Towards a Jurisprudence of Sustainable Development in South Asia:

Litigation in the Public Interest

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This paper presents an updated version of part of a chapter in "Foreign Investment, Human Rights and the Environment: A Perspective from South Asia on the Role of Public International Law for Development," published by Koninklijke Brill NV, Leiden, The Netherlands, in 2007, which in turn consisted of an adapted version of the author's PhD thesis.

Introduction

South Asia, according to the grouping of the South Asian Association for Regional Cooperation, consists of Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka. Although Southern Asia is by and large one of the economically poorest regions of the world, it is rich in non-economic terms—ecological, historical, cultural, ethical, philosophical, and spiritual. The Indian sub-continent is home to a value system involving the spiritual, ethical, individual, and collective dimensions of human life, which are all interconnected and require mutual accommodation, as all phenomena in nature are united in a physical and metaphysical relationship. Religious traditions and philosophical thought in Southern Asia find close links with justice, equity, and sustainable development; non-violence and compassion for all; reconciliation, harmony, equilibrium and the middle path; equitable distribution of resources and moderation in consumption. Throughout the colonial and post-colonial history of most of the countries in the region, however, the traditional wisdom of holistic approaches to development have been gradually replaced by globally dominant models of economic development and today the problems of development versus the environment and human rights, poverty, pollution and overpopulation: indiscriminate liberalization and urbanization are commonplace.

In a variety of issues ranging from a massive leakage of methyl-isocyanate gas to phosphate mining, and from the noise of a thermal power plant generator to Genetically Modified Organisms, public interest litigation[1] ("PIL") has evolved as a popular tool in the South Asian region[2] since the mid-1980s. It has taken diverse forms, like representative standing, where a concerned person or organization comes forward to espouse the cause of poor or otherwise underprivileged persons; and citizen standing, which enables any person to bring a suit as a matter of public interest, as a concerned member of the citizenry. Given the various and numerous classifications that divide the social fabric in this region, it is fair that poor, illiterate, legally-illiterate, minority, low caste, and other disadvantaged and underprivileged persons gain access to justice through distortions of traditional doctrines of standing. The test for *locus standi* in these cases has, within limits, been liberalized from the need to be an aggrieved person, to simply being a person with a genuine and sufficient concern. In addition, class actions allow one suit in the case of multiple plaintiffs and/or defendants, and have been useful in this area.

Before the Bhopal disaster, PIL emerged as a tool in cases of social injustice, for instance bonded and child labor, and issues of public accountability, like illegal payments to public officials. In relation to challenges to development projects, Indian courts had consistently been slow to interfere with projects beneficial to development.[3] In the case of the Sardar Sarovar Dam Project, PIL was invoked by the Narmada Bachao Andolan, challenging the failure to ensure rehabilitation for millions of persons displaced by the construction of over 300 dams across the Narmada river. Protracted litigation ended years later in 2000.[4] The main catalyst for the evolution of PIL was the Bhopal disaster. In its immediate aftermath, the victims of this catastrophic industrial accident first brought action against Union Carbide in India. The Indian government then passed legislation, assumed the role of *parens patriae*, and filed suit against the parent company in the US, on behalf of the victims. This course of action was largely due to lack of legislation, enforcement capacity, and legal resources in India at that time. The ensuing case of *In re Union Carbide Corp. Gas Plant Disaster*[5] concerned liability and compensation for thousands of deaths and personal injuries. However, the case was sent back to India on the basis of *forum non conveniens*. Finally, it was settled out of court, and the settlement was given judicial assent in the Supreme Court of India.[6] Thus the issue of liability was never adjudicated by a court of law. Under the settlement, Union Carbide was to pay $470 million, generally thought to be inadequate.[7] Poor implementation means that victims of Bhopal lacked redress for decades, as highlighted on the 20th anniversary of the disaster, on December 3, 2004.[8]

The realization of the total incapacity of the host state legal system to deal with such a disaster led to the passage of environment-related laws and litigation in India in the years immediately following the Bhopal accident. Most states in the region have since invoked legislative, constitutional, and judicial mechanisms to further environmental protection and sustainable

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development, and their experience can be informative for other developing countries.[9] Legislation for environmental protection has now been passed in most countries in South Asia.[10] This includes provisions requiring environmental impact assessments for development projects, statutory environmental pollution control by administrative agencies,[11] and environmental standards for discharge of emissions and effluents.[12]

Several constitutions in the region recognize an obligation of the state as well as citizens, to protect the environment.[13] In addition, the right to life (and liberty) is enshrined in some constitutions[14] and has been interpreted by the judiciary to include the right to a clean and healthy environment.[15] In the Indian case of *Subash Kumar v. State of Bihar*, the petitioner filed a public interest litigation pleading infringement of the right to life arising from the pollution of the Bokaro River by the sludge discharged from the Tata Iron and Steel Company, alleged to have made the water unfit for drinking or irrigation. The court recognized that the right to life includes the right to enjoyment of pollution-free water and air. It stated that if anything endangers or impairs the quality of life, an affected person or a genuinely interested person can bring a public interest suit, which envisages legal proceedings for vindication or enforcement of fundamental rights of a group or community unable to enforce its rights on account of incapacity, poverty, or ignorance of law.[16]

