

Environmental Jurisprudence from Pakistan: Some Lessons for the SAARC Region

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A. The SAARC Region

The SAARC Region, comprising the founder countries Sri Lanka, Bhutan, India, the Maldives, Nepal, Pakistan and Bangladesh and with Afghanistan joining it in 2005, is renowned for its spectacular natural beauty and splendour and the richness of its biological wealth. It is home to 1.6 billion people constituting about a quarter of the total global population. Its political systems have ranged from ancient monarchies in Nepal and Bhutan up to recently to nascent Westminster democracies which have bloomed and fully blossomed in some countries of the region and in others have survived repeated challenges by military dictatorships. Most of the region was colonized by Great Britain until the liberation and independence of these countries in the last over six (6) decades.

Beyond the above commonality of history, the region is home to:

1. The world's most spectacular mountainous region and the highest peak, Mount Everest, in Nepal. The Hindu Kush-Himalayan range, the "roof top of the world" or the "third pole", is one of the largest storehouses of freshwater in the world; its mountains are the source of major river systems, Ganges and Brahmaputra (Nepal, India and Bangladesh) and Indus (Pakistan), that serve nearly a billion people in South Asia.
2. Two (2) of the seven (7) largest mangrove eco-systems in the world in the Sundarbans (India and Bangladesh) and the Indus (Pakistan).
3. Freshwater blind dolphins in the Indus (Pakistan) and the Ganges river systems (India and Bangladesh), the majestic Bengal tiger, the elusive snow leopard, and the marcopolo.
4. Expansive desert regions in Rajasthan (India), Cholistan and Tharparkar (Pakistan).
5. Richly forested areas (Bhutan, 60%) and countries where the forest cover is under immense pressure (Pakistan, 4%).
6. Important wetlands providing wintering home to the migratory birds from Europe and Central Asia at Bharatpur (India), Haleji and Keenjhar (Pakistan).

The richness of the SAARC environmental landscape is dominated by several common challenges to the region. These include poverty, deforestation, desertification, challenges of climate change, unprecedented glacial melts, and environmental degradation. But what makes a dismal outlook for the future is not the enormity of these challenges but the lack of political will, resources and capacity in the region to deal with these issues.

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South Asia occupies about 5 per cent of the world's land mass, but is home to about 20 per cent of the world's population. This is expected to rise to about 25 per cent by 2025. Three-quarters of South Asia's population lives in rural areas, with one-third living in extreme poverty (on less than a dollar a day). Their well-being is further compromised by indoor air pollution, which is a severe health hazard. ... South Asia is very vulnerable to climate change. Impacts of climate change have been observed in the form of glacier retreat in the Himalayan region, where the approximately 15,000 glaciers will likely shrink from the present total area of 500,000 km² to 100,000 km² by 2035. These glaciers form a unique reservoir, which supports perennial rivers such as the Indus, Ganges and Brahmaputra, which, in turn, are the lifeline of millions of people in South Asian countries (Bangladesh, Bhutan, India, Nepal, and Pakistan).

B. Prioritization of Environment in the Region

Responding to these challenges, SAARC has prioritised environmental protection as one of the sixteen (16) stated areas of regional cooperation.²

Experience has shown that countries that make a commitment to environmental protection in their national Constitutions facilitate an appropriate orientation of their national policies. The SAARC Region has been particularly fortunate in this respect.³ The environmental awakening at the international level by the Stockholm Conference on the Human Environment, 1972, has eloquently echoed in the new Constitutions adopted after 1972 or in the post 1972 amendments to the Constitutions in the region.

A 2011 amendment to the Constitution in Bangladesh⁴ proclaims:

Protection and improvement of environment and biodiversity

18A. The State shall endeavour to protect and improve the environment and to preserve and safeguard the natural resources, bio-diversity, wetlands, forests and wild life for the present and future citizens.

The judiciary in Bangladesh has provided activist relief to environmental causes. Even prior to this Constitutional amendment, the Supreme Court of Bangladesh had, following similar results in India and Pakistan, ruled, in Farooque v. Bangladesh, that the right to a clean environment is included in the right to life guaranteed in the Constitution of Bangladesh:

Article 31 and 32 of our constitution protect right to life as a fundamental right. It encompasses within its ambit, the protection and preservation of environment, ecological balance free from pollution of air and water and sanitation, without which life can hardly be enjoyed. An act or omission contrary thereto will be violative of the said right to life.⁵

² For a list of all sixteen (16) areas of regional cooperation with respect to the SAARC Region, see: http://www.saarc-sec.org/areaofcooperation/cat-detail.php?cat_id=54

³ See, generally, Jona Razzaque, "Public Interest Environmental Litigation in India, Pakistan and Bangladesh" (Kluwer Law International, 2004) which provides a seminal regional over-view of this subject.

⁴ The Constitution of the People's Republic of Bangladesh (1972) is available at: http://bdlaws.minlaw.gov.bd/pdf_part.php?id=367

⁵ 1997 B.L.D. 17, 33.

Article 5 of the 2008 Constitution of Bhutan⁶ raises the duty to protect the environment to an obligation of trust for the benefit of present and future generation:

Every Bhutanese is a trustee of the Kingdom's natural resources and environment for the benefit of the present and future generations and it is the fundamental duty of every citizen to contribute to the protection of the natural environment, conservation of the rich biodiversity of Bhutan and prevention of all forms of ecological degradation including noise, visual and physical pollution through the adoption and support of environment friendly practices.

