

Increasing Access to Environmental Justice









A Resource Book for Advocacy and Legal Literacy in South Asia

J. Mijin Cha



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International Centre for Integrated Mountain Development

The International Centre for Integrated Mountain Development (ICIMOD) is an independent 'Mountain Learning and Knowledge Centre' serving the eight countries of the Hindu Kush-Himalayas – Afghanistan , Bangladesh , Bhutan , China , India , Myanmar , Nepal , and Pakistan  – and the global mountain community. Founded in 1983, ICIMOD is based in Kathmandu, Nepal, and brings together a partnership of regional member countries, partner institutions, and donors with a commitment for development action to secure a better future for the people and environment of the extended Himalayan region. ICIMOD's activities are supported by its core programme donors: the governments of Austria, Denmark, Germany, Netherlands, Norway, Switzerland, and its regional member countries, along with over thirty project co-financing donors. The primary objective of the Centre is to promote the development of an economically and environmentally sound mountain ecosystem and to improve the living standards of mountain populations.

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in South Asia**

J. Mijin Cha

International Centre for Integrated Mountain Development (ICIMOD)
Kathmandu, Nepal
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FOREWORD

For local communities in the Himalayan region, issues of environmental justice are an integral component of daily existence. With most mountain livelihoods traditionally dependent on access to land, tenure and use rights are fundamental to people's ability to feed their families. Tenure and use rights are also the most critical factor in motivating mountain people to either invest in and conserve their environment, or use it to satisfy short term needs. The injustice of many arrangements is all too common, and all too commonly a source of unrest and even violent conflict.

Today, new issues of environmental justice are also confronting mountain communities. A typical example of the basis for current environmental struggles in the mountains of the region is that the environmental burdens of hydropower generation (such as dams, changes in water flow, and resettlements) are carried by the mountain people, while the benefits (such as a safe and environmentally friendly supply of irrigation and electricity) are mostly enjoyed in the cities and the plains.

The basic idea of environmental justice is to explore the sharing mechanisms of environmental burdens and ensure that these burdens are not only laid on the shoulders of the weaker sections of the society. It is based on the larger ideal of the fundamental right of each individual to live in a clean and healthy environment. ICIMOD, with its long experience in mountain development, recognises that any environmental burden should be shared in an equitable way to improve the sustainability of development interventions, provide better motivations for conservation, and reduce social and economic inequities.

Most of ICIMOD's regional member countries have a good legal basis for ensuring environmental justice. However, knowledge about the legal options and processes is not widespread. With this resource book on advocacy and legal literacy in South Asia, we attempt to close a part of this knowledge gap and thus facilitate access to environmental justice opportunities. The knowledge provided by this book with its examples from Bangladesh, India, and Nepal should help users to become familiar with the basic legal concepts and practices related to the environment in these countries. It also provides a basis for training courses on this emerging and vitally important topic.

This resource book is an outcome of the 'Minority Rights and Environmental Justice' project initiated in 2004 by the Ford Foundation and ICIMOD. I hope that it will be of use to many people and organisations trying to decrease the environmental burdens of marginalised people and contribute to more socially inclusive and environmentally sustainable societies.

J. Gabriel Campbell, Ph.D.
Director General, ICIMOD
March 2007

ACKNOWLEDGEMENTS

This manual is the product of an ICIMOD project on ‘Advancing Minority Rights to Environmental Justice in the Hindu Kush-Himalayas’. The project is financially supported by the Ford Foundation and is part of a shared vision to increase understanding of, and access to, environmental justice. The struggle for livelihood security and access to and use of natural resources is an integral part of environmental justice, or injustice, as the case may be. As such, I dedicate this manual to those individuals who face this struggle and so bravely fight to assert their rights, even against seemingly insurmountable odds. It is my hope that this manual will provide tools that can be used in their struggle.

I would like to thank the Ford Foundation, ICIMOD, and ICIMOD’s Director General Dr. J. Gabriel Campbell for providing me with the opportunity to work in the Himalaya and create this manual. In particular, I would like to thank Dr. Michael Kollmair and all my colleagues in the Culture, Equity, Gender and Governance programme. Special thanks to Ms. Radhika Gupta for all her help and support. The support of Susan Sellars-Shrestha (editing) and Dharma R. Maharjan (layout) ensured that this manual could be published in its current form. The review of Narayan Belbase (IUCN Nepal) provided additional value and insights to the content, as well as an update on the Nepal Interim Constitution.

Very special thanks to our friends and colleagues in the field who provided invaluable support and input in helping to shape the content and form of this manual. A special thanks to all our friends in the Chittagong Hill Tracts at Green Hill and Trinamool Unnayan Sangstha, and the participants who took part in our Environmental Justice workshop in Khagrachari district.

Finally, on a personal note, many thanks to my parents for their love and support, and to my friends in Nepal who helped make it a home for me.

Dr. J. Mijin Cha

ACRONYMS AND ABBREVIATIONS

ADR	alternative dispute resolution
BELA	Bangladesh Environmental Lawyers Association
CEQA	California Environmental Quality Act
CHT	Chittagong Hill Tracts
EIR	environmental impact report
NEPAP	Nepal Environmental Policy and Action Plan
NGO	non-government organisation
PIEL	public interest environmental litigation
PIL	public interest litigation
Rs	rupees
US	United States

INTRODUCTION

Environmental justice is a newly emerging idea in South Asia. While local communities have been fighting environmental struggles for years, environmental justice aims to look at the issues from a new angle. As part of a larger ideal of the fundamental right of each individual to live in a clean and healthy environment, environmental justice aims to ensure that marginalised and weaker members of a community are not forced to bear the main burden of environmental hazards or harm. There is an explicit recognition of the increased burden that marginalised communities face.

While the concept originally arose in the 1980s in the United States, the issues surrounding environmental justice have a different focus in South Asia. In particular, in the Himalayan region, access to and use of natural resources contributes significantly to the determination of what is, or is not, an environmental burden. For instance, the ability to access land for agricultural purposes affects those who rely on subsistence farming to a far greater degree than it affects those with other sources of livelihood.

ABOUT THIS RESOURCE BOOK

This book aims to provide a resource to community-based organisation (CBO) and non-government organisation (NGO) workers to increase local-level awareness of environmental justice, both as a reference book and, to a smaller degree, as a training resource. The theme of the resource book is how to increase ‘legal literacy’ (familiarity with basic legal concepts and practices) in relation to environmental justice. While there are several ways to access justice, this resource book focuses on legal ways because a basic awareness and understanding of the law is arguably the first step to accessing justice.

Often the idea of law and legal systems alienates individuals who have no experience with such matters. The purpose of this resource book is to provide information on law and legal systems generally and environmental justice specifically. Once familiar with the basics of law, individuals can then understand their rights and how to enforce them. This resource book also gives examples of situations where certain laws have been used to protect the environmental rights of a community or individual.

The resource book is divided into two main parts: Part 1 is generic and Part 2 is country specific. Part 1 is dedicated to increasing legal literacy, in other words, familiarity with the idea of law and the difference between customary and formal laws. It also defines environmental justice and introduces the idea of ‘legal gateways’ — ways in which the legal system and law-making systems can be accessed.

Part 2 sets out the relevant basic constitutional provisions and environmental legislation in Bangladesh, India, and Nepal. Rather than including every environmental statute, the resource book focuses on laws that directly affect rural communities in the Himalayas. For example, while laws regulating industrial pollution are not included, laws on forest use and conservation are included. Industrial pollution is more likely to affect urban populations than rural populations. Forest use and conservation, on the other hand, greatly affects the lives of rural citizens in the Himalayas.

Part 2 provides individual country environmental legislation to facilitate cross-learning between countries. For instance, advocates in Nepal can see how environmental legislation has evolved in India or Bangladesh and keep a few examples of successes in mind when creating or advocating for new environmental legislation within their own countries.

To further legal literacy and familiarity, two annexes are included in the resource book. Annex 1 provides a glossary of commonly used legal terms and expressions. Annex 2 provides a detailed discussion of public interest litigation. Public interest litigation (PIL) has been used frequently to enforce environmental rights since the 1980s, especially in India where the judiciary has developed an extensive body of PIL jurisprudence.

HOW TO USE THIS RESOURCE BOOK

This resource book can be used in two ways. Firstly, it can be used as a reference book for issues of environmental justice, as well as the basics of environmental law and legal systems. Secondly, it can be used as training material for advocates, civil society and community-based organisations to educate them on issues of environmental justice.

Suggested workshop format

The two-day training below is designed to assist organisations (NGO or CBO) working in environmental justice (or related fields) to increase legal literacy and the range of strategies and tools available to them.

Objectives: At the end of the training, participants will be able to examine and explore the concepts, strategies and tools of environmental justice and to reflect upon and assess their own environmental justice issues/context.

Suggested modules:

Day 1	Introductory Session:	Getting to know each other Expectations Training overview
	<i>break</i>	
	Session 1:	Conceptual and historical overview of environmental justice in general and in the South Asia context (lecture and discussion of Chapter 1).
	<i>lunch</i>	
	Session 2:	Environmental justice strategies and tools: the Kettleman City Case and the Adavasi Struggle (Chapter 1). Group exercise: Participants may break into at least two groups. Each group is given one of the above case studies to discuss and come up with a list of the strategies and tools used. Each group then presents their case and strategies/tools to the rest of the participants. The facilitator may also give participants a hand out of the strategies and tools listed after the case studies at the end of Chapter 1.
	<i>break</i>	
	Session 3:	Orientation to country specific environmental legislation in Bangladesh, India or Nepal (lecture and handout Chapter 4, 5 or 6). The focus could be tailored to one or more countries depending on the needs of the participants.
Day 2	Session 4:	Case study analysis to reflect upon the applicability of environmental justice laws in a particular context (Chapter 4, 5 or 6). Group exercise: Participants discuss, reflect upon and analyze relevant landmark cases, for example: <ul style="list-style-type: none">• Bangladesh the BELA Writ from Chapter 4• India the Delhi Air Pollution Cases from Chapter 5• Nepal the Godawari Marble Case and/or Thapa v. The District Forest and Morang from Chapter 6
	<i>break</i>	
	Session 5:	Action planning: The application of environmental justice concepts, strategies and tools to environmental justice advocacy in own community/country. This session could be supplemented by a hand out of Table 1: Legal gateways (Chapter 2).
	Closing Session:	Wrap-up Evaluation Closing

PART 1:

ENVIRONMENTAL JUSTICE

CHAPTER 1: INTRODUCTION TO ENVIRONMENTAL JUSTICE

In this Chapter

- ▶ *Environmental justice and other terms defined*
- ▶ *The history and evolution of the environmental justice movement and the Kettleman City Case*
- ▶ *Environmental justice in South Asia and the Adivasi struggle*

Definitions

Environmental justice

In its most basic form, environmental justice is the struggle against the unfair environmental burden often placed on marginalised communities.

Marginalised communities

Marginalised communities, sometimes referred to as minority communities, are communities separate from the mainstream, majority sector of society. 'Marginalised' is a more appropriate term than 'minority' as the community facing marginalisation may not be a numerical minority.

A marginalised community may be separated from the mainstream by:

- race or ethnic origin
- class or economic status
- caste
- religion
- geographical remoteness or isolation

Communities can be marginalised in several ways, most commonly by:

- **Lack of political representation:** Lack of political representation can lead to poor political voice and the enactment of non-beneficial governmental policies and legislation.
- **Lack of social representation:** Lack of social representation often leads to a lack of political will or under-representation.

For example: If all people living in Bangladesh are considered to be Bengali, the existence of indigenous populations is ignored. As a result, the customs, traditions, religions, practices, and other aspects of indigenous cultures have no importance. This results in the marginalisation of indigenous peoples both socially and politically.

Ethnic minorities often have less access to resources, lower incomes, and lower levels of education, all examples of marginalisation.

Marginalised communities have less political power than mainstream communities. *For example:*

- They may have faced severe social repression — as in the case of Dalits in India and Nepal.

Environmental justice is the struggle against the unfair environmental burden often placed on marginalised communities

- They may also have faced political repression by governments — such as religious minorities in previously Taliban-controlled Afghanistan.
- They may also be living in rural areas with less developed infrastructure/less services and are more vulnerable to poverty.

Environmental burdens

Environmental burdens range from polluted air and water to diminished access to natural resources.

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Air and water pollution are beginning to spread outside of urban areas into rural areas. The high population density in South Asia exacerbates this trend. Urban centres are continually expanding, bringing urban pollution to rural areas. Air and water pollution affect marginalised communities to a greater degree than mainstream communities for several reasons:

- Marginalised communities often lack the resources to install water treatment processes, for instance, to ensure safe drinking water.
- Land next to polluting industries tends to be cheaper and, therefore, one of the few places where marginalised communities can afford to live.
- Many low-wage jobs such as rickshaw driving or manual labour take place outdoors and result in prolonged exposure to air pollutants.

Environmental burden can also refer to a difficulty in accessing natural resources. Often marginalised and rural communities find it difficult to access natural resources due to:

- Government action, such as the privatisation of forest lands or creation of national parks and protect areas.
- Historic land disputes resolved in favour of richer, more powerful members of a community.

Marginalised communities are very often either landless or small land holders. Additionally, whatever land they possess is often poor in quality, leading to a reduced livelihood. Marginalised communities also face the constant fear of displacement. Displacement can occur for a variety of reasons:

- a large dam project flooding their lands
- government occupation or privatisation of their forest lands
- large construction projects

Disproportionate environmental burdens

Environmental burdens can disproportionately affect marginalised communities because:

- Marginalised communities may be exposed to more toxins than mainstream communities.
- The same environmental burden may affect marginalised people's lives more than it would affect others.

