

INTERVIEW

DR. PARVEZ HASSAN: PAKISTANI ENVIRONMENTAL LAWS

*Dr. Parvez Hassan currently serves as the President of the Pakistan Environmental Law Association. As a pioneer in Pakistan's environmental protection movement and the promotion of an independent judiciary, Dr. Hassan has unique insight into Pakistan's struggle to preserve the rule of law and the environment. After receiving his Master of Laws in 1963 from Yale University, Doctor of Laws in 1969 from Harvard University and practicing with several distinguished law firms, Dr. Hassan returned to Pakistan and is a senior partner at Hassan & Hassan (Advocates). Notably, he argued and won *Shehla Zia v. WAPDA*, the case before the Supreme Court of Pakistan which affirmed that a decent environment is a constitutionally protected right to life and dignity. More recently, Dr. Hassan spoke out against the removal of Chief Justice Chaudry by former president and general, Pervez Musharraf, which resulted in his arrest along with over 500 other lawyers. His leadership and advocacy have helped to evolve the rule of law and protection of the environment in Pakistan and left an indelible mark on Pakistan's sustainable development movement.*

*Interviewed by Hannah Cochrane**

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Dr. Hassan, can you please give a brief description of your background in cultivating Pakistan's sustainable development movement?

I was not formally schooled or educated in environmental law. On return to Pakistan in 1969, following post-graduate degrees in law from Yale and Harvard, and associations with three law firms in the United States, I established a corporate law firm in Lahore. My first encounter and romance with environmental protection started with a surprise invitation in 1977 from the United Nations Regional Office, Economic and Social Commission for Asia and the Pacific (ESCAP) to do an overview of Environmental Protection Legislation in the ESCAP Region. This led to more associations with the important work of ESCAP and the United Nations Environment Program (UNEP) in the region. Such work included a mission to Bangladesh and the drafting of its proposed Environmental Protection Ordinance in 1978. A similar effort was made in proposing what became the Pakistan Environmental Protection Ordinance, 1983.

This early opportunity with ESCAP and UNEP led to my becoming a member of the Board of Directors of the Worldwide Fund for Nature Pakistan (WWF Pakistan). Also, I met Wolfgang Burhenne during an ESCAP–UNEP meeting in Bangkok. This introduction resulted in his later offer to me to become the deputy chair of the Commission on Environmental Law (CEL) of the International Union for Conservation of Nature and Natural Resources (IUCN). I was the chair of CEL from 1990 to 1996, guided by Deputy Chair Nick Robinson.

At home, I was active with the IUCN activities in Pakistan and was the founding chair of the Rockefeller Foundation–sponsored LEAD Pakistan as well as on the Board of LEAD International. We later established the Sustainable Development Policy Institute (SDPI) in Islamabad and I was on its Board of Governors and also the chairman.

All of the above gave me the opportunity to develop the origins of the environmental movement in Pakistan. We invoked the public interest jurisdiction of our superior courts to move our mission forward in the case of *Shehla Zia v. WAPDA*.¹ This case, which I

1. *Shehla Zia v. W.A.P.D.A., P.L.D. 1994 SC* (Supreme Court of Pakistan) 693.

argued before the Supreme Court of Pakistan, gave us a head start in the early recognition by the country's highest court that environmental rights were a part of the constitutionally-protected fundamental rights. This work has continued with the Pakistan Environmental Law Association (PELA) founded in 1999, which I presently chair.

In essence, close associations with the leading national and international organizations: ESCAP, UNEP, WWF Pakistan, IUCN, LEAD International, LEAD Pakistan, PELA and SDPI have facilitated my work in the field of environmental protection and sustainable development. I could not have wished for a better background to canvas and advocate environmental priorities in Pakistan.

Can you describe your role with the Environmental Protection Council in protecting the environment and the importance of the Environmental Protection Council in promoting the rule of law and the preservation of the environment?