The Royal Government shall:

- a. Protect, conserve and improve the pristine environment and safeguard the biodiversity of the country;
- b. Prevent pollution and ecological degradation;
- c. Secure ecologically balanced sustainable development while promoting justifiable economic and social development; and
- d. Ensure a safe and healthy environment.

The Constitution of Bhutan goes further: it mandates that a minimum of 60% of Bhutan's total land shall be maintained under forest cover for all time (Article 5(3)). No better recognition of the challenge of deforestation and a more determined effort to meet it exists among the other Constitutions in the SAARC Region.

The Constitution of the Maldives (2008)⁷ places a duty in respect of the environment:

The State has a fundamental duty to protect and preserve the natural environment, biodiversity, resources and beauty of the country for the benefit of present and future generations. The State shall undertake and promote desirable economic and social goals through ecologically balanced sustainable development and shall take measures necessary to foster conservation, prevent pollution, the extinction of any species and ecological degradation from any such goals (Article 22).

The Constitution of Afghanistan (2004)⁸ has a more general commitment:

The state shall be obligated to adopt necessary measures to protect and improve forests as well as the living environment (Article 15).

Article 16 of the Interim Constitution of Nepal (2007)⁹ provides for the rights regarding environment and health in the following terms:

Every person has the right to live in a clean environment.

⁶ The Constitution of the Kingdom of Bhutan (2008) is available at: <http://www.constitution.bt/>

⁷ A copy of the Constitution of the Republic of Maldives (2008) be obtained at: <http://www.maldivesinfo.gov.mv/home/upload/downloads/Compilation.pdf>

⁸ The Constitution of Afghanistan (2004) is available at: <http://www.afghanembassy.com.pl/cms/uploads/images/Constitution/The%20Constitution.pdf>

⁹ The Interim Constitution of Nepal (2007) is available at: <http://www.nic.gov.np/download/interim-constitution.pdf>

Every citizen shall have the right to basic health services free of cost from the State as provided for in the law.

The Indian Constitution (1950)¹⁰, through an amendment in 1976, provides:

48A. The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country.

Article 51A of the Indian Constitution provides:

51A. Fundamental Duties – it shall be the duty of every citizen of India

(g) to protect and improve the natural environment including forests, lakes, rivers and wildlife, and to have compassion for living creatures.

These have been the basis of some of the innovative judicial activism and public interest litigation in environmental causes in the region¹¹. The scale and sophistication of Indian environmental case law brought through public interest litigation is truly impressive and in this respect it remains the most exciting of the South Asian jurisdictions with robust case law on the public trust doctrine,¹² the precautionary principle and polluter pays principle¹³, intergenerational equity¹⁴ and incorporation of international treaties in domestic law.¹⁵ Undoubtedly, a constitutional right to protect the environment certainly helped in the development of this field but it must be added that the liberal regime introduced by public interest litigation in India influenced the final outcomes in these cases.

The Sri Lankan Constitution (1978)¹⁶ provides:

The State shall protect, preserve and improve the environment for the benefit of the community. (Article 27 (14)).

Article 28 provides:

28. Fundamental Duties. The exercise and enjoyment of rights and freedoms is inseparable from the performance of duties and obligations, and accordingly it is the duty of every person in Sri Lanka-

(d) to preserve and protect public property and to combat misuse and waste of public property...

¹⁰ The Amended Constitution of India (1950) may be accessed online at: http://india.gov.in/govt/constitutions_india.php?id=2

¹¹ See, generally, Jona Razzauqe, *supra* note 2; See also, Dr. Parvez Hassan and Azim Azfar “Securing Environmental Rights Through Public Interest Litigation in South Asia” (2004) 22 Virginia Environmental Law Journal 215.

¹² *M. C. Mehta v. Kamal Nath* (1997) 1 S.C.C. 388, also published in the UNEP/UNDP Joint Project “Compendium of Judicial Decisions on Matters Related to Environment- National Decisions” (1998), at p. 259.

¹³ *Vellore Citizens Welfare Forum v. Union of India* A.I.R. 1996 S.C. 2715; and also see *Indian Council for Environmental Action vs. Union of India*, 1996 3 SCC 212, also available at UNEP/UNP Joint Project, *supra* n.11, at p. 394.

¹⁴ *State of Himachal Pradesh vs. Ganesh Wood Products*, A.I.R. 1996 S.C. 149

¹⁵ *People United for a Better Living in Calcutta v. State of West Bengal*, A.I.R 1993 (Cal.) 215.

¹⁶ The Constitution of Sri Lanka (1978) is available at: <http://www.priu.gov.lk/Cons/1978Constitution/Introduction.htm>

(f) to protect nature and conserve its riches.

The judiciary in Sri Lanka has also impressively provided activist relief in environmental causes. The region has resonated with the Bulankulama case¹⁷ decided by the Supreme Court of Sri Lanka as an important formulation of the public trust doctrine.

Pakistan has the weakest response to environmental challenges in its Constitution, 1973. There is no specific provision on fundamental rights or principles of state policy in respect of the environment. But as the subsequent discussion will show, the Supreme Court of Pakistan was not deterred by this handicap to intervene to protect environmental causes.¹⁸

Beyond commitments in their Constitutions, most of the countries in the SAARC Region have also provided appropriate framework laws on the environment and several have set up institutions, seeking the enforcement of such laws through environment protection agencies. Pakistan, India, Bangladesh, and Sri Lanka have, particularly, developed integrated and robust framework laws: the Environment Protection Act, 1997 (Pakistan), the Environment Protection Act 1986 (India), the Bangladesh Environment Conservation Act, 1995, and the National Environmental Act, 1980 (Sri Lanka). Some countries in the region are signatories to many Multilateral Environmental Agreements. Thus, in the three decades since Stockholm, the SAARC countries have reached an impressive sophistication in their environment-related legal regimes.

