

# The Promise of Article 9A

## Bridging constitutional rights and environmental governance



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Human Rights Commission of Pakistan

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# Introduction

The 26th Constitutional Amendment to the Constitution of Pakistan has been marred by controversy from its inception. Human rights organizations and bar associations alike have raised significant and critical issues on the mode and manner in which the amendment was passed, and its implications on the independence of the judiciary. In the noise surrounding the legitimate concerns of stakeholders, a key addition to the Fundamental Rights guaranteed under the Constitution has been largely ignored in popular discourse. This addition was made with the introduction of Article 9A to the Constitution, which states: ‘Every person shall be entitled to a clean, healthy and sustainable environment’.

Pakistan is one of the most vulnerable countries to the impacts of climate change. This is because of various factors, including its geographical location, reliance on climate-sensitive sectors, socioeconomic conditions, and general lack of mitigation and adaptation measures required to tackle the impending climate disasters. Flash floods have become common, caused by glacial lake outburst floods in the mountainous north, riverine floods, and urban flooding. Storm surges and cyclones periodically pose risks of coastal flooding as well. Yet, Pakistan also consistently faces short-term and prolonged droughts in its arid and semi-arid regions, making it one of the most water-stressed countries in the world. Rising global temperatures have made heat waves a periodic occurrence. At the same time, air pollution in major urban centres has placed Lahore, Peshawar, Faisalabad, and Karachi at the top of the world’s most polluted cities. Amid the many obvious environmental hazards and climate catastrophes, issues surrounding land degradation and the loss of biodiversity have often gone unnoticed.

Resultantly, the UN Habitat Pakistan Country Report 2023 places Pakistan as the fifth most vulnerable country to climate change. Germanwatch Climate Risk Index placed Pakistan at the top spot as

the most vulnerable country to climate change globally, on account of the catastrophic floods of 2022. Using available sources, including Germanwatch's Climate Risk Index (CRI), Pakistan has occupied varying ranks over time. In the CRI covering 2000–19, Pakistan was consistently among the top ten countries most affected by climate change, typically ranking around eighth globally. However, in the CRI 2025 report – which uses the latest data from 2022 – Pakistan was placed first among all nations for climate-related impacts in 2022, based on measures of both human and economic losses.<sup>1</sup> The climate crisis facing Pakistan, and its current adaptation and mitigation strategies do not suggest a significant change in this status quo. The World Bank estimates that the combined risks of extreme climate-related events, environmental degradation, and air pollution could reduce Pakistan's GDP by at least 18 to 20% by 2050.<sup>2</sup> This loss in GDP will likely occur due to reduction in agriculture and livestock yields owing to increased floods and heatwaves and destruction of infrastructure. These statistics and rankings consistently highlight Pakistan's significant vulnerability to climate change, emphasizing the urgent need for adaptation and mitigation measures.

This paper presents an analysis of how environmental rights have historically been perceived in Pakistan, the legislative and policy initiatives that have been taken over the past three decades, the role of the judiciary in advancing environmental rights, and the pathways forward to ensure that the introduction of Article 9A is meaningful, purposive, and effective.

# Constitutional history of environmental rights in Pakistan

Prior to the inclusion of Article 9A in the Constitution, the right to a clean and healthy living environment was read into the Constitution through various court judgments. While Pakistan's first dedicated environmental legislation can be traced back to 1983, the law practically remained dormant, with the institutions identified therein barely coming into existence.<sup>3</sup> By using the permissibility of legislation<sup>4</sup> on 'Environmental Pollution and Ecology' in the Concurrent Legislative List,<sup>5</sup> the Pakistan Environmental Protection Act (PEPA) 1997 was passed by the federal legislature. PEPA was enacted to ensure that environmental protection, conservation, rehabilitation, and improvement efforts were streamlined, and sustainable development was promoted.<sup>6</sup> PEPA 1997 also provided a grievance redressal mechanism through environmental tribunals to fulfil the law's mandate. The 18th Amendment to the Constitution abolished the Concurrent List and made no change to the Federal Legislative List which would allow for federal regulation of the subject of environment. Consequently, the subject of environment fell exclusively in the legislative and executive domain of the provinces. All four provinces enacted their own provincial environmental laws, adopting the PEPA as their basis, with minor modifications, with provincial environmental protection agencies (EPAs) becoming the primary regulators for environment. However, as recognized in pronouncements by the superior judiciary, such as in the Asghar Leghari case,<sup>7</sup> Signal-Free Corridor case,<sup>8</sup> Haroon Farooq<sup>9</sup> and Maple Leaf Cement Company, and critics such as civil society organizations alike, the EPAs failed to discharge their functions effectively. The state of air quality in major metropolitan centres of the country, the water and food security crises, and the lack of effective disaster management also testify to this opinion.

