

Human Rights and the Environment:

A South Asian Perspective

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(Pakistan)

A keynote address delivered at the 13th Informal ASEM Seminar on Human Rights, co-organized by the French Ministry of Foreign and European Affairs, the Raoul Wallenberg Institute (delegated by the Swedish Ministry of Foreign Affairs), the Philippine Department of Foreign Affairs and the Asia-Europe Foundation (ASEF) and hosted by the Danish Institute of Human Rights and the Danish Ministry of Foreign Affairs, on 21-23 October 2013, at Copenhagen, Denmark

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Dr. Parvez Hassan**

A. Introduction***

Whether a human rights framework is appropriate for responding to environmental challenges associated with globalization is a question that continues to engage policy makers, academics and the courts alike. Some find the individualism underlying human rights at odds with the collective concerns of environmental law¹ or find that in the divergence between intra-generational or inter-generational equity, there is no single core value underpinning human rights.² Others point to a halo effect, the argument that given the special place of civil and political rights in the pantheon of human rights, inclusion of environmental rights gives them a cultural legitimacy³ they may otherwise lack.⁴ Even the debate surrounding the environmental dimension of first-generation human rights is not determinative because the procedural rights of access to information and to become a party to legal proceedings are equally important as far as enforcement of rights is concerned.

When every passing decade shows mounting scientific evidence of environmental threat to our planet, undeniable rust of the international environmental treaty machinery and hugely varying shades in the effectiveness of national regimes means there is a lot to be said for having many tools at our disposal in the fight to stop environmental degradation. Inclusion of environmental concerns in mankind's age-old quest of advancing human rights therefore makes more sense than ever.

Historically, the advancement of human rights pre-dates the environmental movement by many centuries and both have for the large part evolved separately in response to specific threats to human liberty and the planet. However, the advent of the Universal Declaration of Human Rights (the "Universal Declaration") after the end of the Second World War signalled a new era in which we see the plasticity of human rights emerge as a durable phenomenon. Attempts to read the basic corpus of human rights in an ecologically literate manner has thus to be seen in the context of a historic continuum in which two separate streams have merged to put the dignity of man on a stronger footing.

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¹ Anna Grier, Where Discourses Meet, (2010) 1 (1) Journal of Human Rights and the Environment, at 1.

² Loretta Ferris "Book review, Kerri Woods Human Rights and Environmental Stability", (2013) 4 (1) Journal of Human Rights and the Environment, at 101.

³ Conor Gearty, Do Human Rights help or hinder Environmental Protection, (2010) 1 (1) Journal of Human Rights and the Environment, at 17.

⁴ Whether there is any unique content in environmental rights is explored in Dinah Shelton, Developing Substantive Environmental Rights, (2010) 1 (1) Journal of Human Rights and the Environment, at 91 and Lynda Collins, Security of the Person, Peace of Mind: a Precautionary Approach to Environmental Uncertainty, (2013) 4 (1) Journal of Human Rights and the Environment, at 92.

B. Internationalization of Human Rights

The world's first charter of human rights is attributed to the Persian King, Cyrus the Great, whose armies conquered the city of Babylon in 539 B.C. Instead of pillaging the town, the King announced a series of decrees on a baked cylinder, which had the effect of freeing the slaves, allowing the people to choose their religion and announcing racial equality. Today known as the Cyrus Cylinder, it is translated into all six official languages of the United Nations, and its provisions are similar to the first four articles of the Universal Declaration of Human Rights.

The "Magna Carta" or "Great Charter" marks the next important milestone in the struggle for human liberty. The long-suffering subjects of King John of England forced him to sign this document in the year 1215, which underpins the rule of constitutional law in the English speaking world today as it established the right of citizens to own property and to be free from excessive taxes. The Magna Carta was reinforced by Sir Edward Coke's petition of right in 1628, when the English Parliament, frustrated by the expenses of overseas wars, petitioned King Charles to recognize the principle that there could be no taxation without authority of parliament, no subject could be imprisoned without cause shown (origin of the right of *habeas corpus*), and martial law could not be used in times of peace.

What we now consider as inviolable basic rights such as ownership of property, freedom from arbitrary arrest and imposition of taxes, supremacy of parliament, took centuries to crystallize and today form the bedrock principles of rule of law and constitutional democracy. In time, the advancement of human rights moved beyond protection of ordinary persons and property to encompass freedom of speech and religion. These are amongst the prominent rights in the United States Constitution of 1787 (including the Bill of Rights) and the French Declaration of the Rights of Man and Citizen two years later, both landmark documents in the history of Western Civilization.

Many would argue that these rights are universal in nature and not the special province of a particular civilisation. It may have taken a few centuries, but the end of the Second World War saw the nations of the world gather together and pledge allegiance to the Universal Declaration of Human Rights with its ringing endorsement of the inherent rights of all humans "as a common standard of achievement for all peoples and all nations". It is important to appreciate that the struggle for human rights is incessant and no single landmark document can provide a lasting fence around the expression or exploration of these rights or deal with the myriad problems that threaten the security or dignity of man.

Of the 58 States then members of the United Nations, the 48 nations⁵ that voted to adopt the Universal Declaration of Human Rights on 10 December 1948 had no idea that they were initiating the first step to the internationalisation of the protection of human rights. The League Minority Treaties, the Mandate System, the doctrine of humanitarian intervention and the Red Cross Conventions for the treatment of wounded soldiers in combat had, earlier, prominently enabled human-rights based actions across state boundaries but it was the United Nations

⁵ Eight Socialist States abstained mostly on the ground that the Universal Declaration contained an Article on the right to own property and two States were absent.

Charter, and particularly its Articles 1, 55 and 56, that enabled, for the first time in 1945, a collective global commitment to the promotion and protection of human rights. Inspired by the leadership of Eleanor Roosevelt (U.S.A.), Rene Cassin (France) and Charles Malik (Lebanon), these visionaries, in three (3) years laid the foundation, in 1948, in the Universal Declaration of Human Rights, for an edifice that has convincingly mainstreamed the agenda of human rights in global policies and practices.

The Universal Declaration set its own challenges. It was proclaimed as a resolution of the United Nations General Assembly which meant that, as per Article 11 of the U.N. Charter, it was merely a recommendation and not binding on the member-states. This notwithstanding, the Universal Declaration soon acquired a life of its own. Its eloquence soon resonated in national Constitutions, state practices and the jurisprudence of national courts. Yet, it took eighteen (18) years to transform the declaratory content of the Universal Declaration into hard and binding law in the adoption in 1966 of the (1) International Covenant on Civil and Political Rights, (2) International Covenant on Economic Social and Cultural Rights, and (3) the Optional Protocols (the “International Human Rights Covenants”). The International Magna Carta, many of us felt at that time, stood completed.

The glow of the Universal Declaration had, in the meantime, permeated to the regional levels. In Europe, the European Convention of Human Rights (the “European Convention”) was adopted in 1950 and set up the European Commission of Human Rights (later abolished under Protocol 11) and the European Court of Human Rights to implement the new human rights regime in Europe. In the Americas, there was a parallel development. The American Convention of Human Rights, 1969 (the “American Convention”), looked to the Inter-American Court of Human Rights and the Inter-American Commission of Human Rights to enforce human rights.

In about two decades since its adoption in 1948, the protection of human rights had transcended to a matter of legitimate “international concern” and regional priority well beyond the defence of “domestic jurisdiction” that transgressing states had traditionally invoked, before the U.N. Charter, to shield their human rights abuses. Humanity had come a long way in a shared concern for the dignity and well being of human beings.