But while the institutional, legal and regulatory framework in each of these countries may be satisfactory, the implementation of environmental laws and policies has remained an elusive dream. As noted by me elsewhere:

But it requires more than writing laws and signing treaties to promote sustainable development. A provision in law about environmental impact assessment is of no use if the country does not have the professional and technical ability to conduct and evaluate such assessments. Setting environmental quality standards for industrial emissions and effluents can make a difference only if the EPAs have the laboratories and equipment and technical administrators to police such standards. A strong cadre of environmental lawyers is needed to draft national laws for implementing international conventions and otherwise to enforce environmental protection laws.¹⁹

But, perhaps, the most salutary common feature in the region is judicial activism that has pioneered environmental protection in the most innovative forms.²⁰ The superior courts of India, Pakistan, Bangladesh, and Sri Lanka have, particularly, impacted effectively on environmental regimes in those countries.

¹⁷ Bulankulama vs. Ministry of Industrial Development (Eppawala case) (2000) 3SLR 243 (SL) S.C. Application No. 884/99 (F/R). Also published in South Asian Environmental Reporter, Vol. 7(2) June 2000.

¹⁸ See, Dr. 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).

¹⁹ See Parvez Hassan, "Environment and Sustainable Development: A Third World Perspective", 31 *Envtl. Pol'y & L.* 36, at p.40 (2001).

²⁰ See, generally, Dr. Parvez Hassan, "Environmental Rights as part of Fundamental Rights: The Leadership of the Judiciary in Pakistan", in A. Postiglione (ed.), "The Role of the Judiciary in the Implementation and Enforcement of Environment Law", 135-159 (Bruylant Bruxelles 2008). Also published in PLJ 2003 (Magazine), at 209-231.

Another blessing for the SAARC Region has been the visionary leadership of certain individuals. While Justices P. N. Bhagwati (India) and Saleem Akhtar (Pakistan) led the courts in their countries to pioneer environmental reform in precedent-setting decisions, Dr. M. S. Swaminathan (India) and Syed Babar Ali (Pakistan) have provided leadership to IUCN and WWF at the international level. And, Lalanath De Silva (Sri Lanka), Dr. Mohiuddin Farooque and Rizwana Hasan (Bangladesh), and Dr. Salim Ali, M. C. Mehta, and Anil Agarwal (India) inspired the efforts of civil society toward environmental justice. The SAARC Region has been the richer for the durable imprint of the efforts of each of these individuals.²¹

Looking ahead, the challenge for the SAARC Region in the coming years is to seek to improve the implementation of environmental laws and policies. Each country in the region will find its own route to this goal. This paper will present Pakistan's quest for environmental protection, beginning in the 1970s, and show where it went right and where it went wrong in the last four (4) decades. The purpose is to provide some lessons which other countries in the SAARC Region might find useful.

C. C. Emerging Environmental Challenges and Pakistan

1. Legal and Regulatory Framework

I have had the privilege of being associated with most national developments in the field of environment as they have unfolded over the years. I have been associated with the drafting of the first legislation in Pakistan, the Pakistan Environment Protection Ordinance, 1983, and with the subsequent Pakistan Environment Protection Act, 1997. These legislations established a high-powered Pakistan Environment Protection Council, headed by the President/Prime Minister, to establish national policies in the field of environment. They also established implementational arms of the Council in the Pakistan Environment Protection Agency (PEPA) at the federal level, and Environment Protection Agencies (EPA) in the provinces. The requirement of Environmental Impact Assessment was also pioneered in the 1983 Ordinance. The 1997 Act expanded the provisions of the 1983 Ordinance to provide for Initial Environmental Examination and to set up Environmental Tribunals. The Pakistan Environmental Protection Council, mandated to do so, adopted the National Environmental Quality Standards as well as Rules and Regulations in various specific fields such as the Hospital Waste Management Rules, 2005, Pakistan Bio-safety Rules, 2005, and the Review of IEE/EIA Regulations, 2001. All these have been supplemented by the direction-setting National Conservation Strategy and its supporting Provincial Conservation Strategies.²²

Thus, by now, Pakistan has a comprehensive framework environmental law in the 1997 Act which (a) included provisions on federal and provincial EPAs, (b) provided for Environmental Tribunals, (c) strengthened Environmental Impact requirements, (d) enabled the

²¹ For the author's tribute to Justices P. N. Bhagwati and Saleem Akhtar and Dr. Mohiuddin Farooque at the UNEP Global Judges Symposium in Johannesburg, 2002, see Dr. Parvez Hassan, "Judicial Activism towards Sustainable Development in South Asia" PLJ 2003 Mag. 39-41.

²² For an overview of Pakistan's legal and regulatory framework on the environment see, generally, Parvez Hassan and Jawad Hassan "Chapter on Pakistan" in "The Role of the Judiciary in Environmental Governance: Comparative Perspectives", p. 381-409 (Kluwer Law International, 2009). Dr. Parvez Hassan, From Rio 1992 to Johannesburg 2002: A Case Study of Implementing Sustainable Development in Pakistan, (2002) 6 Singapore Journal of International & Comparative Law 683-722

formulation of National Environmental Quality Standards, and (e) facilitated Rules and Regulations in many fields. Sectoral laws including in forestry²³, mining²⁴, wildlife²⁵ and fisheries²⁶ supplement this basic framework. This is all very impressive on paper but, on the ground, not much has changed because there is very poor implementation of the laws and policies.

