

# THE RIGHT TO A CLEAN ENVIRONMENT IN INDIA: GENDER PERSPECTIVE

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*Gayathri D. Naik\**

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\* PhD candidate at School of Law SOAS University of London. The author is a Commonwealth Scholar from India and holds BAL.LLB (GLC Ernakulam), LLM ( SAU), and MPA (IGNOU).

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## I. INTRODUCTION

The watershed moments for the recognition and development of human rights mechanisms in international law were the creation of the United Nations in 1945 and the Universal Declaration of Human Rights (UDHR) in 1948.<sup>1</sup> Since then, the UDHR, the International Covenant on Civil and Political Rights (ICCPR),<sup>2</sup> and the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>3</sup>—collectively the International Bill of Rights—have mainstreamed several human rights in the form of political, cultural, social, and economic rights. However, despite UDHR’s significance in human life and the enjoyment of human rights, the right to a clean environment could not find a place in any of these instruments.

The right to a clean environment is an all-encompassing right necessary for the realization of other rights because the environment contains all life. If the environment is harmed then the future of every creature is also threatened, which is evident from the impacts of climate change.<sup>4</sup> Hence, recognizing and protecting the right to a clean environment demands significant attention. Any harm to the environment significantly affects its beneficiaries—including humans. Women who are responsible for managing their family often bear the first burden of any harm to the environment, such as in case of polluted water. Many societies consider women to be duty bearers rather than rights holders.<sup>5</sup> International law recognized women’s rights nearly two

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1. See G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) (outlining standards for international human rights).

2. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, art. 1.

3. See generally G.A. Res. 2200A (XXI), International Covenant on Economic, Social and Cultural Rights (Dec. 16, 1966) [hereinafter *ICESCR*] (“[R]ecognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”).

4. See Chelsea Harvey, *Climate Change is Becoming a Top Threat to Biodiversity*, E&E NEWS (Mar. 28, 2018), <https://www.scientificamerican.com/article/climate-change-is-becoming-a-top-threat-to-biodiversity/> (describing the threat to species internationally due to climate change); *Species and Climate Change*, INT’L UNION FOR CONSERVATION NATURE, <https://www.iucn.org/theme/species/our-work/species-and-climate-change> (last visited Feb. 17, 2020) (describing how climate change is going to impact species generally).

5. Kuntala Lahiri-Dutt, *Water, Women and Rights*, in *WATER AND THE LAWS IN INDIA* 275, 275–76 (Ramaswamy R. Iyer ed., 2009).

decades after adopting the UDHR.<sup>6</sup> Analyzing this issue from a gender perspective, do women enjoy the right to a clean environment? If yes, what is the content and scope of that right; additionally, who is responsible as a duty bearer?

The right to a clean environment, which has a conservation dimension, often faces concerns relating to the sovereign rights of countries to exploit natural resources within their territories, as well as to the right of developing countries to develop and to combat poverty.<sup>7</sup> The right to a clean environment has been widely discussed from various dimensions: as a substantive and procedural right, as a human right, and as a constitutional right.<sup>8</sup> These discussions have largely been anthropocentric and have not addressed rights of nature, but these ideas are presently evolving.<sup>9</sup> Few studies have analyzed these rights from a gender dimension.<sup>10</sup> This is especially concerning since women are more closely knit to the environment in their daily lives.<sup>11</sup> This article attempts to explore these lacunae while examining this right through a gender lens. Specifically, it addresses how women are represented in right to a clean environment debates and how that representation could be improved.

Societies around the world recognize the intrinsic, invisible bond that exists between environment and gender through their culture and lifestyles. For example, Earth is revered as Mother Earth in every society.<sup>12</sup> In India, while rivers are represented as feminine, mountains, air, and fire possess masculine characteristics.<sup>13</sup> However, women and their rights are sidelined in the political sphere.<sup>14</sup> Debates concerning the right to a clean environment and its relationship with human rights continue.

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6. G.A. Res. 34/180, Convention on the Elimination of All Forms of Discrimination Against Women (Dec. 18, 1979).

7. James T. McClymonds, *The Human Right to a Healthy Environment: An International Legal Perspective*, 37 N.Y. L. SCH. L. REV. 583, 584 (1992).

8. S. Radhakrishnan, *Development of Human Rights in an Indian Context*, 36 INT'L. J. LEGAL INFO. 303, 307, 311, 329 (2008).

9. See, e.g., McClymonds, *supra* note 7 (omitting substantive discussion of rights of nature).

10. See generally WOMEN AND THE ENVIRONMENT 5 (Gender Unit, UNEP 2010) (inferring that studies have not analyzed environmental rights from a gender perspective.).

11. *Id.*

12. *Exploring the World's Creation Myths* (Nov. 13, 2005), <https://www.npr.org/templates/story/story.php?storyId=5010951>.

13. Kalyani Sardesai, *The River with the Masculine Gender, Brahmaputra*, <https://heritage-india.com/river-masculine-gender-brahmaputra/> (last visited Feb. 26, 2020).

14. See generally Paula Baker, *The History of Women in Politics*, NAT'L CONST. CTR.: CONST. DAILY (May 11, 2016), <https://constitutioncenter.org/blog/the-history-of-women-in-politics> (explaining the lack of political focus on women generally).

India has developed a strong constitutional jurisprudence on the right to life, which includes a right to a clean environment as a prerequisite.<sup>15</sup> But, do these developments address the concerns and impacts of environmental harm on women or their need for a safe and clean environment? Article 21 of the Constitution of India assures every individual has a right to life.<sup>16</sup> The Judiciary has broadly interpreted this right to include many interrelated rights that have been carved from the right to life.<sup>17</sup> This article examines the right to a clean environment, which is derived from the guaranteed right to life under Article 21, from a gender perspective. Additionally, this article uses the right to water as a test case for examining the relevant gender dimensions.

## II. RIGHT TO ENVIRONMENT: CONTENT AND CONTEXT

The UN Conference on the Human Environment in 1972 marked the beginning of debates on the human right to a clean environment.<sup>18</sup> The Conference recognized the need to prevent environmental degradation through increased state interference in environmental protection and conservation.<sup>19</sup> International conventions and declarations preceding the Conference were narrower,<sup>20</sup> only focusing on certain species or certain developed countries.<sup>21</sup> These narrower conventions reflected bilateral or regional trade interests<sup>22</sup> rather than environmental awareness.<sup>23</sup> The

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15. See, e.g., *Virenda Gaur and Ors v. State of Haryana and Ors, Gaur v. State of Haryana*, (1994) 6 SCR 78 (“Environmental, ecological, air, water, pollution, etc. should be regarded as amounting to violation of Article 21. Therefore, hygienic environment is an integral facet of right to healthy life and it would be impossible to live with human dignity without a humane and healthy environment.”).

16. INDIA CONST. art. 21.

17. *Court on its own motion v. Union of India, Suo Moto, Writ Petition, No. 284 of 2012*.

18. U.N. Conference on the Human Environment, *Stockholm Declaration on the Human Environment*, U.N. Doc. A/CONF.48/14/Rev. 1, at 45–48 (June 5–16, 1972) [hereinafter the Stockholm Declaration].

19. *Id.* at 37.

20. See Convention for the Preservation and Protection of Fur Seals, July 7, 1911, 37 Stat. 1542, T.S. No. 564 (discussing preservation and protection of fur seals); Convention Between France and Great Britain, Relative to Fisheries in the Seas Between Great Britain and France, Gr. Brit.- Fr., *ratified Jan. 14, 1868*, 57 BSP 8 (U.K) (discussing fishing on shared seas); Convention pour la Protection des Oiseaux Utiles à l'Agriculture [Convention for the Protection of Birds Useful to Agriculture], Mar. 19, 1902, 22 RECUIEL DES TRAITÉS 1907, p. 96 (Fr.) (discussing bird preservation); International Agreement for the Regulation of Whaling, opened for signature June 24, 1938, 53 Stat. 1794, T.S. No. 944 (discussing whaling regulation specifically).

21. Anita M. Halvorssen, *The Origin and Development of International Environmental Law*, in ROUTLEDGE HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 25, 25, 28 (Shawkat Alam et al. eds., 2012).

22. DANIEL BODANSKY, *THE ART AND CRAFT OF INTERNATIONAL ENVIRONMENTAL LAW* 11 (2010).

23. See Edith B. Weiss, *The Evolution of International Environmental Law*, 54 JAPANESE Y.B. INT'L L. 1, 3 (2011) (noting the lack of development of international environmental principles pre-1972).

Conference spurred a truly global effort of environmental protection by encouraging the participation of more countries.<sup>24</sup> The product of the Conference, the 1972 Stockholm Declaration, not only upholds the rights of man to be in a healthy environment, but also reminds him of his responsibility to protect and improve the environment for present and future generations.<sup>25</sup> The Stockholm Declaration also led to the adoption of several international agreements on the environment and related issues.<sup>26</sup> This early Declaration spawned an increase in debates about and recognition of a right to a clean environment at international and national levels.<sup>27</sup> This section examines the content and context of a right to a clean environment. First, this section analyzes the right to a clean environment as both a substantive and procedural right before examining it from a gender dimension, the focal point of this article.

### A. A Substantive Right

In light of an ever-expanding environmental and human rights crisis, there have been proliferations of environmental and human rights treaties at international and regional levels.<sup>28</sup> Discourses on the right to a clean environment since the 1972 Stockholm Declaration have brought attention to existing international treaties to examine how and to what extent this right is

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24. See generally U.N. Conference on the Human Environment, Rep. of the U.N. Conference on the Human Environment, U.N. Doc. A/CONF.48/14/Rev.1, (1972) (explaining a global effort of environmental protection.).

25. See Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 8249 (discussing the abolishment of trade of endangered species); United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 (discussing protection of international waters); Vienna Convention for the Protection of the Ozone Layer, Mar. 22, 1985, T.I.A.S. 11097 (discussing the protection of the ozone layer); Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, T.I.A.S. 89–101 (discussing the management and control of emissions that deplete the ozone layer).

26. See Takyiaw B. Prempeh, *The Importance of the Stockholm Conference to the Creation of International Law* (Jan. 22, 2017), <https://takyiawprempheh.wordpress.com/2017/01/22/the-importance-of-the-stockholm-conference-to-the-creation-of-international-environmental-law-2/> (finding that the Stockholm Convention influenced topics discussed at the Rio Conference on the Human Environment and Development of 1992); Günther Handl, *Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration), 1972 and the Rio Declaration on the Environment and Development, 1992*, LIBRARY OF INT'L L. 1, 1 (2012) (finding that “following Stockholm, global awareness of environmental issues increased dramatically, as did international environmental law-making proper”).

27. Sumudu Atapattu, *The Right to a Healthy Life or the Right to Die Polluted?: The Emergence of a Human Right to a Healthy Environment Under International Law*, 16 TUL. ENVTL. L.J. 65, 69 (2002).

28. Lawrence Susskind, *Strengthening the Global Environmental Treaty System*, ISSUES SCI. & TECH., Fall 2008, at 1.

realized through them.<sup>29</sup> Recognizing the right to a clean environment is crucial for the effective and meaningful enjoyment of that right. This section discusses what constitutes the right to a clean environment under different fields of law: environmental law, human rights, and constitutional rights. These fields influence decision-making processes seeking to ensure that an agency does not cause environmental degradation that can infringe on human rights.<sup>30</sup>

### 1. Right to a Clean Environment as a Constitutional Right

More than 100 nations have granted a constitutional right to a clean environment.<sup>31</sup> Human rights could be implemented at a domestic level, either through constitutional recognition or statutory mechanisms.<sup>32</sup> Recognizing human rights through a constitutional provision enhances the status of those rights for maximum protection.<sup>33</sup> In this case, a constitutional right to a clean environment could help encourage effective environmental protection by reducing activities resulting in environmental harm. It could also lead to an equitable distribution of access to and control of natural resources, and ensure that the state performs its duty to enact and implement environmental laws.<sup>34</sup>

As a constitution reflects the political and social spirit of a society, including a right to a clean environment within a constitution could imply the value and recognition that society provides to the environment.<sup>35</sup> A right to a clean environment is an “eco-centric notion as a human centred right,”

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29. See, e.g., The Minamata Convention on Mercury, *opened for signature* Oct. 10, 2013, 27 U.N.T.S. 17 (entered into force Aug. 16, 2017) (mandating the protection of human health and the environment from the adverse effects of mercury).

30. See Dinah Shelton, *Human Rights and the Environment: Substantive Rights*, in RESEARCH HANDBOOK ON ENVIRONMENTAL LAW 265, 265 (Malgosia Fitzmaurice et al. eds., 2011) (discussing the link between human rights and environmental rights).

31. James R. May & Erin Daly, *Global Constitutional Environmental Rights*, in ROUTLEDGE HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 603, 603, 605 (Shawkat Alam et al. eds., 2012); TIM HAYWARD, CONSTITUTIONAL ENVIRONMENTAL RIGHTS 2 (2005); see James R. May, *Constituting Fundamental Environmental Rights Worldwide*, 23 PACE ENVTL. L. REV. 113, 114 (2005–2006) (discussing the growth in countries recognizing a fundamental right to a clean environment in their constitutions).

32. May & Daly, *supra* note 31, at 603.

33. See Ernest-Ulrich Petersmann, *Theories of Justice, Human Rights, and the Constitution of International Markets*, 37 LOY. L.A. L. REV. 407, 413, 416 (2003) (discussing constitutional provisions as they relate to human and individual rights in an international context).

34. DAVID R. BOYD, THE ENVIRONMENTAL RIGHTS REVOLUTION: A GLOBAL STUDY OF CONSTITUTIONS, HUMAN RIGHTS, AND THE ENVIRONMENT 52, 58–59 (2012).

35. Nicholas Bryner, *A Constitutional Human Right to a Healthy Environment*, in RESEARCH HANDBOOK ON FUNDAMENTAL CONCEPTS OF ENVIRONMENTAL LAW 168, 170 (Douglass Fisher ed., 2016).

which implies that humans are rights holders.<sup>36</sup> However, if the rights are defined in terms of the whole environment and ecosystem, they could be incorporated as environmental values into the constitution.<sup>37</sup>

The ubiquitous nature of environmental issues, including its extent and complexity, requires coordinated actions at a global level and concerted political efforts at a national level to implement environmental protection through the highest possible means.<sup>38</sup> Including a right to a clean environment in a constitution not only ensures equitable distribution of materials, but also possess several advantages. Professor of Environmental Political Theory at the University of Edinburgh, Tim Hayward, points to five advantages: it engrains the societies' environmental protection values; promotes coordination and unification of environmental regulations in the state; promotes cooperation among states; keeps environmental protection above the whims and fancies of legislature; and enables public participation.<sup>39</sup>

Many constitutions have provisions related to the right to a clean environment.<sup>40</sup> These rights could be either be specifically environmental-protection related or utilized without specifically referring to environmental protection.<sup>41</sup> Both direct and indirect inclusion of this right could enable the fulfilment of the procedural right to a clean environment, including access to information, public participation, and access to justice in environmental matters.<sup>42</sup>

Various studies have shown that different factors influence the incorporation of this right in constitutions. Jefford and Millers highlight three types of constitutions where environmental rights have been included: (1) younger constitutions; (2) constitutions with strong economic and social rights; and (3) constitutions in countries that have adopted these rights prior to enacting its own.<sup>43</sup> Jeffords and Gellers call these three factors (1) generational effect; (2) opposition cost effect; and (3) constitutional norm

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36. *Id.* at 172.

