

# The Pakistan Supreme Court's Use of Suo Motu Actions in Environmental Cases

by Aamina Islam

Aamina Islam is an Advocate in the High Court of Pakistan.

"If the motto 'and justice for all' becomes 'and justice for those who can afford it,' we threaten the very underpinnings of our social contract."<sup>1</sup>

Natural resources, such as clean air and water, are public resources shared by all, yet owned by no one in particular. Since public resources are not sold in a free marketplace, they have no free market value that takes into account factors such as scarcity and environmental degradation. However, if such public goods are carelessly used without any rules governing their use, such resources inevitably succumb to the "tragedy of the commons,"<sup>2</sup> under which resources that are free or available to everyone may be ruined by abuse or overuse. To avoid or mitigate this, some level of control will be necessary through government planning, by implementation of rules and regulations, or by good governance.

The state of natural resources in Pakistan today illustrates the very real ramifications of the tragedy of the commons. A drastic increase in the level of human activity in recent years has resulted in environmental devastation that threatens human health, safety, and survival. In addition to addressing the immediate hazards of environmental degradation, Pakistan must recognize that natural resources are not the property of Pakistan alone, but have a global dimension and must be used in a sustainable manner. Long-term environmental sustainability necessitates preserving environmental assets or, at a minimum, not depleting them. "Development that does not respect nature rebounds on man."<sup>3</sup>

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1. Chief Justice Ronald George, California Supreme Court, Annual State of Judiciary Speech (2001).
2. H. Scott Gordon, *The Economic Theory of a Common Property Resource: The Fishery*, 62 J. POL. ECON. 124 (1954); Garrett Hardin, *The Tragedy of the Commons*, 162 Sci. 1243 (1968).
3. Mahesh Chander Mehta, *Making the Law Work for the Environment*, 2 ASIA PAC. J. ENVTL. L. 349, 349 (1997); see also Parvez Hassan & Azim Azfar, *Securing Environmental Rights Through Public Interest Litigation in South Asia*, 22 VA. ENVTL. L.J. 215, 218-19 (2004).

Sustainable development requires that "exploitation of resources, the direction of investments, the orientation of technological development and institutional changes are all in harmony [to] enhance both current and future potential to meet human needs and aspirations."<sup>4</sup> In the absence of sustainable development, the inevitable result is "resources exhausted, ecosystem collapses; species disappear, and people's lives, health, livelihoods, and their very survival are threatened."<sup>5</sup>

This Article discusses the legal basis of the suo motu<sup>6</sup> cause of action that has been recognized by the Pakistan Supreme Court in environmental matters, including a brief history of the evolution of the application of this cause of action with respect to environmental issues, the type of issues that have been addressed under it, why the Court felt the need for application of this cause of action, and how availability of suo motu relief has changed industry's and regulators' formerly lackadaisical attitudes toward environmental impacts in Pakistan. Further, this Article urges Pakistan to adopt a constitutional provision acknowledging the right of its people to a healthy environment, to provide a clear mandate to the government to protect the environment and natural resources, and to form the basis of environmental justice for plaintiffs harmed by pollution.

## I. Current Environmental Regulation in Pakistan

### A. Environmental Protection Act of 1997

Pakistan is an important geopolitical country that is rich in cultural, natural, and human resources. Rapid urbanization and industrialization, coupled with a population explosion, has resulted in sanitation, health, and environmental challenges and has led to an ecological and economical imbalance. The government of Pakistan, in order

4. David Hunter, *The Goal of Sustainable Development*, INTERNATIONAL ENVIRONMENTAL AND POLICY LAW 102 (Foundation Press 2001).
5. Hassan & Azfar, *supra* note 3, at 218-19.
6. "Suo moto" is Latin for "on its own motion."

to address these issues, enacted the Pakistan Environmental Protection Ordinance of 1983. The Ordinance however, remained largely unimplemented, due to political and economic conditions in Pakistan, and was replaced by the Pakistan Environmental Protection Act (PEPA) of 1997.

PEPA provides for the establishment of a Pakistan Environmental Protection Council (PEPC),<sup>7</sup> which has responsibility for approving national environmental policies within the framework of the national conservation strategy (NCS)<sup>8</sup> set forth in §4 of PEPA. The work of the PEPC is supported by federal and provincial Environmental Protection Agencies<sup>9</sup> (each an EPA). PEPA<sup>10</sup> also provides for the creation of a Provincial Sustainable Development Fund in each province with the purpose of financing projects that are intended to protect, conserve, rehabilitate, or improve the environment, prevent and control pollution, and promote sustainable development. The law establishes a framework for evaluating the impact of proposed projects on the environment through an initial evaluation, followed by a more extensive environmental assessment where warranted.<sup>11</sup> PEPA makes available coercive and punitive measures to support enforcement.

