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ENVIRONMENTAL CONSTITUTIONALISM IN SOUTH ASIA: COMPARATIVE STUDY OF INDIA, PAKISTAN AND BANGLADESH

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ABSTRACT

One of the particular inspirations behind writing on a subject like environmental constitutionalism lies in the fact of its post-colonial origins. From a historical logic, the development of environmental regime has been more inclusive and representative of wider global community compared to the epistemology of prevalent socio-political ideas that we know in today's world. In this thesis, I briefly discuss the role played by Southeast Asian region, particularly India, Pakistan and Bangladesh, in putting the importance of environmental issues at the center of world's conscience. Moving towards the core of the argument, this thesis attempts to understand the connection between the influence of the role played by the Southeast Asian region at the global level and its practical manifestations in the local context of all the comparator states. This is done through observing the behavior of key institutions of the state- particularly that of the constitutional courts. In doing so, I am compelled to scrutinize the similarities in the constitutional designs of all comparator states, and discuss the robust role of the judiciary in providing the impetus for constitutional environmentalism with full thrust. Despite the judicially unenforceable nature of environmental rights in the constitutions, I discuss the contributions of constitutional jurisprudence in driving and advancing the environmental regime despite all odds. Special reference and dedication are given to the importance of "right to life" in becoming a legal justification for the courts to incorporate the right to healthy environment as a natural part and parcel of the aforementioned right.

Further down, I also discuss the successive liberalization of standing rules (or locus standi) in human rights cases and the invent of "public interest litigation" channeled through highest courts in both countries. The already existing avenues of public interest litigation in human rights cases with wider standing rules provided for a more conducive space for the environmental regime to thrive and flourish from the highest level of law in place. I shall also discuss the various trickle down and ripple effects of such jurisprudence, specially through highlighting several new fundamental rights that the constitutional courts in the comparator countries ended up crafting, without express reference or inclusion in the texts of the constitution

Briefly, I highlight how the courts are often accused of judicial activism, which is considered to be a threat to the separation of power and transgression of authority. Any challenges faced by the courts in terms implementation of their orders in environmental cases, such as cooperation from the executive is also discussed in the context of courts' suspected abilities to deal with environmental matters.

Further, along with that, I also take the issue of environmental constitutionalism from an eco-centric approach, that, in some ways, takes a head-on collision with the anthropocentric approach. I give some brief examples from the Latin American region to demonstrate how constitutions in the region are viewing nature as the subject of environmental constitutionalism, rather than humans. However, eventually, I point out some of the practical challenges and loopholes in the ecocentric approach and argue how the anthropocentric approach still provides promising prospects for the advancement of environmental cause through constitutional gateways

CHAPTER 1: INTRODUCTION & BACKGROUND

Chronologically speaking, international environmental law started to develop almost a decade and half later when compared to the invent of international human rights law. The invent of global international human rights regime happened with the coming of Universal Declaration of Human Rights (UDHR) 1948 into being; and, on the other hand, the international environmental saw its beginning with the Stockholm Declaration 1972 coming into existence. Now, it may be accurate to say that both human rights and environmental rights regime came in the form of "soft law"[1]- as both were a result of political declarations rather than any kind of binding treaty or convention. However, the UDHR gained far more influence both at international as well as national levels compared to its environmental counterpart. At international level, the UDHR manifested and translated itself in the form of International Covenant on Civil and Political Rights (ICCPR) 1966 and gained a widespread participation, specially following an era dominated by mass decolonization and independence. Furthermore, some parts of ICCPR also became an essential part of the Customary International Law (CIL) with a relatively more binding force. [2]Additionally, at national level,

[1] *See E. Mcwhinney, United Nations Law Making 78-79 (1984); Change and Stability in International Law-Making 66-101 (A. Cassese & J.)*
[2] *See Hurst, The Status of the Universal Declaration of Human Rights on National and International Law, GA Journal of International and Comparative law, Vol 25:287, "Introduction" at pg. 289.*

constitutions of the many newly formed states[3] gave express reference to their commitment to the guidelines of UDHR and borrowed a series of rights mentioned in the ICCPR into their national constitutions as fundamental rights. Also, various national courts have also cited UDHR in their judgements[4] that reflects the highest level of importance given to social and political rights within national jurisdictions.

Against the abovementioned backdrop, it is evident that civil and political rights dominated the human rights regime and continued to enjoy a much wider and broader influence compared to environmental rights. There was lag between civil and political rights and environmental rights, with the former being translated into the bill of rights in many of the newly independent states but the latter still lacking its sheer presence both at international and national levels. Some form of these civil and political rights, such as freedom of speech and freedom of assembly and freedom of association, are found in almost constitutions present in the world at the moment.[5] This could be observed throughout and across the board, regardless of the type of government, democratic or authoritarian, that is in place: every constitution tends to have some amount of civil and political rights entrenched in them.[6]

[3] Cameroon Constitution of 1972's Preamble gives express reference to UDHR, inter alia, and "affirm commitment" to it.; Burkina Faso's Constitution of 1991 also gives reference to "subscribing" to UDHR in their Preamble.

[4] France: Judgment of May 5, 1993, (Association scouts de France), Cass. civ. 2e; Belgium: M. v. United Nations and Belgium, Ct. App. of Brussels, Pasicrisie belge, 1972, I, p. 971, reprinted in 69 I.L.R. 139; Germany, Federal Republic of: 52 BVerwGE 313 (1977)
Australia: Austl. v. Tasmania, 158 C.L.R. 1 (Austl. 1983) (the Tasmanian Dam Case).

[5] See Zachary Elkins and Tom Ginsburg, How Many Rights Are Enough?, "Living in the Age of Rights", Article Published by the ConstituteProject. It is available online at the following link: <https://www.constituteproject.org/data-stories/how-many-rights-is-enough?lang=es>

[6] See Zachary Elkins, Tom Ginsburg and James Melton, The Content of Authoritarian Constitutions, Cambridge University Press, pp. 141.

Similarly, according to a study, as many as 147 national constitutions contain some form of reference to environmental rights within them.[7] It is therefore evident that perhaps there is a growing recognition of constitutions as the most effective tools and gateways for the protection and advancement of environmental rights.[8]

However, The Constitutional Environment Rights (CERs) may take a variety of forms, ranging from those that are judicially enforceable rights to those which are only a part of "policy directives"- which non-justiciable and judicially unenforceable.[9] Attempts have been made to translate and transform the environmental rights into a more binding forms or "hard law" in the similar fashion as that of human rights, such attempts at the level of international law still remain unachieved. [10]

Similarly, at national level, particularly in the comparator countries, the environmental rights are excluded from the bill of rights and instead made part of the soft and judicially unenforceable Directive Principles of State Policy (DPSP).[11] However, despite their unenforceability- which shall be discussed in more detail later- a number of historical factors have influenced the courts in the comparator countries to show a very proactive and robust approach in terms of bringing a jurisprudential revolution in relation to CERs.

[7] *See David R. Boyd, The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment 47–50 (2012).*
[8] *James May and Erin Daly Global Environmental Constitutionalism (Cambridge University Press, 2015); Louis Kotzé "Arguing Global Environmental Constitutionalism" 2012 1(1) Transnational Environmental Law 199-233*
[9] *See Erin Daly, Constitutional Protection for Environmental Rights: The Benefits of Environmental Process, "Introduction" in International Journal of Peace Studies, Volume 17, Number 2, Winter 2012.*
[10] *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).*
[11] *Note: "Directive Principles of State Policy" is how the positive rights are titled in the Indian Constitution of 1949. In Pakistan's Constitution of 1973, they are titled as "Principles of Policy" whereas in the Bangladesh's Constitution of 1972, they are called "Fundamental Principles of State Policy".*

Before moving further, it is vital to look at the historical rundown of such proactive role played by the constitutional courts in the comparator countries. It was fairly obvious that instruments like UDHR had a relatively lower representation and role played by the many post-colonial states, including India, Pakistan and Bangladesh. In contrast, post-colonial states had a much active participation in the lead up to the environmental rights regime. Indian Prime Minister in 1972, Indira Gandhi, became a prominent figure with her "Project Tiger" around the Stockholm Declaration. Lately, India played a crucial role in the development of Common But Differentiated Responsibilities under the United Nations Framework Convention on Climate Change (UNFCCC)[12]. Subsequently, Pakistan played an important role Rio Conference 1992 as the chair of G77 before the United Nations Conference on Environment and Development (UNCED) alongside India[13] and made significant contributions in developing Common but Differential Responsibilities (CBDRs)- later incorporated under Principle 7 [14] of Rio Declaration. It helped bridge the gap between the developed and developing countries towards a "global partnership". Similarly, Bangladesh was also seen proactive in terms of their participation at the UNCED and was part of developing Agenda 21 of the Rio Conference related to sustainable development. [15]

The abovementioned historical developments instilled a sense of ownership among the Southeast Asian countries to advance the environmental causes in their home countries. Therefore, despite being the different nature of responsibilities that all three comparator

[12] *Sandeep Sengupta, 'India's Engagement in Global Climate Negotiations from Rio to Paris' in Navroz K Dubash (ed), India in a Warming World: Integrating Climate Change and Development (Oxford University Press 2019) 116–119.*
[13] *Ibid.*
[14] *See Imad Ibrahim, Tomas Deleuil and Paolo Farah, What is the Role of CBDRs in Fight Against Climate Change, gLAWcal journal.*
[15] *Bangladesh Country Profile Implementation Of Agenda 21:Review Of Progress Made Since Theunited Nations Conference Onenvironment And Development, 1992 (1997)*

countries were to take upon themselves as part of developing world, and all showed an impressive commitment towards environmental considerations.