Much of the legal and constitutional evolution regarding environmental rights has occurred through judicial and civil society activism. In 1994, the Supreme Court of Pakistan initiated proceedings under Article 184(3) of the Constitution, on a letter conveyed to it from concerned residents of a locality in Islamabad, to judicially review whether potential electrical discharges from a proposed grid station would be violative of fundamental rights guaranteed under the Constitution.<sup>10</sup> While questioning whether the rights to life and dignity – dignity being unqualified and inalienable – can be protected if citizens did not have access to, inter alia, a clean atmosphere and a healthy environment, the Supreme Court held that a person is entitled to protection of the law from being exposed to hazards. This landmark judgment, famously known as the *Shehla Zia* case, set the tone for mainstreaming a clean environment and healthy atmosphere as a fundamental right, given implicit recognition by reading Articles 9 and 14 of the Constitution together.

The superior courts in Pakistan have repeatedly recognized the implicit fundamental right to a clean and healthy environment. Most judicial progress on this front has occurred through public interest litigation, driven by proactive and progressive interpretations of law and the Constitution prompted by affected persons and activists alike. Recognition of various facets of environmental rights has come through courts acting on petitions led by public interest and human rights organizations. Preservation of land rights for food security came about through both on ground and in court resistance by the farmers in the Ravi Urban Development Authority (RUDA) area,<sup>11</sup> halting the destruction of the Lahore canal green cover occurred as a consequence of spirited agitation and litigation by environmental activists, prompting intervention by the Supreme Court and culminating in the Lahore Canal Heritage Park Act 2013. The Sindh High Court at Karachi interpreted the right to life as guaranteeing a clean and healthy environment, declaring that the legislature is duty-bound to enact laws, and the executive is duty-bound to enforce them, in a manner which promotes high intellectual and spiritual goals and



happiness in life.<sup>12</sup> In 2015, the Lahore High Court recognized that, inherent in the concept of the right to a clean and healthy environment was the principle of environmental justice, which required states to ensure that the environment was not harmful to the health or wellbeing of the citizens, and that the protection of the environment for present and future generations was an essential part of political and social justice, and integral to the right to life and dignity under the Constitution.<sup>13</sup>

In another case, the Supreme Court recognized that provision of clean drinking water was a duty of the state.<sup>14</sup> In 2016, the Peshawar High Court declared that the fundamental right to life, liberty and dignity given under Articles 9 and 14 of the Constitution includes the application of international environmental principles of sustainable development, precautionary principle, environmental impact assessment, inter- and intra-generational equity and public trust doctrine.<sup>15</sup> The Lahore High Court, in an internationally acclaimed judgment given in 2018, expanded the scope of environmental justice to include climate justice as well, which would cover facets of agriculture, health, food, building approvals, industrial licenses, technology, infrastructure, human resources, and disaster preparedness.<sup>16</sup> In a petition related to the working conditions of labourers, the Lahore High Court also recognized that right to health included a right to live in a clean, hygienic, and safe environment, and that the state was bound to provide at least minimum conditions ensuring human dignity, and necessity to work in an industry should not be at the cost of health of a worker.<sup>17</sup>

After the introduction of Article 9A to the Constitution, the Supreme Court recognized that life worth living is one having a sustainable environment, which is now a mandate of the Constitution, requiring that its significance and importance be brought to bear on everyone, and effective preservation measures being taken. It commended the addition of the right to a clean, healthy and sustainable environment to the Constitution.<sup>18</sup> The Lahore High Court, recognizing that the

right to life and environment required a progressive and dynamic approach, has introduced the concept of 'rolling mandamus' to ensure that state functionaries follow statutory mandates of environmental protection and preservation.<sup>19</sup>

