

# ELR

## NEWS & ANALYSIS

### Greening Environmental Rights: Separating Law and Morality in Environmental Public Interest Litigation in Pakistan

by Dominic J. Nardi Jr.

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*Editors' Summary: Many environmentalists consider active environmental litigation in developing countries to be a positive development. However, in Pakistan, a country that encourages public interest litigation, this system poses serious institutional and legal problems that may hinder the development of an effective national response to environmental challenges. Those litigating for environmental protection in Pakistan may be relying too heavily on the courts to take measures that should be within the jurisdiction of the Pakistan EPA. In this Article, Dominic J. Nardi Jr. warns that judicial activism might lead to conflicts with the executive, or could encourage environmental regulators to spurn responsibility for handling future environmental problems. He recommends that the judiciary relegate public interest cases based on statutes to the country's Environmental Tribunals, since they presumably have the expertise necessary to adjudicate these types of cases. For public interest cases relying on fundamental rights or morality, the Federal Shariat Court may be the best venue for equitable relief.*

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While many American lawyers view Europe as having relatively progressive environmental laws, it is in fact South Asia that has been at the forefront of encouraging environmental public interest litigation (PIL). The courts in Bangladesh, India, and Pakistan have all reduced legal standing for public interest environmental lawsuits and engaged in environmental policymaking where the environmental agencies have failed to take action. Such an aggressive judicial activism may be less surprising in India, with its ingrained tradition of democracy and respect for the judiciary, but some observers may be surprised to learn that the Pakistani judiciary has followed its Indian counterpart in the field of PIL. While some environmental lawyers may see the Pakistani judiciary's environmental activism as a boon in a country with poor law enforcement, there are several important reasons for avoiding overdependence on the courts. Many PIL cases are brought under constitutional rights that are often not clearly defined or delineated. The Pakistani judiciary's analysis of constitutional environmental rights often leads it to engage in controversial policymaking and disputes with other branches of government on how to protect the environment. Indeed, many of the cases seem to mix legal analysis with moral judgments, making for unclear jurisprudence.

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In this Article, I analyze the institutional and legal problems with environmental PIL in Pakistan and propose an alternate means for Pakistan's adjudicatory institutions to handle such cases. In Part I, I will discuss relevant background information on the environmental and energy challenges Pakistan currently faces. Next, I will present some background on major environmental laws and problems with their enforcement. In Part III, I will explain Pakistani environmental PIL, its origins, and recent jurisprudence. In Part IV, I will analyze some of the institutional and legal problems that stem from the judiciary's acceptance of PIL and the problems of mixing environmental law with equitable judgments. Finally, I will propose an institutional solution to these problems that would channel environmental statutory or regulatory cases to the Environmental Tribunals and constitutional or equity cases to the Federal Shariat Court.

#### I. Current Environmental and Energy Challenges

As in the rest of South Asia, Pakistan's current environmental and energy challenges derive from the country's high population density. As of 2007, the country had an estimated 165 million people, and the population is growing at 1.8% per year.<sup>1</sup> This growth strains the country's natural resources, particularly its supply of fresh water. It also in-

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1. Central Intelligence Agency, *Pakistan*, CIA WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/pk.html> (last visited July 28, 2007).

creases demand for energy, and thus results in more pollution. Soil degradation reduces agricultural productivity and drives farmers further into poverty.<sup>2</sup> The World Bank estimated that in 2005, overall environmental degradation cost the country 6% of gross domestic product (GDP), or about 365 billion Rupees (Rs.) per year.<sup>3</sup> In short, the country's current environmental and energy challenges are directly tied to its high population density and economic growth, requiring careful consideration of the appropriate policy choices for achieving sustainable development.

#### A. Biodiversity

Pakistan already has very little forest cover. In the early 2000s, the United Nations Food and Agriculture Organization (FAO) estimated that only 3% of the country's land area is covered by forest.<sup>4</sup> During the 1990s, the country had a deforestation rate of 1.5% per year.<sup>5</sup> More recently, forest cover fell from 2.116 million hectares in 2000 to 1.902 million hectares in 2005, a 2.1% change per year during that period.<sup>6</sup> This is among the highest rates of deforestation in the Asia-Pacific region. Fortunately, around 9.5% of Pakistan's land area is nationally protected—close to the global average of 10%.<sup>7</sup> At the same time, around 80% of households depend on wood for cooking fuel, increasing stress on the forests.<sup>8</sup> Meanwhile, rangeland productivity is estimated at merely one-third of its potential, with up to 80% of rangeland degraded.<sup>9</sup> Destruction of these habitats and poaching pose a threat to Pakistan's endangered species, which include the snow leopard, the houbara bustard, the Indian vulture, the woolly flying squirrel, and the Afghan tortoise.<sup>10</sup>

#### B. Water Pollution and Sanitation

In the 2005-2006 economic survey, the Pakistan government stated that preserving the quality and availability of fresh water was the country's most pressing environmental

challenge.<sup>11</sup> Per capita water availability shrank from 1,200 cubic meters (m<sup>3</sup>) in 2001 to 1,105 m<sup>3</sup> in 2005-2006, dangerously close to the scarcity level of 1,000 m<sup>3</sup>.<sup>12</sup> Rural and urban poor face a lack of sanitation and access to clean drinking water, which causes diarrheal diseases and typhoid.<sup>13</sup> Low rainfall and rapid sedimentation are key reasons behind the shortage. Poor wastewater management also creates problems. In July 2005, the Punjab Environmental Protection Department released a study claiming that 10 cities, including Lahore, faced an environmental disaster due to the lack of effective wastewater treatment and the discharge of sewage into waterways.<sup>14</sup> In October 2006, in Lasbela District in Balochistan alone, six people were reported to have died due to contaminated water and hundreds developed gastroenteritis.<sup>15</sup>

#### C. Air Pollution and Transport

Air pollution, particularly from particulate matter (PM), has become a serious environmental health concern.<sup>16</sup> The number of vehicles being driven on the roads in Pakistan has risen dramatically. As of 2005, there were 10 passenger cars per 1,000 people, a relatively high number for South Asia.<sup>17</sup> The absolute number of cars jumped from 0.8 million 20 years ago to 4 million today, an increase of 400%.<sup>18</sup> Because of the lack of enforcement of emission standards, consumption of low-quality, highly polluting fuel is widespread, and lead and carbon emissions have become major sources of health risks in urban centers.<sup>19</sup> Likewise, the lack of fuel efficiency standards means that the country has a relatively high level of carbon dioxide (CO<sub>2</sub>) energy intensity per unit of GDP.<sup>20</sup> Indeed, from 1990-2003, CO<sub>2</sub> emissions grew by 40%.<sup>21</sup> A Ministry of Environment report recently estimated that approximately 22,700 people, including 700 children, die prematurely due to urban air particulate pollution.<sup>22</sup> On a population-weighted average, Pakistanis emit 128 micrograms per cubic meter (μg/m<sup>3</sup>) of PM per person per year—almost twice the average for South Asia.<sup>23</sup> On the other hand, there has been an increasing trend toward the use

2. Pakistan already has a relatively low amount of agricultural land, around 35% of total versus 54% for South Asia as a whole. Furthermore, it has several times more fertilizer per hectare of arable land than most developing countries. *Id.*

3. WORLD BANK, REPORT NO. 36946-PK, PAKISTAN: STRATEGIC COUNTRY ENVIRONMENTAL ASSESSMENT 1 (2006), available at [http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2006/10/02/000160016\\_20061002113552/Rendered/PDF/3694610vol011PK.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2006/10/02/000160016_20061002113552/Rendered/PDF/3694610vol011PK.pdf).

4. FAO, <http://www.fao.org/forestry/site/countryinfo/en/> (follow "select a country" hyperlink, then follow "Pakistan" hyperlink) (last visited July 27, 2007).