At the Pakistan Development Forum, 2006, I highlighted:

The result, to generalize, is that we have a framework environmental protection legislation that is not enforced; we have a high-powered National Environmental Protection Council that does not meet; we have a Federal Pakistan Environmental Protection Agency, supported by Provincial Environmental Protection Agencies, all of whom do not act; we have environment – specific Environmental Tribunals that are not resourced; and we have National Environmental Quality Standards that are not implemented.²⁷

This position has suffered a further setback under the 18th Amendment to the Constitution adopted in 2010.²⁸ Under the 18th Amendment, the subject of environment has been moved to the exclusive domain of the provinces. The result is that the federal objectives and planning will yield to provincial legislation and initiatives in the future. What adds to the challenge of this decision is that the provinces have not yet developed the ability over the years to effectively manage environmental issues.

2. Ineffective Implementation

The ineffective implementation in Pakistan has mostly come about because Pakistan did not invest in developing the capacity to administer and implement environmental laws and policies. The EPAs at the federal and the provincial levels were all ignored in budgetary allocations and no significant training and development of professional cadres of environmental managers, lawyers, and specialists took place. No appropriate investment in laboratories and monitoring evaluation of environmental data was developed.

As a result of the under-resourcing of the EPAs, Pakistan yet does not have the managerial, professional, and technical capability to support its environmental laws and policies. No commitment was made toward public education or to the development of environmental

²³ See, The Forests Act, 1927 available at: <http://punjablaws.gov.pk/laws/40.html>

²⁴ See, The Mines Act 1923 available at: <http://faolex.fao.org/docs/pdf/pak64462.pdf>

²⁵ See, The Islamabad Wildlife (Protection, Preservation, Conservation and Management) Ordinance, 1979 available at: http://www.na.gov.pk/uploads/documents/1302130691_430.pdf and also see, generally, Provincial Wildlife Protection Ordinances: Punjab Wildlife (Protection, Preservation, Conservation and Management) Act 1974 (PLD 1974 Provincial Statutes 129, Sindh Wildlife (Amendment) Act 1972 (PLD 1972 Provincial Statutes 308), Balochistan Wildlife Protection Act, 1974 (PLD 1975 Provincial Statutes 28), and the N.W.F.P. Wildlife (Protection, Preservation, Conservation and Management), 1975 (PLD 1975 Provincial Statutes 186)

²⁶ See, The West Pakistan Fisheries Ordinance, 1961 available in PLD 1962 Central & Provincial Statutes 134.

²⁷ Dr. Parvez Hassan, "The Role of the Judiciary and Judicial Commissions on Sustainable Development Issues in Pakistan", 2006 All Pakistan Legal Decisions, Journal, 45, at 49. See also a paper on the same topic presented at the International Judicial Conference organized by the Supreme Court of Pakistan during its Golden Jubilee Celebrations 11-14 August 2006, available at: <http://www.supremecourt.gov.pk/ijc/Articles/9/7.pdf>.

²⁸ PLD 2010 Federal Statutes 1.

syllabi in educational institutions and the result is that environmental management has not been mainstreamed in our national policies.

3. Environmental Jurisprudence of Pakistan

In spite of the above handicaps, the superior judiciary of Pakistan has developed a special role in protecting the environment and this in spite of the fact that “environment” is not included in the Constitution amongst the fundamental rights of the citizens of Pakistan. In the landmark Shehla Zia case²⁹, the Supreme Court of Pakistan pioneered in holding that the right to environment is included in the right to life and the right to dignity guaranteed by the Constitution of Pakistan. This was a bold initiative by the Supreme Court, helped in considerable measure by similar initiatives by the judiciary in India. Shehla Zia has been followed in several other cases and it is now settled law in Pakistan that the judiciary will move to prevent actions which may harm the environment.³⁰

For instance, in General Secretary Salt Miners Labour Union (CBA) Khewra, Jhelum v The Director, Industries and Mineral Development, Punjab, Lahore³¹, the Supreme Court, relying on Shehla Zia, and reiterating its openness to procedural constraints in public interest litigation cases, stated that “The right to have unpolluted water is the right of every person wherever he lives”.³²

The High Courts of Pakistan also caught onto the momentum provided by the Supreme Court in the Shehla Zia case. In Pakistan Chest Foundation v Government of Pakistan³³, the petitioners filed a writ petition for the purposes of stopping tobacco advertisements from being broadcasted on Pakistani television. The Lahore High Court, while accepting the writ petition, brought the case within the “right to life” principle enunciated in Shehla Zia:

Applying the principle of law enunciated in Shehla Zia’s case (supra) to the facts and circumstances of the present case, the citizens of this country and particularly the younger generation are entitled to protection of law from being exposed to the hazards of cigarette smoking, by virtue of the command contained in Article 4 (2)(a) of the Constitution.³⁴

Similarly, in Rana Ishaque vs. DG, EPA³⁵, the Lahore High Court restrained one hundred and twenty one (121) industrial units of Punjab, excluding those that had already installed treatment plants, from discharging effluents into drains and canals on a petition stating that these were being drained without treatments. In Anjum Irfan vs. LDA³⁶, the Lahore High Court, citing Shehla Zia, addressed the setting of air and noise pollution standards under the Pakistan Environment Protection Act, 1997 and suggested that the new industries must be compelled to install devices used for checking and controlling pollution.

²⁹ 1994 PLD 693 Supreme Court, also published in UNEP/UNDP Joint Project, supra note 11, at p. 323

³⁰ See, Parvez Hassan, “Shehla Zia vs. WAPDA: Ten Years Later” supra note 17.

