

## **Judicial Commissions and Climate Justice in Pakistan**

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# Judicial Commissions and Climate Justice in Pakistan \*

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Pakistan has a remarkable story in its efforts for environmental protection, sustainable development and climate justice. Beyond the stellar leadership provided by Pakistan as Chair of G77 at the Earth Summit in Rio de Janeiro, Brazil in 1992,<sup>1</sup> its superior judiciary has been the centre-piece for providing direction and a national compass. The judiciary did this with innovative interpretation and totally undeterred by the lack of the right to the environment as a fundamental right in the country's Constitution. It has progressed from an ownership of the precautionary principle in the Shehla Zia case in 1994<sup>2</sup> to a bold declaration of environmental justice and climate justice in the Asghar Leghari case in 2018.<sup>3</sup> It has done so with the support of judicial commissions and implementation bodies that it now routinely appoints in complex environmental issues. I have been involved to head twelve (12) of these – ranging from examining the degradation of water quality by coal-mining activities, to solid waste management, clean air, smog, heritage public park, hospital waste, Islamabad's environment, climate change, houbara bustard and child care. My presentation here today is the telling of that remarkable story.

## **A. Constitutional Foundations of Fundamental Rights**

The Constitution of the Islamic Republic of Pakistan, 1973 (the “Constitution”), includes a catalogue of “Fundamental Rights” for the enjoyment and protection of which any person can directly approach the High Courts under its Article 199. The Constitution affirms that this justiciable character of fundamental rights “shall not be abridged” (Article 199(2)). The fundamental rights include Article 9 which deals with the right to life and Article 14 that provides for the dignity of man:

9. Security of person. No person shall be deprived of life or liberty save in accordance with law.

14. Inviolability of dignity of man etc. (1) The dignity of man and, subject to law, the privacy of home, shall be inviolable....

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\* A paper presented at the Asia Pacific Judicial Colloquium on Climate Change: Using Constitutions to Advance Environmental Rights and Achieve Climate Justice at Pearl Continental Hotel, Lahore, Pakistan, 26-27 February 2018. This presentation is a part of the author's book, Resolving Environmental Disputes in Pakistan: The Role of Judicial Commissions, under publication by Pakistan Law House (2018).

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<sup>1</sup> See, generally, Parvez Hassan, (1) U.N Summit on Environment: The Rio Declaration, The Nation, 15 May 1992, (2) Rio '92 – Prospects and Challenges, The Nation, 9 June 1992, (3) Environment: Time for Action, The Dawn, 24 August 1992, and (4) The Rio Summit: An Assessment, The Nation, 25 August 1992.

<sup>2</sup> PLD 1994 Supreme Court 693.

<sup>3</sup> Lahore High Court Writ Petition 25501 of 2015.

Article 184(3) of the Constitution even empowers the Supreme Court of Pakistan to directly take up matters involving the enforcement of any of the fundamental rights if it considers that such enforcement involves a question of public importance.

There is no Article in the Constitution that frames the “right to the environment” as a fundamental right. The reference to “environmental pollution and ecology” in Item 24 of the Concurrent Legislative List enabled both federal and provincial legislative competence. But the Concurrent List was deleted under the 18<sup>th</sup> Constitutional Amendment in 2010 leaving environmental matters almost solely within provincial domains.

### **B. Growing Practice of Appointing Commissions in Public Interest Environmental Litigation**

The Pakistani judiciary has, in the past over twenty five (25) years, developed a dense jurisprudence of public interest environmental litigation (“PIEL”) to enforce the constitutionally protected Fundamental Rights of the public.<sup>4</sup>

The need, rationale, and justification for developing the PIEL jurisdiction have been explained by Mr. Justice Tassaduq Hussain Jilani in State vs. M.D. WASA:

The rationale behind public interest litigation in developing countries like Pakistan and India is the social and educational backwardness of its people, the dwarfed development of law of tort, lack of developed institutions to attend to the matters of public concern, the general inefficacy and corruption at various levels. In such a socio-economic and political milieu, the non-intervention by Court in complaints of matters of public concern will amount to abdication of judicial authority.<sup>5</sup>

In the landmark PIEL decision in Shehla Zia vs. WAPDA,<sup>6</sup> the Supreme Court of Pakistan held that the right to a clean and healthy environment was part of the Fundamental Right to Life guaranteed by Article 9 and the Right to Dignity guaranteed by Article 14 of the Constitution. In this case, the Supreme Court also introduced the Precautionary Principle of environmental law, included in the Rio Declaration,<sup>7</sup> into Pakistani jurisprudence.

Over the years in dealing with environmental cases, the superior courts of Pakistan have adopted a unique and innovative approach of appointing Commissions to investigate the issues and to make recommendations. This pioneering corpus of practice has come mostly from the vision of

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<sup>4</sup> For a detailed survey of public interest litigation in Pakistan, see Werner Menski, Ahmad Rafay Alam and Mehreen Raza Kasuri, Public Interest Litigation in Pakistan (Pakistan Law House, Karachi, 2000), Mansoor Hassan Khan, The Concept of Public Interest Litigation and its Meaning in Pakistan, PLD 1992 Journal 84, and Parvez Hassan, “Judiciary Leading the Way” (1998) 15(1) The Environmental Forum 48. For a general review of trends, in respect of public interest litigation, in the region, see Dr. Parvez Hassan and Azim Azfar “Securing Environmental Rights Through Public Interest Litigation in South Asia” (2004) 22 Virginia Environmental Law Journal 215. Jona Razzaque, Public Interest Environmental Litigation in India, Pakistan and Bangladesh (Kluwer 2004) provides a seminal over-view of this subject.

<sup>5</sup> 2000 CLC 471 (Lahore).

<sup>6</sup> Supra note 2.

<sup>7</sup> The Rio Declaration on Environment and Development was adopted at the 1992 United Nations Conference on Environment and Development.