In Pakistan, an adequate standard of living has been interpreted to include an environment adequate for the health and well-being of the people.[17] In the case of *Shehla Zia and Others* v. *WAPDA*,[18] the right to life was upheld and interpreted to include a healthy environment. The petitioners, who were residents in the vicinity of a grid station being constructed by the respondents, alleged that the electromagnetic field created by high voltage transmission lines would pose a serious health hazard. It was held that the word "life" cannot be restricted to the vegetative or animal life or mere existence between conception and death. Life should be interpreted widely, to enable a person not only to sustain life, but also to enjoy it. Where life of citizens is degraded, the quality of life is adversely affected, and health hazards are created affecting a large number of people, the court may order the stoppage of activities that create pollution and environmental degradation. Since the scientific evidence was inconclusive in this case, the court applied the precautionary principle. Noting that energy is essential for life, commerce, and industry, the court held that a balance in the form of a policy of sustainable development was necessary, appointing a Commissioner to examine and study the scheme and report back to it.

A body of jurisprudence on sustainable development and its domestic implementation has evolved in India.[19] Most other countries in the region have followed in the same direction. Their various efforts viewed collectively point to the evolution of a body of regional, or comparative, jurisprudence on issues of development and environment with an overt human rights dimension, largely through the agency of citizen involvement, legal representation in the public interest, and judicial innovation. The contribution of the judiciary—especially the higher judiciary—is striking, especially in the light of the lesser commitment to sustainability on the part of most third world politicians. The case law should in principle be applicable to both global and local business, provided that transnational corporations can also be subject to domestic law in host states. Most of the cases concern local industries, but some also deal with transnational business. Whatever the factual context may be, the legal issues are the same, and the legal principles have been applied to the balancing of conflicting interests of environment, development, and human rights. The case law is therefore of basic relevance to this study and to foreign investment activities.

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Judicial Intervention in Sustainable Development in the Regional Terrain

Heightened sensitivity and concerted action in the judiciary, legal profession, and civil society have helped to create an expanded notion of access to justice[20] and to foster the phenomenon of PIL.[21] Related developments include a degree of shift from adversarial to inquisitorial judicial methods[22] suited to environmental issues, a broad and purposive approach to statutory interpretation,[23] and a measure of flexibility in procedure adopted and redress granted.[24] *The Dhera Dun case*[25] involved a public interest petition addressed to the Supreme Court of India by the Rural Litigation and Entitlement Kendra. The court directed that all fresh quarrying in the Himalayan region of the Dhera Dun district be stopped and ultimately ordered the closure of several mines. The lessees of the mines submitted a scheme for limestone quarrying, which was rejected. On appeal, the court emphasized that the environmental disturbance caused by limestone mining had to be balanced against the need for limestone in industry. After careful consideration and study of the

issues, mostly on its own initiative, the court upheld the closure of the quarries. In view of the unemployment that would ensue, the court ordered employment of the workers in the reforestation and soil conservation program in the area. This type of strong and proactive judicial action is evident in a variety of other PIL cases. *Aruna Rodrigues v. Union of India*, for example, is an ongoing litigation over Genetically Modified Organisms in which the Supreme Court has placed tight restrictions on GMO crop testing, like prescribing safe distances for test crops from other farms and requiring testing to confirm that no crop contamination has occurred.[26]

Judicial intervention has served to scrutinize governmental and private sector activities and abate administrative apathy.[27] Significant measures include the creative usage of Directive Principles of State Policy,[28] judicial recognition of a right to a healthy environment,[29] and the interpretation of an adequate standard of living to include an adequate quality of life and environment. In cases like *Juan Antonio Oposa* v. *The Honourable Fulgencio S. Factoran* in the Philippines, which recognized intergenerational equity and the right to a balanced and healthful ecology,[30] human rights provisions have been used for environmental protection.[31] Judicial measures have also liberalized *locus standi* to include any person genuinely concerned for the environment,[32] placed a public trust obligation on states over natural resources,[33] imposed absolute liability for accidents arising from ultra-hazardous activities,[34] applied the polluter-pays and precautionary principles,[35] and promoted sustainable development and good governance.[36]

PIL has also become a common feature in cases concerning development, environment, and human rights, which have closely linked jurisprudence in Sri Lanka

The Indian case of *Municipal Council Ratlam* v. *Vardichand*[37] extended the frontiers of public nuisance through innovative interpretation in light of India's constitutional embodiment of social justice and human rights. The facts arose from what the Supreme Court described as a "Third World Humanscape," where overpopulation, large-scale pollution, ill-planned urbanization, abject poverty, and dire need of basic amenities combined with official inaction and apathy to create a miserable predicament for slum and shanty dwellers in a particular ward in Ratlam, Madhya Pradesh. Justice Krishna Iyer confirmed the finding of public nuisance by the lower courts.[38] Fortifying judicial powers to enforce laws, the judge stated that the nature of the judicial process is not merely adjudicatory nor is it that of an umpire only. Affirmative action to make the remedy effective is the essence of the right, which otherwise becomes sterile. Justice Iyer also referred to the need for the judiciary to be informed by the broader principle of access to justice necessitated by the conditions of developing countries and obligated by the Indian Constitution. This case adopts a holistic approach in terms of its orders for local development and provision of basic needs.

