

Environmental and Climate Justice - A perspective from Pakistan

Remarks delivered by Justice Syed Mansoor Ali Shah Judge, Supreme Court of Pakistan Islamabad

Irum Ahsan, a friend, from the Asian Development Bank (ADB) reached out to me when I was the Chief Justice of the Lahore High Court and asked whether the Court would be interested to host an environmental/climate change colloquium co-sponsored by UNEP. I loved the idea and was on a conference call with the organizers within a week. I was thrilled at the idea of hosting a world class colloquium attracting the best human resource on environment and climate change to Lahore, a subject that is perhaps Pakistan's most fundamental governance and security issue. I wanted the judiciary to take a head start on climate change.

Thanks to UNEP and ADB for bringing these wonderful people to this beautiful and historical city of Lahore, and to Pakistan. I am honoured that we have amongst us a dazzling assemblage of an illustrious group of climate and environmental experts and some of them have been good friends over the years. Elizabeth Mrema, Prof John Knox, Lord Carnwath, Prof James May, Antonio Oposa, Justice Brian Preston, Prof Ben Boer, Justice Antonio Benjamin, Prof Denise Antolini, Prof Erin Daly, Marlene Oliver, Justice Dato Sri Azhar Muhammed, Sumudu Atapattu, Judge Fleur Kingham, Prof Qin Tianbao, Andy Riane, and Nils Henrick Rolf Ring.

Let me also say that during the run up to the colloquium I went through a personal change, thankfully not climate change. I was elevated to the Supreme Court of Pakistan and our new Chief Justice, Justice Yawar Ali, held up the torch and kept the fire burning along with the amazing dream team of green judges of the court: Justice Ayesha A. Malik, Justice Ali Baqir Najafi, Justice Jawad Hassan, and from the District Judiciary: Judge Mahrukh, DG, PJA; Judge Shazib Saeed, Chairman Environmental Tribunal; Judge Shazia Munawar; Judge Rai; and several other judges of the District Judiciary. So here we are!

Pakistan and climate change

Pakistan has faced catastrophic floods, droughts, and cyclones in recent years that have killed and displaced thousands, destroyed livelihoods, and damaged infrastructure. Climatic changes are expected to have wide-ranging impacts on Pakistan: reduced agricultural productivity, increased variability of water availability, increased coastal erosion and seawater incursion, and increased frequency of extreme climatic events. Glacier melt in the Himalayas is projected to increase flooding and will affect water resources within the next two to three decades. This will be followed by decreased river flows over time as glaciers recede. Fresh water availability is also projected to decrease which will lead to biodiversity loss and reduce availability of freshwater for the population. Coastal areas bordering the Arabian Sea in the south of Pakistan will be at greatest risk due to increased flooding from the sea and in some cases, the rivers. Being a predominantly agriculture economy, climate change is estimated to

decrease crop yields in Pakistan which in turn will affect livelihoods and food production. Combining the decreased yields with the current rapid population growth and urbanization in the country, the risk of hunger and food security will remain high.

Endemic morbidity and mortality due to diseases primarily associated with floods and droughts are expected to rise. Increases in coastal water temperatures would exacerbate the abundance of cholera. The impact of climate change will also aggravate the existing social inequalities of resource use and intensify social factors leading to instability, conflicts, displacement of people and changes in migration patterns. Pakistan ranks seventh among the most adversely affected countries by climate change on the Global Climate Risk Index 2017. Pakistan has suffered the devastating impacts of natural disasters and climate change in the recent years, witnessing an earthquake in 2005 and heavy floods in 2010. Climate change have rapidly increased in Pakistan, causing and exacerbating disasters, forcing people to flee their homes and seek shelter elsewhere, thus leading to a climate-induced migration. The summer monsoon has shifted toward the end of the season and the winter rains have shifted toward late February and March.

Likewise, the snowfall season in Pakistan that usually started in November and ended by December now extends through March. According to reports, "The high rate of population growth has reduced per capita water availability from an ample 5,200 cubic meters per person per day to less than 1,000." Future projected population growth will reduce this to less than 500 by mid-century, which will make the country dependent on others for its food security. Climate change may reduce the water resources even further and this will affect lives, livelihoods and civic peace. This is a clarion call that Pakistan is one of the countries most vulnerable to the effects of climate change.

Mainstreaming Climate Change

In response to these formidable and unnerving challenges and threats, The Government of Pakistan came up with a Climate Change Policy, 2012 and the Framework for the Implementation of the Climate Policy (2014-2030). Adaptation efforts are the focus of this policy document. The vulnerabilities of various sectors to climate change have been highlighted and appropriate adaptation measures spelled out. These cover policy measures to address issues in various sectors such as water, agriculture, forestry, coastal areas, biodiversity and other vulnerable ecosystems.