Justices Saleem Akhtar and Tassaduq Hussain Jilani (we environmental lawyers call them “green” Judges). In 2011, the Chief Justice of Pakistan, Mr. Justice Iftikhar Muhammad Chaudhry, led a bench of the Supreme Court to endorse the practice of looking to Commissions/Committees for mediating environmental disputes. And, in a yet more recent case, in 2015, Mr. Justice Mansoor Ali Shah, the then Green Judge of the Lahore High Court, got international attention when he appointed a Climate Change Commission to facilitate the implementation of the National Climate Change Policy. He followed by appointing the Houbara Bustard Commission, the Smog Commission and the Child Care Commission.

I have had the privilege of being associated with most of the important environmental cases in which judicial commissions and implementation bodies were appointed in Pakistan. The eloquent story of PIEL in Pakistan, from 1991 to date, has unfolded to the following details:

### 1. The Asphalt Plants Case (1991)

The first appointment of a Commission in the field of environment in the country in public interest litigation was most probably in United Welfare Association, Lahore vs. Lahore Development Authority (Writ Petition No. 9297 of 1991) before Mr. Justice Khalil-ur-Rahman Khan of the Lahore High Court. The intervention of the court was sought for getting certain asphalt plants removed from the Petitioners’ sites in Lahore on account of serious health hazards the plants were posing for the residents. Dr. Justice Nasim Hasan Shah comments on this case:

The anxiety felt by the Court on hearing this complaint is manifest from the order it passed on 15 October 1991. Herein after noticing the contention of the petitioner it not only called upon the Lahore Development Authority to answer the allegations contained in the petition but also requested a renowned environmentalist namely Dr. Parvez Hassan, Advocate to visit the area “to verify the complaint made and then suggest to the Court the measures to be adopted.”<sup>8</sup>

I visited the area, with scientific support from Pakistan Council of Scientific and Industrial Research (PCSIR), and reported to the Lahore High Court that:

The air-borne pollutants, from the operational activity of the plant, are dispersed over a large area. ... [and that these pollutants were emitting] toxic substances like sulphur dioxide, nitrogen oxides, hetrocyclic compounds and hydrocarbons besides colossal quantities of air-borne fine dust emitted through the crush unloading at the site and during its processing at the plant.

I recommended to the Court that:

The continued operation of these plants is inconsistent with the rights of the adjoining residential areas to a clean and healthy environment. The residents are continually exposed to the obnoxious fumes and the potential health hazards unleashed by these asphalt plants. These should be removed from the site and relocated in areas where there is no danger to the environment. Even at the reallocated sites, the activities of the plants

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<sup>8</sup> Environment and the Role of the Judiciary, PLD 1992 Journal 21, at 27.

should be monitored with a view to minimize the impact of their environmental degradation.

As a result of this report, the Director General, Lahore Development Authority, passed orders for the shifting of the asphalt plants.

## 2. The Shehla Zia Case (1994)

In the Shehla Zia case, in which I was counsel to the petitioner, the Supreme Court was presented a unique petition when some residents of a residential area of Islamabad approached the Court regarding the construction of a high voltage grid station by the Water and Power Development Authority (WAPDA). The residents, led by Ms. Shehla Zia, apprehended that the electro-magnetic radiation of the grid station could be harmful for their health.

In adjudicating this case, the Supreme Court pioneered the use of judicial commissions in Pakistan to tackle complex environmental issue and to present suitable options. In its order, the Supreme Court gave significant relief to the petitioners by staying the construction of the grid station until further studies were done to establish the nature and extent of the threat posed by electro-magnetic radiation emitted by power plants. Drawing on the experiences of the Indian courts, the Supreme Court set up a commission of experts to study the technical dimensions and to submit a report in this respect:

16. In the problem at hand the likelihood of any hazard to life by magnetic field effect cannot be ignored. At the same time the need for constructing grid stations, which are necessary for industrial and economic development, cannot be lost sight of. From the material produced by the parties it seems that while planning and deciding to construct the grid station WAPDA and the Government Department acted in a routine manner without taking into consideration the latest research and planning in the field nor any thought seems to have been given to the hazards it may cause to human health. In these circumstances, before passing any final order, with the consent of both the parties we appoint NESPAK as Commissioner to examine and study the scheme, planning, device and technique employed by WAPDA and report whether there is any likelihood of any hazard or adverse effect on health of the residents of the locality... as suggested above (emphasis added).<sup>9</sup>

The public utility concerned was also directed to make a public-friendly administrative approach a norm in its future work. The Shehla Zia case unleashed a new paradigm in public interest litigation on environmental issues in Pakistan as the superior courts grew more receptive to appointing Commissions to progress environmental rights.<sup>10</sup>

## 3. The Salt Miners Case (1994)

In 1995, the Supreme Court appointed a Commission, with me as the Chairman, in General Secretary, West Pakistan Salt Mines Labour Union (CBA) Khewra, Jhelum vs. Director,

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<sup>9</sup> Supra note 2, at 715.

<sup>10</sup> See generally Parvez Hassan, “Shehla Zia vs. WAPDA: Ten Years Later”, PLD 2005 Journal 48, also published in International Environmental Law Committee Newsletter of the American Bar Association’s Section on Environment, Energy and Resources 13-19 (May 2005).

Industries and Mineral Development, Punjab, Lahore,<sup>11</sup> to visit the site of extensive mining activity and to recommend remedial measures. The Commission was given powers to inspect, record evidence, and examine witnesses under the Civil Procedure Code.

The Commission visited the site in Khewra, Jehlum, held public meetings and made several recommendations which were adopted by the Commission by consensus to their acceptance by the Supreme Court<sup>12</sup>.

As counsel of the petitioners in the Shehla Zia case, and the Chairman of the Commission appointed in the Salt Miners case, I had a hand in shaping the orientation of the Pakistani courts to the use of judicial commissions in public interest environmental litigation. The basic approach that was followed was to recommend to the court how commissions, in other countries, have helped provide science/technology-based solutions which lie outside the expertise of the Courts. Apart from providing the court expert guidance, the other limb of this approach was to highlight the importance of a non-adversarial, public-private partnership model for handling the most intractable civic problems.