CHAPTER 2: CONSTITUTIONAL DESIGN & RELEVANCE

2.1 INDIA

By the virtue of Indian constitution's constitutional age and legacy, it is imperative to highlight the relevant features of Indian constitution first. The Indian Constitution of 1949 pioneered the inclusion of Directive Principles of State Policy (DPSPs) in its constitution in the Southeast Asian region. Chapter IV of the constitution lays down a list of positive rights that the state must keep in mind while making policies for the country. However, it was not until 1976 that the Indian parliament approved the 42nd amendment in 1976 to the constitution and incorporated the protection of environment as part of state's duty in the following words, "*The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country."*[16]

One of the interesting features that the 42nd amendment to the Indian constitution was to include a list of "fundamental duties" of citizens as part of recommendations given by Swaran Singh Committee in the year 1975.[17] One of such duties is contained in Article 51A(g) which states that it is the duty of "*every citizen to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures*". This indicates a dual approach adopted by the Indian constitution that not only

[16] *Indian Constitution of 1949, Article 48-A.*
[17] *Basu Durga Das (1993), Introduction to Indian Constitution (15 edition), New Delhi: Prentice Hall of India, pp 475.*

obligates the state to take responsibility, but also creates a corresponding duty of the citizens to protect the environment.

2.1.2 BANGLADESH

Until lately, Bangladesh's constitution did not contain any express provision related to environment. However, in 2011, the country included a specific provision related to environment as part of its "Fundamental Principles of State Policy" contained in Part II of the constitution. This came as a result of Constitution (Fifteenth Amendment) Act 2011 which reads "*The State shall endeavour to protect and improve the environment and to preserve and safeguard the natural resources, bio-diversity, wetlands, forests and wild life for the present and future citizens." [18]* However, there is no express provision related to the duties of citizens in regards to the protection of environment as far as Bangladesh's constitution is concerned.

2.1.3 PAKISTAN

Pakistan's Constitution of 1973 falls behind both of its regional comparators in terms of including any express provision related to environment. The only reference that Pakistan's original constitution had in relation to environmental issues was the word "ecology"[19]. However, following 2010 the 18th Amendment to the constitution, the subject of environment was devolved to the provinces in wake of transfer of powers to the federating units.[20] The

[18] *Constitution (Fifteenth Amendment) Act 2011, Section 12*
[19] *See Pervez Hassan, Human Rights and Environment: A South Asian Perspective, "Pakistan", Keynote Address Delivered at 13th Informal ASEAM Seminar on Human Rights.*
[20] *Constitution of Pakistan 1973, Article 270AA. The aforementioned Article states: (6) "Notwithstanding omission of the Concurrent Legislative List by the Constitution (Eighteenth Amendment) Act, 2010, all laws with respect to any of the matters enumerated in the said List (including Ordinances, Order, rules, bye-laws, regulations and notifications and other legal instruments having the force of law) in force in Pakistan or any part thereof, or having, extra-territorial operation, immediately before the commencement of the Constitution*

latter has certainly added confusion and curtailed the powers of federal government in the country to enter into multi-national environmental agreements (MEAs).[21] However, it does not affect the constitutional jurisprudence in retrospect and neither does it impact the constitutional protection available to the right to a safe and healthy environment as part of right to life in any way whatsoever.

On the other hand, just like India and Bangladesh, Pakistan's constitution too contains a chapter on "Principles of Policy" under chapter 2. As many as 11 principles of policy like, inter alia, promotion of local governments, full participation of women in national life, protection of family, promotion of social justice, promotion of social and economic wellbeing of the people and participation of people in armed forces are contained in the said chapter. However, as mentioned earlier, there is no such principle of protection of environment that exists within the chapter on principles of policy. Neither has the legislature ever passed any amendment to include such a principle unlike India and Bangladesh.

Nevertheless, as we shall see in the following parts of this study, this has not precluded the courts in the country from advancing the protection of environmental rights in any manner whatsoever.

Pakistani courts have not been restrained by lack of any express provision in the constitution related to environment. If anything, the courts in Pakistan have been relentless and proactive

(Eighteenth Amendment) Act, 2010, shall continue to remain in force until altered, repealed or amended by the competent authority." .... (8) On the omission of the Concurrent Legislative List, the process of devolution of the matters mentioned in the said List to the Provinces shall be completed by the thirtieth day of June, two thousand and eleven."

[21] See Dr Pervez Hassan, Environmental Jurisprudence from Pakistan: Some Lessons Learnt from SAARC Region, paper presented at the South Asia Conference on Environmental Justice organized by the Supreme Court of Pakistan from March 24-25, at Bhurbhan, Pakistan.

in incorporating the right to environment as an integral part of right to life contained under Article 9 of the constitution. In this regard, an important observation that could be made is that even in absence environmental provisions in the constitutions, courts still have the tendency to induce the environmental rights through jurisprudential measures alone.

2.2 DIRECTIVE PRINCIPLES, NON-JUSTICIABLE ESRs AND TRANSFORMATIVE CONSTITUTIONALISM

Despite a clear reference to environmental rights in two of the three countries' constitutions as mentioned above, such rights are traditionally held to be non-justiciable rights, i.e they are judicially unenforceable. Therefore, before we delve in to any substantial discussion about the path and process courts have followed in order to fill this gap to environmental rights enforceable, it would only be fair to give a brief background for the readers to know why these rights have been kept judicially unenforceable in the first place.

In doing so, it is important to understand the exact place that these environmental rights occupy in the constitutions of respective countries. In a nutshell, these environmental rights come as part of the overall package of certain economic and social rights (ESRs) contained in the constitutions of all three comparator states in the form of directive principles of state policy.

The presence of certain non-justiciable ESRs in the comparator countries has to be seen in a particular historical context. The devastating effects of colonization and resulting historical injustices demanded the newly formed states to hope for a progressive realization of certain aspirational goals as a society following independence in the 1947 from the British rule. For

example, the Indian Constitution clearly asks for the economic and social promotion of scheduled castes and other weaker sections as part of its Directive Principles.[22]

Similarly, Pakistan's constitution aspires to eradicate social evils and achieve "social justice" as part of their Principles of Policy[23]. Bangladesh is no exception to this, as the constitution dedicates an entire chapter on Fundamental Principles of State Policy. It includes elements of social and economic security in the form of protection of workers and peasants[24] as well as "freedom from exploitation"[25]

Such ESRs are traditionally thought to work as tools for transforming a society over the period of time, or manifest to produce a particular brand of constitutionalism: transformative constitutionalism. Hailbronner, while distinguishing it from liberal constitutionalism (traditionally considered to be a common feature of Global North constitutions), is of the opinion that such brand of constitutionalism expects to form a more just and equal society through positive state actions as much as it tends to limit the state actions (in the form of negative rights contained in bill of rights).[26] Upendra Baxi terms this phenomenon as a "redemptive" project that aims to restructure "memory and forgetfulness" and tries to apply it for the application of human rights and socio-economic rights through a forward-looking approach.[27] It does not, however, imply that transformative elements in a constitution bring any sharp changes in otherwise liberal texture of such constitutions (such as separation of

[22] *Constitution of India 1949, Article 46 under "Directive Principles of State Policy"*
[23] *Constitution of Pakistan 1973, Article 37 under "Principles of Policy"*
[24] *Constitution of Bangladesh 1992, Article 14 under "Fundamental Principles of State Policy"*
[25] *Ibid, Article 10.*
[26] *See Hailbronner, The American Journal of Comparative Law, FALL 2017, Vol. 65, No. 3 (FALL 2017), pp. 527*
[27] *See Viljoen, Oscar Vilhena, and Upendra Baxi, Comparing the Apex Courts of Brazil, India and South Africa (Pretoria University Law Press 2013), chap. 28, pp. 618.*

power and bill of rights). Rather, it only aims to institutionalize social change in futuristic sense while keeping historical context and injustices in mind. [28]

The abovementioned context was important to shed some light on the unique features of the comparator countries' constitutions and help us understand them in a more nuanced way. These countries have included a list of non-justiciable rights- also called as positive rights- in their constitutions alongside the alongside the justiciable rights as part of bill of rights- also called as negative rights. This dichotomy between justiciable and non-justiciable rights does not originate from jurisprudential sources or knowledge, but from the respective constitutions themselves. In the following paragraph, a clear reference is given to the text of the constitution which creates such a distinction between enforceable and unenforceable rights.

Looking at the constitutions of all three comparator states, they use more or less a similar language to create the abovementioned distinction. The Indian Constitution states, *"The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws"* (emphasis added)[29]. Similarly, Pakistan's Constitution terms this non-justiciability in the following words "*The validity of an action or of a law shall not be called in question on the ground that it is not in accordance with the Principles of Policy, and no action shall lie against the State, any organ or authority of the State or any person on such ground*"[30]. Finally, Bangladesh's Constitution is no different as it mentions, "*The principles set out in this Part shall be fundamental to the governance of Bangladesh, shall be applied by the State in the making of laws, shall be a*

[28] *T Roux The politics of principle: The first South African Constitutional Court, 1995-2005 (2013).*
[29] *Supra note 18, Article 37.*
[30] *Supra note 19, Article 30(2)*

guide to the interpretation of the Constitution and of the other laws of Bangladesh, and shall form the basis of the work of the State and of its citizens, but shall not be judicially enforceable (emphasis added)."[31]

A critical analysis of the abovementioned provisions in the respective constitutions points towards a categorical constitutional limitation on the enforceability of anything contained in the part of respective constitutions dealing with principles of policy. As highlighted earlier, both India's and Bangladesh's constitutions contain environment as a subject in their directive/fundamental principles, whereas Pakistan's constitution does not contain any such provision in the entire constitution in the first place.