Framework for implementation of Climate Change Policy (2014-2030)

The Framework for Implementation of NCCP is divided into four timeframes: Short Term Action (within 2 years), Short Term Action (within 5 years), Medium Term Action (within 10 years), and Long Term Action (within 20 years). The National Climate Change Policy of 2012 is Pakistan's guiding document on climate change, setting out the goal of achieving climate-resilient development for the country through mainstreaming climate change in the economically and socially vulnerable sectors of the country.

Climate Change and Human Rights

We in Pakistan undisputedly recognize that clean, healthy and functional environment is integral to the enjoyment of human rights, such as the rights to life, health, food and an adequate standard of living. Indubitably, climate change will have a profound effect on the enjoyment of human rights for individuals and communities globally. This is not merely an abstract assumption or a future possibility. According to UNEP:

“The impacts of climate change on freshwater resources, ecosystems, and human settlements are already undermining access to clean water, food, shelter, and other basic human needs; interfering with livelihoods; and displacing people from their homes. These impacts constitute a serious interference with the exercise of fundamental human rights, such as the rights to life, health, water, food, housing, and an adequate standard of living.”

Pakistan’s Perspective: Judicial Role

No one here can deny that there is an inseparable nexus between climate change and human rights. Our Constitution authorizes our constitutional courts to directly deal with the enforcement of fundamental rights. Our constitutional values provide that principles of democracy, freedom, and equality of opportunity, social, political and economic justice shall be fully observed. Our Fundamental Rights (human rights) provide for right to life, right to dignity, right to non-discrimination, right to movement, right to information, right to property or against its deprivation.

Pakistan has had a telling and a robust experience with the environmental rights. Years of judicial engineering has intricately weaved, through purposive and progressive interpretation, international environmental principles with our constitutional values and fundamental rights and generated jurisprudence that protects and safeguards nature. At the heart of this jurisprudence is the new constitutionalism – a blend of human rights and international environmental principles, with a singular purpose to safeguard and protect Nature, and especially, the marginalized people including women, children and those falling below the poverty line.

In not more than two decades, our courts starting from *Shela Zia* (1994) down to *Imrana Tiwana* (2016) and now *Maple Leaf* (2018), have been loud and clear that environmental rights and international environmental principles are an integral part of our constitutional values, fundamental rights and principles of policy and can be enforced by the constitutional courts as fundamental rights. The growth of environmental jurisprudence in Pakistan is in effect the story of “constitutionalization” of the environmental rights. Additionally, this “judicialization” of environmental rights is to us *environmental justice*.

In *Imrana Tiwana* (2016), a full bench of this court for the first time referred to the concept of *environmental justice* in the following words:

“The corpus of environmental laws have a singular purpose of protecting life and nature....To us *environmental justice* is an amalgam of the constitutional principles of democracy, equality, social, economic and political justice guaranteed under our [constitution] and the fundamental right to life, liberty and human dignity which

include the international environmental principles of sustainable development, precautionary principle, environmental impact assessment, inter and intra-generational equity and public trust doctrine.”

Environmental jurisprudence or environmental justice in Pakistan, however, remained grounded in fundamental rights and stood anchored within the statutory framework of our Environmental Protection Law. The matrix of environmental justice remained confined to the polluter, the aggrieved party and the EPA. Environmental justice is, therefore, geographically confined within the national boundaries and so are the parties concerned. You will hear a lot more on the subject from my colleagues who will share our rich jurisprudence on the constitutionalization of the environmental rights. So, I dare not encroach on their domain. I move on to an area that concerns me the most i.e., Climate Change.

The *Ashgar Leghari case* (2015-2018) brought Climate Change to court for the first time in Pakistan. A case, where an agriculturist or a farmer prayed that Climate Change Policy (2012) and the Framework for the Implementation of the Climate Change Policy (2014-2030) of the Federal Government be enforced. He prayed that as a farmer, he will lose his crops and livelihood if water scarcity, repeated droughts and lack of climate friendly agriculture is not introduced by the State as per the stated policy. He pressed his human rights, in other words, the constitutional guarantees of right to life, right to business and right to dignity to approach the constitutional court.

Enforcement of fundamental rights or human rights, by issuing a writ of mandamus against the Federal Government, was something simple and straight forward, but the challenge and opportunity was to judicialize climate change by connecting the Climate Change Policy and its lack of enforcement with violation of human rights like rights to life and dignity. Building this link was a unique opportunity and the Court didn't let it go. Hence starts our journey into the realm of *climate justice*.

