

Environmental Constitutionalism:

The Role of Constitutional Courts in Rendering Environmental Justice

“The fate of the Creation is the fate of the humanity”

E.O. Wilson

- Environmental issues are persistent, pervasive and pernicious.
 - The Constitution of Pakistan is not inert but a living document which evolves and grows with time.
 - Constitutional Courts have a central role to play in tackling environmental issues while enforcing and interpreting the fundamental rights enshrined in the Constitution.
 - Constitutionalization of environmental rights means looking at fundamental rights as enshrined in the Constitution through the environmental lense.
 - Post Burbhan Declaration 2012 (The Conference declared a “Common Vision on Environment for the South Asian Judiciaries), Lahore High Court established the Green Benches.
 - A Green single bench and Green division bench at the principal seat.
 - A senior most judge at the benches to grace the court as Green single bench and two senior most judges at the benches to grace the court as Green division bench.
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- **Judicial Activism in Developing Environmental Jurisprudence**
 - The most significant feature in the environmental landscape of Pakistan is the judicial activism that has responded to public interest environmental litigation.

- This has been facilitated by Article 199 of the Constitution of Pakistan which confers writ jurisdiction on the High Courts to enforce Fundamental Rights and Article 184 (3) which confers jurisdiction on the Supreme Court to enforce Fundamental Rights of “public importance”.
- These Article have been frequently invoke for the suo moto jurisdiction of the Supreme Court and the High Courts (the “superior courts”).
- The superior courts have been liberally responsive to environmental issues and complaints, including on the jurisdictional issue to locus standi, the main body of environmental jurisprudence in Pakistan has been laid down by the Supreme Court and the High Courts.

- **Landmark Green Precedents.**

- In the landmark decision in **Shehla Zia vs. WAPDA**¹, the Supreme Court of Pakistan held that the right to a clean and healthy environment was part of the Fundamental Right to dignity provided in Article 14. In this case Supreme Court also introduced the precautionary principle of environmental law, with specific reference to its inclusion in the Rio Declaration on Environment and development into Pakistani jurisprudence.
- In the **Khewra Mine Case**² the petitioners sought enforcement to the right of the residents to have clean and unpolluted water against coal mining activities in an upstream area. The Supreme Court affirmed its expansive approach to Article 184(3) and stated that ‘the right to have unpolluted water is the right every person wherever he lives.

¹ PLD 1994 Supreme Court 693

² 1994 SCMR 2061

- In dealing with noise pollution, the Supreme Court in '**Islamuddin case**'³, restrained the defendants from creating public nuisance in their workshops, stating that even noise made in carrying on a lawful trade, if injurious to the comfort of the community, is a public nuisance.
- The Supreme Court took **Suo Motu**⁴ **action** in Islamabad Chalets and Pir Sohawa Valley Villas, restraining the construction of chalets and villas situated at a distance of two kilometres of the Margalla Hills, where the housing scheme was launched. The housing scheme in question would have had a direct bearing on the eco-system of the Margalla Hills.
- The Supreme Court also took **suo motu action in the New Murree Project**⁵ which posed grave environmental hazard as its initiation would have destroyed 5,000 acres of forest. The project was ultimately disbanded and the court reiterated the global environmental law principles of intergenerational equity as well as sustainable development in order to achieve goal of healthy environment, not only for present population but also for future generations.
- In the **IMAX Cinema Case**⁶ the Supreme Court opined that conversion of a public park into shopping mall and setting upto of the IMAZ cinema without observing the codal formalities of the legal framework in particular non filing of the initial environmental examination was grossly illegal and was an offence under the Act.
- Recently in the **Canal Road Expansion case**⁷, the question before the Supreme Court was the environmental impact of widening the 14 km road along the banks of the canal that runs through Lahore. It was contended that not merely would the scheme devastate the green belt along both sides of the canal, but would even fail to achieve its stated objective of

³ PLD 2004 SC 633

⁴ SUo Motu case No.13 of 2005, Report 2005-2006, SC of Pakistan, Golden Jubilee Edition, 106

⁵ 2010 SCMR 361

⁶ 2006 SCMR 1202

⁷ 2011 SCMR 1743

improving traffic flow in order to reduce traffic congestion in the city. The Court while holding that green belt around both sides of the canal was a public trust resource and hence could not be converted into private or any other use also observed that widening of the road was infact a public purpose and as minimum area was being affected and project conformed with the Act thus the Doctrine of Public Trust, in circumstances, could not be said to have been compromised.

➤ **SUO MOTU CASE NO.13 OF 2010: In the matter of Contaminated Water to Rawalpindi from Rawal Dam Supreme Court of Pakistan 2013 S C M R 591**

- Right to clean drinking water
- Discharge of solid waste and liquid into Rawal Lake
- Government directed to take immediate steps for installation of water treatment plant

➤ **Syed Mansoor Ali Shah v. Government of Punjab Lahore High Court PLD 2007 Lahore 403**

- Air pollution caused by vehicular emissions
- Court constituted a Commission to study and analyse the increasing problem of vehicular air pollution and formulate a solution
- Perseverance and protection of dignity of man was fundamental right of citizens which was guaranteed under Art.14 of the Constitution
- State functionaries were bound by contractual obligations under International Treaties to take effective measures for elimination of vehicular pollution.
- Measures and recommendations for control and maintenance of vehicles, air quality and fuel standards, capacity building and monitoring/inspection stations were enumerated.

