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Pakistan

A Good Story That Can Go Awry If Shortcomings Remain Unacknowledged

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Pakistan, a country of more than 215 million people,[1] ranks high on the list of countries vulnerable to climate change.[2] Its history of and experience with environmental law litigation provide many lessons; while there is reason to celebrate certain judicial developments, it is important that litigators and observers remain cognizant of the shortcomings of the approaches currently in vogue. This chapter discusses Pakistan's experience with environmental and climate litigation while also commenting on the limitations of the current approaches.

22.1 ENVIRONMENTAL LAW LITIGATION IN PAKISTAN: THE HISTORICAL CONTEXT

Although legislation in Pakistan has contained environmental protection provisions for many years, it was not until the 1990s that Pakistan saw the emergence of far-reaching developments on environmental protection in the legislative and judicial spheres.

The Constitution of the Islamic Republic of Pakistan 1973 ('the Constitution')[3] has a separate chapter on judicially enforceable rights (dubbed

* This chapter expands on ideas already mentioned in my blog for OpenGlobalRights. Many of the themes and arguments used here have also been explored in greater detail in my article 'From Shehla Zia to Asghar Leghari: Pronouncing Unwritten Rights is More Complex Than a Celebratory Tale'. It is printed in the book *Climate Change Litigation in Asia Pacific*. See Jolene Lin and Douglas A. Kysar (eds.), *Climate Change Litigation in Asia Pacific* (Cambridge: Cambridge University Press, 2020).

[1] World Bank Data on Pakistan is available at: <https://data.worldbank.org/country/pakistan>.

[2] See Syed Muhammad Abubakar, 'Pakistan 5th Most Vulnerable Country to Climate Change, Reveals Germanwatch Report', DAWN, 16 January 2020.

[3] The Constitution is available at: <http://www.pakistani.org/pakistan/constitution/ (last accessed 23 August 2020)>..

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'Fundamental Rights')[4] that can be used to challenge executive action as well as legislation. The text of the Fundamental Rights, however, carries no express provision regarding any individual or collective right to environmental or climate protection. This gap was ultimately addressed through a judicially crafted process that began in the late 1980s and culminated in a major environmental law ruling in 1994.

Beginning in the late 1980s,[5] the Supreme Court of Pakistan opened the door to a new species of litigation called 'public interest litigation' or PIL.[6] Simply put, PIL is class action constitutional law litigation that does not require a class to come before the court – individuals can sue to address an issue relating to the 'public interest' and can identify a class being affected by the issues raised. Inspired by courts in India, PIL is characterized by relaxed standing/locus requirements for litigants approaching the court, the judicial use of a collaborative and non-adversarial approach to enforcing rights, and the liberal use of judicially created 'commissions' to gauge basic facts that are then used by the court to pass final judgment.[7] Courts use fact-finding commissions in PIL because the High Courts and the Supreme Court of Pakistan in their constitutional jurisdiction – traditionally, as a matter of practice – do not allow the presentation of evidence through, for example, witness examination in such proceedings since courts limit themselves to questions of law and not disputed issues of fact.[8]

As a result of PIL, the Supreme Court and the High Courts have progressively read the Fundamental Rights chapter in expansive ways. These readings may seem curious if one adopts a textualist approach, but they have been justified in the name of aiding vulnerable citizens by expanding the scope of rights. Article 9, which guarantees that no person shall be deprived of life or liberty save in accordance with law, has received a very broad reading and has been interpreted to include a host of other rights, among them the right to a clean and healthy environment.

[4] Articles 8 to 28 of the Constitution of the Islamic Republic of Pakistan cover the Fundamental Rights and their effect.

[5] *Benazir Bhutto* v. *Federation of Pakistan and Others* (1988) PLD 416 (SC) (Pak.).

[6] See Mansoor Hassan Khan, *Public Interest Litigation: Growth of the Concept and Its Meaning in Pakistan* (Karachi: Pakistan Law House, 1993); see also see Maryam Khan, 'Genesis and Evolution of Public Interest Litigation in the Supreme Court of Pakistan: Toward a Dynamic Theory of Judicialization' (2014) 28 *Temple International and Comparative Law Journal* 285.

[7] See Khan, 'Genesis and Evolution of Public Interest Litigation in the Supreme Court of Pakistan', above note 7 at 285.

[8] For an illustration, see *Rules and Orders of the Lahore High Court* (Lahore: Zephyr, 2005), Volume V, Rule 7, Chapter 4-J. As a matter of practice, superior courts in Pakistan will generally not get involved in issues relating to factual controversies.