5. *Id.*

6. FAO, STATE OF THE WORLD'S FORESTS 2007, at 111 (2007), available at <http://www.fao.org/docrep/009/a0773e/a0773e00.htm> (follow "Annex" hyperlink). For comparison, India gained 29,000 hectares during the same period, while Nepal and Sri Lanka, which had the next highest rates of deforestation, only lost 1.4% and 1.5% per year. FAO, *supra*.

7. WORLD BANK, *supra* note 3, at 172.

8. FAO, *supra* note 6.

9. WORLD BANK, *supra* note 3, at 1.

10. For more on endangered species in Pakistan, see World Conservation Union (IUCN), *Red List*, <http://www.iucnredlist.org/search/search-basic> (choose "Pakistan" from the list and follow "Search" hyperlink) (last visited July 7, 2007).

11. HUMAN RIGHTS COMMISSION OF PAKISTAN (HRCP), STATE OF HUMAN RIGHTS IN 2006, at 294 (2006), available at [http://www.hrcp-web.org/ar\\_anualreport-06/](http://www.hrcp-web.org/ar_anualreport-06/).

12. *Id.* at 295.

13. The World Bank estimates that only 41% of the rural population has access to improved sanitation. Meanwhile, around one-quarter of children under age five suffer from diarrhea, acute respiratory infection, or both. WORLD BANK, THE LITTLE GREEN DATA BOOK 2007, at 172 (2007), available at <http://siteresources.worldbank.org/INT/DATA/64199955-1178226923002/21322619/LGDB2007.pdf>.

14. HRCP, *supra* note 11, at 295.

15. *Id.*

16. WORLD BANK, *supra* note 3, at i.

17. By comparison, in 2007, China also had around 10 passenger cars per 1,000 people. *Id.* at 68.

18. HRCP, *supra* note 11, at 300.

19. ENERGY INFORMATION ADMINISTRATION (EIA), COUNTRY ANALYSIS BRIEFS: PAKISTAN (2006), available at <http://www.eia.doe.gov/emeu/cabs/Pakistan/Full.html>.

20. *Id.*

21. WORLD BANK, *supra* note 3, at 172.

22. *Id.* at 40.

23. *Id.* at 172.

of compressed natural gas (CNG) for transportation, which is relatively cleaner.

#### D. Energy

Pakistan is still heavily dependent on fossil fuels, which are a major source of air pollution and greenhouse gas (GHG) emissions. It must import much of its oil from the Middle East. On the other hand, in 2005, less than 1% of electricity was generated from coal, the energy source that creates the most pollution.<sup>24</sup> It also relies heavily on hydropower, which comprises 30% of its energy generation.<sup>25</sup> Mainly, however, the country relies on natural gas, which amounted to around 50% of Pakistan's total energy consumption in 2005.<sup>26</sup> Natural gas does produce relatively less pollution than oil or coal, but Pakistanis rely on it more because it is cheaper than because of any environmental benefits. Pakistan currently produces much of its natural gas domestically, but will likely have to import much more in the future. The Pakistani government estimates that the country will have to increase energy generation capacity by 50% by 2010 in order to meet demand.<sup>27</sup>

## II. Environmental Law in Pakistan

Pakistan does have a basic framework for environmental laws, and has joined many of the most important international environmental treaties. While some of the laws are adequate, there are many gaping holes, particularly at the federal level, that prevent proper policy responses to major environmental challenges. However, the most significant problem is the poor enforcement of its existing laws. Thus, any analysis of Pakistan's environmental laws would be incomplete without looking at their enforcement in practice.

### A. Domestic Environmental Law

Under the Concurrent Legislative List of Pakistan's 1973 Constitution, both the federal government and provincial governments have jurisdiction over ecology, natural resources, and environmental pollution.<sup>28</sup> However, most natural resource laws tend to be provincial or local laws.<sup>29</sup> Many of the federal laws on natural resources date back to the colonial era and manage natural resources with the goal of future exploitation, rather than preservation of ecosystems.<sup>30</sup> Likewise, many of the lawsuits dealing with natural resource use are brought before state courts rather than the federal or Supreme Court.<sup>31</sup> Furthermore, there is no legal

requirement compelling the federal and provincial governments to coordinate their environmental policies.<sup>32</sup>

In an effort to provide a legal framework for environmental pollution and protection measures, the federal government passed the Pakistan Environmental Protection Act (PEPA) of 1997.<sup>33</sup> Under §12 of PEPA, and §5(1) of the Environmental Protection Agency's (EPA's) review of PEPA, the government must initiate an initial environmental examination (IEE) or environmental impact assessment (EIA) for any project likely to cause "adverse environmental effect."<sup>34</sup> The Pakistan EPA can also establish protected areas in environmentally sensitive areas.<sup>35</sup> However, none of its provisions provide for citizen participation in environmental decisionmaking or access to information.<sup>36</sup> Also, PEPA does not automatically override other statutes, and it has proven difficult to implement through the federal and provincial government bureaucracies.<sup>37</sup>

PEPA prohibits the operation of motor vehicles that emit air pollutants or noise in excess of levels determined by the National Environmental Quality Standards (NEQS).<sup>38</sup> The NEQS set limits on emissions of smoke, carbon monoxide (CO), and noise pollution from new and used vehicles.<sup>39</sup> The EPA is also instructed to establish ambient air, water, and land quality standards. The standards should be the same as or higher than those established in the NEQS, but EPA may adopt less stringent standards for certain areas with special approval from the Pakistan Environmental Protection Council.<sup>40</sup> However, unlike similar laws in other countries, PEPA does not make it mandatory to direct funds received from penalties levied on polluters toward future environmental reclamation or restoration projects, so such projects may not have any secure source of funding.<sup>41</sup>

### B. International Environmental Law and Treaties

As of early 2007, Pakistan was a party to the Convention on Biological Diversity (CBD),<sup>42</sup> the Kyoto Protocol on Climate Change,<sup>43</sup> the Convention on Combating Desertifica-

24. *Id.*

25. *Id.*

26. EIA, *supra* note 19.

27. *Id.*

28. CONST. OF THE ISLAMIC REPUBLIC art. 70(4), Fourth Sched. (Pak.).

29. The federal government does have laws controlling allocation of fresh water resources and logging in strategic areas, but even these laws are limited in scope and power. IJAZ AHMED ET AL., ENVIRONMENTAL LAW IN PAKISTAN PART I: FEDERAL 14 (2005), available at [http://www.iucn.org/places/pakistan/elaws/PDF/Federal/Description-Analysis/Description%20and%20Analysis%20\(Federal\).pdf](http://www.iucn.org/places/pakistan/elaws/PDF/Federal/Description-Analysis/Description%20and%20Analysis%20(Federal).pdf).

30. *Id.*

31. *Id.*

32. *Id.* at 15.

33. No. 34.

34. See §5(a).

35. Pakistan Environmental Protection Agency Review of Initial Environmental Examination and Environmental Impact Assessment Regulations 2000 (SRO 339(I)/2000) (June 13, 2000).

36. AHMED ET AL., *supra* note 29, at 76.

37. *Id.* at 77.

38. National Environmental Quality Standards (Self-Monitoring and Reporting by Industry) Rules 2001 (SRO 528(I)/2001) (Apr. 2001).

39. Limits for CO are 4.5–6%, exceeding international standards of 2–3%. Nitrogen oxides, sulfur oxides, lead, and benzene emissions are not mentioned. *Id.*

40. PEPA §6(1)(g). The Pakistan Environmental Protection Council was established in 1984 under §3 of the Pakistan Environmental Protection Ordinance to further formulation and implementation of environmental policy at a national level. It is a high-level body chaired by the Prime Minister with seats for provincial Chief Ministers, provincial environment ministers, civil society, and private-sector participants. WORLD BANK, *supra* note 3, at 26.

