

## Litigating Climate Change in India and Pakistan: Analysing Opportunities and Challenges

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### I. INTRODUCTION

In 2018, the case of *Asghar Leghari v Pakistan*<sup>1</sup> put a global spotlight on the region as a leading jurisdiction for climate litigation. In *Leghari*, an agriculturalist brought a petition for the enforcement of his fundamental rights demanding that the Government of Pakistan take more action on climate change. Judge Shah in the Lahore High Court (a judge with a pro-environment record both as a judge and lawyer) ordered the establishment of a committee to begin the operationalisation of Pakistan's climate policies.<sup>2</sup> The order carefully weaved together human rights, climate change adaptation and justice. The Courts in Pakistan and India are often identified for their climate litigation potential because of a history of public interest litigation and a reputation for an 'activist' judiciary.<sup>3</sup> Not long after *Leghari* similar new petitions were filed in both Pakistan and India.<sup>4</sup> Thus, both jurisdictions are now of interest to academics, lawyers, activists tracking and analysing the expansion of climate litigation around the world.

This chapter analyses climate litigation in India and Pakistan and the opportunities and challenges that exist going forward. It traces the limited case law that has developed to date expressly incorporating climate considerations. The chapter does not aim for an in-depth analysis of each climate change case. Rather, the chapter analyses the development of litigation with reference to broader socio-political dimensions of litigation, environment and climate change in the region.

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<sup>1</sup> *Asghar Leghari vs. Federation of Pakistan*, Writ Petition 22501cddc/2015 (Jan 25, 2018 Lahore High Court).

<sup>2</sup> Benazir Shah, 'Shah's Revolution' *Newsweek Pakistan* (25 September 2016) <<http://www.newsweekpakistan.com/revolutionary-justice/>> accessed 1 April 2020.

<sup>3</sup> See for example: Jacqueline Peel and Jolene Lin, 'Transnational Climate Litigation: The Contribution of the Global South' (2019) 113 *American Journal of International Law* 679; Joana Setzer and Lisa Benjamin, 'Climate Change Litigation in the Global South: Filling in Gaps' (2020) 114 *AJIL Unbound* 56; Jolene Lin, 'Litigating Climate Change in Asia' (2014) 4 *Climate Law* 140.

<sup>4</sup> *Ridhima Pandey v Union of India*, Application No. 187/2017, National Green Tribunal. Petition available from: [http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2017/20170325\\_Original-Application-No.-\\_-of-2017\\_petition-1.pdf](http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2017/20170325_Original-Application-No.-_-of-2017_petition-1.pdf) accessed 22 April 2020; *Rabab Ali v Federation of Pakistan & Another* (Petition filed at Supreme Court, April 2016) petition available from: [http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2016/20160401\\_Constitutional-Petition-No.-\\_-I-of-2016\\_petition-1.pdf](http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2016/20160401_Constitutional-Petition-No.-_-I-of-2016_petition-1.pdf) accessed 22 April 2020.

The chapter goes on to analyse a broader sphere of ‘litigation in the context of climate change’<sup>5</sup>, rather than only what is generally defined as ‘climate litigation’<sup>6</sup>. This includes litigation that brings forward issues that deal with mitigation and adaptation but do not necessarily expressly deal with ‘climate change’. Indeed, a rich jurisprudence has developed where litigation has partially been successful in linking issues of rights, livelihoods, ecology and justice. Tracing this jurisprudence provides a broader understanding of litigation on climate change in the region.

Accordingly, this chapter provides a fresh perspective to the current literature on climate litigation in India and Pakistan, through a more focussed analysis of climate litigation in the domestic political and legal context within which such litigation takes place. While legal commentators have identified the region for its climate litigation potential, this is often discussed in a decontextualized manner.<sup>7</sup> Much of the literature is comparative, or solely focuses on the *Leghari* judgement as a standalone leading case.<sup>8</sup> Drawing upon the broad legacy of the Courts, authors conclude the strong potential for climate litigation. While this may be true, as will be argued, the picture is slightly more complex and nuanced. The politics of climate change, discourse around climate change, the politics of the court, as well as developments in different types of litigation, are also important in explaining the opportunities and challenges for climate litigation in Pakistan and India. Ultimately, through understanding this context we can assess how future litigation can enact and implement substantive change. The lessons drawn in this chapter are also relevant to the growing literature on climate change litigation in the Global South where similar challenges are faced.