I was involved in drafting both pieces of legislation in Pakistan pertaining to the environment. First, in the Pakistan Environmental Protection Ordinance, 1983, which was replaced by the Pakistan Environmental Protection Act, 1997 (PEPA), we established the Pakistan Environmental Protection Council as the highest policy making forum in the country. But, the provision that the president or the prime minister of Pakistan shall head the council, intended to strengthen the council's authority, has proven to be a weakness over the years, because the president and the prime minister have not been available for the minimum two statutory meetings a year required under PEPA and the earlier Pakistan Environmental Protection Ordinance, 1983. I have been a member of this council since its inception and, other than the National Environmental Quality Standard which we adopted at our first meeting in 1993, I cannot identify anything else of durable importance that may have been transacted by the council.

I understand that there have been recent changes to Pakistan's Constitution. How were these changes drafted and what impact will it have on the rule of law?

The subject of the environment was included in the Concurrent List of the Constitution of Pakistan 1973 (the Constitution). This meant

that both the federation and the provinces of Pakistan could legislate on subjects included in the Concurrent List. However, following the Eighteenth Amendment passed in 2010, the Concurrent List has been deleted and the result is that the environment is now a provincial subject. This may be a severe setback to the federal–provincial coordination on environmental matters, and the provinces are currently responding to the new situation by working toward specific provincial legislation on environmental protection. The chances are that such provincial legislation will mirror some of the provisions of PEPA.

The constitutional amendment notwithstanding, the thrust of jurisprudential activism by our superior courts led by the *Shehla Zia* case, will continue to anchor citizens' concern about major environmental issues.

You were part of the 500 lawyers who were arrested for protesting the removal of Chief Justice Chaudhry by General Musharraf. This remarkable event made headlines all around the world. Can you explain the momentum behind this unprecedented event, why it was important for you to participate and your views on the government's response?

Pakistan has been unfortunate in the repeated interruptions of democratic rule by *coup d' etats* and takeovers: by Ayub Khan in 1958; Yahya Khan in 1969; Zia-ul-Haq in 1977; and Pervez Musharraf in 1999. Indeed, as much as half of Pakistan's existence as a nation since 1947 has been under military rule. It seems to be a historical legacy in South Asia that movements for independence and human rights were led by lawyers such as Gandhi, Nehru and Jinnah. Lawyers in Pakistan have, resultantly, led movements against military dictators. In some ways, facing police brutality and imprisonment has come to be an occupational hazard for lawyers in Pakistan. I was active in the leadership of the lawyers' movement against General Zia-ul-Haq in the 1980s and was brutalized by the police. I responded with the same conviction in joining the lawyers' movement against Pervez Musharraf in 2007, when, in a defining moment in Pakistan's history, Chief Justice of Pakistan, Mr. Iftikhar Muhammad Chaudhry, refused to resign and showed unique courage in standing up to Pervez Musharraf and his generals. The lawyers' movement is a symbol of the admiration and gratitude that the lawyers, civil society and media

have for the independence of the chief justice, an independence that was not acceptable to Pervez Musharraf. Pervez Musharraf needed “a more reliable judge” considering the important constitutional matters that were likely to come up before the Supreme Court during the election year 2007, including his own eligibility as a presidential candidate and his right to continue holding the dual offices of the army chief and the president of the country. The success of the lawyers’ movement against Pervez Musharraf showed the strength that the lawyers, civil society and media had jointly achieved in forcing change.²

During the February 2008 elections, both the Pakistan’s Peoples Party (PPP) and Pakistan Muslim League (PML-N) parties elevated the issue of the reinstatement of the judges. Were you surprised by this response? Were you surprised by the breakdown of the new coalition government over the mechanism for restoration of the judges?

When the Pakistan People’s Party and Pakistan Muslim League–N joined in the demand for the reinstatement of judges, it was simply in tune with the popular demands expressed so vocally in the nationwide protest movement which was lionized by the media, particularly the electronic media. When, later, the ruling Pakistan People’s Party delayed the reinstatement of the judges, it was clear that this inaction could jeopardize the success of the new government. It finally gave in to the pressures of the movement.