The pattern of appointing court-empowered expert commissions with broad participation of the stakeholders and involving site visits and public hearings and “consensus” recommendations adopted in this case was to imprint on the future environmental commissions in the country.

#### 4. The Solid Waste Management Commission (2003)

In 2003, in an intra-court appeal, City District Government vs. Muhammad Yousaf,<sup>13</sup> challenging the use of a site for dumping solid wastes, a Division Bench of the Lahore High Court appointed the Solid Waste Management Commission to review the suitability of Mahmood Booti as a site for solid waste disposal. The Court also directed the Commission to advise on the optimal environmentally appropriate manner for the disposal of solid wastes in Lahore as well as to recommend other sites for the disposal of solid wastes as per Lahore’s requirements.

I was appointed the Chairman of the Commission comprising, on my recommendation, a broad section of representatives from both the public and private sectors. This roundtable included government officials and city administrators including the District Nazim (the Mayor of Lahore), the District Co-ordination Officer, the Director, Solid Waste Management, Government of Punjab, Director General, EPA, Punjab, Secretary, Health, Punjab, academics and scientists, parliamentarians, specialists, environmentalists, and members of civil society (representatives of IUCN Pakistan and WWF-Pakistan). The Commission set up a sub-committee for hospital waste disposal under the Provincial Secretary, Health, who is in charge of all the public sector

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<sup>11</sup> 1994 SCMR 2061.

<sup>12</sup> Order of the Supreme Court dated 8 July 2002 in HRC No. 120 of 1993 included the direction that:  
.... recommendations of the Commission shall be complied with in letter and spirit by the lease holder of the mines and no violations shall take place on the respective sites.

In April 2015, the Supreme Court, through its order dated 7 April 2015 in HRC No. 120 of 1993, appointed another Commission to verify the implementation of the recommendations of the earlier 1994 Commission.

<sup>13</sup> I.C.A No. 798 of 2002 filed before the Lahore High Court.

hospitals. It is also a reflection of the public-private sector partnership and harmonious working of the Commission that it persuaded the City District Government Lahore to arrange and finance the Environmental Impact Assessment (“EIA”) of Mahmood Booti by NESPAK, a consultancy firm chosen by the Commission.

As in the Salt Miners case, the Commission was successful in orchestrating a consensus of the members of the Commission in their final recommendations which were accepted by the High Court.<sup>14</sup>

On 23 March 2005, Lahore inaugurated the construction of its first integrated compost and landfill plant at Mahmood Booti and the plant was commissioned one (1) year later with private sector participation on a build, operate and transfer basis. According to The News, “Lahore’s first compost plan will transform around 20 percent of the city’s solid waste into 250 tonnes of organic fertilizer on a daily basis.”<sup>15</sup> The Solid Waste Management Commission moved with dedication and resolve to provide a model environmentally appropriate solid waste disposal regime for Lahore, hopefully to be replicated in other parts of the country.<sup>16</sup>

#### 5. The Lahore Clean Air Commission (2003)

In Syed Mansoor Ali Shah vs. Government of Punjab,<sup>17</sup> The Lahore High Court appointed, in July 2003, a Lahore Clean Air Commission, also chaired by me and co-chaired by the Advocate General, Punjab, to recommend measures for the improvement of Lahore air quality. This Commission, on my request, similarly included representatives from both the private and public sectors including the City District Government Lahore. It set up sub-committees with respect to (1) clean fuel, (2) rickshaws, (3) public transport and (4) coordination with local councils. The Rickshaws sub-committee, for example, worked under the chairmanship of the Provincial Secretary, Environment, and the Clean Fuel sub-committee worked under the chairmanship of the District Coordination Officer, Lahore. Syed Mansoor Ali Shah, the coordinator of both this and the Mahmood Booti Commission, chaired the sub-committee on public transport and held public hearings at the City Government conference room. All the oil companies were invited by the Clean Fuel sub-committee to assist the work of the Commission.

The Lahore Clean Air Commission similarly finalized its Report on 21 May 2005 with a developed consensus of all stakeholders including the manufacturers and users of public transport and rickshaws. These recommendations, including of four stroke engines for rickshaws and CNG use, were filed in the Lahore High Court. In 2006, the Secretary, Transport, Government of Punjab, joined in supporting the recommendations of the Commission before the Lahore High Court.

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<sup>14</sup> Order of the Lahore High Court dated 25 January 2005 in I.C.A No. 798 of 2002.

<sup>15</sup> Aoun Sahi, The News on Sunday (9 April 2006).

<sup>16</sup> It was a measure of the gratitude of the city of Lahore for the work and role of the Solid Waste Management Commission that the speakers at the commissioning of the Plant acknowledged the pivotal role of the Commission in forging a science-based consensus on an acrimonious issue and thereby avoiding long years of litigation and appeals.

<sup>17</sup> Writ Petition No. 6927 of 1997 filed before the Lahore High Court.



The Lahore High Court adopted the recommendations of the Commission. It went further. In order to ensure the implementation of the recommendations of the Commission, Mr. Justice Hamid Ali Shah directed the establishment of a Standing Body of the Commission, with me as Chair, to remain operational till the implementation of the recommendations of the Commission.<sup>18</sup> In this manner, the Court also provided a means for ensuring compliance and enforcement of PIEL judgments.

#### 6. The Lahore Canal Road Mediation Committee (2011)

In May 2006, the Traffic Engineering and Planning Agency (“TEPA”) of the Lahore Development Agency began preparations to cut down trees along the Lahore Canal Road in order to widen it for the purposes of reducing congestion. The move was resisted by a civil society organization by the name of the Lahore Bachao Tehreek (“LBT”). LBT’s activism secured an EIA of the road widening project. The LBT challenged the approval given to the EIA by the EPA, Punjab but the case remained pending in the Lahore High Court. In 2009, when the provincial government sought to proceed with the road widening project, the Supreme Court took suo motu notice<sup>19</sup> of the environmental harm that would result in the felling of trees. On 14 February 2011, the Supreme Court appointed me as the mediator between the LBT and the Government of Punjab with powers to associate others for the purposes of the mediation.