The explicit inclusion of Article 9A solidifies and unequivocally recognizes the right to a clean and healthy environment as a fundamental right. Since the right to a clean and healthy living environment was read into the Constitution by the judicial arm, it can be claimed that the evolution of environmental law has been driven by judicial activism. Inclusion of Article 9A provides a clear and undeniable basis for exercise of judicial and executive powers in relation to this right. As a mandate, Article 9A ensures that the protection of such a right is not perceived as an activist's approach to the law, but rather as an established constitutional requirement. Article 9A, especially on account of its unequivocal wording, helps settle any political or executive concerns limiting the application of such a right, requiring the legislature and executive to prioritize the execution of such right in policies, laws, regulations, and executive decision-making. These and other relevant factors, detailed herein, require serious consideration from all state institutions, and provide a political and constitutional basis fostering a positive context for enforcement of such a right by the executive, legislative, and judicial arms of the state.

# Unqualified constitutional rights

The Constitution enumerates various fundamental rights under Chapter 1 of Part II. However, only a limited number of these rights are absolute and unqualified. An unqualified right is one that is absolute and cannot be limited, restricted, or subjected to a balancing exercise against the rights of others or broader notions of public, state and economic interests. For example, while Article 9 gives a right to life, it makes the same subject to the law which prescribes a mechanism for depriving one of the same. Similarly, while there is a right to freedom of trade, business or profession, and freedom of speech, these rights are subject to restrictions based on broader societal interests such as public order, morality, health, security of the state, or the rights of others.

On the other hand, fundamental rights such as dignity, prevention against retrospective or double punishment, and prohibition of slavery are absolute rights, and the courts rarely entertain any reasoning for curtailing the same. Article 9A has been introduced as an unqualified right, marking a significant theoretical advancement in the realm of environmental protection in Pakistan. The importance of Article 9A lies in its potential to prioritize environmental protection above all competing considerations by state institutions. It mandates that the state must treat the provision of a clean, healthy, and sustainable environment as a primary policy objective in the daily functioning of the government.

The pre-26th Amendment approach to the right to a clean and healthy environment was to balance interests between environmental law and the right of the state to pursue economic development or private actors to pursue their business needs. As a justiciable right, Article 9A compels the executive and judiciary to uphold its absolute nature

in all considerations. In addition to strengthening environmental legislation, the constitutional recognition of the right to a clean, healthy and sustainable environment serves as a tool for the courts to address existing gaps in environmental law. There are examples from Costa Rica and Nepal on how courts can direct governments to enact laws to protect natural resources, such as fisheries, and mitigate air pollution.<sup>20</sup>

# Comparative analysis with other jurisdictions

The experience of other jurisdictions with comparable constitutional rights may provide a better understanding of the implications of this unqualified and justiciable right being included as a mandate to the Constitution under Article 9A. The inclusion of environmental rights in constitutions is increasingly gaining traction worldwide. Neighbouring India has included the right to a pollution-free environment as a fundamental right under their constitutional equivalent of Article 9.<sup>21</sup> The Supreme Court of India also recognized sustainable development as a constitutional principle under the same provision.<sup>22</sup> However, the best and closest equivalent to Article 9A of the Constitution of Pakistan comes from the Constitution of the Republic of South Africa, which, in Section 24 states:

Everyone has the right

- a. to an environment that is not harmful to their health or well-being.
- b. to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that
  - i. prevent pollution and ecological degradation;
  - ii. promote conservation; and
  - iii. secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

Building on the above, the courts in South Africa have taken a progressive approach to the interpretation of Section 24 and have held that economic development must always be balanced against environmental rights.<sup>23</sup> The state must also ensure that public participation is essential to decision-making on environmentally sensitive matters. The South African courts have also held that the

state must take reasonable steps to fulfil environmental rights, and courts can take a proactive approach to order specific remedies. The courts in South Africa have also held that carbon emissions threaten the right to a healthy environment, and the state is obligated to prevent harm even without scientific certainty. IPCC reports were used as a driving force to reach such determinations.

A more progressive approach for environmental preservation comes from Ecuador, which mandates that 'Nature has the right to exist, persist, and regenerate'. This progressive understanding of the environmental condition has led the courts of Ecuador to grant legal personhood to environmental factors such as rivers by taking an eco-centric approach.