For example: if water resources become scarce, those with more money and resources may be slightly inconvenienced by having to conserve or buy water. However, for a woman living in a rural community, a water shortage may mean that she has to walk further to fetch water. This places a greater physical burden upon her and also leaves her with less time to complete her other tasks.



Patanjali Yonzon

Women fetching water in Nepal

Environmental Justice Movement

The issues central to the idea of environmental justice existed long before the terminology evolved. The idea that marginalised communities bear a disproportionate burden of environmental harm can be traced back many years.

However, the term 'environmental justice' did not arise until the mid 1980s. Around that time, a study released in the United States of America found that minority communities were bearing a larger burden of environmental harm than others. The study found that over 90% of hazardous waste industries (industries that create harmful pollution such as waste incinerators or hazardous waste dumps) were located in 'communities of colour'.¹ Subsequent studies found that race was the number one factor in locating these industries. Areas where African American and Hispanic American communities lived were the most likely to be chosen as locations for the placement of hazardous industries. This led to the emergence of a movement now known as the environmental justice movement.

The environmental justice movement is distinctive because it looks at cases of environmental harm, not just as a purely environmental concern, but also as a civil rights or human rights issue. The idea of environmental justice recognises the fact that clean air and water and non-toxic living conditions are basic civil rights, not just environmental concerns.

The inclusion of human rights allows for the use of additional legal tools in the fight for environmental justice. Instead of using only environmental statutes, environmental justice advocates also look to civil rights law for protection.

Environmental justice advocates in the US, not only brought the idea of civil rights and the environment together, they also had a unique approach: Instead of a purely legal strategy of continually engaging in legal battles, environmental justice groups aim to increase a community's ability to effectively participate in the decision-making process. The legal aspects are just one part of a broader movement focused on changing the way decisions are made.

Environmental justice looks at environmental harm as an issue of environmental concern and as an issue of civil and human rights.

¹ 'Communities of colour' is a term adopted and used by people of colour as a chosen means of self-reference and nomenclature, especially in North America.

The Kettleman City Case

Background

In the early 1980s, the residents of Kettleman City, California discovered a toxic waste dump just a few miles from their town. Kettleman City is a small town of farm workers. Over 90% of the residents are Latinos and many of them speak only Spanish. While they are no longer a numerical minority in California, Latinos are still marginalised and thought of as a 'minority' community.

The toxic waste had been dumped near Kettleman City since the 1970s without the community's consent or knowledge. The situation became urgent in 1988 when the residents discovered that there were plans to build a toxic waste incinerator at the same location. Chem Waste proposed to build an incinerator that would burn up to 108,000 tons of toxic waste every year. This meant that 5,000 truck loads of toxic waste, in addition to the hundreds of daily trucks, would pass through Kettleman City.

Remarkably, the residents did not come to know about this from Chem Waste, the owner of the dump, or state or local officials. Instead, an organiser for Greenpeace, an international environmental NGO, notified the residents of the plans.

Community action

Local residents mobilised and began to gather information. They formed an organisation called El Pueblo para el Aire y Agua Limpio (People for Clean Air and Water). During their research, they found a report that confirmed that marginalised communities do indeed face a disproportionate environmental burden. The report suggested that companies and localities should place garbage incinerators in, among others:

- rural communities
- poor communities
- communities with low education levels
- small communities

The reason given was that these communities would offer the least resistance. It was a stark view of the reality of environmental decision making.

The legal battle

Under the California Environmental Quality Act (CEQA) an Environmental Impact Report (EIR) must be completed to examine the environmental impact of a proposed project on a location or community. If there is a negative environmental effect, alternative or mitigation measures must be proposed.

The EIR on the toxic incinerator was 1,000 pages, highly technical, and only in English. After much pressure from the community, Chem Waste prepared a scant five-page executive summary in Spanish.

In conjunction with the EIR, the Planning Commission held a public hearing on the incinerator proposal. About 200 Kettleman City residents attended, hoping to testify at the hearing. They even brought their own translator. However, the Commission refused their request, stating that translation was only allowed in the far back of the room and not during testimony. The residents testified anyway, in Spanish, from the front of the room. The Planning Commission approved the incinerator. The residents appealed, but their appeal also failed.

It seemed that the County — already receiving \$7 million dollars per year in revenue from Chem Waste's existing dump — had too much to gain from the project. The incinerator would almost double the tax revenue that the County received from the toxic waste dump. With the incinerator, the County would receive about one sixth of its annual revenue from this single company.

Finally, the residents filed a law suit under the CEQA arguing that the EIR was not sufficiently analysed. The law suit ultimately succeeded.

The judge ruled that the EIR had not sufficiently analysed the toxic waste incinerator's impact on air quality and on agriculture in the area. The judge also ruled that the residents of Kettleman City had not been meaningfully included in the permitting process. In September of 1993, Chem Waste withdrew its application.

Strategies and Tools

The Kettleman City case highlights several important environmental justice strategies:

1. Community mobilisation

The Kettleman City case shows the strength that communities have when they mobilise. The majority of the residents in Kettleman City were Latino and a great number of them did not speak English, yet they were able to mobilise enough support and pressure to force a major company out of their community.

2. Effective use of environmental statutes

The key to stopping Chem Waste from building a toxic incinerator was for El Pueblo to act as a citizen enforcer and diligently watch Chem Waste's movements. Through this, the citizens' group was able to point to the inadequacy of the EIR and use the environmental statute to take their cause to court.

3. Effective use of non-legal tools

While the legal aspect was decided in El Pueblo's favour, the struggle would not have been as successful without the use of non-legal tools. The fight against Chem Waste began as a media campaign with the help of the Greenpeace organiser. Action was taken through citizens' groups, NGOs, and media outlets. Ultimately, the combined pressure forced Chem Waste to abandon their original proposal.

4. Interlinking of civil rights and environmental rights

Not only did Chem Waste fail to adequately consider the EIR, it did not allow for effective public participation in the decision making process. Two laws were violated:

- the environmental statute (the CEQA) requiring an EIR assessment
- the right to public participation

The first is purely an environmental concern. The second is purely a civil right — the right to effective participation. Through the combination of the two rights, El Pueblo was able to stop the toxic waste incinerator from entering their community.

Environmental Justice in South Asia

In South Asia, the goal of environmental justice is still to eliminate the disproportionate environmental burden placed on marginalised communities. There are, however, a few different points of emphasis in the South Asia context:

- In South Asia, there are many more factors leading to marginalisation, including religion, class, and ethnic background. In the US, the issue revolves almost exclusively around race and poverty.
- The scope of environmental issues in South Asia includes access to natural resources and land for livelihood and equitable sharing of benefits arising from the utilisation of natural resources, as well as urban pollution concerns.

The emphasis on using human rights protection against environmental harms remains the same. It is this emphasis on human rights that led many courts in South Asia to find that the right to live in a clean environment is part of the fundamental right to life

In South Asia there are many more factors leading to marginalisation, and the scope of environmental issues includes access to resources.

The Adivasi Struggle

Background

In the Indian state of Andhra Pradesh, the indigenous Adivasi population is nearly 100,000 people, roughly 2% of the total population. The Adivasi population in India is estimated at 10% of the total population. The Adivasis in Andhra Pradesh mainly rely on subsistence farming and the collection of non-timber forest products for their livelihood.

Tribal rights

Several pieces of legislation grant rights to Adivasis in relation to land ownership:

- The Fifth Schedule of the Constitution of India restricts the entry and ownership of land and immoveable resources in Adivasi areas by non-Adivasis and outsiders.
- The Scheduled Area Land Transfer Regulation Act of 1959 voids the transfer of land or immovable property from tribal to non-tribal in scheduled areas (areas reserved for scheduled tribes).
- At a more regional level, the Andhra Pradesh Scheduled Area Land Transfer Regulation (Amendment) Act, Section 1 of 1970 prohibits the transfer of land from non-tribal to non-tribal in scheduled areas.

The displacement of Adivasis has been happening for decades: In the 1950s and 1970s by multipurpose projects like reservoirs and hydroelectric projects; in the 1980s by mineral-based projects, paper, pulp, and wood projects; and since the 1990s, by multi-national companies. These projects appropriated large tracts of tribal and forest lands and natural resources. State policy also turned to the private sector for industrialisation, particularly in the power and mining industries.

Most of the mineral deposits in India are found in tribal and forest regions (almost 90% of coal mining in India is in tribal areas). Nearly 2 million people, 70% of which were Adivasi, have been displaced by mines in tribal areas. The impact of mining on the Adivasi has been devastating. Problems include:

- loss of control over resources and common property
- increasing pressure on land for local communities
- no economic gain for local communities
- loss of food security and domestic fulfilment
- deteriorating status and health of tribal women
- political unrest
- environmental destruction

Struggle to reclaim lands in Visag District

The Adivasis' struggle in the Visag District began in 1970s when the Government denied 14 tribal villages the title deeds to their land, instead granting mining leases to non-tribals and private companies. This was illegal according to the Scheduled Area Land Transfer Regulation Act of 1959.

The Adivasis petitioned the government, unsuccessfully, for two decades to grant title deeds. Finally, they enlisted the help of SAMATA, a small voluntary social action group. SAMATA successfully filed public interest litigation (PIL) writs on their behalf. The PILs were filed on the basis that the Government was also a 'person' and as such, was a non-tribal and did not have the power to transfer tribal lands to non-tribals.

As a result of their judicial success, the Adivasis gained courage and organised themselves to demand land rights. After a drawn out, two-and-a-half year legal battle at the provincial High Court and a two-year battle at the central Supreme Court, the Supreme Court gave its historic judgement in July 1997.

The 1997 SAMATA judgement

The Supreme Court ruled as follows:

- The Court recognised the 73rd Constitution Amendment Act and the Andhra Pradesh Panchayat Raj (Extension to Scheduled Areas) Act allows local bodies to act as institutions of self-government.
- The Court ruled that Government lands, forest lands, and Adivasi lands in Scheduled Areas cannot be leased out to non-Adivasi or private industries, including the mining industry.
- The Court held that the transfer of leases is prohibited.

- The Court reiterated the need to give the right of self-governance to Adivasis.
- The Court directed that at least 20% of the net profits of companies be set aside in a permanent fund for the establishment and maintenance of water resources, schools, hospitals, sanitation, and transport facilities, and that this 20% allocation did not include expenditure for reforestation and the maintenance of the ecology.

All mining operations in the region came to standstill during the legal battle. The company finally offered Rs.1,500,000 compensation per acre of wetland, instead of the original Rs.1,500 per acre. A joint petition by the State of Andhra Pradesh and the Central Government asking the Court to modify the SAMATA order was dismissed. The original court decision stands.

Strategies and Tools

Environmental justice must be a multi-tiered approach that encompasses media, community organisations, non-government organisations (NGOs), and any other willing participant. Together, they can achieve more than could be achieved through individual action. The strategies and tools used in the SAMATA case include:

1. Community mobilisation

While SAMATA brought the PIL to court, the local community initiated civil society measures, such as protests, through their own initiative. Organising protests indicates a certain level of confidence. For a community that has historically faced severe oppression, the confidence to organise protests is a great gain.

2. Effective use of constitutional provisions

The SAMATA writ petition successfully used two constitutional provisions in arguing for the revocation of the mining leases: The Fifth Schedule of the Constitution, which forbids the transfer of tribal land to a non-tribal, and Article 21 of the Constitution, which guarantees the right to life.

3. Effective use of non-legal tools

The Adivasi struggle in Andhra Pradesh encompassed the use of media outlets and networks of community organisations in a struggle against the government and mining industry. The government and industry had access to more monetary and legal resources than the Adivasis. However, the use of multiple non-legal tools (networking with other campaigns and movements, linkages with scientific and academic communities, media advocacy, dialogue with the government, and legal action and advocacy) gave the community groups the ultimate edge in their struggle.

4. Interlinking of civil rights and environmental rights

The Court stated that the right to life is beyond mere survival or an animal existence. Instead, the right to life means a right to live with human dignity with a minimum sustenance and shelter. The Adivasis, therefore, have a fundamental right to social and economic empowerment — the lands in scheduled areas are preserved for the social and economic empowerment of the Adivasis. The combined force of constitutional provisions granted environmental rights using human rights provisions, without explicitly listing environmental rights. This interlinking of environmental rights and human rights is fundamental to environmental justice.

CHAPTER 2: LEGAL GATEWAYS

In this Chapter

- ▶ *Legal gateways defined*
- ▶ *Five gateways to environmental justice*

Definition

Legal systems are the primary way in which rights are enforced and protected. However, they are often criticised for being too complex, time-consuming and expensive. The environmental justice context is no different. In fact, there are added complications in environmental justice cases because:

- Environmental justice cases often centre on sensitive issues, such as land rights for marginalised communities.
- Environmental protection suffers more from judicial time delays because every passing day can result in additional damage to the environment and/or communities or public health that is often irrevocable.

The ability of individuals to access legal systems and law-making processes is a primary focus of environmental justice advocates. The ways in which legal systems and laws can be accessed are called legal gateways. The abundance, or conversely lack, of available gateways indicates an individual's level of access to the legal system.