37. *Id.* at 172–73.

38. See generally Joana Castro Pereira, *Environmental Issues and International Relations, a New Global (Dis)order—The Role of International Relations in Promoting a Concerted International System*, 58 REV. BRAS. POLIT. INT. 191, 192 (2015) (explaining that environmental issues belong to the states and to all humankind).

39. HAYWARD, *supra* note 31, at 6–7.

40. BINOD PRASAD SHARMA, CONSTITUTIONAL PROVISIONS RELATED TO ENVIRONMENT CONSERVATION: A STUDY 1 (2010).

41. STEPHEN J. TURNER, A SUBSTANTIVE ENVIRONMENTAL RIGHT 27 (2009).

42. Philippe Cullet, *Definition of an Environmental Right in a Human Rights Context*, 13 NETH. Q. HUM. RTS. 25, 36 (1995).

43. Chris Jeffords & Lanse Minkler, *Do Constitutions Matter? The Effects of Constitutional Environmental Rights Provisions on Environmental Outcomes*, 69 KYKLOS 294, 311–12 (2016).

effect.<sup>44</sup> Sometimes historic factors like colonialism and the timeframe of drafting the constitution also matter.<sup>45</sup> For example, constitutions in South Asia, which are drafted in parallel to human rights development, contain numerous provisions of the Universal Declaration of Human Rights.<sup>46</sup>

Though the U.S. Constitution does not have an environmental rights provision, many state constitutions do.<sup>47</sup> Constitutions from South American countries—like Brazil, Argentina, and Columbia—have environmental rights enshrined in them.<sup>48</sup> In South Asia, as highlighted above, constitutions reflected attempts to evade past injustices.<sup>49</sup> However, many constitutions, including India's, did not originally include environmental rights.<sup>50</sup>

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44. Chris Jeffords & Joshua C. Gellers, *Constitutionalizing Environmental Rights: A Practical Guide*, 9 J. HUM. RTS. PRAC. 136, 138 (2017).

45. Joshua C. Gellers, *Environmental Constitutionalism in South Asia: Analyzing the Experiences of Nepal and Sri Lanka*, 4 TRANSNAT'L ENVTL. L. 395, 409, 420 (2015).

46. *Id.* at 411–14.

47. See, e.g., N.Y. CONST. art. XIV (preserving forests to be forever wild, establishing forest and wildlife conservation, and authorizing disposition or use of certain lands); HAW. CONST. art. IX, § 8 (declaring “The State shall have the power to promote and maintain a healthful environment, including prevention of any excess demands upon the environment and the State’s resources.”); ILL. CONST. art. XI (establishing the public policy of legislative and individuals’ duties to the environment); MASS. CONST. art. XCVII (declaring “the people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural scenic, historic, and esthetic qualities of their environment; . . .”); PA. CONST. art. I, § 27 (declaring “[t]he people have the right to clean air, pure water, and to preservation of natural, scenic, historical, and esthetic values of the environment.”); MONT. CONST. art. II, § 3 (establishing the right to a clean and healthful environment as an inalienable right); *id.* art. IX (protecting the state’s environmental and natural resources, explaining water rights, and commenting on cultural resources); R.I. CONST. art. 1, §§ 16–17 (regulating fishery and shore privileges, and preserving natural resources).

48. See CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 225 (Braz.) (outlining the right of all to an ecologically balanced environment); Sec. 41, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.) (outlining the right to a healthy and balanced environment fit for human development for all inhabitants); CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 79 (outlining the right of every individual to enjoy a healthy environment); CONSTITUCIÓN POLÍTICA DE REPÚBLICA DE CHILE [C.P.] art. 19 § (8) (outlining the right to live in an environment free from contamination); POLITICAL CONSTITUTION OF PERU art. 2 (22) (outlining every person’s right “to peace, tranquility, enjoyment of leisure time, and rest, as well as to a balanced and appropriate environment for the development of his life.”); CONSTITUCION POLITICA DE LA REPUBLICA DEL ECUADOR [CONSTITUTION] art. 14 (outlining the right of the population to live in a healthy and ecologically balanced environment).

49. See generally art. 41 CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.) (stating that repairing environmental harm is a priority); CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] ch. VI (Braz.) (establishing ways to ensure compliance); CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] ch. III art. 19 § 8 (ensuring the state will oversee the protection of the right to a clean environment); CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] ch. III art. 79 (stating that it is the state’s duty to protect the environment); CONSTITUCIÓN DE ECUADOR [CONSTITUTION] 2011, art. 14 (declaring conservation and protection matters of public interest); INDIA CONST. art. 14–15 (mandating equality before the law); Constitución Política de Peru [CONSTITUTION] Dec. 29, 1993, art. 2 § 22 (granting the right to a “balanced and appropriate environment”); CONST. (1987), pmbl., art. II §§ 2, 4 (Phil.) (stating the purpose of the constitution). (showing examples of constitutions conscious of past injustices).

50. See generally art. 41 CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.); CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] tit. VIII, ch. VI, art. 225 (Braz.); CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] ch. III art. 79; CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] ch. III art. 19 § 8; CONSTITUCIÓN DE ECUADOR [CONSTITUTION] 2011, art. 1; INDIA CONST. art. 51A § g (describing



However, environmental issues were later adjudicated under the right to life.<sup>51</sup> The subsequent section discusses in detail the provisions in the Constitution of India and the development of the right to a clean environment. Including environmental rights in the constitution is the best way to ensure access to resources, environmental protection, and sustainable development.<sup>52</sup> It also ensures that rights of nature are protected, since the right to a clean environment is accompanied by the duty to protect the environment.<sup>53</sup> This duty to nature, bestowed upon both the state and citizens, ensures the preservation of the quality of and options to access nature for future generations.<sup>54</sup> However, this right remains vague in most constitutions, where the provisions include language such as “every individual has the right to enjoy a healthy environment” and “it shall be the duty of every citizen . . . to protect and improve the natural environment.”<sup>55</sup> It is not clear what the consequence is for violating that duty, apart from the penal sanctions included in environmental protection statutes.<sup>56</sup> If this right and its inherent duty is a constitutional provision, it is the highest right, and violations should warrant harsher punishments in the interest of both anthropogenic and eco-friendly development patterns.

## 2. Right to a Clean Environment as a Human Right

Arguments for recognizing a right to a clean environment are as old as the Brundtland Commission Report.<sup>57</sup> The Report of the World Commission on Environment and Development proposed a human rights status for

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only citizen’s duties to protect the environment, not a constitutional right to a clean environment); CONSTITUCIÓN POLÍTICA DE PERU [CONSTITUTION] Dec. 29, 1993, art. 2 § 22 (showing that many constitutions do not have a specifically outlines right to a clean environment).

51. Lavanya Rajamani, *The Right to Environmental Protection in India: Many a Slip Between the Cup and the Lip?*, 16 REV. OF EUR. COMMUNITY AND INT’L ENVTL. LAW 274, 277 (2007); Jona Razzaque, *Public Interest Environmental Litigation in India, Pakistan and Bangladesh*, in 7 COMPARATIVE ENVIRONMENTAL LAW & POLICY SERIES 1, 68–70 (Eric W. Orts & Kurt Deketelaere eds., 2004).

52. Dominic McGoldrick, *Sustainable Development and Human Rights: An Integrated Conception*, 45 INT’L & COMP. L.Q. 796, 804–05 (1996).

53. Press Release, Secretary General, Protecting Environment Is ‘an Urgent Moral Imperative’, Sacred Duty for All People of Faith, Secretary-General Tells Vatican Workshop on Climate Change, U.N. Press Release SG/SM/16710-ENV/DEV/1510 (Apr. 28, 2015) (U.N. Secretary General Ban Ki Moon noting that humans have a moral duty to protect the environment).

54. May, *supra* note 31, at 138.

55. See generally CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 79 (outlining the right of every individual to enjoy a healthy environment); INDIA CONST. art. 51A § g (describing the Indian citizen’s constitutional duty to protect the environment).

56. May, *supra* note 31, at 177.

57. See U.N. SECRETARY-GENERAL, REPORT OF THE WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT: OUR COMMON FUTURE, U.N. Doc. A/42/427 (1987) (proposing a global agenda for change and addressing environmental concerns.).

environmental rights.<sup>58</sup> Several scholars consider human rights mechanisms to be the best mechanisms for recognizing a right to a clean environment.<sup>59</sup> Linking human rights and environmental rights could create a mutual benefit when environmental protections would strengthen the existing human rights system.<sup>60</sup> Additionally, the human rights framework could refresh itself with new elements that are not currently considered.<sup>61</sup> Environmental rights, when granted as a rights-based approach within a human rights framework, could be elevated to the highest norm—even to a constitutional norm which cannot be denied or deprived by arbitrary means.<sup>62</sup> This would be beneficial because, internationally, human rights mechanisms are stronger and more influential than environmental treaties.<sup>63</sup>

Environmental protection and human rights have now been recognized and developed as intertwined and complementary goals.<sup>64</sup> Judicial decisions reflect this. For example, the decision of the International Court of Justice in *Gabčíkovo Nagymaros* notes: “The protection of the environment is ... a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as right to health and right to life itself.”<sup>65</sup> Scholars like Alan Boyle have pointed out that analyzing the right to a clean environment from a human rights perspective has three advantages: (1) the human rights perspective addresses the impacts of environmental issues on individuals rather than states’; (2) it makes states accountable for environmental governance and implementation; and (3) wider interpretation of economic and social rights to include environmental protection elements acknowledges the very existence of a right to a clean environment.<sup>66</sup>

Though environmental rights have been discussed from a human rights perspective under a right to clean environment, environmental rights, and a right to safe and adequate environment, these rights have focused on the anthropogenic dimension, with a healthy environment as a prerequisite for a

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58. *Id.* at part III § 4.5 (1987).

59. See, e.g., Alan Boyle, *Human Rights and the Environment: Where Next?*, 23 EUR. J. INT’L L. 613, 616 (explaining how a declaration or protocol on human rights could articulate the relationship between the environment and human rights).

60. REPORT OF THE WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT: OUR COMMON FUTURE, *supra* note 57, at annexe I.

61. Cullet, *supra* note 42, at 25.

62. See *generally Equal and Inalienable Rights*, BILL OF RIGHTS INST., <https://www.docsoffreedom.org/student/readings/equal-and-inalienable-rights> (last visited Feb. 5, 2020) (explaining how the constitution provides for and protects inalienable rights).

63. Cullet, *supra* note 42, at 25.

64. DONALD K. ANTON & DINAH L. SHELTON, ENVIRONMENTAL PROTECTION AND HUMAN RIGHTS 119 (2011).

65. The *Gabčíkovo-Nagymaros* Project, Judgement, 1997 I.C.J. 7, 91–92 (Sept. 25) (separate opinion by Weeramantry, J.).

66. Boyle, *supra* note 59, at 613, 623, 629.

healthy life.<sup>67</sup> Thus, the right to a clean environment, which has also been considered a customary right,<sup>68</sup> raises the question of the nature, content, and beneficiaries of this right.<sup>69</sup> This substantive content of the right to a clean environment is still difficult to define.<sup>70</sup> A difference of opinion exists about whether these rights are individualistic, collective, or group rights.<sup>71</sup>

Yet another issue that needs to be addressed is the interpretation of terminology relating to the right to a clean environment. While the term “right to a clean environment” clearly denotes that humans have a right to a clean, safe, and adequate environment, does this right include rights of the environment itself? In my opinion, and continuing the rights of nature debates, this right should be interpreted to include rights of nature as well. The right to a clean environment could not only include the rights of humans to a clean environment, but it could reflect the right to a clean environment of non-human species as well, where all flora and fauna have a right to a clean environment favorable for survival. A shift to a less anthropogenically focused understanding of a healthy environment has been argued.<sup>72</sup> Specifically, scholars argue that the recognition of rights of nature<sup>73</sup> should be upheld at par with human rights to create harmonious and eco-centric sustainable development.<sup>74</sup> In this climate change era that includes

67. See for instance, these sources discussing the right to a clean environment, but using different terminology: Sumudu Atapattu, *The Right to a Healthy Life or the Right to Die Polluted?: The Emergence of a Human Right to a Healthy Environment Under International Law*, 16 TUL. ENVTL. L.J. 65, 67 (2002) (discussing a “human right to a healthy environment”); David P. Bryden, *Environmental Rights in Theory and Practice*, 62 MINN. L. REV. 163, 164, 175, 219 (1978) (using the term “environmental rights” in the context of the Minnesota Environmental Rights Act); May, *supra* note 31, at 113 (using the terms “fundamental, enforceable, individual right to a clean and healthy environment”); James W. Nickel, *The Human Right to a Safe Environment: Philosophical Perspectives on Its Scope and Justification*, 18 YALE J. INTL. L. 281, 281 (1993) (referring to the “right to a safe environment” or “RSE”); Dinah Shelton, *Human Rights, Environmental Rights, and the Right to Environment*, 28 STAN. J. INT’L L. 103, 103–05 (1991) (using the terms “right to environment,” “safe and healthy environment,” and “environmental rights”); HAYWARD, *supra* note 31, at 9.

68. John Lee, *The Underlying Legal Theory to Support a Well-Defined Human Right to a Healthy Environment* 25 COLUM. J. ENVTL. L. 283; Jennifer M. Mohamed, *Silent Spring + 55: The Human Right to a Clean Environment*, 42 ENVIRONS: ENVTL. L. & POL’Y J. 35, 38 (2018).

69. Joshua J. Bruckerhoff, *Giving Nature Constitutional Protection: A Less Anthropocentric Interpretation of Environmental Rights*, 86 TEX. L. REV. 615 (2008); see generally Fatma Zohra Ksentini (Special Rapporteur on the Comm’n on Human Rights) *Review of Further Dev. in Fields with Which the Sub-Commissions has Been Concerned Humans Rights and the Env’t*, ¶¶ 5–7, U.N. Doc. E/CN.4/Sub.2/1994/9 (July 6, 1994) (recognizing the beneficiaries of the right).

70. See TURNER, *supra* note 41, at 27 (explaining differences between jurisdictions in what constitutional rights are accepted in environmental lawsuits).

71. McGoldrick, *supra* note 52, at 811.

72. Bruckerhoff, *supra* note 69, at 618.

73. See generally Christopher Stone, *Should Trees Have Standing?—Towards Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450, 456 (1972) (discussing rights of nature being synonymous to human rights).