Several recent cases of public interest litigation in South Asia further elucidate the concept of sustainable development and move its implementation forward. The superior courts of India were the catalysts for judicial activism and innovation in the region and public interest litigation is now also commonplace in the lower courts. Cases include *Akhil* v. *Secretary A.P. Pollution Control Board W.P.*;[39] *A.P. Pollution Control Board* v. *Appellate Authority Under Water Act W.P.*;[40] *A.P. Gunnies Merchants Association* v. *Government of Andhra Pradesh*;[41] *Research Foundation for Science* v. *Union of India*;[42] *Chinnappa* v. *Union of India*[43] and *Beena Sarasan* v. *Kerala Zone Management Authority et al.*[44] In *Research Foundation for Science and Technology and Natural Resources Policy* v. *Union of India et al.*,[45] a public interest suit led to the appointment by the Supreme Court of a Committee to inquire into the issue of hazardous wastes.

In Pakistan, recent cases include *Bokhari* v. *Federation of Pakistan*[46] and *Irfan* v. *Lahore Development Authority* ("Lahore Air Pollution Case").[47] The first case concerned the grounding and collapse of a ship in the port of Karachi in 2003, leading to a major oil-spill, which caused far-reaching environmental damage. The ability of the legal system to respond was, in this case before the Supreme Court, found to be totally lacking due to many reasons including lack of preparedness and failure to ratify relevant international conventions. This case was held to be suitable for public interest litigation. The Court went on to discuss public interest litigation as it had evolved in India and Pakistan, where it was said to be particularly useful because of the realities of poverty, illiteracy, and institutional fragility. It was found that in Pakistan, PIL had been used in a very wide range of social issues, from environmental pollution to the prevention of exploitation of children. The Lahore Air Pollution Case concerned air and noise pollution from rickshaws, mini buses, and other vehicles and the non-performance of statutory duties by the relevant authorities, charged with ensuring a pollution free environment for the citizens. The court cited several Indian judgments, including *Ratlam Municipality* v. *Vardichand*, where Justice Krishna Iyer had touched on the need to be practical and practicable and order only what can be performed.

In Nepal, *Suray Prasad Sharma Dhungel* v. *Godavari Marble Industries et al.*[48] was a landmark case, decided by a full bench of the Supreme Court. The Court held that a clean and healthy environment is part of the right to life under the Constitution. It upheld the *locus standi* of NGOs or individuals

working for environmental protection, and directed that relevant laws necessary for the protection of the environment be enacted. In *Sharma et al.* v. *Nepal Drinking Water Corporation et al.*,[49] the Supreme Court emphasized the significance of pure drinking water to public health and, without explicitly saying that it is a basic right, expressed that its provision was a responsibility of a welfare state. The Court took account of several aspects of the Nepali Constitution, including the main objectives of the state, and the spirit of the Constitution. Without issuing a writ of *mandamus* to guarantee the right to pure drinking water, as requested by the petitioner public interest lawyer, it alerted the Ministry of Housing and Physical Development to hold the Drinking Water Corporation accountable in complying with its legal obligations under its governing statute. In *Sharma et al.* v. *His Majesty's Government Cabinet Secretariat et al.*,[50] the Nepali Supreme Court was petitioned to "quash a government decision allowing unfettered import of diesel taxies and leaded petrol from India." It held that a healthy environment is a prerequisite to the protection of the right to personal freedom under the Constitution and that the state has a primary obligation to protect the right to personal liberty under Article 12 (1) by reducing environmental pollution as much as possible. Based on the concept of sustainable development, the court stated that the environment cannot be ignored for development. The court issued a directive to enforce essential measures within a maximum of two years in order to reduce vehicular pollution in the Kathmandu Valley, well known for its historical, cultural, and archaeological significance.

In Bangladesh, the case of *Bangladesh Environmental Lawyers Association* v. *Secretary, Ministry of Environment and Forests*,[51] concerned the neglect, misuse, and lack of coordination by governmental authorities in relation to Sonadia Island, a precious forest area and rich ecosystem. Authorities were instead alleged to be preparing the land for industrial purposes destructive of the environment, like shrimp cultivation, thereby destroying the habitat for fauna and flora, and weakening natural disaster prevention benefits. More recently, in *Bangladesh Environmental Lawyers Association* v. *Bangladesh et al.*, the Supreme Court ordered the closing of ship breaking yards that were operating without necessary environmental clearance and a variety of actions to be taken by the government to prevent future environmental harm, including establishing a committee to ensure that regulations are created and followed.[52]

PUBLIC INTEREST LITIGATION AND SUSTAINABLE DEVELOPMENT LANDSCAPE IN SRI LANKA

Sri Lanka's modern domestic jurisprudence is linked closely to relevant international law. The dynamic currents of sustainable development law—especially in the context of human rights, public interest litigation, and the environment—in the domestic courts of the South Asian region have influenced the ebb and flow of the waters of the island's jurisprudence, making fundamental changes in its course. The fabric of the domestic law, therefore, acquires new motifs and designs, creating an interesting mosaic. For a just, equitable, and sustainable development in Sri Lanka it is necessary to identify where environmental degradation and resource depletion make it difficult to meet basic needs, and to modify human activities to both eliminate undesirable side-effects and satisfy these needs.[53]

