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Analysis

THE SYMBOLIC VALUE OF *LEGHARI V FEDERATION OF PAKISTAN*: CLIMATE CHANGE ADJUDICATION IN THE GLOBAL SOUTH

Climate Change is a defining challenge of our time and has led to dramatic alterations in our planet's climate system. For Pakistan, these climatic variations have primarily resulted in heavy floods and droughts, raising serious concerns regarding water and food security. On a legal and constitutional plane this is clarion call for the protection of fundamental rights of the citizens of Pakistan, in particular, the vulnerable and weak segments of the society who are unable to approach this Court.¹

Climate change is an urgent, existential challenge. And whilst the machinery of international law has begun to produce an ambitious response with broad consensus, governments have been slow to implement those commitments.² Across the globe, concerned citizens and environmental organisations are turning to courts in an attempt to hold governments to account on promised targets.³ One such case, is the 2015 decision in *Leghari v Federation of Pakistan* a valuable example in this avalanche of climate change litigation. In a case brought by a drought effected Pakistani agriculturalist, the High Court of Lahore mandated the creation of a Climate Change Commission in order that urgent action be taken to address the impact of climate change in Pakistan. *Leghari* was the first climate change case from the Global South to attract world-wide scholarly and journalistic attention,⁴ emerging as it did at the same time as the far better publicised *Urgenda Foundation v The State of Netherlands*.⁵ The decision of the then Mr Justice Mansoor Ali Shah, now a Justice of the Supreme Court of Pakistan, was a bold example of transformative adjudication in pursuit of climate justice and is emblematic of the 'rights turn' in climate change litigation.⁶ It is also an important example of climate change adjudication from the Global South, which has not been as well documented as suits originating in the US, Australasia and Europe. Its significance, domestically and internationally, is therefore symbolic as well as practical. In this case note we

¹ *Leghari v Federation of Pakistan* (2015) W.P. No. 25501/2015, Order Sheet, 4 September 2015 [6].

² UNFCCC, Decision 1/CP.21, 'Adoption of the Paris Agreement' (29 January 2016) FCCC/CP/2015/10/Add 1, 2, Annex: Paris Agreement.

³ United Nations Environment Programme and Columbia University, Sabine Centre for Climate Change Law, *The Status of Climate Change Litigation: A Global Review* (UNEP Publications 2017).

⁴ Although certainly not the first climate change case from the Global South, see for example the 2005 Nigerian case: *Gbemre v Shell Petroleum Development Company of Nigeria & Ors* (2005) Federal High Court of Nigeria

⁵ *Urgenda* was a decision that compelled the Dutch government to reduce greenhouse gas emissions by at least 25% in a case brought by an NGO and a group of 900 Dutch citizens: *Urgenda Foundation v The State of Netherlands* The Hague District Court, C/09/456689, 24 June 2015.

⁶ Jaqueline Peel and Hari M Osofsky, 'A Rights Turn in Climate Change Litigation' (2017) *Transnational Environmental Law* 37, 38.

unpack the decision in *Leghari*, highlight some of its notable features and to examine its particular importance for potential litigants the Global South.

The Decision

Ashgar Leghari was a compelling claimant, a law student and agriculturalist from the Rahim Yar Khan District, in Pakistan's South Punjab region, his family's 500-acre sugarcane farm suffered from water scarcity and temperature changes caused by climate change. In an effort to 'compel the concerned departments and ministries to take action'⁷ he filled a public interest suit challenging the Federation of Pakistan for failing to execute its 2012 National Climate Change Policy⁸ and implement its Framework for the National Climate Change Policy.⁹ He argued that Pakistan was a direct victim of climate change and thus the government was required to take 'immediate remedial adaptation measures to cope with the disruptive climatic patterns.'¹⁰ In support of this claim, he argued that the failure to adapt to climate change breached his fundamental rights as enshrined in the Constitution of Pakistan, namely the right to life in Article 9 and the inviolability of human dignity protected by Article 14.

