(13).

3. Remedies to Facilitate Environmental Justice

While dealing with environmental matters, the most common remedies offered by the court are injunction, declaration and, civil and criminal damages.(14) The judiciary of Bangladesh, in at least four environmental cases, granted injunctive relief to reduce environmental harm or pollution.(15) Though *suo motu* actions have been taken by the court in India,(16) the Bangladesh judiciary allowed such action in one case related to human rights.(17) Moreover, the Indian courts made several directions on unconditional closure of tanneries and relocation,(18) on payment of compensation for reversing the damage,(19) to create experts and special committee in environmental cases,(20) to pay the costs required for the remedial measures,(21) on necessary measures to be adopted by the relevant Ministry to broadcast information relating to environment in the media,(22) and to set up a committee to monitor the directions of the court.(23) There is ample opportunity for Bangladesh judiciary to make the similar sort of innovative directions(24) and *suo motu* action in environmental cases.

4. National Application of International Environmental Law

National courts' decision can promote the application of internationally recognised environmental principles in several ways.(25) By applying an international environmental principle, national courts implement it in the 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 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 courts in Bangladesh do not mention these principles directly. The indeterminacy of international environmental norms and restrictive standing rule pose serious obstacle to their successful application in our domestic courts.

4.1 Sustainable Development and Its Application in the National Court

Sustainable development(26) reflects the principle of sustainable and equitable use of natural resources and its integration in the domestic legal system. As an umbrella concept,(27) it tends to reconcile the conflicting goals of economic development and environmental protection.(28) 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. (29) The uncertainty in relation to the elements of sustainable development and apparent contradiction between the objectives of development and of environmental protection make it difficult for this concept to achieve a definitive role in international environmental law.

In the FAP case, the Bangladeshi court applied sustainable development in an indirect manner and gave priority to a development project funded by international donors.(30) Taking an anthropocentric view, the court defined sustainable development which 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 case directly mentions this concept. In India, however, the court adopted a balancing approach to deal with pollution from leather industries or tanneries, to prevent encroachment of wetlands or to

preserve forests and vegetation.(31) In most cases, the Indian judiciary 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. 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.(32) In spite of these Indian decisions, it is expected that our judiciary would give priority to the fundamental right to healthy environment.(33)

4.2 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.(34) This principle assures each generation the right to receive the planet in no worse a condition than received by the previous generation, and views the environmental and resource conservation obligations of the present generation from that perspective.(35) 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 (36). A few Constitutions (37) impose a constitutional duty on the citizens and on the state to protect and maintain the eco-systems and natural resources for the benefit of present and future generations. The Constitution of Bangladesh does not mention this principle directly. However, if the spirit of the Constitution is considered, this principle can be easily applied in the domestic legal system.

In India, this principle has been considered as a part of achieving sustainable development. 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. 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.(38) Unfortunately, in both cases, the court did not establish the precise nature of this right or how to achieve it. (39)

4.3 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(40). Moreover, a fundamental change lies in the shifting of burden of proof. 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.(41)

Precautionary principle is considered in Bangladesh as a guiding non-binding principle for policy making. Because of the frequent use of this principle in the substantive law,(42) the judiciary in Bangladesh, while deciding environmental cases, can apply this principle with considerable ease.

In one case (43), the court examined the seriousness of environment damage to determine whether there is any need for precautionary approach. However, the threshold of the seriousness of such damage was not examined and the court did not accept it as part of customary law. In order to avoid the strict rules and procedures of evidence and causation, the Indian courts, on the other hand, applied precautionary principle as part of the customary law.(44) As the environmentalists are supporting the customary status of this principle(45) and the environmental legislation in Bangladesh has integrated this principle, it is about time that judiciary follows the examples set by the Indian courts.

4.4 Polluter Pays Principle and its Application in National Court

The polluter pays principle (hereafter, 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.(46) There is no uniform way and the states are free to determine their own national standard. It is only after these standards are set by the public authorities, 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 (47). 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 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.

SECTION II

Improving 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(48) have made the task of the environmentalists and of the judiciary much easier. The trend in South Asia shows that the environmental activists continuously used the constitutional writ petition to protect the environment.(49) 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 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 Sangsad* has just passed the Legal Aid Bill 2000 (50) and 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.(51) In most of

the cases in India, the cost was decided in a case by case basis(52). In two of the environmental cases in Bangladesh, the court disposed of the matter without any order regarding cost.(53) Moreover, 'no-win, no-fee' could be an option to 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.(54) To cope with that, a special fund for cases perceived as plainly in the public interest could help to examine environmental test cases with complex points of law and to establish precedents.