South Asia had just emerged by the late 1940’s from the yoke of colonialism and it had no significant impact on, or contribution to, the proclamation of the Universal Declaration in 1948. In the U.N. General Assembly, Pakistan, which had become independent about sixteen (16) months earlier in August 1947, took the floor to scope the Article on the freedom of religion to suggest that it inherently included the right to proselytise. Its Foreign Minister, Sir Zafrulla Khan, who was to later become the President of the U.N. General Assembly and the President of the International Court of Justice, was already a respected voice in the General Assembly at the time of its adoption of the Universal Declaration.

C. International Commitments to Protecting the Environment

About twenty four (24) years after 1948, the international community witnessed another tumultuous event that was to stream a parallel development in the internationalisation of resource management. The United Nations Conference on the Human Environment held in 1972 in

Stockholm, Sweden, was to become to environmental protection and sustainable development what the Universal Declaration is to the international protection of human rights. For the first time in human history, the collective global conscience was stirred to care for Planet Earth and to proclaim certain principles that have endured over the years to guide national policies and jurisprudence.

But, unlike the international developments in the protection of human rights leading to the Universal Declaration, the Stockholm Principles had a much broader participation. The Universal Declaration, preceding the Decolonisation Decade, was led by the developed world. The United Nations then comprised 58 nation-states and the foot-print of the colonies was yet to blossom. The flower of independence bloomed in the 1960s and Stockholm included the new Afro-Asian States. From this perspective, the developments toward international efforts to protect the environment were not handicapped by the non-participation of the emerging decolonised states. Thus while the beginnings of the human rights concerns in the U.N. Charter and the Universal Declaration are laid at the door of the victorious U.S. and European Allies, the roots of the internationalisation of the protection of the environment are found in a more universal consensus between the developed and the developing countries. The Third World had arrived on the international stage to influence global policies.

And, it was a measure of the growth in the stature of South Asia that India's Prime Minister, Indira Gandhi, dominated attention and headlines at Stockholm by her campaign Project Tiger.

Stockholm had truly excited global interest and, a decade later in 1982, the United Nations General Assembly adopted the World Charter for Nature by a vote of 111 for, one against (United States) and 18 abstentions.

In the ten (10) year cycle that now characterizes global commitments to international conferencing on sustainable development, the United Nations Conference on Environment and Development (UNCED) met in Rio de Janeiro, Brazil, in 1992, to adopt the Rio Declaration on Environment and Development that authoritatively reinforced the Stockholm Principles and the World Charter for Nature. This spectacular Earth Summit represented a high water-mark in international efforts to prioritise sustainable development. Agenda 21, the Convention on Biological Diversity and the Statement of Principles for the Sustainable Management of Forests were the other landmark achievements of UNCED.

Rio 1992 provided an important opportunity for the leadership of South Asia. Pakistan, then the Chair of the Group of 77, well led the developing countries in the important North-South agenda before UNCED. With the support of China to G77 proposals, Pakistan spoke for a significant part of the global human population represented in Rio, a role that was much respected.

India at Stockholm and Pakistan at Rio had shown the stellar contribution of South Asia to the emerging international commitment to sustainable development. This high profile involvement of both these nations undoubtedly influenced the judicial activism in environmental matters in the jurisprudence of South Asia.

The momentum of Rio was next carried to the World Summit on Sustainable Development in Johannesburg, South Africa, in 2002. The WSSD prioritised Water, Energy, Health, Agriculture and Biodiversity and, for the first time, laid down time lines for the accomplishment of certain

stated goals. But, for me, the most remarkable accomplishment in Johannesburg was the pioneering initiative of UNEP to organize a Global Judges Symposium on Sustainable Development and the Role of Law in recognition, apparently, of the role of the Judiciary in many jurisdictions – particularly South Asia as we will subsequently show – to promote environmental protection.

Rio +20 (2012) was the most recent Summit in the decennial calendar of sustainable development. And, once again, it acknowledged the growing role of the judiciary in issues of sustainable development in the holding of the World Congress on Justice, Law and Governance as a parallel event.

Other notable developments have been the Earth Charter (2002) and the IUCN Draft International Covenant on Environment and Development (1995) in the drafting and launching of both of which I had actively participated.

In my attendance of many of these milestone events starting with Rio 1992⁶, I developed a layman's guide to the respective positions and concerns of the developed and developing countries in the evolving global environmental agenda. To the developing countries, the important areas were (1) sovereignty over natural wealth and resources, (2) right to development, (3) eradication of poverty, (4) consumption patterns of the North, (5) capacity building, (6) waste trade, (7) reschedule/write off debts, (8) transfer of resources, (9) transfer of technology, and (10) harmful activities of transnational corporations.

The developed countries, on the other hand, sought focus on population stabilization, forests, intellectual property rights, and good governance.

The commonality of interest between the North and the South was, however, readily visible on the need for a global partnership and for empowering youth, women, and indigenous people.

From this pot pourri dialogue emerged durable principles and concepts such as sacred trust for future generations, inter-generational equity, intra-generational equity, polluter pays principle, principle of sustainable development, need for public participation, environmental impact assessment, principle of prevention, precautionary principle, principle of restitution/restoration of environment, principle of strict liability, public trust doctrine, and RRR (reduce, recycle, and reuse) in waste management.

This emerging global environmental order has, to generalise, developed a corpus of soft law and principles for national and international behaviour which have impacted on humanity and Planet Earth. There have been attempts to transform these soft law principles into binding treaty obligations of states. In addition to my active association with the drafting and launch of the

⁶ I have been privileged to attend Rio (1992), Rio +10 (2002), Johannesburg (2002), and Rio +20 (2012). Additionally, I was a part of the launch of the Earth Charter, The Hague (2000) and attended Earth Charter + 10 at The Hague (2010). Also, I attended several Prepcoms and other preparatory meetings for these major conferences. See, generally, Parvez Hassan, Changing Global Order: Role of Courts and Tribunals in Pakistan in Environmental Protection, presented at the New Delhi Dialogue on Role of Courts and Tribunals in the Changing Global Order, organized by the Jawaharlal Nehru University, at New Delhi, India, on 15 March 2013

Earth Charter⁷, I was privileged to lead, as Chairman, IUCN Commission on Environmental Law, 1990-1996, the most significant of such attempts in the launch, in the UN General Assembly in 1995, of the Draft International Covenant on Environment and Development.⁸ With Wolfgang Burhenne, my predecessor-Chair, and Nick Robinson, my successor-Chair, we in the IUCN Commission of Environmental Law, sought to fast track the development of “hard” international environmental law. The internationalization of the protection of human rights had provided some guidelines. It took sixteen (16) years to transform the declaratory content of the Universal Declaration in 1948 into binding commitments under the 1966 International Human Rights Covenants. We tried to progress the soft laws content of the Stockholm Principles on Human Environment (1972), World Charter for Nature (1982), Rio Declaration on Environment and Development (1992) and the Johannesburg Declaration on Sustainable Development (2002) into a binding framework treaty on environment and development. But the IUCN Draft Covenant, almost two decades later, still remains a draft.

This is not to say that there was no progress on the ground. Stockholm, Rio and Johannesburg each inspired, mostly in the developed world, national initiatives, policies and legislation that were, sometimes, effectively mainstreamed through judicial interventions.

However, the developing countries of South Asia were slow to assimilate the issues of sustainable development in their policies and legislation. But it is a measure of the vision of the judiciaries in these countries that they did not wait for national or international hard law to provide protection against environmental degradation. This region was fortunate in the pioneering formulations of fundamental rights around the right to life including a right to the environment by Justice P.N. Bhagwati in India. They soon resonated in Pakistan through an equally visionary Justice Saleem Akhtar⁹. Similar developments of judicial activism took place in Sri Lanka and Bangladesh. And, the region was all set to see its courts and the judiciary as the major facilitators, in implementation, of the changing global environmental order.

It is clear from the above narrative, that totally independent of the progress of human rights since 1948, the environment and development have, since 1972, also been effectively mainstreamed in the global priorities.