In two linked court orders, that read like the scolding of naughty children, Mr Justice Mansoor Ali Shah criticises 'the delay and lethargy of the State in implementing the Framework' and the impact of this on the fundamental rights of the citizens of Pakistan. In the first order of 4 September 2015, he mandates the creation of a Climate Change Commission to monitor the progress of the Framework.¹¹ He also compels the appearance of the Joint Secretary for Climate Change, who had recently been transferred to another region,¹² and requires that each ministry, department and authority appoint a Climate Change Focal Person to attend and assist at the next hearing.¹³ In the second order of 14 September, he examines the Framework and Policy in detail, constitutes the Climate Change Commission and sets expectations for that Commission, retaining a supervisory jurisdiction for the court over the activities of the Commission.

Such a directive judicial approach is likely to raise the heckles of many British educated lawyers as the judge appears to be wading deep into policy decisions. However, this would be a mischaracterisation of these orders, rather Mansor Ali Shah J is acting in a supervisory function to

⁷ Anam Gill, 'Farmer sues Pakistan's government to demand action on climate change' *Reuters*, November 2015 <https://www.reuters.com/article/pakistan-climatechange-lawsuit/farmer-sues-pakistans-government-to-demand-action-on-climate-change-idUSL8N1383YJ20151113> (accessed 14 June 2019)

⁸ National Climate Change Policy 2012.

⁹ Framework for Implementation of Climate Change Policy (2014-2030) 2014.

¹⁰ *Leghari*, Order Sheet, 4 September 2015 (n 1) [4]

¹¹ *ibid* [8.iii]

¹² *ibid* [8]

¹³ *ibid* [8.i]

ensure that a previously ignored enacted law is applied and that fundamental rights are observed. He was simply playing balancing role that we expect courts to play in constitutional arrangements, particularly where there is constitutional protection of fundamental rights. Therefore, to dismiss this case as an example of judicial overreach, without further examination of its notable features would be a mistake. We highlight four such features in what follows.

First, although Pakistan is ‘not a major contributor to global warming and is actually a victim of climate change’ – and is therefore unable to do much to mitigate against it – the court nevertheless required strong action from Pakistan, especially with regards to adaptation.¹⁴ As with the first *Urgenda* decision, the sheer enormity of the task of addressing climate change was not regarded as an adequate excuse to do nothing.¹⁵ Indeed, the court in that case spelled this out very clearly: ‘it is an established fact that climate change is a global problem and therefore requires global accountability.’¹⁶ This approach is praiseworthy, because courts are recognising that a collaborative effort is required to steward the planet’s atmosphere, no matter how small the overall contribution.

Second, although Pakistan does not give explicit constitutional protection to environmental rights, the Court adds an environmental gloss to existing fundamental rights. Mansoor Ali Shah J does this by recourse international environmental law principles such as the precautionary principle and intergenerational equity and more general constitutional principles such a democracy and equality.¹⁷ Thus, he opens up a conversation between the international environmental law commitments of the Pakistani government and their domestic obligations to protect fundamental rights. In this way *Leghari* represents a ‘trend towards petitioners increasingly employing rights claims in climate change lawsuits, and a growing receptivity of courts to this framing.’¹⁸

Third, building on his elaboration of environmental rights, Mansoor Ali Shah J, call for existing environmental jurisprudence to be ‘fashioned to meet the needs of something more urgent and overpowering.’¹⁹ In so doing, he draws a distinction between environmental justice, which he regards as localised, and climate justice, which by contrast requires a more holistic, planetary approach.²⁰ His recourse to climate justice arises not from the Framework nor the Policy, rather from his view on the fundamental rights engaged in relation to climate change. Further, because he regards the Framework as a ‘living document’ these rights are part of the synergistic approach

¹⁴ *ibid* [3]

¹⁵ *ibid* [7]; *Leghari* Order Sheet, 14 September 2015 14 (n 1) [8].

¹⁶ *Urgenda*, [4.79].

¹⁷ *Leghari*, Order Sheet, 4 September 2015 (n 1)[7]

¹⁸ Peel and Osfsky (n 6) 40.