³¹ 1994 SCMR 2061, also see UNEP/UNDP Joint Project, supra note 11, at p. 282.

³² Id., at 2070.

³³ 1997 CLC 1379 [Lahore].

³⁴ Id. at 1425.

³⁵ Writ Petition No. 671 of 1995 before the Lahore High Court, Lahore.

³⁶ Writ Petition No. 25084 of 1997 before the Lahore High Court, Lahore.

The reliance on Shehla Zia has been extended to issues beyond the environment. In Benazir Bhutto v President of Pakistan³⁷, the political abuse of wire-tapping was described as an assault on the “right to life” provision in the Constitution:

With this [Shehla Zia] definition of the word ‘life’, one would not deter to state that telephone-tapping and eaves-dropping mar the protection afforded and guaranteed to the right to life.³⁸

The impetus of Shehla Zia has further extended to the invocation of the doctrine of public trust. In Sindh Institute of Urology and Transplantation vs. Nestle Milkpak Limited³⁹, the establishment of a water-bottling plant that used the common aquifer was challenged on the grounds that such use of natural resources was a violation of the doctrine of public trust. In delivering its judgment, the Sindh High Court noted:

It is well-settled that natural resources like air, sea, waters, and forests are like Public Trust. The said resources being a gift of nature, they should be made freely available to everyone irrespective of the status. "Doctrine of Public Trust" as developed during the days of ancient Roman Empire, enjoins upon the Government to protect the resources for the enjoyment of the general public rather than to permit their use for private ownership or commercial purposes. Even under the Islamic law certain water resources are to be protected from misuse and over exploitation.⁴⁰

The doctrine of public trust was again the subject of judicial scrutiny in the case of Muhammad Tariq Abbassi vs. Defence Housing Authority⁴¹. This case concerned the development of beach-front properties in Karachi wherein it was contended that the development would restrict the access of the public to the public beach, thereby violating Fundamental Rights guaranteed under the Constitution. The Court recognized that the right of free access of the public-at-large to parks, and similar public spaces was a Fundamental Right guaranteed under Article 9 of the Constitution and extended this right to the beach at Karachi and other coastal areas.

Relying on Article 9 and other provisions of the Constitution, the Balochistan High Court has, in a recent “green” judgment led by its Chief Justice, supported the public trust doctrine to disallow construction of shops around a public park on the considerations, among others, that enclosing the park on three sides will be “claustrophobic” and the users of the park will be “holed in within the pit of the Park”.⁴²

Also recently, in the Lahore Canal Bank Road case⁴³, in which I was appointed as the Mediator, the Supreme Court relied on the Shehla Zia case as providing the grundnorm in extending the meaning of Fundamental Right of Life. The decision of the Supreme Court was

³⁷ PLD 1998 Supreme Court 388.

³⁸ Id. at 619.

³⁹ 2005 CLC 424 [Karachi].

⁴⁰ Id. at 440.

⁴¹ 2007 CLC 1358 [Karachi]

⁴² Chamber of Commerce and Industry Quetta vs. D.G. Quetta Development Authority, PLD 2012 Balochistan 31; the cited portions are on pages 37-39.

⁴³ Sue Motu Case No. 25 of 2009 (Cutting of Trees for Canal Widening Project Lahore), 2011 SCMR 1743. A copy of the judgment may also be obtained online at: http://www.supremecourt.gov.pk/web/user_files/File/SMCNo25of2009.pdf

anchored on the understanding of the doctrine of public trust. Issue (vii) framed by the Supreme Court read as under:

Whether the project entailing the widening of the road on both sides of the Canal, which would have the effect of reducing the area of green belt, is violative of the Doctrine of Public Trust (Paragraph 11).

The Supreme Court, in its judgment, following a precedent-setting postulation of the public trust doctrine, held:

The case in hand, if examined, in the light of the Doctrine of Public Trust as explained by the academics and construed by the Courts including the Pakistan Supreme Court leads to an inescapable conclusion that the green belt around both sides of the Canal is a Public Trust resource; that it cannot be converted into private use or any other use other than a public purpose; that widening of the road as proposed is a public purpose; that a minimum area is being affected and the remaining green belt/public park is much larger; that the same has been recommended by the Mediation Committee to be declared as Heritage Park and the recommendations of the said Committee have been accepted by the Province of Punjab in totality. In these circumstances, the Doctrine of Public Trust cannot be said to have been compromised (Paragraph (35)).

4. Role of Commissions

One of the welcome decisions taken by the Supreme Court of Pakistan in the Shehla Zia case was to establish a Commission for the review of scientific, technical and professional data submitted by the parties in the case. Thus, in the first case on the environment before it, the Supreme Court recognized the need to involve other disciplines for the successful outcome in those cases. It is well known that many environmental issues criss-cross into other disciplines such as mining, engineering, medicine, economics, health and public safety. It is not possible for judges with specialized legal backgrounds to evaluate and make recommendations in these complex areas. In Shehla Zia, the Supreme Court pointed to a way forward by including the expert guidance of Commissions.

The precedent of the appointment of a Commission in Shehla Zia has now resonated richly in the jurisprudence of our superior courts. The Supreme Court appointed a Commission in the Salt Mines case as well as in the recent (2011) decision involving the widening of the Lahore Canal Bank Road. In the Salt Mines case, a Commission headed by me was appointed to visit the site of extensive mining activity and to recommend remedial measures.