D. Ownership of Human Rights in South Asia

The catalogue of human rights proclaimed as “universal” by the United Nations in 1948 were readily owned by South Asia at the highest level of a Constitutional commitment. In fact, the Constitutions of India, Pakistan, Sri Lanka and Bangladesh, all of which post-date the Universal Declaration, elevated these to “fundamental rights” for the enjoyment and protection of which every person could directly approach the superior High Courts – and in some exceptional cases involving “public interest” – even the highest Supreme Courts of the country. This was a unique incorporation of human rights in the basic law of the land and, through the writ jurisdiction, the superior courts of South Asia have championed the rights-based dignity of the human being.

⁷ The Earth Charter has also influenced the development of “soft law”. See, generally, Parvez Hassan, Earth Charter: The Journey from the Hague 2000, 2002 Pakistan Law Journal (Magazine), at 1-4; and Parvez Hassan Earth Charter: An Ethical Lodestar and Moral Force, in P. Corcoran, M. Vilela and A. Roerink (eds.), The Earth Charter in Action: Toward a Sustainable World, 29-31 (KIT Publishers, Amsterdam 2005).

⁸ See Parvez Hassan, Toward an International Covenant on Environment and Development, American Society of International Law Proceedings, 513-522 (1993); and Parvez Hassan, The IUCN Draft International Covenant on Environment and Development: Background and Prospects, in A. Kiss and F. Burhenne-Guilmin (eds.), A Law For The Environment: Essays in Honour of Wolfgang E. Burhenne, 39-42 (IUCN 1994).

⁹ I acknowledged the visionary role of Justices Bhagwati and Saleem Akhtar in South Asia at the UNEP Global Judges Symposium, Johannesburg, (2002); see Parvez Hassan, Judicial Activism Toward Sustainable Development in South Asia, 2003 Pakistan Law Journal (Magazine), at 39-41.

In fact, responding to poverty levels in the region, the judiciary in South Asia supported and championed public interest litigation. This meant that the superior courts bypassed technical hurdles of locus standi and standing to sue to extend relief, in some cases on its own motion suo moto, to the down-trodden and marginalized sections of society. This was as good as things could get for enforcing human rights across class and resource barriers.

The ground was broken in the early 1980's in India when Justice P.N Bhagwati and a group of like-minded judges recognized the need for public interest litigation in a developing nation with weak institutions and myriad socio-economic problems. As Justice Bhagwati wrote in S.P Gupta vs. Union of India¹⁰, a restrictive approach to standing was inimical to the process of national reconstruction in India where "law is being increasingly used as a device of organized social action for the purpose of bringing about socio-economic change".¹¹ It was observed that in past cases the Indian courts had departed from the strict rule of locus standi "where there has been a violation of the constitutional or legal rights of persons who by reason of their socially or economically disadvantaged position are unable to approach the court for judicial redress".¹² The Gupta case laid the foundation for moulding the rules of civil procedure for maintaining petitions in which the most vulnerable sections of society approach the court for effective redress:

It may therefore now be taken as well established that where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right or any burden is imposed in contravention of any constitutional or legal provision or without authority of law...and such person or determinate class of persons is by reason of poverty, helplessness or disability or socially or economically disadvantaged position, unable to approach the Court for relief, any member of the public can maintain an application for an appropriate direction, order or writ....¹³

The spirit behind public interest litigation was to not let the rigidities of law prevent relief for the most vulnerable¹⁴. Many of the cases related to entrenched maladies such as bonded labour¹⁵ and custodial deaths¹⁶.

Owing to a common history, the decisions of Indian courts have what legal doctrine deems "persuasive" value in other South Asian jurisdictions including Pakistan, where the plant of public interest litigation was to be transplanted next in a welcoming soil. The first genuine public interest case in Pakistan was a human rights case involving bonded labourers. Much like the

¹⁰ AIR 1982 SC 149.

¹¹ Id. at 191.

¹² Id. at 188. The court referred to Sunil Batra v Delhi Administration AIR 1980 SC 1579 and Sr. Upendra Baxi v State of UP (1984) Scale 1137 as examples of the trend to relax standing where legal injury had occurred to indigent or otherwise weak and oppressed persons.

¹³ See S.P. Gupta, supra note 10, at 188.

¹⁴ Menski et al. note that there are four ways in which public interest litigation differs from traditional adversarial litigation: "First the court may be approached in a flexible way for the petition to be filed, for example the court may accept a letter as a writ petition rather than insisting that the normal procedure be followed. Second, locus standi is usually expanded and construed in its widest possible meaning to include any bona fide petitioner rather than just a narrowly defined category of 'aggrieved person'. Third, proceedings conducted by the court are inquisitorial rather than adversarial, and they tend to be discretionary, incorporating any elements of informal procedure which the judge considers appropriate to follow. Finally, the nature of remedies awarded is different from what we see in 'normal' constitutional petitions, with long-term aims including enforcement under the supervision of the courts taken into consideration. The aim of the exercise is to achieve better justice, so much is clear." See Werner Menski, Ahmad Rafay Alam and Mehreen Raza Kasuri, Public Interest Litigation in Pakistan (Pakistan Law House, Karachi, 2000), at 65

¹⁵ Bandhua Mukti Morcha vs. Union of India, AIR 1984 Supreme Court 802

¹⁶ D.K Basu v. State of West Bengal AIR 1997 SC 610

sequence of event in the earlier Indian judgment, Morcha v. Union of India¹⁷, the Supreme Court of Pakistan invoked jurisdiction on the basis of a telegram sent by a group of brick kiln bonded labourers and their families.¹⁸

As Justice Tasadduq Jilani, now a member of the Pakistani Supreme Court (and next in line to become Chief Justice), wrote in State v. M.D. WASA¹⁹:

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

Public interest litigation has been applied successfully to a broad spectrum of social ills from discriminatory laws and regulations affecting women and children to the humiliating treatment of prisoners.²⁰ These cases arose from three major sources: letters written to the Chief Justice of the superior courts of Pakistan, newspaper reports (which become the basis of suo motu actions by the courts), and cases filed by petitioners that raised questions of human rights.²¹ The dilemma of how to enforce fundamental rights in a backdrop of illiteracy and ignorance was answered by a group of like-minded judges by recognizing the virtue of a “massification of society, where citizens were increasingly drawn together on the basis or rights and justice”.²²

In effect, the incorporation of fundamental rights as justiciable rights in the Constitutions of India, Pakistan, Sri Lanka and Bangladesh, combined with an over-zealous and activist judiciary in these countries, has ensured an effective juridical framework for the protection of human rights in South Asia.

¹⁷ supra note 14.

¹⁸ Darshan Masih vs. State, PLD 1990 SC 513

¹⁹ 2000 CLC 471 [Lahore].

²⁰ Since all these cases are not reported it is convenient to mention the examples given by Dr. Nasim Hasan Shah, a former Chief Justice of the Supreme Court of Pakistan. In an article published in the Pakistan Law Digest, Dr. Shah states that the courts of Pakistan have used public interest litigation to do away with “ (1)malpractices in our educational system; (2) afford protection to women of any origin (Pakistan or Foreign) subjected to any sex related offences and to stop the menace of obnoxious calls to them; (3) protect the property rights of female heirs/owners by issuance of directions to the Attorney-General to take steps to amend the relevant existing law or to cause fresh legislation to be initiated for securing their rights; (4) prevent exploitation of the children by restraining the authorities from taking them to public places for reception of dignitaries. It has also ruled that children shall not be forced to undertake any such work which under the law has only to be done by the labour force; (5) suspended all restrictions imposed against Nurses working in Military Hospitals and Air Hostesses of Pakistan International Airlines to getting married while in service; (6) stayed public hangings as being contrary to the Constitutional provisions guaranteeing dignity of man; (7) issued guidelines for controlling the traffic muddle in Karachi; (8) checked the practice of extortion of money by Railway staff from the passengers traveling in the Samjhota Express (train running between Pakistan and India) and appointed a Commission of Advocates and Human Rights activists to monitor the situation; (9) directed the Federal and Provincial Governments to stop making appointment against the retirement rules, a practice which was violative of fundamental right of equal opportunity for all citizens to enter upon a profession; and (10) issued guidelines to be observed by the authorities to check environmental pollution caused by fumes of motor vehicles, deforestation, open sewerages, dumping of nuclear waste etc. “. see Dr. Nasim Hasan Shah “Public Interest Litigation as a Means of Social Justice” 1993 PLD Journal Section 31, at 33.