This chapter has four substantive sections. Section II discusses the background to climate change and the courts in the region. Section III examines recent ‘climate litigation’ analysing litigation that concerns ‘climate-specific’ policies and litigation that attempts to enforce existing environmental laws and policies. This section also highlights climate litigation that is potentially hazardous from a broader justice perspective because of a narrow climate framing. Section IV examines litigation ‘in the context of’ climate change, highlighting how the courts have been dealing with climate issues, often without climate language. Finally, Section V analyses the challenges and opportunities for future climate litigation in the region.

## II. BACKGROUND: CLIMATE AND THE COURTS IN INDIA AND PAKISTAN

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<sup>5</sup> Kim Bouwer, ‘The Unsexy Future of Climate Change Litigation’ (2018) 30 *Journal of Environmental Law* 483, 485.

<sup>6</sup> To be clear, ‘climate litigation’ in this article is defined as cases that have a clear climate component in its language or reasoning. These may include cases where climate change appears as a ‘core’ or ‘peripheral’ concern. This can be contrasted with many of the cases discussed in Part IV that go beyond ‘climate litigation’.

<sup>7</sup> See for example: Peel and Lin (n 3); Setzer and Benjamin (n 3); Lin (n 3); Louis J Kotzé and Anel du Plessis, ‘Putting Africa on the Stand: A Bird’s Eye View of Climate Change Litigation on the Continent’ [forthcoming] *Journal of Environmental Law and Litigation*; Emily Barritt and Boitumelo Sediti, ‘The Symbolic Value of *Leghari v Federation of Pakistan*: Climate Change Adjudication in the Global South’ (2019) 30 *King’s Law Journal* 203.

<sup>8</sup> Some exceptions are: Shibani Ghosh, ‘Litigating Climate Claims in India’ (2020) 114 *AJIL Unbound* 45; Emeline Pluchon, ‘Leading from the Bench: The Role of Judges in Advancing Climate Justice and Lessons from South Asia’, *Routledge Handbook of Climate Justice* (Routledge 2018); Parvez Hassan, ‘Judicial Commissions and Climate Justice in Pakistan’, *Asia Pacific Judicial Colloquium on Climate Change* (2018) <<http://pja.gov.pk/system/files/4%20-%20Judicial%20Commissions%20and%20Climate%20Justice%20in%20Pakistan%20%28Feb%202018%29%20-%20Dr.%20Parvez%20Hassan.pdf>> accessed 20 March 2020.

### A. *Contextualising climate change*

At the international level, Pakistan and India have traditionally taken a stance that climate change is an issue for developed countries who need to mitigate their emissions and provide financial and technical support for adaptation.<sup>9</sup> The position is based on notions of climate justice and equity. For example, India played a leading role in framing differential treatment under the climate regime, anchoring the principle of common but differentiated responsibility and respective capabilities into the UN Framework Convention on Climate Change.<sup>10</sup> This position has slightly shifted over time. But, by and large, both countries maintain policy positions that conserve a (carbon-intensive) development space and ensure that the obligations imposed on developing countries like itself are kept at a minimum.<sup>11</sup>

Nevertheless, both countries have significant mitigation and adaptation concerns. Pakistan, for example, faces energy deficits, poverty and developmental challenges.<sup>12</sup> It has set itself a vision of becoming an upper-middle-income country by 2025 and being among the ten largest economies in the world by 2047.<sup>13</sup> At the same time, Pakistan has to contend with being one of the most climate-vulnerable countries in the world.<sup>14</sup>

The international context explains the slow development of climate-specific law and policy in Pakistan and India. Domestically, climate change has often been viewed as an issue of foreign policy concern. Hence, for most of the last three decades, the public discussion in India was limited and focused on *whether* to engage on climate change.<sup>15</sup> Given the international climate justice arguments, India's civil society has been sympathetic to the Government's international position. At the same time civil society has found it difficult to 'scale back' claims of climate

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<sup>9</sup> Both countries are part of the 'Like Minded Developing Countries' negotiating bloc, who are identified for key negotiating positions based on mitigation based on historic responsibility and the provision of finance and technology transfer to developing countries. See: Lau Blaxekjær and Tobias Dan Nielsen, 'Mapping the Narrative Positions of New Political Groups in the UNFCCC' (2014) 10–11 <[https://www.indiaeu-climategovernance.org/Reports/Blaxekjaer-and-Nielsen\\_-\\_IECGN\\_-\\_Mapping-the-narrative-positions-of-new-political-groups-under-the-UNFCCC.pdf](https://www.indiaeu-climategovernance.org/Reports/Blaxekjaer-and-Nielsen_-_IECGN_-_Mapping-the-narrative-positions-of-new-political-groups-under-the-UNFCCC.pdf)>.

