Climate Change Litigation in the Asia-Pacific*

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Setting the scene

The Asia-Pacific region includes a great variety of nations with diverse cultures, religions, economies, histories, and, not least, legal systems. Many of these countries are part of the Global South facing substantial equitable development challenges. Broadly speaking, the term Global South refers to regions outside of Europe and North America including Asia and Oceania whose interests can be contrasted with the "Global North". There is no doubt that countries in the Global South are bearing, and will bear, substantial adverse impacts of climate change.

The impacts of climate change are unfortunately well understood in nations in the Pacific Ocean with many small island Pacific nations acutely aware of the existential crisis they face due to sea level rise. The Alliance of Small Island States (AOSIS) group of nations has long been a negotiating bloc at international climate change treaty negotiations which commenced with the UNFCCC in 1992, and produced key agreements such as the Kyoto Protocol 1997, The Doha Amendment to the Kyoto Protocol 2012, and the Paris Agreement 2015. AOSIS has 39 member states from the Caribbean, Pacific (15 states), African, Indian and South China Seas regions (2 Asian states). The Pacific Forum (a regional organisation facilitating dialogue between its 18 members) recently released its 51st Leaders Communique which reaffirmed the urgency of action on climate action to limit global warming to 1.5 degrees Celsius.[1]

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[1] Pita Ligaiula, '51st Pacific Islands Forum Leaders Communique 2022'(Webpage, July 18 2022) *PINA* <https://pina.com.fj/2022/07/18/51st-pacific-islands-forum-leaders-communique-2022/&gt>.

The Association of Southeast Asian Nations (ASEAN) countries includes 10 member states in Southeast Asia. Singapore is the only member of both ASEAN and AOSIS.

The Asian Development Bank, an organisation with 68 governmental members established in 1966 to promote economic growth and co-operation in "Asia and the Far East", has funded substantial work investigating the science and regulation of climate change in the Asia-Pacific. In December 2020 it released a series of four reports entitled 'Climate Change, Coming Soon to a Court Near You'.

The reports focused on:

1. Climate science,
2. Climate litigation in the Asia-Pacific and beyond,
3. National climate change legal frameworks in the Asia-Pacific, and
4. International climate change legal frameworks.[2]

These are invaluable resources for those interested in legal responses to climate change in our region.

The United Nations Environment Program has also been instrumental in promoting the environmental rule of law including by providing materials for judicial education, for example the series Judicial Handbook on Environmental Law.[3] It has also undertaken a number of global surveys of climate change litigation, in 2017 and 2020.[4]

The rise of climate change litigation in many jurisdictions is well documented in the Sabin Centre for Climate Change law database at

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[2] 'Climate Change, Coming Soon to a Court Near You', *Asian Development Bank* (Web Page, 8 December 2020) <https://www.adb.org/publications/series/climate-change-coming-to-court>.

[3] Dinah Shelton and Alexandre Kiss, 'Judicial Handbook on Environmental Law' (Handbook, 2005, 1st ed) *United Nations Environment Programme* <https://wedocs.unep.org/bitstream/handle/20.500.11822/8606/JUDICIAL_HBOOK_ENV_LAW.pdf?sequence=3&amp%3BisAllowed=>; James May and Erin Daly, 'Judicial Handbook on Environmental Constitutionalism' (Handbook, 2017, 2nd ed) *United Nations Environment Programme* <https://wedocs.unep.org/bitstream/handle/20.500.11822/20766/judicial-handbook-environmental-constitutionalism.pdf?sequence=3&isAllowed=y>; James May and Erin Daly, 'Judicial Handbook on Environmental Law' (Handbook, 2019, 3rd ed) *United Nations Environment Programme* <https://www.unep.org/resources/publication/global-judicial-handbook-environmental-constitutionalism-third-edition>.

[4] 'The Status of Climate Change Litigation, A Global Review' (May 2017) *United Nations Environment Programme* <https://wedocs.unep.org/bitstream/handle/20.500.11822/20767/climate-change-litigation.pdf?sequence=1&isAllowed=y>; 'Global Climate Litigation Report 2020 Status Review' (Review, 2020)) *United Nations Environment Programme* <https://wedocs.unep.org/bitstream/handle/20.500.11822/34818/GCLR.pdf?sequence=1&isAllowed=y>.