Sri Lanka's 1978 Constitution has some provisions on the environment in its chapter on Directive Principles of State Policy and Fundamental Duties. Article 27(2) says that the state is pledged to establish in Sri Lanka a democratic socialist society, the objectives of which include (e) the equitable distribution among all citizens of the material resources of the community and the social product, so as best to sub-serve the common good. Article 27(14) asserts that the state shall protect, preserve and improve the environment for the benefit of the community. According to Article 28(f), it is the duty of every person to protect nature and conserve its riches. Although Article 29 states that the Directive Principles of State Policy and Fundamental Duties are not justiciable,[54] the Sri Lankan Courts have given recognition to these principles, which they have read in the light of principles of international law. In a dualist country such as Sri Lanka, they have been an invaluable aid to the incorporation of international law, and have facilitated the infiltration of international public and community values into the domestic legal system. 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. As pointed out by Savithri Goonesekere:

> The jurisprudence being developed in the Indian Supreme Court is important for Sri Lanka and South Asia, since it provides insights into the manner in which policy perspectives recognized in international standards can be integrated into domestic law. This process is important because international treaties in India and Sri Lanka as well as some other countries do not become locally enforceable as law unless they are integrated into local law by courts and legislatures.[55]

Many public nuisance cases constitute the relevant jurisprudence in the pre-environmental era. The first such major case in Sri Lanka after the enactment of the National Environmental Act ("NEA") was *Keangnam Enterprises Ltd.* v. *Abeysinghe*.[56] It arose from a complaint by the inhabitants of a village in the North-Western province to the Magistrate's Court ("MC") of Kurunegala regarding public nuisance from blasting and metal quarrying operations. The metal was used to develop a major road. Excessive noise and vibration from blasting day and night had led to severe damage to person and property, including insomnia, fear psychosis, loss of hearing and bursting of ear-drums, the drying up of wells, failure of crops, and structural damage to property. The Magistrate granted an injunction restraining the operation of the quarry and a conditional order to remove the nuisance, upon which the company applied for revision to the Court of Appeal ("CA") under Article 138 of the Constitution. The Keangnam company had obtained some licenses, such as a site clearance, but not an Environmental

Protection Licence ("EPL") as required by the NEA. The CA insisted on this requirement, which the company had applied for but not yet obtained. The Court also did not accept the argument that the possession of an EPL would oust Magisterial jurisdiction for public nuisance, since the company did not have a license.[57] In a subsequent case, the MC stated that the blasting of rocks and operation of a metal crusher amounted to a public nuisance, even though the company had an EPL, since the terms of the EPL were being violated, causing severe damage, including physical injury to persons, damage to over 100 houses, and metal dust pollution.[58] The quarry was required to comply with the standards set by the Central Environmental Authority ("CEA") in the EPL. A conditional order for the removal of a public nuisance was also granted in a case of pollution from untreated chemical effluents discharged into public waterways by a textile dying plant causing skin rashes; a lime kiln around which there was an increased incidence of cancer and tuberculosis; a factory producing rubber gloves and boots which caused groundwater pollution from toxic chemicals and wastes leading to respiratory problems; and a factory producing sulphuric acid.[59] In *Hettiarachchige Premasiri et al.* v. *Dehiwala – Mount Lavinia Municipal Council*,[60] public nuisance provisions were used for the removal of a nuisance, in this case garbage, causing a major threat to public health as well as danger to a bird sanctuary in the vicinity. Since the nuisance was not removed by the Municipal Council in spite of having been given ample time, the interim order was made absolute.

In all these cases, the environmental factor weighed heavily with the courts. While this is indeed a welcome position, it is submitted that sustainable development rather than environmental protection *per se* should be the guide to both legislation and case law in the developing country context. Public nuisance being a criminal law remedy does not allow much leeway for the balancing of conflicting interests, unlike its civil law counterpart, private nuisance. The facts of the above cases are such that the decisions appear to be just and equitable. However, this may not always be the case, and it is important that environmental protection does not become a counterproductive issue. Nuisance remedies are *ex post facto*, and in this sense, Environmental Impact Assessments ("EIAs") provide a better source of protection, as they are prospective and can adopt a preventive approach.

PIL has also become a common feature in cases concerning development, environment, and human rights, which have closely linked jurisprudence in Sri Lanka.[61] 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.[62] Decisions are sometimes made behind closed doors and a culture of disclosure is not common in public affairs.[63] In this context, PIL serves as a legal tool to raise issues of social accountability in decision-making by the government and industry.

In Sri Lanka, most environmental cases have been based on remedies in administrative law, fundamental rights, public nuisance, and the public trust doctrine. The question of *locus standi* usually arises in writ applications, which are particularly useful in invalidating unlawful action by governmental bodies and compelling them to carry out their statutory duties, respectively.[64] The first Sri Lankan case in the nature of PIL in the environment/development context was *Environmental Foundation Ltd.* v. *The Land Commissioner et al.* ("The Kandalama case"),[65] which concerned the granting of a lease of state land to a private company for the purpose of building a tourist hotel. The hotel was to be built in close proximity to an ancient tank and sacred Buddhist temple, upsetting the local environment, both natural and cultural. In spite of the public interest suit questioning the irregularity of the lease, and in contravention of the relevant statutory provisions, the project did go through. The positive effect of the case was that the authorities were ordered by the court to follow the correct procedure and were compelled to do so by providing notice in the newspaper. This case was the first in Sri Lanka to uphold the standing of an NGO dedicated to the cause of environmental protection. It had important implications with respect to access to justice, the role of the judiciary, access to information, public participation in decision-making, and compliance with and implementation of the law. The Environmental Foundation ("EFL") has since 1981 filed action in environmental matters without its *locus standi* being challenged.