²¹ Id. at 32-33.

²² Parvez Hassan and Ahmad Rafay Alam, Public Trust Doctrine and Environmental Issues before the Supreme Court of Pakistan, (2012) PLJ Magazine, at 45.

E. Judiciary-Led Fusion of Human Rights and Environment in South Asia

From the participation of Pakistan's Sir Zafrulla Khan in the adoption of the Universal Declaration in 1948 to the popularity of the Project Tiger campaign of India's Indira Gandhi at Stockholm in 1972 to Pakistan's prominent leadership at Rio in 1992, South Asia has effectively participated in the development of two of the most important international agendas over the last six (6) decades. But both human rights and the environment progressed, internationally, in separate and almost flow-alone streams. They were, however destined to converge as they both centred on human dignity and human welfare.

It is again remarkable that this fusion was pioneeringly led by an activist judiciary in South Asia. The background and narrative follows:²³

1. India

On the domestic front in South Asia, environmental rights forked in two directions: as part of framework legislation to be enforced by the executive branch and being framed as fundamental rights in constitutions whose ultimate guardians are the courts. The former model is marked by specialized executive authorities that create and administer environmental policies. A critical tool in the hands of these agencies is the environmental impact assessment (EIA) which allows harm to environmental resources to be assessed and minimized. Complementing the role of these authorities are technical organizations responsible for setting standards and norms and judicial tribunals responsible for dealing with related offences.

The centralisation of planning and enforcement promised by the framework model was widely welcomed as a critical advancement. Wilson et al. have argued that framework legislation represents a very coherent model for top down and co-coordinated environmental planning:

The emergence of integrated and ecosystem oriented legal regimes has been an essential first step, permitting a holistic view of the ecosystem, of the interrelationships and interactions within it, and of the linkages in environmental stresses. This has been achieved through the framework environmental legislation technique which provides a broad and flexible framework for addressing environmental issues and for responding to changes in socioeconomic and ecological parameters. It has also provided a basis and a reference point for the coordination and rationalization of previously fragmented, disjointed and overlapping sectoral legal regimes. Although the framework legislation typology will require further refinement over the coming years to ensure that it fulfills expectations, it represents one of the most critical developments in environmental management in developing countries in the two decades since Stockholm²⁴.

²³ See, generally, Jona Razzaque, *Public Interest Environmental Litigation in India, Pakistan and Bangladesh* (Kluwer 2004), and Parvez Hassan and Azim Azfar, *Securing Environmental Rights through Public Interest Litigation in South Asia*, in 22.3 *Virginia Environmental Law Journal* 216-236 (2004))

²⁴ P. Wilson, B. Ogolla, R Branes and L. Kurukulasuriya, *Emerging Trends in National Environmental Legislation in Developing Countries*, in Donna G. Craig, Nicholas A. Robinson, and Koh Kheng-Lian, *Capacity Building for Environmental Law in the Asian and Pacific Region*-at 175, at 185-186.

We now have the benefit of hindsight as framework legislation has been around for many years and I will draw upon the example of South Asia²⁵ as typical of jurisdictions where robust regulatory and institutional models have not fared well as far as implementation is concerned. On paper, the region boasts an impressive array of environmental protection laws, federal agencies tasked with enforcement of standards and regulatory instruments. Mention may be made of the Environment Protection Act, 1997 (Pakistan), the Environment Protection Act 1986 (India), the Bangladesh Environment Conservation Act, 1995, and the National Environmental Protection Act, 1988 (Sri Lanka).

As I have written on other occasions:

But it requires more than writing laws and signing treaties to promote sustainable development. A provision in law about environmental impact assessment is of no use if the country does not have the professional and technical ability to conduct and evaluate such assessments. Setting environmental quality standards for industrial emissions and effluents can make a difference only if the EPA's have the laboratories and equipment and technical administrators to police such standards. A strong cadre of environmental lawyers is needed to draft national laws for implementing international conventions and otherwise to enforce environmental protection laws²⁶.

Commentators have cautioned that the passage of laws and set up of institutional mechanism can in fact be a step backward if they result in complacency:

Indeed apart from establishing appropriate legal and institutional frameworks, the effective implementation of environmental legislation remains one of the most daunting challenges for developing countries. For in the final analysis, ineffective law may be worse than no law at all. It gives the impression that something is being done whereas the existing legal arrangements are contributing little in terms of practical environmental management.²⁷

The amended Constitution of India, 1950, directs the State "to endeavour to protect and improve the environment and to safeguard the forests and wild life of the country". However, the South Asian region is perhaps the best example of constitutionalism applied to environmental law. Owing to the work of visionary judges, public interest litigation in South Asia has become intertwined with the environmental movement in the region. De Silva offers the following explanation for this nexus:

The origin of environmentalism in the developed world was always related to recreation and aesthetics. Environmental activism in South Asia is always about survival. In this context, issues such as involuntary displacement and resettlement,

²⁵ A comparative survey of environmental law in the SAARC region and a proposal for regionalizing environmental management in the SAARC Region is found in Parvez Hassan, *Environmental Jurisprudence from Pakistan: Some Lessons for the SAARC Region*, 2012 Corporate Law Decisions, Journal, at 24-49.

²⁶ Parvez Hassan, *Environment and Sustainable Development: A Third World Perspective*, (2001) 31 Environmental Policy and Law, 36, at 40.

²⁷ See Wilson, *supra* note 24, at 186.

provision of basic human needs of water and sanitation, become central to environmental law.²⁸

The environmental movement in India was one of the biggest beneficiaries of the public interest litigation culture. This sentiment is echoed by Nomani who notes:

Out of the commitment to deep ecological values, environmentalism and ecocentrism, the Indian courts have held that the creation of a reliable and effective rights based approach would not only help to ensure the sustenance and survival of indigenous and marginalized communities, but also the well being of cosmic future generations.... Essentially being a subaltern phenomenon, a wide spectrum of social and individual groups such as lawyers, environmentalists, action groups, forest dwellers, citizens fora, tribal societies, consumer centers, feminist groups and voluntary organizations have thrown open their grievance before the higher courts... Emboldened by this judicial liberalism, India's robust environmental movement in an adversarial atmosphere of repressive policing and bureaucratic red tape has ushered in a third generation of human rights culture.²⁹

An embedded constitutional right to protect the environment and superior courts willing to explore these rights to their logical conclusion has given India a mature case law on the public trust doctrine,³⁰ the precautionary principle and polluter pays principle³¹, inter-generational equity³² and incorporation of international treaties in domestic law.³³ Importantly, environmental rights were read into human rights as early as in the 1980's in India.

2. Pakistan

With a robust foundation of public interest litigation in Pakistan, bridging the doctrine to environmental causes posed its own difficulties initially. Part of the challenge was that the Constitution of Pakistan, 1973, was drafted too soon after Stockholm to take cognizance of environmental rights. The only reference to the environment is in a schedule to the Constitution that says that "ecology" can be something that can be legislated on both by the provinces as well as by the Federation, which today has been amended to solely empower the provinces in a nod to devolution. There are no directives of state policy or of fundamental rights concerning the environment.