Columbia University[5] and at the 'Climate Change Laws of the World' database maintained by the Grantham Research Institute on Climate Change and the Environment at the London School of Economics (which excludes the largest climate litigation jurisdiction, the USA).[6] A database of climate change jurisprudence in ASEAN jurisdictions was launched online in 2021 by 'LITIGASIA' at the International Union for Conservation of Nature Environmental Law Colloquium.[7] When very recently interrogated in relation to the Asia-Pacific region, the countries which the Sabin Centre database identified as having experienced climate litigation are Australia, Chile, India, Indonesia, Japan, Nepal, New Zealand, Papua New Guinea, Pakistan, Philippines, South Korea, and Taiwan.[8] LITIGASIA's database relating to ASEAN countries also identified Thailand, Malaysia, Vietnam and Cambodia as jurisdictions with climate cases.[9]

Several countries in South Asia have a strong tradition of public interest environmental litigation based on their democratic and fundamental rights-based constitutional schemes, such as Pakistan, India, Nepal and Bangladesh, and the Philippines in Southeast Asia.[10]

Innovative cases in domestic courts

It is not possible in the short time I have to undertake a comprehensive analysis of caselaw in the Asia-Pacific. I will focus on a few key cases in a few of the countries in the Global South. Brief mention of Australia will also be made by way of contrast. Despite its status as a Pacific power, I will not embark on the Sisyphean task of analysing climate litigation in the USA.

I note that there has been no rights-based climate litigation in the Pacific Islands.[11]

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[5] 'Climate Change Litigation Databases' (Web page, 2022) *Sabin Center for Climate Change Law* <http://climatecasechart.com/>.
[6] 'Climate Change Laws of the World' (Web page, 2022) *Grantham Research Institute on Climate Change and the Environment* < https://climate-laws.org/litigation_cases>.
[7] 'Climate Change Litigation Cases in South-East Asia' (Web page, 2022) *LITIGASIA* <https://www.litigasia.org/>.
[8] 'Jurisdiction' (Web page, 2022) *Sabin Center for Climate Change Law* <http://climatecasechart.com/non-us-jurisdiction/>.
[9] *LITIGASIA* (no 7).
[10] Justice Syad Mansoor Ali Shah, 'Foreword' in Jolene Lin, Douglas A. Kysar (ed) *Climate Change Litigation in the Asia Pacific* (Cambridge University Press, 2020) xii ('*Climate Change Litigation in the Asia Pacific*').
[11] Margaretha Wewerinke-Singh, 'Litigation Human Rights Violations Related to the Adverse Effects of Climate Change in the Pacific Islands' in *Climate Change Litigation in the Asia Pacific*, 95.

The following cases in Asia show the importance of:

1. Superior and apex courts making substantive decisions,
2. Absence of procedural impediments such as limiting standing to sue in encouraging access to justice,
3. Innovative reasoning of judges in considering for example future generations and multiple sources for environmental law principles, and
4. A willingness of judges to craft extensive remedies.

India

The Supreme Court of India is recognised for its innovation in public interest litigation over many decades in terms of reducing procedural impediments, engaging jurisdiction under the Indian Constitution and imposing innovative remedies. Its many judgments in cases commenced by the public interest lawyer McMehta over decades are well known, such as the Taj Mahal case.[12]

The Indian Supreme Court appears to be the first in Asia to have extended the constitutional right to life to include a right to a clean environment.[13]

The National Green Tribunal was established in 2010 and has also taken innovative action in the climate change context.