- In the recent **Signal Free Corridor Case**⁸, a project which would have converted a stretch of 7 km of road into a signal free high speed expressway, a full bench of Lahore High Court declared the same as illegal and stopped the authority from starting any such new development project. The court while examining the integrality of environmental justice to fundamental rights opined that the corpus of environmental laws have a singular purpose of protecting life and nature including the international Environmental Principles of sustainable development, inter and intra-generational equity and public trust doctrine.
- **Muhammad Ayayz v. Government of Punjab Lahore High Court 2017 CLD 772**
 - Case relating to Noise Pollution
 - Application of Precautionary Principle
 - The state and its officers must employ measures to achieve environmental justice and preserve the environment
- **Muhammad Shahid v. Punjab Environmental Tribunal (Poultry Farm Case) Lahore High Court WP No.74381 of 2017 Decided 18.01.2018**
 - Water Justice
 - Adverse Impact on the Environment, first question to be asked
- **Maple Leaf Cement Factory Case, Lahore High Court, Case No: W. P. No.115949/2017 Decided: December, 2017**
 - Sustainable Development creates a balance between development and environmental protection and conservation.
 - The central theme of sustainable development is, the best interpretative tool for the actualization of the Environmental laws.
 - Precautionary Principle
 - Principle of “In Dubio Pro Nautra”
- **What do these Green Decisions Indicate?**
 - The Constitutional Courts in Pakistan have taken a broad and expansive view of their jurisdiction in relation to environmental issues.

⁸ PLD 2015 Lahore 522. P.S. Judgment was appealed against and was partly allowed by Supreme Court in the case reported as 2015 SCMR 1739.

- Courts have recognized that there can be multiple stresses on the environment and there is sometimes a dynamic tension involved, which may mean that it may not be possible to redress one without to a certain extent leaving others unaddressed.
- The aim is not necessarily a perfect environment but a balanced one and the above referred judgments show that in such cases, the judicial approach has been appropriately nuanced
- Courts have not held any environmental issue to be beyond their jurisdiction, and in displaying a ready willingness to take up all sorts of matters, have steadily pushed ahead along the path opened up in Shehla Zia case.
- Challenges to the environment do not end with drafting appropriate laws, policies and judgments. In fact, they begin with these. To transform these laws and policies into effective implementation requires a massive commitment to the capacity building of the courts rendering environmental justice especially the tribunals.
- Without this, any effort will have little chance of success. The support of the courts, media and civil society organizations should also be encouraged in the region.

➤ **Gender and Environment**

“Advancing gender equality may be one of the best ways of saving the environment, and countering the dangers of overcrowding and other adversities associated with population pressure. The voice of women is critically important for the world’s future – not just for women’s future.”

Amartya Sen

- “The gender dimension of climate change and its impacts are likely to affect men and women differently.”
14th Conference of the Parties in Poznan, Poland UNFCCC’s Secretariat, December, 2008
- The secretariat urged formulation of “gender inclusive policy measures to address climate change” and stressed that women

“are important actors” and “agents of change” in coping and adaptation.

- The Beijing Declaration and Platform for Action identified three strategic objectives in the critical area of women and the environment:
 - Involve women actively in environmental decision-making at all levels.
 - Integrate gender concerns and perspectives in policies and programmes for sustainable development.
 - Strengthen or establish mechanisms at the national, regional and international levels to assess the impact of development and environmental policies on women.
- **Climate change litigation: a fairly new phenomenon.**
 - The existing environmental jurisprudence has to be fashioned to meet the needs of something more urgent and overpowering i.e. Climate Change.
 - From Environmental justice we need to move to Climate Change Justice.
 - Need to ensure that issues of climate change are dealt with in a more proactive and robust manner.
 - Climate Change is a defining challenge of our time and has led to dramatic alterations in our planet’s climate system. For Pakistan, these climatic variations have primarily resulted in heavy floods and droughts, landslides and glacial lake outbursts severely affecting these most vulnerable and resource poor communities.
 - One a legal and constitutional plan this is a clarion call for the protection of fundamental rights of the citizens of Pakistan, in particular, the vulnerable and weak segments of the society.

- Pakistan ranks 22nd in the Climate Change Vulnerability Index 2016 (CCVI).
- The main objectives of Pakistan's Climate Change Policy 2012 include:
 1. To pursue sustained economic growth by appropriately addressing the challenge of climate change;
 2. To integrate climate change policy with other interrelated national policies;
 3. To focus on pro-poor gender sensitive adaptation while also promoting mitigation to the extent possible in a cost-effective manner;
 4. To ensure water security, food security and energy security of the country in the face of the challenges posed by climate change;
 5. To minimize the risks arising from the expected increase in frequency and intensity of extreme weather events such as floods, droughts and tropical storms;
 6. To strengthen inter-ministerial decision making and coordination mechanisms on climate change;
 7. To facilitate effective use of the opportunities, particularly financial, available both nationally and internationally;
 8. To foster the development of appropriate economic incentive to encourage public and private sector investment in adaptation measures;
 9. To enhance the awareness, skill and institutional capacity of relevant stakeholders;
 10. To promote conservation of national resources and long term sustainability.

➤ **Judicial Innovation and Climate Justice, “The Asghar Leghari Case”,
Lahore High Court**

- PIL petition by a farmer against Governmental inaction regarding Climate Change
- Judicial Leadership: Climate Change Orders (CCOs)
- Catalyst to mobilize government machinery regarding Climate Change.
- Major Developments made through CCOs:
 - Climate Change Focal Persons
 - Climate Change Commission (CCC)
- CCC identified priority Adaptation Measures to be implemented in short span of time
- Public Awareness and Sensitization regarding Climate Change
- Capacity building of relevant personnel of Government
- Funding Related Issues
- National Water Policy and Provincial Water Policy