<sup>10</sup> Sandeep Sengupta, 'India's Engagement in Global Climate Negotiations from Rio to Paris' in Navroz K Dubash (ed), *India in a Warming World: Integrating Climate Change and Development* (Oxford University Press 2019) 116–119.

<sup>11</sup> *ibid* 118.

<sup>12</sup> According to the UNDP, 38 per cent of the population of Pakistan experience Multidimensional Poverty, see: United Nations Development Programme and Oxford Poverty & Human Development Initiative, 'Multidimensional Poverty in Pakistan' (2016) xi <[https://www.pk.undp.org/content/pakistan/en/home/library/development\\_policy/Multidimensional-Poverty-in-Pakistan.html](https://www.pk.undp.org/content/pakistan/en/home/library/development_policy/Multidimensional-Poverty-in-Pakistan.html)> accessed 8 June 2016. On Pakistan's energy shortages, see: M Mujahid Rafique and S Rehman, 'National Energy Scenario of Pakistan – Current Status, Future Alternatives, and Institutional Infrastructure: An Overview' (2017) 69 *Renewable and Sustainable Energy Reviews* 156.

<sup>13</sup> Ministry of Planning, Development and Reform, 'Pakistan 2025: One Nation- One Vision' (Government of Pakistan) <<http://fics.seecs.edu.pk/Vision/Vision-2025/Pakistan-Vision-2025.pdf>> accessed 12 April 2020.

<sup>14</sup> For example, a study of countries most affected by climate risks between 1994-2013 found Pakistan in the 10 most climate affected countries in the world. See: Sönke Kreft and others, *Global Climate Risk Index 2015 Who Suffers Most From Extreme Weather Events? Weather-Related Loss Events in 2013 and 1994 to 2013* (Germanwatch Nord-Süd Initiative eV 2014).

<sup>15</sup> Navroz K Dubash, 'An Introduction to India's Evolving Climate Change Debate' in Navroz K Dubash (ed), *India in a Warming World: Integrating Climate Change and Development* (Oxford University Press 2019) 23.

justice to the local level.<sup>16</sup> In other words, the discourse on climate change, among civil society activists and NGOs, has remained at this international level. Articulating local concerns around developmental and environmental challenges like education, health, access to water and sanitation, in the language of climate change has not been forthcoming.<sup>17</sup> For example, in India, large-scale activism on issues such as big dams and deforestation were framed as social justice or environmental justice issues without bringing in the links to climate change and climate justice. This context foregrounds the discussion of climate litigation in this chapter. Overall, there has not been widespread engagement with ‘climate change’ by civil society activists at the local level, even if they are dealing with its associated social and environmental impacts.

### B. *The role of the Courts in environmental and rights-based litigation*

Despite expressly ‘climate-related’ activism being limited at the local level, India and Pakistan have a history of using the judiciary for environmental rights-based claims more broadly. Commentators have identified Pakistan and India as jurisdictions with strong potential for future climate litigation, based on a history of progressive judgements that have borne from public-interest litigation.<sup>18</sup> Rajamani and Ghosh state that India had an ‘engaged and proactive civil society, an activist judiciary, a progressive body of enviro-legal jurisprudence and an unparalleled culture of public interest litigation’ that meant it was ripe for climate litigation.<sup>19</sup> Similarly, Lin states that it is ‘perhaps just a matter of time before climate change becomes a subject of litigation in the Indian courts’.<sup>20</sup> Setzer and Benjamin note that in Pakistan, ‘dynamic judicial and legislative interactions illustrate new opportunities for advancing climate action in highly vulnerable countries’.<sup>21</sup>

With the growth of climate litigation in recent years, there has been an emerging interest in climate litigation in the Global South for rights-based climate litigation.<sup>22</sup> Commentators have also identified the judiciary as being uniquely positioned to link climate change with human rights. Peel and Lin, in their analysis of climate litigation in the Global South, argue that India and Pakistan have progressive judiciary that generates judgements that protect the rights of vulnerable social groups and the environment.<sup>23</sup> Pluchon writes that ‘judges in South Asia have responded courageously, clear-eyed in the view they can and must play a crucial role in advancing environmental rights and climate justice’.<sup>24</sup> However, to assess such potential, it is

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<sup>16</sup> Sengupta (n 10) 133; Susannah Fisher, ‘The Emerging Geographies of Climate Justice’ (2015) 181 *The Geographical Journal* 73, 79–80.