In the Lahore Canal Bank Road case, the Supreme Court dealt with the challenge of the widening of the Lahore Canal Bank Road which the green lobby opposed on the ground that it would involve the cutting of trees which have been a part of Lahore's heritage. The Government of Punjab desired the widening of the road because of traffic and hospital needs. The Supreme Court, in appointing me as the Mediator in the dispute, enabled me to appoint a cross section of environmentalists, botanists, traffic engineers, city planners, parliamentarians and Government officials as part of a Committee to develop a consensus, approved by the Supreme Court, on a limited widening of the road. In acknowledging the value of Commissions, the Supreme Court stated:

In such cases the Court may not have the requisite expertise to adjudicate. This is why the Court seeks the assistance of experts or experts' committee. The advantage of the experts' committees is that it enables the Court to receive technical expertise while the Judges are left to decide questions of law. Such committees reduce the chances of judicial arbitrariness and add legitimacy to the judgments (Paragraph 54).

But, as noted by me elsewhere:

... the use of judicial commissions is by no means a panacea as the technique can only work effectively where expert opinion is not divided and there is a fair chance that a consensus can emerge amongst the diverse group of stakeholders. 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. 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 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.⁴⁴

The country's High Courts have also adopted the practice of appointing a Commission to facilitate the resolution of contentious, divisive and adversarial proceedings. In fact, the first appointment of a Commission in the field of environment in the country in a public interest environmental litigation was most probably by the Lahore High Court in United Welfare Association, Lahore vs. Lahore Development Authority⁴⁵ before Mr. Justice Khalil-ur-Rahman Khan in which 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, former Chief Justice of the Supreme Court of Pakistan, 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"⁴⁶.

⁴⁴ See Dr. Parvez Hassan, "The Role of the Judiciary and Judicial Commissions on Sustainable Development Issues in Pakistan", *supra* no.26, at p. 56-57.

⁴⁵ Writ Petition No. 9297 of 1991 before the Lahore High Court, Lahore.

⁴⁶ See Justice Dr. Nasim Hasan Shah, "Environment and the Role of the Judiciary", PLD 1992 Journal 21, at 27.

In light of the above, I visited the area and with scientific support from the Pakistan Council of Scientific and Industrial Research (PC SIR), recommended to the Lahore High 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 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.

The Lahore High Court, similarly, established the Lahore Clean Air Commission in July 2003 to propose remedial measures for Lahore's deteriorating air quality⁴⁷, also chaired by myself and co-chaired by the Advocate General, Punjab. This Commission included representatives from both the private and public sectors. It set up sub-committees with respect to (1) clean fuel, (2) rickshaws, (3) public transport and (4) coordination with local councils. The Lahore Clean Air Commission 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 were filed in the Lahore High Court and in 2006, the Secretary, Transport, Government of Punjab, joined in supporting the recommendations of the Commission before the Lahore High Court.

Also, in City District Government vs. Muhammad Yousaf,⁴⁸ a Division Bench of the Lahore High Court comprising Justices Tassaduq Hussain Jilani and Bashir Mujahid, appointed the Solid Waste Management Commission to deal with solid waste disposal issues. 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.

In addition to the Commissions/Mediation Committees appointed in the Supreme Court cases, I had the privilege of being the Chair of both the Lahore Clean Air Commission and the Lahore Solid Waste Management Commission appointed by the Lahore High Court and the earlier Lahore High Court Committee appointed in the United Welfare case discussed above. I included in the Commissions, in each case, the representatives from civil society organizations, universities, government officials, parliamentarians and subject specialists. The basic approach that was followed by all these Commissions was to provide science/technology-based solutions that lay outside the expertise of the Courts. Apart from providing such guidance to the Court, 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.

⁴⁷ Syed Mansoor Ali Shah vs. Government of Punjab, Writ Petition No. 6927 of 1997 filed before the Lahore High Court, Lahore.

⁴⁸ I.C.A No. 798/2002 filed before the Lahore High Court.

The environmental jurisprudence of the superior courts of Pakistan has been immeasurably enriched by the specialist inputs of the Commissions.⁴⁹

5. Other Environmental Allies

As one who started the advocacy of environmental causes in Pakistan, I acknowledge the important support by the judiciary, particularly the Supreme Court of Pakistan. I have looked to other allies in the support of this work. The media has been equally responsive and many successes of environmental cases in the courts may be attributed to the public opinion that the media may have created in support of such causes.

The support of civil society organizations has also been helpful in the development of a “green” lobby in Pakistan. IUCN, WWF, LEAD, and PELA and the legal community have all provided technical and professional guidance in environmental advocacy.

6. The Environment and the 18th Amendment

In 2010, Pakistan responded to the demands of the provinces to bring about major changes in the constitutional arrangements with respect to the competence and the jurisdiction of the provinces in certain fields. The provinces were seeking more powers and autonomy under the federal scheme and the 18th Amendment passed by the Parliament in 2010⁵⁰ enabled the devolution of powers from the federation to the provinces in some fields. Prior to the 18th Amendment, many subjects were within both the federal as well as provincial jurisdictions as included in a Concurrent List. The federal law-making powers enjoyed primacy in the subjects listed in the Concurrent List in case the provinces also legislated in the same area. The 18th Amendment has abolished the Concurrent List which included the “environment and ecology”. The result is that now the environment is a provincial subject and the federal government has no competence to deal with this important field at the national level.⁵¹ This has raised many questions of the inability of the federal government to

⁴⁹ See, generally, Dr. Parvez Hassan and Ahmed Rafay Alam, “The Role of Commissions in Public Interest Environmental Litigation in Pakistan”, 2011 All Pakistan Legal Decisions, Journal, 78 at 88-89.

⁵⁰ Supra note 27.

⁵¹ Article 270AA, introduced by the 18th Amendment, provides:

....