Environmental Foundation Limited et al. v. *The Attorney General* ("The Nawimana case")[66] was a class action brought by residents of two villages in the south of Sri Lanka and involved a fundamental rights petition over serious damage to health and property caused by quarry-blasting operations. The petitioners alleged the violation of several Constitutional provisions, namely, that sovereignty is in the people and is inalienable and includes fundamental rights; that no person shall be subjected to torture or to cruel, inhuman, or degrading treatment; the freedom to engage in any lawful occupation; freedom of movement and of choosing a residence;[67] as well as the Directive Principles of state policy.[68] The case was settled through mediation of the CEA, and the petitioners obtained relief. The court recognized the possibility of invoking fundamental rights provisions in environment-related cases, and the connection between environment, development, and human rights. It also accepted, by a majority decision, the possibility of public interest litigation, since the first petitioner was an environmental NGO.

In *Environmental Foundation Ltd.* v. *Ratnasiri Wickremanayake, Minister of Public Administration et al.*,[69] there was an unequivocal recognition of the possibility of bringing public interest litigation in suitable cases. Until this judgment, cases in the nature of public interest suits had been heard, but with no pronouncements on their acceptability as a matter of principle. The judgment is therefore significant because it disposes of the issue as to whether public interest litigation is admissible in the Sri Lankan legal system. In this *certiorari* application, Justice Ranaraja expressly extended *locus standi* to a person who shows a genuine interest in the subject matter, who comes before the

court as a public-spirited person, concerned to see that the law is obeyed in the interest of all. Unless any citizen has standing, therefore, there is no means of keeping public authorities within the law except where the Attorney General will act, and frequently he will not.[70] In *Deshan Harinda (a minor) et al.* v. *Ceylon Electricity Board et al.* ("The Kotte Kids case"),[71] a group of minor children filed a fundamental rights application alleging that the noise from a thermal power plant generator exceeded national noise standards and would cause hearing loss and other injuries. Standing was granted for the case to proceed on the basis of a violation of the right to life. Although the Sri Lankan Constitution does not expressly provide for the right to life, it was argued that all other rights would be meaningless and futile without its existence, at least impliedly. The case was settled, as the petitioners agreed to accept an *ex gratia* payment without prejudice to their civil rights, so there is no adjudicatory decision.

In *Gunarathne* v. *Homagama Pradeshiya Sabha et al.*,[72] in what was the first express reference to sustainable development by the Supreme Court, it was noted that: "Publicity, transparency and fairness are essential if the goal of sustainable development is to be achieved." Here, the court refers expressly to the prime elements of good governance, intrinsic to the concept of sustainable development. The court stated that the CEA and local authorities must notify the neighborhood and hear objections, as well as inform the industrialists and hear their views in deciding whether to issue an EPL. The Court imported this requirement in the licensing process even though the law was silent on the matter. The Court also required that agencies give reasons for their decisions and must inform the parties of such reasons, thus introducing facets of natural justice. In *Lalanath de Silva* v. *The Minister of Forestry and Environment* ("The Air Pollution case"),[73] the petitioner averred that the Minister's failure to enact ambient air quality standards resulted in a violation of his right to life. The Supreme Court ordered the enactment of regulations to control air pollution from vehicle emissions in the city of Colombo. Regulations were enacted pursuant to this decision, which had the effect of ensuring steps for implementation of the law and compliance with it.[74] Leave to proceed with this case was granted on the basis of a violation of the right to life, however, the case was decided through an order for making regulations without dealing with the issue of the right to life. This case is significant for the role of civil society with regard to laws and their implementation because the petitioner, although himself a lawyer, appeared in his capacity as a member of the citizenry.

In the South Asian region as a whole, public interest litigation has been useful in injecting an informed, participatory, and transparent approach to the processes of development, and to governmental and private sector actions involving public resources

The case of *Tikiri Banda Bulankulama* v. *Secretary, Ministry of Industrial Development*[75] is a significant example of how consensus reached in New York, Geneva, or The Hague can touch the lives, livelihoods, and environments of people in a remote village on a distant island. This case concerned a joint venture agreement between the Sri Lankan government and the local subsidiary of a transnational corporation for the mining of phosphate in the North-Central Province. The terms of the mineral investment agreement were highly beneficial to the company and showed little concern for human rights and the environment; indigenous culture, history, religion and value systems; and the requisites of sustainable development as a whole. It was the subject of a public interest suit by the local villagers (including rice and dairy farmers, owners of coconut land, and the incumbent of a Buddhist temple) in the Supreme Court.