Re Court on its Own Motion v Himachal Pradesh, the National Green Tribunal initiated its own case against the State of Himachal Pradesh.[14] It found that 40% of glacial retreat in the Rohtung Pass could be attributed to emissions of black carbon.[15] It relied on the State's constitutional mandate to protect and improve the environment under Art 48A and the obligations of citizens to protect and improve the natural environment under Art 51A(g) of the Constitution of India.[16] It noted that the right to life under Art 21 of the Constitution includes the right to a clean and decent environment. The Court undertook a detailed analysis

[12] *M.C. Mehta vs Union Of India* [1996] WP 13381/1984 (Supreme Court of India).
[13] Subhash Kumar v. State of Bihar and Ors [1991]; Virender Gaur and Ors. v. State of Haryana and Ors (1995) 2 SCC 577 (Supreme Court of India).
[14] *Sher Singh vs State Of Hp* [2014] http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2014/20140206_2013-CWPIL-No.-15-of-2010_opinion-1.pdf
[15] *Re Court on its Own Motion v Himachal Pradesh* (2013) CWPIL No. 15 of 2010 (National Green Tribunal) <http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2016/20160509_2013-CWPIL-No.-15-of-2010_order-1.pdf>.
[16] Ibid [11]

of Indian environmental jurisprudence.[17] It also extensively analysed environmental threats to the Rohtung Pass, including from climate change.[18] Finding that the provincial government had not formulated specific guidelines on the prevention and control of environmental degradation in relation to the glacier of Rohtung Pass, the Tribunal issued extensive directions.[19] It created a monitoring committee to tour the area and ensure that the Court's directions are complied with and to submit quarterly reports to the Tribunal.[20] The orders also required a government body to conduct a study of the glacier, inter alia.[21]

Pakistan

Pakistan's superior courts have shown great willingness to address environmental degradation in public interest litigation relying on the Constitution of Pakistan. The Constitution of Pakistan does not contain an explicit right to a healthy environment.[22] Pakistan's superior courts have nevertheless interpreted the rights to life and dignity of man (Articles 9 and 14) to include a right to a healthy environment and to impose positive obligations on the State.[23] The rules of standing have been relaxed in public interest litigation.[24] *Shehla Zia and Ors v WAPDA* (PLD 1994 SC 693 is a key authority in which the Supreme Court of Pakistan established that the right to life includes the right to a healthy environment.

In *Leghari v Federation of Pakistan* (W.P. No. 25501/2015) (2018) (*Leghari*), the petitioner filed a complaint in the High Court of Lahore alleging that the national Government of Pakistan had failed to implement the National Climate Change Policy 2012 (the Policy) and the Framework for Implementation of Climate Change Policy, (2014-2030) (the Framework). The petition argued that climate change is a serious threat to water, food and energy security of Pakistan which offends the fundamental right to life under art 9 of the Constitution and the right to human dignity (art 14), which give rise to the right to a healthy and clean

[17] Ibid [16]-[19].
[18] Ibid [33].
[19] Ibid [38].
[20] Ibid.
[21] Ibid.
[22] Waqqas Ahmad Mir 'From Shehla Zia to Asghar Leghari: Pronouncing Unwritten Rights Is More Complex than a Celebratory Tale' in *Climate Change Litigation in the Asia Pacific*, 263.
[23] Ibid.
[24] Ibid 264.

environment. The petition relied on *Shehla Zia and Ors v WAPDA* (PLD 1994 SC 693.

The Court:

1. Treated the petition as a public interest petition akin to a continuing mandamus or writ of kalikasan (procedure from the Philippines Supreme Court) (no procedural impediment).

2. Applied innovative reasoning holding that existing environmental jurisprudence must be fashioned to meet the needs of addressing climate change. The Court adopted a lens of "climate justice" rather than "environmental justice", considering the latter term to have too much emphasis on the local. The importance of climate adaptation in Pakistan was emphasised.

   The principle of water justice (as a sub-principle of climate justice) was said to be protected by Arts 9 and 14 of the Constitution.

3. Held the delay and lethargy of the State in implementing the Framework for Implementation of Climate Change Policy offended the fundamental rights of citizens.