<sup>17</sup> Pradip Swarnakar, ‘Climate Change, Civil Society, and Social Movement in India’ in Navroz K Dubash (ed), *India in a Warming World: Integrating Climate Change and Development* (Oxford University Press 2019) 254.

<sup>18</sup> Lin (n 3); Pluchon (n 8); Jacqueline Peel and Hari M Osofsky, ‘A Rights Turn in Climate Change Litigation?’ (2018) 7 *Transnational Environmental Law* 37, 52–53.

<sup>19</sup> Lavanya Rajamani and Shibani Ghosh, ‘India’ in Richard Lord and others (eds), *Climate Change Liability: Transnational Law and Practice* (Cambridge University Press 2011) 176.

<sup>20</sup> Lin (n 3) 142.

<sup>21</sup> Setzer and Benjamin (n 3) 59.

<sup>22</sup> See for example: Peel and Lin (n 3); Setzer and Benjamin (n 3); Joana Setzer and Lisa C Vanhala, ‘Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance’ (2019) 10 *Wiley Interdisciplinary Reviews: Climate Change* e580, 5.

<sup>23</sup> Peel and Lin (n 3) 706.

<sup>24</sup> Pluchon (n 8) 139.

important to first analyse the historic and contemporary context of environmental and rights-based litigation and the judiciary in India and Pakistan.

A major reason for the growth of rights-based litigation has been public interest litigation (PIL). PIL brought forward several technical and procedural flexibilities. Standing rules were transformed to allow for claims to be brought on behalf of a public grievance, and to allow any person, acting bona fide, to advance claims of human rights violations on behalf of victims who could not do so themselves as a result of their poverty, disability or socially or economically disadvantaged positions.<sup>25</sup> From an environmental justice and rights perspective, this allowed petitioners (such as civil society activists) to bring forward cases on behalf of communities affected by environmental harm, or to address a general environmental justice grievance. At its core, the relaxation of standing rules allowed for petitions on ‘public interest’ grounds, giving rise to PIL.

The courts have also expanded their to allow for the appointment of fact-finding commissions and experts, transforming the judiciary’s role in PILs from adversarial to investigatory. The use of the doctrine of *continuous mandamus*, where the Court leaves cases open for long periods has also been important in the growth of rights-based environment cases, allowing for the Courts to issue multiple orders over time to oversee the implementation of rights.

Accordingly, judicial flexibilities and techniques have given rise to a rich and unique jurisprudence on environmental, development and human rights issues. In both countries, the judiciary has expanded the constitutional right to life to produce new derivative rights to water, food and a healthy environment.<sup>26</sup> The judiciary has also incorporated core principles of international environmental law into its jurisprudence, for example, the polluter pays, sustainable development, and the precautionary principle.<sup>27</sup>

Moreover, green courts and benches play an increasing role: a National Green Tribunal (“NGT”) was established in India in 2010 and environmental tribunals have existed in Pakistan since 1999. To be clear, for this chapter, references to courts and judiciary include the role of the tribunals and their members.

### C. *The complex legacy and state of the judiciary*

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<sup>25</sup> For example, in Pakistan, the foundations of PIL are based on Article 199(1) of the 1973 Constitution that allows a High Court to hear cases regarding the ‘enforcement of any Fundamental Right’ if satisfied that there is ‘no other adequate remedy provided by law’ on the application of ‘any aggrieved person’. For a more complete discussion, see: Maryam S Khan, ‘Genesis and Evolution of Public Interest Litigation in the Supreme Court of Pakistan: Toward a Dynamic Theory of Judicialization’ (2014) 28 *Temple International and Competition Law Journal* 285, 298–299. Similarly, Article 226 of the Indian Constitution (for the High Court) and Article 32 (for the Supreme Court).

<sup>26</sup> See: Jona Razzaque, *Public Interest Environmental Litigation in India, Pakistan and Bangladesh* (Kluwer Law International 2004) 94–122.

<sup>27</sup> In India, see *Indian Council for Enviro-legal Action v Union of India and Ors* (1996) 3 SCC 212 (polluter pays principle) and *Vellore Citizens Welfare Forum* (1996) 5 SCC 647 (sustainable development and precautionary principle). In Pakistan, see *Shehla Zia v WAPDA*, *Pakistan* PLD 1994 SC 693 (sustainable development and precautionary principle). The polluter pays principle has not been incorporated to the same extent in Pakistan. There are only a few cases that expressly refer to the principle such as: *Mohammad Ayaz v Government of Punjab* (2017) CLD 772, where the Lahore High Court made reference to it. For a more complete discussion on the incorporation of principles of international environmental law into the jurisprudence of India and Pakistan see: Razzaque (n 26) 317–369; Shibani Ghosh (ed), *Indian Environmental Law: Key Concepts and Principles* (Orient BlackSwan 2019).