41. AHMED ET AL., *supra* note 29, at 77.

42. CBD, U.N. Conference on Environment and Development, June 5, 1992, reprinted in 31 I.L.M. 818, 823 (1992).

43. Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, reprinted in 37 I.L.M. 22 (1998). Although a non-Annex I Party, Pakistan does not currently have any legally binding obligations to reduce GHG emissions.

tion (CCD),<sup>44</sup> the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES),<sup>45</sup> the Convention on the Conservation of Migratory Species of Wild Animals,<sup>46</sup> the Ramsar Convention on Wetlands,<sup>47</sup> and the World Heritage Convention.<sup>48</sup> In theory, the federal government assumes the obligation to implement the provisions of these treaties, which includes passing any necessary implementing legislation. While the federal government uses statutes to control the import and export of endangered species in order to comply with CITES, it has not passed a federal law to govern wildlife or to implement many of these other treaties.<sup>49</sup> Furthermore, it has not passed federal legislation to establish a national system of protected areas, as required by the CBD.<sup>50</sup>

### C. Problems With Traditional Environmental Law Enforcement

Like many other developing countries, Pakistan's government has not been able to adequately address the country's environmental problems. The EPA lacks both funding and technical capacity to enforce the law. Indeed, the national agency has only 52 people.<sup>51</sup> In addition, there is often a lack of political will to implement existing laws.<sup>52</sup> One of the reasons for this is undoubtedly corruption. According to Transparency International, the police and judiciary, which are essential for environmental enforcement actions, are perceived as among the most corrupt institutions in the country.<sup>53</sup> Furthermore, much of the population is unaware of their legal rights and tort law has not yet developed sufficient responses to environmental degradation.<sup>54</sup> All of these factors make it very difficult for public interest lawyers to rely on environmental laws in courts. Plaintiffs at the federal level may not even find laws on point. Even if a plaintiff finds a particular environmental statute in his favor, corruption and weak enforcement agencies mean that he will not necessarily find redress through traditional litigation.

## III. Environmental PIL

Because of the aforementioned problems in traditional litigation, Pakistan's Supreme Court has adopted the doctrine of PIL to increase access to justice for public interest litigants. PIL allows the Court to waive standing requirements, hear cases on a nonadversarial basis, appoint committees to decide issues of fact or policy, and waive court fees and affidavits.<sup>55</sup> In fact, the Court in PIL cases can issue orders to solve problems beyond the immediate dispute and seek corrective action or injunctions to prevent future harm, rather than merely compensation.<sup>56</sup> This part will look at the origins of PIL in Pakistan, as well as some of the important environmental PIL cases.

### A. Origins of PIL

Under Article 184(3) of the Constitution, the Supreme Court has the right to consider "a question of public importance with reference to the enforcement of the Fundamental Rights."<sup>57</sup> Since it does not contain any provisions on standing, this article of the Constitution has been interpreted as giving the Supreme Court original jurisdiction over public interest cases. In order to facilitate PIL, the Court declared that "[a]ll technicalities have to be avoided unless it be essential to comply with them on grounds of public policy . . . ."<sup>58</sup> However, under Article 199, cases concerning breaches of fundamental rights in the High Courts or lower courts must apply an "aggrieved person" test, requiring the complainant to have a direct and personal interest in the claim, although there has been little clear guidance on the application of the test in PIL cases.<sup>59</sup>

The first major PIL cases arose from challenges to martial law. In 1988, during the reign of Gen. Muhammad Zia-ul-Haq, Benazir Bhutto successfully appealed for the right to form political parties.<sup>60</sup> Although the Constitution was suspended for several years after the 1999 coup, the courts continued to rely on its principles for PIL cases in the interlude.<sup>61</sup>

44. United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa art. I, P 2, U.N. Doc. A/AC.241/15/Rev. 7 (1994), reprinted in 33 I.L.M. 1328 (1994).

45. Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, reprinted in 12 I.L.M. 1085 (1973).

46. Convention on the Conservation of Migratory Species of Wild Animals, June 23, 1979, reprinted in 19 I.L.M. 656 (1979).

47. Convention on Wetlands of International Importance Especially as Waterfowl Habitat, Feb. 3, 1971, reprinted in 11 I.L.M. 963 (1972).

48. Convention for the Protection of the World Cultural and Natural Heritage, Nov. 23, 1972, reprinted in 11 I.L.M. 1367 (1972).

49. The federal government has passed the Islamabad Wildlife (Protection, Preservation, Conservation, and Management) Ordinance No. 70 of 1979, but this only applies to the federal capital.

50. AHMED ET AL., *supra* note 29, at 14.

51. PAKISTAN EPA, PAKISTAN ENVIRONMENTAL PROTECTION AGENCY HISTORY (2005), available at <http://www.environment.gov.pk/aboutus/Brief-Pak-EPA.pdf>.

52. Parvez Hassan & Azim Azfar, *Securing Environmental Rights Through Public Interest Litigation in South Asia*, 22 VA. ENVTL. L.J. 215, 219 (2004).

53. TRANSPARENCY INTERNATIONAL—PAKISTAN, NATIONAL CORRUPTION PERCEPTION SURVEY 2006, at 23 (2006), <http://www.transparency.org.pk/pub/publications.htm> (follow "National Corruption Perception Survey 2006" hyperlink).

54. State v. M.D. WASA, 2000 C.L.C. 22 (Lah.) 471, 475, cited in Hassan & Azfar, *supra* note 52, at 226.

55. PARVEZ HASSAN, ENVIRONMENTAL RIGHTS AS PART OF FUNDAMENTAL HUMAN RIGHTS: THE LEADERSHIP OF THE JUDICIARY IN PAKISTAN 7 (2003), available at <http://www.elaw.org/assets/word/Environmental.Rights.Pakistan.doc>.

56. For a description of environmental PIL in India, from which Pakistan derived much of its doctrine, see ARMIN ROSENCRANZ & SHYAM DIVAN, ENVIRONMENTAL LAW AND POLICY IN INDIA 133-34 (2001).

57. CONST. OF THE ISLAMIC REPUBLIC art. 184(3) (Pak.).

58. Intiaz Ahmed v. Ghulam Ali, P.L.D. 1963 S.C. 382, 400, quoted in Hassan & Azfar, *supra* note 52, at 232.

59. CONST. OF THE ISLAMIC REPUBLIC art. 199 (Pak.); Jona Razzaque, Background Paper No. 4 for the Joint UNEP-OHCHR Expert Seminar on Human Rights and the Environment Human Rights and the Environment in Geneva: The National Experience in South Asia and Africa (Jan. 14-16, 2002), available at <http://www.ohchr.org/english/issues/environment/envir/bp4.htm>.

60. JONA RAZZAQUE, PUBLIC INTEREST ENVIRONMENTAL LITIGATION IN INDIA, PAKISTAN, AND BANGLADESH 78 (2004); see also Benazir Bhutto v. Federation of Pakistan, P.L.D. 1988 S.C. 416.

61. Although the 1973 Constitution was suspended after the 1999 military coup, it was quickly restored in March 2003, and in the interlude, judges continued to rely on its provisions. Legal Framework Ordinance No. 24 of 2002, [http://www.pakistan.org/pakistan/constitution/musharraf\\_const\\_revival/lfo.html](http://www.pakistan.org/pakistan/constitution/musharraf_const_revival/lfo.html).