PEPA, in its Preamble, provides for the protection, conservation, rehabilitation, and improvement of the environment for the prevention and control of pollution, and promotion of sustainable development.<sup>12</sup> However, PEPA is not self-implementing and requires the promulgation of rules and regulations. Due to delays in the promulgation of rules and regulations, the law has not been implemented to any meaningful extent. In addition, there is a general lack of understanding among the general population as to the benefits of environmental controls. Environmental education and awareness would be helpful in showing how PEPA is *for* the people rather than *against* them.<sup>13</sup>

7. The PEPC under §3 is run by the prime minister or such other person the prime minister nominates on his behalf.

8. Jawad Hassan, in his book *Environmental Laws of Pakistan*, explained that the NCS is designed as a broad-based policy program aimed at the sustainable use of renewable resources, preventive action against pollution and other adverse effects of industrial and urban growth, mandatory environmental impact assessment (EIA) of new projects, and stringent control on toxic chemicals and hazardous substances. JAWAD HASSAN, ENVIRONMENTAL LAWS OF PAKISTAN 111 (Book Biz Lahore, 2006).

9. EPA is responsible for pollution control and is entrusted with the administration of PEPA. EPA plays an important role in making rules and regulations under the 1997 Act.

10. In addition, PEPA prohibits discharges or emissions in excess of the National Environmental Quality Standards (NEQS) established by the PEPC or other standards established under PEPA (§11), prohibits import of hazardous waste (§13), prohibits handling of hazardous substances except under license (§14), and requires motor vehicles to install pollution control devices (§15).

11. PEPA provides for a dual screening process of an initial environmental examination followed by a more comprehensive EIA (§12).

12. PEPA defines sustainable development under §2(xiii) as "development that meets the needs of the present generation without compromising the ability of future generations to meet their needs."

13. For example, the government of Pakistan would not be able to effectively impose a ban on the use and production of plastic bags (if it determined that

## B. The Failure of Administrative Enforcement

With economic development an overriding priority in Pakistan, the government has not made implementation or enforcement of PEPA a high priority. According to Federal Minister for Environment, Hameedullah Jan Afridi, the provincial EPAs have failed to enforce the National Environmental Quality Standards (NEQS) and other environmental laws, and industries continue to create air and water pollution.<sup>14</sup> Illustrative of the lack of effective enforcement is an incident reported by Pakistan's leading newspaper, *The Daily Jang*. A multinational paint manufacturing company dumped toxic material in a graveyard in Orangi Town, Karachi, in November 2006, injuring as many as 14 children.<sup>15</sup> "I have been asked to keep quiet [about this incident]," stated Sindh Environmental Protection Agency (SEPA) Director General, Abdul Malik Ghouri.<sup>16</sup> He did not specify who had pressured him. He said that there is no eyewitness to ascertain who is responsible for dumping the toxic waste. Director General Ghouri collected samples of the toxic material and issued notices under PEPA<sup>17</sup> to the responsible factory for the crime, but until the newspaper article appeared, the powerful industrial lobby was successful in hushing up the case by influencing the families of the affected children and SEPA.<sup>18</sup> The Sindh Ministry for the environment reported that the culprits had been quick in removing the toxic material from the dump, so as to remove any evidence, and as a result, the government could not find anything toxic in the samples sent to laboratories. The chemical simply disappeared. The fact that the Director General of the environmental agency charged with protecting the environment could be overruled by industry indicates the difficulty of enforcement of environmental protection laws in Pakistan.

In connection with a similar incident of toxic waste dumping that same year, the acting Director General of SEPA, Dr. Iqbal Saeed Khan, initiated proceedings<sup>19</sup> against the alleged culprits and sealed their factory. He was swiftly transferred, the factory was unsealed, and Dr.

was appropriate to control pollution) unless and until there is a viable alternative available. If EPA imposed such restrictions, Pakistani small industries would consider PEPA to be against them, and the economic harm to small businesses would be seen to outweigh any environmental benefits.

14. Jan Afridi, *Government to Cancel All Land for Non-Forest Use*, PAKISTAN PRESS INT'L, July 10, 2009.

15. Shahid Hussain, *Marauders Strike Again*, DAILY JANG (Nov. 19, 2006), at 2.

16. *Id.*

17. PEPA §11 explicitly prohibits discharge or emission of any effluent, waste, air pollution, or noise in an amount, concentration, or level in excess of the NEQS or other established standards. The Act states that whoever contravenes or fails to comply with the provision of the Act is liable to punishment by fine, which may extend to one million rupees.

18. Hussain, *supra* note 15.

19. A First Information Report was lodged, which, under the Code of Criminal Procedure of 1898 (Act V of 1898), applies to proceedings before the Environmental Tribunal relating to trial of offenses under §17.