At present, the Environment Court Bill is under the consideration of the Parliament.(55) 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 examples in India, the court should use their power(56) to appoint a commission to examine any person, to question the conflicting scientific reports(57), 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.(58) Moreover, tortious claim and class suit(59) should be encouraged as there is an added advantage of monetary compensation and courts generally opt for detailed evidence.

Furthermore, 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 suffering with environmental problems. 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 actively in the environmental protection, not to mention having a successful profession at the same time. Also, 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.(60)

Concluding Remarks

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 settlement mechanism could be a viable option to initiate better protection of the environment(61). Alternative dispute resolution, such as mediation(62) could provide a solution if the dispute is between local groups and big companies. The mediator assists 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.

Moreover, strength of a judiciary depends much on a strong and comprehensive regulatory framework.(63) The non-governmental organisation requires to participate more in the policy

making and make the politicians aware of the loopholes in the environment. A central complaint body would be a 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, help the complaint body to work efficiently. In South Asia, incentive-based mechanism is applied only in India to encourage the implementation of environmental regulations.(64) Though there is no such 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 such approach(65). Furthermore, in Bangladesh, different regulatory bodies, instead of co-operating with one another, appear to be at odds due to their lack of understanding and communications. At the moment, the Department of Environment is in charge of bringing together the fragments of the authorities and to promulgate the necessary guidelines. But, there is a lack of personnel, budgetary resources and motivation to enforce the existing legislation. Nevertheless, better public consciousness, effective public participation in the environmental decision making and strong environmental regulations would certainly help to strengthen the role of judiciary in the environmental field.

REFERENCES

(1) 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. Since joining the European Union however, the Parliament is no longer sovereign in the traditional sense, as validity of its law can be challenged in the courts on the grounds of non-conformity with European law.

(2) The fundamental rights are directly enforceable in the court and consistently used in Bangladesh and India to protect the environment. Some related rights that are or could be used in Bangladesh for the protection of environment: right to life (Art.31), liberty (Art. 32), equality (Art. 27), 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). 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.

(3) (1997) 49 DLR (AD), 1 and (1996) 48 DLR, 438: the legality of an experimental structural project of the Flood Action Plan was questioned. Co-ordinated by the World Bank, the project aimed to plan, design or undertake construction of dams, barrages and embankments in order to control flood. According to the petitioner, FAP was an anti-environment and anti-people project.

(4) The Appellate Division [(1997) 49 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 [(1996) 48 DLR (HC) at 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 DC 180).

(5) 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 overall ownership over the land. Property right begins where the Government's right to interfere ends. In India, the right to property is protected by Art. 300A and no longer a fundamental right.

(6) 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.

(7) 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.

(8) *M. C. Mehta V. Kamal Nath* (1997) 1 SCC 388: The case dealt with lease of a forestland by the government to a private company for development 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.

(9) The definition, the type of the resources protected by public trust, and elements public trust obligations are unclear. Moreover, the judge's intervention in environmental policy making is also vehemently objected by legislature and elected representatives. See generally: J.L. Sax, 'The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention' (1970) 68 Mich. Law Review 471; David Vander Zwaag, 'The Concept and Principles of Sustainable Development: 'Rio Formulating' Common Law Doctrines and Environmental Laws' (1993) 13 Windsor Yearbook of Access to Justice 39.

(10) 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.

(11) 26 DLR (SC) 1974; 29 DLR 1977 (HCD) 188; 43 DLR (AD) 126: In all these cases the court held that aggrieved person test requires the person to be directly affected. The question of standing is one of discretion and the court grants it upon due consideration of facts and circumstances of each case.

(12) FAP case (Environmental case) [49 DLR (1997) AD, 1]: The Appellate Court commented that an aggrieved person need not suffer directly. 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) [50 DLR (1998), 318], having applied the court the liberal 'aggrieved person' test, the court did not grant standing to the applicant, a human right activist.

(13) The Indian Constitution, either in Article 32 or in Article 226 has not mentioned who can apply for enforcement of fundamental rights and constitutional remedies. Though the 'aggrieved person' test was being applied to honour the tradition, there was no constitutional restriction as to who can apply to the court.

(14) In India, the court applied absolute liability in cases of environmental pollution. In *H-Acid* case (AIR 1987 SC 1086), the Supreme Court while allowing the fertiliser plant to restart ordered the management to deposit a large sum of money by way of security for payment of compensation claims made by the gas victims in this case. For Bangladesh, the court has not awarded compensation or damages to any environmental victims.