The proposed project was to lead to the displacement of over 2,600 families, consisting of around 12,000 persons. The Supreme Court found that at previous rates of extraction, there would be enough deposits for perhaps 1,000 years, but that the proposed agreement would lead to complete exhaustion of phosphate in around 30 years. According to Justice A.R.B. Amerasinghe, fairness to all, including the people of Sri Lanka, was the basic yardstick in doing justice. The Court held that there was an imminent infringement of the fundamental rights of the petitioners, all local residents.[76] The particular rights were those of equality and equal protection of the law under Article 12(1); freedom to engage in any lawful occupation, trade, business, or enterprise under Article 14(1)(g); and freedom of movement and of choosing a residence within Sri Lanka under Article 14(1)(h). The judge, after referring to the concepts of sustainable development,[77] intergenerational equity,[78] and human development, as well as analyzing the agreement with reference to several principles of international environmental law, including Principles 14 and 21 of the Stockholm Declaration and Principles 1, 2, and 4 of the Rio Declaration, stated as follows:

> 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 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.[79]

This pronouncement could have significant ramifications for a dualist country like Sri Lanka, where international law norms need to be embodied in enabling legislation to be binding on courts. This judgment extends the incorporation process to the intermediary of the Superior Courts.[80] Deepika Udagama comments that it is doubtful that a petition could be grounded directly on international law and that while international human rights standards have been increasingly used as interpretive aids, international law will probably still have to be pleaded to expand the scope of existing domestic legal provisions.[81]

The court disallowed the project from proceeding unless and until legal requirements of rational planning including an EIA was done. It found that the proposed project would harm health, safety, livelihoods, and cultural heritage, as it even interfered with the Jaya Ganga, a wonder of the ancient world declared as a site to be preserved under UNESCO's World Heritage Convention. This cultural heritage, the court noted, was not renewable, nor were the historical and archaeological value and the ancient irrigation tanks that were to be destroyed. Having considered the question as to whether economic growth is the sole criterion for measuring human welfare, the court stated that ignorance on vital facts of historical and cultural significance on the part of persons in authority can lead to serious blunders in current decision-making processes that relate to more than rupees and cents. The judgment, requiring the cancellation of the project unless proper procedures are followed, draws inspiration from principles of international environmental law and sustainable development (in particular the separate opinion of Judge Weeramantry in the ICJ case, *Hungary* v. *Slovakia*[82]), as well as the ancient wisdom and local history of conservation, sustainability, and human rights. The company's exemption from submitting its project to an EIA was held to be an imminent violation of the equal protection clause. Although the constitution basically provides only for civil and political rights to be justiciable, the court allowed for a broader interpretation to include social and economic rights.[83] Natural resources of the country were said to be held in guardianship by all three branches of the government and the public trust doctrine was recognized. The judge in this case has been lauded for having taken "the parameters of the discourse on constitutional protection of human rights to new heights."[84] Moreover:

> While harking back to ancient practices does not generally provide grounds for a legal judgment, in this instance, it did make a positive contribution by emphasizing the universal and timeless nature of concepts such as sustainable development, which are at times perceived as 'western' or alien to non-Occidental societies.[85]

Mundy v. *Central Environmental Authority and others*[86] concerned several appeals relating to the building of the Southern Expressway linking Colombo city with the city of Matara on the Southern coast, an important step in terms of infrastructure development towards enhancing industry, trade, and investment. Protracted litigation opposing the project and its different alternative routes involved allegations of potential damage to human rights including large-scale displacement, and injury to the environment including sensitive ecosystems. The Court of Appeal had upheld the developmental interest, holding that when balancing the competing interests, the conclusion necessarily has to be made in favor of the larger interests of the community, which would benefit immensely from the project. The Court gave highest priority to the public interest in development, then to the environmental damage to wetland ecosystems, and lastly, to the human interests of affected persons. Several persons appealed to the Supreme Court with regard to particular sections of the route which resulted in the taking of their lands with no arrangements for compensation. The Supreme Court varied the order of the CA and ordered compensation under the *audi alteram* principle of natural justice and Constitutional Article 12(1) on equality and equal protection. In an innovative, value-laden, and exemplary expression of equity, equality, and social justice, Justice Mark Fernando stated:

> If it is permissible in the exercise of a judicial discretion to require a humble villager to forego his right to a fair procedure before he is compelled to sacrifice a modest plot of land and a little hut because they are of "extremely negligible" value in relation to a multi-billion rupee national project, it is nevertheless not equitable to disregard totally the infringement of his rights: the smaller the value of his property the greater his right to compensation.[87]

Weerasekera et al. v. Keangnam Enterprises Ltd.[88] involved a mining operation alleged to violate public nuisance law by local citizens because of the noise level of its operation. The lower court found that because the mining company had acquired an EPL, they had no jurisdiction to hear the case. The Court of Appeal overturned this, holding that acquiring a license for the operation did not excuse the Keangnam mining company from public nuisance claims over the way they run their operation. This holding is significant because it limits the ability of a company to use their Environmental Protection License as a shield to other legal claims over the impacts of their operation.

Still another significant case, *Environmental Foundation Ltd. v. Urban Development Authority et al.,*[89] concerned the proposed leasing out of the Galle Face Green, a popular seaside promenade in Colombo city and a major public utility built by a British governor in the 19th century. It has always been a treasured public property for use by one and all, but was by the terms of the proposed lease to be handed over by the Urban Development Authority ("UDA") to a private company to build a "mega leisure complex." The Supreme Court, in a fundamental

rights application, upheld the argument of the petitioner NGO to preserve the country's national heritage for use of the public. Very significantly, the court upheld the petitioner's argument of infringement of the right to information by reading the Constitutional Article 14(1), on the freedom of speech and expression, as encompassing a right to information. This line of argument was adopted because the Constitution does not expressly include the right to information. In view of the clandestine nature of the agreement between the UDA and the private companies, the Court also held that the petitioner's rights to equality under Article 12(1) had been infringed.