The discussions above explain the potential for climate litigation. Indeed, PIL has historically been lauded as a pillar of hope, protecting the rights of the poor and radically shifting the relationship between citizen and state.<sup>28</sup> Today, the reputation of the judiciary on issues of environmental and social justice is mixed. Particularly in India, there has been a well-established critique of the judiciary's approach over the last twenty years.<sup>29</sup> While examining these in detail is beyond the scope of this chapter, a few short points are important to contextualise the role of the judiciary in recent times.

First, there is a critique of an 'activist' judiciary and the over extension of powers that are normally reserved for democratically elected governments.<sup>30</sup> Second, in India, commentators have noted how the judiciary's rulings have reflected the broader neoliberal ideologies of the state since the 1990s.<sup>31</sup> Thus, the court has often issued judgements that protect 'economic development' over the rights of the poor and marginalised. For example, in the *Narmada*<sup>32</sup> judgement, the rights of local people were seen as a 'justifiable sacrifice' for the development of a large hydropower dam.<sup>33</sup> In other cases, the courts have utilised the justification of 'protecting the environment' to demolish slums and render people homeless, based on the 'unhygienic' conditions, such as poor drainage infrastructure (that was never provided by the state).<sup>34</sup> Third, the implementation of judicial orders is an ongoing issue that has weakened the judiciary. As Singh highlights, in India, while there may be 'consensus on the legitimacy of judicial activism' the judiciary neither has 'the purse nor the sword' and 'remains the weakest wing of the government'.<sup>35</sup> With a well-documented apathetic attitude towards implementation of environmental law, the role of the petitioner does not end with filing the petitions and getting the decision in their favour, rather there is a responsibility to keep monitoring the implementation of the judicial decision.<sup>36</sup> Indeed, it means there can be a continuous back and forth with the judiciary to try to implement an order.

Finally, it is important to keep in mind the changing political context that the judiciary operates in, including its relationship with the executive. In Pakistan, the executive and judiciary have

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<sup>28</sup> Mayur Suresh and Siddharth Narrain, 'Introduction' in Mayur Suresh and Siddharth Narrain (eds), *The Shifting Scales of Justice: The Supreme Court in Neo-liberal India* (Orient BlackSwan 2014).

<sup>29</sup> See for example: Balakrishnan Rajagopal, 'Pro-Human Rights but Anti-Poor? A Critical Evaluation of the Indian Supreme Court from a Social Movement Perspective' (2007) 8 Human Rights Review 157; Mayur Suresh and Siddharth Narrain (eds), *The Shifting Scales of Justice: The Supreme Court in Neo-Liberal India* (Orient BlackSwan 2014).

<sup>30</sup> See for example: Anuj Bhunia, *Courting the People: Public Interest Litigation and Political Society in Post-Emergency India* (Cambridge University Press 2017).

<sup>31</sup> See for example: Prashant Bhushan, 'Supreme Court and PIL' (2004) 39 Economic & Political Weekly 1770; Suresh and Narrain (n 32).

<sup>32</sup> *Narmada Bachao Andolan v Union of India and Others* (2000) 10 SCC 664 (Supreme Court of India).

<sup>33</sup> Balakrishnan Rajagopal, 'The Role of Law in Counter-Hegemonic Globalization and Global Legal Pluralism: Lessons from the Narmada Valley Struggle in India' (2005) 18 Leiden Journal of International Law 345, 376–378.

<sup>34</sup> Amita Baviskar, 'The Politics of the City' [2002] *Seminar* <<http://www.india-seminar.com/2002/516/516%20amita%20baviskar.htm>> accessed 2 April 2018; René Véron, 'Remaking Urban Environments: The Political Ecology of Air Pollution in Delhi' (2006) 38 Environment and Planning 2093.

<sup>35</sup> Parmanand Singh, 'Promises and Perils of Public Interest Litigation in India' (2010) 52 Journal of the Indian Law Institute 172, 184.

