CLIMATE CHANGE LITIGATION IN THE ASIA PACIFIC

This is the first scholarly examination of climate change litigation in the Asia Pacific region. Bringing legal academics and lawyers from the Global South and Global North together, this book provides rich insights into how litigation can galvanize climate action in countries including Pakistan, Indonesia, Malaysia and China. Written in clear and accessible language, the fourteen chapters in this book shed light on the important question of how litigation may unfold as a potential regulatory pathway towards decarbonization in the world’s most populous region.

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CLIMATE CHANGE
LITIGATION IN THE ASIA PACIFIC

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FOREWORD

The impacts of climate change will intensify over the course of the twenty-first century. There remains a substantial gap between what governments have promised to do and the actions they have undertaken to date. The Climate Action Tracker predicts a 1.5ºC warming by 2035, a 2ºC warming by 2053 and a 3.2ºC warming by 2100. Climate change is a critical existential issue that threatens all life forms on this planet. It is, therefore, larger than human rights and will require all hands on deck across all sectors.

Courts are sworn to impartiality, justice, protection of human rights and upholding the rule of law. As governments fail to meet their climate targets, people increasingly are turning to courts to referee the adequacy of governments’ responses to and inaction regarding climate change. In recent cases, courts have played a significant role by holding governments accountable for their inadequate climate action; mitigating carbon emissions; helping evolve adaptation solutions, including compensation; promoting sustainable development goals; influencing climate policymakers; safeguarding human rights and ensuring sustainable development and climate justice. Judges and courts are no longer bystanders and are being hailed for their judicial stewardship in some countries.

In *Climate Change Litigation in the Asia Pacific*, Jolene Lin and Douglas A. Kysar have initiated a conversation that is long overdue. It is a collection of scholarship that carefully examines the purpose, trends, impact and future of climate change litigation in the Asia Pacific, raising the question of what role litigation and judicial action can play in the world of climate change. This book brings together diverse judicial approaches and ideas from different countries to explore the common judicial theme of climate change litigation across the Asia Pacific, while being aware of their political, social, economic and cultural diversity. The book tries to find a more holistic and sustainable definition for climate change litigation in order to build collegiality of judicial thought across these countries to promote and advance climate change efforts. The
various chapters chronicle that judicial approaches in different countries vary according to the constitutional and legal frameworks, responsiveness of the courts and robustness of the civil society. Some countries, therefore, play a more significant role in climate change litigation compared to others. The authors share evolving ideas, approaches and techniques applied in climate change litigation across the Asia Pacific, which is a treasure trove for judges, litigators, climate activists and policymakers. The conversation that *Climate Change Litigation in the Asia Pacific* starts will help cross-fertilize ideas and approaches in various jurisdictions, leading to awareness, dialogue and the possibility of a powerful coalition.

Setting the stage for the current state of climate change litigation, some countries\(^1\) in the Asia Pacific have had a strong historical tradition of dealing with public interest environmental litigation based on their democratic and fundamental rights-based constitutional schemes. These courts have a rich jurisprudence of safeguarding nature, ecosystems, biodiversity and the quality of life of their citizens. These judges have intelligently carved international environmental principles of sustainable development, precautionary principles, environmental impact assessments, public trust doctrines and so forth into their constitutional values of political, economic and social justice, along with fundamental constitutional rights like right to life and dignity. Environmental public interest litigation has not been adversarial but more inquisitorial, informed by a good understanding of environmental science and other life sciences.

In environmental litigation, it is often the case that the polluter largely falls in the local jurisdiction – the courts hold the polluter accountable and impose penalties. The issues are limited to air, water or land pollution. However, climate change brings a totally new set of challenges to litigation in the Global South. Countries that contribute insignificantly toward greenhouse gas (GHG) emissions but suffer at the hands of climate change need to learn to adapt. Adaptation climate change litigation is a new paradigm and very different from mitigation climate change litigation. For instance, countries faced with extreme weather, floods, droughts, erratic monsoon rains, melting of glaciers, siltation of dams, low agricultural productivity, reduction in forest cover, natural migration of adversely affected plant species, damage to coastal areas, natural

\(^1\) South Asian countries like Pakistan, India, Bangladesh and Sri Lanka, and the Philippines in Southeast Asia.
disasters and reduction of freshwater reserves need to deal with issues regarding water, food and energy security. This climatic imbalance strikes hard at the most vulnerable in the society – that is, children, women and the poor. These countries generally have inadequate infrastructure and weak resilience in the face of natural disasters. For this, pro-adaptation climate change litigation primarily focuses on strengthening institutions, in almost all sectors, to increase their resilience and capacity to adapt to climate change. In the Leghari case, this was made possible through the collaborative and participatory tool of a commission comprising the main stakeholders, including the government, working together to collaborate and find solutions. The court monitored and regulated the commission. State policies (e.g., agriculture, irrigation, water or energy or infrastructure development) are being challenged before the courts to ensure that they are climate resilient.

Climate Change Litigation in the Asia Pacific can spark an impetus for change, as it starts a dialogue and questions the importance of and need for climate change litigation in the Asia Pacific. This scholarly work regarding climate change litigation can help convert judges into climate judges with a common goal. The book will connect countries on a singular platform of human rights, rule of law and climate justice, overcoming the political, geographical and cultural divide. To enhance climate change litigation, judges need to come together and exchange ideas via helpful forums such as the Asian Judges Network (AJNE) and the Roundtable of Judges on Environment/Climate, regularly organized by the Asian Development Bank (ADB). Social mobilization, public awareness, understanding of climate science and better judicial coordination can go a long way to promote climate change litigation. This book makes a step in the right direction. It is a new beginning and one full of hope.