A group of petitioners who wanted to challenge the construction of a high voltage grid station in a residential area in the Pakistani capital, Islamabad, approached the Supreme Court of Pakistan in 1994 to obtain relief. The residents were apprehensive of the public health effects of electromagnetic radiation posed by the proposed grid station and also worried about threats to the city's much prized green belt regulations. As counsel, I argued the case on the basis of a "right to life" (and right to dignity) in the 1973 Constitution and in doing so I drew on the extensive

²⁸ Lalanath De Silva, Environmental Law Development in South Asia, (1999) 4(3) Asia Pacific Journal of Environmental Law 243, at 249.

²⁹ Zafar Mahfooz Nomani, The Human Right to Environment in India: Legal Precepts and Judicial Doctrines in Critical Perspective, (2000) 5 (2) Asia Pacific Journal of Environmental Law 113, at 114-115

³⁰ M. C. Mehta v. Kamal Nath (1997) 1 SCC (Supreme Court Cases) 388.

³¹ Vellore Citizens Welfare Forum v. Union of India (1996) 5 SCC (Supreme Court Cases) 647.

³² Rural Litigation and Entitlement Kendra v. State of U.P. (1987) Supp. SCC 487 (India). An earlier judgment in this matter was AIR 1985 SC 652.

³³ People United for a Better Living in Calcutta v. State of West Bengal 1993 AIR (Cal) 215.

environment-related case law in India on the constitutionally-protected “right to life” as embracing a “quality” of life. This argument resonated with the bench, which embraced a wider connotation to the “right of life”:

The word life has not been defined in the Constitution but it does not mean nor can it be restricted only to the vegetative or animal life or mere existence from conception to death. Life includes all such amenities or facilities which a person in a free country is entitled to enjoy with dignity, legally and constitutionally.³⁴

The receptivity of the Court to the precautionary principle covered in Principle 15 of the Rio Declaration on Environment and Development, 1992 was another significant advance. In its order, the Supreme Court gave significant relief to the petitioners by staying the construction of the grid station until further studies were done to establish the nature and extent of the threat posed by electro-magnetic radiation emitted by the grid station. Drawing on the experiences of the Indian courts, the Supreme Court set up a commission of experts to study the technical dimensions and to submit a report in this respect.

As Akhund and Qureshi note:

Shehla Zia vs. WAPDA case sets out two of the most critical foundations of environmental law in Pakistan. First, by virtue of the broad meaning of the word “life” as contained in Article 9 of the Constitution, together with the requirement for dignity of man contained in Article 14, the fundamental right to an unpolluted environment has been established. Secondly, the case established the application of the precautionary principle where there is a hazard to such rights.³⁵

Today, the case is routinely cited in Pakistan to allow standing to petitioners and to apply the “right to life” and precautionary principle to slow or stop projects threatening environmental harm before adequate assessments are completed and the voice of affected constituents is heard. Apart from petitions brought by civic organizations, both the Supreme Court and High Court have taken suo motu notice of environmental threats and the involvement of the superior judiciary in a controversial project is often enough to deprive it of political clout. The legacy of Justices Bhagwati in India and Saleem Akhtar in Pakistan have ensured that both countries have enduring “green benches” interpreting fundamental rights in an ecologically literate manner.

³⁴ Shehla Zia v WAPDA PLD 1994 Supreme Court 693, at 712.

³⁵ Nelma Akhund and Zainab Qureshi You Can Make a Difference- A Lawyer’s Reference to Environmental Public Interest Cases in Pakistan (IUCN, Karachi, 1998), at 13. Shehla Zia, has attracted a great deal of national and international comment. Okidi in particular notes how the case reinforces the need for lawyers to draw on international scholarship in presenting their cases: “This fact enjoys clear testimony in the opinion of the Supreme Court of Pakistan in Shehla Zia v. WAPDA, where the profuse citation of scholarly literature confirms the readiness of the national courts to draw on research results from various countries to support their decision. But it underscores one additional point, namely that the quality and wide acceptability of court decisions may also reflect the quality of the plaint and professional literacy of the counsel for the plaintiff. The easiest task for the courts is to follow precedents. However, it is the compelling quality and arguments in a plaint that may leave a court with no option but to set new precedents. In the above case, the counsel for the plaintiff assisted in the progressive development of environmental law”, Ben Boer, Koh Kheng-Lian, C. O. Okidi and Nicholas A. Robinson, Training the Trainers Program, (1999) 4 (2) *Asia Pacific Journal of Environmental Law* 175, at 181. For detailed background information to the Shehla Zia case, supra, see Osama Siddique, Public Interest Litigation in the Wake of Shehla Zia versus WAPDA: The Cast Story, in Public Interest Litigation: Shehla Zia versus WAPDA (SDPI) at 7. See also Parvez Hassan, Shehla Zia vs. WAPDA: Ten Years Later, 2005 All Pakistan Legal Decisions, Journal, at 48. See also Parvez Hassan, From Rio 1992 to Johannesburg 2002: A Case Study of Implementing Sustainable Development in Pakistan, (2002) 6 Singapore Journal of International & Comparative Law 683-722

The downside of litigation is that it is time-consuming and expensive and even litigants who emerge successful often discover that they have attained a Pyrrhic victory; after all the time, acrimony and expense, the spoils of victory are few. Therefore, in another promising development, the courts in Pakistan routinely appoint commissions with technical members as well as civic society and many times a mediated outcome is made possible where everyone benefits.³⁶ In my home city of Lahore, intractable issues such as air quality³⁷, solid waste disposal³⁸ and widening of heritage roads³⁹ have yielded to this approach. The critical role of the courts on using fundamental rights as a bulwark against commercial encroachment on the environment is likely to continue as the recent 18th Amendment to the Pakistan Constitutions makes environment a provincial subject. In contrast to their Federal forebears, the provincial EPA's are in a much weaker position to implement framework legislation.

3. Sri Lanka

Although Sri Lanka's 1978 Constitution provides for a series of fundamental rights, it asserts in its Directive Principles of State Policy that the state shall protect, preserve and improve the environment for the benefit of the community, the same are not justiciable. This has not stopped the Sri Lankan courts from giving recognition to these principles by reading them in the light of international law. As Puvimanasinghe points out:

The Sri Lankan Constitution does not provide for the right to life, and its chapter on fundamental rights deals mainly with civil and political rights, with limited protection of social, economic and cultural rights. Given these limitations, broad interpretations of the Directive Principles by the judiciary can truly advance social justice.⁴⁰

The landmark judgment in the field is *Bulankulama v. The Secretary, Ministry of Industrial Development*⁴¹, which brought the issues of sustainable development, inter-generational equity and fate of vulnerable populations to the fore. This case arose out of a joint venture between the Government of Sri Lanka and the local subsidiary of a multi-national for the aggressive development of a phosphate mine that would have displaced around twelve thousand people and depleted the mineral deposits in thirty years instead of perhaps a millennium at the previous rates of extraction. Just as the Pakistan Supreme Court had not allowed promulgation of domestic law to undermine the state's international environmental commitments, the Sri Lankan Supreme Court stated:

Undoubtedly, the state has the right to exploit its own resources pursuant, however, to its own environmental and development policies. Rational planning constitutes an essential

³⁶ As I noted recently, "the basic approach that was followed was to recommend to the court how commissions, in other countries have helped provide science/technology-based solutions which lie outside the scope of the Courts. Apart from providing the court expert guidance, the other limb of this approach was to highlight the importance of a non-adversarial, public-private partnership model for handling the most intractable civic problems". Parvez Hassan and Ahmad Rafay Alam, Role of Commissions in Public Interest Environmental Litigation in Pakistan, (2011) PLD Journal, at 84

³⁷ City District Government v Muhammad Yousaf I.C.A No. 798/2002 filed before the Lahore High Court.