(6) Notwithstanding omission of the Concurrent Legislative List by the Constitution (Eighteenth Amendment) Act, 2010, all laws with respect to any of the matters enumerated in the said List (including Ordinances, Order, rules, bye-laws, regulations and notifications and other legal instruments having the force of law) in force in Pakistan or any part thereof, or having, extra-territorial operation, immediately before the commencement of the Constitution (Eighteenth Amendment) Act, 2010, shall continue to remain in force until altered, repealed or amended by the competent authority.

....

(8) On the omission of the Concurrent Legislative List, the process of devolution of the matters mentioned in the said List to the Provinces shall be completed by the thirtieth day of June, two thousand and eleven.

See, (a) Air League of PIAC employees vs. Federation of Pakistan, 2011 SCMR 1254 and (b) Industrial Relations Advisors’ vs. Federation of Pakistan, 2010 PLC 359 (Karachi).

deal with the environment even at a national policy level and in particular to enter into Multilateral Environmental Agreements (MEAs) with other countries.

There is some discordance in Pakistan over the 18th Amendment and it appears that its Parliament may have acted in haste to bar a federal role in national environmental planning. Efforts are being made to revisit this decision and the outcome of this effort would influence major international initiatives such as on climate change in which the active participation of Pakistan is necessary at the national level.

On the bright side, however, the 18th Amendment has introduced the “Right to Information” as a fundamental right under the Constitution (Article 19A). This will facilitate an effective implementation of the freedom of information legislation and help environmentalist activists to get appropriate facts and data so essential to the successful outcome of their efforts.

D. Lessons for the SAARC Region

From Pakistan’s experience, it is possible to conclude that an effective environmental regime in a country would depend on the following dos:

1. A commitment in the national constitution to environmental protection would influence an over-all orientation of laws and policies. Pakistan has lagged behind in a Constitutional commitment to environmental protection. A commitment at the level of the Constitution creates prioritisation in judicial decisions. The Pakistan judiciary has not allowed this handicap to prevent its activist jurisprudence in the support of environmental causes.
2. An activist judiciary, supported by a proficient bar, has played a stellar role in the successes of environmental causes in Pakistan.
3. A major lesson from Pakistan’s judicial interventions for environmental causes has been the contribution of Commissions that have been appointed by the superior courts to deal with the technical and scientific issues before the Courts. This strategy to broad base the decision-making from a consensus arrived at in the Commissions has lent much credibility to the work of the superior courts.
4. The Courts in Pakistan have, on several occasions, used the public trust doctrine to protect the use of natural resources and this rich jurisprudence may be of some relevance to the region’s judiciary.⁵² Similarly, the precautionary principle has been repeatedly invoked in environmental petitions on the precedent of Shehla Zia.
5. Any national commitment to environmental protection is facilitated by a framework national law on the environment that establishes a high level policy making body to professionalise the implementation of the environmental policies through environmental protection agencies. Such a law should provide for environmental impact assessment as a major means for environmental management.
6. The framework law should be supplemented by specific sectoral laws, rules and regulations such in the forestry, wildlife, and marine areas.
7. A committed civil society has championed environmental causes before the courts of Pakistan. IUCN and WWF Pakistan and other initiatives developed with them such as

⁵² See, generally, Dr. Parvez Hassan and Mr. Ahmad Rafay Alam, “Public Trust Doctrine and Environmental Issues before the Supreme Court of Pakistan”, PLJ 2012 (Mag.) 44..

the Sustainable Development Policy Institute (SDPI) have anchored much of the initiatives toward environmental literacy and sustainable development in Pakistan. Of all its global offices, IUCN has one of the most impressive national presence in Pakistan and it has, particularly, provided backbone support to almost all national initiatives such as the National Conservation Strategy and the Provincial Conservation Strategies. This commitment of IUCN in Pakistan has made a difference in our over-all efforts.

8. Civil society in Pakistan, usefully, developed a network of environmental journalists (Pakistan Forum of Environmental Journalists) in the earliest stages which created and facilitated favourable public opinion on environmental issues. My success in most of the environment cases that I have handled have importantly benefited from the public opinion created by the media in Pakistan. Effective implementation of environment regimes is facilitated with the support of the media.
9. Although at a nascent stage in Pakistan as a fundamental right under the Constitution, the right to information unmistakably influences the quality of information and data available for the success of environmental regimes at national levels.

Equally valuable for the SAARC Region would be to learn from the mistakes of Pakistan. The list of don'ts includes:

1. Implementation continues as by far the most daunting challenge and failure in Pakistan. The appropriate resourcing and building the capacity for environmental management is key to the implementation of environmental policies and laws. This is where Pakistan went wrong and did not invest in this capacity. The most important lesson from Pakistan is that the SAARC countries should place capacity building as the number one priority. I have been visiting Brazil regularly since the Earth Summit in 1992. I am not aware of any country that, over the years, has invested as heavily in capacity building as Brazil. The result is that this capacity has today built its own momentum to effectively both formulate and implement the environmental policies of Brazil.
2. A major handicap in implementing environmental laws and policies has been the failure of the Governments in Pakistan, both federal and provincial, to themselves lead by example in respecting and following these laws. Time and again, huge public sector projects are announced and although these require an EIA and a public-participative approval process, the Governments openly violate these requirements. I recall that, despite my public demand at the Pakistan Development Forum in 2006, the construction of the massive GHQ in the most picturesque part of Islamabad by General Parvez Musharraf was undertaken without the obligatory EIA.
3. Women and youth also significantly improve the quality of implementation. Among important failures in Pakistan, it has failed to involve this crucial constituency in its environmental agenda. SAARC would do well to not repeat that failing.
4. Pakistan's decision to make the environment an exclusive subject for provincial action and policy has weakened Pakistan's ability to deal with the environment at a national level holistically. Pakistan already feels handicapped particularly in dealing with the challenges of climate change at a national level and to deal with the MEAs that it has entered into with obligations to other countries.