Khan was made an “officer on special duty” in another department by the well-entrenched bureaucracy.<sup>20</sup>

The Sindh Minister for Environment and Alternate Energy, Askari Taqvi, in a press conference before Pakistan Press International, reported that industries are creating air and water pollution in the city without any constraints. According to Minister Taqvi, in Karachi, a number of flyovers (bridges) have been constructed, but the developers did not perform the environmental impact assessment (EIA) required under PEPA before starting work.<sup>21</sup>

Naeem Qureshi, the president of National Forum of Environment and Health (NFEH), has said that the environment is always given lowest priority by the political leadership, due to the lack of political will to resist pressure from influential persons. In a press conference on June 4, 2009, he reported that environmental pollution had reached an alarming level in the large cities of Pakistan, due to the rising number of motor vehicles. He reported that 30% of vehicles in Karachi were not suitable for the roads, as they discharge thick smoke formed from half-burnt fuel. He expressed surprise that, despite the orders of the Sindh High Court against thick smoke-emitting buses, no action had been taken as of that date to address the problem.<sup>22</sup> He alleged that, despite the multifold increase in the budget of the Environment Ministry (rising from Rs 50 million to Rs 345 million in the preceding four years) and the increasing number of foreign-funded environment projects, no significant improvement had been made in atmospheric and marine pollution.<sup>23</sup>

The impotency, lack of action, and habitual neglect of officials tasked with enforcement of the environmental laws and regulations have resulted in the failure of the government in the planning and execution of several ongoing mega-developmental projects, such as dams and overhead bridges, without adequate considerations to the natural environment.

## II. Environmental Protection in the Courts

Where policymakers are the perpetrators, “recourse to the administration becomes [futile] and the affected people turn to the defensive mechanisms afforded by the courts.”<sup>24</sup>

As discussed above, the executive and legislative branches of the government have not given priority to addressing environmental concerns. A major reason for this is that Pakistan suffers from the common ailments of developing countries: state repression; governmental lawlessness; and administrative defiance. The resulting absence of commitment to improvement of the environment is evident through the lack of implementation of PEPA and meaningful action by the agency charged with

its enforcement, a lack of public awareness of its existence and benefits, a defective complaint procedure for aggrieved persons who want to bring issues to the attention of the relevant governmental authorities, improper functioning of some of the environmental tribunals and environmental magistrates, irregular meetings of the PEPC, the failure of PEPA to publish the National Environmental Report, the lack of regular ambient air quality standards, the existence of stringent NEQS that are difficult for industry to achieve and therefore largely ignored, and a lack of trained and motivated experts at the governmental agencies in the provincial EPAs. This dismal background has set the stage for evolving judicial activism in Pakistan.

### A. *Suo Motu* Actions: Judicial Activism Could Be an Important Means of Supporting Environmental Protection

The enabling provision for the Supreme Court to act *suo motu* (“on its own motion”) in protecting fundamental rights is set forth in Article 184(3) of the Pakistan Constitution of 1973, which provides that “without prejudice to the provision of Art 199, the Supreme Court shall, if it considers that the *question of 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.” (Emphasis added.)

Pakistan’s Constitution is built on the principle of trichotomy of powers (i.e., the independence of judiciary, executive, and legislature). The Constitution defines the composition of each branch, specifies its powers, and places limits on the exercise of such powers. In this way, the Constitution lays down a system of checks and balances, so that each branch is able to function effectively in its own sphere and does not interfere in the domain of another.<sup>25</sup> Given the parliamentary form of government, Pakistan does not have a concept of separation of powers, but rather a power-sharing system. The judiciary is the custodian of the Constitution and is required to ensure that actions taken by any other branch of the state do not violate the provisions of the Constitution. It has generally viewed its role as one of judicial review in proceedings “whereby the acts, decisions, and omissions of authorities and bodies performing legal function, affecting the fundamental rights of the individual are challenged in the courts.”<sup>26</sup> In some cases, the power of judicial review “extends in the absence of legislation, causing the nonavailability of remedy thus to provide a lucid pitch for the judges to apply their own sense of wisdom and this extension of muscle by the judges is often termed Judicial Activism.”<sup>27</sup>

20. Hussain, *supra* note 15, at 1.

21. Afridi, *supra* note 14, at 2.

22. *Karachi Witnessed Fast Environmental Decay in 12 Years*, Nation, The Pakistan, Asia Pulse Pte. Ltd., June 4, 2009, at 1.

23. *Id.* at 1.

24. Hassan & Azfar, *supra* note 3, at 4.

25. *State v. Ziaur Rehman*, 1973, P.L.D., S.C. 49.

26. Malik Qamar Afzal, *Judicial Review: A Study of Judicial Activism Vis-à-Vis Judicial Restraint*, 2006, P.L.D., Journal 67, at 68.

27. Syed Mushtaq Hussain, *Public Interest Litigation*, 1994, P.L.D., Journal 5. The notion of Judicial Activism is obviously contrary to the idea of “judicial restraint,” which has been the norm. Prof. Syed Mushtaq Hussain asserts that judges should not decide issues that are not before them or that are

Until fairly recently, the judges of the Supreme Court had been against suo motu intervention of the Courts, not encouraging High Courts to exercise such powers.<sup>28</sup> The Supreme Court held in *Asma Jilani* that “[t]he Court’s judicial function is to adjudicate upon a real and present controversy which is formally raised before it by a litigant. If the litigant does not choose to raise a question, however important it might be, it is not for the Court to raise it suo motu.”<sup>29</sup> Scholar Asif Saeed Khan Khosa endorsed this position, saying that judges should never assume the role of a reformer of a society. By initiating the procedure on its own, the Court discards its cloak of neutrality and enters the arena as a party to a cause.<sup>30</sup> More recently, the Supreme Court of Pakistan has been taking up suo motu actions in respect of a variety of legal causes to protect the poor and ordinary people. So far, such cases have involved bonded labor, educational malpractice, child abuse, gender exploitation, murder, traffic control, and environmental degradation.