Legal gateways can be classified into two different categories:

1. Gateways that access the way laws are made.
 - Lobbying or administrative review (i.e., the review of administrative agency actions by a neutral party)
2. Gateways that access the way laws are applied.
 - Litigation activities to enforce laws that have already been created, and public interest litigation where individuals bring a legal action to protect the existence of fundamental rights.

Legal gateways are important because, no matter how active the judiciary may be, without access to legal measures the legal system is a meaningless tool to the people who cannot access it.

For access to environmental justice there are five commonly used gateways:

1. Actual legal remedies
2. Statutory consultation procedures
3. Administrative review
4. Defensive use of the legal system
5. Alternative dispute resolution

**The ways in which
legal systems
and laws can be
accessed are called
legal gateways.**

Actual legal remedies are remedies provided by laws and regulations, e.g., public interest litigation (PIL) writ petitions.

Actual Legal Remedies

Actual legal remedies are remedies that are provided by laws and regulations. Any time the legal system is used to enforce a legally guaranteed right is an example of an actual legal remedy.

For example: Many environmental protection regulations impose fines on violators. Going to court to enforce those fines is an example of an actual legal remedy.

Public interest litigation (PIL) writ petitions fall under the actual legal remedies gateways. A more detailed analysis of PIL is presented in Annex 2. Briefly, public interest litigation is a form of legal action that allows individuals to access the judicial system with more relaxed procedural rules. PIL writ petitions may only be filed for issues of public interest, such as environmental protection or the protection of fundamental rights. Apart from PIL, some environmental protection legislation includes a provision which allows citizens to enforce the content of the legislation. Using the 'citizen suit' provision, individuals can bring suit before the court when the state fails to enforce the statute.

One of the benefits of PIL is that writ petitions can be filed directly with a competent court or judge and are not subject to the same rigorous and tedious procedural rules as other petitions. However, due to the large judicial backlog that exists in most countries, even with the relaxed procedural rules, PIL writ petitions can take years to be reviewed. However, even if unsuccessful, PILs can be used as mobilising tools to gather community support and momentum on issues of environmental justice.

Statutory Consultation Procedures

Statutory consultation procedures refer to statutory requirements for community consultation.

For example: Within a statute that governs construction projects or permitting procedures, the section that requires some form of community consultation is a statutory consultation procedure.

Many statutes require an environmental impact assessment (a document that states the environmental impact a project may have) before a permit can be issued or construction can take place. As part of the assessment, communities must be consulted to inform them of the project, what the environmental impacts will be and how these impacts will be mitigated. This process is an example of a statutorily required consultation procedure.

Administrative Review

Administrative review is the review of an administrative act or decision of an agency or branch of the government (such as government departments or ministers) by a neutral party. Administrative review improves the public accountability of government. There are two main benefits to administrative review:

- It enables citizens to monitor the legality and merits of governmental decisions that affect them.
- It is a measure of accountability for government decision-making.

Traditionally, one of the main functions of the judiciary is to conduct administrative reviews of government agencies or administrative acts to determine whether they conform to legal requirements.

For example: If the Forest Department passed a regulation impacting on community forestry, the community affected could ask the judiciary to review the Forest Department action to see if it abides by existing laws and regulations. If the judiciary determines that the action is not legal, the Forest Department would be forced to withdraw its action.

This is different from a legal action because there are no rights involved. The community asking for administrative review is only asking the judiciary to review the legality of the decision-making process and result. They are not asking for any rights to be protected or created.

Defensive Use of the Legal System

Defensive use of the legal system is for citizens who want to use the legal system, not to positively assert a right, but to block an action or policy. In essence, the legal system is used to 'defend' citizens against government policy or action. Normally, the courts are approached to protect or assert the rights of citizens. When using the legal system in a defensive way, the courts are approached to stop the government from enacting a policy or regulation. Further, when an individual or corporation's action is likely to violate the rights guaranteed by the Civil Liberties Act, the legal system is used in a defensive way to prevent violation of those rights.

For example: If the government were to pass a regulation banning NGO activity in certain areas, such as areas where natural resource uses are in conflict, citizens could approach the courts to block this regulation. The courts would then be asked to defend the citizens and NGOs against a government action.

Alternative Dispute Resolution

Alternative dispute resolution (ADR) is an alternate way of resolving disputes without going to court. Typically, in an alternative dispute resolution both parties agree to be bound by the decision of a neutral arbitrator. The neutral arbitrator is someone who both parties have agreed to present their cases to. The arbitrator, after hearing both sides, comes to a conclusion that both parties must accept based on the guiding legal principles that govern the case.

Once parties have agreed to ADR, the decision of the arbitrator cannot be appealed to a court, unless there is gross misconduct by the arbitrator. The benefit of ADR is that it is a much quicker way of resolving disputes. The risk, however, is that any decision must be accepted without any availability of appeal.

For example: If two families were fighting over a plot of land, both parties could agree to go through ADR to resolve their dispute, instead of filing a claim in court. The arbitrator does not need to be a judicial administrator. The parties could appoint a community leader or elder to hear the claim and come to a decision.

The legal system can be used defensively to block an action or policy, instead of merely positively asserting a right.

Table 1: Legal gateways			
Legal Gateway	Use	Advantages	Disadvantages
Actual Legal Remedies (e.g. PIL)	To enforce remedies provided by law, e.g., to protect the environment or fundamental rights	<ul style="list-style-type: none"> • PIL writs can be filed directly with a judge. • Not subject to strict procedural rules. • Even if not successful, PIL publicises the issue and may lead to policy change. 	<ul style="list-style-type: none"> • Litigation may take many years. • Costly
Statutory Consultation Procedures	To ensure community consultation	<ul style="list-style-type: none"> • Enforced by an application to the court, not a full court case; therefore, quicker and less expensive than some other legal actions. • Allows community to voice concerns and express how they feel about the project. • Gives community notice of project so that action can be taken if opposed to the project. 	<ul style="list-style-type: none"> • Limited effectiveness — can only result in the court ordering community consultation. • There is no requirement for community concerns to be followed.
Administrative Review	To review an administrative act of a government body	<ul style="list-style-type: none"> • Allows citizens to monitor government decisions. • Encourages government accountability. • Less formal than some other legal actions. • Less expensive than some other legal actions. 	<ul style="list-style-type: none"> • No rights are involved so the court can only hold that the government action is legal or illegal.
Defensive Use of Legal System	To block an action or policy of the government	<ul style="list-style-type: none"> • Allows citizens to stop the government from doing something. • Quicker and less expensive than some other legal actions. 	<ul style="list-style-type: none"> • Formal legal procedures must be followed.
Alternative Dispute Resolution	To resolve disputes without going to court	<ul style="list-style-type: none"> • Accessible • Inexpensive or free • Informal • Can be very quick • Decision is made by someone with local knowledge at the local level. • Education no bar to access. 	<ul style="list-style-type: none"> • Decision is binding; cannot be appealed to a court. • Sometimes considered 'rough justice'.

CHAPTER 3: CUSTOMARY AND FORMAL LAW

In this Chapter

- ▶ *Customary law and legal systems defined*
- ▶ *Comparison of customary law and formal law*
- ▶ *Conflict between the two systems*

Definition

Every country has a formal legal system that is defined by a uniform set of state-made, formal laws. Customary law, on the other hand, is a non-state legal system that parallels the system of formal laws.

Customary law, also called traditional law, is not a fixed set of rules or instructions on how to use land and other resources. Instead, customary law is more of an expression of social relationships. It is an evolving body of norms and rules that governs the behaviour of a community. Formal law is for the community. Customary law is *within* the community.

Customary laws are an integral part of the social, political and economic ways of the societies that follow them. Customary laws are integrated into the moral code of a community. There is no separate legal system or sphere in communities that follow customary law. Customary law covers issues ranging from conflict resolution mechanisms, to irrigation, to social customs and morals.

The use of customary law has three distinct advantages.

1. The officials presiding over the dispute live within the community and are, therefore, very familiar with the applicable customary law.
2. The customary court procedures are relatively flexible, especially when compared to formal legal systems.
3. There is a high possibility of reconciliation and compromise because the dispute usually goes through several steps of resolution.

For example: In the Chittagong Hill Tracts a dispute is first taken before the karbari (village chief or elder) who sits with a council of influential social leaders and other village elders who try to resolve the matter through informal hearings. If the matter cannot be resolved by the karbari it goes before the headman or clan chief.

Customary and Formal Law Compared

There is often a struggle between formal legal systems and customary systems. Formal legal systems, by their very nature, are strict and inflexible. In contrast, customary laws are the exact opposite and remain fluid and easily adaptable. Problems occur when formal legal systems try to force formal legal rules on communities that follow customary norms and laws.

Customary law, or traditional law, is an evolving body of norms and rules that governs the behaviour of a community.



Sanjoy Madhani

Local community leaders meeting in Nagaland, India

For example: Many customary legal systems encourage group ownership of resources, such as forests. This is incompatible with the more individualistic nature of formal law. Trying to force the customary notion of group ownership into a formal, individualistic regime would not result in any workable compromise.

Table 2: Comparison of customary and formal law

Customary Law	Formal Law
Customary law is usually unwritten and is not codified. It is not restricted and limited to a set definition or meaning.	Formal laws , or statutory laws, are written and codified. They are formally recorded and referenced in writing.
Customary laws are created from within a community and are socially accepted and observed.	Formal law is created by a state-entity, such as the parliament or legislature. It is accepted and observed, not necessarily through social acceptance, but through a formalised system of rule-making.
Customary laws , due to their more informal nature, can change more easily than formal laws. Customary laws change when the particular needs and interests of a social group change.	Formal laws are more difficult to change. Formal laws can be changed only by following certain set criteria and rules.

Formal legal systems are strict and inflexible; customary laws are fluid and adaptable.

For example: In the natural resource context, an example of customary law would be the community forest management methods used by indigenous people who work and live within the forests. There are rules and norms by which people are expected to abide. However, they are unwritten and they are created out of and by the community. An example of formal law would be the actual statutes that govern the land according to the government. For example, the Indian Forest Conservation Act, which sets out who can control the forests and who can benefit from the forests, is formal law. It is written and it was passed by the legislature and is meant to govern all individuals, not just specific communities.

Conflict between Customary and Formal Systems

In the environmental justice context, the distinction between customary and formal law is particularly relevant.

For example: In South Asia, there are several indigenous communities that practise jhum, or shifting cultivation. The ways in which the shifting cultivation is regulated and how the land is divided is provided for in customary rules and norms. However, if jhum cultivation is outlawed in the formal legal system, the communities practising jhum are left without a livelihood and the formal legal system comes into direct conflict with the customary system.

On an individual dispute level, there are two different conflict scenarios:

1. Conflict between individuals both of whom are bound by customary law.
2. Conflict between individuals where only one abides by customary law.

Table 3: Conflict scenarios in customary law and formal law

<p>Scenario 1: Conflict between individuals where both follow customary law</p> <p>Under this scenario, customary law would bind both individuals and the dispute resolution mechanisms provided for by customary law would be used.</p>	<p>Advantages:</p> <ul style="list-style-type: none"> • The individual or group that would determine the outcome of the dispute would be from the same community and familiar with the community's customs and practices. • Due to the informal nature of customary law, disputes can be resolved quickly and without the same restrictive procedures as formal law. <p>Disadvantages:</p> <ul style="list-style-type: none"> • The decision of the elder, tribal council or arbitrator is final and cannot be appealed to a higher body. • While customary law may have evolved out of the community's customs and practices, this does not guarantee that it is equitable. • Customs take years to evolve and change. Inherent discrimination, such as caste or gender discrimination, can appear in customary laws and may result in an unjust decision.
<p>Scenario 2: Conflict between individuals where one follows customary law</p> <p>Under this scenario, two issues arise:</p>	<p>Issue One:</p> <ul style="list-style-type: none"> • What venue will hear the dispute; will it be a formal legal court or will it be a customary court? <p>Issue Two:</p> <ul style="list-style-type: none"> • What law will be applied? Customary law binds those that follow the set customs and norms of a certain community. Formal law binds those that do not follow customary law.

Customary and Formal Law in the Chittagong Hill Tracts

Background

The Chittagong Hill Tracts (CHT) are located in the south-eastern corner of Bangladesh. Historically, the CHT had its own governing administration separate from the rest of Bangladesh. As a result, the CHT today applies a mixture of customary, regional, and national laws.

The traditional institutions of the CHT, to a limited extent, regulate the use of natural resources in their respective jurisdictional areas or territories. The jurisdiction of the traditional institutions, however, applies only in the administration of customary laws, not formal laws. While customary laws on personal matters, such as family laws, do not face much interference from State or national laws, customary laws with respect to land and other natural resources are much more contested. Customary land and forest rights are upheld only when they do not conflict with state law.

Formal and customary land laws

Since the CHT was annexed to British Bengal in 1860, both customary and formal land laws have been in place. However, the two systems are often in conflict. This conflict is not surprising as customary land laws evolved around communal and subsistence resource management. Formal land laws, on the other hand, focus more on individual ownership or commercial resource management and are exchange-oriented.

The authority over the management and administration of customarily held lands, such as forests, jhum land, and grazing commons, lies mainly with the headmen and the chiefs of the community. At the same time, this authority is also held by the State at the district level. The district level authority is more clearly defined than the authority of the traditional leaders. This results in the authority of government officials over untitled and recorded lands being more highly regarded than the authority of the indigenous institutions.