Environmental Foundation Limited has handled over three hundred cases dealing with environmental matters and is currently engaged in litigation covering a wide variety of issues. The Supreme Court has asked the organization to intervene in a case dealing with the environmental impacts of sand mining. Other ongoing cases have dealt with air pollution and included court orders for mandatory vehicle emission testing as well as a variety of actions against private parties for noise pollution and other torts.[90] Public interest applications filed by the Centre for Environmental Justice—another environmental NGO—involve irregular and/or unregulated mechanized mining and transport of sand from sand dunes in a wetland ecosystem in the North-Western Province, without permits under the relevant statutes;[91] activities threatening the coastal zone and its habitats, including destruction of mangroves; sand mining; coral extraction; destructive fishing methods; coastal pollution and improper constructions—all needing urgent coastal pollution control and management.

These cases are filed against relevant governmental authorities, pleading for writs of *mandamus* for carrying out of statutory duties,[92] as the government is the guardian of natural resources on behalf of present and future generations of the people of Sri Lanka. The most recent case now pending before the Court of Appeal, and filed by the same NGO, concerns the protection of a major national park, forming a wetland of international importance under the Ramsar Convention on Wetlands, and alteration of the boundaries of this park by the governmental authorities—*Centre for Environmental Justice v. Ministry of Agriculture, Environment, Irrigation and Mahaweli Development et al.*[93] This alteration would, it is argued, pose a further threat to the ecosystem, already endangered by landfills, aquaculture farms, fisheries, pollution, mining of minerals and the clearing of mangroves. The petition argues that the action of the authorities is in breach of several international conventions including the Wetlands, Cultural and Natural Heritage, Biodiversity Conventions and the Bonn Convention on Migratory Species of Wild Animals, several declarations including the Johannesburg Declaration, and relevant articles of the Sri Lankan Constitution. It requests writs of *certiorari* and *mandamus*.

Three decades of civil unrest in Sri Lanka have undoubtedly slowed the progress of PIL efforts to increase sustainable development, and have retarded all development in the island. A number of other states in South Asia have encountered political turmoil that creates unique obstacles to sustainable development. In Sri Lanka, several NGOs demonstrated resilience and resolve through difficult times and continued to file suits and push sustainable development forward through the court system, which has by and large been receptive to their efforts. Now with the end of the civil war and what one hopes will be the dawn of an era of recovery, reconciliation and resurrection, there is renewed scope for sustainable development in the context of justice and peace; equity and solidarity in building the nation of post-conflict Sri Lanka.

Conclusion

In the South Asian region as a whole, public interest litigation has been useful in injecting an informed, participatory, and transparent approach to the processes of development, and to governmental and private sector actions involving public resources. It has provided a voice to persons who would otherwise be unheard. Through PIL, multiple sectors and stakeholders become involved in the development process, as envisaged in the idea of sustainable development. PIL has brought forth an element of accountability, and created a space for the portrayal of a human face in development. The tool of PIL has afforded a viable mechanism for compliance with sustainable development norms in a creative, innovative, and imaginative manner, and also helped to make the development process more holistic. On the other hand, however, it has also meant that courts become directly involved in making policy decisions. This in turn has both positive and negative ramifications, and is by no means uncontroversial. It could create a system of decision-making that is, in a sense, *ex post facto* and decentralized. If not kept within certain limits, it could divert the development process away from the policy-planning objectives of the state, leading to inconsistency and incoherence. One safeguard here is that most cases revolve around the central issue of the lawfulness of a decision or action.

PIL could be abused, overused, and misused. There must therefore be checks, balances, and limitations in order that the development process is not interfered with unnecessarily. Principles of international law should be selectively adopted and suitably adapted to domestic contexts. There is a tendency to use these tools to oppose development projects, particularly because of opposition in the political arena or other dynamics including religion, culture, or personal reasons. In order to maintain its credibility, PIL should be steered towards the attainment of sustainable development rather than the opposition to all development. What is important is to promote development that is sustainable. In fact, the concept of sustainable development stands for the spirit of reconciliation and cooperation rather than conflict and confrontation, making environmental protection an integral component of development. Otherwise, it would be counterproductive to the whole project of development, and therefore to all persons, who should be at the center of development, and its true beneficiaries. Sustainable development integrates the right to development, and inter and intra-generational equity. As stated in Article 1 of the Declaration on the Right to Development, "the right to development is an inalienable human

right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized."[94]

The content of much of the jurisprudence tends to concern the negative aspects of large development projects, such as displacement, and of industrialization, such as pollution. This could be related to the influence of norms of environmental protection emerging from international law, and the comparative experience and jurisprudence of the "western" developed world. Environmental legislation in developing countries often emulates that of developed countries, and is sometimes a virtual reproduction. This is not an ideal practice, as the context of each country is different. On some occasions, explicit reference has been made to international law. At other times there is no reference and the reasoning process is independent, but the arguments and decisions come remarkably close to the law of sustainable development. What is clear is that the domestic jurisprudence is influenced by international law, and how this law has taken shape in the domestic courts of several states in South Asia, as judiciaries in the region have been influenced by developments in neighboring states.