74. See *Salim v. State of Uttarakhand*, 2017 PIL No. 126 of 2014 (Utt.) (India) (declaring the rivers Ganga and Yamuna as legal persons); *Miglani v. State of Uttarakhand*, 2017 PIL No. 140 of 2015 (Utt.)

unsustainable development patterns and increasing human rights atrocities, recognizing rights of nature is essential, in part because of the environment's impact on human life.<sup>75</sup>

### *B. Procedural Right*

Discussions about the right to a clean environment would not be complete without procedural rights. The right to a clean environment as a procedural right includes rights dealing with access to information, participation in decision making, and access to justice.<sup>76</sup> Human rights treaties have guaranteed these rights since the adoption of the UDHR.<sup>77</sup> Environmental protection, which the 1972 Stockholm Conference addressed,<sup>78</sup> was crystallized explicitly in Rio in 1992.<sup>79</sup> Principle 10 of the Rio Declaration, adopted during the United Nations Conference on Environment and Development, highlights the rights to information, public participation, and access to justice as three cornerstones of procedural rights in environmental law:

Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective

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(India) (declaring the glaciers Gangotri and Yamunotri as legal persons); Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, s 14 (N.Z.) (declaring the Te Awa Tupua river as a legal person).

75. Mohamed, *supra* note 68, at 37–38.

76. Jonas Ebbesson, *The Notion of Public Participation in International Environmental Law*, 8 Y.B. INT'L ENVTL. L. 51, 70 (1997).

77. See G.A. Res. 217 (III), *supra* note 1, at 73–75 (guaranteeing the right to an effective judicial remedy for violation of fundamental rights in Article 8; entitling everyone to a fair public hearing by an independent tribunal in Article 10; and granting everyone the right to freedom of opinion and expression, which includes the right to receive and impart information in Article 19); see also International Covenant on Civil and Political Rights, *supra* note 2, at 173 (furthering the purposes set out in the Universal Declaration of Human Rights); African Charter on Human and Peoples' Rights, June 27, 1981, 1520 U.N.T.S. 218, pmbl. (continuing to grant rights to people internationally after the adoption of the Universal Declaration of Human Rights); EUROPEAN CONVENTION OF HUMAN RIGHTS, COUNCIL OF EUROPE (1950).

78. United Nations Conference, *Report of the United Nations Conference on the Human Environment*, ¶¶ 1–2, A/CONF.48/14/Rev.1 (June 1972).

79. U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. DOC. A/CONF.151/26 (Vol. I), annex I (Aug. 12, 1992) [hereinafter *Rio Declaration*].

access to judicial and administrative proceedings, including redress and remedy, shall be provided.<sup>80</sup>

Though these rights could ensure credibility, effectiveness, and accountability<sup>81</sup> in domestic environmental decision making, there is no international treaty for these procedural rights in environmental law.<sup>82</sup> Nevertheless, following Rio Principle 10, several environmental treaties have incorporated provisions based on these three pillars.<sup>83</sup> A regional convention in Europe, the Aarhus Convention,<sup>84</sup> implemented these pillars into enforceable rights. With a rights-based approach, this Convention is a unique step in ensuring the right to environment both substantially and procedurally.<sup>85</sup>

Recognizing a right to a clean environment would not ensure a complete right unless it is enjoyed in a meaningful manner by every individual. Since the environment is always interrelated with issues of development and human rights, the right to a clean environment requires that every person is able to receive information about decisions that affect the environment, through which he could form opinions and participate in decision making.<sup>86</sup> In other words, every person must have an opportunity to be a part of rulemaking at the grassroots level where the impacts of these decisions, including environmental harm, are mostly felt. This right must also include the right to access justice for redress of any harm that has occurred. Thus, the right to a clean environment includes the recognition of a right to a clean and safe

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80. *Id.*

81. ELENA PETKOVA ET AL., WORLD RESOURCES INST., CLOSING THE GAP: INFORMATION, PARTICIPATION, AND JUSTICE IN DECISION-MAKING FOR THE ENVIRONMENT, (1) 66, 92 (Bob Livenash ed., 2002).

82. May, *supra* note 31, at 123–24.

83. *See, e.g.*, United Nations Framework Convention on Climate Change art. 3, 6(a)–(b), May 9, 1992, 1771 U.N.T.S. 107 (incorporating these three pillars); 1992 Convention on Biological Diversity art. 6, 14, June 1, 1992, 1760 U.N.T.S. 79 (incorporating these three pillars); United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification art. 3–4, June 17, 1994, 1954 U.N.T.S. 3 [hereinafter United Nations Convention to Combat Desertification] (incorporating these three pillars); Convention on the Law of the Non-Navigational Uses of International Water Courses art. 25, May 21, 1997, 2999 U.N.T.S. 12 (incorporating these three pillars).

84. *See generally* Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Oct. 3, 2001, 2161 U.N.T.S. 37770 [hereinafter Aarhus Convention] (creating enforceable rights from these three pillars).

85. Jona Razzaque, *Human Rights to a Clean Environment: Procedural Rights*, in RESEARCH HANDBOOK ON INTERNATIONAL ENVIRONMENTAL LAW 284, 284, 288 (Fitzmaurice, et al. eds., 2010).

86. Aarhus Convention, *supra* note 84, at art. 1.

environment to everyone, including human and non-human species,<sup>87</sup> along with a right to information, public participation, and access to justice.<sup>88</sup>

### 1. Access to Information

A right to information, as a *sine qua non* of the procedural right in the environment, enables people to participate effectively in decision making. This is the first step for procedural justice.<sup>89</sup> Since harm that occurs after the installation of a project or activity is irreversible, this factor becomes significant in acting as a preventative measure to ensure informed decisions.<sup>90</sup> True and timely information is a prerequisite for good governance in a democracy.<sup>91</sup> In environmental governance, it ensures that people are able to understand things around them and prepare themselves to participate in an informed manner.<sup>92</sup> Factors necessitating increased attention towards the right to a clean environment include: increased environmental damage; involvement of state and non-state parties in activities that may cause environmental pollution and harm, which could even have reverberations in a transboundary context or cause significant loss to an ecosystem; and displacements of indigenous people for development activities like dams.<sup>93</sup>

Environmental information, as defined by the Aarhus Convention, includes the state of the environment, factors that affect the environment, decision-making processes, and the state of human health and safety.<sup>94</sup> It also includes information on the environment, human and non-human factors and activities that are likely to affect the environment, and economic analyses and assumptions used in environmental decision making.<sup>95</sup> The right-duty paradigm inherent in the right to a clean environment sorts this information into active and passive information.<sup>96</sup> Active information refers to the duty

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87. See Armin Rosencranz & Mukta Batra, *The Supreme Court of India on Development and Environment From 2001 to 2017*, 6 ENVTL. L. & PRAC. REV. 1, 5, 20–21 (2018) (describing impacts of environmental judicial decisions on humans); *Essar Oil Ltd. v. Halar Utakarsh Samiti & Ors.*, (2004) 2 SCC 392 (recognizing impacts of environmental judicial decisions on animals).

88. James R. May, *Constitutional Directions in Procedural Environmental Rights*, 28 J. ENVTL. L. & LITIG. 27, 30, 36 (2013).

89. *Id.* at 36.

90. ANTON & SHELTON, *supra* note 64, at 357.

91. May, *supra* note 88, at 36.

92. STEPHEN STEC AND SUSAN CASEY-LEFKOWITZ, *THE AARHUS CONVENTION: AN IMPLEMENTATION GUIDE*, at 1, U.N. Doc. ECE/CEP/72, U.N. Sales No. E.00.II.E.3 (2000).

93. See *generally id.* (discussing factors affected by a right to a clean environment).

94. Aarhus Convention, *supra* note 84, at art. 2 § 3.

95. *Id.*

96. Aaron Xavier Fellmeth, *Paradigms of International Human Rights Law*, 111 AM. J. INT'L L. 819, 820 (2017).

of the state to collect and disseminate information among its citizens.<sup>97</sup> Passive information refers to the right of each citizen request information from the state.<sup>98</sup> In sum, access to information in environmental matters ensures transparency that enables non-state stakeholders to exercise their right in public participation and access to justice.<sup>99</sup> It also increases state accountability.<sup>100</sup> Several countries have now protected these rights, either through their Constitution or legislation.<sup>101</sup>

## 2. Public Participation

The participatory right, which enhances the sustainability of natural resources, also allows non-state entities to participate in decision making both at the international and domestic level, which was hitherto confined to state entities only.<sup>102</sup> However, law making without public participation lacks effectiveness and legitimacy. Decision making requires public participation because of public participation can contribute to environmental protection via environmental legislation.<sup>103</sup> Additionally, through the human rights lens, public participation provides legitimacy to decision making.<sup>104</sup>

It is quite clear that both the law makers and citizens should be a part of law making. Taking from the definition of democracy, for the people, by the people and of the people,<sup>105</sup> environmental law making should have participation at the grassroots level, especially when most large-scale development projects have simultaneous impacts on the displaced population and natural environment.

A right to a clean environment could guarantee public participation, which in turn could empower people to demand information and public participation in environmental decision making. Public participation would

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97. See generally Aarhus Convention, *supra* note 84, at art. 5 (requires state to disseminate information to the public).

98. See *id.* at art. 4 (describing how the government will make environmental information available to the public).

99. Peter Oliver, *Access to Information and to Justice in EU Environmental Law: the Aarhus Convention*, 36 *FORDHAM INT'L L. J.* 1423, 1425–26, 1433 (2013).

100. *Id.* at 1436, 1443, 1445.

101. *Constitutional Protections of the Right to Information* (Jan. 9, 2012), <http://www.right2info.org/constitutional-protection> (last modified Jan. 9, 2012) (finding that countries including Brazil, Argentina, Chile, Mexico, Norway, Finland, Hungary, Greece, Sweden, New Zealand, Pakistan, South Africa, Kenya explicitly provide the right to information in their Constitutions; India and the United States have enacted legislation on the right to information).

102. Ebbesson, *supra* note 76, at 54.

103. *Id.* at 68.

104. *Id.* at 62.

105. *Government of the People, by the People, and for the People*, <https://www.dictionary.com/browse/government-of-the-people-by-the-people-and-for-the-people> (last visited Feb. 26, 2020).

also allow for people to use access to justice mechanisms if their rights were violated. Several international agreements have recognized the significance of public participation in their provisions.<sup>106</sup> For instance, the Rio Declaration and Agenda 21 mandate public participation for handling environmental issues.<sup>107</sup> Not only does the Declaration call upon the states to ensure public participation, but it also highlights the role of women,<sup>108</sup> youth,<sup>109</sup> indigenous people, and local communities<sup>110</sup> in environmental management and development.<sup>111</sup>

The 1992 United Nations Framework Convention on Climate Change requires the state to promote and cooperate in education, training, and public awareness of climate change and to encourage public participation. This includes encouraging participation by non-governmental organizations.<sup>112</sup> An environmental impact assessment is considered an apt mechanism to assess the harm of developmental activities to the environment.<sup>113</sup> For instance, the 1992 Convention on Biological Diversity requires that states introduce such assessments along with public participation.<sup>114</sup> In addition, conventions, like Desertification,<sup>115</sup> also encourage states to allow stake holders to participate in decision making and implementation.<sup>116</sup>

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106. *See generally*, United Nations Conference on Environmental & Development, Agenda 21, Sec. 1.3, A.CONF/151/26 (June 1992) (“The broadest public participation . . . should also be encouraged.”); Aarhus Convention, *supra* note 84; Convention On Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 38 I.L.M. 517 (June 25, 1999) (“Recognizing that, in the field of the environment, improved access to information and public participation in decision-making enhance the quality and the implementation of decisions. . . .”); *Rio Declaration*, *supra* note 79 (“Environmental issues are best handled with the participation of all concerned citizens. . . .”).

107. United Nations Conference on Environment & Development, Agenda 21 (June 3–15, 1992); *Rio Declaration*, *supra* note 79, at princ. 10; *see* G.A. Res. 217, *supra* note 1, at art. 21 (creating a generalized right of public participation in government affairs in Article 21).

108. *Rio Declaration*, *supra* note 79, at princ. 1, 20.

109. *Id.*

110. *Id.* at princ. 22.

111. *See id.* at princ. 4, 5, 20–22 (identifying women, youth, indigenous and local populations; and outlining the roles and impacts of local authorities, industry and development, and science in sustainability).

112. United Nations Framework Convention on Climate Change art. 4(1)(i), Sept. 9, 1992, 1771 U.N.T.S. 107.

113. *See* Framework Convention on Climate Change, *supra* note 83, at art. 14(1) (advocating public participation in an environmental impact assessment).

114. *See* Convention on Biological Diversity, *supra* note 83, at art. 14(1) (advocating public participation in an environmental impact assessment).

115. United Nations Convention to Combat Desertification, *supra* note 83, at art. 3.

116. *Id.* at art. 4.



Environmental harms know no political boundary, with impacts crossing state boundaries.<sup>117</sup> This transboundary nature of degradation is a challenge in environmental management because it requires cooperation and coordination of all states, highlighting the significance of international management of environmental issues.<sup>118</sup> The Convention on Environmental Impact Assessment in a Transboundary Context (Espoo) Convention on transboundary environmental issues requires states to take legal, administrative, and other measures to initiate environmental impact assessment measures, including public participation.<sup>119</sup> The Espoo Convention also address the transboundary impacts of environmental decision making.<sup>120</sup> Similarly, the Aarhus Convention of 1998 has elaborate provisions on public participation.<sup>121</sup> Article 6 of the Convention makes public participation mandatory for activities listed in Convention Schedule 1 and activities which are not listed but have “significant effects on the environment.”<sup>122</sup>

Both the Espoo and Aarhus Conventions provide models for effective public participation and environmental management, and both acknowledge that environmental issues are transboundary in nature. However, they are regional conventions, which makes their adoption and implementation difficult at the global level unless strong conservation efforts drive law makers to adopt the Conventions in other regions as well.<sup>123</sup> Public participation provisions could be helpful if successfully implemented at national levels. Public participation could take the form of elections, grassroots actions, lobbying, public speaking, or hearings, among others.<sup>124</sup> However, this public participation, in turn, requires the right to access justice to make it complete.

### 3. Access to Justice

The third pillar of procedural rights in environmental matters is access to justice. Access to justice is quintessential to ensure that the executive

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117. See generally, Daniel Bodansky et al., *International Environmental Law: Mapping the Field*, in THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 1, 8 (Daniel Bodansky et al. eds., 2008) (“International environmental problems are interconnected and need to be addressed holistically.”).

118. *Id.*

119. Convention on Environmental Impact Assessment in a Transboundary Context, *supra* note 83, at art. 2.

120. *Id.*

121. Aarhus Convention, *supra* note 84, at art. 6–8.

122. *Id.* at art. 6.