By now, I had developed successful criteria for the appointment of Commissions. One, it must include the highest level Governmental functionaries who will ultimately be responsible for the implementation of the proposals of the Commission. Two, a member of the Provincial or National Assembly elected from the area under consideration by the Commission adds to the focus of the Commission. Three, experts must be included from Universities or with well-recognized specializations. Four, representation from civil society organizations active in the field helps the work of the Commission in their respective fields. I have always included IUCN Pakistan, WWF-Pakistan, Sustainable Development Policy Institute (SDPI), and LEAD Pakistan in most Commissions that I head. I have held leadership positions in each of these organizations in the past and receive utmost co-operation and support from them. Five, a well-regarded member of the media helps in disseminating the work of the Commission. But above all is the consideration that each member of the Commission must bring unchallenged integrity to his work in the Commission. I used these criteria to request eight (8) eminent citizens, elected representatives and government officials, representing the cross-section of stakeholders to participate as a Committee.

The Committee held its four (4) meetings in an open and informal manner at the Beaconhouse National University (“BNU”) and the Lahore University of Management Sciences (“LUMS”) in Lahore to enable their students and faculty to participate in a dispute resolution effort impacting on the city of Lahore. Resultantly, the participants at these meetings included students and faculty members not only from LUMS and BNU, but also from Kinnaird College, Lahore and the Lahore School of Economics. Comments from the public were also invited. Mian Amer Mahmood, a former Nazim (Mayor) of Lahore, participated in the public hearings. Moreover, the Committee made a site visit which extended from Jallo Mor on the Canal to Thokar Niaz Beg so as to give the Committee members an opportunity to view and appreciate the entire stretch of the Canal.

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<sup>18</sup> PLD 2007 Lahore 403, at 422.

<sup>19</sup> Suo Motu Case No. 25 of 2009.

The Commission also involved eight (8) experts in its work. The experts helped the Committee, among others, in developing the understanding of the botanical and horticultural characteristics of the natural environment along the canal as well as the international standards of road safety.

The Report of the Committee was finalized on 14 May 2011. The Committee approached its mandate with a view to protecting and sustaining the heritage of the Lahore Canal. The Committee felt responsible for preserving this heritage for future generations. It was mindful of the jurisprudence of the superior courts wherein the Doctrine of Public Trust<sup>20</sup> has been applied to public spaces and was inspired by the experiences of protecting public spaces in other jurisdictions. The Committee held up the common man as the centrepiece of its concerns and attention in order to promote social equity. The “consensus” Report included eighteen (18) recommendations, the most important of which included the declaration of the Lahore Canal area as a Heritage Urban Park, re-engineering of the junctions along the Canal Road, ecosystem preservation and people-centric planning. The Committee also proposed a draft of the Lahore Canal (Heritage Urban Park) Act, 2011. The Supreme Court accepted the entire recommendations of the Committee.<sup>21</sup> And, pursuant to the recommendations of the Committee, the Lahore Canal Heritage Park Act, 2013, was passed by the Punjab Assembly on 7 January 2013.

#### 7. Islamabad Environmental Commission (2015)

In 2011, several writ petitions were filed before the Islamabad High Court in respect of the environment in Islamabad in which grievances relating to the inaction and non-performance of the statutory duties by the federal EP Agency and the Capital Development Authority (the “CDA”) were raised. It was contended in the petitions that certain actions and omissions of the federal EP Agency and the CDA had adversely affected the environment of Islamabad.

On 20 February 2015, the Islamabad High Court constituted the Islamabad Environmental Commission, and appointed me as the Chair of this Commission to investigate the grievances raised in the petitions and make recommendations to prevent the further “destruction” and “degradation” of the environment of Islamabad.<sup>22</sup> I was also given powers to associate others in the Commission. Accordingly, the government officials, representing the cross-section of stakeholders, civil society organizations, public representatives, representatives from the media and the academic/scientific community were requested to become a part of the thirteen (13) members Commission.

The Commission held six (6) meetings. It formed six (6) sub-committees to look at the various environmental and regulatory issues, including air and water pollution, encroachments, solid waste management and legal and regulatory framework. The sub-committees were enabled to co-opt members from in and outside the Commission.

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<sup>20</sup> See, generally, Sindh Institute of Urology and Transplantation vs. Nestle Milkpak Limited, 2005 CLC 424 (Karachi) and Muhammad Tariq Abbasi vs. Defence Housing Authority, 2007 CLC 1358 (Karachi).

<sup>21</sup> See, Cutting of Trees for Canal Widening Project, Lahore (Sou Moto Case No. 25 of 2009), 2011 SCMR 1743. See also, Lahore Bachao Tehrik vs. Dr. Iqbal Muhammad Chauhan, 2015 SCMR 1520.

<sup>22</sup> By its order dated 20 February 2015 in Shiraz Shakeel vs. CDA, Writ Petition No. 1276 of 2011.

Inasmuch as the major complaints related to changes in the Master Plan of Islamabad, the Commission turned to the expert guidance of the nationally prominent urban planner, Mr. Arif Hasan, and requested his presence as a “special invitee” at one of the meetings of Commission. On the aspect of the major issue of hospital waste, the Commission benefited from the guidance of another “special invitee”, Dr. Javed Akram, Vice Chancellor, Pakistan Institute of Medical Sciences (“PIMS”), the largest hospital in Islamabad.

The Commission also requested the comments of the public. A public hearing was also held by the Commission which was attended by over 150 persons.

Along with some members of the Commission, I also met with the representatives of several hospitals, including Dr. Javed Akram, Vice Chancellor, PIMS, in Islamabad on 6 October 2015 at the Ministry of Climate Change. Valuable feedback was received during this meeting which helped in the formulation of recommendations, particularly regarding hospital waste management in Islamabad.