### B. Evolution of Environmental PIL Jurisprudence

In some of the earlier environmental public interest cases, parties relied more on statutes or regulations than on a constitutionalized right to environmental protection. In fact, it is unclear how much power the Court really had to affect environmental policy, since the publicity surrounding the cases may have played a greater role in their resolution than did the Court's orders. In one early case, a plaintiff complained about quarrying and stone crushing activities in Margallah Hills National Park. Before the Lahore High Court issued an order, the media had publicized the issue and the government took action to address it.<sup>62</sup> In 1991, the Society for Conservation and Protection of the Environment (SCOPE) filed a petition to stop construction of a highway through Kirthar National Park.<sup>63</sup> Again, the government intervened before the courts could act. In September 1991, SCOPE filed petitions to protest hunting permits given to hunt the houbara bustard, which was a protected species under the Sindh Wildlife Protection Ordinance of 1972. The Sindh High Court limited its opinion to the specific hunting permits in question, but overall hunting of the houbara bustard declined nonetheless.<sup>64</sup>

This trend changed dramatically in 1994 in the case of *Shehla Zia v. Wapda*,<sup>65</sup> when the Court for the first time articulated an expansive view of environmental human rights under the Constitution. While the Pakistani Constitution does not explicitly mention a right to environmental protection, the Supreme Court read a right to a clean and healthy environment into Article 9, which holds that "no person shall be deprived of life . . ."<sup>66</sup> and Article 14, which states that the "dignity of man . . . shall be inviolable."<sup>67</sup> In *Shehla Zia*, residents brought a suit protesting a proposed grid station that posed potential electromagnetic radiation. The Court interpreted Article 9 of the Constitution to include "all such amenities and facilities which a person born in a free country is entitled to enjoy with dignity, legally and constitutionally."<sup>68</sup> Furthermore, because it could not judge the scientific knowledge on harms from electromagnetic radiation, the Court adopted the precautionary principle.<sup>69</sup> It also found an established customary law "right to the human environment" since the international community, including Pakistan, had agreed upon the Declaration of United Nations Conference on the Human Environment of 1972, presuming that accession to the document meant Pakistan agreed to the principle of a right to the human environment.<sup>70</sup>

62. Roedad Khan v. Federation of Pakistan, Writ Petition No. 642 of 1990 filed by the Margallah Hills Society in the Lahore High Court, Rawalpindi Bench, cited in Hassan & Azfar, *supra* note 52, at 8.

63. Hassan, *supra* note 55, at 9.

64. *Id.*

65. P.L.D. 1994 S.C. 693.

66. CONST. OF THE ISLAMIC REPUBLIC art. 9 (Pak.).

67. *Id.* art. 14.

68. *Shehla Zia*, P.L.D. 1994 S.C. at 712, quoted in Neal A. Kemkar, *Environmental Peacemaking: Ending Conflict Between India and Pakistan on the Siachen Glacier Through the Creation of a Transboundary Peace Park*, STAN. ENVTL. L.J., Jan. 2006, at 67, 88.

69. *Id.* In the case, it is not clear that there ever was truly a health threat from the proposed grid.

70. Even though Pakistan had not ratified the document, it had signed it, and the Court found this evidence of its moral force. Hassan & Azfar,

In other cases, the Supreme Court used commissions as fact-finding bodies. In the *Salt Miners* case, the Court held that water free from pollution and contamination were part of the Article 9 right to life.<sup>71</sup> The Court appointed a five-member commission to inspect a stream and reservoir supplying the Khewra region and to recommend methods of preventing further pollution to water supplies.<sup>72</sup> In *Muhammad Yousuf v. Province of Punjab*,<sup>73</sup> the Lahore High Court appointed a commission to examine the EIA of a landfill and study alternative locations for it. The commission included representatives from the city government, provincial EPA, and technical experts.

However, like the court in India, the Pakistani judiciary eventually became involved in detailed policymaking in an urban pollution case. In 1997, in *Anjum Irfan v. LDA*,<sup>74</sup> noted PIL lawyer Syed Hamid Ali Shah asked for a ban on two-stroke rickshaws and other petrol and diesel vehicles, and an order to convert them to CNG. Six years later, the Lahore High Court set up the Lahore Clean Air Commission, with the mission of collecting and analyzing information on the feasible and practical solutions for monitoring, controlling, and improving vehicular air pollution in Lahore. The commission recommended introducing the EURO II CNG buses and CNG rickshaws, phasing out existing buses in two years, a ban on two-stroke rickshaws, and setting ambient air quality and vehicle emission standards by 2006.<sup>75</sup>

### IV. Institutional and Legal Problems With PIL

While some environmental lawyers may see the Pakistani judiciary's environmental activism as a boon in a country with poor enforcement of environmental laws, there are several reasons for avoiding overdependence on the courts. First, courts can only deal with the case presented before them, so even the most liberal court will not be able to implement its policies on a nationwide scale. Indeed, an aggressive court may tempt environmental administrators to relax their oversight efforts. Second, unlike administrative agencies, courts do not have the economic or scientific expertise to balance the costs and benefits of environmental

*supra* note 52, at 237-38. The Court's action was similar to the U.S. courts' decisions in Alien Torts Claims Act human rights cases. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

71. General Secretary Salt Miners Labour Union (CBA) Khewra, Jhelum v. The Director, Industries and Mineral Development, Punjab, Lahore, 1994 S.C.M.R. 2061, discussed in Hassan, *supra* note 55, at 14.

72. *Id.*

73. 2003 C.L.C. 576 [Lahore], quoted in Hassan, *supra* note 55, at 16.

74. P.L.D. 2002 Lahore 555, cited in Hassan, *supra* note 55, at 16. The Supreme Court also played a role in directing provincial governments, particularly Punjab, to control vehicular smoke and noise pollution caused by two-stroke auto-rickshaws. Mohammad Rafiq Khan, *Policy Implications of Problem of Banning Two-Stroke Auto-Rickshaws in Lahore*, presented at the 22d Annual General Meeting and National Conference, Lahore of the Pakistan Society of Development Economists, Dec. 19-21, 2006, <http://www.pide.org.pk/PSDE/pdf/Mohammad%20Rafiq%20Khan.pdf>.

75. ASIAN DEVELOPMENT BANK (ADB), COUNTRY SYNTHESIS REPORT ON URBAN AIR QUALITY MANAGEMENT 2, 11 (2006), available at <http://www.adb.org/Documents/Reports/Urban-Air-Quality-Management/pakistan.pdf>; Syed Mansoor, Presentation to the National Workshop on Urban Air Quality Management and Integrated Traffic Management in Karachi: Civil Society Combating Vehicular Air Pollution Through Judicial Intervention, (Sept. 13-14, 2006), <http://www.cleanairmet.org/caiasia/1412/article-71120.html>.

policies. Finally, there are still concerns over the independence of the judiciary, so a future administration may seek to interfere in controversial environmental cases. To understand these issues better, I will discuss similar institutional problems that have arisen with environmental PIL in India. There is a relative abundance of cases and literature from India, so an analysis of PIL in India may provide a picture of where PIL in Pakistan is headed.

#### A. Problems Arising From Constitutionalizing Rights

Public interest lawyers sometimes seek to have courts interpret certain rights in their nation's respective constitution, even if not clearly expressed in the constitution's text or based on the drafters' original intent. However, this can lead to controversial results. In the United States, the most infamous example of a constitutionalized right is that of abortion, as found through the Due Process Clause in *Roe v. Wade*.<sup>76</sup> As Justice Byron White noted in his dissent, the decision effectively deprives the people and its elected legislature from dealing with this controversial issue.<sup>77</sup> As such, the U.S. Supreme Court inherently assumes the final word on any regulation regarding constitutionalized rights. In the years since *Roe*, the Court has had to concern itself with the minutiae of abortion regulation, from whether states can require women to notify their husbands before their abortion to the amount of information a doctor can be required to provide women seeking an abortion.<sup>78</sup> The controversy over the Court's handling of the abortion issue has led to political changes as well. Indeed, some trace the rise of the religious right during the 1980s back to *Roe*.<sup>79</sup>

While the United States has sufficiently strong legal institutions to channel such debates into the political and legal spheres, developing countries may lack these advantages. Such constitutionalized rights can overburden busy courts and create a backlog of cases, preventing adjudication of many other important issues. Constitutionalizing fundamental rights such as environmental health or privacy may lead to unproductive conflict between the branches of government, in which the executive may seek to avoid enforcing the courts' decisions.<sup>80</sup> In the future, regulators may worry more about bureaucratic turf wars with the judiciary than policymaking. Finally, as with *Roe*, a controversial environmental PIL decision may provoke widespread protests or frustration with environmental activism, particularly if

the decision hurts the economic interests of elites or politically powerful interest groups.