123. Convention on Environmental Impact Assessment in a Transboundary Context, *supra* note 83, at art. 18.

124. ANTON & SHELTON, *supra* note 64, at 381.

guarantees rights to information and public participation. If access to justice is not recognized, the executive could deny access to information or public participation on grounds like public safety or national security.<sup>125</sup> Article 8 of the UDHR affirms that the right to an effective judicial remedy is a human right.<sup>126</sup> Article 2(3) of the ICCPR requires that each state ensures: (1) an effective remedy to every person whose rights or freedoms are violated; (2) that this right be determined by competent judicial, administrative, or legislative authorities; and (3) that these competent authorities shall enforce such remedies.<sup>127</sup>

On a national level, access to justice in environmental matters enables aggrieved persons to challenge the legitimacy of substantive and procedural irregularities involved in any state decision. Access to justice has also resulted in the creation of a right to a clean environment in many jurisdictions, like India.<sup>128</sup> Examples of concepts that judicial decisions have contributed to include: ecologically sustainable development; the polluters pay principle; the precautionary principle; the public trust doctrine; and the preventive principle.<sup>129</sup> Several treaties have also incorporated some of these laws or concepts.<sup>130</sup>

The Aarhus Convention includes the two pillars mentioned above and also contains elaborate provisions for access to justice.<sup>131</sup> It ensures that any person who has been wrongfully denied information has access to a review procedure before a court of law or another independent and impartial body established by law.<sup>132</sup> This Convention also provides access to an expeditious procedure that is either free of charge or inexpensive.<sup>133</sup> Several countries' Constitutions have provided citizens access to justice as a human right.<sup>134</sup>

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125. See May, *supra* note 88, at 40 (listing the ways access to information can be limited).

126. G.A. Res. 217 (III), *supra* note 1, at 73.

127. International Covenant on Civil and Political Rights, *supra* note 2, at art. 2 (3).

128. Brian J. Preston, *The Judicial Development of Environmentally Sustainable Development*, in RESEARCH HANDBOOK ON FUNDAMENTAL CONCEPTS OF ENVIRONMENTAL LAW 475, 475–76, 503 (Douglas Fisher ed., 2016) (explaining India's judicial construction of access to justice for indigent populations); see also PETKOVA ET AL., *supra* note 81, at 103 (noting that there are either reduced fees or no fees for environmental cases).

129. See, e.g., Preston, *supra* note 128, at 476 (explaining that courts help to develop the concept of ecologically sustainable development); A.P. Pollution Control Board v. M.V. Nayudu, (1999) 2 SCC 718 (India) (taking the concepts of the precautionary principle and the polluter pays principle and incorporating it into Indian law); M.C. Mehta v. Kamal Nath, (1997) 1 SCC 388 (India) (incorporating the public trust doctrine into Indian law).

130. See BODANSKY, *supra* note 22, at 13 (discussing sources of international environmental law).

131. Aarhus Convention, *supra* note 84, at art. 9.

132. *Id.*

133. *Id.*

134. See, e.g., CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 229 (outlining the right of any individual to have access to the administration of justice); CONSTITUCIÓN POLÍTICA DE REPÚBLICA DE CHILE [C.P.] art. 19 (3) (outlining the right to equal protection under the law in the exercise of people's

Access to justice has been utilized to foreground environmental issues and seek remedy in such cases.<sup>135</sup> Although the right of accessing justice has applied to non-citizens, this is not the case in all situations.<sup>136</sup> This complexity compounds in environmental issues. For example, in many cases involving environmental refugees migrating from vulnerable countries and seeking assistance from host countries, the host country becomes caught up with security issues and denies refugees basic human rights.<sup>137</sup>

Similarly, non-citizens who suffer from environmental harm caused by neighboring states have difficulty holding these states responsible. These matters are adjudicated in international court.<sup>138</sup> However, international court decisions are often not successfully implemented by states, further complicating the issue.<sup>139</sup> International courts often address environmental harm as a collective issue instead of an individual harm.<sup>140</sup> Therefore, women and women's rights find no mention.

### C. The Right to a Clean Environment: A Feminist Critique

Environmental law, developed since 1972, has addressed several issues of environmental degradation ranging from land, air, water, and the highly debated concerns of increasing impacts of climate change.<sup>141</sup> Legal challenges would enhance the development of laws and regulations. Yet, existing laws have not been able to reduce environmental degradation.<sup>142</sup> The

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constitutional rights); POLITICAL CONSTITUTION OF PERU art. 2 (2) (outlining the right of every person to equality before the law); CONSTITUCIÓN POLÍTICA DE LA REPUBLICA DEL ECUADOR [C.P.] art. 75 (outlining the right of every person to free access to justice).

135. Brian J. Preston, *Benefits of Judicial Specialization in Environmental Law: The Land and Environment Court of New South Wales as a Case Study*, 29 PACE ENVTL. L. REV. 396, 405–06 (2012).

136. Robert B. Gordon, *Lawyers, the Legal Profession & Access to Justice in the United States: A Brief History*, 148 DAEDALUS 177, 181 (2019).

137. See, e.g., Tim McDonnell, *The Refugees the World Barely Pays Attention to* (June 20, 2018), <https://www.npr.org/sections/goatsandsoda/2018/06/20/621782275/the-refugees-that-the-world-barely-pays-attention-to> (discussing environmental refugees, the tents they are forced into, and the increased terrorism within them); INTERNAL DISPLACEMENT MONITORING CTR., ON THE GRID: THE GLOBAL DISPLACEMENT LANDSCAPE 18 (2018) (showing different areas that have been displaced by environmental disasters).

138. DUNCAN BRACK, INTERNATIONAL ENVIRONMENTAL DISPUTES: INTERNATIONAL FORUMS FOR NON-COMPLIANCE AND DISPUTE SETTLEMENT IN ENVIRONMENT-RELATED CASES 4 (2001) (noting that international courts have jurisdiction over disputes between countries).

139. See, e.g., Aloysius P. Llamzon, *Jurisdiction and Compliance in Recent Decisions of the International Court of Justice*, 18 EUR. J. INT'L L. 815, 833–35 (2008) (illustrating that international courts are limited in their power to compel compliance by Sovereign States).

140. Bodansky et al., *supra* note 117, at 2.

141. Shiraz Rustomjee, *Global Environmental Law and India*, 36 INT'L J. LEGAL INFO. 342, 342, 345–46, 349–50 (2008).

142. See Itzhak (Zahi) Ben-David et al., *Research: When Environmental Regulations are Tighter at Home, Companies Emit More Abroad*, HARV. BUS. REV. (Feb. 4, 2019),

right to a clean environment becomes more significant in this climate change era where environmental degradation and its drastic impacts are highly expanding and clearly visible.

Environmental treaty negotiations and implementations have experienced a North-South divide with a Northern predominance in policy making.<sup>143</sup> The North stresses a technocratic approach defined by scientific principles.<sup>144</sup> Meanwhile, the global South argues for differential treatment of countries defined by principles of social justice, self-determination and democracy, and cultural rights of nations.<sup>145</sup> Environmental protection priorities also vary between the North and South. The North highlights advanced environmental issues like ozone depletion.<sup>146</sup> The South—which includes developing nations—highlights the issues that affect the daily lives of millions, like impacts of water scarcity, desertification, food security, and environmental pollution, and stresses developing countries' necessity for economic growth to address impending poverty.<sup>147</sup>

The inequity in priorities and approaches between developed and developing countries originated from historic colonialization and its impacts leading to environmental injustice at the global scale.<sup>148</sup> The unsustainable consumption patterns of the global North combined with an increasing demand for goods result in degradation of nature in the South—the burdens of which are inappropriately imposed upon vulnerable categories like women, indigenous people, and children.<sup>149</sup> International environmental law, however, does not address these impacts.<sup>150</sup> Its focus is primarily on

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<https://hbr.org/2019/02/research-when-environmental-regulations-are-tighter-at-home-companies-emit-more-abroad> (showing that pollution controls do not work at the global scale).

143. Sumudu Atapattu & Carmen G. Gonzalez, *The North-South Divide in International Law: Framing the Issues*, in INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH 1, 2 (Shawkat Alam et al. eds., 2015) (describing the historic context of the North-South divide).

144. *Id.*

145. Carmen G. Gonzalez, *Beyond Eco-Imperialism: An Environmental Justice Critique of Free Trade*, 78 DENV. U.L. REV. 979, 985–87 (2001).

146. M. Rafiqul Islam, *History of the North-South Divide in International Law*, in INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH 31 (Shawkat Alam et al., eds., 2015).

147. *See generally* Atapattu & Gonzalez, *supra* note 143, at 1 (describing the historic context of the North–South divide).

148. *See* Carmen G. Gonzales, *Genetically Modified Organisms and Justice: The International Environmental Justice Implications of Biotechnology*, 19 GEO. INT'L ENVTL. L. REV. 583, 593–95 (2007) (describing underlying causes of global injustices).

149. *Id.*; Carmen G. Gonzales, *Environmental Justice and International Law*, in ROUTLEDGE HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 77, 78 (Shawkat Alam et al., eds., 2013).

150. *See* Hari M. Osofsky, *Learning from Environmental Justice: A New Model for International Environmental Rights*, 24 STAN. ENVTL. L. J. 71, 75, 77 (2005) (discussing the impacts not addressed in international environmental law).

environmental harm and preventing environmental damage rather than on the impacts of these harms on human beings.<sup>151</sup>

Environmental justice is grounded in human rights and fights substantive and procedural injustices based on race, color, and socio-economic status.<sup>152</sup> It aptly forms the basis for discussing environmental rights from a gendered dimension.<sup>153</sup> A human rights framework could fill the gap that environmental law could not fill. Hence, recognizing the right to a clean environment is the essential tool to address environmental impacts borne by vulnerable communities like women.

Environmental law is only as effective as who participates in making it. Under public international law, states are the primary law makers, although non-state actors, like NGOs, are also provided a venue in these discussions and negotiations.<sup>154</sup> Yet, the voices of the victims of environmental harm—particularly women’s voices—remain unheard in these platforms.<sup>155</sup> Unless discussions and negotiations recognize women’s voices, the right to a clean environment remains yet another right created for all but not actually helping those most impacted by the consequences of the states’ decisions.

Environmental degradation severely impacts the lives of women in the global South because their lives are closely knitted around nature and the environment.<sup>156</sup> Several scholars adopt an eco-feminist perspective in analyzing environmental degradation and its impacts on women.<sup>157</sup> Taking inspiration from the eco-feminist perspective, this article follows their analyses to examine the legal framework of the right to a clean environment in India from the women’s rights perspective.

Recognizing the right to a clean environment creates a duty.<sup>158</sup> The responsibility for the duty rests upon the state to ensure environmental

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151. *Id.* at 107.

152. Sheila Foster, *Justice from the Ground Up: Distributive Inequities, Grassroots Resistance, and the Transformative Politics of the Environmental Justice Movement*, 86 CALIF. L. REV. 775, 776 (1998).

153. Osofsky, *supra* note 150, at 107.

154. BODANSKY, *supra* note 22, at 13; Kamrul Hossain, *The International Environmental Law-Making Process*, in ROUTLEDGE HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 61, 62 (Shawkat Alam et al. eds., 2013).

155. See Bethany Caruso, *Women Still Carry Most of the World’s Water* (July 16, 2017), <https://theconversation.com/women-still-carry-most-of-the-worlds-water-81054> (reporting on the burden women bear from water shortages and their lack of involvement in decision-making process concerning this problem).

156. See *A Deepening Crisis*, FOOD & AGRIC. ORG. OF THE U.S., [www.fao.org/3/S5500E/S5500E08.htm#P219\\_25283](http://www.fao.org/3/S5500E/S5500E08.htm#P219_25283) (last visited Mar. 3, 2020) (explaining how women directly rely on natural resources).

157. For examples of writing regarding this topic, see VANDANA SHIVA, *STAYING ALIVE: WOMAN, ECOLOGY AND DEVELOPMENT* (1989); MARIA MIES & VANDANA SHIVA, *ECOFEMINISM* (1993); BINA AGARWAL, *ENVIRONMENTAL CHANGE AND COLLECTIVE ACTION* (2016).

158. INDIA CONST. art. 51A§ g.

protection.<sup>159</sup> Hitherto, this right remains a general human right for every human being. However, taking into consideration women and their special needs, it is high time to rewrite and reconceptualize this right through an eco-feminist perspective.

Eco-feminism<sup>160</sup> addresses the domination of women, children, people of color, and underprivileged people and the non-human environment.<sup>161</sup> It correlates the subordination of women and nature by power circles.<sup>162</sup> Eco-feminism is related to the broader environmental justice movement, which arose from the discriminatory environmental harm suffered by people of color in U.S. and then perpetuated as a global movement against environmental imperialism.<sup>163</sup> Both movements focus on the shifting attitude towards the affected persons, recognizing them as rights holders rather than only victims.

Surprisingly, the trajectory of the development of the eco-feminist movement parallels the growth of environmental law. Eco-feminism developed in 1970s, with its contextual, pluralistic, inclusive, and holistic nature being drawn from elements of feminism, environmentalism, and philosophy.<sup>164</sup> The eco-feminist approach applies the feminist idea of gender as the starting point to analyze the concept of “domination.”<sup>165</sup> Eco-feminism examines how societal powers dominate women and nature, and it analyzes the philosophical underpinnings of these domination theories and structures.<sup>166</sup> According to the Water Supply and Sanitation Collaborative Council, gender “refers to the socially determined roles and responsibilities of women, men and children. Gender is related to how we are perceived and

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159. See generally United Nations Human Rights Special Procedures, *Framework Principles on Human Rights and the Environment*, U.N. Doc. a/HCR/37/59 (Jan. 24, 2018) (noting that states have a responsibility to protect the environment).

160. Francoise d'Eaubonne coined the term “Eco-feminism” in her 1974 book, *Feminism or Death*. See Mark Somma & Sue Tolleson-Rinehart, *Tracking the Elusive Green Women: Sex, Environmentalism, and Feminism in the United States and Europe*, 50 POL. RES. Q. 153, 153 (1997) (discussing the origin of the term “eco-feminism”).

161. Karen J. Warren, *Introduction to ECOFEMINISM: WOMEN, CULTURE, NATURE* xi (Karen J. Warren & Nisvan Erkal eds., 1997) (explaining the concept of ecofeminism).

162. See Abeda Sultana, *Patriarchy & Women's Subordination: A Theoretical Analysis*, THE ARTS FAC. J., July 2010–June 2011, at 1, 6–11 (explaining the concept of female subordination and dependence).

163. Vast literature is available on the environmental justice movement: Alice Kaswan, *Environmental Justice: Bridging the Gap Between Environmental Laws and “Justice”*, 47 AM. U. L. REV. 221, 256 (1997); Eileen Guana, *The Environmental Justice Misfit: Public Participation and the Paradigm Paradox*, 17 STAN. ENVTL. L.J. 3, 5, 8 (1998); Robert D. Bullard, *Race and Environmental Justice in the United States*, 18 YALE J. INT'L L. 319, 319–20 (1993).

164. JYTTE NHANENGE, *ECOFEMINISM: TOWARDS INTEGRATING THE CONCERNS OF WOMEN, POOR PEOPLE, AND NATURE INTO DEVELOPMENT* 98 (2011).