The Report of the Islamabad Environmental Commission was finalized on 19 October 2015. The Report contained as many as twenty-three (23) recommendations but with the developed consensus of all the members and stakeholders. These recommendations, including safeguarding the Master Plan of Islamabad, solid and hospital waste management, and better co-ordination of environmental agencies, were filed in the Islamabad High Court on 20 October 2015.

The Islamabad High Court directed the appointment of an Implementation Committee to implement the recommendations of the Islamabad Environmental Commission. The appointment of the Implementation Committee has been notified.

#### 8. Climate Change Commission (2015-2018)

In Asgar Leghari vs. Federation of Pakistan<sup>23</sup>, the Lahore High Court was approached by the petitioner for the enforcement of his fundamental rights under Articles 9 and 14 of the Constitution. The petition contended that the increased heat trapping of carbon dioxide (CO<sub>2</sub>) and other greenhouse gases in the atmosphere is increasing the global temperature which, in turn, is adversely affecting the climate of Pakistan. The petition further submitted that to combat the threat of climate change in Pakistan, the Government of Pakistan, through the Ministry of Climate Change, had introduced the National Climate Change Policy, 2012 (the “Policy”) and the Framework for Implementation of Climate Change Policy (2014-2030) (the “Framework”), but that no implementation of the Policy and the Framework has taken place.

On 14 September 2015, the Lahore High Court constituted the Climate Change Commission and appointed me as the Chair of this Commission with powers to associate others and to facilitate the effective implementation of the Policy and Framework. As the Lahore High Court enabled the Commission to co-opt other members, the Commission exercised this power to draw from governmental Ministries, Departments and Agencies, civil society organizations, representatives from the media and the academic/scientific community.

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<sup>23</sup> Supra note 3.

Accordingly, the thirty (30) member Commission comprised me as the Chair, Mr. Arif Ahmed Khan, Secretary, Climate Change (Vice Chair), and several Federal Secretaries (including of Finance, Water and Power, National Food, & Research and Planning, Development and Reform) and Secretaries, Government of Punjab (including of Irrigation, Agriculture, Food, Forest, Health, and Environment Protection), civil society organizations, Universities and media representatives.

The Commission held twelve (12) meetings during 2015-2018. The Framework specifies strategies for the implementation of the Policy which are time-bound as follows:

- (1) Priority Actions (within 2 years);
- (2) Short term (within 5 years);
- (3) Medium term (within 10 years); and
- (4) Long term (within 20 years).

I proposed, at the outset, that the best course of action for the Commission would be to focus on the Priority Actions because if these are implemented in their entirety, a substantial part of the Framework would have been implemented and will also serve to form the foundation of the other Short Term/Medium Term/Long Term Actions.

During its second meeting on 17 October 2015, the Commission appointed six (6) Implementation Committees to review the implementation of the Priority Actions under the Framework. These were (1) Water Resources Management, (2) Agriculture, (3) Forestry, Biodiversity, and Wildlife, (4) Coastal and Marine Areas, (5) Disaster Risk Management, (6) Energy. The Chair of each of the Implementation Committees was enabled to co-opt other members from within or outside the Commission.

The Climate Change Commission, largely facilitated by the work of its Implementation Committees, submitted a Report on 16 January 2016. The Report contained sixteen (16) recommendations which had the consensus and backing of all the stakeholders. These recommendations, among others, included climate change awareness and monitoring, financial allocation, food security and protection of ecologically sensitive habitats and species. Also, a proposal to set up a Climate Change Authority was discussed in the Commission. This was later included in the Climate Change Act, 2017.

The Lahore High Court accepted all the recommendations of the Commission and to ensure the effective implementation of these recommendations, Mr. Justice Syed Mansoor Ali Shah, on 18 January 2016, directed that:

3. I have gone through the Findings and Recommendations of the Commission. The Commission has done wonderful work and each member of the Commission has meaningfully contributed under the able leadership of the Chairman. It is clear that the Policy, as well as, the Framework were almost untouched till the Commission was constituted by this Court, resulting in mobilizing the government machinery. Since then there has been modest progress in achieving the objectives and goals laid down under the Policy and the Framework. The Report submitted by the Commission deals with priority

actions under the Framework and reveals that the priority actions which were to be achieved by 31st December, 2015, have not yet been fully achieved.

4. The Commission shall ensure that the priority items under the Framework, as far as the Province of Punjab is concerned, are achieved latest by June, 2016. The Commission is additionally tasked to look into the short term actions under the Framework and come up with a workable and achievable timetable for the same.<sup>24</sup>

In its Report dated 16 January 2016 to the Lahore High Court, the Commission had reported on the progress in the implementation of the Priority Areas (PAs) up to 31 December 2015. On the review of this Report, the Lahore High Court ordered, on 18 January 2016, that the “Commission is additionally tasked to look into the short term actions under the Framework and come up with a workable and achievable timetable for the same.”

The Supplemental Report dated 24 February 2017 responded to the order of the Lahore High Court dated 18 January 2016. It included the Reports of six (6) Implementation Committees, giving an update on their actions on the Priority Actions. Overall, of the 242 Priority Areas given in the Framework, the six (6) Implementation Committees reported progress on 144 PAs and that is about 60 percent of the total Priority Areas. The progress on 144 PAs is uneven and at various stages of advancement with many needing more time and resources for completion.

The recommendations of the Commission in the Supplemental Report were adopted, on 28 February 2017, by (now) Mr. Chief Justice Syed Mansoor Ali Shah:

### **CLIMATE CHANGE ORDER-19.**

Chairman, Climate Change Commission (“**Commission**”) has tendered appearance and placed on record Supplemental Report dated 24.02.2017 making the following recommendations:

#### **Recommendations**

“**The Commission recommends** that the Secretary P&DD should submit plans for initiation of remaining about 100 PAs and also compile a quarterly report on completion of work on ongoing 144 PAs.

**Priority Projects in ADP 2016-2017:** Since the last submission, the Commission has helped some GOPb departments prioritize 15 ‘climate smart’ projects of which 13 were finally approved by P&DD for inclusion in the ADP 2016-2017. The Commission learnt that the financial value of these projects was relatively miniscule in percentage terms of the total development budget of the province.