Shortly after the 2007 crisis you remarked, “The rule of law remains elusive in Pakistan and a dream more distant than it appeared in 1947.” Do you still believe this to be true? Is the newly-elected government respecting judicial independence?

When the judges were reinstated in 2009, the rule of law appeared no more elusive in Pakistan and no more a distant dream. We thought we had gotten there. But the ruling government has been obstructive in its implementation of some of the decisions of the Supreme Court of Pakistan which impact, directly or indirectly, on the corruption of the present leadership in the government. The

2. See, generally, Parvez Hassan, *Environmental Protection, Rule of Law and the Judicial Crises in Pakistan*, 10 ASIA-PAC. J. ENVTL. L. 167-181 (2007).

constitutionality of some of the provisions of the Eighteenth Amendment has been challenged before the Supreme Court, particularly the new role of the legislature and executive in the appointment of judges to the superior courts. These provisions are seen as a threat to the independence of the judiciary. From these perspectives, 2010 will be an important year in the determination of the balance required in the separation of powers.

In an article you have mentioned that judicial activism on the part of the chief justice was one of the reasons for the 2007 judicial crisis. Can you explain the connection?

The chief justice had moved against the Musharraf government in the cases of persons who were missing from their homes, many suspected to have been in the custody of intelligence agencies, as well as other human rights violations. He and his court also struck down several important governmental initiatives such as the privatization of the Pakistan Steel Mills. Further, they struck down the development of Murree [one of the largest resort towns in the Galyat area of Pakistan] on grounds of protecting the environment. I believe that this “green” approach annoyed the military dictatorship at that time.

Would you discuss the importance of *Shehla Zia v. WAPDA* for both Pakistan and for the emerging right to a clean and healthy environment in international law?

In 1994, the Supreme Court of Pakistan was presented with a unique petition: some residents of the federal capital, Islamabad, had approached the Court regarding the construction of a high voltage grid station by the Water and Power Development Authority (WAPDA) in a residential area of Islamabad. The residents of this neighborhood, led by Ms. Shehla Zia, asserted that the electromagnetic radiation of the grid station would likely be harmful to the health of the residents. The extraordinary aspect of this petition was that it sought the jurisdiction directly of the Supreme Court of Pakistan under Article 184(3) of the Constitution under which the Supreme Court of Pakistan can enforce the fundamental rights guaranteed to the people of Pakistan by the Constitution if such protection is a matter of “public importance.” Ordinarily, the High Courts in the provinces are mandated to protect the fundamental rights of the citizens of Pakistan and it is only in exceptional

circumstances that Article 184(3) can be invoked. The second unusual feature of this petition was that it did not pertain, strictly speaking, to any of the fundamental rights guaranteed by the Constitution. The claim was for a right to a clean environment and the Constitution did not in any manner provide for such a fundamental right.

The result in *Shehla Zia* exceeded the expectations of the petitioners. In one broad sweep, the Supreme Court laid down law to be followed by all the courts in Pakistan: (1) Environmental rights are covered in the rights to life and dignity guaranteed in the Constitution; (2) Environmental rights are to be interpreted in accordance with developments at the international level; (3) Commissions composed of technical experts may be established by courts in determining complex policy issues;³ and (4) Public disclosure and participation are essential in decision-making by governmental agencies.

The *Shehla Zia* case has attracted a great deal of international attention and comment. It is included in the UNEP/UNDP Compendium of Judicial Decisions on Matters Related to Environment: National Decisions compiled in 1998. It is also included in a recommended syllabus for the law schools of the Asia Pacific region in Asian Development Bank, Capacity Building for Environmental Law in the Asia and Pacific Region: Approaches and Resources (2002).⁴ The case also has been cited with approval in many subsequent cases both in the Supreme Court and in the courts below.⁵

Can you explain the origins of the *suo moto* power and the use of the public interest litigation by the court to protect the people of Pakistan?