<sup>36</sup> Geetanjoy Sahu, 'Implementation of Environmental Judgements in Context: A Comparative Analysis of Dahanu Thermal Power Plant Pollution Case in Maharashtra and Vellore Leather Industrial Pollution Case in Tamil Nadu' (2010) 6 Law Environment and Development Journal 335, 340.

had a long fraught relationship, given periods of military dictatorship. Environmental tribunals in Pakistan have suffered from long periods of not operating, due to vacancies, interference and other bureaucratic impairments.<sup>37</sup> In India, in recent years the central government has interfered with both the NGT and the Supreme Court impacting its independence and functioning.<sup>38</sup> Accordingly, many prominent lawyers, commentators and even former-judges, have questioned recent actions of the Supreme Court and the NGT and whether they can still effectively take action against the unbridled powers of the state.<sup>39</sup>

### III. CLIMATE LITIGATION IN PAKISTAN AND INDIA

#### A. *Litigating climate policy through the Courts*

The traditional ‘international’ framing of climate issues, referred to earlier, has meant a very slow development of climate-specific laws and policies. Climate-specific laws and policies are thus a very nascent area in both India and Pakistan. In India, the main climate policy at a national level is the National Action Plan on Climate Change (“NAPCC”).<sup>40</sup> The NAPCC puts forward a ‘co-benefits’ approach to addressing climate change. A co-benefits approach, under the NAPCC, is to take ‘measures that promote our development objectives while also yielding co-benefits for addressing climate change effectively’.<sup>41</sup> In other words, maintain a space for climate action, while not sacrificing India’s position of being able to pursue (carbon-intensive) economic development. Nevertheless, the development and implementation of climate policy has been slow, particularly at the sub-national (state) level in India.<sup>42</sup> Nor has there been climate-specific legislation enacted in India.

In *Gaurav Bansal*<sup>43</sup>, the NGT in India was petitioned to act against state and central governments over the lack of implementation of climate policies. The government argued that as climate change was the subject of international conventions, it does not lie within the ambit of the NGT. However, the NGT held that it was within its ambit to scrutinise national climate policies. States that did not yet have action plans on climate change were ordered to expedite

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<sup>37</sup> Martin Lau, ‘The Role of Environmental Tribunals in Pakistan: Challenges and Prospects’ [2019] Yearbook of Islamic and Middle Eastern Law Online 1, 17.

<sup>38</sup> On the executive interference and functioning of the NGT, see: Geetanjoy Sahu, ‘Ecocide by Design? Under Modi, Vacancies At National Green Tribunal Reach 70%’ *The Wire* (15 February 2018) <<https://thewire.in/featured/ngt-political-apathy-vacancies>> accessed 25 May 2019; Gitanjali Nain Gill, ‘Mapping the Power Struggles of the National Green Tribunal of India: The Rise and Fall?’ [2018] *Asian Journal of Law and Society* 1. On the Supreme Court, see: Alok Prasanna Kumar, ‘A Decade of Decay’ (2020) 55 *Economic & Political Weekly*.

<sup>39</sup> Kumar (n 42); Karan Thapar, ‘Justice Lokur: ‘SC Not Fulfilling Its Constitutional Role Adequately, Needs to Introspect’ *The Wire* (30 April 2020) <<https://thewire.in/law/justice-lokur-sc-not-fulfilling-its-constitutional-role-adequately-needs-to-introspect>> accessed 4 May 2020; Prashant Bhushan, ‘The Supreme Court Is Locked Down and Justice Is in “Emergency” Care’ *The Wire* (28 April 2020) <<https://thewire.in/law/lockdown-supreme-court-justice>> accessed 4 May 2020.

<sup>40</sup> Government of India, ‘National Action Plan on Climate Change’ (Prime Minister’s Council on Climate Change 2008).

<sup>41</sup> *ibid* 2.

<sup>42</sup> Oxford Policy Management, ‘India’s State Action Plans on Climate Change: Towards Meaningful Action’ (2015) <[http://www.opml.co.uk/sites/default/files/india\\_state\\_action\\_plans\\_climate\\_change.pdf](http://www.opml.co.uk/sites/default/files/india_state_action_plans_climate_change.pdf)> accessed 12 April 2018.

<sup>43</sup> *Gaurav Bansal v Union of India*, Application No. 498/2014, National Green Tribunal (July 23, 2015).

the drafting of such plans. The NGT also confirmed it could hear petitions that concerned specific violations of the national or state action plans on climate change.