For example, the overall authority to regulate jhum cultivation lands is expressly given to the Deputy Commissioner, the central government's representative in the hill districts. In practice, however, the allocation of jhum lands is done according to customary law and local practice and usage. The process is completed under the authority of the headmen. The role of customary practices is not explicitly mentioned, but allowing the traditional authorities to have a direct role in land and natural resource management and administration is an implicit acknowledgement of customary law by the formal legal system.

Customary resource rights

In addition to jhum, customary resource rights over grazing lands, water bodies, and hunting are also important. Some of these rights, such as the rights over water bodies and hunting, are not directly acknowledged by legislation. Others, in relation to grazing commons and grasslands, are indirectly acknowledged in a manner similar to the jhum example. Finally, some rights, such as the right to use timber, bamboo, and other minor forest products for domestic purposes are explicitly acknowledged by formal legislation.

The problem with the co-existence of formal and customary legal systems is that when a conflict arises, the formal legal system rules are likely to prevail. Indigenous peoples' customary rights have come to be regarded as mere privileges that can be revoked by the State at will.

See Chapter 4 for more information on the CHT.

PART 2:

**BANGLADESH, INDIA
AND NEPAL**

CHAPTER 4: BANGLADESH

In this Chapter

- ▶ *Introduction to environmental justice in Bangladesh*
- ▶ *Constitutional provisions establishing a right to life*
- ▶ *Overview of environmental legislation in Bangladesh*
- ▶ *Public interest litigation, the expansion of the right to life, and the BELA case*
- ▶ *Overview of the history and governing system of the Chittagong Hill Tracts*

Introduction

Environmental protection in Bangladesh was, and continues to be, rooted in traditional legislation, including various Acts intended to provide wide-spread environmental protection and more specific legislation in areas like forest protection. Historically, there was, however, no Act detailing an individual's right to live in a clean environment.

A fundamental part of achieving environmental justice is the recognition and enforcement of every individual's right to live in a clean environment. This will ensure that marginalised communities are not forced to live in unhealthy environments and reinforce the idea that everyone, regardless of age, caste, race, religion, or gender, has an equal right to a clean environment.

In working towards this ideal, the Bangladesh judiciary has judicially created a fundamental right to a clean environment as part of the fundamental right to life. The Bangladesh Constitution does not contain an explicit right to life provision, either as a constitutional provision, or as a directive principle (a provision that gives working guidelines to the government but does not actually create rights). However, the judiciary has interpreted two provisions together, as will be discussed in more detail below, to create a fundamental right to life. Taking the idea of a right to life further, the judiciary in Bangladesh has created a right to a clean environment as part of the right to life.

Constitutional Provisions

Fundamental rights

As in all countries with a written constitution, in Bangladesh, constitutional provisions are the supreme law ruling the land. This means that no law can be passed that contradicts or negates any part of the Constitution. All legislative, executive, and judicial actions must conform to the Constitution, both in the literal words and actions and in the spirit of the words and actions.



Woman crosses flood waters, Bangladesh

Gender and Disaster Network

There are two specific articles in the Constitution of Bangladesh that guarantee fundamental rights:

1. **Article 11:** Article 11 of the Bangladesh Constitution guarantees fundamental rights and freedoms and respect for the dignity and worth of a person. However, Article 11 is limited by Article 8(2). Article 8(2) provides that the principles set out in this part of the Constitution detailing fundamental rights “Shall be a guide to the interpretation of the Constitution and of the other laws of Bangladesh”. Article 8(2) goes on to specifically mention that these principles are not judicially enforceable, that is, they are principles that should guide the Government in making its policy decisions but they, in and of themselves, do not give legally enforceable rights to citizens. They are not laws that citizens can sue in court to enforce.
2. **Article 102(1):** Article 102(1) of the Constitution gives the High Court division the power to pass necessary orders to enforce fundamental rights.

In Bangladesh, the Supreme Court is divided into two benches: the High Court and an Appeals Court. The High Court can issue necessary orders or writs to enforce fundamental rights and can move petitions on the application of an aggrieved person. The High Court can issue the following types of orders:

- Certiorari
- Mandamus
- Prohibition

No law can be passed that contradicts or negates any part of the Constitution.

Certiorari is used when the act or proceeding in question has already been completed. For example, one would file a writ of certiorari to contest a building permit that has already been issued.

Mandamus is used to compel a public functionary to do what s/he is under a legal duty to do when s/he is refusing to do it. For example, if the head of the Department of Environment was required by law to ensure that all polluting industries did not violate their operating permits, mandamus would be filed if the head was not ensuring such compliance.

Prohibition is used when the act or proceeding is not yet completed. For example, prohibition would be filed when the building permit was still under consideration by the authorities but had not yet been issued.

Fundamental right to life

The Constitution of Bangladesh does not explicitly provide for the right to a healthy environment in either its directive principles or as a fundamental right. However, Articles 31 and 32 together create a fundamental right to life, which can be inferred to include the right to a healthy environment.

1. **Article 31:** Article 31 states that every citizen has the right to protection from “action detrimental to life, liberty, body, reputation, or property”, unless they are taken in accordance with law.
2. **Article 32:** Article 32 states that, “No person shall be deprived of life or personal liberty save in accordance with law”.

The limitation on the Court is that the Court itself cannot initiate any proceedings to declare any law or action in violation of fundamental rights. For enforcement of fundamental rights, an aggrieved person must apply to the High Court Division

and then the High Court Division is obligated to consider the petition and remedy the breach of fundamental rights. Unlike other petitions, writs for the protection of fundamental rights can be filed before the violation occurs, instead of waiting for the violation to occur. This is particularly relevant in the environmental justice context.

For example: If the government were to initiate a policy that would take land from citizens and use it to build a polluting industry, a writ petition based on the assumed pollution levels could be filed before the industry was even built.

This is important because it is much easier to stop projects before they begin construction than trying to stop projects once construction has begun.

**Articles 31 and 32
of the Bangladesh
Constitution together
create a fundamental
right to life.**

Environmental Legislation

Ministry of Environment and Forest

The Ministry of Environment and Forest was created in 1989. It is the ultimate body responsible for all matters relating to national environmental policy and regulatory actions. The implementing agency for the Ministry is the Department of Environment. Apart from overseeing the activities of the implementing agency, the Ministry of Environment and Forest has major inputs in the setting of environmental policy and the integration into development of all public investment projects.

The Department of Environment has a broad mandate and regulatory power to enforce the Environment Conservation Act 1995 and the Environment Conservation Rules 1997. The Department is also responsible for:

- Setting environmental guidelines and standards for industry
- Surveillance of environmental quality and sampling
- Stipulating corrective measures for polluters
- Reviewing Environmental Impact Assessments for development projects and providing environmental clearance
- Creating public awareness
- Conducting environmental training
- Undertaking research on environmental resource management

Even though it has a large mandate, the Department is still a small agency with limited capacity to execute its mandate. To date, it has been largely unable to use the power of the environmental laws at its disposal. For instance, although it conducts spot-checks on vehicle emissions, the Department seldom enforces the provision by requiring the police to fine violators or impound vehicles. There has been a significant increase in its authority, however, with the establishment of the environment courts, which will enable the Department to bring cases against violators faster than through regular courts.

Environment Court Act 2000

The Environment Court Act 2000 established two environment courts, one in Dhaka and the other in Chittagong. The Environment Courts have jurisdiction over any matter arising from an environmental law. In other words, any violations of environmental laws, and only environmental laws, can be brought before the Environment Court.

However, private citizens can bring cases before the Environment Courts only after the complaint has been filed with the Department of Environment. Only if the Department does not respond within 60 days will the Environment Courts hear the

complaint. Cases brought by the Department of Environment can be filed directly with the Environment Courts and do not need to abide by any waiting period.

Forest Act 1927

The original Forest Act 1927 was meant to consolidate the law relating to forests, the transit of forest products, and the duty imposed on timber and other forest products. The Forest Act gave power to the Government to classify any land suitable for afforestation as a reserved forest. Once land has been classified as a reserve forest, the Government has a right to appoint an officer (Forest Settlement Officer) to inquire into and determine the existence, nature, and extent of any person's rights with respect to the reserved forest.

The reserve forest is government property and managed by the Forest Department. There are small areas of protected forest, mainly an intermediate category of forests awaiting formal recognition as reserve forest. There is a presumption that forest-produce belongs to the Government. If a question arises as to whether any forest-produce is the property of the Government, the produce is presumed to be the property of the Government until proven otherwise.

The original Forest Act was specifically amended to include a provision on social forestry by the Forest (Amendment) Act 2000 and the Social Forestry Rules 2004. Apart from defining 'social forestry', the 2000 Amendments prohibit land cultivation and attempted cultivation, and penalise activities that may cause damage to social forestry programmes. Social forestry is also sometimes called 'community forestry' and revolves around the inclusion of local communities and communities living within the forests in the management, use, and conservation of forests.

The 2000 Act defines social forestry as:

- Forestry on any land which is the property of the Government or over which the Government has proprietary rights.
- Forestry on any other land assigned to the Government by voluntary agreement of the owner of the forest.

The Government may establish a social forestry programme by assigning rights to forest-produce or rights to use the land for the purposes of social forestry through one or more written agreements.

National Environmental Policy 1992

Based on the National Conservation Strategy, an initiative by the Government to integrate environment and development into a policy framework, the National Environmental Policy was drawn up by the Ministry of Environment and Forest.

The Policy sets the basic framework for environmental action and provides sectoral guidelines. The Policy has many wide-sweeping, broad objectives. Amongst them, the Policy aims to:

- Maintain the ecological balance and overall development through protection and improvement of the environment.
- Protect the country against natural disasters.
- Identify and regulate activities that pollute and degrade the environment.
- Ensure environmentally sound development in all sectors.
- Ensure sustainable, long term, and environmentally sound use of all national resources.

The National Environmental Policy sets the basic framework for environmental action and provides sectoral guidelines.

- Actively remain associated with international environmental initiatives to the maximum extent possible.

In line with the Policy, the Government passed several environmental acts and regulations to combat industry-related pollution problems.

Environment Conservation Act 1995

The Bangladesh Environment Conservation Act 1995 gives the Director General of the Ministry of Environment and Forest the authority to enforce environmental laws. The authority enables him or her to deal with the need for pollution control and other issues. The Act was strengthened by the 1997 Environment Conservation Rules, which provide the regulatory framework for environmental management in Bangladesh.

The Act is a good example of framework legislation, meaning it provides general guidelines on environmental protection. The Act was created to:

- Provide for the control and mitigation of environmental pollution
- Facilitate environmental conservation
- Improve environmental standards

Under the Act, if the discharge of any environmental pollutant is over the prescribed limit, or even likely to exceed the prescribed limit due to an accident or other unforeseen act or event, the person responsible must mitigate or prevent the environmental pollution caused as a result of the discharge. Any person that is affected, or likely to be affected, by environmental degradation or pollution may apply to the Director General to remedy the damage or perceived damage.

Environment Conservation Rules 1997

The 1995 Bangladesh Environment Conservation Act specified the powers and functions of the Ministry of Environment and Forest and the Department of Environment and the responsibilities of industries to ensure environmental safety and rehabilitation. The Environment Conservation Rules 1997 determine the standards for air quality, water quality, noise quality, motor vehicle exhaust quality, and sewer and waste discharge quality.

The Rules classify industry into three categories:

- Green (safe)
- Orange (hazardous)
- Red (dangerous)

Based on these categories, the Rules apply increasingly stringent requirements on the more potentially dangerous industries.

According to the Rules, the public may ask the Director General of the Department of Environment for redress of grievances, apply for clearance for an investment, and give notice to an industrial unit that it is to be audited and samples collected. The Rules also provide:

- Tables of standards to be met for air and water quality
- Acceptable noise levels
- Motor vehicle exhaust concentration levels
- Effluent and waste discharge allowed from different types of industry



Krishna P. oli

The Bangladesh Environment Conservation Act 1995 enables the Ministry of Environment and Forest to deal with the need for pollution control and other issues.

Public Interest Litigation

Public interest litigation (PIL) is a recognised legal mechanism for the enforcement of constitutionally guaranteed rights involving issues of public interest. It is a legal proceeding in which redress is sought in respect of injury to the public in general. In a PIL, the collective rights of the public are affected and there may be no direct specific injury to any one individual member of the public.

The purpose of PIL is to ensure that constitutional or legal rights, benefits, and privileges are given to vulnerable sections of the community.

Some of the arguments in favour of PIL are:

- Because the constitution is the supreme law, challenging a breach of a fundamental right means that the petitioner can move to higher courts and get judgements quicker than through other means, i.e., civil or criminal law routes.
- PIL can address the problem of the non-implementation of substantive laws.

Substantive laws focus on actual issues and concerns, whereas procedural laws govern what happens and when. For example, laws detailing action to be taken for environmental protection are substantive laws. Rules detailing who to file complaints with and who can file a complaint are procedural laws. There are many reasons for the non-implementation of substantive laws, including:

- Institutional weakness and inadequacy, leading to non-enforcement and malpractice
- Outdated and inconsistent law
- Ignorance or lack of objectivity of the individual enforcing the law

Public interest environmental litigation

Building on the idea of public interest litigation, public interest environmental litigation (PIEL) aims to promote the enforcement of environmental rules and rights.

PIEL is necessary because:

- Public officials and agencies are not capable of adequately policing the environmental system due to insufficient funds, inadequate staff, and lack of expertise.
- Agencies may be unwilling to bring actions against violators due to political pressure, or the agency itself may be promoting the activity that it should be regulating.
- PIEL also reduces the government's burden to enforce the regulation. It utilises private resources saving the government money and leading to a more efficient administration of legislative policies.