Thus, there may be resistance to the use of suo motu actions to advance environmental protection. Such action may exacerbate conflicts between the judicial and executive branches and be viewed as the judiciary stepping outside the bounds of its authority in order to enhance its power and influence. In addition, if the courts undertake suo motu actions, it will be difficult to discern whether the court is acting as a judge or as a litigator on behalf of others. It could also have serious impacts on perceptions about the legal profession generally, and litigation more specifically. If the Court becomes very active in bringing suo motu actions, courts may be viewed as no longer fulfilling their role of providing justice, and instead seen as dictating justice at their own will. Despite these concerns, there is a role for this type of judicial activism. As the noted scholar Malik Qamar Afzal points out, in order to keep a check on the malfunctioning of the executive, the judiciary provides relief to the sufferers of dictatorship by interpreting laws that are either deficient or vague in their correct perspective.<sup>31</sup> Hence, there is a role for the judiciary to act as a watchman on other branches of the government and to provide a speedy remedy to citizens who are practically powerless in trying to contest state authority.

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yet to arise, and should not interfere in affairs where they do not have a full picture of the events before them. *But see Afzal, supra* note 26, at 69 (positing that the courts can caution administration and public functionaries and compel them to perform their duties strictly in accordance with the rule of law, checking activities of the executive branch through suo motu actions).

28. *Tariq Transport Company, Lahore v. Sargodha-Bhera Bus Service and others*, 1958, P.L.D., S.C. 437:

High Court, therefore, is not competent merely on information or of its own knowledge to commence certiorari proceedings or other proceedings of a similar nature under the constitutional provision. And if that be correct, as I hold it is, the High Court could neither suo-motu nor at the instance of the Provincial Transport Authority, which was not at the slightest degree concerned with the matter, go into the various issues raised by the Authority.

29. *Miss Asma Jilani v. The Government of Punjab and Another*, 1972, P.L.D., S.C. 139.

30. Asif Saeed Khan Khosa, *Suo Motu Exercise of Writ Jurisdiction*, 1993, P.L.D., Journal 87, at 96.

31. Afzal, *supra* note 26, at 69.

## B. Examples of Recent *Suo Motu* Judicial Activism

### I. Nonenvironmental Cases

The threshold entry of public interest litigation via suo motu actions came with the 1988 case of *Benazir Bhutto*.<sup>32</sup> Benazir Bhutto filed a petition under Article 184(3) of the Constitution as co-chairperson of the Pakistan Peoples Party, challenging the amendment made in the Political Parties Act of 1962, on the grounds that those amendments violated the fundamental rights of freedom of association and equality before the law. The Court ruled that there was no legal bar to a lawsuit for the enforcement of a group or class of persons who are otherwise unable to seek relief from the Court.

The first significant judgment by the Supreme Court was in the *Darshan Masieh* case.<sup>33</sup> This was a forced labor case involving violation of fundamental rights, which advanced public interest litigation. The Supreme Court invoked jurisdiction on the basis of a telegram sent to the Court by a group of brick kiln-bonded laborers and their families, alleging bonded labor and illegal detention by the employers. The Supreme Court took cognizance for the enforcement of the fundamental right regarding bonded labor practices. The Court held that any conceivable just and proper order can be passed that is deemed to be appropriate for enforcement of a fundamental right. The court justified that “when formulating a scheme of action, the court must have [due regard for] the particular circumstances of the case, to surrounding realities including the potential for successful implementation, and the likelihood and the degree of response from the agencies on whom the implementation will depend.” Justice Nasim Hassan Shah observed: “[T]he jurisdiction exercised by the Supreme Court in the cited cases was not essentially confined to the enforcement of fundamental rights within the meaning of Art. 184(3) of the Constitution but was a much wider exercise of judicial discretion to provide social justice to the citizens. . . .”<sup>34</sup>

The Supreme Court has taken action based on two primary sources of requests for the Court to act suo motu: letters and telegrams to the Court<sup>35</sup> and news items of the national press and electronic media. In each case, the Court converted the information into petitions upon which it then took action.<sup>36</sup> The Court also has acted on petitions of human rights violations.<sup>37</sup> This intervention by the Court has been favorably welcomed by the public.

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32. *Benazir Bhutto v. Federation of Pakistan*, 1988, P.L.D., S.C. 416.

33. *Darshan Mashi v. State*, 1990, P.L.D., S.C. 513.

34. Hussain, *supra* note 27.

35. One example is the *Darshan Masieh* case, wherein the Court invoked jurisdiction on the basis of a telegram. *Darshan Mashi v. State*, 1990, P.L.D., S.C. 513.

36. Rina Saeed Khan, *Playing Havoc With Nature*, THE REVIEW (June 8, 2006).

37. *E.g.*, in Human Right Case Nos. 2, 20, and 25 (1992).