165. Warren, *supra* note 161, at xi.

166. *Id.* at 98–99.

expected to think and act as women, men or children (girls and boys) because of the way society is organized, and not because of our biological differences.”<sup>167</sup>

Gender is not the only significant element in eco-feminism. Eco-feminism also links women and nature through the lens of the suppression of these two entities.<sup>168</sup> According to the eco-feminist ideology, the same structural and ideological factors that determine the subordination of women in a society equally apply to conquering natural resources.<sup>169</sup> Bina Agarwal notes that eco-feminism highlights conceptual links between depicting women and nature and the ways of acting upon them, commonalities of women and nature movements, and the alternative vision for an egalitarian society.<sup>170</sup> Thus, bringing gender and the environment together would highlight the need to rethink and reexamine concepts and methods of development, redistribution, and institutional changes.<sup>171</sup>

Eco-feminism could prove to be a useful tool for rethinking the content of the right to a clean environment in different ways. Women are depicted as victims of environmental damage and, at the same time, considered to be the engineers of environmental protection.<sup>172</sup> Firstly, the eco-feminist view could foreground the issues of women as victims and argue for their rights to be treated equally. Secondly, following and expanding upon this, the eco-feminist view could argue for equal participation in law making in both international and domestic environmental matters. Women could project themselves as equal rights holders and make their voices heard to enact laws that consider their needs as well. Thirdly, the eco-feminist view could define the right to a clean environment with the principles of equality, sustainability, and intergenerational equity with a focus on resource protection.

Currently, international environmental law adopts a duty-oriented approach focused on preventing environmental harm and imposing sanctions upon violators.<sup>173</sup> Environmental law negotiators have also investigated the debates between the global North and South in the context, content, scope,

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167. WATER SUPPLY & SANITATION COLLABORATIVE COUNCIL, VISION 21: A SHARED VISION FOR HYGIENE, SANITATION AND WATER SUPPLY AND A FRAMEWORK FOR ACTION 8 (2000).

168. NHANENGE, *supra* note 164, at 99.

169. See CHRIS J. CUOMO, FEMINISM AND ECOLOGICAL COMMUNITIES 1 (1998) (explaining that an essential part of feminist environmentalism is acknowledging the connections and similarities between human oppression and the degradation of nature).

170. AGARWAL, *supra* note 157, at 24.

171. *Id.* at 56.

172. Warren, *supra* note 161, at 5–11.

173. BOYD, *supra* note 34, at 52; see generally Robert I. McMurry & Stephen D. Ramsey, *Environmental Crime: The Use of Criminal Sanctions in Enforcing Environmental Laws*, 19 LOY. L.A. L. REV. 1133 (1986) (discussing the use of duty, responsible corporate officer, and similar doctrines to sanction entities for violating environmental regulations).

and mechanisms of regulations. These investigations focus on burden-sharing in financial and technical assistance for the prevention and mitigation of environmental harms.<sup>174</sup> These state-centered discussions give due attention to the differential treatment of developing states where individuals, particularly women, have been suppressed during these debates—their pains and concerns left in a vacuum.<sup>175</sup> Hence, recognizing a right to a clean environment from a gender dimension is essential. The major prerequisite to achieving this recognition is deviating from state-centered discussions to a rights-holder-centered approach that includes due consideration for the previously ignored classes: women and nature.

### III. RIGHT TO A CLEAN ENVIRONMENT IN INDIA: RECOGNITION AND DEVELOPMENT

#### *A. Constitutional Rationale and Parameters*

The right to a clean and safe environment is a fundamental right under Article 21 of the Indian Constitution.<sup>176</sup> The Constitution does not explicitly include the environment *as either a right of the citizens or as a duty of the state*. Instead, this right is derived from the right to life enshrined in Article 21, which interprets the right to a clean and safe environment as either a precondition or an essential component of life.<sup>177</sup> The Stockholm Declaration of 1972 significantly impacted Indian domestic law by encouraging the Indian government to exercise its international obligations to implement the principles of the Declaration.<sup>178</sup> The Indian government exercised these rights by enacting a Constitutional Amendment Bill, with separate statutes

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174. See, e.g., Bharat H. Desai & Balraj K. Sidhu, *Quest for International Environmental Institutions: Transition from CSD to HLPF*, in INTERNATIONAL AND ENVIRONMENTAL LAW AND THE GLOBAL SOUTH 152, 164–65 (Shawkat Alam et al. eds., 2015) (explaining that financial burdens of having representation in these meetings to mitigate environmental damage can be too much for the Global South and that the Global North would need to help financially); Karin Mickelson, *The Stockholm Conference and the Creation of the North-South Divide in International Environmental Law and Policy*, in INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH 109, 164–65 (Shawkat Alam et al. eds., 2015) (examining landmark events and debates regarding global environmental problems and their solutions); John Ntambirweki, *The Developing Countries in the Evolution of an International Environmental Law*, 14 HASTINGS INT'L & COMP. L. REV. 905, 911–17 (1991) (discussing the implementation of financial and technical assistance in international treaties).

175. Ntambirweki, *supra* note 174, at 907, 910; *Intell. F. v. State of A.P.*, (2006) 3 SCC 549.

176. *Virendra Gaur v. State of Haryana*, (1994) 6 SCR 78 (India).

177. INDIA CONST. art. 21 (“No person shall be deprived of his life or personal liberty except according to procedure established by law.”).

178. See *Stockholm Declaration*, *supra* note 18, ¶ 8 (encouraging nations to take responsibility and act to preserve the human environment).



on water and wildlife.<sup>179</sup> Article 48-A resulted from these efforts.<sup>180</sup> An addition to Part IV of the Directive Principles of State Policy (DPSP), Article 48A provides that “[t]he State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country.”<sup>181</sup>

The 1972 Stockholm Declaration called for nations to act upon their duties and reminded mankind to protect the environment, rather than recognizing the human right to a clean and safe environment or the environment’s own rights. A rights-based approach to the environment was missing in those principles. The government of India included protections for environment in Article 48A and in DPSP Part IV-A to remind the State and her citizens of their duty to protect the environment.

The DPSP’s non-justiciable but welfare-oriented principles are crucial in administration and law making.<sup>182</sup> The principles outlined in the DPSP guide the Indian government in its efforts to establish a welfare state based on the principles of equality, liberty, and fraternity as envisaged by the Preamble of the Indian Constitution.<sup>183</sup> These principles also encourage the development of an egalitarian system through affirmative actions to reduce socio-economic disparities.<sup>184</sup> The DPSP has helped form a society that recognizes the constitutional goals of social, economic, and political justice.<sup>185</sup>

The DPSP’s significance in the realm of governance and law making has transformed its interpretation. Formerly non-justiciable and inferior to fundamental rights,<sup>186</sup> the DPSP is now an essential part of constitutionally recognized fundamental rights.<sup>187</sup> Establishing the DPSP as an important part

179. The Water (Prevention & Control of Pollution) Act, No. 6 of 1974, INDIA CODE (2019); The Wildlife (Protection) Act, No. 53 of 1972, INDIA CODE (2019).

180. INDIA CONST. art. 48A.

181. *Id.*

182. *See id.* at art. 37 (“The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.”).

183. *Id.* (“The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.”).

184. For discussions on DPSP, its aims and objectives, see generally, ARUN K THIRUVENGEDAM, *THE CONSTITUTION OF INDIA: A CONTEXTUAL ANALYSIS* (2017); H. M. SEERVAI, *2 CONSTITUTIONAL LAW OF INDIA: A CRITICAL COMMENTARY* (1993); M. P. JAIN, *INDIAN CONSTITUTIONAL LAW* 742–48 (1987); B SHIVA RAO, *THE FRAMING OF INDIA’S CONSTITUTION; SELECT DOCUMENTS* (1966); GRANVILLE AUSTIN, *THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION* 75–83 (1966); DURGA DAS BASU, *COMMENTARY ON THE CONSTITUTION OF INDIA* 287–90 (5th ed. 1965).

185. *See generally* GRANVILLE AUSTIN, *supra* note 184 (describing the aims and objectives of the DPSP).

186. *State of Madras v. Srimathi Champakam Dorairajan*, AIR 1951 SC 226 (India); *Mohd. Hanif v. State of Bihar*, AIR 1958 SC 731 (India).

187. CJ Das, who previously gave judgment on *Champakam Dorairajan*, AIR 1951 SC 226, held that : “Nevertheless, in determining the scope and ambit of the fundamental rights relied on by or on behalf

of the Indian legal and governmental systems—and equating its status with fundamental rights—creates a duty for the state to protect individual rights.<sup>188</sup> The Indian Supreme Court applied Article 48A in several cases relating to environmental issues.<sup>189</sup>

In addition to modifying Part IV of the Constitution, the 42nd Amendment added the environment to Part IV-A-Fundamental Duties.<sup>190</sup> Article 51A(g) of Part IV-A created a fundamental duty for every citizen “to protect and improve natural environmental including forests, lakes, rivers, and wildlife, and to have compassion for living creatures.”<sup>191</sup> Though these environmental aspects were added to the Constitution by the 42nd Amendment, other provisions in the Constitution could also be applied to the environment and its components.<sup>192</sup> For example, Constitutional provisions that require the state to address public health issues<sup>193</sup> and to organize agriculture and animal husbandry<sup>194</sup> also reflect the government’s interactions with the environment, though indirectly.

A discussion of Constitutional provisions relating to the environment would not be complete without addressing the division of legislative powers between the central government and the states.<sup>195</sup> The constitutional division

of any person or body the court may not entirely ignore these directive principles of State policy laid down in Part IV of the Constitution but should adopt the principle of harmonious construction and should attempt to give effect to both as much as possible.” *In re The Kerala Education Bill 1957 v. Unknown*, (1959) 1 SCR 995, ¶¶ 12, 14 (1958) (India); *see also* *State of Madras v. Srimathi Champakam Dorairajan*, AIR 1951 SC 226 (clarifying the interpretation of the Constitution); *Minerva Mills Ltd. v. Union of India*, AIR 1980 SC 1789 (India) (clarifying the interpretation of the Constitution).

188. C.M. Abraham, *Environmental Jurisprudence in India*, in 2 THE LONDON-LEIDEN SERIES ON LAW, ADMINISTRATION AND DEVELOPMENT 1, 18–19 (1999).

189. *See, e.g.*, *Virendra Gaur v. State of Haryana*, (1994) 6 SCR 78 (India) (“Environmental ecological, air, water, pollution, etc. should be regarded as amounting to violation of Article 21.”); *Indian Council for Enviro-Legal Action v. Union of India*, AIR 1996 SC 1446 (citing Article 48A as the statutory authority that mandates the Indian government to protect its citizens living near chemical industrial plants from environmental harms); *M.C. Mehta v. Union of India*, AIR 1998 SC 1037 (recognizing the individual rights of workers and their rights to better working conditions and compensation for damages); *Rural Litigation and Entitlement Kendra Dehradun v. State of Uttar Pradesh*, AIR 1988 SC 594 (India) (citing Article 48A as the government’s obligation to stop illegal mining and preserve forested areas); *Kinkri Devi And Anr. v. State of Himachal Pradesh*, AIR 1988 HP 4 (India) (asserting Article 48A in best practices in mining operations to minimize damage to the environment).

190. INDIA CONST. art. 51A § g.

191. *Id.*

192. *Id.*

193. *Id.* at art. 47 (“The State shall regard the raising of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavor to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.”).

194. *Id.* at art. 48 (“The State shall endeavor to organize agriculture and animal husbandry on modern and scientific lines and shall, in particular, take steps for preserving and improving the breeds, and prohibiting the slaughter, of cows and calves and other milch and draught cattle.”).

195. *See id.* at art. 245–50 (outlining the distribution of legislative powers in the Indian government).

of legislative powers is enumerated in three lists: the Union List, the State List, and the Concurrent Lists.<sup>196</sup> In accordance with Article 246, the Union List vests legislative power of entries in the Union Government; the State List vests legislative power of entries in the states; and the Concurrent List vests shared legislative power between the central and state governments, subject to Article 254.<sup>197</sup> Similarly, Parliament has the exclusive power over any residual matter not provided for in the lists.<sup>198</sup>

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196.

- (1) Notwithstanding anything in clauses (2) and (3), Parliament has the exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the 'Union List').
- (2) Notwithstanding anything in clause (3), Parliament, and, subject to clause (1), the Legislature of any State also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the "Concurrent List").
- (3) Subject to clauses (1) and (2), the Legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (in this Constitution referred to as the "State List"). (4) Parliament has power to make laws with respect to any matter for any part of the territory of India not included 2 [in a State] notwithstanding that such matter is a matter enumerated in the State List.

*Id.* at art. 246 §§ 1–3. Schedule Seven of the Constitution divides the legislative power between the central government and States in three Lists; the Union List (97 entries); the State List (66 entries); and the Concurrent List (47 items). *Id.* at sched. 7.

197.

- (1) If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void.
- (2) Where a law made by the Legislature of a State 1 with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State: Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State.

*Id.* at art. 254 §§ 1–2.

198.

- (1) Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent List or State List.
- (2) Such power shall include the power of making any law imposing a tax not mentioned in either of those Lists.

Parliamentary powers to legislate on certain subjects in the State List have been crucial for enacting environmental legislation like the 1972 Water Act.<sup>199</sup> According to Article 249, Parliament can make laws on any subject on the State List if the Rajya Sabha, or Council of States, passes a resolution that it is necessary and expedient to the national interest to enact such laws.<sup>200</sup> Parliament exercised this Article 252 power when it enacted the 1972 Water Act. Parliament did so upon request from two or more states, and a resolution that, in effect, has been passed by all Houses of Legislatures of those states.<sup>201</sup> The following section discusses the environmental laws Parliament has enacted.

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*Id.* at art. 248 §§ 1–2.

199. *Id.*; The Water (Prevention & Control of Pollution) Act, No. 6 of 1974, INDIA CODE (2019).

200.

- (1) Notwithstanding anything in the foregoing provisions of this Chapter, if the Council of States has declared by resolution supported by not less than two thirds of the members present and voting that it is necessary or expedient in the national interest that Parliament should make laws with respect to any matter enumerated in the State List specified in the resolution, it shall be lawful for Parliament to make laws for the whole or any part of the territory of India with respect to that matter while the resolution remains in force.
- (2) A resolution passed under clause (1) shall remain in force for such period not exceeding one year as may be specified therein: Provided that, if and so often as a resolution approving the continuance in force of any such resolution is passed in the manner provided in clause (1), such resolution shall continue in force for a further period of one year from the date on which under this clause it would otherwise have ceased to be in force.
- (3) A law made by Parliament which Parliament would not but for the passing of a resolution under clause (1) have been competent to make shall, to the extent of the incompetency, cease to have effect on the expiration of a period of six months after the resolution has ceased to be in force, except as respects things done or omitted to be done before the expiration of the said period.

INDIA CONST. art. 249 §§ 1–3.

201.

- (1) (1) If it appears to the Legislatures of two or more States to be desirable that any of the matters with respect to which Parliament has no power to make laws for the States except as provided in articles 249 and 250 should be regulated in such States by Parliament by law, and if resolutions to that effect are passed by all the Houses of the Legislatures of those States, it shall be lawful for Parliament to pass an Act for regulating that matter accordingly, and any Act so passed shall apply to such States and to any other State by which it is adopted afterwards by resolution passed in that behalf by the House or, where there are two Houses, by each of the Houses of the Legislature of that State.
- (2) Any Act so passed by Parliament may be amended or repealed by an Act of Parliament passed or adopted in like manner but shall not, as respects any State to which it applies, be amended or repealed by an Act of the Legislature of that State.