The 1994 *Shehla Zia* case, in particular, is now recognized as seminal.[9] A group of residents in the capital city of Islamabad approached the Supreme Court in its original constitutional jurisdiction[10] with a PIL asking the court to declare that the construction of a proposed electricity grid station should stop. The applicants supported their claim by arguing that the Water and Power Development Authority had carried out inadequate assessments of the effects of the proposed grid station on human health and the environment. The Supreme Court used the language of Article 9, which prohibits the state from depriving a person of life or liberty save in accordance with law, to impose a positive obligation on the state and establish that the 'right to life' in the Constitution included the right to a clean and healthy environment.[11]

Over the next few years, the Supreme Court's approach was adopted by the High Courts too, as courts decided hundreds of cases where the petitioners' main claim was the 'right to a clean and healthy environment'. Many of these cases involved challenges by citizens to large-scale construction or development projects as well as challenges to the conversion of amenity plots or residential plots into commercial zones.[12] In other cases, the grievances aired went beyond a particular locality and concerned entire cities, like when a lawyer filed a PIL challenging vehicular pollution in the capital of Pakistan's largest province.[13] Other citizens challenged how the government disposed of solid waste.[14] Until 2015, the scope of PIL and the right to a clean and healthy environment was limited to cases similar to those identified above.

22.2 CLIMATE CHANGE: THE NEW CHALLENGE FOR PIL IN PAKISTAN

In 2015, Asghar Leghari,[15] an agriculturalist and member of the Lahore High Court Bar Association, approached the Lahore High Court to complain of

[9] See *Shehla Zia and Others* v. *WAPDA* (1994) PLD 693 (SC) (Pak.).

[10] Article 184(3) allows a party to invoke the original jurisdiction of the Supreme Court of Pakistan if there is a question of general public importance involved with respect to the enforcement of any of the Fundamental Rights conferred by the Constitution.

[11] See *Shehla Zia and Others* v. *WAPDA* (1994) PLD 693, 714 (SC) (Pak.).

[12] See *Ardeshir Cowasjee and 10 Others* v. *Karachi Building Control Authority and Others* (1999) SCMR 2883 (Pak.).

[13] See *Syed Mansoor Ali Shah and 4 Others* v. *Government of Punjab and 3 Others* (2007) PLD 403 (Lahore) (Pak.).

[14] See *Muhammad Yousaf* v. *Province of the Punjab* (2003) CLC 576 [Lahore] (Pak.); see also Order dated 11 December 2002 in Intra-Court Appeal No. 798/2002, titled *City District Government* v. *Muhammad Yousaf and Others* (2002) I.C.A No. 798/2002 [Lahore] (Pak.).

[15] See *Leghari* v. *Pakistan* (2015) W.P. No. 25501/2015 [Lahore High Court Green Bench] (Pak.).

inaction by the state in fighting climate change. The scope of the petition was unlike any other brought before the court. Leghari based his claim on the Pakistani Ministry of Climate Change's failure to implement the National Climate Change Policy, 2012 ('the Policy') and the Framework for Implementation of Climate Change Policy (2014–2030) ('the Framework'). Since he had invoked PIL jurisdiction, the petitioner was not only arguing that there had been a violation of his own fundamental rights but also emphasized that the broader public had been denied its rights. Hence, this claim was not about a city-wide problem – it was about a global issue affecting all Pakistani citizens and people around the world.

In its own words, the court was motivated to act to protect the fundamental rights of the citizens of Pakistan, particularly those of the vulnerable and weak segments of society who are unable to approach the court themselves.[16]

Soon after admitting the petition for regular hearing, the court set up a Climate Change Commission.[17] This twenty-one-member commission consisted of representatives of the federal and provincial governments, environmental experts, interest groups, and the petitioner's counsel.

From September 2015 to January 2018, the Climate Change Commission acted, in the court's own words, as 'the driving force in sensitizing the [federal and provincial] governments and other stakeholders regarding gravity and importance of climate change'.[18]

The Commission was tasked with ensuring the 'effective implementation of the Policy and the Framework'.[19] While the case proceeded, the court received interim and supplemental reports from the Commission, which helped it gauge progress while also ensuring that all parties cooperated.

The Commission worked as a unit as well as in smaller working groups to achieve the goals identified under Priority Actions provided under the Framework and the Policy. As per the judicial record, the Commission, over a two-year period, helped achieve 66 per cent of the Framework's Priority Actions.[20] The Commission also helped design a framework for Climate Smart projects and a method to evaluate them.[21] It worked with a provincial government to develop a Draft Water Policy as well as a Draft Climate Change Policy.[22] The work of the Commission also led all relevant provincial

[16] Ibid. at ¶12.
[17] Appointed through the Orders of 14 September 2015, ibid. at n14.
[18] Ibid. at n14, ¶19.
[19] Ibid. at ¶13.
[20] See ibid. at ¶19.
[21] See ibid. at ¶16.
[22] See ibid. at ¶ 18.

departments to identify climate change focal points. Plans were also set in place to ensure that climate change concerns are reflected in future growth and development plans.