Accordingly, India's main climate-specific policy instruments were justiciable, providing an avenue for future climate litigation. This led to *Mahendra Pandey*<sup>44</sup>, where the Government of Delhi had not enacted a state action plan on climate change. The NGT disposed of the matter once an action plan was submitted. As Ghosh remarks, although the NGT did not play a role in the formulation of the Government of Delhi's plan, its interventions 'expedited' the matter.<sup>45</sup>

In Pakistan, the main climate-specific policy is the National Climate Change Policy 2012.<sup>46</sup> The federal government also released a Framework for the Implementation of Climate Change Policy in 2013, to institutionalise and operationalise climate policy.<sup>47</sup> This policy development led to the most significant case in South Asia regarding climate change, to date: *Asghar Leghari v Federation of Pakistan*.<sup>48</sup> In *Leghari*, the petitioner, a farmer, took the Government of Pakistan to Court over failing to implement its national climate policy. The petitioner submitted that climate change posed an 'immediate and serious threat' to his fundamental rights.<sup>49</sup> The petition drew attention to the government's inaction of implementing adequate adaptation measures in accordance with the national Framework of Implementation of Climate Change Policy. The petitioner asserted a breach of fundamental rights under Article 9 (the right to life) and Article 14 (the right to dignity).

As with many other instances of PIL, the Court took it upon itself to push the executive into action. It treated the petition as a rolling review, or *continuing mandamus*, and thus took a role as overseeing the implementation of Pakistan's climate policies that were in question. The Court created a Climate Change Commission, made up of members of various government departments at both federal and provincial level, lawyers, representatives from the media, academics, and representatives from environmental NGOs.<sup>50</sup> The Court noted that the role of the Commission was to shift government departments towards 'climate-resilient development'.<sup>51</sup>

Over three years, the Commission oversaw the training and sensitising of different government departments. In its final report in 2018, it noted that two-thirds of the priority items in the Framework of Implementation of Climate Change Policy were now completed.<sup>52</sup> Accordingly, the Court disbanded the Climate Change Commission.<sup>53</sup> However, the Court did not stop there. Instead of closing the case and leaving it to the executive going forward, it constituted a

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<sup>44</sup> *Mahendra Pandey v Union of India*, Application No. 470/2016, , National Green Tribunal (Jan 2, 2019).

<sup>45</sup> Ghosh (n 8) 47.

<sup>46</sup> Ministry of Climate Change (MOCC), 'National Climate Change Policy' (Government of Pakistan 2012) s 1.

<sup>47</sup> Climate Change Division, 'Framework for Implementation of Climate Change Policy' (Government of Pakistan 2013).

<sup>48</sup> *Asghar Leghari vs. Federation of Pakistan* (n 1).

<sup>49</sup> *ibid* [10].

<sup>50</sup> *ibid* [13].

<sup>51</sup> *ibid* [19].

<sup>52</sup> The Commission met twelve times between 2015 and 2018, it set up implementation committees along six climate-relevant priority areas These were (1) Water resources management; (2) Agriculture; (3) Forestry, Biodiversity and Wildlife; (4) Coastal and Marine Areas; (5) Disaster Risk Management; (6) Energy. See: Hassan (n 8).

<sup>53</sup> *Asghar Leghari vs. Federation of Pakistan* (n 1) [19].

Standing Committee on Climate Change (with a smaller membership than the Commission) that is seen as a ‘link between the Court and the Executive’.<sup>54</sup> The case was left open, to specifically allow the Standing Committee to approach the Court for enforcement if required.

*Leghari* largely focusses on climate adaptation policies in Pakistan. Judge Shah mentioned the vital importance of adaptation in Pakistan, reflecting Pakistan’s position as a developing country.<sup>55</sup> However, building on the success of *Leghari*, another petition was brought forward to challenge the lack of climate mitigation action in Pakistan.<sup>56</sup> The petition in *Maria Khan* centres upon lack of action and support for renewable energy projects. *Maria Khan* is still pending; however, it creates a real test for the Supreme Court of Pakistan of whether it does continue in the trajectory of *Leghari* regarding mitigation. In many ways, a successful judgement for petitioners in *Maria Khan* could be ground-breaking in focusing on broad mitigation policy in a country in the Global South.

### *B. Climate change and the enforcement of existing environmental laws and policies*

Aside from climate-specific policies, petitions have also been brought to ensure that existing environmental policies consider climate change. In India, nine-year-old petitioner Riddhima Pandey petitioned the NGT that existing domestic and international environmental and climate change policies compel the national government to take climate action. The arguments put forward in *Pandey*<sup>57</sup>, were extensive and comprehensive. They invoked, among other things, the need for climate change to be integrated into environmental impact assessments, the proper enforcement of national forestry and air pollution laws, and the public trust doctrine.