4. Conceived of innovative remedies - during proceedings in 2015, the Court constituted a Climate Change Commission consisting of environmental experts, federal and provincial government representatives, interests group and the petitioners' counsel. It dissolved that body in the final judgment in 2018, then constituting a Standing Committee on Climate Change to act as a link between the Court and the Executive and to render assistance to the Federal government in ensuring the Policy and Framework were implemented. The Federal and provincial governments were ordered to engage, entertain and consider the suggestions of the Committee, the members of which were appointed by order of the Court.[25]

In *DG Khan Cement Ltd v Government of Punjab* (2021, CP1290-L/2019, Supreme Court of Pakistan, Appellate Jurisdiction), the petitioner, an operator of a cement company, argued that provincial

[25] Ibid 267-268. A number of novel elements within Pakistani jurisprudence have been identified by scholars, for example its willingness to allow a continuing mandamus or rolling review and willingness to enforce a policy document issued by the Executive without evidence of detrimental reliance on the policy by a petitioner.

government controls preventing the expansion of such activities in a defined area were unlawful. The two-judge bench found that there were serious environmental threats to underground water aquifers in the area, including from cement companies. The relevant region was described as a “stretch of land… whose charm has captivated pilgrims, travellers and emperors since olden days. The picturesque region rich in biodiversity, and historical and sociocultural heritage is a national asset of timeless magnificence.”

1. The Court applied the precautionary principle and the principle of in dubio pro natura (if in doubt, favour the protection of the environment). The Court held that the provincial government was obliged to act in line with these principles until a detailed hydrogeological study had been prepared. It found that that approach was compliant with the constitutional rights to life, sustainability and dignity.

2. The Court further recognized the limits of a human rights centred regime and acknowledged examples of legal personhood being conferred on the environment from Ecuador, New Zealand, Australia, Uganda, Colombia, Bangladesh and local government in the USA. The Court pronounced that “Man and his environment each need to compromise for the better of both and this peaceful co-existence requires that the law treats environmental objects as holders of legal rights”.

3. The Court also invoked the principle of water justice recognised by the World Water Forum in 2018, whereby the state should exercise stewardship over all water resources for the benefit of current and future generations and the community of life. Once again the precautionary principle and pro natura principle were applied.

4. The Court also approved the provincial government’s control explicitly on the grounds that it was a climate resilient measure in line with the national climate change policy and the Constitution. The Court acknowledged that its decisions will impact future generations and applied principles of intergenerational justice and climate democracy. The Court endorsed sustainable development as in step with constitutional values of social and economic justice.

The provincial government's regulatory control was upheld and the cement company could not enlarge its existing plant, until further studies were completed.

Nepal

Sharing with Pakistan and India a common law legal system with extensive constitutional human rights protections, Nepal has proved fertile ground for constitutional human rights based climate litigation. In *Shrestha v. Office of the Prime Minister et al,*[26] the petitioner filed suit in the Supreme Court of Nepal seeking mandamus or another appropriate order to protect the interest of all biodiversity in Nepal, alleging violations of Articles 16 (right to live with dignity), 30 (right regarding clean environment), 35 (right to health care) and 36 (right to food) of the Constitution of Nepal, provisions of the Environmental Protection Act 1997 and international treaties to which Nepal was a party.[27]

The Court held:

1. Climate change directly affected the well-being of citizens who were guaranteed a constitutional right to a clean environment, such that there was a meaningful relationship between the issues and the petitioner (which I take to be analogous to standing in the Australian context).[28]

2. The Court's reasoning recognised the devastating consequences of climate change for Nepal and found that the national government had failed to take any effective action to address climate change impacts.[29] A comprehensive law addressing climate change had not been passed. The *Environment Protection Act 1997* did not contain provisions which specifically focused on climate change.
   The Court endorsed the principle of "climate justice" and sustainable development including inter and intra-generational

[26] *Advocate Padam Bahadur Shrestha, a resident of Kathmandu District, Kathmandu Metropolitan City, Ward No 10, Baneshwor Vs. The office of the Prime Minister and Council of Ministers, Singhadurbar, Kathmandu and others* [2018] 074-WO-0283 (Supreme Court of Nepal) ('*Shrestha v Office of the Prime Minister et al*')
[27] Ibid 3.
[28] Ibid 11.
[29] Ibid 4.

equity.[30] Climate change was further held to implicate the right to life, to have nutritious food.[31]