Another important aspect of the *Leghari* case was that the court kept it pending as a rolling mandamus or continuing review. This is important because there may not always be a clearly identifiable endpoint in climate litigation. A 'rolling review' or a continuing mandamus is, by no means, the norm in Pakistan. The last order in this case was passed in January 2018, which consigned the matter to the record instead of closing it as a finally adjudicated matter. With its last order, the court took another innovative step by setting up a six-member Standing Committee – composed of select members of the Commission – that can approach the court 'for appropriate orders for enforcement of the fundamental rights of the people in the context of climate change, if and when required'.[23]

Also notable is the court's recognition of environmental justice as distinct from climate change matters – perhaps no one could have predicted at the time of the *Shehla Zia* decision in 1994 that this would be the form that the jurisprudence would take. In the court's own language, environmental justice 'was largely localized and limited to our [national] ecosystems and biodiversity'.[24] Climate justice, on the other hand, calls for a new approach that recognizes the shift 'from a lineal local environmental issue to a more complex global problem' where 'the identity of the polluter is not clearly ascertainable and by and large falls outside the national jurisdiction'.[25] Recognizing that countries face a choice between mitigation or adaptation, the court emphasized the importance of the latter.[26]

The court noted that climate change is not confined to 'local geographic issues'.[27] The court was emphatic that Pakistan faces immense challenges as a result of climate change, including, but not limited to, threats to the environment, ecology, economy, and society. Hence, the scope of PIL now covers what the court called climate justice.

Leghari is as seminal a case as *Shehla Zia*, which first opened the door to the use of PIL to protect the environment. There is no denying that the potential scope of future public interest litigation petitions has broadened.

[23] Ibid. at ¶27.
[24] Ibid. at ¶20.
[25] Ibid. at ¶21.
[26] See ibid.
[27] Ibid. at ¶20.

22.3 THE LIMITATIONS OF CLIMATE CHANGE PIL

PIL in the High Court and the Supreme Court is high impact insofar as it grabs headlines and allows petitioners, activists, and arguably even judges to feel good about themselves; the high rhetoric of this type of PIL invokes the language of the Constitution while promising protections for the general public and criticizing state inaction. Yet this cannot be seen as a long-term sustainable panacea. Courts can open the door for litigants, but high rhetoric without substantive action cannot solve climate change issues that affect people on the ground. To the extent that courts encourage and aid this high rhetoric, while knowing that the state cannot fulfil the promises of this rhetoric, is unfortunate, to say the least. Constitutional courts tasked with deciding questions of law – and not fact – are not and cannot be the real or final battleground for climate change.

The Supreme Court and the High Courts have also been reluctant to appoint scientists as experts to assist them in climate change or even environmental law litigation. This is the unfortunate result of a common outlook according to which senior (almost always male) lawyers are seen as experts on all things related to environmental law and climate change. Scientific expertise is important not only because it lends credibility to court verdicts but also because it is necessary from a strategic perspective: if superior courts don't use scientists as experts then this will, indeed already does, send a signal to lower forums acting as triers of fact that they do not need to appoint scientists as experts either. In a system where powerful individuals and corporations hire the most expensive lawyers and experts to defend them before the courts that conduct trials of first instance, the courts of magistrates and the environmental tribunal lack capacity and expertise. Superior courts can help these lower courts hold wrongdoers accountable by encouraging them to appoint scientists as experts. If triers of fact, such as statutory tribunals vested with the authority to decide questions of fact, remain ineffective, climate change litigation will continue to suffer a big setback. Superior courts, as well as tribunals exercising statutory jurisdiction, will need to acknowledge that their own expertise in the science involved in climate change litigation can be limited and, as a result, they will need to be more open to appointing climate change experts (i.e., scientists) – not just lawyers – to ensure that solutions are viable and have purchase across the board.

The High Courts, apart from the constitutional jurisdiction in which they hear PIL matters, also exercise appellate jurisdiction and hear statutory appeals of specific fact-based questions under the Environmental Protection Act 1997. The treatment of statutory appeals and the time they take to be resolved is

vastly different from the high-profile indulgence granted to claims lodged in the courts' constitutional (as opposed to appellate) jurisdiction.[28] This is troubling and must be addressed by the High Courts that hear appeals from decisions of the lower forum, that is, the Environmental Tribunal. While specific fact-based questions involving liability of individual parties might be less glamorous compared to constitutional law questions involving lofty promises, individuals, and entities contributing to climate change can only be held accountable after detailed evidence is examined and courts rule on the issues involved. It will hurt the courts' legitimacy if they cannot counter the perception that they are slow to address statutory appeals in environmental law; the meaty cases where issues of fact, evidence and specific liability are involved. This is of course as opposed to PIL jurisprudence that, in the eyes of many, is used to lift the public perception of courts while trying to make the executive look inept.