PIEL also:

- Generates awareness of environmental issues on a mainstream level.
- Educates the responsible actors and creates values of environmental protection in society, even if the actual case is lost in court on issues of legal interpretation or on technical grounds.

The attention generated by a PIEL can bring about changes in behaviour that, however limited, may become significant and lead to long term change.

Until 1994, Bangladesh had no reported cases decided by the Supreme Court on environmental issues. The first environmental case was filed in January of 1994 by

The purpose of PIL is to ensure that constitutional or legal rights, benefits, and privileges are given to vulnerable sections of the community.

the Bangladesh Environmental Lawyers Association (BELA). Since that time, BELA has filed a number of cases that have contributed to the development of public interest litigation. It has filed PIEL in relation to various environmental problems, including:

- Industrial pollution
- Vehicular pollution
- Unlawful construction
- Illegal felling of public forests
- Razing of hills
- Land use and unlawful development schemes

PIEL expands the fundamental right to life

The fundamental right to life has been expanded to include anything that affects life, public health, and safety.

This 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 1996, BELA brought another petition before the Court, this time dealing with radiation levels in milk powder. Testing of milk powder imported into Bangladesh showed radiation levels above acceptable limits. The petitioner claimed that the action and inaction of government officials purporting to act under the Import Policy Order 1993–95 dealing with testing of imports for radiation was an infringement of the right to life guaranteed under Articles 31 and 32 of the Bangladesh Constitution.

In siding with the petitioners, the Court stated that, “A man has a natural right to the enjoyment of healthy life and a longevity up to normal expectation of life in an ordinary human being ... The natural right of man to live free from all the man made

The fundamental right to life has been expanded to include anything that affects life, public health, and safety.

BELA Writ Expands Right to Life

In 1994, the Bangladesh Environmental Lawyers Association (BELA) filed a writ petition before the Supreme Court that addressed air and noise pollution. The writ petition sought:

- Appropriate direction to be given to the Government of Bangladesh to perform its statutory duties and functions to control environmental pollution created by motor vehicles.
- Effective measures to ensure appropriate mitigation measures to prevent further danger to life and health from vehicular pollution.

In its petition, BELA stated that air pollution from faulty motor vehicles is universally identified as a major threat to human body and life. The pollution in Dhaka City was incompatible with conditions required for the growth of human life and ecology.

The petition also claimed that the failure of public officials to perform their statutory and public duties endangered the lives of city dwellers and the environment, to the point of violating the people’s fundamental rights.

The main thrust of the petition was that, although the right to a safe and healthy environment was not directly specified in the Constitution as a fundamental right, such a right was inherent and integrated into the right to life in Article 32 of the Constitution. Therefore, the right to a sound environment was also a fundamental right under Article 32, and is supported by Article 31 which prohibits actions detrimental to life, body, or property. The failure of the government to perform its duties denied the people their basic fundamental rights.

The Supreme Court agreed with this argument that the constitutional right to life does include the right to a safe and healthy environment.

hazards of life has been guaranteed under the aforesaid Articles 31 and 32 subject to the law of the land”.

The Court went on to state, “We are therefore, of the view that the right to life under Article 31 and 32 of the Constitution not only means protection of life and limbs necessary for full enjoyment of life but also includes, amongst others, the protection of health and normal longevity of an ordinary human being”. In other words, the Court expanded the right to life to include a life free of hazards and anything that affects life, public health, and safety.

Standing to sue

The Bangladesh Supreme Court has adopted a similar policy on standing issues (locus standi) as the Indian Supreme Court. ‘Standing’ dictates who is allowed to bring a suit before the court, i.e., who has ‘standing to sue’. In another case brought by BELA challenging the implementation of a Flood Action Plan, the issue of standing was addressed. Initially, BELA’s petition was denied for lack of standing. BELA appealed to the District Court and the High Court eventually took up the matter.

The High Court interpreted Article 102 of the Constitution (granting power to hear and adjudicate cases to the High Court) as not limited only to individual rights and individual complaints. The Court stated that it did not give importance to the dictionary meaning of ‘any person aggrieved’ in Article 102. The Court stated that instead, Article 102 should be seen within the grander scheme of the Constitution and not isolated by itself. The Court interpreted ‘any person aggrieved’ to include ‘people’ as a collective and consolidated personality.

The Court stated, “The High Court Division cannot under the circumstances adhere to the traditional concept that to invoke its jurisdiction under Article 102 only a person who has suffered a legal grievance or injury or an adverse decision or a wrongful deprivation or wrongful refusal of his title to something is a person aggrieved”. Under this interpretation, PIEL writ petitions will be able to overcome the standing issue, as they deal with environmental issues and environmental issues are clearly in the public interest.

To have standing in a PIEL case, you do not have to be an aggrieved individual, simply an interested member of the public, as PIEL writs deal with environmental issues, which are clearly in the public interest.

Chittagong Hill Tracts

History and background

The Chittagong Hill Tracts (CHT) is a hilly, forested area in the south-eastern part of Bangladesh covering over 13,000 square kilometres. The CHT is home to thirteen indigenous ethnic groups, called the 'Jumma' people. The Jumma people are racially, culturally, ethnically, and religiously different from the Bengali majority, with their own unique languages.

The CHT has a different governing history from the rest of Bangladesh. The Jumma people were independently governed until 1860 when the British annexed the CHT and created an autonomous administrative district. In 1900, the British enacted Regulation 1 of the 1900 Act, otherwise known as the CHT Regulation of 1900 or the CHT Manual, which provided limited self-government for the peoples of the CHT. The Regulations made it clear that no person other than a hill tribe member indigenous to the CHT, the Lushai Hills, or the Arakan Hill Tracts, of the state of Tripura could enter or reside within the CHT without the permission of the Deputy Commissioner.

The special status of the Chittagong Hill Tracts was further defined by the Government of India Act of 1935. The Act designated the CHT as a 'Totally Excluded Area'. This formally severed the political links between the CHT and the Province of Bengal.

Conflict and the peace accord

The CHT has been an area of unrest since the colonial era. Land-related problems are widely thought to be one of the main contributors to the political unrest and conflict in the CHT. An armed resistance to the Bangladeshi Government began in the 1970s and continued until 2 December 1997 when a peace accord was signed. The Peace Accord set out detailed provisions for strengthening the system of self-governance in the CHT and recognised the indigenous peoples' right to land, culture, language, and religion.

Land administration system

Despite the seemingly strong legislative protection afforded by the Peace Accord, land disputes are still prevalent in the CHT. The CHT has two major systems of land administration: one for reserved forests areas and another for the rest of the region. The reserved forest area covers less than one-quarter of the region. This area is administered by the Bangladesh Forest Department under the Ministry of Environment and Forest. The rest of the CHT is administered by a mix of political and bureaucratic authorities that include traditional institutions, such as the chief, headman, and karbari (village chief or elder), and formalised elective councils at various levels of administration.

Traditional government

The CHT has an important traditional governing structure that is administered through the circle chiefs (rajas). The authority of the chiefs is further distributed through headmen, the karbaris (village-level traditional land administrators), and land revenue officers recognised by the civil government. While they still perform their functions, their role in land allocation has been considerably reduced in the last 20 years. However, the traditional leaders still resolve social problems. They also provide a valuable and trusted non-political form of guidance for local communities.

See Chapter 3 for more information on customary and formal law in the CHT.

CHAPTER 5: INDIA

In this Chapter

- ▶ *Introduction to environmental justice in India*
- ▶ *Constitutional provisions targeted at environmental protection*
- ▶ *Overview of environmental legislation and environmental courts in India*
- ▶ *Public interest litigation, the Doon Valley Case, and the Delhi Air Pollution Cases.*

Introduction

Environmental justice in India has come to the fore in recent years. Environmental justice advocates have fought against issues ranging from the mass displacement of tribal people by large dams, to the protection of forest reserves and resources from mining companies. The Indian judiciary was the first in South Asia (and one of the first in the world) to declare that the fundamental right to life must include the right to live in a clean environment. Also, through judicial decisions, the idea of 'public interest litigation' has been firmly established as one of the greatest advocacy tools available for the enforcement of fundamental rights and privileges.

Constitutional Provisions

The Indian Constitution contains several provisions targeted specifically at environmental protection.

The Indian judiciary was the first in South Asia (and one of the first in the world) to declare that the fundamental right to life must include the right to live in a clean environment.



Rice terraces in Darjeeling

Elisabeth Kerkhoff

Article 21 provides for a fundamental right to life, which has been interpreted to include a right to a clean and healthy environment.

1. **Article 48A and Article 51A:** In 1976, the Indian Constitution was amended to include two provisions, Article 48A and 51A. These amendments directly affect the environment. Article 48A states, “[T]he State shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country”.

In addition to the obligation that is imposed on the State, Article 51A imposes an obligation on each citizen of India to, “protect and improve the natural environment including forests, lakes, rivers, and wild life, and to have compassion for living creatures”.

These provisions indicate government awareness of the need to provide a constitutional basis for environmental protection. Furthermore, the present Constitution of India leaves open several ways and means for the legislature to enact specific measures for environmental protection.

2. **Article 21:** Article 21 provides for a ‘fundamental right to life’. The Indian judiciary was the first to interpret the right to life to include a right to a clean and healthy environment.

Even though there is a strong Constitutional and legislative framework for environmental protection, the judiciary on the whole does not make use of most of the possible provisions; they prefer writ petitions filed under Article 21. Article 21 public interest writ petitions are filed to enforce fundamental rights guaranteed in the Constitution. The development of Article 21 litigation and the effects of the litigation will be further explored in the section in this Chapter on public interest litigation.

Environmental Legislation

Indian Forest Act 1927

The Indian Forest Act was enacted in 1927 and remains in force today. The Act demarcates four categories of forests:

- **Reserved forests:** Forests that the Government has reserved for a specific purpose, whether for its own use or for conservation, etc.
- **Village forests:** Reserved forests assigned to a village community. The state governments are empowered to designate protected forests and may prohibit the felling of trees, quarrying, and the removal of forest produce from these forests.
- **Protected forests:** Forests that are set aside for conservation and cannot be used for commercial use. The preservation of protected forests is enforced through rules, licences, and criminal prosecutions.
- **Private forests:** Forests owned by other entities besides the Government. Use and preservation are at the discretion of the owner.

Under the Act, a state may declare forest lands or waste lands as reserved forests and may sell the produce from these forests. Any unauthorised felling of trees, quarrying, grazing, and hunting in reserved forests is punishable by a fine or imprisonment, or both. The Forest Act is administered by forest officers who are authorised to compel the attendance of witnesses and the production of documents, to issue search warrants, and to take evidence in an inquiry into forest offences.

Forest (Conservation) Act 1980

In response to the rapid rate of deforestation and the resulting environmental degradation, the Central Government passed the Forest (Conservation) Act in 1980. The Forest Conservation Act was amended in 1988. The amended Act requires the approval of the Central Government before:

- A state 'de-reserves' a reserved forest
- Uses forest land for non-forest purposes
- Assigns forest land to a private person or corporation
- Clears forest land for the purpose of reforestation

An Advisory Committee constituted under the Act advises the Central Government on these approvals.

The Water and Air Acts

In the 1970s and 1980s India passed two pieces of legislation that were meant to provide over-arching protection for water and air.

The Water (Prevention and Control of Pollution) Act 1974 was meant to, "provide for the prevention and control of water pollution and the maintaining or restoring of wholesomeness of water". The Act established Central and State Pollution Control Boards to oversee the prevention, abatement, and control of water pollution. These Boards have the power to:

- Obtain information from any person or industry regarding non-compliance with the Act.
- Take samples of any effluent to determine non-compliance.
- Enter and inspect any place for non-compliance.

The Act also imposed fines and personal liability on violators.

Similar to the Water Act of 1974, the main goal of the Air Act 1981 was, "to provide for the prevention, control, and abatement of air pollution". The Air Act, like the Water Act, also created Central and State Boards. The main functions of the Central and State Boards are to:

- Improve the quality of air by advising the Central and State Governments on matters dealing with air pollution.
- Plan and execute a nationwide programme for the prevention, control, or abatement of air pollution, including a nationwide mass media campaign.
- Organise and train persons engaged in air pollution prevention, control, and abatement programmes.
- Collect and disseminate information relating to air pollution.

Additionally, the Central Pollution Control Board is to provide technical assistance and guidance to State Pollution Control Boards.

Instead of creating an effective working framework for environmental protection, the Acts were widely criticised for their ineffectiveness in controlling and regulating water and air pollution. Further criticism focused on interest group infestation of the Boards, lack of expertise, and the absence of public participation. In response to this criticism, the legislature passed the Environment Protection Act 1986.

Environment Protection Act 1986

The intent of the Environment Protection Act 1986 (the Environment Act) was to remedy the deficiencies in the earlier laws and serve as a single piece of environmental legislation. Under the Environment Act, the Central Government has the power

The amended Forest (Conservation) Act 1988 restricts state governments from de-reserving, using, assigning or clearing forest.

to take all measures necessary, “for the purpose of protecting and improving the quality of the environment and preventing, controlling, and abating environmental pollution”.