#### B. Evolution of the Judiciary's Role in Environmental PIL

In early uses of PIL, the Pakistani courts had taken a commendably modest approach in deciding cases. In the *Houbara Bustard* case described above, the Supreme Court limited its decision to the immediate question before it. In Human Rights Case No. 20-K/92, regarding alleged health problems near a sewage treatment plant in Karachi, the Court was satisfied that the mayor understood the problem and allowed him to supervise efforts to repair the damage.<sup>81</sup> Even in *Shehla Zia*, the Court refused to rule on whether electromagnetic radiation has in fact constituted a health hazard, admitting that such a determination was beyond its scientific capabilities. In fact, by 1993, the Supreme Court realized that the system was being abused and set out guidelines limiting PIL cases to those with no statutory remedy available. In the mid-1990s, it appeared that the number of PIL cases on the Court's docket was in decline; in 1993, it considered only 101 out of 772 PIL petitions as valid public interest cases.<sup>82</sup>

However, in later cases, the courts have gone to extremes. In response to a letter from the Karachi Administration Women's Welfare Society complaining about health hazards from the use of open storm drains for sewage disposal, the Court directed remedial measures to repair the water and sewerage pipes.<sup>83</sup> In another case, the Court *suo moto* issued orders to stop the dumping of chemical waste off a coastline in Balochistan because Justice Saleem Akhtar had read a report on the situation in *Dawn* newspaper.<sup>84</sup> The Court also demanded information on persons who owned property near the coastline, micromanaged allotment of land, and ordered the insertion of conditions into their leases against dumping.<sup>85</sup> In other PIL cases, the courts have gone so far as to issue guidelines to control traffic in Karachi, deforestation, and the dumping of nuclear waste.<sup>86</sup>

76. 410 U.S. 113 (1973).

77. *Id.* at 222 (White, J., dissenting) ("the people and legislatures of the 50 States are constitutionally disentitled to weigh the relative importance of the continued existence . . . of the fetus . . . against a spectrum of possible impacts on the mother"); see also John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 935 (1973) ("[w]hat is frightening about *Roe* is that [its] super-protected right is not inferable from the language of the Constitution").

78. See, e.g., *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).

79. Alan Cooperman & Thomas B. Edsall, *Evangelicals Say They Led Charge for GOP*, WASH. POST, Nov. 8, 2004, at A1, available at <http://www.washingtonpost.com/wp-dyn/articles/A32793-2004Nov7.html>.

80. LINN HAMMERGREN, WORLD BANK RESEARCH PAPER: USE OF EMPIRICAL RESEARCH IN REFOCUSING JUDICIAL REFORMS: LESSONS FROM FIVE COUNTRIES (2005), available at <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/usesOfER.pdf>.

81. Martin Lau, *Islam and Judicial Activism: Public Interest Litigation and Environmental Protection in the Islamic Republic of Pakistan*, in HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION 299 (Alan E. Boyle & Michael R. Anderson eds., 1996).

82. *Id.* at 300.

83. WORLD BANK, *supra* note 3, at 26; see also JAWAD HASSAN ET AL., ENVIRONMENTAL LAW IN PAKISTAN PART 6: NORTHERN AREAS 71 (2004), available at <http://www.iucn.org/places/pakistan/elaws/PDF/N-Areas/NA%20Review%20Vol-1/NA%20Review%20Vol-1.pdf>.

84. In re Human Rights Case (Environmental Pollution in Balochistan), P.L.D. 1994 S.C. 102, quoted in 1 ADB, CAPACITY BUILDING FOR ENVIRONMENTAL LAW IN THE ASIAN AND PACIFIC REGION 747 (Donna G. Craig ed., Asian Development Bank 2003).

85. *Id.*

86. To give readers a better understanding of the expansive scope of PIL, I have reprinted a footnote from Hassan & Azfar, *supra* note 52, at 215 n.70:

[I]t is convenient to mention the examples given by Dr. Nasim Hasan Shah, a former Chief Justice of the Supreme Court of Pakistan. In an article published in the Pakistan Law Digest, Dr. Shah states:  
orders have been made to do away with—  
(1) malpractices in our educational system;  
(2) afford protection to women of any origin (Pakistan or Foreign) subjected to any sex related offences and to stop the menace of obnoxious calls to them;  
(3) protect the property rights of female heirs/owners by issuance of directions to the Attorney-General to take steps to

### C. Importing Judicial Activism From India

The Lahore High Court's consideration of CNG transportation in *Anjum Irfan* mirrors some of the Indian Supreme Court's judicial activism in the Delhi pollution case, *M.C. Mehta v. Union of India*.<sup>87</sup> Indeed, the Pakistani judiciary's evolution toward a more activist institution may have been inspired by PIL cases in India. Parvez Hassan, a leading environmental PIL lawyer in Pakistan and partner at Hassan & Hassan, notes that he relied on Indian environmental lawyer M.C. Mehta's reasoning in arguing his own cases.<sup>88</sup> Not surprisingly, this import has created legal problems similar to those found in India.

As with PIL in India, excessive reliance on the courts may unduly interfere with policymaking that should be done by the executive. In *M.C. Mehta*, the Indian Supreme Court nearly created a constitutional crisis when it ordered the Delhi government to switch buses over to CNG.<sup>89</sup> It caused protests among bus operators worried about the cost of converting to CNG.<sup>90</sup> Rather, the Court ignored the Indian government's other policies to address transport pollution, including setting fuel quality specifications for sulfur content in diesel<sup>91</sup> and creating a metro system,<sup>92</sup> insisting that immediate conversion to CNG was the only option. A very similar dynamic, no doubt inspired by the Delhi case, was played out in Lahore in *Anjum Irfan*. Even before the Lahore High Court had decided on Shah's peti-

amend the relevant existing law or to cause fresh legislation to be initiated for securing their rights;

(4) prevent exploitation of the children by restraining the authorities from taking them to public places for reception of dignitaries. It has also ruled that children shall not be forced to undertake any such work which under the law has only to be done by the labour force;

(5) suspended all restrictions imposed against Nurses working in Military Hospitals and Air Hostesses of Pakistan International Airlines to getting married while in service;

(6) stayed public hangings as being contrary to the Constitutional provisions guaranteeing dignity of man;

(7) issued guidelines for controlling the traffic muddle in Karachi;

(8) checked the practice of extortion of money by Railway staff from the passengers traveling in the Samjhota Express (train running between Pakistan and India) and appointed a Commission of Advocates and Human Rights activists to monitor the situation;

(9) directed the Federal and Provincial Governments to stop making appointment against the recruitment rules, a practice which was violative of fundamental right of equal opportunity for all citizens to enter upon a profession; and

(10) issued guidelines to be observed by the authorities to check [environmental] pollution caused by fumes of motor vehicles, deforestation, open sewerages, dumping of nuclear waste etc.

87. 8 S.C.C. 770 (1997). The case was litigated from 1985 to 2003, with the Supreme Court issuing a series of orders and occasionally reopening jurisdiction on the case to address new developments.

88. Hassan, *supra* note 55, at 3. Hassan notes that the courts have cited Indian precedents extensively, particularly in *State v. M.D. WASA*, 2000 C.L.C. 471.

89. Armin Rosencranz, *The Delhi Pollution Case: The Supreme Court of India and the Limits of Judicial Power*, 28 COLUM. J. ENVTL. L. 223, 224 n.2 (2003).

90. *Id.*

91. URVASHI NARAIN & RUTH GREENSPAN BELL, WHO CHANGED DELHI'S AIR? 8 (2005), available at <http://www.rff.org/Documents/RFF-DP-05-48.pdf>.

92. Ruth Greenspan Bell et al., *Clearing the Air: How Delhi Broke the Logjam on Air Quality Reforms*, ENV'T MAG., Apr. 2004, at 27.

tion, the Lahore government had already introduced CNG in some taxis and private vehicles; of the country's 350,000 CNG vehicles, 100,000 were in Lahore. Furthermore, it had planned to introduce 100 CNG buses by 2005 and 300 by 2009.<sup>93</sup> Even if the government's actions were merely a response to the initial petition, the Court could have refused to second-guess the government's intervention, as it had in the *Roedad Khan* and *Kirthar National Park* cases.<sup>94</sup> Instead, like the Indian Supreme Court, it ordered implementation of its policies.