Syed Mansoor Ali Shah
Judge
Supreme Court of Pakistan
Islamabad
25 October 2019

2 Asghar Leghari v. Federation of Pakistan and Others (PLD 2018 Lahore 364).
ABBREVIATIONS

1MDB        1Malaysia Development Berhad
ACCC        Australian Competition and Consumer Commission
ACF         Australian Conservation Foundation
ADB         Asian Development Bank
APEC        Asia-Pacific Economic Cooperation
ASEAN       Association of Southeast Asian Nations
BBC         British Broadcasting Corporation
CCC         Committee on Climate Change
CCL         climate change litigation
CCP/CPC     Chinese Communist Party
CCSBT       Convention on the Conservation of Southern Bluefin Tuna
CDM         Clean Development Mechanism
CEDAW       Convention on the Elimination of All Forms of Discrimination against Women
CER         certified emission reduction
CETA        Canada-EU Trade Agreement
CIEL        Center for International Environmental Law
CJ          chief justice
CJEU        Court of Justice of the European Union
CLS         critical legal studies
CNOOC       China National Offshore Oil Corporation
CO₂         carbon dioxide
CPL         civil procedure law
CRC         Convention on the Rights of the Child
CRPD        Convention on the Rights of Persons with Disabilities
DENR-EMB    Department of Energy and Natural Resources’ Environmental Management Bureau
DOE         Department of Environment
ECT         Energy Charter Treaty
ECCHR       European Court of Human Rights
EDO         Environmental Defender Office
EE          energy efficiency
EIA         environmental impact assessment
<table>
<thead>
<tr>
<th>Abbreviation</th>
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<tr>
<td>EIS</td>
<td>environmental impact statement</td>
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<tr>
<td>ENGO</td>
<td>environmental non-governmental organization</td>
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<tr>
<td>EPA</td>
<td>Environmental Protection Agency</td>
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<td>EPB</td>
<td>Environmental Protection Bureau</td>
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<td>EPI</td>
<td>environmental public interest</td>
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<td>EPIL</td>
<td>environmental public interest litigation</td>
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<td>EPL</td>
<td>Environmental Protection Law</td>
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<td>EPMA</td>
<td>Environmental Protection and Management Act</td>
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<td>EQA</td>
<td>Environmental Quality Act 1974</td>
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<tr>
<td>ERF</td>
<td>Emissions Reduction Fund</td>
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<td>ESD</td>
<td>ecologically sustainable development</td>
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<td>EU</td>
<td>European Union</td>
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<td>FYP</td>
<td>Five-Year Plan</td>
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<td>GDP</td>
<td>gross domestic product</td>
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<td>GHG</td>
<td>greenhouse gas</td>
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<td>GLAN</td>
<td>Global Legal Action Network</td>
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<td>HRC</td>
<td>Human Rights Council</td>
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<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<td>International Convention on the Elimination of All Forms of Racial Discrimination</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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<td>IDR</td>
<td>Indonesian rupiah</td>
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<td>IIA</td>
<td>international investment agreement</td>
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<td>IMCC</td>
<td>Inter-ministerial Committee on Climate Change</td>
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<td>IPCC</td>
<td>Intergovernmental Panel on Climate Change</td>
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<td>ISDS</td>
<td>investor-state dispute settlement</td>
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<td>ITLOS</td>
<td>International Tribunal for the Law of the Sea</td>
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<td>IUCN</td>
<td>International Union of Conservation of Natural Resources</td>
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<tr>
<td>LBT</td>
<td>‘Lahore Bachao Tehrik’ (Save Lahore Movement)</td>
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<td>LDA</td>
<td>Lahore Development Authority</td>
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<tr>
<td>LGBTQ</td>
<td>lesbian, gay, bisexual, transgender and queer or questioning</td>
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<td>LHC</td>
<td>Lahore High Court</td>
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<tr>
<td>MEE</td>
<td>Ministry of Ecology and Environment</td>
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<td>MEP</td>
<td>Ministry of Environmental Protection</td>
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<td>MoEF</td>
<td>Ministry of Environment and Forestry</td>
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<td>NAACP</td>
<td>National Association for the Advancement of Colored People</td>
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<td>NAFTA</td>
<td>North American Free Trade Agreement</td>
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<td>NDC</td>
<td>nationally determined contribution</td>
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<td>NDRC</td>
<td>National Development and Reform Commission</td>
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<td>NEPA</td>
<td>National Environmental Policy Act</td>
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LIST OF ABBREVIATIONS

NGO non-governmental organization
NHRI National Human Rights Institution
NPC National People’s Congress
NSW New South Wales
NSWLEC New South Wales Land and Environment Court
NUS National University of Singapore
OECD Organization for Economic Cooperation and Development
OHCHR Office of the High Commissioner of Human Rights
PCC Punjab Coal Company
PCIJ Permanent Court of International Justice
PCS Pollution Control Study
PEPA Pakistan Environmental Protection Act 1997
PIL public interest litigation
PRC People’s Republic of China
RE renewable energy
RMB Chinese renminbi
SEC Securities and Exchange Commission
SIDS Small Island Developing States
SITA Suppression of Immoral Traffic Act
SME small- and medium-sized enterprise
SPC Supreme People’s Court
TAN transnational advocacy network
TCFD Task Force on Climate-Related Financial Disclosures
UN United Nations
UNCTAD United Nations Conference on Trade and Development
UNFCCC United Nations Framework Convention on Climate Change
UPR Universal Period Review
USD US dollars
VCAT Victorian Civil Administrative Tribunal
WAPDA Water and Power Development Authority
WTO World Trade Organization
XR Extinction Rebellion
YLS Yale Law School