The *suo moto* jurisdiction invoked by the superior courts in

3. The use of judicial commissions in environmental cases, post *Shehla Zia*, has been discussed in Parvez Hassan, *Judicial Commissions as a Way Forward for Environmental Protection in Pakistan*, 37/2-3 *Env'tl. L. & Pol'y*, 185-193 (2007). See also Parvez Hassan, *The Role of the Judiciary and Judicial Commissions on Sustainable Development Issues in Pakistan*, a paper presented at the Pakistan Development Forum, held in Islamabad on May 10, 2006.

4. Capacity Building for Environmental Law in the Asian and Pacific Region: Approaches and Resources (Donna Craig, Koh Kheng-Lian & Nicholas Robinson eds., 2002).

5. For a further discussion of the *Shehla Zia* case, see Parvez Hassan, *Shehla Zia v. WAPDA: Ten Years Later*, 48 *P.L.J.* 48 (2005); Parvez Hassan, *A Decade of Shehla Zia*, *Int'l Env'tl. L. Comm. Newsletter* (A.B.A., Chicago, Ill.), May 2005, at 13-19.

Pakistan, that is the High Courts and the Supreme Court of Pakistan, is based, generally, on the broad powers granted in the writ jurisdiction to the High Courts under Article 199 of the Constitution for the protection of the fundamental rights enshrined in the Constitution. Also, the enabling provision for the Supreme Court to act *suo moto* is Article 184(3) of the Constitution which gives it over-arching jurisdiction in matters of “public importance” with respect to the “enforcement of fundamental rights.”

The *Shehla Zia* case was the first environmental case before the Supreme Court under Article 184(3). The Supreme Court had already invoked this power in a public interest initiative with respect to a case involving bonded labor.⁶ Thereafter, the Supreme Court invoked *suo moto* jurisdiction to hear cases involving malpractice in the educational system, child abuse, victims of gender exploitation, murder cases, traffic control, and environmental degradation.⁷

Do you see a connection between the growth of environmental protection and the response from the lawyers protesting in 2007? What are the implications for the broader world as well as in the region against extremism?

As a consequence of the escalating degradation of the environmental conditions in Pakistan and the continuing executive and legislative apathy, the judiciary has stepped in to fill a vacuum. The lawyers’ movement for the rule of law and the independence of the judiciary have played a vital role in encouraging and promoting judicial activism in Pakistan.

The use of extremism in the region has been explained in several dimensions. The most important is the deprivation of human liberties and the denial of prompt and effective justice. The new spirit and energy of our superior courts could respond to this need.

Can you briefly describe what you think the Pakistani people expect out of their legal system, and in your opinion are they getting it?

The people of Pakistan, like the people of any other country in

6. Darshan Masih v. State, PLD 1990 SC (Supreme Court of Pakistan) 513.

7. Public interest litigation in Pakistan has been discussed in Parvez Hassan & Azim Azfar, *Securing Environmental Rights through Public Interest Litigation in South Asia*, 22 VA. ENVTL. L.J. 215, 216-36 (2004).

the world, want their legal system to provide free, timely and effective justice which can only be secured by the presence of an independent judiciary in the country. The judiciary in Pakistan had always been the subject of political influence and interference, both by the elected governments and the military dictators. The lawyers' movement has led to an independent judiciary in the country, probably for the first time in the history of Pakistan. It is yet premature to say that the present judiciary in Pakistan has succeeded in providing free, timely and effective justice to the people of Pakistan, but it can be said that the judiciary has started its journey in that direction. The Judicial Policy of Pakistan (2009), announced by the chief justice of Pakistan following a consultative process, is a demonstration of this commitment.

Have there been any notable judicial developments in the area of environment protection?