## 2. Environmental Suo Motu Cases

By 1992, Pakistan was beginning to question whether the Court had the power to exercise its jurisdiction in checking the abuse of power and misuse of authority in the environmental arena. Doubts remained over whether in so doing the Court was overstepping its judicial role. Scholars and practitioners questioned whether Pakistan's adversarial system of litigation would be threatened by court interference; whether lawyers would be displaced; whether suo motu interventions by the Supreme Court could really help in enforcement of environmental law; and whether suo motu actions are a proper procedure to protect the fundamental environmental rights of common people.

These questions were partially answered by the landmark 1994 environmental case of *Shela Zia*.<sup>38</sup> In this case, citizens apprehensive about the health effects of the construction of a high-voltage grid station in a residential area sent a letter to the Supreme Court. The Court responded to the letter by rendering a historic judgment, thereby breaking down barriers to the right to sue by entertaining the application for relief and accepting the petition.<sup>39</sup> The Court held that the right to a clean environment is a fundamental right of all the citizens of Pakistan and is conferred by the "right to life" and the "right to dignity" protected under Articles 9 and 14 of the Constitution. The Court further held the word "life" is very significant, as it covers all facets of human existence. Although life is not defined in the Constitution, the Court held that its meaning cannot be restricted only to vegetative or animal life, or mere existence from conception to death. The Court found that life includes all such amenities and facilities that a person born in a free country is entitled to enjoy legally and constitutionally. The Court concluded that "a person is entitled to protection of law from being exposed to hazard of electrical magnetic fields or in such hazards, which may be due to installation of any grid station, factory, power station, or such like installations."<sup>40</sup> This innovative interpretation of the right to life and dignity has been the most salutary development to protect the environment and promote sustainable development in Pakistan.<sup>41</sup>

In 1992, the Karachi Administration Women's Welfare Society (KAWWS) wrote a letter to the Supreme Court concerning actions of the Karachi Administration Employees Co-Operative Housing Society (KAECHS) stating, "[t]he health hazards in the use of open storm water drains for the disposal of sewage, and the contamination of household water by sewage, resulting from damaged adjoining water and sewage pipes are a violation of the fundamental rights of the people living in the area." The Supreme Court suo motu converted the letter into human rights case No.9-K/1992. The Court declared "a Commission was to be constituted to report on whether the com-

plaints in the original petition were correct."<sup>42</sup> After the Commission reported that the complaint in the petition was correct, the Court ordered the KAECHS to take remedial measures, including the repair of the water and sewerage pipes.<sup>43</sup>

The above cases indicate that the Court is willing to exercise its powers under Article 184(3) of the Constitution to investigate questions of fact raised by citizens in letters to the Court, recording evidence, appointing a commission, or otherwise in order to ascertain the validity of citizen concerns.<sup>44</sup>

Justice Saleem Akhtar, in 1994, took notice of a news report and acted suo motu under Article 184(3) to determine the effect of certain businessmen who were purchasing land in the coastal area of Baluchistan for dumping hazardous nuclear and industrial waste. The Court asked for a report on the matter from the provincial government. The report found that the allegations were unfounded. The Court, nevertheless, issued directions to the government that no person shall be allotted land for dumping nuclear or industrial waste, that the government should submit a list of persons to whom land in the coastal area of Baluchistan has already been allotted, and that a condition must be inserted in the agreement of allotment to the effect that the land should not be used for the dumping of nuclear or industrial waste. The Court directed that a similar undertaking be obtained from each allottee of the land in the coastal area.<sup>45</sup>

In the subsequent *Khewra Salt Mine* case, petitioner's sought enforcement of the right of the residents to unpolluted water.<sup>46</sup> Petitioners alleged that if miners were allowed to continue their activities, which extended into the water catchments area, the watercourse, reservoir, and the pipelines would become contaminated. The Supreme Court, while entertaining the petition filed under Article 184(3) of the Constitution of Pakistan, issued a number of directions to the concerned departments, and directed the miners to shift within four months from the location of the mouth of the specified mine to a safe distance from the stream and small reservoir, in such a manner that those areas would not be polluted by mine debris, carbonized material, and water spilling out from the mines, to be determined to the satisfaction of the Commission appointed by the Supreme Court for that purpose.<sup>47</sup>

In a human rights case concerning smoke-emitting public vehicles, the Supreme Court ordered the provincial government of Sindh to take effective measures to eliminate pollution. The Court held that all smoke-emitting vehicles,

42. Human Rights Case No. 9-K (1992).

43. IUCN, THE WORLD CONSERVATION UNION, YOU CAN MAKE A DIFFERENCE: ENVIRONMENTAL PUBLIC INTEREST CASES IN PAKISTAN 49.

44. Parvez Hassan & Azim Azfar, *Securing Environmental Rights Through Public Interest Litigation in South Asia*, 22 VA. ENVTL. L.J. 215, at 13.

45. Human Right Case, Environment Pollution in Baluchistan, 1994, P.L.D., S.C. 102.

46. *Khewra Jhelum v. Director Industries and Mineral*, 1994, S.C.M.R., 2061.