Before indulging into a detailed discussion as to how the constitutional courts in the respective countries have worked against all constitutional odds to effectively make environmental rights enforceable, it is important to look at the international commitments of the respective countries and see their status in light of national constitutions. Here, some scholarly works dealing with the relationship between international law and national law have divided the legal systems in two camps: "monist" and "dualist". In monist legal systems, the national law is considered to be deriving its legitimacy from the international law itself and national law is considered to be lower in hierarchy compared to the national law.[32] The dualist legal systems, on the other hand, does not consider the national law to be deriving its legitimacy from the international law; in fact, international law and national law are considered to be two separate legal systems; and in order for international law to become part of national law, it has to be transformed or translated into national law through certain legal

[31] *Supra note 20, Article 8(2).*
[32] *LORI FISLER DAMROSCH & SEAN D. MURPHY, INTERNATIONAL LAW: CASES AND MATERIALS 621 (6th ed. 2014)*

routes described in the national law itself.[33] In this sense, dualist systems hold national law above in the hierarchy compared to international law. In the context of all three comparator countries, it could be argued that all of them fall rather in the category of dualist camp. Indian Constitution, in this regard, states, "*Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body.* "[34] Pakistan's constitution mandates the "*executive authority of federation*" to deal with matters related to "*outside*" of Pakistan.[35] Therefore, constitutionally, the federal government has the power to ratify or accede to any international legal instrument. Furthermore, the fourth schedule of Pakistan's constitution, that deals with federal legislative list, empowers the federal government in relation to "*implementing of treaties and agreements*" as well as "*international treaties, conventions, agreements and international arbitration*"[36] Similarly, Bangladesh's Constitution gives this power to the president and parliament and states, "*All treaties with foreign countries shall be submitted to the President, who shall cause them to be laid before Parliament: Provided that any such treaty connected with national security shall be laid in a secret session of Parliament.*"[37]

It merits a mention that all three comparator countries, India, Pakistan and Bangladesh, have ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966.[38] However, as mentioned above, all three legal systems, theoretically, fall under the

[33] *ibid*
[34] *Indian Constitution 1949, Article 253.*
[35] *Pakistan Constitution 1973, Article 97.*
[36] *Fourth Schedule of Constitution of Pakistan 1973, Section 32; Democratizing Foreign Policy: Parliamentary Oversight of Treaty Ratification in Pakistan in LUMS Law Journal.*
[37] *Bangladesh Constitution 1972, Article 145A.*
[38] *India ratified on 10th April, 1979, Bangladesh ratified on 5th October, 1998 and Pakistan signed on 3rd November, 2004 but ratified on 17th April, 2008.*

dualist camp and hence it cannot be said that the courts are bound to follow the international commitments made by the respective comparator countries without giving due importance to the national constitutions and domestic laws. This further proves the limitations upon the courts in the respective countries' jurisdictions in terms of keeping themselves within the confines of national law to develop an original jurisprudence that could make space for the environmental rights in light of very little avenues available to them to achieve the aforementioned purposes. In the following discussion, it is discussed how the constitutional courts worked their way out of this constitutional quagmire and opened gateways for the environmental rights to be derived from the "right to life" itself- a right that forms a part of the judicially enforceable fundamental rights. In this sense, such jurisprudence was very novel and revolutionary of its own time. This jurisprudence is more than two decades old now and its influence has rapidly spread across the Southeast Asian region and even beyond.

2.3 INCORPORATING ENVIRONMENTAL RIGHTS WITHIN MEANING OF RIGHT TO LIFE

Even in absence of enforceable right to a clean environment, the courts in Indian, Bangladesh and Pakistan have not been constrained in advancing the environmental cause through their proactive and rather activist approach. Unlike India and Bangladesh (both constitutions include environmental protection as part of directive principles), Pakistan's constitution does not even include any such provision. However, all three constitutions share a similar feature: a provision related to protection of "right to life".

To be more precise, it is important to look at the exact constitutional text of the respective comparator countries as a point of reference for the readers. In India's Constitution, Article

21 states, "*No person shall be deprived of his life or personal liberty except according to procedure established by law."* Pakistan's Constitution also prohibits any violation against one's life and Article 4(2)(a) says, "*No action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law."* Article 32 of Bangladesh's Constitution also mentions right to life and states, "*No person shall be deprived of life or personal liberty save in accordance with law."*

It goes without saying that this right to life and liberty comes as part of enforceable fundamental rights contained in the bill of rights in the respective constitutions. However, before discussing how the right to life evolved to incorporate right to a safe and healthy environment, this study deserves to give a brief account of the history as well as the most common types of areas where right to life had traditionally been employed until gaining central position in environmental jurisprudence. By doing so, this study intends to prove a sharp turning point in the jurisprudence related to the right to life which further indicates the unanticipated expansion of the word "life" itself by the constitutional courts. Further, the following section also discusses the inspirations and impetus that constitutional courts in the comparator countries had gained through some sources in the international environmental law; and which eventually led the courts to provide a constitutional cover to environmental rights despite non-binding and non-justiciable nature of environment-related provisions within international and national law respectively.

2.3.1 Historical Development of Right to Life from Being Civil and Political Right to Becoming Environmental 'Right' in International Law

The history of right to life dates back to the United States Declaration of Independence 1776. In one of its opening passages, the Declaration recognized the "*right to life, liberty and pursuit of happiness*" as an "*inalienable*" right.[39] French Declaration of Rights of Man 1789 also makes a similar, though not exact, reference to the "*security*" and *"liberty"* of man as an "imprescriptible" right. [40] The same right was exported and incorporated in the international law for the first time as part of Universal Declaration of Human Rights (UDHR) 1948 which states, "*Everyone has the right to life, liberty and security of person*."[41] It was not until the ICCPR 1966 that this right gained immense importance in the form of a binding treaty. The ICCPR mentions this right in the following words, *"Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."*[42]

It was not until the Declaration of the United Nations Conference on the Human Environment (commonly known as "Stockholm Declaration") that the international community expressed its resolve to bring environmental issues at the center of world's conscience. The following excerpt is taken from the Stockholm Declaration: "*In the long and tortuous evolution of the human race on this planet a stage has been reached when, through the rapid acceleration of science and technology, man has acquired the power to transform his environment in countless ways and on an unprecedented scale. Both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights-even the right to life itself.*"[43]

[39] *United States Declaration of Independence, 4th July, 1776, Paragraph 2. It is available at <https://www.archives.gov/founding-docs/declaration-transcript>*
[40] *French Declaration of Rights of Man, 26th August, 1789, Article 2. It is available at <https://www.archives.gov/founding-docs/declaration-transcript>*
[41] *Universal Declaration of Human Rights 1948, Article 3. It is available at <https://www.un.org/en/about-us/universal-declaration-of-human-rights>*
[42] *International Covenant on Civil and Political Rights*
[43] *Declaration of the United Nations Conference on Human Environment (also called as Stockholm Conference and Stockholm Declaration) 1972, Principle 1.*

Also, the United Nations Conference on Environment and Development (UNCED) issued a Declaration, also called as Rio Declaration, in 1992 based on the agenda of striking a balance between development and environment. Rio Declaration although does not mention "right to life" unlike Stockholm Declaration as its predecessor, however, it still mentions that *". . . entitled to a healthy and productive life in harmony with nature"*[44] and *". . . a higher quality of life for all people."*[45]

The two abovementioned declarations brought the human rights aspect, particularly right to life, as a crucial way of looking at environmental challenges across the world. This is also called "anthropocentric" approach towards environment. Anthropocentric approach entails a concept that sees the humans as subject matters of rights; and the belief that value is human-centered and other beings are means to human ends.[46] This could be testified by giving a closer look at certain parts of the and Stockholm and Rio Declarations themselves. For example, the Stockholm Declaration's Principle states, *". . . Of all things in the world, people are the most precious . . ."* and Principle 6 declares environment "*on which our life and well-being depend*" whereas defending "*human environment*" for present and future generations has become a "*goal for mankind*". Similarly, Rio Declaration also employs a similar use of words and states, "*Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature."*[47]

As mentioned in earlier in this thesis, all three comparator countries were not only party to the two most crucial declarations referred above, but were also active participants in their

[44] *United Nations Conference on Environment and Development 1992 (also called as Rio Conference and Rio Declaration) Principle 1*
[45] *Ibid, Principle 8.*
[46] *See Helen Kopnina, H., Washington, H., Taylor, B. et al. Anthropocentrism: More than Just a Misunderstood Problem. J Agric Environ Ethics* ***31,*** *109–127 (2018). The definition is given in the abstract.*
[47] *Supra note 41*

preparatory stages. However, unlike ICCPR, the Stockholm and Rio Declarations were only political declarations. In international law, such declarations are often termed as "soft law": to put it simply, soft law means legally non-binding instruments or commitments in international relations between states.[48] It is in sharp contrast with "hard law" (legally binding under international law) which obliges the member states to adhere to them by implementation in their respective jurisdictions- for example ICCPR. Moreover, technically speaking, the said declarations did not mention a right to a healthy environment as a direct or unambiguous right despite such proposals being made at the preparatory stages.[49] According to a 2011 UN study[50], a separate right to a healthy environment remains to be a tough and "difficult question" as of now.