The Pakistani courts' reliance on commissions in PIL cases also mirrors that of the commissions in India. While the courts use the commissions in an admirable attempt to overcome their own shortcomings as bodies of general law, these commissions inevitably go beyond mere determination of facts and become partisan policymaking bodies often driven by the environmental lawyers who brought the initial suit. In *Godavarman*, the Indian Supreme Court used commissions to determine valuations for afforestation schemes and set timber policy, inadvertently devastating the timber industry in the country's Northeast.<sup>95</sup> In the Delhi CNG case described above, bus companies had difficulty presenting their case to the Court, limiting the Court's consideration of the economic factors involved.<sup>96</sup> Even Hassan acknowledges that the executive branch is better suited for cost-benefit analysis of environmental policies since commissions are limited to the current state of scientific knowledge and do not have policy expertise.<sup>97</sup> Ironically, the commissions often include lawyers from environmental nongovernmental organizations (NGOs), which may present a conflict of interest. In fact, along with Hassan, Shah, the same lawyer who filed the petition in *Anjum Irfan*, served as the coordinator for the Lahore Clean Air Commission.<sup>98</sup> Predictably, as of March 2007, the Court's order had not been fulfilled. The city has only 5,000 CNG rickshaws, but needs 60,000 to meet commuter demand. Likewise, Punjab Province is having difficulty obtaining CNG buses because the leading manufacturer had turned down a contract bid and imported buses would be too costly due to tariffs.<sup>99</sup>

93. HASSAN GHAZALI, CENTRE FOR SCIENCE AND ENVIRONMENT, CNG STRATEGY IN LAHORE AND THE ROLE OF LAHORE CLEAN AIR COMMISSION (2004), available at [http://www.cseindia.org/aboutus/press\\_releases/press\\_20040330.htm](http://www.cseindia.org/aboutus/press_releases/press_20040330.htm).

94. *Roedad Khan v. Federation of Pakistan*, Writ Petition No. 642 of 1990 filed by the Margallah Hills Society in the Lahore High Court, Rawalpindi Bench, cited in Hassan, *supra* note 55, at 8. In fact, Pakistan has over 1,450 CNG stations and is third in the world for CNG use. Many cities, including Hyderabad, Islamabad, Peshawar, and Quetta, are phasing out diesel in favor of CNG buses. Reporter, *Pakistan Tops in Asia With 1,450 CNG Stations*, DAWN, June 9, 2007, available at <http://www.dawn.com/2007/06/09/nat19.htm>.

95. Armin Rosencranz et al., *The Godavarman Case: The Indian Supreme Court's Breach of Constitutional Boundaries in Managing India's Forests*, 37 ELR 10032 (Jan. 2007).

96. *Id.* at 144.

97. Hassan & Azfar, *supra* note 52, at 245.

98. Jawad Hassan & Parvez Hassan, Address at the Pakistan Environmental Law Association First Annual Seminar: The Role of the Pakistan Environmental Law Association in Strengthening the Environmental Laws in Pakistan (2004), [http://www.cleanairnet.org/caiasia/1412/articles-59803\\_pela.pdf](http://www.cleanairnet.org/caiasia/1412/articles-59803_pela.pdf); ADB, COUNTRY SYNTHESIS REPORT, *supra* note 75, at 11.

99. Correspondent, *Government Fails to Honour Commitment: Clean Lahore*, DAWN, Mar. 24, 2007, available at <http://www.dawn.com/2007/03/24/nat10.htm>. Other examples of such commissions include the Solid Waste Management Commission, which was established to review suitability of solid waste disposal measures in

Paradoxically, successful environmental PIL may win short-term gains but hinder long-term environmental progress. While a favorable decision may give environmentalists political capital for a given cause, Prof. Armin Rosencranz notes that it could reduce the political pressure on the responsible administrative agencies to take action against that particular environmental challenge.<sup>100</sup> Most politicians would be unwilling to entertain policies or expend political capital to address a problem that the judiciary has already “solved.”<sup>101</sup> By contrast, a political movement to seek a legislative or administrative response may produce a more durable solution involving those who must enforce the law. Such an effort, although more burdensome, could provide national or more systematic responses that would go beyond what a court could consider. For example, instead of filing a lawsuit for each city plaintiffs want to clean up, a policy solution could potentially address all cities at once.<sup>102</sup> This is not to suggest that environmental lawyers cease to bring public interest lawsuits over environmental degradation. Rather, litigation should be used as a tactic to enforce existing laws rather than to shape policy.

#### *D. Concerns Over Judicial Independence and Political Freedom*

As with any judicially determined constitutionalized fundamental right, later interpretation of that right depends heavily on the nature and composition of the judiciary. Relying on PIL in Pakistan is particularly risky because the ebb and flow of PIL’s success is highly determined by the individual judges. The Court addressed the problem of coastal dumping in Balochistan only because Justice Akhtar had happened to read a newspaper article on the subject.<sup>103</sup> Likewise, the CNG case had been stalled before the Lahore High Court until Justice Sair Ali took a personal interest in it.<sup>104</sup>

Relying so heavily on the judiciary is particularly dangerous in Pakistan since, unlike in India, the Pakistani judi-

ciary’s independence is not fully secure. Judges are appointed by the executive, which is now controlled by the military.<sup>105</sup> Following the 1999 coup, the government purged the bar of judges who might have opposed the coup and required all judges to take an oath promising to uphold Gen. Pervez Musharraf’s Provisional Constitutional Order.<sup>106</sup> The executive also has the power to grant favored judges special benefits, such as rent-free residences.<sup>107</sup> Furthermore, members of the lower judiciary earn a mere Rs. 20,000-40,000 per month, making judges susceptible to state patronage and corruption.<sup>108</sup> In a 2006 Transparency International perception poll, Pakistanis view the judiciary as one of the country’s most corrupt institutions.<sup>109</sup> The recent removal of Chief Justice Iftikhar Mohammed Chaudhry by General Musharraf after his coup of November 3 further demonstrated the fragility of the country’s judiciary.<sup>110</sup> Because of all of these factors, if environmental lawyers seek to bring cases challenging politically sensitive projects, the judiciary may not be strong enough to challenge the executive branch.<sup>111</sup>

#### **V. Solutions to Readjust the Balance Between Law and Morality**

Given the problems discussed above, Pakistan should consider readjusting its judicial institutions properly to prevent too much judicial activism in PIL cases. As Hassan claims,

105. The constitutional provision guaranteeing independence for the judiciary had been amended and postponed several times even before the military coup of 1999. RAZZAQUE, *supra* note 60, at 433.

106. INTERNATIONAL CRISIS GROUP (ICG), REP. NO. 86 BUILDING JUDICIAL INDEPENDENCE IN PAKISTAN 5 (2004), available at [http://www.crisisgroup.org/home/index.cfm?action=login&ref\\_id=3100](http://www.crisisgroup.org/home/index.cfm?action=login&ref_id=3100).

107. *Id.* at 15.

108. *Id.* at 18.

109. TRANSPARENCY INTERNATIONAL, *supra* note 53, at 23.

110. Throughout 2007, the political tension between Gen. Musharraf and the Supreme Court rocked Pakistani politics. On March 9, the government removed Chief Justice Iftikhar Chaudhry, claiming he had abused his office. After months of sustained protests by lawyers and human rights activists, Justice Chaudhry was reinstated in July. The country faced another political dilemma when the Court was expected to rule on whether Gen. Musharraf was allowed to run for president while still an army officer. On November 3, Gen. Musharraf avoided the ruling by removing Chief Justice Chaudhry once again and placing him under house arrest. However, the Chief Justice has also become a rallying figure for opponents of the Musharraf regime. See BBC News, *Sacked Judge in Pakistan Appeal*, BBC NEWS WEBSITE, Nov. 8, 2007, [http://news.bbc.co.uk/2/hi/south\\_asia/7085723.stm](http://news.bbc.co.uk/2/hi/south_asia/7085723.stm); see also Ahmed Rashid, *Musharraf at the Exit*, WASH. POST, Mar. 22, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/03/21/AR2007032101786.html>.