*Id.* at art. 252 §§ 1–2.

### B. Legislative Enactments

Despite the 42nd Amendment, which provides for the inclusion of environmental protection as a governmental initiative, the Seventh Schedule of the Constitution does not reference the environment.<sup>202</sup> While “water” was already an entry on the State List, the 42<sup>nd</sup> Amendment Act added “forest” to the Concurrent List.<sup>203</sup>

A plethora of environmental protection laws exist in India.<sup>204</sup> Environmental statutes are mainly used to implement DPSP rules, while courts have adopted purposive interpretations of the statutes to promote legislative objectives and intent.<sup>205</sup> The Bhopal Gas Tragedy of 1984 was a turning point in the environmental history of the country.<sup>206</sup> The tragedy led to the enactment of an umbrella legislation for environmental protection. The Environmental Protection Act 1986, however, adopts duty-based, state-focused approach without a rights framework for citizens.<sup>207</sup>

### C. Right to a Healthy Environment: Stepping from Proactive Judiciary

The judiciary in India is the cornerstone of development of environmental jurisprudence in the country. Exercising a proactive role in interpreting constitutional provisions—especially Part III and Part IV—the Supreme Court and several High Courts have upheld the right to a clean environment as a fundamental right of every person.<sup>208</sup> In several other cases, the courts mandated that the State exercise its duty to protect and preserve the environment, and to protect the public health.<sup>209</sup> This section examines the role of the judiciary in India with regard to environmental protection and

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202. *See id.* at art. 246 §§ 1–4, sched. 7, list I (pointing out that the Seventh Schedule lists lack any reference to the environment).

203. *See id.* art. 246, sched. 7, list II, § 17 (describing state control over waterways); *id.* art. 246, sched. 7, list III, § 17A (including an amendment adding constitutional protection of forests).

204. The Tiwari Committee, appointed by the Government of India, reported that there were almost 200 environmental related statutes in the country when the report was submitted in 1980. *See* GOV'T OF INDIA, REPORT OF THE COMMITTEE FOR RECOMMENDING LEGISLATIVE MEASURES AND ADMINISTRATIVE MACHINERY FOR ENSURING ENVIRONMENTAL PROTECTION 89, 92 (1980) (discussing the existing administrative and legal arrangements for protecting the environment).

205. SHYAM DIVAN & AEMIN ROZENCRAZ, ENVIRONMENTAL LAW AND POLICY IN INDIA 59 (2d ed. 2001).

206. Stuart Diamond, *The Bhopal Disaster: How It Happened*, N.Y. TIMES, Jan. 28, 1985, at A2.

207. The Environment (Protection) Act, No. 29 of 1986, INDIA CODE (1986).

208. Kyle Burns, *Constitutions & the Environment: Comparative Approaches to Environmental Protection and the Struggle to Translate Rights into Enforcement*, VT. J. ENVTL. L., <http://vjel.vermontlaw.edu/constitutions-environment-comparative-approaches-environmental-protection-struggle-translate-rights-enforcement/> (last visited Feb. 4, 2020).

209. *Id.*

the judiciary's contribution to the evolution of the substantive and procedural right to a clean and safe environment.

### 1. Expanding the Interpretation of Part III: Refining Fundamental Rights

Environmental pollution has been rampant in India for many decades.<sup>210</sup> Historically, citizens had limited options for bringing claims against the polluting entities.<sup>211</sup> Citizens could bring tort actions; writ petitions under Article 32 or Article 226 of the Constitution; file an application for compensation in the case of hazardous activities under the Public Liability Act 1991; or approach the National Green Tribunal.<sup>212</sup> The scope of this paper does not include judicial remedies for environmental pollution. Instead, it explores constitutionally vested authorities in the Supreme and High Courts of India, under Articles 32 and 226 respectively, to issue certain legal instruments, like writ petitions. These petitions have given rise to several environment-related cases and have led to the subsequent recognition and development of environmental rights and jurisprudence.<sup>213</sup> These constitutional provisions empower the Supreme Court and High Courts to issue directions, orders, or writs—including writs of habeas corpus, mandamus, prohibition, quo warranto, and certiorari.<sup>214</sup>

Courts have been dynamic in the interpretation of the Indian Constitution, particularly Parts III and IV. Cases involving Part III have benefitted the most from wider interpretations.<sup>215</sup> From the meaning of “state” under Article 12, to the elaborate definition of “right to life” under Article 21, the courts have consistently graced each provision in Part III with similar dynamism.<sup>216</sup> An extensive discussion of each article and their broad interpretation by the courts is beyond the scope of this article. Instead, the key provisions of Article 21, and related Articles, are discussed below.

Article 21 of the Constitution is the foundation for development of human rights and environmental jurisprudence in India. Through various judgments, the Supreme Court has expanded the meaning of life from mere

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210. *Air Pollution on the Move in India*, <https://www.earthobservatory.nasa.gov/images/92347/air-pollution-on-the-move-in-india> (last visited Feb. 7, 2020).

211. DIVAN & ROZENCRAZ, *supra* note 205, at 49.

212. *Id.* at 87.

213. *Id.* at 50.

214. INDIA CONST. art. 32, § 2; *id.* art. 226, § 1.

215. *Maneka Gandhi v. Union of India*, (1978) 2 SCR 621 (establishing that the procedure established by law should not be arbitrary, unjust, or unfair).

216. INDIA CONST. arts. 12, 21; *see Gandhi v. Union of India*, (1978) SCR 621 (“Article 12 defines the State as including the Government and Parliament of India and the Government and Legislature of the States and of local or other authorities within the territory of India or under control of the Government of India.”) (Kailasam, J., dissenting).

existence to meaningful living.<sup>217</sup> Article 21 guarantees the right to life. As interpreted in *Maneka Gandhi*, this fundamental right is not confined to executive action, but also applies to the law-making process.<sup>218</sup> The courts reminded the Legislature that any general procedure established by law is not sufficient to deprive a person of their life or personal liberty.<sup>219</sup> Instead, procedures established by law must be “fair, just and reasonable,” meeting the conditions of Articles 14 and 19.<sup>220</sup>

This step in expanding the interpretation of the right to life tremendously changed the meaning of “life and liberty” enshrined in Article 21. A number of cases have further broadened the scope and ambit of the right to life. An observation by Justice Bhagwati highlights the judicial developments:

The right to life enshrined in Article 21 cannot be restricted to mere animal existence. It means something much more than just physical survival . . . .The right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing one-self in diverse forms, freely moving about and mixing and commingling with fellow human beings.<sup>221</sup>

The Supreme Court has undertaken two key steps to expand the interpretation of the right to life. First, it mandated that the procedure established by law employed for the deprivation of life and liberty should be reasonable, fair and just—which should also pass the tests under Articles 14 and 19.<sup>222</sup> Second, the Supreme Court derived several interrelated rights and liberties from the right to life in Article 21 and incorporated them into new ideas. One such idea was the right to a clean and safe environment examined in this article.<sup>223</sup>

A clean environment is quintessential for enjoying life, as noted in *Virendra Gaur v. State of Haryana*:

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217. *Supreme Court Grants ‘Right to Die With Dignity’ to Terminally Ill* (Mar. 9, 2018), [https://www.indiawest.com/news/india/supreme-court-grants-right-to-die-with-dignity-to-terminally/article\\_d4cb67ea-23e6-11e8-96ac-5b8fc4c22a39.html](https://www.indiawest.com/news/india/supreme-court-grants-right-to-die-with-dignity-to-terminally/article_d4cb67ea-23e6-11e8-96ac-5b8fc4c22a39.html); see also *Common Cause v. Union of India*, (2005) 215 SCR 143 (expanding the meaning of life).

218. *Maneka Gandhi v. Union of India*, (1978) 2 SCR 621.

219. *Id.*

220. *Id.*

221. *Francis Coralie Mullin v. Union Territory of Delhi*, (1981) 2 SCR 516 (India).

222. *Maneka Gandhi v. Union of India*, (1978) 2 SCR 621.

223. *DIVAN & ROZENCRAZ*, *supra* note 205, at 49.

Enjoyment of life and its attainment including their right to life with human dignity encompasses within its ambit, the protection and preservation of environment, ecological balance free from pollution of air and water, sanitation without which life cannot be enjoyed. Any contra acts or actions would cause environmental pollution. Environmental ecological, air, water, pollution, etc. should be regarded as amounting to violation of Article 21. Therefore, hygienic environment is an integral facet of right to healthy life and it would be impossible to live with human dignity without a humane and healthy environment.<sup>224</sup>

Additionally, specific components of the environment, like water and air, have been regarded as essential to enjoy one's right to life under Article 21.<sup>225</sup> Since the recognition of the right to a clean environment, the courts have consistently reiterated this right as a reminder to the State of its constitutional duty towards its citizens to protect the environment.<sup>226</sup> The Indian courts have applied international environmental legal principles like the precautionary principle,<sup>227</sup> the public trust doctrine,<sup>228</sup> the polluters pay principle,<sup>229</sup> and the intergenerational equity principle<sup>230</sup> for domestic regulation of activities that cause environmental degradation.<sup>231</sup>

The specialized environmental court, The National Green Tribunal (Tribunal),<sup>232</sup> also continues to emphasize a clean and safe environment as a part of the right to life. As the Tribunal explained in *M/s Sterlite Industries Ltd. v. Tamil Nadu Pollution Control Board*,

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224. *Virenda Gaur v. State of Haryana*, (1994) 6 SCR 78 (India).

225. *See Subhash Kumar v. State of Bihar*, (1991) 1 SCR 5 (India) ("Right to live is a fundamental right under Art. 21 of the Constitution and it includes the right of enjoyment of pollution free water and air for full enjoyment of life.").

226. *Court On Its Own Motion v. Union of India*, *Suo Moto Writ Petition*, No. 284 of 2012, ¶ 21; *Delhi Jal Board v. Nat'l Campaign for Dignity and Rts.*, *Civil Appeal*, No. 5322 of 2011, ¶¶ 13–14 (India); *In re Noise Pollution v. Unknown*, AIR 2005 SC 3136, ¶¶ 9–10 (India); *Narmada Bachao Andolan v. Union of India*, (2000) 10 SCC 664, ¶¶ 1–4; *Vellore Citizens' Welfare Forum v. Union of India*, 1996 AIR SC 2715, ¶ 47.

227. *Andhra Pradesh Pollution Control Board v. Prof. M.V. Nayudu*, (1999) 2 SCC 718 (India).

228. *M.C. Mehta v. Kamal Nath*, (1996) 1 SCC 388 (India).

229. *Vellore Citizens' Welfare Forum v. Union of India*, AIR 1996 SC 2715, ¶ 47; *Research Foundation for Science v. Union of India*, (2005) 13 SCC 186, ¶¶ 24, 27–28; *Indian Council for Environmental Action v. Union of India*, AIR 1996 SC 1446.

230. *Intellectuals Forum, Tirupathi v. State of Andhra Pradesh*, AIR 2006 SC 1350 (India).

231. *Id.*

232. The National Green Tribunal Act established the National Green Tribunal in 2010. The objective of NGT is "effective and expeditious disposal of cases relating to environmental protection and conservation of forests and other natural resources including enforcement of any legal right relating to environment and giving relief and compensation for damages to persons and property and for matters connected therewith or incidental thereto." The National Green Tribunal Act, No. 19 of 2010, INDIA CODE (2010), vol. 25.



[the] [r]ight to decent environment, as envisaged under Article 21 of the Constitution of India also gives, by necessary implication, the right against environmental degradation. It is in the form of right to protect the environment, as by protecting environment alone can we provide a decent and clean environment to the citizenry.<sup>233</sup>

Realizing the risk of development activities on environmental degradation, the Tribunal stressed tilting the balance in favor of the environment with the duty and obligation of protection bestowed upon the state.<sup>234</sup>

The right to a clean and safe environment has indeed been recognized as a fundamental right in India.<sup>235</sup> This right is recognized either as a part of life or a right essential to enjoy the broader right to life. The right to a clean and safe environment has not yet been recognized as an independent right beyond the right to life.

However, this interpretation reflects an anthropocentric view of the environment, where recognition of environmental rights is considered a human right essential for human life. It lacks a nature-oriented focus, though concepts of sustainable development and intergenerational equity have been widely recognized as part of this human right to a clean and safe environment.<sup>236</sup> In spite of recognition of this right by the courts, the right to a clean and safe environment has not been established by any statute. Though the Constitution requires the State and its citizens to protect the environment, it does so without including any right-based approach.<sup>237</sup> This duty-based approach signifies that these duty holders only have duties towards the environment, but the environment itself does not enjoy any related right. The gap here has been partially filled by the courts through carving out the right to a clean environment from Article 21.<sup>238</sup> Therefore, a combined reading of Parts III, IV, and IV-A could lead to the conclusion that the right to a clean and safe environment is an essential element of life that attaches a duty to the State and citizens to protect the environment.

It is not clear how these rights and duties are to be implemented. There are environmental statutes that use a state-oriented-duty framework instead

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233. *M/s Sterlite Indus. Ltd. v. Tamil Nadu Pollution Control Bd.*, Appeal No. 57/203 (2013) NGT (India).

234. *Sher Singh v. State of Himachal Pradesh*, O.A. No. 237 (THC)/2013 (2010) NGT Judgement Feb. 6, 2014 (India).

235. *Narmada Bachao Andolan v. Union of India*, (2005) 4 SCC 32.

236. *Intellectuals Forum v. State of Andhra Pradesh* (2006) 3 SCC 549 (India).

237. INDIA CONST. art. 51A, § g.

238. *See generally* *Delhi Jal Board v. Nat'l Campaign for Dignity and Rts.*, Civil Appeal, No. 5322 of 2011, 11, ¶ 19 (India) (explaining the use of public interest litigation for indigent populations).

of a rights-based framework.<sup>239</sup> Similarly, since the environment is not confined to any one territory, there is a need for more elaborate discourse on transboundary environmental harms. Environmental rights are also essential when considering increased development activities potentially causing transboundary harms and victims of this harm transcends political boundaries

## 2. Relaxing Locus Standi: Public Interest Litigation

Public interest litigation (PIL) has expanded public access to the judiciary for redressing societal grievances. The law of standing in litigation has seen drastic changes since the 1980s.<sup>240</sup> The traditional locus standi rules maintained that bringing a claim before the judiciary was available only for a victim of an injury caused by another party's violation of some legal rule.<sup>241</sup> PIL has relaxed this rule of locus standi. It has expanded the ambit of judicial remedy through its distributive access to justice mechanism for the disadvantaged sections of the society.<sup>242</sup> Under a PIL system, any publicly minded person could act on behalf of the public or those who are unable to access traditional judicial remedies.<sup>243</sup> Since PIL's introduction, it has been applied in several cases concerning the right to life including prisoners' rights;<sup>244</sup> bonder labor;<sup>245</sup> the right to a speedy trial;<sup>246</sup> protection of women in protective housing;<sup>247</sup> the rights of construction workers;<sup>248</sup> and the right to clean and safe drinking water.<sup>249</sup>

The court has visualized PIL to be a collaborative effort by stakeholders, the petitioner, the state, and the judiciary all working to broaden the justice-delivery mechanism and ensure the observance of constitutional values and

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239. See ORG. FOR ECON. CO-OPERATION & DEV., ENVIRONMENTAL COMPLIANCE AND ENFORCEMENT IN INDIA: RAPID ASSESSMENT 8 (2006) (summarizing the National Environmental Policy Act of 2006, which has a state-oriented duty framework).