However, despite this being a "difficult question", the courts in the comparator countries have not shied away from dealing with it. In fact, the non-binding nature of Stockholm and Rio Declarations as well as the non-justiciable nature of environmental rights in the national constitutions[51] did not restrain the courts in the comparator countries. The constitutional courts in the comparator countries led the global community from the front in an effort to incorporate the right to a healthy and clean environment as substantive part of right to life- as envisioned by Principle 1 of Stockholm Declaration.[52] In this sense, generally as well as considering the local jurisprudence in the comparator countries, an anthropocentric approach

[48] *See Alan Boyle, Soft Law in International Law Making, International Law (4th edition, 2014), pp. 118.*
[49] *See Gunther Handl's Introductory Note on Stockholm Declaration 1972 and Rio Declaration 1992, Summary of Key Provisions and Their Legal Significance- General Observations, para. 3. It is available at United Nations' website at the following link: < https://legal.un.org/avl/ha/dunche/dunche.html>*
[50] *Ibid. The abovementioned source mentions a study carried out by United Nations High Commissioner on Human Rights in 2011 that noted such observations that is mentioned in this thesis.*
[51] *A point of clarification: Only India's and Bangladesh's Constitutions contain such a provision under Directive Principles of State Policy and Fundamental Principles of State Policy. On the other hand, Pakistan's Constitution does not contain any such provision in it.*
[52] *Supra note 40.*

towards environmental constitutionalism has been adopted by the constitutional courts.[53] In the following sections, we will see some of the highlights of this journey as well as see the challenges and criticisms faced by the courts in this endeavor.

CHAPTER 3: LANDMARK JUDGEMENTS IN ENVIRONMENTAL JURISPRUDENCE: COUNTRY-WISE ANALYSIS

In this section, the study at hand explores the very first judgements that incorporated the right to a healthy environment as a substantive and integral part of right to life. This is likely to give a better account of how the courts have used the fundamental right to life as a tool to incorporate a substantive right to a safe, clean and healthy environment. As mentioned above, this could be seen in the broader canvas of transformative project that constitutions in the comparator countries seek to aspire by the virtue of positive state actions contained in the directive principles of the respective countries' constitutions. Furthermore, a country-wise account of the landmark judgements related to different aspects of environment as variables, while keeping right to life as a constant in all cases. It is given in order to provide a clearer picture of the broad nature of environmental issues being brought under the ambit of right to environment, thereby enriching us with the breadth and spectrum of jurisprudence developed around environment and right to life. Also, this provides us with an opportunity to exercise a comparative analysis on any points of convergence and/or divergence in the jurisprudence developed by each country's constitutional courts.

[53] *Kotzé "Human Rights and the Environment in the Anthropocene" 2014 1(3) Anthropocene Review 252-275; and more generally, Alexander Gillespie International Environmental Law, Policy and Ethics (Oxford University Press 1997) 4-18.*

3.1 INDIA

a. Mining, Forestation, Environment & Right to Life

The landmark case determining environment as a crucial aspect attached with citizens' right to live in India came in as early as 1985. The case *Rural Litigation and Entitlement vs State of Uttar Pradesh and Others*[54] (also called "Dehradun Valley Litigation") involved quarrying of limestone in the Mussoorie hill in Himalayas region that often used dynamite explosions as part of the process. Due to land sliding and cave-ins as a natural consequence, it resulted in loss of life of several local villagers. In 1982, the state government refused to renew the leases to the companies citing ecological concerns as a justification. The Allahabad High Court (AHC) granted an injunction against the non-renewal order of the state government and allowed the miners to continue the mining activities.

Against this backdrop, a letter was sent to the Supreme Court of India (SCI) regarding the environmental impacts of the injunction order of the AHC. The SCI turned the letter into a writ petition under Article 32[55] The court in 1985 stopped several mining operations in the city of Mussoori city following the report provided by a committee (Bhargava Committee) formed on the orders of the SCI to probe the environmental impacts and dangers associated with mining. In the same order, the court also ruled, *"This would undoubtedly cause hardship to the but It is a price that has to be paid for protecting and safeguarding the right of the*

[54] *1985 AIR 652; 1985 SCR (3) 169. It is available at the following link: < https://indiankanoon.org/doc/1949293/>*

[55] *This Article of the Indian Constitution deals with the original jurisdiction of the Supreme Court in relation to the enforcement of fundamental rights. The first two provisions of the said Article are produced below: (1)"The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed." (2) "The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part."*

people to live in healthy environment with minimal disturbance of ecological balance. . .”[56]. Further, the court formed another committee (Bandhyopadhyay Committee) to assess the plans presented by the miners for the protection of environment. The committee was empowered to include the inputs of not only the petitioners and miners, but also the “interventionists” and “*such other persons or organisations as may be interested in maintenance and preservation of healthy environment and ecological balance.*”[57] The latter is indicative of the court’s approach of broad participation of civil society and other stakeholders in environmental causes- something which will be discussed in a little more detail later in this thesis. However, eventually, the committee’s report led the courts in 1988 to conclude that most mining operations were resulting in ecological disturbance and hence the court ordered to cease most of the mining operations, except three operations. The court in its pursuant order issued in 1988 said, “*We are also satisfied that if mining activity even to a limited extent is permitted in future, it would be not congenial to ecology and environment and the natural calm and peace which is a special feature of this area in its normal condition shall not be restored.”*[58] Moreover, the court looked concerned regarding the deforestation caused due to the mining operations. It ruled that such mining operations were “prejudicial” to the conservation of forests. The court went to the extent of ordering the three mining companies to deposit at least 25% of their profits to a mutual fund which must be spent on restorative activities including afforestation.[59] The magnitude of importance attached by the courts with ecological concerns could be seen in the fact that the courts did not simply issue an a prohibitory injunction, but also provided damages (although the word “damages” was not used in the order as the case did not involve adversarial proceedings) as compensatory

[56] *Supra note 53, “Judgement”, under the heading “Original Jurisdiction”, para 11.*
[57] *Id.*
[58] *See Rural Litigation and Entitlement vs State of Uttar Pradesh and Others 1988, 1989 AIR 594. It is available at <https://indiankanoon.org/doc/104313664/>*
[59] *Ibid. The relevant part of the ruling could be found towards the end of the judgement (5th last para.) on the online link provided with supra note 57.*

measure for the environment. The constitutional courts in India, from the very beginning, therefore have seen to be very proactive and at the forefront in the protection of environment.

b. Water and Air Pollution, Environment & Right to Life

Another case, *Subash Kumar v. State of Bihar (1991)*[60], in India furthered the environmental jurisprudence in the country in the field of water and air pollution. The said case involved a matter of preventing industrial waste and slurry being disposed-off in the Bukaro River- in Hazaribagh district of state of Bihar- which was alleged to have been causing severe water pollution in the nearby areas. Therefore, a writ petition was filed under Article 32[61] of the Indian Constitution-in the form of public interest litigation- at the Supreme Court of India against the State of Bihar to stop a business giant Tata Iron and Steel Co. Ltd to from discharging the industrial waste through their washeries into the Bukaro river.

The petitioner in the said case possessed an agricultural land near the river bed of Bukaro river and claimed that industrial operations carried out by the respondents affected the fertility of his agricultural land as well as polluted both the underground drinking water near Bukaro river. The respondents in the said case, particularly Tata Iron and Steel Co. Ltd, presented their counter-claims that company had followed the rules and procedures laid down under the Water (Pollution and Control) Act 1974 and the discharge of effluent did not affect water quality of the river.

[60] *AIR 1991 SC 420. The text of full judgement can be accessed by the following link: <https://www.ielrc.org/content/e9108.pdf>*
[61] *Supra note 54*

In its obiter dicta, the Supreme Court for the first time referred to Article 21 of the Indian Constitution and ruled to incorporate environment as substantive part of right to life as one of the most important fundamental rights. The court declared in the following words:

"*Right to live is a fundamental right under Art. 21 of the Constitution and it includes the right of enjoyment of pollution free water and air for full enjoyment of life. If anything endangers or impairs that quality of life in derogation of laws, a citizen has right to have recourse to Art. 32 of the Constitution for removing the pollution of water or air which may be determined to the quality of life."*[62]

Further, the court used a very encouraging language, despite dismissing the petition at hand, for the prospective litigants to approach the court under Article 32 and stated that each citizen whose right to quality of life is impacted as a result of derogation of an environment related law may seek recourse from the court under right to life as a fundamental right. Also, the court went a step ahead and included air pollution as one of the potential causes for affecting the quality of life, although this was not contented by the petitioners themselves.

However, eventually, the writ petition was dismissed by the Supreme Court citing a possible conflict of interest of the petitioner as he was himself involved in the business of purchasing of slurry and industrial waste contained carboniferous materials with high market value. The court held that the petitioner seemed to have been pursuing his "private interest" instead of pursuing any public interest for that matter.