Many concerns have been raised about the enforcement of decisions flowing from PIL, which often lags behind the decisions and orders. In fact, the experience of South Asia has been that implementation and enforcement have tended to lag behind the adjudication of cases and making of orders. If enforcement does not keep pace with the jurisprudence, the whole process will become futile and counterproductive. Therefore, an effort must be made to ensure expedient enforcement of orders. Orders frequently give remedies such as the installation of safeguards in factories, rather than their closure, and this is in line with the constructive spirit of sustainable development in its quest for a balance. Equilibrium, the middle path and mutual accommodation interconnect with strands of the complex web of the South Asian heritage - in all its diversity and yet the unity of all phenomena, its abject poverty and yet the abundance of its wealth.

Endnotes: Towards a Jurisprudence of Sustainable Development in South Asia: Litigation in the Public Interest

[1] D. Nesiah, Keynote Address at the All-Asian Public Interest Environmental Law Conference in Nuwara Eliya (Dec. 1, 1991); H. Dembowski, Taking the State to Court, Public Interest Litigation and the Public Sphere in Metropolitan India (2001), *available at* http://www.asienhaus.de/english/index.php?LINK=6&ULINK=4&UULINK=0#438_.

[2] According to Justice Bhagwathi, former Chief Justice of India: "Law as I conceive it, is a social auditor and this audit function can be put into action when someone with real public interest ignites the jurisdiction . . . public interest litigation is part of the process of participatory justice and standing in civil litigation of that pattern must have liberal reception at the judicial doorsteps." Fertilizer Corp. Kamgar Union, Sindri & others, A.I.R. 1981 S.C. 344, *available at* http://www.commonlii.org/in/cases/INSC/1980/220.html; S.J. Sorabjee, Judicial Activism in Public Law, Paper presented at the Silver Jubilee Law Conference of the Sri Lankan Bar Association, Colombo (1999).

[3] The High Courts of Kerala, Karnataka, Gujarat, Bombay and New Delhi, for instance, refused to interfere with several development projects in the 1980s, including those relating to power production, oil refineries, bridges and international airports.

[4] Narmada Bachao Andalan v. Union of India & others, A.I.R. 1999 S.C. 3345, *available at* http://www.ielrc.org/content/c0001.pdf.

[5] In re Union Carbide Corp. Gas Plant Disaster, 634 F. Supp. 842, 844 (S.D.N.Y. 1986) (aff'd as modified); In re Union Carbide Corp. Gas Plant Disaster, 809 F.2d 195, 197 (2d Cir. 1987).

[6] Union Carbide Corp. v. Union of India, A.I.R. 1990 S.C. 273, *available at* http://www.commonlii.org/cgi-commonlii/disp.pl/in/cases/INSC/1989/179.html?query=union+carbide.

[7] *See, e.g.,* Indira Jaising, *Bhopal, Settlement or Sell-Out?*, The Lawyers, Mar. 1984, at 4.

[8] Proceedings of the Int'l Conference on the 20th Anniversary of the Bhopal Gas Tragedy, "The Bhopal Gas Tragedy and its Effects on Process Safety," Dec. 1–3, 2004, Indian Institute of Technology, Kanpur, India, *available at* http://www.iitk.ac.in/che/jpg/bhopal2.htm.

[9] C.G. Weeramantry, *Private International Law & Public International Law*, 34 Rivista di Diritto Internazionale Private e Processuale 313, 324 (1998).

[10] Environmental Conservation Act, No.1 (1995) (Bangl.); The Environment Protection Act, No. 29 of 1986; India Code (1991); Water (Prevention and Control of Pollution) Act of 1974, No. 6 of 1974; India Code (1974); Air (Prevention and Control of Pollution) Act, No. 14 of 1981; India Code (1981); The National Environmental Act, No. 47 (1980) (Sri Lanka); The Environmental Protection Act, No. 34 (1997) (Pak.); The Environmental Protection Act, No. 24 (1997) (Nepal); The Environmental Protection & Preservation Act of 1993, No. 4 (1993) (Maldives); The National Environmental Protection Act of 2007 (Bhutan). In Bhutan, environmental conservation and sustainable development form part of the beliefs and values, inherent to the community. They are high on the policy agenda, integrated into measures like the Environmental Assessment Act 2000, Biodiversity Act 2003, and the work of the National Environmental Commission, and will be central in the National Environmental Protection Act presently in the process of formulation.

[11] In Sri Lanka for example, the Central Environmental Authority and local authorities issue Environmental Protection Licenses.

[12] Part IV B of the National Environmental Act of Sri Lanka regulates environmental quality for inland waters and the atmosphere. The National Environmental Act, *supra* note 10.

[13] India Const. arts. 48a & 51a(g); Nepal Const. art. 26(4) (referring to the need to prevent further damage to the environment through development, by raising public awareness); Sri Lanka Const. art. 27(14) ("the State shall protect, preserve and improve the environment for the benefit of the community"); Sri Lanka Const. art. 28(f) ("the exercise and enjoyment of rights and freedoms is inseparable from the performance of duties and obligations and accordingly it is the duty of every person in Sri Lanka (f) to protect nature and conserve its riches"); Sri Lanka Const. art. 27(4) (providing that the State shall strengthen and broaden the democratic structure of government and the democratic rights of "the People by decentralizing administration and affording all possible opportunities to the People to participate at every level of national life and in government.").

Endnotes: Towards a Jurisprudence of Sustainable Development in South Asia: Litigation in the Public Interest *continued on page 86*