240. E.g., Manoj Mate, *The Rise of Judicial Governance in the Supreme Court of India*, 33 B. U. INT'L L. J. 169, 171–72, 175–76, 178–79 (2015) (discussing the changes in the law of standing in litigation since the 1980s).

241. Jamie Cassels, *Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?*, 37 AM. J. COMP. L. 495, 499 (1989).

242. *Id.* at 497–500.

243. S.P. Gupta v. President of India, (1982) 2 SCR 365 (1981) (India) (explaining PIL to include those who are impoverished, physically unable to access the courts, or have other socio-economic disadvantages that make traditional access to the judiciary difficult to achieve).

244. See *Batra v. Delhi Admin.*, (1980) 2 SCR 557 (1979) (India) (affirming that even a prisoner is entitled to the precious rights guaranteed by Article 21 of the Constitution).

245. *Bandhua Mukti Morcha v. Union of India*, (1984) 2 SCR 67.

246. *Hussainara Khatoon v. Home Secretary, State of Bihar*, (1979) 3 SCR 169 (India).

247. *Dr. Upendra Baxi v. State of Uttar Pradesh*, (1983) 2 SCC 308 ¶¶ 1–2 (India).

248. *People's Union for Democratic Rights v. Union of India*, (1983) 1 SCR 456, 466.

249. *Kumar v. State of Bihar*, (1991) 1 SCR 5 (India); *M.C. Mehta v. Kamal Nath*, (1997) 1 SCC 388 (India) (citing the polluter pay principle in relation to the public trust doctrines in public interest litigation that seeks to redress the pollution of waterways and holding violators accountable).

objectives,<sup>250</sup> participatory justice,<sup>251</sup> and human rights to deprived classes.<sup>252</sup> As Justice Dalveer Bhanderi reminds,

[PIL] is not in the nature of adversary litigation, but it is a challenge and an opportunity to the government and its officers to make basic human rights meaningful to the deprived and vulnerable sections of the community and to assure them social and economic justice which is the signature tune of our Constitution. The Government and its officers must welcome [PIL] because it would provide them an occasion to examine whether the poor and the down-trodden are getting their social and economic entitlements or whether they are continuing to remain victims of deception and exploitation at the hands of strong and powerful sections of the community and whether social and economic justice has become a meaningful reality for them or it has remained merely a teasing illusion and a promise of unreality, so that in case the complaint in the public interest litigation is found to be true, they can in discharge of their constitutional obligation root out exploitation and injustice and ensure to the weaker sections their rights and entitlements.<sup>253</sup>

PIL has transformed environmental jurisprudence in India. As highlighted previously, the right to a clean and safe environment is not a constitutional right, but a judicially interpreted right originating in the fundamental right to life.<sup>254</sup> PIL transformed the previously unrecognized status of the right to a clean and healthy environment to the most sought-after right. It expanded access to and implementation of environmental justice to all sections of society.<sup>255</sup> Relaxing the “locus standi” rules allowed for flexibility in the courts’ approach to public issues and expanded the meaning of fundamental rights. The courts, through a combination of DPSP and fundamental rights, achieved a complete understanding of human rights, and, in many cases, applied several international standards for the implementation of human rights.

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250. *People’s Union for Democratic Rights v. Union of India*, (1983) 1 SCR 456, 466.

251. *Fertilizer Corp. Kamgar Union v. Union of India*, (1981) 2 SCR 52 (1980).

252. *Ramsharan Autyanuprasi v. Union of India*, AIR 1988 SC 549.

253. *State of Uttaranchal v. Balwant Singh Chaufal*, (2010) 3 SCC 402 (India).

254. See INDIA CONST. art. 51A § g (describing only citizen’s duties to protect the environment, not a constitutional right to a clean environment); *State of Uttaranchal v. Balwant Singh Chaufal*, (2010) 3 SCC 402, ¶ 45 (India) (describing the development of PIL and dividing it into three phases, with the second phase relating to environmental cases).

255. Jona Razzaque, *Linking Human Rights, Development, and Environment: Experiences from Litigation in South Asia*, 18 *FORDHAM ENVTL. L. REV.* 587, 592 (2006).

Importantly, the recognition of the right to a clean and safe environment in India is a result of PIL. PIL repeatedly acted as a catalyst for the “judicial democracy” movement by transforming the courts into a “liberated agency with a high socio-political visibility” from its narrow traditional role.<sup>256</sup>

### 3. From Law Interpreter to Law Making Role

The Supreme Court deviated from its traditional role of law interpreter to law maker when it interpreted Part III and IV of the Constitution. Article 32 creates a fundamental right which guarantees access to a judicial remedy at the Supreme Court for fundamental rights violations.<sup>257</sup> Litigants have invoked Article 32, resulting in the court granting writs of mandamus, certiorari, and prohibition against public bodies for failing to execute their duties to protect the environment.<sup>258</sup>

Through writ petitions and PIL, the Supreme Court relaxed the rules of locus standi and widened access to the poorest and downtrodden.<sup>259</sup> PIL allowed for prompt judicial action in human rights violations cases, bettering the living conditions of many individuals.<sup>260</sup> Environmental law cases saw the development of a strong, vibrant, and dynamic jurisprudence parallel to international environmental law. These cases incorporated several principles like polluter pays, the precautionary approach, public trust, and absolute liability, shifting the court to a rule-making role.

In the *Oleum Gas Leakage* case, the court modified the English principle of strict liability to create the absolute liability principle to suit the needs of present social and economic situations.<sup>261</sup> *Ryland v. Fletcher* established that a landowner has strict liability for anything likely to cause harm being brought to and collected on his land if that thing escapes and causes damage to another.<sup>262</sup> This rule’s many exceptions—Acts of God, acts of strangers, and consent—has been found to be unsuitable to address present-day

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256. Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, in 4 THIRD WORLD LEGAL STUDIES 107, 107–08 (1985).

257. INDIA CONST. art. 32, § 1.

258. See, e.g., *Rampal v. State of Rajasthan*, AIR 1981 (Raj.) 121 (issuing a writ of Mandamus to the Municipal Board to construct proper sewers and drains); *Bangalore Med. Tr. v. B.S. Muddappa*, (1991) 3 SCR 102 (India) (finding that residents of a locality have locus standi to challenge the action of the authorities); *Singh v. State of Uttar Pradesh*, (1964) 1 SCR 332 (1962) (India) (issuing a writ of mandamus directing the police not to continue domiciliary visits).

259. *Bangalore Med. Tr. v. B.S. Muddappa*, (1991) 3 SCR 102 (India).

260. Ashok H. Desai & S. Muralidhar, *Public Interest Litigation: Potential and Problems*, in SUPREME BUT NOT INFALLIBLE – ESSAYS IN HONOUR OF THE SUPREME COURT OF INDIA 159, 165 (B.N. Kirpal et al eds., 2000).

261. *M.C. Mehta v. Union of India*, AIR 1998 SC 1037.

262. *Rylands v. Fletcher* [1868] UKHL 1, LRE & I. App. (HL) 330 (appeal taken from Eng.).

challenges.<sup>263</sup> Thus, the Court established the absolute liability principle, which was later adopted in the 1991 Public Liability Insurance Act.<sup>264</sup> Justice Bhagwati explained:

an enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas owes an absolute and nondelegable duty to the community to ensure that no harm results to anyone on account of hazardous or inherently dangerous nature of the activity which it has undertaken.<sup>265</sup>

Courts have applied the polluter pays principle in cases that inspired its duty to protect the environment and people.<sup>266</sup> The Court noted that “polluting industries are absolutely liable to compensate for the harm caused by them to villagers in the affected area, to the soil and to the underground water and hence, they are bound to take all necessary measures to remove sludge and other pollutants lying in the affected areas.”<sup>267</sup> Similarly, in *Vellore Citizens Welfare Forum* the court—combining the polluter pays and the precautionary principles—held that “[t]he ‘Polluter Pays’ principle . . . means that the absolute liability for harm to the environment extends not only to compensate the victims of pollution but also the cost of restoring the environmental degradation. Remediation of the damaged environment is part of the process of ‘Sustainable Development’ . . . .”<sup>268</sup> After several subsequent cases following *Vellore*, Indian environmental law has adopted and established the combined polluter pays and precautionary principles.<sup>269</sup>

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263. Shramanad Wibedi, *A Critical Analysis of Strict and Absolute Liability*, <http://www.legalservicesindia.com/article/2155/Strict-and-Absolute-Liability.html> (last visited Feb. 7, 2019).

264. Public Liability Insurance Act, No. 6 of 1991, INDIA CODE (1992).

265. *M.C. Mehta v. Union of India*, (1987) 1 SCR 819.

266. *See M.C. Mehta v. Union of India*, (1987) 1 SCR 819 (recognizing the “Polluter Pays” principle for the first time in India, establishing that anyone causing harm to the environment faces strict liability); *see, e.g., M.C. Mehta v. Kamal Nath*, (1997) 1 SCC 388 (India) (arguing that the “Polluter Pays” principle has been established as the law of the land and that violators face “absolute liability” to those that suffer harm and also for the costs of restoring environmental loss through “sustainable development” efforts).

267. *Indian Council for Enviro-Legal Action v. Union of India*, AIR 1996 SC 1446.

268. *Vellore Citizens Welfare Forum v. Union of India*, 1996 AIR SC 2715.

269. *Research Foundation for Science Technology National Resource Policy v. Union of India*, (2005) 13 SCC 186; *Andhra Pradesh Pollution Control Board v. M.V. Nayudu*, (1999) 2 SCC 718 (India); *Indian Council for Enviro-Legal Action v. Union of India*, AIR 1996 SC 1446.

In yet another development, the Court introduced the public trust doctrine for the protection of natural resources.<sup>270</sup> The doctrine, which impresses upon the State a duty to protect natural resources for the enjoyment of the public rather than lending it for private persons or commercial interests, envisages the State as a trustee who holds these resources for the beneficiary.<sup>271</sup> The public trust doctrine has been applied in the conservation of a river, and later to several other natural resources.<sup>272</sup> In many cases, the law-making role of the courts has filled the gaps in legislation. However, this active judicial role is against the principle of the separation of powers and is seen as an intrusion on legislature's powers.<sup>273</sup> Yet, this activism has created several human rights—some from already existing rights and some new—and reminded the State of its public duty, holding the State accountable to the people.

#### IV. FEMINIST ANALYSIS OF THE RIGHT TO ENVIRONMENT IN INDIA

This section examines the right to a clean and safe environment in India from a gendered perspective. As explained in previous sections, the right to a clean and safe environment is considered an essential part of the right to life—a fundamental right guaranteed by the Constitution. It should be noted that there are no clear judicial decisions on the parameters defining a clean and safe environment. This right to a clean and safe environment is not confined to any specific gender or species because environmental degradation affects all living organisms. However, there are some individuals who are affected more than others due to their closer interactions with the environment. This section aims to explore the right to a clean and safe environment through a woman's eye. The water and sanitation sectors will act as the means to understanding and examining this right. These sectors are intimately related to feminist issues, because none of these rights—the right to a clean and safe environment, water, and sanitation—have received legislative recognition.

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270. M.C. Mehta v. Kamal Nath, (1996) 1 SCC 388 (India).

271. Paul A. Barresi, *Mobilizing the Public Trust Doctrine in Support of Publicly Owned Forests as Carbon Dioxide Sinks in India and the United States*, 23 COLO. J. INT'L L. & POL'Y 39, 57 (2012).

272. M.C. Mehta v. Kamal Nath, (1996) 1 SCC 388 (India).

273. Rehan Abeyratne & Didson Misri, *Separation of Powers and the Potential for Constitutional Dialogue in India*, 5 J. INT'L & COMP. L. 363, 373 (2018).

*A. Water*

## 1. Human Right to Water

In India, water—like the environment as a whole—is recognized as essential to the right to life.<sup>274</sup> Several international, regional, and national instruments have recognized the right to water. Internationally, this right has been strengthened explicitly by the United Nations High Commission for Refugees General Comment 15.<sup>275</sup> Although no international human rights treaties—except the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW)<sup>276</sup> and Convention on the Rights of the Child (CRC)<sup>277</sup>—explicitly mentions the right to water, the status of water as a derivative right remains intact.<sup>278</sup> As a derivative right, water is an essential right derived from or interconnected to other rights like health, life, food, and housing.<sup>279</sup>

At the international level, Article 6 of the ICCPR provides that everyone has an inherent right to life which cannot be deprived arbitrarily.<sup>280</sup> It follows, then, that the non-discrimination provision includes the right to water, being closely linked to the right to life. Articles 11 and 12 of ICESCR also underline the essential status of water. Article 11 recognizes the right to an adequate standard of living, including: adequate food, clothing, housing, and the opportunity to experience the continuous improvement of one's living conditions.<sup>281</sup> Similarly, under Article 12, states are obligated to adopt necessary measures for the progressive realization of these rights, which include the enjoyment of the highest standard of physical and mental health.<sup>282</sup> The right to water, implied in these convention rights, must also share human right status.

However, the CEDAW explicitly recognizes water as a right which every state is bound to provide and ensure to all women. This Convention for the protection of women and their rights requires member states to eliminate

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274. *Attakoya Thangal v. Union of India*, AIR 1990 (Kerala) 321; *Kumar v. State of Bihar*, (1991) 1 SCR 5 (India).

275. U.N. Comm. on Economic, Social and Cultural Rights, General Comment No. 15: The Right to Water, ¶¶ 1,4, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003) [hereinafter General Comment 15].

276. Convention on the Elimination of All Forms of Discrimination Against Women art. 14(h), Dec. 18, 1979, 34 U.N.T.S. 180.

277. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

278. Stephen C. McCaffrey, *Human Right to Water*, 5 GEO. INT'L ENVTL. L. REV. 1, 7, 12 (1992).

279. Amanda Cahill, *The Human Right to Water—A Right of Unique Status: The Legal Status and Normative Content of the Right to Water*, 9 INT'L J. HUM. RTS. 389, 391 (2005).