[62] *Supra note 53, para 7.*

c. Corporate Social Responsibility, Environment & Right to Life

Right to life was again brought under the spotlight at the Supreme Court in yet another case of Charan Lal Sahu v. Union of India and Others[63]. The case concerned with the constitutionality of a law, Bhopal Gas Leak Disaster (Claims) Act 1985[64], which was passed by the parliament in wake of disastrous 1984 leaks from a pesticide plant in the city of Bhopal. The tragic incident took as many as 3000 lives of workers in the industry. However, beyond the human casualties, the incident caused a serious damage to the flora and fauna, thereby having a serious impact on the environment in the adjacent areas. In the said case, the Supreme Court once again referred and emphasized the importance of environment as an integral part of right to life protected under the Indian Constitution. The court stated, "*In the context of our national dimensions of human rights, right to life, liberty, pollution free air and water is guaranteed by the Constitution under Articles 21, 48A and 5l(g), it is the duty of the State to take effective steps to protect the guaranteed constitutional rights*."[65] As part of corporate social responsibility, the court further ruled that it is the responsibility of corporations, including Transnational Corporations, to pay caution and respect towards their actions which may have an impact on humans and ecology in the national jurisdictions that they operate in. Although the said case involved a complex set of jurisdictional issues, the court eventually concluded that it was the responsibility of the state to ensure that corporations carry out their businesses while keeping ecological concerns at the center of the safeguard-measures adopted by them.

[63] *1990 AIR 480*
[64] *Bhopal Gas Leak Disaster (Processing of claims) Act [1985]; Act 21 of 1985*
[65] *Supra note 62.*

d. Polluter Pays Principle, Environment & Right to Life

The Supreme Court of India has not restricted itself to issuing declaratory judgements. However, the court has given a jurisprudential recognition to the polluter pays principle (PPP) first established under Rio Declaration 1992's Principle 16[66]. This was done in the case of Indian Council for Enviro-Legal Forum v. Union of India and Others (1996)[67]. The case involved a group of chemical factories producing sulphureous sludge that caused water pollution around the village Bichhri, near the city of Udaipur. The public interest litigation came under Article 32 of the constitution and asked the court to close the chemical factories in the village that was causing water and land pollution. The court in the said judgement held that the environmental damage caused by the chemical factories infringed the right to life of people of Bichhri village and that it was the "duty" of the court to intervene in the matter.

The court, while acknowledging environmental degradation caused by chemical factories, ordered the closure of two of the respondents' factories in the Bichhri village.[68] However, the court did not stop itself here and went beyond to acknowledge the PPP through its decision. "Once the activity carried on is hazardous or inherently dangerous, the person carrying on such activity is liable to make good the loss caused to any other person by his activity irrespective of the fact whether he took reasonable care while carrying on his activity."[69]

[66] *Supra note 43, Principle 16. It states: "National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment."*
[67] *1996 AIR 1446. It is available at: <https://indiankanoon.org/doc/1818014/>*
[68] *Ibid, "Directions", please see direction no.2.*
[69] *Id, "Considerations of Submissions", para 15, sub-para 13.*

Moreover, the onus of proof to establish that the entity allegedly causing hazardous activity had carried out reasonable measures to assess the environmental risks was also shifted to such entity, as opposed to those who were affected to prove otherwise. The significance of this case is the fact that courts are not only restricting themselves to theoretical interpretations of environment as part of right to life, but are also taking practical steps towards restoration and remediation of environment. However, cost of remediation that the polluter is considered to be disproportionately low. For example, the Supreme Court in *M.C Mehta v. Kamal Nath and Others (1996)*[70] had issued an order[71] asking the polluter (*Span Motels* was a big listed company with huge annual revenues) to pay only a sum of ten lac Indian rupees. Similarly, in Vellore Citizens Welfare Forum v. Union of India and Others[72], the Supreme Court had ordered a "pollution fine" of Rs. 10,000 to tanneries that were found to have caused serious environmental degradation. However, recently, the Supreme Court in the case of Stertile Industries vs. Union of India and Others[73] overturned Madras High Court's decision of their industrial closure. However, the court ordered punitive damages worth 100 crore, which is considered to be by far the highest in any environmental litigation. The court ordered that he amount be kept in a fixed deposit account and the interest drawn from the said amount be spend on the purpose of improving the environment, including water and soil.

e. Precautionary Principle, Environment & Right to Life

[70] *1997, 1, SCC 488. It is available at <https://indiankanoon.org/doc/1514672/>*
[71] *Ibid. The order was issued in 2002 and is available at < https://indiankanoon.org/docfragment/1239689/?formInput=span%20motel>*
[72] *1996 AIR 2715*
[73] *2013, 6, S.C.R 574. The court mentioned this punitive award in para. 39 and it is available at the following link: <https://indiankanoon.org/doc/26352158/>*

The Supreme Court of India in a case of Vellore Citizens Welfare vs. Union of India and Others[74] elaborated the internationally recognized precautionary principle and incorporated it in the national law through its jurisprudence. In the said case, the court hearing a case involving discharge of huge amounts of industrial effluence by tanneries that, according to a study cited by the judgement, had polluted 35,000 hectares of agricultural land. The Supreme Court was moved under Article 32 of the constitution. Although in terms of the results, as mentioned above, the court did not go as far as awarding a Rs.10,000 fine against each tannery and did not order the closure of the tanneries as they were considered to be a major source of foreign exchange, and hence a balance had to be struck between environmental concerns and trade.

However, the court for the first time acknowledged the precautionary principle as envisioned by Principle 15[75] of the Rio Declaration. Further, the court called the aforementioned principle as the "law of the land" and referred once again to Article 21 (Right to Life) as one of its core objectives. The court further listed three conditions that state authorities were under an obligation to ensure that precautionary principle is adhered: (a) governments and all relevant governmental authorities must anticipate and prevent any possible environmental degradation (b) lack of scientific evidence must not be used as a justification where a particular activity carries the risk of causing environmental degradation (c) the burden of proof lies on the initiator of an activity to prove that the planned activity does not carry any risks of causing harm to the environment. The said case reflects a consistent incorporation of soft-law principles of international environmental regulations/laws into the national legal system by directly tying them to the constitution- right to life in particular.

[74] *Supra note 71.*

[75] *Principle 15 reads as follows: "In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."*

f. Noise Pollution, Environment & Right to Life

The courts in India have been proactive in expanding its right to life jurisprudence in relation to environment to a wide array of issues. In such an attempt, a series of judgements have been given by the courts in India to include noise pollution as possible source of infringement of right to life under Article 21 of the Constitution. In the case of Sushil Chandra vs. State of Uttar Pradesh[76] the Allahabad Hight Court reiterated that excessive noise violates the right to life as it contributes to noise pollution and hence violates Article 21 of the constitution.

3.2 PAKISTAN

a. Electropollution, Environment & Right to Life

Pakistan's landmark case, *Shela Zia v Wapda (1994)*[77] emerged when a group of residents in the federal capital, Islamabad, camped up together and knocked the doors of the Supreme Court against an electricity grid station planned to be installed near in a residential area. The Supreme Court of Pakistan, under Article 184(3)[78], turned the case into one such that had public importance.

[76] *The decision was given in 2019. It is available at the following link: https://indiankanoon.org/doc/137484462/*
[77] *PLD 1994 SC 693. It is available at the following link: <https://www.globalhealthrights.org/wp-content/uploads/2013/02/HC-1994-Shehla-Zia-and-Ors.-v.-WAPDA.pdf>*
[78] *The said Article defines the original jurisdiction of the Supreme Court of Pakistan. It reads as follows: "Without prejudice to the provisions of Article 199, the Supreme Court shall, if it considers that a question of*

The petitioners argued that the concerned governmental authority's, Water and Power Development Authority (WAPDA), plan of installing a new grid station in a residential area would result in formation of electromagnetic fields caused by high voltage of current going through transmission lines may be seriously hazardous for the residents of the adjoining areas. It was argued that children and would be most vulnerable to the health hazards posed by such installations. Further, it was contended by the petitioners that the planned grid station was going to occupy a large part of the green-belts, which further adds into the pool of reasons why such installation would adversely affect the environment. Despite any express of environment in Pakistan's constitution, it was argued that the said actions by the government are likely to endanger the right to life and dignity as stated by Article 9 of the constitution.[79] To support their case, the petitioners cited several studies that indicated the adverse effects of electromagnetic waves on humans causing health hazards such as Multiple Sclerosis, hyper activity and leukemia in children, various allergies and even AIDS.[80]

Answering whether the said activity could fall under the ambit of right to life envisioned by the constitution, the court stated that the word "life" has not been defined anywhere in the constitution.[81] However, the court opined, "It does not mean nor can (the word "life") it be restricted only to vegetative or animal life or mere existence, from conception to death. Life includes all such amenities and facilities which a person born in a free country, is entitled to enjoy with dignity, legally and constitutionally."[82] The court actually went on to extract the

public importance with reference to the enforcement of any of the Fundamental Rights conferred by Chapter 1 of Part II is involved, have the power to make an order of the nature mentioned in the said Article."