(15) *Sharif N Ambia Vs. Bangladesh* (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 v.D.G. Bangladesh Medical and Dental Association* (WP No. 1783 of 1994): The petitioner submitted that the people of the country would suffer, especially the 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. *M. Farooque v. Bangladesh* (W.P. 92/1996): Injunction on government body to prevent them from releasing radioactive milk in open market. *M. Farooque v. Bangladesh* (W.P. No. 948/1997): Injunction on government body to prevent them from filling up public lake as they deviated from the Master Plan.

(16) 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]

(17) *State v. Deputy Commissioner, Satkhira* [45 DLR (HCD) 1993]: The court acted on the 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.

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

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

- (20) For example: in India, special committee was created to monitor air quality and traffic congestion [(1998) 9 SCC 93], 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].
- (21) *Indian Council for Enviro-Legal Action v. Union of India* (1996) 3 SCC 212
- (22) *M.C. Mehta v. Union of India* AIR 1992 SC 382.
- (23) *M.C. Mehta v. Union of India and Others* (1998) 9 SCC 93.
- (24) One example of such directions could be *Dr Mohiuddin Farooque Vs. Bangladesh* [WP No. 92 of 1996]. The case concerned the release of radioactive dried milk in the open market. 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 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.
- (25) For general discussion: D. Bodansky and Jutta Brunnee, 'The Role of National Courts in the Field of Environmental Law' 7:1 RECIEL (1998) 11 at 13.
- (26) 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. 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' YIEL (1990) at 24.
- (27) The principle of sustainable development has been linked to various other concepts, such as, intergenerational and intragenerational equity, principle of integration, sustainable use of natural resources and biological diversity.
- (28) The 1972 Stockholm Conference 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 1992 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.' At the same time, it talks about the 'right to development' which has recently been recognised by the General Assembly. According to many academics: this article, which is required to be read with article 4, is a part of a 'bargain' struck between developing and developed countries. For GA Resolution, See: Environmental Policy and Law 28/1, 1998 at 51.
- (29) 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*' (1995, Kluwer, Netherlands).
- (30) *M. Farooque V Bangladesh* (WP no. 998 of 1994): The petitioner alleged 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. 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 Ministries that no 'serious damage' to the environment and ecology is caused by the development activities.
- (31) For example: Sustainable forest management: 1990 Forest Law Times, 119; AIR 1988 All 121. See generally: P. Leelakrishnan, 'Law and Sustainable Development in India' (1991) Journal of Energy and Natural Resources Law, Vol. 9:3, at 195. Restriction on mining operation causing ecological hazard: (1987) 1 SCR 637; AIR 1988 HP 4. Sustainable use of natural resources: 1990 KLT 580 at 583. Leather industries were closed in favour of environment: AIR 1996 SC 2715 and (1996) 5 SCC 647.
- (32) *Tehri Bandh Virodhi Sangarsh Samiti Case* (WP. No. 12829 of 1985): the court dealt with *Tehri* Hydro electric power project. *Society for the Protection of Silent Valley Case* (Unrep): concerned construction of hydro-electric dam. *Sachidanand Pandey v. State of West Bengal* (AIR 1987 SC 1109): concerned a development project within the zoological garden. 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.
- (33) To remain hopeful, see: A.T.M. Afzal, 'Country Representation-Bangladesh' in the *Report of the Regional Symposium on the Role of the Judiciary in Promoting the Rule of Law in the Area of Sustainable Development* (Colombo, SACEP/UNEP/NORAD, 1997) 61-72.
- (34) The vertical and horizontal effect of such partnership have been examined in various international instruments such as, the Stockholm Declaration 1972, the Rio declaration 1992, the Biological Diversity Convention '92 and the Climate Change Convention '92; and in ICJ Cases, such as the *Nuclear Test Case II*. In applying the principle in

national court, such as in the *Minors Oposa* Case, the court directly applied intergenerational equity with an intention to clarify the position of this principle in the international arena.

(35) Edith Brown-Weiss, *In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity* [Dobbs Ferry, NY: Transnational Publishers. 1989]

(36) Ben Boer, 'Implementation of International Sustainability Imperatives at a National level' in K. Ginther, E. Denters & P. de Waart (eds.) *Sustainable Development and Good Governance* (1995, Kluwer, Netherlands) at 115.

(37) 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/Subsides.2/1992/7 (2 July 1992). Also: UN Doc. E. CN.4/Sub2/1994/9 (6 July 1994).