280. International Covenant on Civil and Political Rights, *supra* note 2, at art. 6

281. ICESCR, *supra* note 3, at art. 11.

282. *Id.* at art. 12.

discrimination against women.<sup>283</sup> The states shall consider and address the particular problems that rural women face and adopt appropriate measures to eliminate all discrimination against women; this ensures that women have adequate access to, among other things, health care facilities, education, and adequate living conditions—particularly sanitation, water supply, and housing.<sup>284</sup> Recognizing this duty to provide access to clean water has been regarded as a step to ease the burden on women as water-collectors in third-world countries where they face several hardships in exercising this right.<sup>285</sup>

In 2010, the United Nations General Assembly established the right to safe and clean water as a human right essential for the full enjoyment of life and all human rights.<sup>286</sup> The General Assembly called upon member states and international organizations to provide financial resources and support capacity-building and technology-transfer endeavors through international assistance and cooperation—with particular attention given to developing countries—in order to scale up efforts to provide safe, clean, accessible, and affordable drinking water and sanitation for all.<sup>287</sup>

General Comment 15 stresses everyone’s human right to safe, adequate, physically accessible, and affordable water for personal and domestic use.<sup>288</sup> The right to water, which contains both “freedoms and entitlements,” requires states to ensure that everyone enjoys this right without discrimination based on “race, colour, sex, age, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), sexual orientation and civil, political, social or other status.”<sup>289</sup> While the right to maintain access to existing water supplies and the right to be free from arbitrary interference form freedoms, the right to a system of water supply and management that provides equal opportunity to enjoy it constitutes an entitlement.<sup>290</sup> Water, which is to be treated more as a social and cultural good than an economic good, must be consistently provided to all.<sup>291</sup> This means that actualizing these rights considers the special needs of individuals who have traditionally faced discrimination in exercising their rights, including: women, children,

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283. Convention on the Elimination of All Forms of Discrimination Against Women, *supra* note 276, at arts. 1–2.

284. *Id.* at art. 14.

285. KNUT BOURQUAIN, FRESHWATER ACCESS FROM A HUMAN RIGHTS PERSPECTIVE: A CHALLENGE TO INTERNATIONAL WATER AND HUMAN RIGHTS LAW 123 (2008).

286. G.A. Res. 64/292, The Human Right to Water and Sanitation (July 28, 2010).

287. *Id.*

288. General Comment 15, *supra* note 275, ¶ 2.

289. *Id.* ¶ 13.

290. *Id.* ¶ 10.

291. *Id.* ¶ 11.



minorities, indigenous people, refugees, asylum-seekers, internally displaced persons, migrant workers, prisoners, and detainees.<sup>292</sup>

The states are obligated to “respect, protect and fulfill” equal rights to a water supply and services, as well as ensure non-discrimination.<sup>293</sup> This obligation requires states to refrain from interfering with the enjoyment of this right.<sup>294</sup> This means that the state is obligated to protect water users from third-party interference.<sup>295</sup> Hence this right not only makes the state duty-bound to protect water users’ rights from its own activities, but also makes it responsible for overseeing the activities of other third-parties. Combined, this ensures that the right to water is a collective responsibility of state and non-state actors involved in distribution, control, and management of water resources.

The state should not only respect and protect this right, but also fulfill its obligations to ensure this right for citizens. This duty includes “the obligations to facilitate, promote and provide.”<sup>296</sup> The obligatory language envisions the state taking positive measures to assist in the enjoyment of this right, improving awareness of the use and conservation of water, and adopting necessary legislative and policy measures for recognizing and implementing the right to water on a national level.<sup>297</sup>

Thus, the human right to water is recognized on an international level as a right derived from other rights. The right to water is specifically recognized for its significance to the enjoyment of the right to life, while other essential rights—like the right to food and the right to health—have independent existence from the right to life.<sup>298</sup> Clearly, “there is no right to the single most important resource necessary to satisfy the human rights more explicitly guaranteed by the world’s primary human rights declarations and covenants.”<sup>299</sup> Considering the significance of water in everyday life and its impacts on life, livelihood, and health, water has received significant attention from a number of nations worldwide.<sup>300</sup>

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292. *Id.* ¶ 16.

293. *Id.* ¶ 20.

294. *Id.* ¶ 21.

295. *Id.* ¶ 23. Third parties can include individuals, groups, corporations, or any public bodies. *Id.*

296. *Id.* ¶ 25.

297. *Id.* ¶ 26.

298. Peter H. Gleick, *The Human Right to Water*, 1 WATER POL’Y 487, 490 (1998).

299. *Id.* at 493.

300. *Id.* at 489–90 (“There is an extensive body of covenants and international agreements formally identifying and declaring a range of human rights.”).

## 2. Human Right to Water in India

Several nations have recognized and implemented the human right to water.<sup>301</sup> South Africa has an elaborate provision on the right to water, which its Constitution explicitly mentions.<sup>302</sup> This provision places a duty on the State to adopt necessary measures to implement the right to water.<sup>303</sup> While India has developed human-rights jurisprudence that has influenced several other developing countries, the right to water is without legislative reference. Instead, as described above, the judiciary created the right as being inferred from the right to life, an explicit right under Article 21 of the Constitution.<sup>304</sup>

There is no legislative framework for the right to water, and the existing legal acknowledgement of the right has not yet been codified into law.<sup>305</sup> The Government of India Act 1935, which granted the States power over water supply and drainage, influenced the current water-law framework.<sup>306</sup> The Constitution grants the states power over waters within the states, but retains the power over interstate rivers and river disputes for the central government.<sup>307</sup> A decentralization drive, initiated under the 73rd and 74th Amendment Act, provided additional power to local governments and panchayat raj (self-government) institutions to control water supply and drainage.<sup>308</sup> Together, these provisions have adopted a duty-based approach rather than a rights-based approach to fulfill a demand-driven water supply. The right to water has neither been recognized nor stressed through these constitutional provisions.

Nevertheless, recent water policies have recognized this rights-focused approach, which, due to their nonbinding nature, remain only a policy statement. The National Water Policy of 2012 acknowledged the fundamental nature of water and its significance and contribution to life and livelihood, and called for a national framework to manage and conserve the

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301. See U.N. OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS, FACT SHEET NO. 35: THE RIGHT TO WATER, at 7, 40, 47 (2010) (noting that nations such as Bolivia, Cambodia, Columbia, India, Eritrea, Ethiopia, Gambia, South Africa, and Uganda have all recognized the human right to water).

302. S. AFR. CONST., 1996, sec. 27(1)(b).

303. *Id.*; see generally David Takacs, *South Africa and the Human Right to Water: Equity, Ecology, and the Public Trust Doctrine*, 34 BERKELEY J. INT'L L. 55 (2016) (discussing South Africa's recognition of a right to water); Anél du Plessis, *A Government in Deep Water? Some Thoughts on the State's Duties in Relation to Water Arising from South Africa's Bill of Rights*, 19 REV. EUROPEAN COMMUNITY & INT'L ENVTL. L. 316 (2010) (discussing South Africa's recognition of a right to water).

304. Philippe Cullet, *Water Sector Reforms and Courts in India Lessons from the Evolving Case Law*, 19 REV. OF EUROPEAN COMMUNITY & INT'L ENVTL. L. 328, 329 (2010).

305. *Id.*

306. Government of India Act 1935, § 130-4 (Eng.).

307. INDIA CONST. art. 246, sched. 7, list II § 17; *id.* at art. 246, sched. 7, list I § 56.

308. *Id.* at art. 243G, sched. 11 § 3; *id.* at art. 243W, sched. 12 § 5.

country's water resources.<sup>309</sup> The latest draft, the National Water Framework Bill, explicitly highlights that water is a fundamental right which guarantees that “[e]very person has a right to sufficient quantity of safe water for life within easy reach of the household regardless of, among others, caste, creed, religion, community, class, gender, age, disability, economic status, land ownership and place of residence.”<sup>310</sup>

The right to water has also been derived by judicial pronouncements by the Indian Supreme Court and the High Courts of various states.<sup>311</sup> Since the early 1990s, various judgments have highlighted this right—like the right to a clean and safe environment—as a prerequisite for, or an essential component of, the right to life. In many cases, the courts have reminded the states of their duty to supply water and safeguard public health.<sup>312</sup> Surprisingly, this rights-duty reminder remains the crux of all judgments without any reference to the specific issues that women face. This is further complicated in the groundwater sector where the land-water nexus determines access and control over the resources.<sup>313</sup>

### 3. Gender Issues in Water

Scarcity and water quality issues, as well as sanitation, have significant impacts on the lives and livelihood choices of people living all over the world. Currently, it is estimated that more than two billion people lack safe drinking water sources and that by 2050 at least one in four people are likely to live in a country affected by severe water scarcity.<sup>314</sup> In those houses

309. MINISTRY OF WATER RES., GOV'T OF INDIA, NATIONAL WATER POLICY 1.1 (2012).

310. MINISTRY OF JALSHAKTI, GOV'T OF INDIA, DRAFT NATIONAL WATER FRAMEWORK BILL [DRAFT] 7 (2016).

311. See, e.g., F.K Hussain v. Union of India, AIR 1990 (Ker) 321 (discussing the right to water in India); Venkatagiriappa v. Karnataka Electricity Bd., (1999) 4 KarLJ 482 (India) (discussing the right to water in India); Kumar v. State of Bihar, (1991) 1 SCR 5 (India) (discussing the right to water in India); Narmada Bachao Andolan v. Union of India, (2000) 10 SCC 664, ¶¶ 1–4 (discussing the right to water in India).

312. Vishala Kochi Kudivella v. State of Kerala, (2006) 1 KLT 919 (India).

313. CHHATRAPATI SINGH, WATER RIGHTS AND PRINCIPLES OF WATER RESOURCES MANAGEMENT 39 (1991); Marcus Meonch, *Approaches to Groundwater Management: To Control or Enable?*, ECON. & POL. WKLY., Sept. 24, 1994, at A-135 (discussing difficulties of groundwater management systems in India); Philippe Cullet, *Groundwater Law in India: Towards a Framework Ensuring Equitable Access and Aquifer Protection*, 26 J. ENVTL. L. 55, 56–57 (2014); Sujith Koonan, *Groundwater: Legal Aspects of the Plachimada Dispute*, in WATER GOVERNANCE IN MOTION: TOWARDS SOCIALLY AND ENVIRONMENTALLY SUSTAINABLE WATER LAWS 159, 169–71 (Philippe Cullet et al. eds., 2010).

314. *Goal 6: Ensure Access to Water and Sanitation for All*, <https://www.un.org/sustainabledevelopment/water-and-sanitation/> (last visited Mar. 19, 2020); UNITED NATIONS, THE SUSTAINABLE DEVELOPMENT GOALS REPORT 2019 9 (2019); UNITED NATIONS, THE UNITED NATIONS WORLD WATER DEVELOPMENT REPORT 2018: NATURE-BASED SOLUTIONS FOR WATER 13 (2018).

without access to a piped water supply, women and girls often perform the role of water collectors, as is the case in India.<sup>315</sup>

“Gendered power and hegemonic masculinities”<sup>316</sup> have always been a part of water governance.<sup>317</sup> Women face inequalities in accessing resources, the division of labor, and water governance structures.<sup>318</sup> The right to equality and non-discrimination based on caste and gender has not yet been fully implemented to realize the empowerment of women and actualization of their rights.<sup>319</sup>

Women engage in the management of water in ways that are often regulated by informal rules and arrangements that go unnoticed by the State.<sup>320</sup> When the State manages water through its formal water laws and policies, it displaces many of these customary traditional rights enjoyed by women and turn women into beneficiaries rather than right holders.<sup>321</sup> In traditional roles of drinking water security, the existing water laws do not address the specific issues that women face. Women often spend hours collecting water, thereby sacrificing their health, access to schools, and other societal benefits.<sup>322</sup> Similarly, in irrigation-water users associations, it has been pointed out that women water users often remain as participants rather than active members.<sup>323</sup> Meinzen-Dick and Zwarteveen note that the male-dominated membership rules of water-user associations are based on property ownership, which hinders women’s access to these associations despite their active participation in water management at informal levels.<sup>324</sup>

Water policies and laws lack gender dimensions due to their universality. Women and girls have more vibrant and intimate relationships with the environment and water.<sup>325</sup> Thus, women deserve more attention due to their role in water conservation and management.

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315. Kate Darling, *A Weight for Water: An Ecological Feminist Critique of Emerging Norms and Trends in Global Water Governance*, 13 MELB. J. INT’L L. 368, 384 (2012); see Warren, *supra* note 161, at 7 (explaining that in the southern hemisphere woman do most of the water collection).

316. Margreet Z. Zwarteveen, *The Politics of Gender in Water and the Gender of Water Politics*, in *POLITICS OF WATER: A SURVEY* 184, 186 (Kai Wegerich & Jeroen Warner eds., Routledge 2010).

317. Darling, *supra* note 315, at 379.

318. Amit Mitra & Nitya Rao, *Gender, Water, and Nutrition in India: An Intersectional Perspective*, 12 WATER ALTERNATIVES 169, 169 (2019).

319. INDIA CONST. art. 14–15.

320. Lahiri-Dutt, *supra* note 5, at 276–77.

321. *Id.* at 276.

322. Caruso, *supra* note 155.

323. See Ruth Meinzen-Dick & Margreet Zwarteveen, *Gendered Participation in Water Management: Issues and Illustrations from Water Users’ Associations in South Asia*, 15 AGRIC. & HUM. VALUES 337, 339 (1998) (discussing the gender roles within irrigation systems).

324. *Id.* at 340.

325. See Caruso, *supra* note 155 (describing the hours women spend dealing with water and their knowledge of the crisis).

## V. CONCLUSION

When it comes to actualizing rights, the environment and gender are interrelated. The right to a clean and safe environment has been recognized as a human right in many international treaties and domestic constitutions.<sup>326</sup> However, these rights are recognized for the development and enjoyment of other human rights—especially the right to life. Therefore, the right to a clean and safe environment is a derivative right, though it is widely recognized now as an essential human right. The right to a clean and safe environment is not only a human right, but a right essential and fundamental for the existence of nature, humans, and non-human species.

To date, this discussion of environmental rights has negated the specific rights of women and their relationship with the environment. Eco-feminists have discussed subjugation of women and nature, but discussions from a legal perspective are lacking. India has an elaborate jurisprudence on the right to a clean and safe environment. This right has been discussed as being either derived from, a prerequisite to, or a part of the right to life guaranteed under Article 21 of the Constitution.<sup>327</sup> The courts have acknowledged this right by incorporating several environmental protection principles. The courts have also frequently reminded states of their duty to protect the environment. Yet these judicial interventions have not expanded their analyses of these rights to consider the specific issues that women and girls are faced with.

The right to water is also a fundamental right. Here, this right was analyzed within the context of the interrelation between women and the environment. As with the right to a clean and safe environment, the Indian courts have not mentioned the female-specific aspects of this right. Given the close relationship between women's rights with the right to a clean and safe environment and the right to water, these rights should be analyzed through the lens of women's rights. This will allow society to understand the problems that women face, highlight their contributions, and ensure equitable access, management, and control of resources.

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326. See, e.g., *Rio Declaration*, *supra* note 79, at art. 145 (stating a right to a clean environment); Art. 41, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.) (stating a right to a clean environment); HONDURAS CONSTITUTION OF 1982, art. 145 (stating a right to access water and sanitation).

327. *Subhash Kumar v. State of Bihar*, (1991) 1 SCC 598 (India).