3. The Court formulated detailed requirements for a new consolidated climate change law which it found was necessary.[32] The Court issued orders requiring the government to introduce such laws in a separate consolidated law addressing climate mitigation and adaptation as soon as possible.[33] The Court also issued orders for mandamus compelling adherence to the provisions of existing laws and policies relevant to climate adaptation and mitigation until the new law was passed.[34] According to the Sabin Centre, since the judgment the Nepalese parliament has passed the *Environment Protection Act 2019* and the *Forests Act 2019*.[35]

Philippines

The judiciary of the Philippines has developed an international reputation for its rich environmental jurisprudence. In the landmark case of *Oposa v Factoran* the Supreme Court of the Philippines recognised the petitioners' constitutional human right to a balanced and healthful ecology.[36] That right was taken to have predated the Constitution of the Philippines (indeed it was said to exist since the inception of mankind) and to be inherent in its tenets.[37] *Oposa* can be seen as an early climate change case as the petitioners argued that deforestation would have consequences for global warming.[38] The Supreme Court of the Philippines has since developed an innovative procedural device known as the writ of kalikasan, which specifically protects the right to a balanced and healthful ecology.

In *Segovia et al v Climate Change Commission*, the Supreme Court noted at [34] that:

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[30] Ibid 11.
[31] Ibid 13.
[32] Ibid.
[33] Ibid 14.
[34] Ibid.
[35] 'Shrestha v. Office of the Prime Minister et al.' (Web page, 2022) *Sabin Center for Climate Change Law* <http://climatecasechart.com/non-us-case/shrestha-v-office-of-the-prime-minister-et-al/#:~:text=Summary%3A,to%20enact%20such%20a%20law>.
[36] *Oposa v. Factoran* (1993) G.R. No. 101083 (Supreme Court of the Republic of the Philippines).
[37] Ibid [21] (Davide, JR., J).
[38] 'Climate Change, Coming Soon to a Court Near You' (Report, 2022) *Asian Development Bank* <https://www.adb.org/sites/default/files/publication/659631/climate-litigation-asia-pacific.pdf> 35-36.

For a writ of kalikasan to issue, the following requisites must concur:

1. there is an actual or threatened violation of the constitutional right to a balanced and healthful ecology;

2. the actual or threatened violation arises from an unlawful act or omission of a public official or employee, or private individual or entity; and

3. the actual or threatened violation involves or will lead to an environmental damage of such magnitude as to prejudice the life, health or property of inhabitants in two or more cities or provinces.

The courts must issue orders within 3 days and judgment within 60 days, have wide ranging remedies available, and must apply the precautionary principle.[39] The Asian Development Bank notes however that there are few instances of success in obtaining the writ.[40]

South Korea

In South Korea the interesting case of *Do-Hyun Kim et al v South Korea* has been underway since 2020. The plaintiff youth climate activists are asserting in the Constitutional Court of South Korea that the climate change law of South Korea (and a Presidential decree made under it setting the emissions reduction target) violates their constitutional rights including the right to life, right to live in a clean and healthy environment, the obligation to prevent natural disasters and protect safety, and the obligation to protect health and safety.[41] The target of a 24% cut in emissions from 2017 by 2030 is argued to be too weak to keep warming to under 2 degrees Celsius.[42]

A further novel case has arisen in South Korea, this time in the District Court of Seoul.[43] In March 2022, a Korean national and 3 Tiwi Islanders filed suit seeking an injunction against the Korea Trade Insurance

[39] Ibid 78.
[40] Ibid 79.
[41] *Do-Hyun KIM and ors (Members of Youth 4 Climate Action) v The National Assembly of the Republic of Korea & anor* [2020] (Constitutional Court of the Republic of Korea) <http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2020/20200313_NA_complaint-2.pdf>.
[42] 'Do-Hyun Kim et al. v. South Korea' (Web page, 2022) *Sabin Center for Climate Change Law* <http://climatecasechart.com/non-us-case/kim-yujin-et-al-v-south-korea/>.
[43] 'Kang et al. v. KSURE and KEXIM' (Web page, 2022) *Sabin Center for Climate Change Law* <http://climatecasechart.com/non-us-case/kand-v-ksureandkexim/ >.