**The Commission recommends** that in the next FY, this number should ramp up substantially and that this allocation should include specific budget lines for social and softer components – and not just the infrastructural investments. The Commission, if requested by the Departments will be pleased to review and guide on selected projects....

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<sup>24</sup> Order of the Lahore High Court dated 18 January 2016 in Writ Petition No. 25501 of 2015.

1. The Framework for Developing and Assessing Climate-Smart Projects under Annual Development Plans be used/piloted by each GOPb department to develop their requests for ADB allocations. The preparations for the next ADP have just begun and the timing is perfect. If requested, the Commission can assist with capacity building of the concerned officers in the province.
2. Each GOPb Departments should develop its plans of action, giving a list of priority projects/areas of investment. The Commission can assist them in developing their plans of action and determine their strategic priorities for the next 2-3 year's ADPs.
3. P&DD needs to develop a template/criteria that could guide the decisions on the requests from the departments. The Commission can work with the officers at the P&DD develop such a template and operationalize for the next years' ADP."

Considering that these recommendations are an outcome of the deliberations of the Commission, which includes members of the Government, therefore, I make these recommendations part of this order and direct the concerned Ministries/Departments of Federal, as well as, Provincial Governments to implement the same (emphasis added).

The Chair of the Commission with the Secretary of the Commission and the Chairs of the Implementation Committees met with the Chairman, Planning and Development, Government of Punjab, on 17 April 2017, to facilitate the mainstreaming of climate change in the policies and upcoming budget of the Government of Punjab. The Chair of the Commission, in this meeting, made many suggestions including the following:

1. The Framework approved by the Commission can help the process of mainstreaming climate compatible development. The Commission recommends that the Framework should be used for designing and developing projects for upcoming ADP, at least for some projects by select departments. We recommend that each department should be advised to apply the framework and 2-3 projects from each department should be selected for their application the Framework.
2. Each GoPb department should develop an action plan, outlining a list of priority projects/areas of investment for mainstreaming climate considerations. The Commission can provide assistance in this regard.
3. P&DD should develop a template/criteria that could guide the decisions on the requests of departments (and not restricting decisions only to the financial or other such considerations). Again, the Commission can work with officers of P&DD to develop such a template and operationalize for next years.

The Chairman, P&D, GoPb, responded well to the work and suggestions of the Chair of the Commission and this highlighted the growing impact of the judiciary-backed contribution of the Commission to the climate change agenda in Punjab in particular and the country in general. This presents an exciting first of a direct interface between the consultative processes of Commissions appointed by the Court with the highest decision-making body in the Government.

The Commission and this case continued before the Lahore High Court for over two (2) years. The work and effectiveness of the Commission was immeasurably enhanced by the regular listing of this case before the Lahore High Court with the full attendance of concerned governmental functionaries, both federal and provincial, and the numbered Climate Change Orders passed at each hearing. These Orders were promptly put on the website of the Court.

The Commission held its final meeting on 20 January 2018 and submitted its Final Report to the Lahore High Court on 25 January 2018. The Chief Justice of the Lahore High Court, Syed Mansoor Ali Shah, just before his elevation to the Supreme Court, passed judgment in the case in February 2018.<sup>25</sup> The Court appreciated the work of the Commission to supporting 66% implementation of the Priority Actions of the National Climate Change Policy, and, on dissolving the Commission, the High Court set up a Sanding Committee on Climate Change with me as the Chair and five (5) members, including Governmental representatives, to facilitate the future work on climate change. The judgment moved the jurisprudence of the superior courts well beyond Shehla Zia to a robust formulation of environmental justice and climate justice. Equally important, the Lahore High Court took an important initiative in the implementation of the National Climate Change Policy.

#### 9. Houbara Bustard Commission (2017-2018)

Pakistan has, over the past several decades, developed a practice of issuing permits to Arab dignitaries (including from the U.A.E., Saudi Arabia, and Qatar) to hunt the Houbara Bustard in areas allocated to these dignitaries. This migratory bird winters in several areas of Pakistan and the Arab Shaikhs falcon-hunt it, every year, in specific areas allocated by the Government to these hunters. The hunting permits are handled by the Ministry of Foreign Affairs highlighting their importance in the country's relations with the Arab dignitaries. A typical permit includes important conditions of hunting in terms of the timing and bag limits. It is noted that the permits allow hunting only through falconry. Guns and use of firearms are not allowed.

Owing to the "vulnerable" status of the Houbara Bustard, the Courts of Pakistan have been repeatedly drawn to protect them against the grant of these permits and illegal hunting. This public interest litigation has involved the High Courts of Sindh, Balochistan and the Punjab and even the Supreme Court of Pakistan. Some judgments have moved to ban the issuance of the hunting permits to others that require regulation over such hunting.<sup>26</sup> None of these judgments required or used population Surveys to determine whether the hunting was sustainable. They relied generally, instead, on the status of the Houbara Bustard under the Convention on International Trade of Endangered Species of Wild Fauna and Flora (CITES), Convention on the Conservation of Migratory Species of Wild Animals (CMS), other international declarations and national laws.

The Chief Justice of the Lahore High Court, in Naeem Sadiq vs. Government of Pakistan (Writ Petition No. 32 of 2014), appointed the Houbara Bustard Commission with me as its Chair. The terms of reference included "field Surveys to assess whether hunting of the Houbara Bustard is a

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<sup>25</sup> [sys.lhc.gov.pk/appjudgments/2018LHC132.pdf](http://sys.lhc.gov.pk/appjudgments/2018LHC132.pdf).

<sup>26</sup> See, e.g., Province of Sindh vs. Lal Khan Chandio, 2016 SCMR 48; Government of Punjab vs. Aamir Zahoor-ul-Haq, PLD 2016 SC 421; Tanvir Arif vs. Federation of Pakistan, 1999 CLC 981 (Karachi); M.D. Tahir, Advocate vs. Provincial Government, 1995 CLC 1730 (Lahore); Society for Conservation and Protection of Environment (Scope) Karachi vs. Federation of Pakistan, 1993 MLD 230 (Karachi).

sustainable activity in Punjab” and “to assess whether the said hunting is beneficial to the local community.” The Commission, including my recommendations, comprised eleven (11) members.