¹⁹ *Leghari*, Order Sheet, 4 September 2015 (n 1) [7]

²⁰ *ibid* [7]

required to adequately respond to climate change.²¹ Beyond this, he offers no further elaboration as to what climate justice entails, leaving scholars Nadia B. Ahmad and Mushtaq ur Rasool Bilal to speculate what this might look like in a Pakistani context.²²

Finally, Ali Shah takes very seriously the need for effective judicial enforcement in environmental law. His directive and supervisory approach holds the government strongly to account for their stated commitments in the Framework and Policy. Admittedly, in doing this, he does tread a thin line along the separation of powers. Sensitivity to the separation of powers is not however unfamiliar in climate change cases,²³ and in *Urgenda*, the Dutch government argued that a court order requiring the government to restrict greenhouse gas emission would be an unacceptable inroad to the powers of a democratically elected branch.²⁴ In *Urgenda*, the court addresses the question directly stating that ‘the task of providing legal protection from government authorities, such as the State, pre-eminently belong to the domain of a judge.’²⁵

Further, this decision sits within a legal tradition and culture, emerging from the Global South, of what Cora Hoexter describes as transformative adjudication.²⁶ Where there is significant government inaction in the face of desperate socio-political circumstances, a void is created that as a matter of constitutional necessity is filled by courts. In this case, for example, such a void existed – Pakistani citizens were suffering violations of their constitutionally protected fundamental rights because the government failed to follow their own legislative agenda. Understanding this context is important for understanding why *Leghari* should not be labelled as an example pure judicial activism. It is also necessary for understanding the symbolic value of *Leghari* and will therefore be considered further in the final section.

Symbolic Value for the Global South

It should hopefully be obvious from the forgoing analysis, that *Leghari* is a bold and exciting decision in its own right,²⁷ standing on the global stage alongside well publicised cases such as

²¹ *Leghari*, Order Sheet, 14 September 2015 (n 1) [9].

²² Nadia B. Ahmad and Mushtaq ur Rasool Bilal, ‘Monsoon, Hydropower and Climate Justice in Pakistan’s River Communities’ in Randal S Abate (eds) *Climate Justice: Case Studies in Global and Regional Governance Challenges* (ELI Press 2016), 473.

²³ In cases in the US, the UK and Canada, courts have declined to recognise issues arising from climate change because of the separation of powers Elizabeth Fisher, Eloise Scottford and Emily Barritt, ‘The Legally Disruptive Nature of Climate Change’ (2017) *Modern Law Review* 173, 183-185.

²⁴ *Urgenda* (n 7) [4.94]-[4.107].

²⁵ *ibid*, [4.97].

²⁶ Cora Hoexter, ‘Judicial Policy Revisited: Transformative Adjudication in Administrative Law’ (2008) 281, 286.

²⁷ A Henry Weaver and Douglas A Kysar, ‘Courting Disaster: Climate Change and the Adjudication of Catastrophe’ (2017) *Notre Dame Law Review* 295, 343.

Urgenda and *Juliana*,²⁸ and propelling the rights turn in climate change adjudication.²⁹ Elaborating its symbolic value for the Global South, is therefore emphatically not a move to present *Leghari* as a marginal case, rather it is to recognise *Leghari* touches a chord in the Global South that these other cases might not. In this section, we suggest two reasons, why *Leghari* might have this special significance.

First, for Pakistan and other countries of the Global South, the consequences of climate change are already being felt, in significant and devastating ways. For those of us in the Global North, climatic changes might result in a hike in the price of broccoli or an unusually sunny October, but for those in the southern hemisphere, those changes mean extreme weather, crop failure, territory loss and loss of life. As is highlighted in the judgement ‘these climatic variations have primarily resulted in heavy floods and droughts, raising serious concerns regarding water and food security.’ The impacts of climate change for Pakistan and other countries in the Global South are live and devastating. Developing an appropriate judicial response in situations of urgency will therefore look quite different to the response in jurisdictions where the devastation of climate change still seems distant.

Second, judicial attitudes and approaches in the Global South share some notable commonalities.³⁰ This is not to claim that all courts in the Global South behave in the same way, rather it is to recognise that many such courts are operating under similar conditions and are therefore likely to respond in a similar way. In conditions of entrenched poverty, inactive government and with the long shadow of colonialist and apartheid infrastructures,³¹ courts in the Global South have taken a transformative approach to the adjudication, particularly when it comes to judging questions of fundamental rights.³² Thus on matters – ranging from health care³³ to the provision of adequate housing,³⁴ from vehicular pollution³⁵ to prisoner’s rights³⁶ – courts adjudicating on the action or inaction of governments have responded robustly and at times prescriptively.³⁷ It is therefore

²⁸ *Juliana v United States* (2015) Case No: 6:15-cv-01517-TC is an ongoing climate lawsuit brought by a group of young people against the United States government for its contribution to climate change which has led to violations of their constitutional rights and a breach of the public trust doctrine.