The powers allotted to the Central Government under this Act are extremely broad. In essence, the Central Government is to take any and all measures necessary to prevent, control, and abate pollution including:

- Setting quality standards for air, water, or soil; the maximum allowable limits of concentration of various environmental pollutants
- Setting procedures and safeguards for the handling of hazardous substances
- Setting procedures and safeguards for the prevention of accidents which may cause environmental pollution

In effect, this Act takes the power from Central and State Boards to set limits for air and water quality and gives it to the Central Government.

The Act, like its predecessors, allows the Central Government to take samples from any factory, premise, or other place to determine environmental pollution. The Environment Act also makes employees of polluting companies personally liable for any act of pollution that is a result of consent or negligence.

Right to Information Act 2005

The recently passed Right to Information Act 2005 has tremendous potential to be used for environmental justice advocacy. Under the Act, any citizen has the right to request and receive information from the Government regarding decisions or policies made that affect the public interest.

Access to information is one of the strongest tools available to environmental justice advocates. With the Right to Information Act, every citizen has access to information and can ensure that their communities or livelihoods are not being threatened through government actions or policies unknown to them.

The Right to Information Act:

- Creates an independent information commission to hear appeals, both at the central and state level, with the power to impose penalties.
- Imposes penalties—including a fine for each day’s delay in providing information—and fines and departmental action for various violations. Violations include refusal to accept a request for information, the giving of false information and the destruction of information.
- Applies equally to the Central and State Governments and to local bodies.
- Ensures access to otherwise exempted information when the public interest in disclosure overrides any harm from disclosure.
- Encourages voluntary disclosure by the government of various categories of information.

Under the Act, any citizen can apply in writing or through electronic means, in English or Hindi or in the official language of the area, specifying the particulars of the information sought.

- The application must be addressed to the ‘Public Information Officer’ (PIO). In his absence, it can also be sent to the District Commissioner to forward to the appropriate authority.
- The reasons for seeking information do not have to be given.
- Information must be provided within 30 days from the date of application. Failure to provide information within the specified period is considered to be a refusal.
- Any material in any form may be requested.

Access to information is one of the strongest tools available to environmental justice advocates.

Environmental courts

As well as legislation for environmental protection and regulation, there are several pieces of legislation that complement the environmental protection regime. This legislation creates judicial authorities that focus solely on environmental litigation.

Two pieces of legislation have been passed by the Indian Parliament to create courts specifically for environmental litigation:

- **National Environment Tribunal Act 1995**
- **National Environment Appellate Authority Act 1997**

The National Environment Tribunal Act 1995 was passed as a result of the UN Conference on Environment and Development held at Rio de Janeiro, in which India participated. One of the resolutions of the conference called upon states to develop national laws regarding liability and compensation for the victims of pollution and other environmental damage.

The Act aims to compensate for damage done to persons, property, and the environment while handling hazardous substances. Specifically, the Act imposes strict liability for death or injury to persons who are not workers and for damage to property or the environment resulting from an accident with a hazardous substance. Strict liability means that fault does not have to be proven. The owner of the property is automatically held liable for any injury.

In addition, the Act allows for cases to be brought in front of the Tribunal, not only by those that have been injured or suffered property damage, but also by, “any representative body or organisation, functioning in the field of the environment and recognised in this behalf by the Central Government”. In essence, this gives NGOs and other public interest bodies standing (a right to appear) in front of the Tribunal.

The Act grants the Tribunal the same powers as a civil court, but the Tribunal is not bound by the procedures set out in the Code of Civil Procedure. The Tribunal is to be established by the Central Government and include judicial members as well as technical members. Decisions can be appealed directly to the Supreme Court. However, the Tribunal does not have the power to order imprisonment or cease and desist orders. The Tribunal can only grant monetary compensation to claimants.

The National Environment Appellate Authority Act 1997 provides for the establishment of a National Environment Appellate Authority to hear appeals of cases involving environmental litigation. The Authority can hear claims from persons challenging an order granting environmental clearance within 30 days of the granting of the order. The Authority must then address and dispose of the appeal within 90 days from the date of filing.

The Authority is not bound by the rules of Civil Procedure, but is to be guided by the principles of natural justice. Proceedings brought before the Authority are to be deemed as judicial proceedings. For example, if one were to bring a civil suit, like

There are two environmental courts in India that deal specifically with environmental litigation: the National Environment Tribunal and the National Environment Appellate Authority.



Sanat K. Chakraiborty

Woman practising shifting cultivation in Meghalaya, India

The Courts in India have taken an activist role in relation to PIL and public minded individuals or groups may bring environmental suits to the highest court in India.

a case for destruction of personal property, there are very set rules that must be followed that dictate when the case can be filed, what court the case can be filed in, and various other rules that would govern the proceedings. In the Environment Appellate Authority, while it is still regarded as a proper court, the same rules would not apply. Instead, the judge or authority would apply the rules of 'natural justice' or, in other words, rules of fairness.

The National Environment Appellate Authority has not turned out to be as effective as the legislature intended. Even though it had been in place for over seven years, as of March 2005, the Authority had only heard 15 cases and, in fact, had heard no cases at all in 2004. The Authority has been used as often by companies challenging the denial of permits (which is outside the jurisdiction of the Authority) as it has by NGOs or private citizens challenging environmental pollution.

In addition to a low level of awareness regarding the ability and jurisdiction of the Authority, it has not welcomed petitions filed by NGOs and has turned away petitions for things as minor as a one day delay in filing a petition. This is particularly hostile considering that, as stated earlier, the Authority is not bound by strict procedural rules.

Public Interest Litigation

Role of the courts

The use of Article 21, public interest writ petitions, has further expanded the reach of environmental protection. In India, PIL is "purely a matter of constitutional law in which the writ jurisdiction of the Supreme Court (meaning the ability of the court to review writ petitions) or any one of the provincial High Courts is invoked".

PIL first emerged in India through the human rights jurisprudence of the Supreme Court of India. It has primarily been judge-led and, to some extent, judge-induced. Faced with a legitimisation crisis, the Supreme Court has worked to achieve distributive justice (or social justice).

As a result of the activist role taken on by the Court the centre of justice has shifted, from traditional ideas of individual locus standi (standing to sue) to the idea of community-oriented public interest litigation. Even though one may not be an aggrieved party, the effect of locus standi means that public minded individuals or groups may bring environmental cases to the highest court in India. Specifically, the courts have taken the view that:

- a) The categories of persons considered 'interested' or 'affected' and, therefore, able to bring legal action against the State should be broadened and expanded.
- b) The poor enforcement of law and policy by administration can force individuals and groups to turn to the courts with public interest litigation of one kind or another.
- c) Those that undertake PIL are considered to be doing a public service and should be encouraged, not repelled, by the court on the basis of narrow and technical rules of standing.

Role of Article 21 and the Doon Valley Case

Through the activist approach taken by the judiciary, Article 21 of the Constitution has been expanded to include a fundamental right to a clean and hygienic environment. Article 21 states, "No person shall be deprived of his life or personal liberty except according to the procedure established by law".

The first indication that the court was willing to expand the right to life to include environmental protection was in the 1985 case of *Rural Litigation and Entitlement Centre v. State of Uttar Pradesh*, otherwise known as the Doon Valley Case. This writ petition related to the mining of limestone quarries in the Dehradun mining area. The Supreme Court ordered the closure of limestone quarries on the basis that their operation upset the ecological balance of the region. While the Court did not explicitly refer to Article 21, the judgement can only be understood on the basis that the Court was referring to the rights granted under Article 21. The Doon Valley case allowed for future writs of enforcement for the newly recognised fundamental right to environmental protection.

The court in *T. Damodar Rao v. S.O. Municipal Corporation* (1987) then took the Doon Valley Case one step further. In this case, the Life Insurance Corporation of India and the Income-Tax Department, Hyderabad sought to use land owned by them in a recreational zone for residential purposes, contrary to the developmental plan. Here, the court ruled that even though the defendants owned the land, because the area had been reserved for a recreational park, the only allowable use of the land was the construction of a recreational park.

The significance of the case lay not in the actual ruling, but in the comments (or dicta) written by the court on the law of ecology and environment. It is here that the court first explicitly stated that the right to a clean environment was a fundamental right. The court stated, “[T]he slow poisoning of the atmosphere by environmental pollution and spoilation should also be regarded as amounting to violation of Article 21 of the Constitution”. Apart from claiming the fundamental right to a clean environment, the court also stated, “[I]t is, therefore, the legitimate duty of the Courts as the enforcing organs of constitutional objectives to forbid all action of the State and the citizen from upsetting the environmental balance”.

The first indication that the court was willing to expand the right to life to include environmental protection was in the 1985 Doon Valley Case.

Delhi Air Pollution Cases

PIL has also been used to stop the use of diesel fuel in Delhi. In a series of judgements, the courts ruled that due to the large number of vehicles in Delhi, from buses to auto rickshaws, the amount of air pollution created was too harmful for the citizens of Delhi.

Facts

In 1985, when the first writ petition concerning air pollution in Delhi was filed, it was estimated that over 10,000 people died every year in Delhi due to complications from air pollution. Worried about the health impact of air pollution on the Delhi population, a writ petition was brought before the Supreme Court asking it to take steps to reduce Delhi's air pollution problems in the interests of public health. In response to the petition, the Court ordered the Delhi administration to detail the steps to be taken to control air pollution from vehicles.

Ruling

As a result of various studies, the Court issued its first order calling for the phasing out of lead from all fuel in Delhi, Bombay, Calcutta, and Madras in 1994. Then, to continue the policy, in 1996, the Court ruled that all government vehicles in Delhi must be converted to compressed natural gas (CNG). In 1998, the Court went a step further and mandated that all buses in Delhi must be converted to CNG from diesel fuel by the end of March, 2001. In this case, the Court acted more quickly and more broadly than the Central Government.

Relaxing procedural rules

The court very clearly addressed the issue of PIL in 1987 in *M.C. Mehta v. Union of India*. Mr Mehta is a practising advocate of the Supreme Court and has brought more than a dozen cases before the court seeking redress for environmental harms. In this 1987 case, the Court stated that, when looking at the enforcement of a fundamental right, it is the substance not the form that is relevant, to the point where a public minded individual would not have to file a writ petition but could file a complaint simply by addressing a letter to the court. The Court further stated that procedure was simply a 'hand-maiden of justice' and should not prevent the poor and disadvantaged from gaining access to justice. The Court emphatically stated, "this Court will not insist on a regular writ petition and even a letter addressed by a public spirited individual or a social action group acting pro bono publico would suffice to ignite the jurisdiction of this Court".

Beyond the allowance of a letter, the Court also stated that the letters do not have to be addressed to the Court or to the Chief Justice. Instead, a letter addressed to an individual justice would suffice as most of the letters would be written by poor or disadvantaged people who may only know one particular judge that comes from their state. While acknowledging that every citizen has a fundamental right to enjoy quality of life and living, the Court warned that this right can only be enforced by people genuinely interested in the protection of society on behalf of society.

CHAPTER 6: NEPAL

In this Chapter

- ▶ *Introduction to environmental justice in Nepal*
- ▶ *Constitutional provisions creating a right to life*
- ▶ *Overview of environmental legislation in Nepal*
- ▶ *Public interest litigation, the right to a clean environment, and the Godawari Marble case*

Introduction

The majority of Nepal's poor live in rural areas and high mountain regions that are remote and not easily accessible. Therefore, the idea of marginalisation in Nepal encompasses not just issues of class, ethnic origin, indigenous populations, and religious minorities, but also isolation. Likewise, the idea of disproportionate environmental burdens has a slightly different focus in Nepal than in other South Asian countries. Many rural women in South Asia have to fetch drinking and cooking water from afar. In Nepal, the harshness and isolation of the mountain communities greatly increases this burden.

Nepal has been slow to adopt wide-spread environmental legislation. While the legislation may have been slow to develop, the judiciary has been quite active. The judiciary continually reiterates the importance of environmental protection. The judiciary in Nepal has declared that there is a 'fundamental right to a clean environment'.

The idea of marginalisation in Nepal encompasses not just issues of class, ethnic origin, indigenous populations, and religious minorities, but also isolation.



Source: ENPHO

Diesel truck polluting the environment in Nepal

The judiciary in Nepal has interpreted the 1990 Constitution to include a right to life and a right to a clean environment.

Constitutional Provisions

On 15 January 2007, Nepal promulgated the 'Interim Constitution of Nepal' (ICN) which repealed the Constitution of the Kingdom of Nepal 1990. The process of transformation of the political system in the country is still underway, and there may well be a new constitution in place in the near future. However, it is likely that any new constitution will include provisions from the Interim Constitution, and equally legal interpretation will be influenced by interpretations of similar provisions in the preceding constitutions. Thus the main relevant articles in the ICN are summarised below. Article 12 (1) of the 1990 Constitution stated that no person shall be deprived of his personal liberty save within accordance with the law, and no law shall be made which provides for capital punishment; the Supreme Court further interpreted this right in the Godawari Marble Case to include a right to clean and healthy environment. This has been further emphasised in the Interim Constitution.