³⁸ Syed Mansoor Ali Shah v Government of Punjab Writ Petition No. 6927 filed before the Lahore High Court.

³⁹ Cutting of Trees for Canal Widening Project, 2011 SCMR 1743.

⁴⁰ Shyami Fernando Puvimanasinghe, Towards a Jurisprudence of Sustainable Development in South Asia: Litigation in the Public Interest, (2009) 1 (10) Sustainable Development Law & Policy, 41-49 at 44.

⁴¹ 3 Sri L.R 243 (2 June 2000).

tool for recognizing any conflict between the needs of development and the need to protect and improve the environment. (Principle 14, Stockholm Declaration) Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature. (Principle 1, Rio De Janeiro Declaration). In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it. (Principle 4, Rio De Janeiro Declaration).

In my view, the proposed agreement must be considered in the light of the foregoing principles. Admittedly, the principles set out in the Stockholm and Rio De Janeiro Declarations are not legally binding in the way in which an Act of our Parliament would be. It may be regarded merely as 'soft law' Nevertheless, as a Member of the United Nations, they could hardly be ignored by Sri Lanka. Moreover, they would, in my view, be binding if they have been either expressly enacted or become a part of the domestic law by adoption by the superior courts of record and by the Supreme Court in particular, in their decisions.⁴²

Bulankulama laid a strong foundation for public interest litigation and just one NGO, the Environmental Foundation Limited is said to have handled over three hundred cases dealing with environmental matters.⁴³ Puvimanasinghe writes that:

PIL has also become a common feature in cases concerning development, environment, and human rights, which have closely linked jurisprudence in Sri Lanka. These cases usually involve executive or administrative action and, frequently, business activities. When major administrative decisions concern the natural resources of the country and other important issues of public interest, there is little room for the community at large to question these decisions, to be informed about their implications, and to ensure accountable and good governance. Decisions are sometimes made behind closed doors and a culture of disclosure is not common in public affairs. In this context, PIL serves as a legal tool to raise issues of social accountability in decision-making by the government and industry.⁴⁴

In Weerasekera et al. v. Keangnam Enterprises Limited⁴⁵ a mining operation, which had acquired an environmental license was alleged to be causing a public nuisance owing to the noise level of the operation. Although the lower court held that the license was an adequate defence, the Court of Appeal overturned the decision on the grounds that obtaining the environmental license was not a shield to legal injury.

The Sri Lankan judiciary has made innovative use of procedural rights as well, reading a right to information (missing in the 1978 Constitution) as part of the right to freedom of expression. Environmental Foundation Limited v. Urban Development Authority (2005) concerned a clandestine agreement between the Government agency and private developers for turning Galle

⁴² <http://www.elaw.org/node/6722> at 10.

⁴³ Puvimanasinghe, supra note 40 at 48.

⁴⁴ Puvimanasinghe, supra note 40 at 45.

⁴⁵ CA (PCH).Apn No. 40/2004 (dd. 2009.06.08)

Face Green, a seaside promenade in Colombo, which had the status of a national heritage site into a leisure complex. The Supreme Court found the contract violative of the petitioner's right to information as well as the right to equality, and though this case concerns conservation of historic properties, the reasoning can easily apply to environmental cases as well.

4. Bangladesh

Much like Pakistan, the Constitution of Bangladesh does not expressly provide for environmental rights, but the Bangladeshi courts have also embraced these rights within the constitutional right to life. In Dr. Mohiuddin Farooque v. Bangladesh and Others⁴⁶, the Supreme Court of Bangladesh stated in its consensus judgment that:

Article 31 and 32 of our constitution protect right to life as a fundamental right. It encompasses within its ambit, the protection and preservation of environment, ecological balance free from pollution of air and water and sanitation, without which life can hardly be enjoyed. An act or omission contrary thereto will be violative of the said right to life.⁴⁷

In this case, the writ petition was filed under Article 102 (1) and (2) of the Bangladesh Constitution by one of the country's leading environment NGO's, the Bangladesh Environmental Lawyers Association, in connection with irregularities regarding the country's Flood Action Plan. The objection as to standing was dismissed by the Appellate Division of the Supreme Court of Bangladesh:

“any person aggrieved” within the meaning of the Article 102 of the Bangladesh Constitution is not confined to individual affected persons only but it extends to the people in general, as a collective and consolidated personality, if an applicant bona fide espouses a public cause in the public interest he acquires the competency to claim hearing from the court...being a public sector subject, flood control and control of river and channel flows is a matter of public concern.⁴⁸

As in India and Pakistan, relaxation of standing and favourable rulings on the constitutional right to life permitted a boon of human rights and environmental petitions. In a public interest litigation concerning air and noise pollution, the Dhaka High Court ordered the Government to convert petrol and diesel engines in government-owned vehicles to gas-fueled engines; the same order also calls for the withdrawal of hydraulic horns in buses and trucks by 28 April 2002.⁴⁹ Another far reaching decision of the Dhaka High Court has called for the withdrawal of two-stroke engine vehicles from Dhaka city by December 2003, the cancellation of licenses for nine year old three-wheelers, the provision of adequate number of CNG stations, and the establishment of a system for issuing fitness certificates for cars through computer checks.⁵⁰

⁴⁶ (1997) 17 BLD.

⁴⁷ (1997), 49 DLR 1.

⁴⁸ Id., at para 49.

⁴⁹ Sayed Kamaluddin, BD Judiciary Showing Increasing Assertiveness, DAWN, 4 April 2002.

⁵⁰ Id.

As in the case of Sri Lanka, an environmental lawyers association (BELA) has been the driving force behind public interest litigation. In Bangladesh Environmental Lawyers Association v. Secretary, Ministry of Environment and Forests⁵¹, the Supreme Court of Bangladesh was petitioned to stop the diversion of a forest area and rich ecosystem in Sonadia Island from being diverted for commercial purposes. The ship-breaking industry, long used to operating without environmental considerations, became the focus of another BELA assault when the Supreme Court ordered the closing of ship breaking yards that were operating without safeguards (Bangladesh Environmental Lawyers Association v Secretary, Ministry of Shipping).⁵²

F. Regional Linkages Through Principles of Treaty Interpretation

At the international level, the convergence of human rights and the environment was influenced by different considerations.

One, the U.N and regional human rights bodies took to enforcing environmental rights as such rights have, since 1972, been included in the national legal systems through constitutional or legislative provisions. The human rights bodies, in such circumstances, addressed issues relating to environmental degradation in violation of the guaranteed rights in the agreements over which they have jurisdiction. This is facilitated by some mandates in the human rights treaties. The European Convention, for example, provides that nothing in the Convention shall be construed as limiting or derogating from any of the human rights that may be ensured under the laws of any Contracting State or under any agreement to which it is a Party (Article 53). To similar effect is Article 29 of the American Convention which recognizes the “rights recognized by domestic laws and other agreements” as well as “other rights or guarantees that are inherent in the human personality”.

Second, the Vienna Convention on the Law of Treaties, 1969 (the “Vienna Convention”), has provided a more durable basis for twinning human rights and environmental matters. Its Articles 31 and 32 lay down the general principles for treaty interpretation. Beyond the good faith duty to interpret treaties in accordance with their ordinary meaning in the context of the whole agreement and its objects and purposes, Article 31 requires the taking into account of:

- (1) any subsequent agreement between the parties regarding the application of its provisions;
- (2) any subsequent practice which establishes an agreement of the parties regarding its interpretation, and
- (3) any relevant rules of international law applicable in relation between the parties.

Article 32 enables recourse to supplementary means of interpretation either to confirm a meaning in cases where it would otherwise be ambiguous, obscure or manifestly absurd or unreasonable.