(38) In *M. Farooque V. Bangladesh and Others* (1997) 49 DLR (AD): the petitioner BELA submitted that they represented not only the present generation but the generation yet unborn. The petitioner mentioned *Minors Oposa case* in which the twin concepts of 'intergenerational responsibility' and 'intergenerational justice' were presented by the plaintiffs to prevent the misappropriation or impairment of Philippine's rain forest. According to the Bangladeshi court, standing in the *Oposa case* was allowed because 'the right to a balanced and healthful ecology' was a fundamental right in the Constitution of Philippine. Several laws in Philippine also apply this principle. Constitution of Bangladesh, expressly, does not provide any such right. See especially: Mustafa Kamal J. in pg.16, para. 53. For the judgement of *Minors Oposa Case*, see 33 ILM 173 (1994).

(39) 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.

(40) 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.

(41) 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.

(42) 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 General for remedying the damage or *apprehended* damage. (sec. 9 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 (sec. 16 of the Act).

(43) *Dr Mohiuddin Farooque Vs. Bangladesh and Others*, (WP No. 92 of 1996): 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.

(44) (1996) 5 SCC 647 at 658; (1997) 2 SCC 353; (1997) 3 SCC 715; (1997) 2 SCC 87; (1997) 2 SCC 411: All these cases, in effect, stated that precautionary principle is considered as part of the law, 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.

(45) For arguments in favour and against: O. McIntyre and Thomas Mosedale, 'The Precautionary Principle as a Norm of Customary International Law', *Journal of Environmental Law* (1997) 9(2):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* (Kluwer, The Hague, 1996).

(46) 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)136-137; S.E. Gaines, 'The Polluter pays principle: From Economic Equity to Environmental Ethos', 26 *Tex. International Law Journal* 463 (1991)467-475.

(47) (AIR 1987 SC 965); (1996) 3 SCC 212; (AIR 1996 SC 2715; (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.

(48) The Constitution (42nd) Act 1976 explicitly incorporated environmental protection and improvement. Article 48A and 51A(g), both directive principles of state policy and not directly justiciable, state that both the state and the citizens have duty and responsibility to protect and improve the environment.

(49) Favouring 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.

(50) 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/

(51) In adversarial system, the cost follows the event. Having said that, cost order depends on the discretion of the court.

(52) 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, Orient Longman, 1997).

(53) *Mohiuddin Farooque V. Bangladesh and others* (48 DLR 1996) p.438 and *Bangladesh Environmental Lawyers' Association V. Election Commission and Others* (46 DLR 1994) P235.

(54) 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 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 may be unwilling to take such cases due to the high investigative costs, time taken and overall risk in terms of success.

(55) According to the bill, six environment courts shall be established in six divisional head quarters. All cases about conservation of environment and 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. No case filed in the Environment Court shall be adjourned for hearing more than three times. Every suit shall be dissolved within a period of 6 months from the date of filing a suit. 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.

(56) For example: Art. 104 of the Constitution: Appellate Division's power in providing complete justice; 102(1) and (2): enforcement of fundamental rights; Art.109: High Court's power to intervene *suo motu*.

(57) There was a possibility in the case where the radioactive milk was questioned in the court. [W. P. No. 92/1996]

(58) For example: in India, in the *R. L .and E Kendra* case (AIR 1985 SC 652; AIR 1987 1 SCR 637; AIR 1987 SC 359; AIR 1988 SC 2187 and AIR 1989 SC 594): concerned with illegal limestone quarries which were posing considerable hazard to environment. The court appointed an expert committee to inspect the mines and a working committee to classify the mines. Based on the report, the court decided which mines should stop operating and set up 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.

(59) These are actions prescribed by the Civil Procedure Code (1908). Less used because of longer time frame, delays and cost. Moreover, it is sometimes difficult to narrow down the expansive issues of environmental damage.

(60) 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.

(61) The *Gram Adalat* (village court), once established, could be used to settle village disputes related to local environmental problems. This pro-people legal mechanism would be less adversarial and would help to provide better access to justice with reduced cost, informal procedure and with tight time-frame. See: the Gram Adalat Bill 1998.

(62) 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.

(63) The main reasons for non-implementation of environmental regulations in Bangladesh 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". Paper collected from BELA, Dhaka, Bangladesh.

(64) 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 environmental harm would be considered as environmental friendly product.

(65) 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. Moreover, under the Forest Act 1927 (Section 28), the Government may assign any village community the right of government over any land which has been constituted as reserved forest. The community in charge of that forest would be responsible for the protection and conservation of such forest.