²⁹ Peel and Osofsky, (n 6) 38.

³⁰ Daniel Bonilla, ‘Towards a Constitutionalism of the Global South’ in Daniel Bonilla Maldonado (eds) *Constitutionalism of the Global South* (CUP 2013) 21.

³¹ Eric Kiber and Charles Fombad, ‘Transformative Constitutionalism and the Adjudication of Constitutional Rights in Africa’ (2017) *African Human Rights Law Journal* 340.

³² Hoexter (n 26) 286.

³³ *Minister of Health and Others v Treatment Action Campaign and Others* (No 1) (CCT9/02) [2002] ZACC 16

³⁴ *Government of the Republic of South Africa v Grootboom* [2000] ZACC 19

³⁵ Writ Petition (Civil) 13029/1985 (Delhi Vehicular Pollution Case)

³⁶ *Mathew Areparmtil & ORs v State of Hihar & Ors* 1984 AIR 1854.

³⁷ There are inevitably dangers to this approach, see for example Anuj Bhawania’s work on the public interest litigation in India: Anuj Bhawania, *Courting the People* (CUP 2017)

possible to identify a common thread of adjudicative practice running through courts in the Global South which has a more activist character, whilst still recognising individual differences of legal culture and political history.

When it comes to the adjudication of issues arising from climate change therefore, the physical conditions and judicial practices of the Global South are therefore likely to produce decisions that bear a greater resemblance to *Leghari* than decisions originating in the Global North. Compare the approach to fundamental rights in *Leghari*, to that of the first instance court in *Urgenda* which struggled to conceptualise the Dutch government's inaction as a violation of the petitioner's rights.³⁸ *Leghari* therefore provides a precedent that better reflects the realities and needs of the Global South.

This precedential impact can already be identified. Domestically, *Leghari* will likely play a part in the decision in *Ali v Federation of Pakistan*, a petition pending before the Supreme Court of Pakistan, brought by a 7 year old petitioner challenging the approval of the development of Thar Coal field which could result in the production of 60 million metric tons of coal a year.³⁹ As in *Leghari*, the claimant relies on the government's climate change Framework and Policy, arguing that coal mining contributes to the release of greenhouse gases and thus negated peoples constitutionally protected rights in relation to the environment.

In the neighbouring jurisdiction of India, another petition involving a child was brought before the National Green Tribunal. In that case, the plaintiff argues that the combination of the public trust doctrine (a doctrine relied on in *Leghari*), India's environmental laws and climate policies, and its commitments under the Paris Agreement, require action to mitigate against climate change. Referring to *Leghari* in the petition, the plaintiff states that the lack of effective action to address the impacts of climate change is 'exactly the situation faced in India as well.'⁴⁰

Elsewhere in the Global South, State Solicitor Ivan Mark Ladores, has argued that *Leghari* provides a helpful framework and precedent for formulating a similar case in the Philippines.⁴¹ Recognising the 'stark similarities in the antecedent between the two countries, in terms of the impact of climate change, the right adversely affected, and the shortcomings of the government to protect the people from further harm' he regards *Leghari* as a 'landmark'⁴² drawing particular attention to the way in

³⁸ Peel and Osofsky (n 6) 38.

³⁹ *Ali v Federation of Pakistan & Or*, Constitution Petition No. ____ / I of 2016.

⁴⁰ *Pandey v Union of India & Or*, Original Application No: ____ of 2017, 47.

⁴¹ Ivan Mark Ladores, 'In the Name of Climate Change: How *Leghari v Federation of Pakistan* is Instrumental to the Pursuit of the Right to Life in the Philippines' (2017) *Groningen Journal of International Law* 203.

⁴² *ibid*, 210

which fundamental rights were developed in the case. The symbolic power of *Leghari* in the Global South is already in motion.

Conclusion

Leghari is undoubtedly a lodestar in the growing tide of climate change lawsuits across the globe. Through its progressive interpretation of fundamental rights, recognition of the demands of climate justice and robust approach to effective judicial enforcement, it sets the standard for the kind of judgment climate litigation activists are hoping for. It is also a sadly rare example of a case from the Global South attracting serious scholarly attention in the Global North. Now that *Leghari* has received this attention, its impacts are likely to be far reaching on both sides of the equator.

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