111. Hassan recently suggested that, among other things, the Supreme Court’s recent ruling on air pollution in Islamabad, including the appointment of PIL lawyer Shah to oversee abatement measures, may have worried the Musharraf government. Parvez Hassan, Address at the International Congress on Environmental Law in Rio de Janeiro: Environmental Protection, Rule of Law and the Judicial Crisis in Pakistan 5 (May 22-24, 2007), [http://www.iucn.org/themes/law/pdffdocuments/CEL10\\_Hassan.pdf](http://www.iucn.org/themes/law/pdffdocuments/CEL10_Hassan.pdf). This concern appears to be justified, as several environmentalist lawyers, including Hassan, were detained by the government after the November 2007 coup. Jane Perlez & David Rohde, *Pakistan Attempts to Crush Protests by Lawyers*, N.Y. TIMES, Nov. 3, 2007, <http://www.nytimes.com/2007/11/06/world/asia/06pakistan.html?ref=todayspaper&pagewanted=print>. Ironically, the growth of the economy and civil society under the Musharraf government may have strengthened the legal profession that now opposes him. For more on the present situation of lawyers in Pakistan, see Benjamin Wittes, *Attack of the Lawyers!*, NEW REPUBLIC, Nov. 12, 2007, <http://www.tnr.com/politics/story.html?id=eba376f1-b3a2-401f-8992-9bd7982ae5dd>.

district of Lahore and recommend remedial measures. City District v. Muhammad Yusaf, ICA No. 798 of 2002.

100. Rosencranz, *supra* note 89, at 251.

101. A recent study by Resources for the Future questions the extent to which air pollution in Delhi was truly solved after the litigation. While PM with a diameter of 10 microns or less (PM<sub>10</sub>), sodium dioxide, and CO have fallen through the use of CNG buses, this dropoff is partly offset by the rise in PM<sub>10</sub> and nitrogen dioxide from the dramatic increase in private diesel cars. Likewise, nothing in the Court’s order addressed domestic biomass, coal, and kerosene use, which amount to the city’s third largest pollution source. URVASHI NARAIN & ALAN KRUPNICK, THE IMPACT OF DELHI’S CNG PROGRAM ON AIR QUALITY 4, 11 (2007), available at <http://www.rff.org/Documents/RFF-DP-07-06.pdf>.

102. For example, even after the Delhi pollution case, many other Indian cities, such as Ahmedabad, Bangalore, and Mumbai, suffer from pollution, yet the Supreme Court’s ruling on Delhi does not force those municipal governments to convert to CNG. Separate PIL suits would have to be filed in each city, and yet as of early 2007, few have been. According to Armin Rosencranz, advocates have filed PIL suits to address urban pollution in Ahmedabad, and perhaps Bangalore. Interview with Armin Rosencranz (Mar. 15, 2007). Asia Pacific Jurist Association Vice President A.S. Chandhiok has claimed that other Indian courts have followed the Supreme Court’s example, but does not elaborate. A.S. Chandhiok, Speech to the Forum on Regional Environmental Law Enforcement and Compliance Conference: Public Interest Litigation and Indian Environmental Jurisprudence (Oct. 27-28, 2004), <http://www.apjalaw.com/news.htm> (last visited July 28, 2007).

103. ADB, *supra* note 84, at 747.

104. ADB, COUNTRY SYNTHESIS REPORT, *supra* note 75, at 11.



PIL is a useful tool if used to strengthen and prod other branches of government.<sup>112</sup> This means the judiciary should no longer interfere in policymaking that falls under the domain of the executive branch. However, this falsely presumes that Pakistan's bureaucracy is willing and able to address environmental problems. Reforming the executive bureaucracy to improve its capability to address environmental problems will be a long-term task and will require a campaign against corruption, and increased technical capacity and funding. While international donors and environmental organizations can and should continue to strengthen the capacity of the EPA and other environmental agencies to deal with these challenges, a concerned and properly instituted judiciary can also play a role. In order to avoid judicial overreaching, that role should be carefully delineated and institutionalized. Below, I discuss an option that would redistribute environmental PIL cases between the Environmental Tribunals, which would handle questions of law, and the Federal Shariat Court, which would handle questions of morality or equity.

### A. Environmental Tribunals

The Constitution allows the government to establish administrative courts or tribunals.<sup>113</sup> PEPA 1997 provided for the Environmental Tribunals to hear cases under environmental laws.<sup>114</sup> However, for several years, no tribunals had been established. In 2000, the federal government finally set up several Environmental Tribunals after a PIL suit against the Ministry of Law complained that the tribunal provision had become a dead letter.<sup>115</sup> Now, Pakistan has already established several Environmental Tribunals (including one for the provinces of Sindh and Balochistan and one for Punjab and Northwest Frontier Province) and plans to establish three more by 2010.<sup>116</sup> While it is too early to determine how aggressive these bodies will be, already most of the tribunals have dealt with over 30 cases in the past few years.<sup>117</sup> Indeed, the tribunal in Peshawar has complained that the EPA has only filed suits against smaller enterprises and seeks to expand its caseload.<sup>118</sup>

The Environmental Tribunals are competent to hear public interest cases concerning questions of law, including the PIL cases based on actual legal grounds. For example, in one recent case, the Punjab Environmental Protection Tribunal heard a complaint by Eco-Watch, an environmental NGO, claiming that hospitals had toxic wastes in violation of

PEPA.<sup>119</sup> The tribunals can provoke executive agencies that fail to implement the law, as Punjab Tribunal did with the Punjab Provincial Transport Secretary when the government failed to enforce a ban on rickshaws with two-stroke engines.<sup>120</sup>

However, the tribunals also provide protections for defendants not present in constitutional PIL; if the tribunal is satisfied that a complaint made was false or intended to harass a party, it can award the victim up to Rs. 100,000.<sup>121</sup> Furthermore, parties can appeal any final decision of the tribunal to the High Court, ensuring that there is judicial review.<sup>122</sup> The Environmental Tribunals' potential remedies in such PIL cases should be limited to enjoining government agencies to carry out the law, injunctions against actions that would cause harm, and declaratory relief<sup>123</sup>; they should not mimic the Supreme Court's attempts at policymaking. Indeed, the tribunals should become the court of first resort for PIL cases, rather than the Supreme Court or provincial High Courts.

### B. Federal Shariat Court

The Constitution establishes the Federal Shariat Court to hear claims that certain laws or provision of law is contrary or repugnant to Islam or Islamic law.<sup>124</sup> While the Federal Shariat Court is mostly used to hear traditional Islamic law cases, particularly family law, it has wide original and appellate jurisdiction, and could be used as a forum for environmental PIL cases that seek to change government policy based on moral consideration. This will mean that environmentalists will have to frame environmental justice in terms of Islamic morality, but some scholarship already exists discussing how environmentalists may do that.

#### 1. Islam in Environmental PIL

Even though the Qur'an does not specifically mention a right to a clean environment, many modern Islamic scholars and PIL lawyers agree that Islamic law provides an implied basis for such a right. Some scholars estimate that over 500 verses in the Qur'an refer to the relationship between man and his environment.<sup>125</sup> In the *Hadith*, the Prophet Muhammad purposefully only took a bowl of water to perform ablutions, telling his followers to take no more than they need.<sup>126</sup> The Qur'an even warns Muslims to "waste not by excess: for Allah loveth not the wasters."<sup>127</sup> In PIL cases, the Su-

112. Hassan & Azfar, *supra* note 52, at 245.

113. CONST. OF THE ISLAMIC REPUBLIC art. 212 (Pak.).

114. PEPA, §23.

115. Jawad Hassan v. Ministry of Law (Writ Petition No. 13470 of 2000), discussed in RAZZAQUE, *supra* note 60, at 393.

116. WORLD BANK, *supra* note 3, at 27; see also Jawad Hassan, discussed in RAZZAQUE, *supra* note 60, at 393.

117. *Sindh Environment Department Has Referred Not a Single Case to Environment Protection Tribunal*, PAKISTAN PRESS INT'L, July 4, 2007, [http://www.accessmylibrary.com/coms2/summary\\_0286-31806165\\_ITM](http://www.accessmylibrary.com/coms2/summary_0286-31806165_ITM).