There is no denying that the executive in Pakistan has yawning gaps in what it promises and what it can deliver – but is judicial activism the answer? If every instance of executive action (or even inaction) is mired in litigation flowing from PIL, it will damage policymaking and fair accountability and is likely to result in the executive perpetually second guessing itself. Courts should therefore steer clear of policymaking – celebrating judicial activism is more likely to hurt rather than promote democratic accountability.

There is no doubt about the gains that are possible when courts are seen as a platform that facilitates dialogue between the state and its citizenry.[29] However, activists also need to remember that direct engagement with the executive as opposed to simply filing constitutional petitions is more likely to be a strong bet for meaningful change. For instance, Pakistan passed the Climate Change Act in the year 2017, which envisages a Climate Change Council[30] as well as a Climate Change Authority.[31] The two bodies are tasked with ensuring that the country has, among other things, policies regarding adaptation as well as mitigation. The substance of these policies has still not been shared with the public – even if such policies exist in some bureaucrat's locked drawer. It goes without saying that, in developing the substance of

[28] See Waqqas Ahmad Mir, 'From Shehla Zia to Asghar Leghari: Pronouncing Unwritten Rights is More Complex Than a Celebratory Tale', in Jolene Lin and Douglas A. Kysar (eds.), *Climate Change Litigation in Asia Pacific* (Cambridge: Cambridge University Press, 2020).

[29] See Paula R. Newberg, *Judging the State: Courts and Constitutional Politics in Pakistan* (Cambridge: Cambridge University Press, 1995), p. 13.

[30] See Pakistan Climate Change Act 2017, 424(2017)/Ex. Gaz., §3 (2017).

[31] See ibid. at §5.

these policies, activist citizens will need to work with the government instead of asking courts to fill in the gaps. While courts can indeed direct that the relevant meetings of the forums identified by Climate Change Act 2017 take place, the activist citizens will need to do the non-glamorous job of working with the government to ensure that policies meet the needs of the vulnerable communities; unlike high-profile constitutional cases, this is non-glamorous work, but it is necessary for long-term sustainability.

Activist litigators appearing for vulnerable communities and rights groups face two major challenges. One is the extreme reluctance of courts in Pakistan to recognize the law of tort, hence rendering next to impossible lawsuits filed against powerful corporations in the hope of recovering tortious damages. In a world in which corporations exert enormous power, muscle, and footprint, activist litigators need to band together to ensure that corporations feel the heat. Although the Punjab Environmental Protection Act 1997[32] envisages the payment of compensation to victims and also talks about sums to be paid by a wrongdoer to restore the environment to its state prior to damage, these provisions are rarely enforced. Powerful actors accused of wrongdoing use delays endemic to the justice system to defeat the letter and the spirit of these provisions. This is one area where activist litigators must push courts to start enforcing the law without delay. The second challenge stems from the nature of PIL; it only allows state action or inaction to be questioned by the High Courts and the Supreme Court. Activist litigators, in order to hold corporations accountable, will therefore, as one option, need to convince the High Courts and Supreme Court to read the Constitution broadly enough to subject private parties to PIL.[33] There cannot, however, be long-term accountability for corporations unless environmental tribunals increase their capacity and expertise and start enforcing provisions that allow corporations to be fined or required to pay compensation to victims.

Empowering institutions (just like communities) needs to be at the top of Pakistan's reform agenda. The institutions that are in dire need of reform include the executive-controlled environmental protection agencies in provinces and the federal capital and forums (such as magistrates' courts and environmental tribunals) that try issues of fact related to environmental and

[32] See ibid. at §17. Provinces have their own environmental protection legislation. The Punjab law is available at: <http://punjablaws.gov.pk/laws/2192a.html>.

[33] See *Pakistan Olympic Association* v. *Nadeem Aftab Sindhu* (2019) SCMR 221 (SC) (Pak.) and *Human Rights Commission of Pakistan* v. *Pakistan* (2009) PLD 507 (SC) (Pak.) for case law that suggests that courts are open to this possibility.

climate change matters. It is imperative that Pakistan's institutions – as well as those approaching these institutions – recognize that the challenges they face will only become more formidable in the coming years. In order to change things for the better, the shortcomings of current approaches to climate and environmental litigation must be acknowledged.

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