Shelton notes:

⁵¹ www.elaw.org/node/2452 (Write Petition to Bangl. S.C Oct. 10, 2003)

⁵² Bangl. S.C (2009), available at www.elaw.org/node/3747

The broad interpretive mandates of regional bodies have led to the practice of finding and applying the most favourable rule to individuals appearing before the courts and commissions. In addition, human rights tribunals have developed various canons of interpretation that reinforce these mandates and the [Vienna Convention on Law of Treaties] rules of treaty interpretation, allowing them to make broad use of environmental laws, principles and standards.⁵³

Jurisprudence under both the European Convention and the American Convention soon began to factor environmental rights in dealing with human rights issues under the respective Convention generally on the basis of the guidelines of the Vienna Convention. This result was also followed under the African Charter of Human and People's Rights, 1984 (the "African Charter"). A few examples highlight the emerging nexus.

1. European Convention

In Fadayeva v Russia⁵⁴ the plaintiff lived near the largest iron smelter in Russia and claimed that toxic emissions had adversely affected her health, placing reliance on Article 8 of the Convention, which protects a person's private and family life:

Article 8 – Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The Government responded that the extent of the pollution was not extreme enough to set up an Article 8 claim. Finding that Article 8 applied, the Court agreed that there could be no arguable claim under Article 8 if the detriment complained of was negligible in comparison to environmental hazards to be inherent in modern cities but held that the assessment of the minimum is relative and depends on all the circumstances of the case, such as the intensity and duration of the nuisance, and its physical or mental effects.

On the facts, the Court held that respondent state had failed to strike a fair balance between the interests of the community and the applicant's right to respect for her home and her private life. Both non-pecuniary damages and costs of litigation were awarded to the plaintiff. Though Article 8 is framed in terms of the right to privacy but that has not stopped the European Court from adopting a purposive interpretation and reading into it the right to a healthy environment not only in this case but many other instances.

⁵³ Shelton, supra note 4, at 93

⁵⁴ No 55723/000 (judgment of 9 June 2005) 2005/IV Eur Ct H R 255 (2005)

2. American Convention

The experience under the American Convention has been well summed up:

At the international level, in the western hemisphere, the Inter-American Commission and Court have articulated the right to an environment at a quality that permits the enjoyment of all guaranteed human rights, despite a lack of reference to the environment in nearly all inter-American normative instruments...The Commission's general approach to environmental protection has been to recognize that a basic level of environmental health is not linked to a single human right but is required by the very nature and purpose of human rights law.⁵⁵

The Commission's Report on the Situation of Human Rights in Ecuador, 1997, states:

The American Convention on Human Rights is premised on the principle that rights inhere in the individual simply by virtue of being human. Respect for the inherent dignity of the person is the principle which underlies the fundamental protection of the right to life and to preservation of physical well-being. Conditions of severe environmental pollution, which may cause serious physical illness, impairment and suffering on the part of the local populace, are inconsistent with the right to be respected as a human being.⁵⁶

Shelton notes that "neither the Inter-American Commission nor the Court adheres to a static or 'originalist' interpretation of the texts" taking the view that "human rights instruments must be interpreted and applied by taking into account" "developments in the field of international human rights law since those instruments were first composed and with due regard to other relevant rules of international law applicable to member states against which complaints of human rights violations are properly lodged".⁵⁷ The author notes that this dynamic approach of taking cognizance of changing conditions is the hall-mark of the European Court, which has stated that it is of "critical importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory".⁵⁸

The above developments will be further reinforced in the 1988 Additional Protocol to the American Convention which provides that "everyone shall have the right to live in a healthy environment and to have access to basic public services".

3. African Charter

Although the European Convention (1950) and the American Convention (1969) enabled a backdoor nexus of human rights and the environment, the approach of the African Charter, of a more recent vintage of 1984, is direct. It provides clearly that "all peoples shall have the right to

⁵⁵ See Shelton, supra note 4, at 104.

⁵⁶ Inter-Am Comm HR, Report on the Situation of Human Rights in Ecuador, OAS Doc OEA/Ser.L/V/II.96, Doc 10 Rev 1, 24 April 1997, at 92.

⁵⁷ See Shelton, supra note 4, at 93.

⁵⁸ Christine Goodwin v The United Kingdom [GC], (App no 28957/95) (Judgment of 11 July 2002) (2002) EHRR 18, para 74.

a general satisfactory environment favourable to their development (Article 24). The difference between the pre-Stockholm European and American Conventions and the 1984 African Charter and the 1988 Additional Protocol to the American Convention show how the international developments on sustainable development since 1972 have impacted on treating human rights and environmental issues together. This approach is indicative of the future.

The work of the African Commission on Human and Peoples Rights (the “African Commission”) well lives up to the mandate of the African Charter. In May 2002, the African Commission acted on a Communication, which alleged that the “oil consortium [with the connivance of the military government of Nigeria] has exploited oil reserves in Ogoni land with no regard for the health or environment of the local communities, disposing toxic wastes into the environment and local waterways in violation of applicable international environmental standards”. The Communication went on to note that

The resulting contamination of water, soil and air has had serious short and long-term health impacts, including skin infections, gastrointestinal and respiratory ailments, and increased risk of cancers, and neurological and reproductive problems.⁵⁹

The Communication accused the Government of Nigeria of withholding vital information about the project⁶⁰ from the affected community and using its security offices for “ruthless operations” including destructing of Ogoni villages and homes.

In its ruling, the African Commission took cognizance of the fact that the Federal Republic of Nigeria has incorporated the African Charter into its domestic law and the Complainants’ allegation that the Nigerian Government violated the right to health and the right to clean environment as recognized under Articles 16 and 24 of the African Charter. The African Commission also read a right to housing and shelter though the same was not explicitly mentioned in the African Charter:

Although the right to housing or shelter is not explicitly provided for under the African Charter, the corollary of the combination of the provisions protecting the right to enjoy the best attainable state of mental and physical health, cited under Article 16 above, the right to property, and the protection accorded to the family forbids the wanton destruction of shelter because when housing is destroyed, property, health, and family life are adversely affected. It is thus noted that the combined effect of Articles 14, 16 and 18(1) reads into the Charter a right to shelter or housing which the Nigerian Government has apparently violated.⁶¹

⁵⁹ Ref. ACHPR/COMM/AO44/1, at 3.

⁶⁰ See also *SERAC v Nigeria*, (27 May 2002) Comm 155/96, Case No ACHPR/COMM/A044/1 where the Court took an expansive view of Governmental obligations “to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources”. Apart from environmental impact studies and independent scientific monitoring, these measures included the duty to provide information and allow the public an opportunity to participate in decision-making.

⁶¹ *Supra* note 59, at 12-13.

G. Looking Ahead

Although not a part of the original vision for human rights in 1948 nor a part of the environment agenda led in Stockholm in 1972, the United Nations, which sponsored both the streams, has, over recent years, seen the desirability of synthesizing the human rights and the environment issues for a better achievement of both the goals. This is the way it should be and it is likely that both will increasingly share a common platform in the future.