On the other hand, courts in the Netherlands have held that the state owes a duty of care to its citizens and must take a proactive approach towards climate change mitigation and adaptation measures to ensure an environmentally sustainable future for coming generations.<sup>24</sup>

These jurisdictions provide just a handful of measures that institutions in Pakistan can adopt to ensure that the fundamental right introduced by Article 9A is implemented in letter and spirit. The way in which environmental rights have been linked to climate rights and encompass an array of environmental factors as germane to such right in other jurisdictions may also be suggestive of the fact that perhaps Article 9A does not do enough.

# ‘Clean,’ ‘healthy’ and ‘sustainable’

Inherent in any interpretation or application of the unqualified right to a clean, healthy and sustainable environment would be considerations of climate change as an environmental condition. Climate change is the manifestation of countries historically ignoring this fundamental right. While Pakistan may have contributed insignificantly to the climate change problem caused by global warming, it is most vulnerable to its impacts.

A clear understanding of the contours of Article 9A and the terms used therein is required to deal with climate vulnerability. While statutory definitions cannot be used to define constitutional terms under rules of constitutional interpretation, an understanding of the breadth of the word environment can be seen from how it is defined under PEPA 1997 (and the provincial environmental protection laws). The definition of environment encompasses:

- Air, water and land
- All layers of the atmosphere
- All organic and inorganic matter and living organisms
- The ecosystem and ecological relationships
- Buildings, structures, roads, facilities and works
- All social and economic conditions affecting community life
- The inter-relationships between any of the above factors.

A consideration of all these factors would be required to understand the implications of the terms ‘clean,’ ‘healthy’ and ‘sustainable’ as used in Article 9A.

## **A clean environment**

In light of deteriorating air and water quality, along with the growing health risks in Pakistan's major urban centres—largely due to unplanned urbanization and mismanagement of rapid population growth—the right to a clean environment would require the eradication of pollutants. Any efficacious measures would firstly require an effective monitoring and reporting mechanism and institution that would inform the public at large of the pressing concerns forming the basis for effective policies regarding deforestation, climate disaster relief, air quality, and water availability. In the longer term, such policies and data will form the foundation of long-term mitigatory and adaptive measures.

The right to a clean environment would therefore require the state to ensure facilities such as the provision of clean air and safe drinking water. Proactive steps would be needed to fulfil the constitutional right to a clean environment, including the development, operation, and maintenance of infrastructure for drinking water supply, wastewater treatment, and waste management. Furthermore, it would require that there are mandated environmental quality standards based on scientific facts.

## **A healthy environment**

The right to a healthy environment would guarantee access to environmental education and information, public participation in environmental decision-making processes, and access to justice with effective remedies.<sup>25</sup> The interpretation of a healthy environment as a constitutional right by courts in foreign jurisdictions is that the government has positive obligations. These obligations are three-fold: firstly, that the state must respect the right to a healthy environment by not infringing it through state action; secondly, to protect the right from infringement by third parties; and lastly to take actions to fulfil the right which would include providing services including



clean water, sanitation and waste management.<sup>26</sup> An example of enforcement of the right to a healthy environment has led to the people in the Peruvian village of La Oroya finally receiving medical treatment for their long-term exposure to lead and other heavy metals emitted by a nearby smelter.<sup>27</sup> The existing interpretation of a right to a healthy environment in other jurisdictions can guide advocacy efforts in Pakistan to push for future action by state institutions on Article 9A.

## **A sustainable environment: Sustainable development?**

Sustainable development is an evolving concept of international law. Originating from the 1972 Stockholm Conference, which emphasized the need to align development with environmental protection to benefit state populations.<sup>28</sup> The concept was formally articulated in the 1987 Brundtland Report, which defined sustainable development as ‘development that meets the needs of the present without compromising the ability of future generations to meet their own needs’.<sup>29</sup> The report highlighted that sustainable development involves harmonizing resource use, investment, technological advancement, and institutional change to support current and future human wellbeing.