47. *General Secretary West Pakistan Salt Mines Labour Union (CBA) Khewra Jhelum v. Director Industries and Mineral Development Punjab Lah*, 1994, S.C.M.R., 2061.

38. *Shela Zia v. WAPDA*, 1994, P.L.D., S.C. 693.

39. Hassan & Azfar, *supra* note 3, at 11.

40. *Shela Zia v. WAPDA*, 1994, P.L.D., S.C. 693.

41. Pervaiz Hassan, *Shela Zia v. WAPDA: Ten Years Later*, 2005, P.L.D., Journal 48, at 1.

whether privately owned or owned by government departments, should be regularly inspected. The Court ordered emergency checks to be carried out for that purpose by the concerned officials, and held that motorcycles and autorickshaws must not be allowed to operate without mufflers, and that the use of pressure horns and multi-tone horns must be prohibited. Supreme Court passed its order under Article 184, requiring effective and remedial measures, in order to streamline the process of checking the pollution as a first step in eliminating it from Karachi.<sup>48</sup>

The Supreme Court declared that the smoke emitted by public transport is the major cause of environmental pollution. The Court, in exercise of suo motu powers and in the public's interest, directed the concerned authorities to examine the matter and the possibility of encouraging the use of compressed natural gas (CNG), instead of diesel. Later on, the Court, via original jurisdiction, ordered the federal and provincial governments to replace all vehicles that emit black smoke, taking them off the roads, and asked the concerned governments to take necessary steps to provide for such matters in the Motor Vehicle Ordinance and the rules framed thereunder.<sup>49</sup>

The Supreme Court took suo motu action in *Islamabad Chalets*, restraining the construction of chalets and villas situated at a distance of two kilometers of the Margalla Hills, where a housing scheme was launched. The Court declared that the housing scheme in question would have a direct bearing on the ecosystem of the Margalla Hills and the overall environment of Islamabad, on account of increased traffic, congestion, noise pollution, diminishing greenery, annihilation of wildlife, unhygienic conditions due to sewerage, and frequent landslides due to the loosening of soil and the removal of rocks.<sup>50</sup>

Not all suo motu cases have been resolved quickly. In March 2006, the Supreme Court took suo motu notice of a petition by four residents of the village of Baghalchur in the Dera Ghazi Khan district of southern Punjab. The residents alleged that the Pakistan Atomic Energy Commission (PAEC) was dumping radioactive atomic waste in an area where mining operations had been conducted in the past. The petitioners claimed this was having a negative impact on the health of local residents, as well as on their cattle.<sup>51</sup> According to the complainants, the area had been used as a dumping station for years, ponds had become poisoned, and animals were losing hair and their hooves were swelling. They alleged that approximately 40 animals had died in the previous year as a result of the dumping. The PAEC countered that it closed the uranium-mining operation at Baghalchur in November 1999 because the reserves had been extracted. The matter remains unresolved.

In the *Maulvi Iqbal Haider* case,<sup>52</sup> petitioner filed under Article 184(3) of the Constitution before the Court of Justice Iftikhar Muhammad Chaudry, posing a question of public importance in reference to enforcement of fundamental rights. The petitioner requested the Court to enjoin the Capital Development Authority (CDA) from converting a public park in Islamabad into a miniature golf club. The Court ruled that a constitutional petition under Article 184(3) of the Constitution could be maintained, if the petitioner established a question of public importance in reference to the enforcement of a fundamental right. A person can invoke the constitutional jurisdiction of the Supreme Court as *pro bono public* (for the public good), but he must show that he is litigating firstly in the public interest, and secondly, for the public good or for the welfare of the general public. In a case of public interest litigation, the Court held that a petitioner can bring an action for relief on his own behalf, and also on behalf of the general public, against various public functionaries, where they have failed to perform their duties relating to the welfare of the public at large, as they are required under relevant law. The Court ruled that the deal for the construction of a golf club or any other commercial activity was contrary to the fundamental rights of the public under Article 26 of the Constitution. The Court ordered the CDA to develop Jubilee Park itself for the purpose of the public of Islamabad.

In another important case, the Supreme Court moved suo motu under Article 184(3) in the matter of a city district government cutting down trees in a public park in order to construct a multistoried car-parking plaza. Although the project had been abandoned at the time of the inquiry, the Court held that the government was constrained from using the property on which the park was sited in the future to any other use other than in accordance with law. The city district government was also directed to restore the status of the public park.<sup>53</sup>

The Chief Justice of Pakistan took suo motu notice of a report in the *Daily Dawn* (June 25, 2006) regarding chopping down approximately 2,000 trees along the Canal Bank Gardens, Lahore. The Court ordered the government of Punjab to submit comments to address the report.<sup>54</sup> On November 28, 2009, the *Daily Dawn* reported that the Court had directed the authorities concerned to put their plans of cutting the trees on hold, and had summoned the chief secretary and the environment secretary to the courthouse in Islamabad.