The Houbara Bustard Commission held its first meeting in my office on 15 July 2017 and recommended, as a first and preliminary measure, the conduct of a survey in four (4) districts frequented by the migratory Houbara Bustard. This was approved by the Lahore High Court to be held between the second week of December 2017 and the second week of January 2018. The Commission developed a methodology for the surveys in consultation with the expertise available in and outside Pakistan. The Commission also facilitated the capacity-building of the staff and officers of the survey teams.

The Houbara Bustard Commission conducted population Surveys of the Houbara Bustard through three (3) separate teams in December 2017 in the Districts of Rahim Yar Khan, Rajanpur and Bhakkar in the Punjab. The Report of the Commission, based on the Survey Reports of these teams, was unanimously approved by the Houbara Bustard Commission at its meeting on 23 January 2018 and submitted to the Lahore High Court in the same month.

#### 10. Smog Commission (2017-\_\_\_\_\_)

By his Order dated 19 December 2017 in Walid Iqbal vs. Federation of Pakistan, Writ Petition No. 34789 of 2016, the Chief Justice of the Lahore High Court has appointed a Smog Commission, among others, to “formulate a holistic Smog Policy for Punjab which identifies the root causes and prescribes a plan to protect and safeguard the life and health of the people of Punjab.” The author has been appointed Chairman of the Smog Commission which is to include the Secretaries, Government of Punjab, of (a) Environment, and (b) Health, and leading civic and professional leaders. The Commission has so far held two (2) meetings and set up specialized sub-Committees.

#### 11. Child Care Commission (2017-\_\_\_\_\_)

On 22 December 2017, the Chief Justice of the Lahore High Court, in Syed Miqdad Mehdi vs. Government of Punjab, Writ Petition 107273/2017, constituted the Child Care Commission with the author as the Chairman and with detailed terms of reference including the “shifting from a segregated system of education for special needs children to a system of inclusive education, designed to meet Pakistan’s commitments under the Convention on the Rights of Persons with Disabilities, 2006 and the Convention on the Rights of the Child, 1989”, and to address several enumerated requirements of “special needs children.” The membership of the Child Care Commission includes the Secretaries, Government of Punjab, of (a) Special Education, (b) School Education, and (c) Health, as well as prominent lawyers and recognized experts. The Commission has held only one (1) meeting so far.

### **C. My Experience as Chair of Commissions**

It is likely that no person has had the privilege and pleasure to head as many Commissions constituted by the superior courts of Pakistan as I have. I am humbled by this opportunity to make a small contribution to environmental protection in Pakistan, a mission that I singly started in my country in the 1970s. It has been a remarkable journey since then and the opportunities offered in shaping and progressing judicial environmental commissions have been immensely



gratifying. So is the fact that the full recommendations of each Commission were adopted by the Courts without any exception. This success was enhanced by some Courts even appointing Implementation Committees/Standing Bodies to implement the recommendations of the Commissions (Lahore Clean Air Commission, Islamabad Environmental Commission and the Climate Change Commission). The Courts, additionally, facilitated the interim recommendations of the Climate Change Commission and the Houbara Bustard Commission.

With the commissioning of the Compost Plant in Lahore, it was remarkable that the public and private sector partnership reflected in the membership of the Solid Waste Management Committee facilitated this success and demonstrated the value to civil society of avoiding protracted, contentious, divisive and adversarial proceedings before the courts of Pakistan. The model, instead, was to resolve complex issues by the use of science, technology and dispassionate technical advice with the willing co-operation and support of the City Government. Each metropolis is unique but it is hoped that the experience of the Solid Waste Management Committee in Lahore may provide some useful lessons for urban environmental management in Pakistan. Equally useful would be a consensus-building approach of the Lahore Clean Air Commission, the Lahore Canal Road Committee, the Islamabad Environmental Commission, and the Houbara Bustard Commission.

The use of court-appointed Commissions to resolve complex environmental issues in Pakistan has already shown promise. Moving away from an adversarial ethos of a court room to a more informal round-table of a Commission by itself promotes a dialogue and discussion between the stakeholders. Moreover, when care is taken toward an all-inclusive process of enabling all the stakeholders from both the public and private sectors to be represented in the Commission, the credibility of its work and success is significantly assured. It is particularly important to include in the Commission those Departments or Ministries of the Government that would ultimately be responsible for the implementation of the recommendations of the Commission. Eminent scientists and experts drawn from Universities and academia can anchor the work of the Commission by providing “neutral” and state-of-the-art technical and science-based advice on the complex issues before the Commission.

For a Chairman, the biggest challenge is in picking the members of the Commission. If they are to be from the most effective decision-makers in the Government, from civil society, from academia, from the legislatures and the media, each of them would be pro-occupied with his/her other commitments and may not readily find time for the Commission.

On appointing me as the Chairman of the Commission, the Court always offered that it could include in its Order any membership that I suggested to it. But I found it more effective beforehand to reach out personally to each person that I thought could bring value to the work of the Commission. I would typically request about 60 hours of the person’s time for the work of the Commission in the next 4-6 months and would recommend to the Court the inclusion of that person in the Commission only if I got that commitment. The larger appeal for the person was the possibility of contributing to a cause of the community or the city or the nation that the Commission was expected to serve. In many cases, the person was already familiar with my work in the environment and invariably agreed to my request to join the Commission. This brings me to my grateful and proud statement that nobody ever refused my request to join a Commission headed by me.

Selecting members for the Commission becomes all the more challenging when the Chair insists on handling all the work, as I invariably did, on a pro bono basis. No member of any Commission that I headed received any remuneration and yet I am grateful for the prolific support that each member gave for the work and result of the Commission. The Commissions improvised their own methods of financing their work requirements. In the Solid Waste Commission, for example, the District Nazim (Mayor), Lahore, a member of that Commission, undertook to finance the costs of an EIA directed by the Commission. Similarly, in the Islamabad Environmental Commission, IUCN Pakistan, a member of that Commission, on the request of the Chair, paid the travel costs of Mr. Arif Hasan, urban planner in Karachi, to attend a meeting as a special invitee of the Commission in Islamabad.