Rather than halting socioeconomic progress, sustainable development aims to guide it in a manner that minimizes environmental harm. It acknowledges the risks posed by unchecked development and calls for decision-making that ensures such growth remains ecologically grounded, thereby preserving environmental resources for future generations. A right to a sustainable environment would mandate that the principles of sustainable development be applied in a manner that does not seek to strike a balance between economic development and environmental protection but treats the latter as a tool for the former. In essence, true sustainability cannot exist without addressing issues of equity and climate justice. A sustainable future can only

exist where environmental integrity, social wellbeing, and economic prosperity are achieved in a fair, just way that leaves a healthy planet for generations to come. This approach was adopted by the Supreme Court of Netherlands while determining that the state of Netherlands was not doing enough to meet its obligations to reduce emissions.<sup>30</sup> Article 9A thus provides a crucial foundation for integrating these principles into the legal and policy framework.

# Implications for state institutions

The transformative nature of Article 9A as an express, justiciable, and unqualified right requires a situational analysis of all state institutions regarding the future of the climate crisis and environmental justice in Pakistan. Article 9A requires environmental considerations to be front and centre of all decision-making processes, and the role and responsibilities of all organs of the state mandate a realization of these implications and a revisit of their current roles.

## The legislature

For the federal and provincial legislatures, the introduction of Article 9A would require a review of the existing constitutional and legal regime related to environmental protection. In the wake of the climate crisis, the true implementation of Article 9A requires a coordinated approach to dealing with its vulnerabilities. However, since environmental action is not always uniform and depends upon the specific conditions of a particular region, such an approach should not infringe upon provincial or local autonomy, both mandates of the Constitution. A balanced approach must be taken to establish forums that enable such coordination. Since the current regulatory regime has already been criticized multiple times by courts and activists alike, a gap analysis of existing legislation is required to ensure that historically identified issues are statutorily addressed. Environmental protection and associated laws currently in vogue do not directly address the concepts of mitigation and adaptation in the wake of the climate crisis and necessitate legislative overhaul.

Some important factual realities must be considered for this purpose. Firstly, there is a need for a federal level entity with clear and constitutional executive authority to act as a coordinator between the provincial governments relating to environmental concerns. Since there is no provision in the Federal Legislative List to allow for such

a legislative intervention to create an executive authority, either a political consensus allowing for legislative intervention by the federal legislature is required<sup>31</sup> or an amendment to the Constitution placing such a subject in the Federal Legislative List. Such an institution may be empowered to allocate and coordinate climate finance and financial assistance under international treaties to appropriate provinces while providing a conduit for conversation and coordination between provincial agencies.

Such measures should ensure provincial autonomy in decision making on most issues. Provincial legislation should address facets of the climate crisis as a guaranteed right to a sustainable environment. Issues such as food security, financial inclusion of environmental rehabilitation in expenditure from public finances, and internal and external climate migration/refugees are just some provincial level macro issues that legislation needs to be framed on. Criminalizing environmental hazards and destruction can be an effective tool for deterrence. Article 140A of the Constitution, which mandates devolution of financial and administrative powers to local governments has profound implications in this regard. Even within provincial borders, the environmental issues of one part of the province would be different from another. The environmental and climatic concerns of a hill station in Punjab would be different from those of the Cholistan region. The issues plaguing communities in the Sulemani mountain range would be different from those relevant for the coastal regions of Balochistan. Therefore, empowering local governments on environmental regulation has to be a paramount consideration in all legislative interventions in the subject going forward.

## **The executive**

The role of regulatory capture of regulators and institutions tasked with environmental protection has also been highlighted several times. The executive arm of the state must recognise that the independence of institutions and regulators tasked with environmental protection

is ineluctable to allow for any meaningful implementation of Article 9A, whether legislative reforms are made or not. The lack of such realization can be seen from the fact that, while provincial environmental protection laws seek to create independent EPAs to regulate environmental concerns, the EPAs in all provinces are attached institutions of provincial departments. Given that most large projects with potential for significant adverse environmental impacts are carried out by government bodies (such as RUDA or those that manage the Cholistan canals, corporate farming, urban planning and orientation, infrastructural development, to a name a few), an administratively attached institution may not be best placed to independently verify and ensure environmental compliance against such projects.