The acting Chief Justice of Pakistan, on January 6, 2007, ordered the Cantonment Board of Karachi and the Karachi Water and Sewage Board to submit reports on the

48. Pollution of Environment Caused by Smoke, Emitting Vehicles, Traffic Muddle H.R. No. 4-K of 1992; 1996, S.C.M.R. 543.

49. *Suo Motu Case No. 3 of 2003*, Supreme Court of Pakistan.

50. *Suo Motu Case No. 13 of 2005*, Report 2005-2006, Supreme Court of Pakistan, Golden Jubilee edition, at 106.

51. *Suo Motu Case No. 2 of 2006, Uranium Waste Poisons Baghalchur Village, Pakistan*.

52. *Supreme Court Constitutional Petition No. 36 (2005)*, *Maulvi Iqbal haider v. CDA, etc.*, 2006, P.L.D., S.C. 394.

53. *Suo Motu Case No. 3, 2006*, P.L.D., S.C. 514.

54. Asif Hussain Shirazi, P.R.O. Chief Justice of Pakistan, *CJP Takes Sua-Motu Action for Chopping Trees*, Press Release, June 29, 2006 (matter is still pending).

alleged filthy condition of a road and the sewer system in Clifton, Karachi.<sup>55</sup>

Justice Javaid Iqbal took suo motu action on June 29, 2007, for delay in construction of roads and underpasses that had not been completed within the stipulated time period and in respect of which substandard material had been used by the contractors. The poor conditions of the bridges/roads had caused pollution and traffic hazards for the general public and commuters. Diseases, including gastrointestinal disease, hepatitis, and asthma, had spread among the population along the construction area.

A recent case involving a proposed resort, the New Muree Project,<sup>56</sup> was registered as a petition by the Chief Justice of Pakistan, and the Court took suo motu action. According to the report submitted by the chief secretary, 1% of Punjab's total tree population (4,000 trees) would be affected by the development of the resort. Moreover, according to environmentalists, the Patriata Forest boasted the highest average rainfall annually in the country (approximately 1,770 millimeters), and it is situated in the catchments of Simly and Rawal Dams, which provide almost one-half of the drinking water for the residents of Rawalpindi and Islamabad. The development of the New Muree Project was expected to result in disturbance to dams in the area that would ultimately lead to silting and other problems. The Court held that the facts of the case raised questions of public importance that touched on fundamental rights, including the right of life, and ordered that the article published in the newspaper be registered as a petition under Article 184(3) of the Pakistan Constitution.

### III. The Beneficial Use of Sua Motu Procedures

An analysis of the cases above demonstrates that the initial fears of lawyers and scholars about the destruction of the legal system due to the suo motu process have not materialized. The Supreme Court has not overstepped its powers and has rightly and justly initiated suo motu proceedings in protection of the environment as a fundamental right. The judicial activism of the court toward dealing with the health effects of a high-voltage grid station in the *Shella Zia* case and the drinking water impacts of deforestation for a resort in the *New Muree* case provide a model for a direct approach toward sustainable development. The Supreme Court applied a principle of employing precautionary measures<sup>57</sup> in the *Salt Miners* case, by taking into account the seriousness of the danger to which the people of the area were exposed, in the *Baluchistan* case by appointing a commission to assess the dumping of hazardous nuclear waste,

and in regards to the smoke-emitting public vehicles in controlling pollution. Although the *Bagulcher* case is currently in a stalemate, it does establish a precedent for suo motu action for nuclear waste disposal in a manner that would create a public hazard.

The availability of suo motu relief has started changing industry and regulators' lackadaisical attitude toward environmental impacts in Pakistan. The governmental agencies that had always considered EIA a hindrance in achieving economic targets have started realizing the importance of EIA. The judicial activism in the above cases has made the industrialists, developers, and governmental agencies more aware of the importance of environmental matters in relationship to socioeconomic development and of a potential Supreme Court check on their activities. For instance, agencies have become active in conserving the environment by controlling the construction of roads and bridges, converting diesel buses to CNG, and converting two-stroke rickshaws into four-stroke rickshaws.<sup>58</sup> Industries, political parties, and other stakeholders have become more aware of environmental considerations.

Nevertheless, the Supreme Court's suo motu actions described above also highlight the immaturity and impotency of Pakistan's public institutions in the enforcement and implementation of environmental law. In these actions, the Court identified legislative ineffectiveness and the immaturity of environmental institutions. The tacit reasons for such ineffectiveness in the region are inadequately trained personnel, lack of equipment, scarce financial resources, insufficient environmental education, and apathy of the public at large. The environmental institutions are not wholly to blame for their weaknesses, because those institutions are still young. This judicial activism, taking into account the interaction of technical, institutional, and political factors with socioeconomic factors, aids in the implementation and enforcement of sound environmental regulations.