118. Recently, the tribunal sent a proposal to allow it to *suo moto* action against polluters. *Peshawar: Environment Tribunal Not Satisfied With EPA Work*, DAWN, June 6, 2007, <http://www.dawn.com/2007/06/06/local8.htm>. If this does happen, it could lead to a huge usurpation of executive power on the scale of what the judiciaries in India and Pakistan have done. However, it is not clear if the federal government would grant it this power.

119. HRCP, *supra* note 11, at 302.

120. The case was in response to a petition by Eco-Watch. The Punjab Transport Department reportedly issued over 40,000 rickshaw permits the day before the ban went into effect. The provincial transport secretary ordered an inquiry into the matter. WORLD BANK, *supra* note 3, at 27. See also HRCP, *supra* note 11, at 300.

121. RAZZAQUE, *supra* note 60, 393.

122. PEPA, §23.

123. Under §22 of PEPA 1997, any person aggrieved by any order of a federal or provincial agency may appeal to the tribunal within 30 days of the communication of the order to the petitioner.

124. CONST. OF THE ISLAMIC REPUBLIC art. 203C (Pak.).

125. RAZZAQUE, *supra* note 60, at 84 n.68; Lau, *supra* note 81, at 285-86, 293-94.

126. MARTIN PALMER & VICTORIA FINLAY, FAITH IN CONSERVATION 52 (World Bank 2003).

127. Qur'an, verse 006:141, quoted in PALMER & FINLAY, *supra* note 126, at 105.

preme Court has relied on Islamic principles to invalidate the dissolution of the National Assembly, order the government to prevent gang rape, and to provide protection for women and children.<sup>128</sup> In *Anjum Irfan*, the Lahore High Court justified its CNG decision by noting that Islam mandates a ban on pollution in any manner, even in personal actions and speeches.<sup>129</sup>

Islam has actually played an important role in granting PIL legitimacy. The secular courts derive their ability to handle PIL cases by reducing Islamic law to a general requirement for substantive justice.<sup>130</sup> The Objectives Resolution, stating that Islamic principles should guide the government in running the country, incorporates principles of Islamic justice into Article 2-A of the Constitution and allows the secular courts to hear claims based on a violation of fundamental rights.<sup>131</sup> The Supreme Court has held that “the right to obtain justice as is ordained by Islam, has become an inviolable right of citizens of Pakistan.”<sup>132</sup> This determination was later formalized in the Quetta Declaration of 1991.<sup>133</sup> However, a generalist court of law is not the proper venue for considerations of Islamic morality.

## 2. The Role of the Federal Shariat Court

The Federal Shariat Court is still a relatively recent institution, formed in 1980 after Article 203-C of Chapter 3-A was amended to the Constitution.<sup>134</sup> The Federal Shariat Court has eight Muslim judges, four of whom are judges qualified for the High Courts, three are Ulema or scholars in Islamic law, and one is the Chief Justice appointed by the president.<sup>135</sup> Since both citizens and governments have to adhere to Islamic duties, this would give the Court power over any “agency action” that would potentially damage the environment.<sup>136</sup> As a check on the Federal Shariat Court, any cases decided by the Federal Shariat Court may be appealed to the Supreme Court for judicial review.<sup>137</sup>

Unlike other judicial organs, the Federal Shariat Court appears to have developed a tradition of moderation in both the cases it hears and the remedies it provides. It only applies Islamic principles to declare laws repugnant if there is a con-

sensus around that principle.<sup>138</sup> For example, it refused to hear a Shariat petition challenging the slaughter of livestock before the animal reached a year old because there was no such consensus on the treatment of livestock.<sup>139</sup> Furthermore, the Federal Shariat Court only hears cases concerning government laws or provisions<sup>140</sup>; it would likely not entertain cases like *Anjum Irfan*, which asked the government to reform Lahore’s transportation sector based only on a vague right to a clean environment. Rather, Islamic principles emphasize religious duties.<sup>141</sup> Thus, a PIL plaintiff could potentially ask the Federal Shariat Court to invalidate a law that allows dumping of chemical wastes in a river as repugnant to Islam, but would not be able to seek a general prohibition on dumping in the absence of such a law. This would at once moderate the judiciary’s interference in policy-making, allow the Federal Shariat Court to act as an “environmental” moral check on the bureaucracy, and shroud PIL in the powerful moral legitimacy of Islam.<sup>142</sup>

## VI. Conclusion

While environmentalists generally consider active environmental litigation in developing countries to be a positive development, PIL in Pakistan poses serious institutional and legal problems that may hinder the development of an effective national response to environmental challenges. Pakistani environmentalists may be relying too heavily on the courts to take measures that should be within the jurisdiction of the Pakistan EPA. Too much reliance on the judiciary may actually result in inappropriate decisions since the courts do not have the policy or scientific expertise of the bureaucracy. Furthermore, judicial activism could lead to conflicts with the executive, or even encourage environmental regulators to spurn responsibility for handling future environmental problems. While a proper legal response to environmental challenges will take decades, the judiciary should relegate PIL cases based on statutes to the Environmental Tribunals since they presumably have the legal and technical background best suited to those cases. For PIL cases that rely primarily on vague fundamental rights or morality, the Federal Shariat Court may be the best venue for equitable relief. The former are an increasingly important forum for hearing environmental cases, while the latter will allow the courts to retain the positive features of promoting environmentalism without the worst of the judicial excesses and policymaking.

128. Lau, *supra* note 81, at 295.

129. HASSAN ET AL., *Court Decisions*, *supra* note 83, at 1457.

130. Lau, *supra* note 81, at 285, 294.

131. *See* CONST. OF THE ISLAMIC REPUBLIC art. 2A (Pak.).

132. Akbar Ali v. The State, P.L.D. 1988 S.C. 416, *quoted in* Lau, *supra* note 81, at 294.

133. Lau, *supra* note 81.

134. CONST. OF THE ISLAMIC REPUBLIC art. 203C (Pak.).

135. Government of Pakistan, *Homepage*, <http://www.pak.gov.pk/judiciary.aspx> (last visited July 15, 2007).

136. Lau, *supra* note 81, at 292.

137. The Supreme Court recently overturned a Federal Shariat Court decision on *riba* (usury). ICG, *supra* note 106, at 3 n.16. However, under Article 203-D(1) of the Constitution, the Federal Shariat Court also has exclusive jurisdiction to examine any law or provision for repugnancy. Charles H. Kennedy, *Repugnancy to Islam: Who Decides? Islam and Legal Reform in Pakistan*, I.C.L.Q., Oct. 1992, at 769, 772.

138. Jeffrey A. Redding, *Constitutionalizing Islam: Theory and Pakistan*, 44 VA. J. INT’L L. 759, 773 (2004).

139. Meat Merchants Welfare Ass’n v. Government of Sind, P.L.D. 1983 F.S.C. 25, *cited in* Kennedy, *supra* note 137, at 773; *see also* CONST. OF THE ISLAMIC REPUBLIC art. 203D-(1) (Pak.) (requiring the Federal Shariat Court to examine laws only on the basis of “the injunctions of Islam, as laid down in the Holy Qur’an and Sunnah of the Holy Prophet. . .”).

140. Kennedy, *supra* note 137, at 772.

141. *See* Ahmed An-Na-‘Im Abdullahi, 25 J. MARSHALL L. REV. 267, 277 (1992); *see also* Hassan & Azfar, *supra* note 52, at 232.

142. This would require environmental NGOs, often secular in nature, to frame their arguments in Islamic terms. However, if they feel uncomfortable doing so they would have recourse to the Environmental Tribunals, the judiciary, and of course the political process.