The court set out to deal with *Asghar Leghari* like any other environmental case but soon realized that the case was more than a regular environmental case, it required *adaptive strategies* rather than polluter pays principle. *Adaptation* and courts was something new to the green benches and environmental courts. It wasn't about curbing pollution or dealing with mitigation under the environmental statute, it was much more. The court was informed that Pakistan is expected to experience increased variability of river flows due to increased variability of precipitation and the melting of glaciers. Demand for irrigation water may increase due to higher evaporation rates. Yields of wheat and basmati rice are expected to decline, subject to water availability. Water availability for hydropower generation may decline. Hotter temperatures are likely to increase energy demand. Warmer air and water temperatures may decrease the efficiency of nuclear and thermal power plant generation. Mortality due to extreme heat waves may increase. Urban drainage systems may be further stressed by high rainfall and flash floods. Sea level rise and storm surges may adversely affect coastal infrastructure and livelihoods, leading to disease and health issues.

The court soon realized that *Adapting* to these impacts may include: development or use of crop varieties with greater heat and drought tolerance, modernizing irrigation infrastructure and employing water-saving technologies, integrated watershed management, reforestation of catchment areas and

construction of additional water storage, diversification of energy mix including investment in renewable and small hydropower projects, improved weather forecasting and warning systems, retrofitting of critical energy infrastructure, and construction of dikes or sea walls. Addressing inland migration and dealing with climate refugees. Furthermore, appropriate measures relating to disaster preparedness, capacity building, institutional strengthening, building the right infrastructures, technology transfer and the list went on.

The existing environmental statute, a construct of polluter pays principle was inadequate to deal with these heterogeneous dimensions. The Court realized that enforcement of the Policy would be enforcing the fundamental rights of the people as it would safeguard their right to clean, healthy and an enjoyable life. However, this simple looking enforcement of the policy brought the court into contact with numerous actors with different roles. In this case, issues of irrigation, crop resilience, water scarcity, food security, etc. came up for discussion. It wasn't an environmental case, which was to be confined within the environmental statute. Our existing jurisprudence had dealt with mitigation, but adaptation required a different approach.

The multiplicity of issues made the court constitute a Climate Change Commission, comprising neutral environmental experts, international organizations like LEAD, WWF and IUCN, local expertise, representative of the Government and other stakeholders to move forward in a participatory manner and to unravel and understand how to deal with this brave new world of adaptation through court orders. Climate Change Commission has been the most important development. Dr. Parvez Hassan who sits here amongst us today, headed the Commission and mobilized the actors including the Government. So most importantly, Asghar Leghari breathed life into the Climate Change Policy. Jump started the process. The Priority Action Items under the Policy got moving and a large percentage of them got implemented. The Chairman of the Commission was pleased to submit in court that due to the intervention of the Court, Government has come of age and can now deal with the challenges of climate change. Asghar Leghari also introduced the concept of *climate justice and water justice* into our jurisprudence.

Where do we go after Asghar Leghari? To me *right to Climate* and *right to Adaptation* are human rights and I hope the Courts will soon acknowledge this. I also feel that the time has come to bring under the constitutional fold and make the Sustainable Development Goals (SDGs) and Nationally Determined Contributions (NDCs) as part of human rights i.e., right to life. Climate Finance and climate investment and the debate on Loss and Damage must soon move into the realm of human rights. The role of Government in all these matters has a deep bearing on the life and welfare of the people. In fact the stance of the Government in international negotiations on climate change is also a part of the fundamental rights of the people of Pakistan. It is just a matter of time. With CPEC (China Pakistan Economic Corridor) new challenges will unfold in the area of Climate Change and we must be prepared to deal with them.

The Judiciary has single handedly moved the climate change agenda in Pakistan. In fact, the judiciary has played a far more active role than the Government. Don't take me wrong, there is no competition here and no one is vying for the first place. We all work for the same country and the same people. This is to underline that the lead role played by the judiciary has resulted in the promulgation of the Climate Change Act, 2017. The Act provides for the establishment of Pakistan Climate Change Council with the mandate to mainstream climate change concerns into decision-making and for developing climate-compatible and climate resilient development processes in various sectors of the economy and to meet Pakistan's obligations under the Sustainable Development Goals (SDGs). This is a wonderful development.

So *Climate Justice* goes beyond to providing *adaptive strategies*, to me it is a judicial mind-set. Climate Justice and its variant water justice require that we the judges be vigilant and apply climate-compatible and climate resilient approach to matters that come before us. There is no such thing as a climate change case, in fact many cases that come before us dealing with urban development, licensing, land acquisition, project financing will invariably have a bearing on climate change - we just have to be vigilant to identify the issue and be always geared to do climate justice. Ladies and gentleman this is what Pakistan's judiciary has to offer the world of climate change.

One last thing, in spite of this robust judicial role, the Judiciary as an institution or actor has not been considered as an integral part of the climate change debate. International negotiations or international platforms do not include the judiciary as a major stakeholder or as a major policy player. I urge the international organizations here to look into this aspect. Our efforts to combat climate change might remain incomplete without taking the judiciary along. I eagerly look forward to hearing the members of the judiciaries of other countries and environmental and climate experts gathered here today– so that we can develop a collective strategy and be brothers and sisters in arms to combat climate change. I wish Pakistan and the international community the best of luck.