The Constitution does not prioritize environmental protection even in the formulation of the fundamental rights. The subject of "ecology" was included in the Concurrent List of the Constitution but this list has been deleted by the Eighteenth Amendment to the Constitution (2010). The inclusion of a matter in the Concurrent List enabled both the federal government and the provincial governments to legislate in the matter (with federal primacy in case of a conflict with a provincial law). The federal overarching environmental legislation, PEPA, and the Environmental Tribunals created under it were enabled by the Concurrent List. However, with the deletion of the Concurrent List, all matters covered by such a list would be within the sole and exclusive domain of provincial governments.

With this development, PEPA and the tribunals set up under PEPA, would now need to be established in provincial legislation.

Historically, in Pakistan, there is a wide gap between legislative goals, declared national policies and their implementation. Whether it is constraint of resources, financial or technical, or lack of capacity or lack of will to commit to environmental protection and sustainable development, the harsh reality is that our laws and policies are not effectively enforced. This weakness of the executive in environmental management has been matched with a vigorous intervention by the judiciary in giving primacy to environmental rights.

The Environmental Tribunals, established pursuant to Section 20

of PEPA, played an important role in the protection of the environment.

In addition to the Environmental Tribunals, the superior courts of Pakistan have also played an important role in the protection and conservation of the environment.⁸

What are the functions of Pakistan’s Environmental Tribunals? Are there measures that could enhance their effectiveness?

The Environmental Tribunals established under Section 20 of PEPA have exclusive jurisdiction to:

- (1) try and impose penalty on any person who discharges or emits or allows the discharge or emission of any effluent or waste or air pollutant or noise in an amount, concentration or level which is in excess of the National Environmental Quality Standards (Section 11);
- (2) try and impose penalty on the proponent of any project who commences construction or operation without filing with the Pakistan Environmental Protection Agency an initial environmental examination or, where the project is likely to cause an adverse environmental effect, an environmental impact assessment, and without obtaining from the Pakistan Environmental Protection Agency approval in respect thereof (Section 12);
- (3) try and impose penalty on a person who imports hazardous waste into Pakistan and its territorial waters, exclusive economic zone and historic waters (Section 13);
- (4) entertain an appeal filed by any person aggrieved by any order or direction of the Pakistan Environmental Protection Agency or any Provincial Environment Protection Agency under any provision of PEPA and rules or regulations made thereunder (Section 22); and
- (5) exercise such other powers and perform such other functions as are, or may be, conferred upon or assigned to it by or under PEPA, or the rules and regulations made there under (Section 21).

The Environmental Tribunals do not take cognizance of any offense except on a complaint in writing by:

8. For a discussion of Pakistan’s efforts in sustainable development and the case law of its superior courts and Environmental Tribunals, see Parvez Hassan, *From Rio 1992 to Johannesburg 2002: A Case Study of Implementing Sustainable Development in Pakistan*, 6 SING. J. INT’L & COMP. L. 683 (2002).

- (1) the Pakistan Environmental Protection Agency or any government agency or local council; and
- (2) any aggrieved person, who has given notice of not less than thirty days to the Pakistan Environmental Protection Agency or the Provincial Environmental Protection Agency concerned of the alleged contravention and of his intention to make a complaint to the Environmental Tribunal.

In the exercise of its criminal jurisdiction, the Environmental Tribunals have the same powers as are vested in the Court of Session under the Code of Criminal Procedure, 1898 (Act V of 1898). In the exercise of the appellate jurisdiction under Section 22 of PEPA, the Environmental Tribunals have the same powers and follow the same procedure as an appellate court in the Code of Civil Procedure, 1908 (Act V of 1908).

The effectiveness of the Environmental Tribunals can be enhanced by:

- appointing independent and highly qualified persons as members of the Environmental Tribunals;
- increasing the number of Environmental Tribunals;
- and, creating awareness among the people of Pakistan as to the applicable environment laws.

After the amendment to the Constitution in 2010, Environmental Tribunals would need to be a part of the future provincial legislations.