To summarize the lesson from Pakistan, it is highlighted that the challenges to the environment do not end with drafting appropriate laws and policies. In fact, they begin with such laws and policies. To transform these laws and policies into an effective implementation requires a massive commitment to the capacity building of the EPAs. Without this, any effort will have little chance of success. The support of the courts, media, women, youth and civil society organizations should also be encouraged by the countries in the region.

E. The Way Forward: Regionalizing Environmental Protection

The protection of human rights in the world was improved by the internationalisation of these concerns through the Universal Declaration of Human Rights, 1948, and the International Covenant of Civil and Political Rights and on Economic, Social and Cultural Rights, 1966. These pioneering initiatives at the international level were facilitated by regional support and the establishment of European Commission/Court of Human Rights, the Inter American Commission/ Court of Human Rights and similar initiatives in Africa. I think the SAARC Region could do well to regionalize the protection of the environment in the SAARC region. For this purpose, I propose:

1. A SAARC Treaty on Environment and Development based on the Stockholm Principles, 1972, Rio Declaration on Environment and Development, 1992, and the Johannesburg Principles, 2002. As Chair of the Commission on Environmental Law, IUCN, I had led the adoption of a proposed international Treaty on the Environment and Development.⁵³ The Earth Charter⁵⁴ is another relevant inspiration and these could form the basis of the SAARC Treaty, particularized to the specific needs of the region.
2. The establishment of a SAARC Commission/Court on the Environment to deal with regional issues.
3. A SAARC Secretariat on the Environment should be set up to be the depository of a data base of information of the region. This Secretariat could facilitate inter-state cooperation and provide a clearing house for the regions' laws, policies and court decisions on the environment.
4. The above would build on the Male Declaration on Control and Prevention of Air Pollution and its likely Transboundary Effects for South Asia (1998), which was an important initiative in tackling transboundary pollution through regional co-operation. SAARC member countries need to further strengthen their monitoring and evaluation mechanisms so that the "momentum of the agenda of air pollution",

⁵³ IUCN Draft Covenant on Environment and Development launched at the Congress on Public International Law, in the U.N. General Assembly, New York, 15 March 1995; See also Dr. Parvez Hassan, "Toward an International Covenant on Environment and Development", American Society of International Law Proceedings, 513-522 (1993); Dr. Parvez Hassan, "The IUCN Draft International Covenant on Environment and Development: Background and Prospects", in A. Kiss and F. Burhenne-Guilmin (eds), A Law For The Environment: Essays in Honour of Wolfgang E. Burhenne (IUCN 1994)

⁵⁴ Dr. Parvez Hassan, "The Earth Charter: The Journey from The Hague 2000", delivered at the Official Launch of the Earth Charter at the Peace Palace, The Hague, The Netherlands, on 29 June 2000, published in 30 Pakistan Law Journal 1-4 (2002); Dr. Parvez Hassan, "Earth Charter: An Ethical Lodestar and Moral Force", in P. Corcoran, M. Vilela and A. Roerink (eds.), The Earth Charter in Action: Toward a Sustainable World, 29-31 (KIT Publishers, Amsterdam 2005)

initiated in the Male Declaration, “is not lost”⁵⁵. Through technical assistance protocols and legally binding agreements between SAARC countries agreeing on time – bound air pollution reduction programs, the air quality, at both national and regional levels, can be maintained.

5. A SAARC Biodiversity Conservation Agreement would provide important regional support to the U.N. Convention on Biological Diversity.⁵⁶ This would facilitate detailed assessments of the biological diversity in the region, mapping and delineation of protected areas and the creation of biodiversity corridors to provide safe transit for migratory species.
6. All the nations of the SAARC region are threatened by effects of climate change⁵⁷. A major concern in South Asia is the lack of knowledge and awareness on climate change as well as the lack of necessary resources to assess the possible impacts. There is a need for research on localized climate changes and its impacts. The focus should be on promoting understanding of climate change, adoption and mitigation, energy efficiency and natural resource conservation.

This vision for the SAARC countries may sound ambitious today but the leadership in the region would do well to today begin to solve the problems of tomorrow.

⁵⁵ See, Dr. Mahmood A Khawaja, “Poison in the Air”, News on Sunday, 26 February 2012 (Islamabad), also available at: <http://jang.com.pk/thenews/feb2012-weekly/nos-26-02-2012/pol1.htm#7>

⁵⁶ See, Dr. Parvez Hassan, “The Political and Legal Dynamics of the Implementation of the Convention on Biological Diversity in the Asian and Pacific Region”, in Biodiversity Conservation in the Asia and Pacific Region: Constraints and Opportunities, 391-401 (ADB/IUCN 1995).

⁵⁷ For a review of the impact of climate change on the unprecedented floods in Pakistan in 2010, see Dr. Parvez Hassan “Pakistan Floods 2010 and the Environmental Challenges”, a paper presented at the 1st International Conference on the Environment and the Role of the Modern State, held at Manaus, Brazil, on 16-19 November 2010. See also Dr. Parvez Hassan and Ahmad Rafay Alam “Bad Weather”, published in the Newsweek Pakistan March 2011 Issue available at: <http://newsweekpakistan.com/features/266>