[79] *Article 9 of Pakistan's Constitution of 1973 reads as follows: "No person shall be deprived of life or liberty save in accordance with law."*
[80] *Supra note 77, para. 2.*
[81] *Id, para. 12.*
[82] *Id.*

definitions of life from Oxford Dictionary [83] as well as Black's Law Dictionary[84] in order to give a wider meaning to the word "life" than the mere fact of being alive. In doing so, the court also cited various Indian judgements that had interpreted the word life, such as *Kharak vs. State of Uttar Pradesh (1963*)[85] and various other foreign judgements. The court further read Article 9 (Right to Life) with Article 14[86] (Right to Dignity) together and question if a person could have a dignified right to life without basic necessities including a healthy environment. Eventually the court formed a committee to probe and investigate the reliability of scientific evidence to support petitioners' claims of health hazards with transmission lines carrying current. Here, the court referred to precautionary principle being adopted by the courts until scientific evidence could be found to be conclusive. Eventually, however, the committee tasked with collective evidence did not find reasonable grounds to support health hazards after which the grid station was finally installed. Nevertheless, not only did it change the course of environmental jurisprudence in the country, but this propelled the legislative branch to bring about Pakistan's first environment-related law into existence.[87]

b. Smoking, Health, Environment & Right to Life

[83] *The court stated: "According to Oxford dictionary, 'life' means "state of all functional activity and continual change, peculiar to organised matter and specially to the portion of it constituting an animal or plant before death and animate existence."*
[84] *The court mentioned: "In Black's Law Dictionary, `life' means "that state of animals, humans, and plants or of an organised being, in which its natural functions and motions are performed, or in which its organs are capable of performing their functions. The interval between birth and death. The sum of the forces by which death is resisted."*
[85] *1963 AIR SC 129*
[86] *Article 14(1) & (2) reads as follows: (1) "The dignity of man and, subject to law, the privacy of home, shall be inviolable." (2) "No person shall be subjected to torture for the purpose of extracting evidence."*
[87] *The Environment Protection Act was passed by the Parliament in 1997 in Pakistan.*

Following the precedent set by the Supreme Court of Pakistan in the abovementioned case, the other courts in Pakistan have followed suit. In the case of *Pakistan Chest Foundation vs. Government of Pakistan*[88], the issue of tobacco advertisements on electronic media was brought before the Lahore High Court (LHC)- one of the constitutional courts in the country, next to the Supreme Court in hierarchy of courts under national legal system. Although the case was not contented in the context of the air pollution, per se, that results because of smoking, it was rather contented in relation to the negative effects of smoking on human health. However, the court made an important point by distinguishing active smoking and passive smoking and the different yet detrimental effects it has on both active and passive smokers, specially children. The court identified a common adverse effect of smoking that decree

Here, the court further brought Article 4(2)(a)[89] in question and ruled that the word "life" contained in the said article has the same meaning as described by the Supreme Court in Shehla Zia case[90]

After creating a strong nexus between Articles 4 and 9 (both contain the word "life"), the court dwelled in the issue of determining whether tobacco advertisements on TV violated the right to life as contained in Article 9[91] of the constitution. The court held, "Indeed there is no law which may provide for the advertisements of cigarettes on the electronic media. Therefore, such advertisements are violative of Article 9 of the Constitution."[92] Further

[88] *1997 CLC 1379 [Lahore]. It is available at the following link <https://pakistanlaw.pk/case_judgements/83922/pakistan-chest-foundation-versus-government-of-pakistan>*
[89] *The said Article reads as follows "No action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law."*
[90] *Supra note 76.*
[91] *Supra note 78.*
[92] *Supra note 87, para. 37.*

elaborating upon the slow yet poisonous effects of smoking on health, the court said, "Cigarette smoking may not mean early and complete loss of life of a person but with continued smoking, a person may either contract the aforementioned deadly diseases or aggravate the same, the effect of either case would be deprivation of life."

The LHC went all the odds and distinguished its reasoning from a past precent[93] set by the Supreme Court in a matter related to tobacco advertisements. In an attempt to do the latter, the LHC stated the Supreme Court had not dealt the issue of tobacco advertisements particularly in relation to right to life (Article 9). Therefore, the LHC court issued directions, banning the state media not to air the tobacco advertisements that contributed as much as Rs. 70 million annually to the state TV at that point in time.

c. Climate Change Policies, Environment & Right to Life

In yet another crucial case of *Asghar Leghari vs. Federation of Pakistan (2018)*[94], the Supreme Court of Pakistan was confronted with the challenge of lack of implementation of Pakistan's Climate Change Policy of 2012 [95] and Framework for Implementation of Climate Change Policy 2014-2030[96] The petition was filed by a farmer who argued that lack of

[93] *See Dr. Amanullah Khan and Another vs. Chairman, Medical Research Council and Others (1994), 1996 SCMR 1211. It is available at the following link: <https://www.globalhealthrights.org/wp-content/uploads/2013/02/SC-1994-Dr.-Amanullah-Khan-and-Anr.-v.-Chairman-Medical-Research-Council-and-Ors..pdf>*

[94] *Writ Petition No. 25501/2015. It is available at the following link: <http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2018/20180125_2015-W.P.-No.-25501201_judgment.pdf>*

[95] *Climate Change Division, 'Framework for Implementation of Climate Change Policy' (Government of Pakistan 2013). It is available at the following link <http://www.nrsp.org.pk/gcf/docs/National-Climate-Change-Policy-of-Pakistan.pdf>*

[96] *It is available at the following link: <http://www.gcisc.org.pk/Framework%20for%20Implementation%20of%20CC%20Policy.pdf>*

implementation of such climate policies leads to lack of preservation of water or shift towards heat resilient crops. This, the petitioner contended, would affect his livelihood under Article 9 (Right to Life) and Article 14 (Right to Dignity) enshrined in the constitution. The court considered the petition as a *rolling review* or *continuing mandamus.*

The court some very powerful remarks while establishing the need to "Water Justice" and stated that right to life and dignity had a strong connection with the provision of clean water in developing countries like Pakistan. It said, "*In adjudicating water and waterrelated cases, we have to be mindful of the essential and inseparable connection of water with the environment, land and other ecosystems. Climate Justice and Water Justice go hand in hand and are rooted in articles 9 and 14 of our Constitution and stand firmly on our preambluar constitutional values of social and economic justice."*[97]

The court further distinguished between "*environmental justice*"[98] and "*climate justice*"[99] and highlighted the importance of each, while emphasizing the need for a jurisprudential shift from the former to the latter. The court maintained that the environmental issues brought to the court so far were confined to the local geography of the country (such as deforestation, water scarcity and etc). However, the court stated that with the discovery of more scientific evidence and knowledge, it is fair to say that environmental issues can no longer be confined to national boundaries; and that it has become a complex global issue. Where it is difficult to identify and pin point the actors involved in bringing climatic changes, the court stated, it is imperative to adopt mitigation and adaptation as two possible strategies to deal with the environmental issues. "*It has to embrace multiple new dimensions like Health Security, Food*

[97] *Supra note 93, "Water Justice" para.23.*
[98] *Id, para. 20.*
[99] *Id, para. 21.*

Security, Energy Security, Water Security, Human Displacement, Human Trafficking and Disasters Management within its fold. Climate Justice covers agriculture, health, food, building approvals, industrial licenses, technology, infrastructural work, human resource, human and climate trafficking, disaster preparedness, health, etc,"[100] the court maintained. The court eventually formed an ad hoc "Climate Change Commission"[101] to oversee the progress of climate policies and respective framework in terms of their implementation; and that was eventually dissolved in favor of a "Standing Committee on Climate Change"[102] to act as a link between the court and the executive branch of the government. The court did not dispose-off the petition, and rather consigned it to the record so that stakeholders could approach the courts for implementation of fundamental rights in case of any breaches.

d .Gender, Environment & Right to Life

In a rare instance, a group of women moved the Lahore High Court under its original jurisdiction under Article 199[103] in the case of Maria Khan and Others vs. Federation of Pakistan and Others (2019)[104]. The petitioners argued that women have less assets compared to men in a society like Pakistan, and hence they are more dependent on the natural resources, specially in wake of disasters. Further, it was stated before the court that women should be

[100] *Id, para. 22.*
[101] *Id, para. 24.*
[102] *Id, para. 25.*
[103] *The relevant part of the said Article states: "Subject to the Constitution, a High Court may, if it is satisfied that no other adequate remedy is provided by law,- a. on the application of any aggrieved party, make an orderi. directing a person performing, within the territorial jurisdiction of the Court, functions in connection with the affairs of the Federation, a Province or a local authority, to refrain from doing anything he is not permitted by law to do, or to do anything he is required by law to do."*
[104] *Maria Khan et al. v Federation of Pakistan et al., Writ Petition 8960/2019 (Lahore High Court). It is available at the following link: <http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20190214_No.-8960-of-2019_application-1.pdf>*

seen as future mothers with specific reproductive rights. As climate change disproportionately affects women more compared to men, this in turn would affect the future generations and harm the principle of inter-generational equity. Based on the aforementioned arguments, the women petitioners argued before the court the court that government's lack of implementation of climate change policies as per commitments under Paris Agreement of 2015 violates their constitutional right to equal protection.[105]

Moreover, it was argued that the lack of implementation of Paris Agreement through local policy framework infringed the right to life of the women affected by climate change and prevent them from fully and effectively enjoying their lives. [106] Citing the earlier precedents set by the Supreme Court, the petitioners maintained, "*Fundamental Rights like the right to life and security of person under Articles 4 and 9 include the right to a healthy and clean environment and the right to human dignity under Article 14 read with the constitutional principles of democracy, equality, social, economic and political justice, include within their ambit the international environmental principles of sustainable development, precautionary principle, environmental impact assessment, inter and intra-generational equity and public trust doctrine."*[107]

Although the court has not yet developed much jurisprudence around this as the case is still pending, but the court held the petition to be maintainable and gave a short order[108] while issuing notices to the respondents. This reflects the robust approach of the civil society as

[105] *Article 25 deals with equal protection of law and states the following: "(1) All citizens are equal before law and are entitled to equal protection of law. (2). There shall be no discrimination on the basis of sex. (3). Nothing in this Article shall prevent the State from making any special provision for the protection of women and children."*
[106] *Supra note 103, See Ground "D".*
[107] *Id, See Ground "F".*
[108] *The order can be accessed through the following link: <http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20190215_No.-8960-of-2019_order-1.pdf>*

well as the responsiveness of the constitutional courts in the country to tackle the environmental issues through constitutional means.

e. Public Trust Doctrine, Environment and Right to Life

The Pakistani courts have repeatedly used the "public trust doctrine" in environment-related cases. One such example comes from the Sindh High Court (one of the constitutional courts in Pakistan) which was tasked with deciding a case between the rights of a multi-national company engaged in the business of bottled water and the rights of health and education-related institutions in a particular area Pakistan's commercial hub, Karachi.