Corporation, and Korea Export Import Bank.[44] Those organisations plan to provide credit for a Santos development seeking to exploit the Barossa Gas reserve near the Tiwi Islands off the coast of the Northern Territory. The plaintiffs, traditional owners of the Tiwi Islands, allege inter alia that this project will cause environmental harm including by emissions of CO2 and that the development is incompatible with the Paris Agreement. The claim relied on Art 25 of the Constitution of South Korea, which specifies a right to a healthy and pleasant environment. The Court dismissed the case in May 2022.[45]

Australian climate change litigation

Australia's 1901 Constitution lacks human rights provisions which have provided the legal basis for most of the cases outlined above. Climate litigation in Australia is reasonably large in volume, identified as second (by a substantial margin) to the United States of America in the Sabin Centre database. Because of constitutional arrangements in Australia, litigation occurs in various State courts and the Federal Court of Australia with varied types of cases reflecting the different jurisdiction being exercised. Until relatively recently cases were often judicial review or merits appeals of administrative environmental and planning decisions about single projects, generally large generators directly or indirectly of greenhouse gas emissions in state courts. This type of litigation, which is ongoing, dates back to the early 1990s: see *Greenpeace Australia Limited v Redbank Power Company Pty Ltd and Singleton Council* (1994) 86 LGERA 143. A variety of outcomes has occurred over time.[46]

Bushfire Survivors for Climate Action Incorporated v Environment Protection Authority[47] is a recent example in the Land and Environment Court of NSW of the application of orthodox principles and existing laws to new subject matter with the applicants being successful. In judicial review proceedings the applicant sought an order in the nature of

[44] Ibid.

[45] Jane Bardon, 'Traditional owners vow to keep fighting Barossa gas field despite losing South Korean court battle' *Australian Broadcasting Commission* (Web page, 25 May 2022) <https://www.abc.net.au/news/2022-05-25/nt-santos-barossa-gas-tiwi-larrakia-lose-southkorea-court-figh/101097372>.

[46] For example, *Gray v The Minister for Planning* (2006) 152 LGERA 258; [2006] NSWLEC 720; *Coast and Country Association of Queensland Inc v Smith* [2016] QCA 242; *Australian Conservation Foundation Inc v Minister for the Environment and Energy* (2017) 251 FCR 359; 227 LGERA 347; [2017] FCAFC 134; *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7; 234 LGERA 257;

[47] [2021] NSWLEC 92; 250 LGERA 1.

mandamus to compel the NSW Environment Protection Authority (NSW EPA) to perform a statutory duty under s 9(1)(a) of the *Protection of the Environment Administration Act 1991* (NSW) (POEA Act), which, it contended, required the development of instruments to protect the environment of NSW from climate change. Section 9(1)(a) imposes a duty on the NSW EPA to "develop environmental quality objectives, guidelines and policies to ensure environment protection". The Court found that on the evidence, at the current time and place, the threat of climate change is of sufficient magnitude and impact to be one against which the environment needs to be protected, and therefore fell within the duty.[48] After analysing existing NSW EPA instruments, the Court found that the duty remained unperformed.[49] The court issued mandamus to compel the NSW EPA to develop environmental quality objectives, guidelines and policies to ensure environment protection from climate change.[50] The NSW EPA is yet to announce its climate policy in response to the Court's judgment.[51]

In conclusion

Climate change litigation in the Asian region is resulting in some novel cases, the examples outlined above focussed particularly on constitutional rights. Procedural impediments have been few and wide-ranging remedies imposed in several cases. Such cases are only possible because of climate conscious lawyering as courts generally hear matters brought before them by parties who present evidence and make submissions which identifies to the court the issues to be determined (with the National Green Tribunal acting on its own motion more of an exception). I trust the rest of the panel discussion further enlightens this important topic for the Asia-Pacific region.

[48] Ibid [69], [101].
[49] Ibid [144].
[50] Ibid [148]-[149].
[51] Since the time of writing the NSW EPA released the EPA Climate Change Policy in January 2023.