In the hearings of the Commissions, we also included those stakeholders that may be adversely affected by our recommendations. Thus, vehicular traffic was an important consideration in the Lahore Clean Air Commission. When we considered proposals for the improvement of air quality through improved vehicular traffic, we specifically reached out to Qingqi, the motor cycle rickshaw company that is an important player in this field, and tried to carry it in our recommendations. We similarly reached out to the car and motor cycle manufactures and assemblers.

The role of the Chairman can also be important in the impartiality and fairness with which he conducts the proceedings of the Commission and enables public participation and hearings to factor different points of view. The success of the Chairman lies ultimately in persuading the members of the Commission and other participants to move away from the narrower mindset and language of “I” “you” “mine” and “yours” to a more appropriate “we” “us” and “ours.” Only when this central aspect of a common ground for the needs of a city or civil society is recognized and realized can a Commission succeed in the important tasks entrusted it by the Courts.

But the use of judicial commissions is by no means a panacea as the technique can only work effectively where expert opinion is not divided<sup>27</sup> and there is a fair chance that a consensus can emerge amongst the diverse group of stakeholders. The greatest strength that a Commission can have is the unanimity or consensus on its recommendations. I have been particularly fortunate in developing a consensus in each Commission that I have headed. The Courts see the quality of the membership of the Commission and the unanimous/consensus voice with which the Commission speaks following an open, inclusive and participative process of public hearings and site visits to fully endorse the recommendations of the Commission.

With the high level/status membership of the Commissions, many Judges expressed surprise at the regular attendance of the members of the meetings of the Commission. The response has been a very good fortune in the leadership I provide to each Commission. It has to do with my involving the members in the work of the Commission, in shaping the process of our work, in developing their ownership of what we did, and in fixing the meetings of the Commission to the

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<sup>27</sup> In the Indian dam case, Tehri Bandh Virodhi Sangarsh Samiti v. State of U.P (1992) Supp 1 SCC 44, the Supreme Court held that it did “not possess the requisite expertise to render any final opinion on the rival contentions of the experts. In our opinion the Court can only investigate and adjudicate the question as to whether the Government was conscious to the inherent danger as pointed out by the petitioners and applied its mind to the safety of the dam. We have already given facts in detail, which show that the Government has considered the question on several occasions in the light of the opinions expressed by the experts. The Government was satisfied with the report of the experts and only thereafter clearance has been given to the project.”

convenience of the maximum members. In one case, the appointing Court had directed the attendance of the members at the meetings of the Commission. But I requested the Court that it is not necessary to coercively (through orders of the Court) secure the attendance of the Commission members and that, instead, I would rather have them do so voluntarily out of their own commitment to their responsibilities on the Commission and to the respect that they may have for its leadership. This proved a far more effective means of building the team work and a sense of ownership in the Commission members.

It may reflect on the measure of the success of Commissions appointed by the Courts in environmental matters that the Government of Punjab has, through its Secretary, Environment, appointed, on 11 December 2017, an Advisory Committee with broad-ranging terms of reference including for the “protection of environment and ecological stability of the Environmentally Sensitive Areas of Murree, Kotli Sattian and Kahuta.” The author has been appointed the Chairman of the Committee with Secretaries, Government of Punjab, of (a) Environment, (b) Forest, Wildlife and Fisheries, and (c) Law and Parliamentary Affairs, as members. Also included as members of the Committee are Commissioner Rawalpindi, prominent academics, and representatives of civil society and professional organizations.

#### **D. Limitations in Work of Judicial Commissions**

Even though the advent of public interest litigation and innovative procedural pathways such as judicial commissions threaten to obliterate the law/policy divide, the successes of the new approach in India and Pakistan have been welcomed by a public that has long been used to an apathetic legislature and a weak executive.<sup>28</sup> As long as environmental protection remains a low priority item for the political establishment and the state machinery, courts in Pakistan will increasingly be called upon to give practical significance to the fundamental rights guaranteed under the Constitution. However, it should be borne in mind that the activism of the courts is not a substitute for proper policy making and implementation as judicial intervention is by its very nature reactive and hemmed in by the procedural pathways that are peculiar to the legal process. The countries of South Asia are still in the early stages of environmental consciousness<sup>29</sup> and although public awareness of environmental issues is improving with each passing year, prioritizing environmental concerns in national planning and steady implementation of laws and policies is of paramount importance.

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<sup>28</sup> See Ashok Desai and S. Muralidhar, “Public Interest Litigation: Potential and Problems” in B.N. Kirpal *et al.*, (ed.) *Supreme But Not Infallible: Essays in Honour of the Supreme Court of India*, Oxford (2000) 159, on the appeal of public interest litigation in India despite the lingering questions about its constitutional legitimacy. For the Pakistan over-view, see generally Parvez Hassan and Azim Azfar, *supra* note 1 at 216-217.

<sup>29</sup> The dissemination and easy availability of information is crucial to any public attempt to improve environmental consciousness and activity. Jona Razzaque notes that “in India, Pakistan and Bangladesh, there is no right to environmental information or right of public participation in decisions-making... There should be a specific Act or guidelines to deal with the availability of environmental information, outlining which information is available and how to go about asking for it from the government, from private individuals and companies.” See Jona Razzaque “Human Rights and the Environment – National Experience” (2002) 32 *Environmental Policy and Law* 99, at 107. On this and other requirements for good environmental governance, see generally, Parvez Hassan, “Elements of Good Environmental Governance” (2001) 6 (1) *Asia Pacific Journal of Environmental Law* 1, also in Donna G. Craig, Nicholas A. Robinson and Koh Kheng-Lian, *Capacity Building for Environmental Law in the Asian and Pacific Region – Approaches and Resources*, Volume II, at 985.