In Sindh Institute of Urology and Transplantation and Others vs. Nestle Milkpak Limited[109], the plaintiffs were a group of health and education-based institutions that pleaded an injunction against Nestle Limited on the grounds that the latter was allotted a 20-acre wide land in an area that was termed by them as the "Education City". They argued that the proposed water plant by Nestle is being installed in an area that was declared by the government (several cabinet meeting notifications were given in support of their evidence) to be reserved for health, education and related amenities only; hence, they argued, that Nestle's water plant will effectively turn the area into an industrial area, thereby causing nuisance in the area which would likely affect the education and health services in the area. Further, it was also argued that the said company is going to extract unsustainable amounts of water from the common aquifer in the area which already gets a low amount of rainfall. It was contended that this would violate the right to life of the people of the area, as it will surely

[109] *2005 CLC 424 [Karachi]. It can be accessed on the following link: <https://pakistanlaw.pk/case_judgements/50932/sindh-institute-of-urology-and-transplantation-versus-nestle-milkpak-limited>*

have adverse effects on the environment by the virtue of industrial effluent in the area. On the other hand, the defendants, particularly Nestle, presented their arguments to convince the court that neither was the area reserved for education-purposes-only under any specific law nor would the operations of the company cause any adverse environmental effects (which was reaffirmed by the Environment Protection Authority's report as the latter stated before the court that Nestle did not

However, the court eventually decided in favor of the plaintiffs and refrained Nestle from carrying out its operations on the said land. Most importantly, the court declared the underground water as a public trust and declared the state as a trustee for such a natural resource. The court said, "*No civilized society shall permit the unfettered exploitation of its, natural resources by anyone particularly in respect of the water which is a necessity of the life. Ground water is a national wealth and belongs to entire society*."[110] Further, it stated that the public trust doctrine demands the government to protect such key natural resources for the use of wider public rather than leaving them open for exploitation to private ownership or for commercial purposes.[111]

3.3 BANGLADESH

a. Archeological Sites, Flood, Environment & Right to Life

Bangladesh has not lagged behind India and Pakistan in developing a similar kind of jurisprudence around the issues related to environmental threats. Such landmark judgement

[110] *Ibid, para. 23.*
[111] *Id, para. 24.*

came in Bangladesh when in the case of Dr. Mohuiddin Farooqe vs. Bangladesh and Others (1997)[112], the Supreme Court of Bangladesh (High Court Division) was hearing a case regarding Flood Action Plan (FAP)[113] and a particular "compartmentalization"[114] project (called FAP-20) in the districts of Sirajganj and Tangail. The said project was said to affect as many as 0.3 million inhabitants being uprooted in the local areas as well as affecting the flora and fauna. Moreover, it was argued that the project could also affect the archeological sites including two mosques, attia mosque and khadim hamdani, as part of the project.

At that point in time (in 1997), the Bangladesh Constitution had no reference to environmental rights in its constitution. [115] However, long before the constitution had a reference to environment, the Supreme Court incorporated the right to a healthy environment as part of right to life enshrined in the constitution.[116] It stated, "*Although we do not have any provision like article 48-A of the Indian Constitution for protection and improvement of Environment, articles 31 and 32 of our Constitution protect right to life as fundamental right. It encompasses within its ambit, the protection and preservation of environment and ecological balance*."

[112] (1997) 17 BLD. A pdf version of the said judgement could be found on the following link: <https://www.academia.edu/31466042/_Mohiuddin_Farooque_vs_Bangladesh_1997_>

[113]The Flood Action Plan was initiated by the Bangladesh government after the catastrophic floods that occurred in 1988. The plan was prepared by the help and aid of foreign donors and it was divided in different projects across the country. For more details on it, please refer to the following link. https://en.banglapedia.org/index.php/Flood_Action_Plan

[114] Supra note 111. "Compartmentalisation" means surrounding of specific areas by embankments with gated or ungated openings through which in and outflow of flood water can be controlled. Inside the compartment, a system of channels and khals has the function of transporting the water to the sub-compartments constructed within a big compartment.

[115] Supra note 18. "Environment" was included as part of Fundamental Principles of State Policy through a constitutional amendment.

[116] Article 31 deals with the right to life in the following words: "No person shall be deprived of life or personal liberty save in accordance with law."

b. Vehicular Pollution, Environment and Right to Life

The organization involved in public interest litigation, namely Bangladesh Legal Aid Services Trust (BLAST), moved the Supreme Court's High Court Division. In the case of BLAST and Others v. Bangladesh and Others[117], the petitioners argued on behalf of two minors against the use of two-stroke rikhshawas (autos) that were becoming a huge source of pollution in the city of Dhaka and adjourning areas.

It was argued that the use of the two-stroke vehicles were more than nine years old, and hence could not be used in the city of Dhaka. They banked on an agreement signed in 1997 between the Dhaka City Auto Rikhshaw Business Association and Bangladesh Road Transport Authority which prohibited the use of rikshaws older than nine years. It was argued that the breach of the agreement was violating the fundamental rights of the citizens, including the very basic right to life enshrined under the Bangladesh's constitution under Articles 31 and 32. Further, it was also argued that the noise pollution caused by the auto rikhshawas was also a nuisance for those living in the city.

As a result, the court ordered the government to phase-out all two-stroke three wheelers from the city until 2002 and ensure that the transport system is replaced with clean and environment-friendly vehicles by the same time.

CHAPTER 4: CRITICAL PERSPECTIVES AND COUNTER-NARRATIVES

[117] *Writ Petition 1694/2000*

4.1 Judicial Activism

One of the primary and foremost criticisms of pursuing environmental agenda through constitution is that it leads the courts to adopt an 'activist' demeanor.[118] Carving a right to healthy environment out of right to life may seem very obvious, evident and even necessary today. However, such a jurisprudence naturally meant further expansion of right to life. For example, in Pakistan, the Supreme Court had declared right to clean water as a part of right to life.[119] Without express reference to clean water anywhere in the constitution, the Supreme Court ended up creating a substantial right of clean water as part of right to life. Similarly, in India, the Supreme Court has made a similar decision in the past and declared that right to food was a part and parcel of right to life and dignity of man enshrined in the constitution.[120] Therefore, in wake of such judgements, the courts are often accused of creating new constitutional rights. In this sense, the judges assume the role of legislators or law makers instead of restricting themselves to what is originally written in the constitution and leaving the rest to the parliament.

4.1.2 Interference in Affairs of Executive

With judicial activism, a natural consequence is that judiciary tends to interfere in certain policy issues that fall squarely within the jurisdiction of the executive, and not the judicial branch. From a purely originalist perspective of the constitutional interpretation, the constitutions expressly prohibit the enforceability of the socio-economic rights, including environmental rights. However, despite the non-justiciable nature of these rights, the court seems to be encroaching in the domain of the executive, which may come with natural

[118] *Anuj Bhuwania, Courting the People: Public Interest Litigation and Political Society in Post-Emergency India (Cambridge University Press 2017).*

[119] *Salt Miners v Director, Industries and Mineral Development, 1994 SCMR 2061*
[120] *People's Union for Liberties v Union of India and Others 2001, Civil Writ Petition No.196*

consequences and backlashes from the executive. For example, in Pakistan, General Pervez Musharraf issued an emergency proclamation and a provisional constitutional order (PCO) in 2007, citing "increasing interference by some members of the judiciary in government policy" in areas "including but not limited to the control of terrorist activity, economic policy, price controls, downsizing of corporations and urban planning.[121] Here, it is needless to mention that environmental litigation was not one of the concerns, neither could an emergency by a military dictator be an ideal example for studying executive-judiciary relations. However, it still serves some general lessons and it may be argued that an excessive amount of interference, if any, may disturb the separation of powers between the executive and judiciary.[122]

4.1.3 Polycentricity & Inability of Courts

Many still stand opposed to the idea of judicial enforcement of Constitutional Environment Rights (CERs) altogether. This school of thought is against the idea of CERs being treated as entrenched provisions that are to be enforced through judicial means. They argue for a "*contrajudicative"* model that purports environmental protection to be taken only as part of directive principles and not as fundamental rights enforced through judicial means. Rather, they argue, that such CERs should not be treated more than a set of social values which is enforced by political institutions, and not judicial branches through "constitutionally obligatory legislation".[123]

[121] *See the text of Emergency Order 2007. This can be read through: https://www.dawn.com/news/274270/proclamation-of-emergency*
[122] *Upendra Baxi, The Avatars of Indian Judicial Activism, in Fifty Years of the Supreme Court of India (S. K. Verma & Kusum Kumar eds., 2007);*
[123] *Supra note 7, Chapter 3*

Here, it is also argued that the focus is being shifted from the failure of political branches in passing necessary constitutionally obligatory legislation to the helplessness of courts unless non-justiciable rights are made substantive and hence enforceable. Therefore, the criticism is that the obligatory non-rights-based nature of principles of policy were meant to give political branches the prerogative to define the scope and extent of these value, and not for the courts to determine that.