From the perspective of Pakistan's ordinary citizens, suo motu actions are a much-needed tool in the enforcement of environmental law and the protection of their fundamental rights. These actions by the Court also put the institutions, administrations, and public functionaries on notice that they will be expected to fulfill their responsibilities in enforcing the law. Sua motu actions by the Supreme Court have made the judicial system a viable option for providing timely relief to affected persons. This process makes environmental rights enforcement accessible to the poor, as it allows them to raise their concerns, even where they would not be able to bear the financial cost of the payment of court fees, engagement of lawyers, and filing of affidavits.<sup>59</sup> The suo motu option provides ordinary citizens

55. M. Arshad Munir, P.R.O. Chief Justice, *Suo-Motu Action on Delay in Construction of Roads & Under-Passes*, Press Release, June 29, 2007 (matter is still pending).

56. *Suo Motu Case No. 10 (2005)*, Report 2005-2006, Supreme Court of Pakistan, Golden Jubilee Edition, at 106.

57. The precautionary principle evolved from the recognition that scientific certainty often comes too late to design effective legal and policy responses for preventing potential environmental threats.

58. Rickshaws are the cheapest transport system of Pakistan for short distances. Earlier, there were two-stroke diesel rickshaws, which not only caused pollution by releasing various harmful gasses like carbon monoxide, hydrocarbons, etc., but also created noise pollution. After the Court suo motu action, the two-stroke engine rickshaws were replaced by four-stroke engines, which are free of noise, as well as any kind of air pollution.

59. Faquir Hussain, *Access to Justice*, 1994, P.L.D., Journal 10, at 19.

with the ironic choice of a speedy inexpensive remedy over which they have limited control or input beyond the initial correspondence with the Court via suo motu action, or a slower and expensive lawsuit over which they will have some control in presenting strategies and directing the litigation. Nevertheless, it is critical that the judges not lose sight of the principle of judicial restraint nor move outside the realm of their authority.

#### IV. Should the Constitution Be Amended to Strengthen Environmental Protection?

The Pakistan Constitution is silent on the subject of environmental protection. The only reference to the environment is found in a schedule to the Constitution providing that “environmental protection and ecology” is a concurrent subject that can be legislated by both federal and provincial governments.<sup>60</sup> Adding an explicit right to environmental protection and a healthful environment to the Constitution would require approval of two-thirds of the legislators.

Absent effective governmental enforcement, the public has benefited from the Court’s use of suo motu actions, but suo motu should not be considered a long-term solution. It is possible that the Court’s judicial activism would not be as necessary if Pakistan’s Constitution delineated a specific right to environmental protection, which may result in recognition of a healthy environment as a priority not so easily ignored by governmental authorities, as has been the case in the past. Legislators should amend the Constitution to add such an environmental right as part of the fundamental right to life.<sup>61</sup>

Article 8 of the Constitution provides that, if fundamental rights<sup>62</sup> are violated, a challenge may be brought in the superior Courts. Article 184(3) authorizes the Supreme Court to take action only when there is a matter of public importance in the enforcement of fundamental rights. This permits the Court to use suo motu actions under Article 184(3) as a tool to bind the members of the executive branch to implement such rights. If the Constitution were amended by the addition of an express right to a healthy environment within the ambit of the fundamental right to

life, then Article 8 would not only require the judiciary to take effective notice of violations, it would provide redress on individual complaints and also give a longer term solution of enforcement and implementation of environmental protection by the executive branch. This would lessen the burden on the Supreme Court in taking suo motu actions, and should reduce the need for such extraordinary measures in providing environmental justice for plaintiffs harmed by pollution. The result would be better conservation and protection of the environment, and also place Pakistan firmly on the path toward sustainable development.

#### V. Conclusion

Suo motu actions have been utilized as a direct result of grave environmental degradation in Pakistan and a failure by the executive and administrative branches of government to uphold and enforce environmental laws. The parliamentary form of government results in the executive and legislative arms of government being subject to the judiciary’s power to serve as a check on certain of their activities and has proved to be a fairly stable form of liberal democracy. Moreover, the basic tenet underlying the establishment of three separate branches is advanced when the courts act to stem the abuse of power and misuse of authority of the other branches in the context of protection of the environment and public health. Such judicial action in the face of severe environmental harm protects the ignored poor, deprived, and the dispossessed who cannot protect themselves within the parameters of the social, economic, and cultural requirements of the society. Since justice delayed is justice denied, the willingness of the Supreme Court to take suo motu actions is a conscientious response to address the continued degradation that would occur in their absence.

Pakistan would benefit from an amendment to its Constitution to add a right to environmental protection. Pakistan should also empower its administrators to provide effective environmental enforcement, and to protect them when they do so in furtherance of the environmental laws. In so doing, Pakistan will provide certainty to the development process and ensure that development occurs in a more sustainable manner.

60. India has taken the bold step of including environmental protection and rights in its Constitution, first by recognizing the right to a healthful environment, second, by undertaking to protect and improve the environment in safeguarding the forests and wildlife of the country, and lastly, by imposing a duty on citizens to improve the natural environment. Armin Rosenzanz & Shiraz Rustomjee, “Citizens’ Right to a Healthful Environment,” 25 ENVTL. POL’Y & L. 324 (1995).

61. Article 9: “No person can be deprived of life or liberty, save in accordance with law.”

62. Article 4 of the Pakistan Constitution lays down the basis of fundamental right: that it is an inalienable right, a right that can never be taken away.