The Lahore High Court in the Signal-Free Corridor case<sup>32</sup> highlighted several such regulatory issues, which persist even today, and require urgent attention. Creation of specialized institutions under other potential legislative interventions have to be given the capacity and authority to perform their functions in a positive manner. To enable such interventions, a realization has to be made that international coordination, assistance, financing and environmental diplomacy are crucial to ensuring that future government action is not only driven by environmental considerations but is also within the capacity of the state to achieve. Independent executive institutions are a first step to achieving this goal. Furthermore, executive institutions must be cognizant of their responsibilities regarding educating the citizens on environmental concerns and ensuring transparency in providing statistics regarding environmental conditions. The executive will also be required to provide protection and rehabilitation to those suffering from adverse environmental conditions.

## **The judiciary**

As detailed above, the judiciary's role has historically been crucial to environmental protection and environmental justice in Pakistan. However, such a role has also been inconsistent at times, such as

requirements by superior courts that incontrovertible evidence be provided by parties in their pleadings who seek injunctive relief against state action on environmental grounds.<sup>33</sup> Considering the now express and unequivocal right to a clean, healthy and sustainable environment, such historic interpretations that were given when a clean and healthy environment was recognized as an implicit right, and may be subject to other considerations, may no longer be good law. Inherent in the rights granted under Article 9A is the application of environmental principles of precaution and polluter pays. In any post-26th Amendment matter seeking enforcement of Article 9A, the superior courts must take a progressive, purposive, and dynamic approach. However, changes brought about by the 26th Amendment to Articles 184(3) and 199 may create hurdles in a court's ability to do so.

Most progressive pronouncements of the superior judiciary have been taken in the larger public interest and have often resulted in rulings which may not have been specifically and necessarily sought in the pleadings of the litigating parties. It is perceived that amendments made to Articles 184(3) and 199 of the Constitution by the 26th Amendment have been made to prevent such judicial activism by the superior courts. While it remains to be seen whether the 26th Amendment could so curtail existing powers of the judiciary, such a change does not prevent the application of environmental principles referred to above, which remain applicable as the primary tools for reviewing any state action for compliance with Article 9A. At the very least, the judiciary must carry the mantle of environmental protection and environmental justice until the legislature and executive have attained the mandate Article 9A places on them.

# Recommendations

While constitutional recognition of a fundamental right to a clean, healthy and sustainable environment is a crucial first step to tackling Pakistan's climate vulnerability, it is exactly that—a first step. In the immediate future, this would command changes in law, policy, and judicial approach to ensuring the protection of this fundamental right. The following are some recommendations which could lead to the enforcement of this right in letter and spirit.

- The existing laws relating to environmental protection, forests, water ways, urban planning, waste management, wildlife, fisheries, etc., require an update in light of Article 9A. Additionally, new legislation is required on an immediate basis to address overlooked facets of environmental and climatic concern.
- The provincial EPAs have to be independently administered entities with no influence from other state institutions to effectively perform their functions. Local level environmental enforcement has to form the backbone of effective redressal.
- At a policy level, sustainability concerns must be made the central theme of any proposed government project or state action. Any new project, proposal, or venture sought to be implemented by the concerned government must meet the requirement of providing a sustainable environment, while ensuring that nothing contained in such project, proposal, or venture infringes upon the constitutional right to a clean and healthy environment.
- A central coordination entity must be established to enforce this right in the federation effectively. The current Climate Change Council established under the Climate Change Act 2017, suffers from potential constitutionality issues due to the absence of environment and climate change from the federal legislative list.
- The constitutional courts must employ international interpretational tools such as the precautionary principle, polluter

pays, environmental justice, climate justice, and equity as the foundational tools for reviewing any state action challenged on the grounds of Article 9A, and the previously held cautionary approach must be revisited.

- Relevant executive agencies and institutions must provide transparency and awareness about the current environmental conditions and the consequences of proposed governmental action. Recognition of public participation as inherent in ensuring a clean, healthy and sustainable environment is paramount.
- To ensure the enforcement of environmental laws, relevant institutions must be detached from direct government influence and made truly independent, which would require investment in their capacity building.
- Effective grievance redressal tribunals must be created, with mandates beyond the limitations of the current environmental tribunals under existing laws, to ensure due process and access to justice against environmentally detrimental state and third-party actions.



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