The 2007 Interim Constitution of Nepal (ICN) guarantees the following rights to the people of Nepal:

1. **Article 12(1):** Article 12(1) guarantees the freedom of personal liberty to every individual. In interpreting this provision, the courts will also take into account the judicial precedent developed by the Supreme Court in the Godawari Marble Case.
2. **Article 16 (1):** Article 16(1) guarantees the right to live in a clean environment to every individual. Recognition of the right to live in a clean environment as a fundamental right is a progressive step taken by the framers of the ICN which gives constitutional recognition to the right to live in a clean environment that was extended by the Supreme Court through interpretation of right to life in the Godawari Marble Case. This provision will have a far reaching impact on addressing the disproportionate distribution of environmental hazards in urban areas.
3. **Article 35(5):** The State's additional/further commitment to environmental protection is also reflected in the directive policies of the ICN. The goal of environmental protection is further highlighted in Article 35(5) which states that the State:
 - Shall make the necessary arrangements to maintain a clean environment.
 - Shall prevent further damage to environmental cleanliness due to physical development activities.
 - Shall give priority to the special protection of the environment and rare wildlife.
 - Shall make arrangements for the protection of forest, vegetation, and biological diversity, and their sustainable use, and for equitable distribution of the benefit arising from these resources.

Article 35(5) has special significance for the conservation of biological resources and ensuring the equitable sharing of the benefits arising from the use of such resources.

4. **Article 35(18):** Article 35(18) stipulates that the State shall pursue the policy of identifying, modernising, and protecting the traditional knowledge, skills, and practices that exist in the country. This is the first time a Constitution of Nepal has mentioned the protection of traditional knowledge of communities.
5. **Article 107:** Article 107 addresses the jurisdiction of the Supreme Court. It contains two very important provisions:

- Any Nepali citizen may file a petition in the Supreme Court to have any law or any part thereof declared void on the ground of inconsistency with this Constitution because it imposes an unreasonable restriction on the enjoyment of the fundamental rights conferred by this Constitution.
- The Supreme Court may issue all necessary and appropriate orders and writs to protect:
 - fundamental rights conferred by this Constitution
 - any other legal rights for which no other remedy has been provided or for which the remedy provided is inadequate or ineffective
 - the settlement of any constitutional or legal question involved in any dispute of public interest or concern

Article 107 is essential for public interest litigation. It allows any citizen to file a writ with the court to protect their fundamental rights and grants the Supreme Court the authority to enforce fundamental rights.

Environmental Legislation

The most comprehensive piece of environmental legislation in Nepal is called the Environment Protection Act 1997. This Act was preceded by two environmental policy and action plans: NEPAP and NEPAP-II.

NEPAP

The first Nepal Environmental Policy and Action Plan (NEPAP) was released in 1993 and embraced the objectives of Agenda 21 of the World Summit on Sustainable Development held in 1992. Broadly, NEPAP's objectives focus on:

- Fostering sustainable development by combining resource productivity with the adoption of materials and processes that minimise adverse environmental impacts.
- Reducing poverty and population growth.
- Improving government policy and legal and regulatory frameworks.
- Ensuring that women and other marginalised groups are included in the mainstream of the development process.

NEPAP addressed issues in terms of their environmental impact, such as the impact of poverty on environmental conditions. However, the implementation of NEPAP was difficult. NEPAP dealt with issues that crossed different administrative boundaries making coordination of implementation prohibitively difficult. For instance, dealing with the effect of poverty on the environment requires action from administrative bodies focused on poverty alleviation and administrative bodies focused on environmental protection.

NEPAP-II

To overcome the problems with NEPAP, an additional action plan (NEPAP-II) was created in 1996. NEPAP-II prepared detailed action plans and identified priority projects for implementation in three areas:

- Forestry
- Water resources
- Industry

NEPAP-II allows public and private bodies with responsibilities and interests in a particular sector to be identified as implementing agencies for projects.

**The main piece
of environmental
legislation in Nepal
is the Environment
Protection Act 1997.**

The Environment Protection Rules set out the types of projects that must conduct an initial environmental examination or Environmental impact assessment.

Environment Protection Act 1997

The Environment Protection Act is the first comprehensive piece of environmental legislation passed in Nepal. The Act was passed to deal with environmental problems including:

- Enforcement of air and water pollution standards
- Making environmental impact assessment for prescribed projects mandatory
- The clear delegation of responsibility and authority between stakeholders and government agencies

The Act explicitly recognises the interdependence of economic development and environmental degradation. The preamble to the Act specifically states that “it is expedient to make legal provisions” in order to maintain a clean and healthy environment by minimising adverse environmental impacts and to protect the environment through proper use and management of natural resources. The preamble also states that, “sustainable development [can] be achieved from the inseparable inter-relationship between economic development and environment protection”.

The Act provides for:

- Procedures to be followed to prevent and mitigate any adverse environmental effects from development projects.
- The necessary legal mandate and authority to be given to the Ministry of Population and Environment and other agencies to implement environmental protection.

In particular, the Act requires initial environmental examination and/or environmental impact assessment for projects and explicitly forbids the creation of pollution “in such a manner as to cause significant adverse impacts on the environment or likely to be hazardous to public life and people’s health”.

Environment Protection Rules 1997

The Environment Protection Rules were created alongside the Environment Protection Act. The Rules set out in more detail the types of projects that must conduct an environmental impact assessment or initial environmental examination. The Rules also set out standards for inspectors, creation of an environmental protection zone, and rules for compensation.

However, there are still wide gaps between these policies and their implementation. The greatest problem existing at all levels is the absence of an integrating mechanism through which all major environmental concerns may be adequately addressed while developmental programmes are implemented. Additionally, there is no proper coordination of sectoral and cross-sectoral initiatives and consideration of their implications. The capacity of institutions is also extremely limited and concerned agencies lack sufficient trained personnel and financial resources.

Forest Act 1993

Prior to 1957, most forests were managed under various indigenous common property systems. In 1957, the Private Forests Nationalization Act brought forests under the jurisdiction of the Government. This was then followed by enactment of various Forest Acts, including the 1961 Forest Act and the 1967 Forest Protection (Special Arrangements) Act.

To try to reverse the deforestation that resulted from the nationalisation of forests in 1957, the Government set forth the Panchayat Forest Rules and the Panchayat

Protected Forest Rules in the late 1970s. The new rules allowed local Panchayats to create a management plan and take over some of the management of their forests. The Panchayat Rules were amended again in 1980 to include more community forestry concepts, but implementation continued to emphasise replanting as the main way to reverse deforestation.

The Forest Act of 1993, with the accompanying Forest Regulations 1995 replaced the previous Forest Act of 1961. The new Forest Act of 1993 broadly defines forests to include all forest areas:

- Whether marked or unmarked
- Within the forest boundary including wasteland and uncultivated lands or unregistered lands surrounded by the forest
- Situated near the adjoining forest, as well as paths, ponds, rivers, or streams, and riverine lands within the forest land

The Act empowers the Government to declare any part of a national forest that has special environmental, scientific, or cultural importance as a protected forest. The Act also empowers to the Government to:

- Grant any part of a national forest in a manner conducive to the conservation and development of forests to produce raw material required by industries
- Plant trees to increase the production of forest products for sale
- Operate a tourism industry or implement agroforestry

Community forestry policy

The Forest Act 1993 formally enshrines the concepts of 'user groups' and 'community forestry' in law. As a result of the Forest Act:

- District forest officers are able to hand over any part of the national forest to a user group for conservation, use, and management.
- Communities are able to sell and distribute their forest products.

The new Forest Act represents a more detailed policy on community forestry. Rights over land, and the biomass on it, are separable under the provisions of the present Act and Regulations.

**The Forest Act 1993
formally enshrines
the concepts of
'user groups' and
'community forestry' in
Nepali law.**



Elisabeth Kerkhoff

Community forest on previously degraded land in Nepal

Under the new Act, forests (outside the national parks and reserves) are legally classified as either private or national forests as follows:

- If both the land and the trees on it belong to a private entity, it is known as a private forest.
- If the land belongs to the State, but the management rights of the biomass (on it) are assigned to an organised body including the State itself, the forest is known as national forest.

There are two types of policies that affect the sustainable management and utilisation of community forests in Nepal: regulatory and fiscal policies.

- **Regulatory policies** refer to the statutory provisions of acts and regulations. These rules describe:
 - what can and should not be done in a community forest
 - who has the rights over the use of forest products
 - what process needs to be followed in handing over a part of national forests to a community forest user group, etc.

The Forest Act 1993 and Forest Regulations 1995 are examples of regulatory policies directly affecting community forestry in Nepal.

- **Fiscal policies** refer to taxes imposed and subsidies provided in the management of community forests in Nepal.
 - Currently, the Government provides financial subsidies, now on a reduced scale, for the production of tree seedlings (Rs.1/seedling) and reforestation of blank areas (Rs.2,000/ha) in community forests.
 - The Government also imposes a sales tax of 20 percent on timber obtained from national forests. This tax is not levied on products derived from community forests.
 - However, the Government charges a 15 percent value-added tax on logs obtained from every type of forests. Even though those that buy timber have to pay the tax, the burden and effect of the tax falls on the community forestry user groups because they receive a lower price for logs sold outside the Government.
 - There is also an export tax of 0.5 percent on non-timber forest products.

The Forest (Second Amendments) Bill 2001

The Forest Act was amended in 2001, to much criticism by community forestry user groups. The Forest (Second Amendments) Bill 2001 was designed to return the control of land to the Forestry Department. The Amendments require user groups to pay 65 percent of their earnings to the Government. Widely seen as an attack on the Forest Act 1993, the Amendments also call for the giving of forest areas to foreign concessions. The primary reason for the Amendments was to generate government revenue.

Relevant Public Interest Litigation

There are two cases in Nepal with a direct impact on the issue of environmental rights and the creation of a fundamental right to a clean environment, the Godawari Marble Case and *Thapa v. the District Forest of Morang and Others*.

The Godawari Marble Case decided that the right to a clean and healthy environment was a fundamental right under Article 12(1) of the Constitution. It also held that NGOs and individuals not directly affected by the issue at hand had standing to sue and issued orders to parliament to enact legislation to protect the Godawari environment.

The Godawari Marble Case

The case of *Suray Prasad Sharma Dhungel v. Godawari Marble Industries and Others* set the legal precedent that allowed the Courts to rule in favour of environmental protection. In the Godawari Marble case, the Court addressed three issues: (i) the right to a clean environment as part of the fundamental right to life in the Constitution, (ii) the legal standing of NGOs or individuals working to protect the environment to bring a case before the Court, and (iii) the power of the Court to issue an order against Parliament to enact a law.

Fundamental rights

Fundamental rights are rights based on, or derived from, the Constitution and whose validity are guaranteed by the courts. Legislatures cannot enact laws that violate the fundamental rights listed in the Constitution. Placing the right to a clean environment in the fundamental rights category would elevate the importance of environmental protection and ensure that all citizens have a right to live in a clean environment.

Standing to sue

Traditionally, only those who are directly affected by the issue at hand can bring a case before the court. The issue before the Supreme Court in the Godawari Marble case was whether NGOs or individuals not directly affected by the environmental issue at hand could bring a case because of their interest in the environmental issue, even though they themselves may not be directly affected.

Power of the court to issue an order to parliament

The third issue focused on the balance of power between the judiciary and the legislature. If the courts can make laws contrary to the legislature, the judiciary becomes a body that no longer just reviews legislative actions to ensure compliance, but actually legislates. In the environmental context, this means that the courts could pass judgments that had the same effect as laws for environmental protection.

Judgement

In the Godawari Marble case the Court ruled in favour of environmental activists on all three issues.

- The Court held that a clean and healthy environment is indeed a part of the right to life under Article 12(1) of the Constitution of the Kingdom of Nepal 1990.
- The Court ruled that environmental protection was an issue of public interest and that, as the Constitution implies that all citizens have a common right to public issues, any individual interested in protecting the environment has standing before the Court. As such, NGOs and individuals not directly affected by the environmental issue at hand are allowed to bring cases.
- The Supreme Court issued orders to the Parliament to enact the necessary legislation for the protection for air, water, sound, and the environment, and for the protection of the Godawari environment.

Specifically, the Court stated that if the environment around the Godawari area was not maintained and if the environment would worsen due to the lease given to the marble industry, “the contract has to be cancelled in view of the public welfare”. While addressing the issue of standing, the Court stated that, “Environmental issues are not the related matter of a specific person, they are a matter for all public interest. Environmental degradation imparts its untoward effect not only to a limited area but encroaches upon the surroundings and the entire nation”. Therefore, “Substantially as environmental issues are a matter of public interest and the term public rights used in the Article 88(2) of the Constitution of the Kingdom of Nepal 1990 implies to the common right provided by any law or Constitution in any community or people of the Kingdom of Nepal”.

Importance for environmental justice

The Godawari Marble case provides environmental justice activists with two important provisions:

1. Communities can be represented in environmental disputes by organisations (such as NGOs) with the resources and ability to bring cases before the Court.
2. As the right to a clean environment is now a fundamental right, communities suffering environmental harm can bring cases before the Court for the violation of their right to a clean environment, even if the pollution is legitimate. This means that, even when the proper operating permits have been issued, if the community is suffering from the pollution caused by the industry, it can bring suit to stop the polluting industry.

Thapa v. the District Forest of Morang and Others

The case of *Thapa v. the District Forest of Morang and Others* the Court gave priority to environmental protection over development and the rights of the individual.

The issue before the Court was whether Mr. Thapa's fundamental rights were infringed when the Government decided to relocate his industry.

The Nepali Government had decided to move Mr. Thapa's industry away from a forest boundary in order to effectively control the destruction of woods and the theft of timber. The Court ruled that the Government's interest in protecting the forest and keeping the environment free of pollution was greater than Mr. Thapa's interest in being able to place his industry where he pleased.

Judgement

The Court ruled that because the regulation would be applied equally, that is no industry would be able to be located near the forest boundary, not just Mr. Thapa's, it did not infringe upon any fundamental rights.