Both international and regional initiatives tell a story where human rights and the environment streams are coming together for the greater good of mankind. The United Nations Committee on Economic, Social, and Cultural Rights adopted a General Comment in 2002 on the right to water, referring to article 11 of the International Covenant on Economic, Social, and Cultural Rights.²⁸ The General Comment states:

The human right to drinking water is fundamental for life and health. Sufficient and safe drinking water is a precondition for the realization of all human rights.⁶²

International Treaties and Covenants are often criticized for being mere statements of intent but it cannot be denied that the commitments made at the world stage create an atmosphere where regional and national initiatives are catalyzed. In the same year as the General Comment on the right to water, the European Commission charged eight E.U. Member States with violating water quality directives (France, Greece, Germany, Ireland, Luxembourg, Belgium, Spain, and the UK).⁶³ The Earth Justice's Issue Paper notes that the "European Commission's increased regulation of water quality standards demonstrates the commitment to the newly recognized human right to clean water".⁶⁴

More recently, in 2010, the United Nations General Assembly has recognized the right to water,⁶⁵ and the Human Rights Council has appointed an independent expert on the issue of human rights obligations related to the enjoyment of a safe, clean, healthy and sustainable environment.⁶⁶ This evolution of human rights is welcome as currently the Constitution of South Africa explicitly recognizes a right to water as such⁶⁷ and the right to water assumes greater importance in the context of the affect of climate change on vulnerable populations. As Westra notes:

It has been further argued that climate change threatens human rights, and that water damage related to climate change threatens the cultural rights and the very existence of indigenous populations living far beyond the limits of the consumer imagination. Climate change, it has been argued, is, in short, a form of intra-and inter-generational justice. Future negotiations regarding climate change protocols

⁶² The sufficiency, safety, affordability, and accessibility to water are defined in the Comment and it further describes a state's legal responsibility in fulfilling the right. The human right to water embraces the notion that sufficient, affordable, physically accessible, safe, and acceptable water will be available for personal and domestic use.

⁶³ The case against France, the European Court of Justice (ECJ) ruled that France had not met the 50 mg/L limit for nitrates in surface waters.

⁶⁴ Earth Justice Issue Paper, Human Rights and the Environment, Materials for the Fifty-Ninth Session of the United Nations Commission on Human Rights, Geneva, 17 March-25 April 2003. The OECD now recognizes the link between human rights and the environment and contains an environmental ranking of its members.

⁶⁵ GA Resolution 64/292 of 28 July 2010.

⁶⁶ A/HRC/19/L.8/Rev.1 and Collins supra note 4, at 92..

⁶⁷ Section 27 of the Constitution of the Republic of South Africa, 1996.

and water law instruments should therefore be placed within a human rights framework, and climate change and human rights need to be understood in the light of a close examination of their intimate interconnection⁶⁸

It is not just in the creation of new socio-economic rights—such as the right to water—that the boundaries of human rights are being pushed outwards. Collins has recently argued that where there is evidence of a significant threat to human health, coupled with scientific uncertainty regarding the existence, mechanism or scope of the risk involved, the security of the person of exposed individuals is violated. The case she draws on is that in October, 2010, members of the Aamjiwnaang community filed suit in Ontario alleging that the decision to allow Suncor Energy Products, to increase production by 24% at their sulphur recovery plant violated their right to security of the person under the Canadian Charter of Rights and Freedoms.

Collins argues that “human rights are unitary and interdependent; if the precautionary principle does form part of a customary international right to environment, then this understanding of environmental rights should inform states’ interpretation of the right to security of the person.”⁶⁹ This is part of an effort to ensure that there is unique content to environmental human rights beyond the support provided in domestic constitutions and customary international law to the concept of a human right to environmental quality

The efforts of the South Asian judiciary to protect the environment are salutary but leaving the environmental movement in the hands of national courts is not a global prescription. Firstly, the basic job of the courts is to interpret laws in the resolution of conflicts and implementation requires the co-operation and capacity of other agencies. Secondly, political, institutional and cultural differences make judicial redress ineffective in many jurisdictions for various reasons. This calls for the regionalization of initiatives to reinforce international conventions and paper over weaknesses in national regimes.

As I wrote elsewhere:

protection of human rights in the world was improved by the internationalisation of these concerns through the Universal Declaration of Human Rights, 1948 and the International Covenant of Civil and Political Rights and on Economic, Social and Cultural Rights, 1966. These pioneering initiatives at the international level were facilitated by regional support and the establishment of European Commission/Court of Human Rights, the Inter American Commission/Court of Human Rights and similar initiatives in Africa.⁷⁰

Clearly, much progress has been made since July 1994 when Ms. Fatma Zohra Ksentini, Special Rapporteur on Human Rights and the Environment for the Sub-Commission on Prevention of Discrimination and Protection of Minorities, issued her Final Report to the Sub-Commission. The Final Report, including the 1994 Draft Declaration of Principles on Human Rights and the Environment, noted that environmental damage has direct effects on the enjoyment of a series of human rights and that human rights violations in turn may damage the environment.⁷¹ The

⁶⁸ Laura Westra, *Climate Change and the Human Right to Water*, (2010) 1 (2) *Journal of Human Rights and the Environment*, at 188.

⁶⁹ See Collins, *supra* note 4, at 93.

⁷⁰ See Hassan *supra* note 25, at 47.

⁷¹ E/CN.4/Sub.2/1994/9. Amongst other measures, Ms. Ksentini recommended that the human rights component of environmental rights be forthrightly made a part of the work of human rights bodies.

world's appetite for energy and goods is always growing bigger and unrestrained commerce that arises to fulfil it continually threatens the planet's delicate eco-system.

When logging companies invade what is left of close-canopy tropical rain forests in Liberia or lowland rain forests in Indonesia, they do not just threaten biodiversity hot spots but displace indigenous people who have depended for centuries on nature for their livelihoods, shelter, medicine and folklore. Hydroelectric dams provide much-needed energy at an economically lower cost but cause massive displacement of communities and encroach on their right to shelter. When mining companies carry out open-pit mining near human habitation or planes fly low over residential neighbourhoods on their landing routes, it is at the cost of the right to shelter in one case and the right to privacy and inviolability of the home in the other.

A rights-based approach to environmental rights, as championed by national courts under their respective constitutions or regional tribunals under human rights conventions, is a critical tool in the struggle to find the right balance between economic growth and the health of the planet and its marginalized communities.

H. Recommendations

The Asia-Europe Foundation, a principal sponsor of the 13th Informal ASEM Seminar on Human Rights, has been an important architect of Asian-Europe co-operation in many important economic and social sectors. It needs to use this credibility to further forge ahead the common ground that has emerged so eloquently in the pursuit of human rights and sustainable development in these two (2) continents. Some suggestions for a blue-print for its future activities:

- (1) support of regional and sub-regional approaches in Asia in human rights as has successfully advanced the emerging human rights-environment nexus in Europe, inter-Americas and Africa.
- (2) support for intra-regional initiatives such as between the ASEAN and the SAARC countries so that both benefit from each others' experiences on the basis of a South-South dialogue.
- (3) support for inter-regional initiatives and co-operation between Asia and Europe to maximize the sharing, for example, of the jurisprudence of the European Convention with the robust activist jurisprudence from Asia, particularly South Asia.
- (4) inter-regional co-operation could include technical support, transfer of resources and technology and capacity building of particularly the Environmental Protection Agencies in Asia. The hope for a global partnership between the South and the North was held out in Stockholm, Rio, and Johannesburg but did not develop to much disappointment in the developing world. This global agenda can be led and played out between Asia and Europe.

(5) a prioritization of good governance as the core need of the Asian continent to include public participation, transparency, and accountability would be necessary for an effective commitment of the Asia-Europe Foundation. The Foundation could start a dialogue on military expenditure in the context of the imperatives for greater budgetary allocations for social sectors of health and education and general welfare of the masses.

(6) the undertaking of an analysis of the impact on human rights and the environment of the U.S. drone attacks in Asia which undoubtedly have global implications. If respect for human rights is about sovereignty of peoples as nation states, the Asia-Europe Foundation should consider an in-depth evaluation of the growing U.S. unilateralism.

(7) the need to involve the judiciary, prosecutors and lawyers to leverage, in the future, the huge successes in the important jurisprudence that has well anchored progress so far in Asia and Europe. Johannesburg (2002) and Rio + 20 successfully involved the judiciaries in recognition of their growing role in the protection of human rights and the environment.