Perhaps the most common challenge that the human-rights-based approach faces from its critics is the polycentricity of the environmental issues and courts' inability in resolving them through judicial means. To put simply, the nature of issues that courts are usually asked to settle often involve a vast network of interrelated and interconnected issues with deep cause-and-effect relationship that the courts do not logistically afford to do.[124]

One such example could be seen in how courts would naturally find it difficult to rule on the impact of certain environmental actions on the future generations, and all the difficulties that accompany such a complex question.[125] Although "activist" courts, particularly in Southeast Asia, may not shy away from taking cognizance of such complex issues to be decided, such polycentricity may result in a "*lack of judicially discoverable and manageable standards"* in the U.S.' context.[126]

Further, new remedies, such as continuing mandamus, means that courts effectively become administrators over the executive branch, monitoring their performance and governance.

[124] *Jeff A. King, The Pervasiveness of Polycentricity, Pub. L. 101, 101–102 (2008).*
[125] *David Boonin, The Non-Identity Problem and the Ethics of Future People (2014)*
[126] *Baker v. Carr, 369 U.S. 186 (1962), Supreme Court.*

Since some environmental litigations last over decades, this also increases the burden of courts and results in a huge backlog of cases.

4.2 Environment: A Collective, Not an Individual Right

Further, it is also argued that human-rights-based model is intrinsically and inherently predicated on an individualistic basis. Contrarily, most of the environmental rights, such as protection against pollution, are in fact always a community's right, and hence can never be looked from particular 'victim's' perspective.[127] It deflects the attention of the courts to see the differential and varied impact of a single problem upon various victims that are often associated with environmental degradation.

4.3 Critique from Eco-Centric Camps

The CERs have largely been driven under the auspices of human-rights regime. Therefore, it would not be entirely wrong to say that environmental constitutionalism as a project has largely been anthropocentric.[128] This is what some have called as using nature as an "inert machine" which is there to "satisfy the needs, desire (and greed) of humans".[129] Often a times, it has been referred to having a basis in the neo-liberal and capitalistic idea of the exploitational right of humans in regards to the natural resources of the world.[130]

[127] *See A Boyle, 'The role of international human rights law in the protection of the environment' in A Boyle and M Anderson (eds), Human Rights Approaches to Environmental Protection (Clarendon 1996) 43*
[128] *Kotzé "Human Rights and the Environment in the Anthropocene" 2014 1(3) Anthropocene Review 252-275; and more generally, Alexander Gillespie International Environmental Law, Policy and Ethics (Oxford University Press 1997) 4-18.*
[129] *Peter Burdon "The Earth Community and Ecological Jurisprudence" 2013 3(5) Oñati Socio-Legal Series 815-837, 818.*
[130] *Anna Grear "Deconstructing Anthropos: A Critical Legal Reflection on 'Anthropocentric' Law and Anthropocene 'Humanity'" 2015(26) Law and Critique 225-249.*

4.3.1 Two Case Studies: Ecuador and Bolivia

a. Ecuador

Ecuador's new constitution which came into existence in 2008.[131] It came as part of a broader political, economic ideological overhauling of a country that was suffering from a range of environmental challenges due to excessive exploitation of natural resources like crude oil.[132] The new constitution of Ecuador states, "*Nature shall be the subject of those rights that the Constitution recognizes for it."*[133]

This makes the nature and earth (or as the Preamble calls it "Pacha Mama") has been made a subject of legal rights,[134] reorienting the relationship, arguably a subservient one, that nature has traditionally had with humans under a human-rights-based model of CERs.[135] This led to the concept among academia and local civil society called "*Buen Vivir"* (or Living Well).[136] It is also held to be believed that this effectively meant that humans were to be considered a part of the nature, not the other way around, and that the split between humans and nature was bridged together.[137]

[131] *Constitution of the Republic of Ecuador, Official Registry No. 449, October 20, 2008.*
[132] *An example is the severe environmental damage caused by Chevron-Texaco in the Ecuadorian Amazonia from 1964 to 1990 as a result of oil extraction. For a more detailed description see Judith Kimerling Amazon Crude (Natural Resource Defense Council, 1991).*
[133] *Supra note, 130, Article 10*
[134] *Patricio Carpio Benalcázar "El Buen Vivir, más allá del desarrollo. La nueva perspectiva Constitucional en Ecuador" in Alberto Acosta and Esperanza Martínez (eds) El Buen Vivir. Una vía para el desarrollo (Abya-Yala, 2009) 133. (translation not available)*
[135] *Alianza País. Plan de Gobierno 2007-2013. Un primer gran paso para la transformación radical del Ecuador, 2006, 8-12 (translation not available).*
[136] *Fundación Pachamama "Recognizing Rights for Nature in the Ecuadorian Constitution", available at http://www. therightsofnature.org/wp-content/uploads/pdfs/Recogniting-Rights-for-Nature-in-the-Ecuadorian-ConstitutionFundacion-Pachamama.pdf*
[137] *Gordon DiGiacomo Human rights, Current Issues and Controversies (University of Toronto Press, 2016) 425.*

b. Bolivia

Similarly, in Bolivia, Article 8 of the Bolivian Constitution of 2009 recognizes the "*Vivir Bien"* (or Living Well) and the concept of inhabiting in this world through harmony with nature.[138] In 2010, the Bolivian government started to make a framework of laws called "Framework Law of Mother Earth"(*Madre Tierra*).[139] The Article 40 of the latter acknowledges earth's right to life, diversity, water, clean air and others. Bolivia also held an international conference and issued a "Universal Declaration of the Rights of Mother Earth (UDRME) in 2010 to push for rights of nature (RoNs) further.[140]

4.3.2 Practical Challenges & Loopholes in Eco-Centric Model

Although Ecuadorian and Bolivian constitutions are framed as being revolutionary for the environmental constitutionalism, the reality might not be very similar. In the case of Ecuador, for example, there is no hierarchical order of rights provisions.[141] Although the constitution makes nature a subject of rights,[142] it also mandates the state as one of its "prime duties" for "sustainable development and equitable distribution of resources.[143] Similarly, in Bolivian constitution of 2009, there is a tension between the environmentally adverse economic activities are considered a part of state duty to industrialize natural resources for elimination

[138] *Fernando Huanacuni Mamani Vivir Bien/Buen Vivir. Filosofías, políticas, estrategias y experiencias regionales (Coordinadora Andina de Organizaciones Indígenas-CAOI, 2010) 46. (translation not available).*
[139] *Law of the Rights of Mother Earth No. 071, December 21, 2010.*
[140] *See the Universal Declaration of the Rights of Mother Earth of Bolivia.*
[141] *Ecuador's Constitution (2008), Article 11(6)*
[142] *Ibid, Article 10*
[143] *Id, Article 3(5)*

of poverty[144] and exploitation of non-renewable resources is considered a necessity for public utilities.[145]

The ground reality of such "sustainable development" can be judged by the fact that Ecuador continues to exploit natural resources that produce hydrocarbons.[146] The Ecuador Mining Act 2009 was formulated directly under the constitutional provision in an apparent contradiction with the rhetoric of being an eco-centric constitution .[147] The government has clamped down and cancelled initiatives that attempted to protect exploitation of oil from Yasuni National Park (UNESCO heritage site).[148] Surprisingly, the Ecuadorian courts have also followed the same lines. In a 2013 case, a lawsuit filed against the developers of a large-scale open-pit mining was rejected by the concerned civil court (despite adverse environmental assessment reports) citing that the project was necessary to fulfill "social development agenda".[149] Like Ecuador, the practical situation in Bolivia is no different. The new mining and metallurgy law of 2014 which has permitted mining operations in protecting natural areas of the country, without judicial intervention or a say in that.[150]

CONCLUSION

Although such courts are often accused of being "activist", particularly in Southeast Asia and Latin America, many advocates consider a human-rights model through judicial 'activism' to

[144] *Constitution of Bolivia (2009), Articles 9.6, 316.6, and 355*
[145] *Ibid, Article 356.*
[146] *See, for example, the National Development Plan (2007-2010) of Ecuador.*
[147] *Ecuador Constitution (2008), Article 313.*
[148] *Carlos Larrea & Lavinia Warnars "Ecuador's Yasuni-ITT Initiative: Avoiding emissions by keeping petroleum underground" 2009 (13) Energy for Sustainable Development 219-223.*
[149] *Judgment, Twenty Fifth Civil Court of Pichincha, Case No. 17325-2013-0038, 18 March 2013, Viteri y otros vs Ecuacorriente S.A, Ministerio de Recursos Naturales, Procurador General del Estado), Ground 7 of Judgement. a*
[150] *Mining and Metallurgy Law 535, 28 May, 2014*

be a remarkable success for the CERs regime.[151] There is a growing demand that such judicial enforcement mechanism not be considered as an exception, but rather a general rule in pursuing the advancement of CERs. However, unlike optimistic accounts of judicial enforcement of CERs as mentioned earlier, some skeptics that support this brand of environmental constitutionalism still find such instances to be few, rare and scarce in today's world.[152] Nevertheless, even if such instances are few and may have a limited practical impact, it still serves as a powerful tool for a symbolic and aspirational value in the constitutional jurisprudence.[153]

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[151] *Supra note 7, at 282–283, 143–146, 175–183*
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