The Court, citing the Constitution of Nepal and the Forest Act of 1993, stated that there was a new thought and understanding about the environment. The Court went on to state that with the new Constitution of 1990, priority must be given to the cleanliness of the environment and the preservation of wildlife, forest, and flora over physical development.

Importance for environmental justice

This case is important for two reasons:

1. It reaffirms the importance of environmental protection and the creation of an environment free from pollution.
2. In the continuing tension between environmental protection and development, the Court stated that priority must be given to environmental protection and not to development.

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ANNEXES

ANNEX 1: LEGAL GLOSSARY

Constitution	A constitution is the fundamental, basic document which establishes the government of a nation or state. It is the ultimate legal document. No laws or regulations can be passed that are contrary to constitutional provisions.
Constitutional Provision	Constitutional provisions are provision in a constitution that create binding obligations upon the state and the state must act in accordance with the constitution. See <i>Directive Principle</i> .
Defendant	The defendant, also referred to as the respondent, is the party who the action is initiated against. In public interest litigation cases, the defendant would be the government or a government agency and/or one or more than one industry or infrastructure development project.
Directive Principle	Directive principles appear in the constitution and are separate from constitutional provisions. Directive principles imply the way in which a state should act, but do not create binding obligations upon the state. See <i>Constitutional Provision</i> .
Fundamental Rights	Fundamental rights are rights granted to individuals by a constitutional provision. They are rights that cannot be infringed upon by governmental action. They are equally applicable to every individual. There are very few rights that are considered fundamental rights; most common are the right to life, right to equality, right to livelihood, and right to privacy.
Liability	Liability is the legal responsibility for an act or failure to act. Failure of a person or an entity to meet their legal responsibility leaves them open to legal action. See <i>Strict Liability</i> .
Litigation	Litigation refers to the process of bringing and pursuing a law suit in court to enforce a right. Filing a law suit and any action that occurs during the time the law suit is before a court is litigation.
Locus Standi	See <i>Standing</i> .
Non Self-Executing	Directive principles and treaties can either be self-executing or non self-executing. Non self-executing means that further legislation must be passed to implement the treaty or directive principle. See <i>Self-Executing</i> .
Petitioner	A petitioner is an individual or group of individuals who initiate a court action, whether by filing a petition or a full law suit.
Pro Bono Publico	Pro bono publico means acting in the public interest.
Procedural Law	Procedural laws are the laws that determine what rules must be followed in litigation. These laws focus on what information can be presented to the court and when it can be presented. They do not have any substantive element and only refer to the rules of the litigation process. They are also referred to as civil procedure law.

Public Interest Litigation	Sometimes referred to as social action litigation, public interest litigation describes the body of cases that are brought on behalf of the public interest. This is in contrast to the majority of cases, which are either criminal cases or cases that deal with private issues between citizens. Public interest litigation is directed at governments and targets government actions. For example, public interest litigation can be targeted at governments to ask them to take specific action, such as stopping construction or requiring pollution control measures. It cannot be used against a private individual. However, it can be field against a body corporate such as an industrial facility.
Self-Executing	Directive principles and treaties can be either self-executing or non self-executing. Self-executing means that they are automatically implemented as legislation and immediately binding without further legislation to enact the provision. See <i>Non Self-Executing</i> .
Standing	Standing refers to the legal requirements (also called locus standi) that must be met before a person can bring a law suit before a court. Standing requirements vary from country to country and from court to court. Generally, there must be some right that has been violated and the person filing the petition must be affected in some way. This last requirement is open to some interpretation and more 'third party standing' cases are being allowed for environmental concerns. See <i>Third Party Standing</i> .
Strict Liability	Strict liability imposes legal responsibility on a person without having to establish fault. For example, if an accident occurs in a situation where strict liability is imposed, no fault needs to be proven and the person owning the land or business where the accident occurred is automatically liable. Most hazardous waste industry owners are subject to strict liability. See <i>Liability</i> .
Suo Moto	Suo moto actions are those initiated by the judiciary of its own accord. Suo moto petitions, for example, are petitions that are started by a judge or judicial official, not started by a private individual or organisation.
Third Party Standing	Third party standing refers to cases brought by a third party who may not have been directly affected but who has a substantial interest in the case nonetheless, e.g., environmental NGOs. See <i>Standing</i> .
Writ	A court's written order, in the name of a state or other competent legal authority,k commanding the addressee to do or refrain from doing some specified act.
Writ Petition	A writ petition is a request to the court to issue a writ. See <i>Writ</i> .
Writ of Certiorari	A writ of certiorari is filed when the act in question, i.e., the act that is causing the controversy, has already been completed and the petitioner wants the decision to be reviewed by a high court. For example, certiorari would be filed if a building permit had already been issued and the petitioner wants a higher court to review the administrative body's decision. See <i>Writ</i> .
Writ of Mandamus	A writ of mandamus is filed to force a public official to perform an action that s/he is required to do under law and has failed to do. For example, mandamus would be filed to force an environmental protection agency officer to take pollution samples as required under law if the officer refused to do so. See <i>Writ</i> .
Writ of Prohibition	A writ of prohibition is filed when the act in question has not yet been completed. A write of prohibition is issued by an appellate court to prevent a lower court from exceeding its jurisdiction or to prevent a non-judicial officer or entity from exercising a power. In contrast to certiorari, prohibition would be filed before a building permit had been issued. See <i>Writ</i> .

ANNEX 2: PUBLIC INTEREST LITIGATION

Overview of Public Interest Litigation

What is public interest litigation?

Public interest litigation (PIL) is a non-traditional form of legal action that can be used to protect public fundamental rights and interests. In PIL, the collective rights of the public are at issue and there may not be a direct, specific injury to any one individual.

PIL differs from other, more traditional legal actions in three main ways:

1. PIL focuses only on fundamental rights (such as the right to life) that affect the public interest and cannot be used to resolve private issues.
2. PIL may be filed by any person or organisation as long as it is on behalf of the public interest.
3. PIL may be filed against government agencies or other decision-making bodies and cannot be filed against private individuals. However, it can be filed against a body corporate such as a chemical fertilizer factory.

Why is PIL an effective tool?

PIL was a legal breakthrough for several reasons:

1. PIL immediately increased the public's access to the judiciary because anyone could file a PIL before the judiciary, as long as the matter was one of public interest.
2. Even if unsuccessful, PIL can bring attention to violations of public interests and rights. It can be used as a media tool and also as a community awareness raising tool.

In the area of environmental issues, public interest environmental litigation (PIEL) is a particularly effective tool. PIEL is necessary because:

1. Public officials and agencies may not be able to police environmental systems due to lack of funds, staff, or expertise.
2. The policing agencies may be unwilling to take action against the violators due to political pressure, or the agencies themselves may be promoting the activity they should be regulating.
3. PIEL reduces the government's burden to enforce regulations by employing citizens as monitors of environmental protection.
4. PIEL can be used as to raise issues of environmental justice, including access to and use of natural resources.

What are the benefits of PIL?

1. PIL can be filed by anyone and in some cases, can be as informal as a hand written letter. This helps to 'de-mystify' the judicial system and make it accessible to many people.
2. PIL can be filed directly with a specific judge. This brings the matter to the court's attention immediately. The time element is particularly important in environmental matters where each passing day can bring increasingly dangerous environmental conditions. This also allows each judge a great deal of independence in deciding the case.
3. PIL can also be filed directly with the Supreme Court or High Court for violations of fundamental rights. In traditional litigation, petitions must first be filed with the District Court, then appealed to the Appellate Court and only after these steps, will the highest court hear a petition. PIL filed for violations of fundamental rights can bypass these steps.

What are the limitations of PIL?

1. One of the main advantages of PIL is judicial independence. However, it is also one of its greatest limitations. PIL filed before an unsupportive judge can be immediately dismissed if the judge so deems.
2. PIL can only be filed against government or government agencies.
 - PIL cannot be filed against private individuals.
 - Therefore, private industries or private land owners cannot be brought to court with a PIL in some jurisdictions or countries. Instead, a writ must be filed against a government agency, for example, for failing to regulate the industry or stop the private land owner.
3. While PIL can result in great rights gains and environmental protection, PIL is still a form of legal action.
 - As such, PIL can only be effective in systems with recognised, legitimate, functioning judicial systems.
 - PIL cannot be used in corrupt or dysfunctional legal systems. This does not mean, however, that they cannot be used as awareness raising and mobilising tools.

PIL in India

Public interest litigation has been used by advocates worldwide for issues ranging from fundamental rights violations to the promotion of environmental education. In South Asia, the case of India well highlights the advantages and disadvantages of PIL.

PIL first emerged in India through a series of human rights cases and has primarily been judge-led and, to some extent, even judge-induced. The courts of India have become famous for the active role they played in expanding fundamental rights and PIL.

Legal basis

The legal basis for the development of public interest litigation in India is found in the Constitution. Under Article 32, the Supreme Court of India has original jurisdiction over all cases concerning fundamental rights and freedoms as listed in Articles 14 to 25 of the Constitution. This means that if a fundamental right or freedom has been violated, the claim can be filed directly with the Supreme Court.

The expansion of PIL

The Indian judiciary expanded PIL in two very important ways:

1. It liberally expanded the rules that dictate who can bring a PIL before the court.
2. Two, it expanded the fundamental right to life to include a right to live in a clean and healthy environment.

Standing to sue in India

Standing, sometimes referred to as *locus standi*, refers to the requirements that must be met before a person can bring a case or petition before a court. Traditionally, a person had to be directly affected by the issue at hand before she or he could bring the matter to court.

In India, the judiciary reversed this requirement for cases of PIL. Even though one may not be an aggrieved party, public minded individuals or groups may bring public interest suits to the highest court of India. Specifically, the Indian courts have taken the following view.

- The categories of persons considered 'interested' or 'affected' and, therefore, able to bring legal action against the State should be broadened and expanded.
- Poor enforcement of law and policy by administration can force individuals and groups to turn to the courts with public interest litigation of one kind or another.
- Those that undertake PIL are rendering a public service and should be encouraged, not repelled, by the court on the basis of narrow and technical rules of standing.

It was not just the standing requirements that the court liberalised. At the height of the PIL trend, the courts liberalised the procedural rules that govern legal actions. For example, a postcard addressed to an individual justice would be considered a proper writ petition and would not require a formal legal document.

The fundamental right to life in India

Article 21 of the Indian Constitution states, “No person shall be deprived of his life or personal liberty except according to the procedure established by law”. What this means is that every individual has the right to life, which cannot be arbitrarily taken away by the government. Also, because it is listed in the Constitution, the right to life is elevated to the status of a fundamental right.

Fundamental rights are only those rights listed in the Constitution and are afforded the utmost protection. The first indication that the court was willing to expand the right to life to include environmental protection was in the case of *Rural Litigation and Entitlement Centre v. State of Uttar Pradesh*, commonly known as the Doon Valley case.

It is in the *T. Damodar Rao v. S.O. Municipal Corporation* case the Court first explicitly stated that the right to a clean environment was a fundamental right. The Court stated, “The slow poisoning of the atmosphere by environmental pollution and spoilation should also be regarded as amounting to violation of Article 21 of the Constitution”. The Court’s statement marked the beginning of the concept that there exists a right to a clean environment as a part of the fundamental right to life.

PIL has also been used to stop the use of diesel fuel in Delhi in a series of cases (the Delhi Air Pollution Cases) from 1994 to 2001.

Benefits and limitations of PIL in India

There is no question that India has the most developed PIL system regionally, perhaps even globally. There are several benefits to the use of PIL in India; however, there are also some serious limitations.

Table 4: Benefits and limitations of PIL in India

Benefits	Limitations
1. Procedural rules were relaxed to: <ul style="list-style-type: none">- allow more people to file public interest petitions- allow less formal documents to be admitted as legal petitions.	1. The attitude in the judiciary is changing. Judges are becoming more wary of PIL. Instead of looking upon them as acts of public service, judges may see them as a nuisance. Because PIL is filed before individual judges, one judge’s negative attitude might ruin a PIL.
2. The fundamental right to life was expanded to include a right to a clean environment.	2. Even though PIL is quicker than traditional legal action, the courts in India have so many cases before them that even PIL takes several years to go through the system. The Delhi Air Pollution cases took over 15 years to be resolved.
3. The right to a clean environment has been used to clean air pollution in various cities in India.	3. When the courts have had the chance to make big, sweeping decisions, they have backed down from their usually aggressive stance. In the case of the Narmada Dam project, even in the face of overwhelming evidence that the project would be environmentally disastrous and displace tens of thousands of people, the court refused to block the construction and the dam was built.

Conclusion

PIL is not a perfect answer, but it is still one of the strongest tools available to communities and individuals. It is a tool that is more easily accessible for communities and individuals than formal legal avenues. PIL breaks the presumption that law is only for the rich and empowered.

However, PIL cannot be the only tool used in a struggle for equitable access to, and use of, natural resources and the right to a clean environment. It is only one element of a larger campaign that should include advocacy, media campaigns, community mobilisation, and national, regional, and international lobbying.

About the Author

J. Mijin Cha has worked with local communities on issues of environmental justice in several countries, including India, Nepal, the United Kingdom, and the United States of America. She received her B.S. from Cornell University, her J.D. from the University of California, Hastings College of the Law, and her LLM and Ph.D from the University of London, School of Oriental and African Studies (SOAS). Her Ph.D thesis was on comparative analysis of access to environmental justice movements in India and the US.

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