The *Pandey* petition received much international attention.<sup>58</sup> However, the NGT’s final order ignored most of the main points of the case. The NGT stated that there is no reason to presume that (international) climate laws were not reflected in policies and taken into consideration in granting environmental clearances, but it left it at that in a short two page judgement.<sup>59</sup> The abrupt end to this petition reflects the ad-hoc nature of how some PIL petitions are dealt with by the courts. The petitioners are appealing the decision.<sup>60</sup>

Nevertheless, on other instances where climate change considerations have been peripheral, the judiciary has passed orders regarding the implementation of environmental laws incorporating climate considerations and climate language. For example, in *Indian Council for Enviro-legal Action*<sup>61</sup>, the applicant had sought directions to stop industries emitting HFC-23

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<sup>54</sup> *ibid* [25].

<sup>55</sup> *ibid* [21].

<sup>56</sup> *Maria Khan et al. v Federation of Pakistan et al.*, Writ Petition 8960/2019 (Lahore High Court).

<sup>57</sup> *Ridhima Pandey* (n 4).

<sup>58</sup> Reuters, ‘Nine-Year-Old Sues Indian Government over Climate Change Inaction’ *Guardian* (7 April 2017) <<https://www.theguardian.com/environment/2017/apr/07/nine-year-old-ridhima-pandey-sues-indian-government-over-climate-change-inaction>> accessed 22 April 2020.

<sup>59</sup> *Ridhima Pandey* (n 4) [3].

<sup>60</sup> Roshni Chakrabarty, ‘11-Year-Old Climate Activist Ridhima Pandey on Fighting Climate Change and Why India Is Vulnerable’ *India Today* <<https://www.indiatoday.in/education-today/how-i-made-it/story/india-s-11-year-old-climate-activist-ridhima-pandey-on-her-own-action-against-climate-change-and-why-india-is-vulnerable-1628706-2019-12-16>> accessed 14 May 2020.

<sup>61</sup> *Indian Council for Enviro-legal Action v MoEFCC & Others*, Application No. 170/2014, National Green Tribunal (Judgement, 10 Dec 2015).

(a greenhouse gas). The NGT recognised that HFC-23 emissions were an important consideration for climate change, as well as ozone depletion and environmental harm. The NGT directed the state to issue measures to regulate the gas, pursuant to the Environment Protection Act<sup>62</sup>. In *Sheikh Asim Farooq*<sup>63</sup> a case was brought regarding the implementation of urban tree protection and planting in Lahore. Both forestry and climate considerations were brought to the Lahore High Court's attention. The Court implemented tree planting and protection in Lahore, justifying this on the bases of forestry laws, environmental and climate change policy.<sup>64</sup>

For countries in the Global South, energy and infrastructure are crucially tied to economic growth and poverty alleviation agendas. India's 'co-benefits' approach to climate change, under its National Action Plan on Climate Change, puts forward the idea that it will marry its climate objectives with economic development (based on increasing energy use and developing infrastructure). While both Pakistan and India have traditionally been heavily reliant on fossil fuels, wind, solar and hydropower are critical for future energy planning in both countries. Such a transition will bring into focus both local concerns (regarding livelihoods and the environment) and global concerns (regarding climate change), with litigation playing a critical role. Not surprisingly, given the resource extraction burden on countries in the Global South, most lawsuits in the Global South have focussed on mitigation issues such as preventing construction of coal fired plants, or deforestation.<sup>65</sup>

A recent example in Pakistan is *Rabab Ali*<sup>66</sup>, where the Lahore High Court has been petitioned to examine, among other things, the approval of a coal-fired power station in the Thar Desert. The petition considers fundamental rights, the public trust doctrine, climate change policies, and various environmental laws and policies. The petitioner in *Rabab Ali* is a 7-year-old girl, and, like *Pandey*, the petition is linked to the globally co-ordinated youth climate activists that are bringing lawsuits around the world.<sup>67</sup> As with *Pandey*, this petition involves a long list of laws and policies, from the international to the domestic level, that are allegedly breached by the project.<sup>68</sup> Among other things, the petition demands that untapped coal reserves are kept 'in the ground' and finances are redirected towards alternative (renewable) energy. At the time of writing, the litigation remains pending.

### C. Emissions framings as a potential hazard to justice

While the cases discussed above represent largely positive developments in climate litigation, albeit at times limited in scope, it is also noticeable that a narrow focus on climate change and emissions reductions can lead to overlooking ecological damage and human rights issues. This is most noticeable in the cases concerning renewable and clean energy projects. Globally, many of these projects have clashed with the rights of local populations and drastically changed the

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<sup>62</sup> Environment (Protection) Act, 1986.

<sup>63</sup> *Sheikh Asim Farooq v Federation of Pakistan etc*, Writ Petition 192069/2018 (Lahore High Court, 30 August 2019).

<sup>64</sup> *Ibid* [46]-[50].

<sup>65</sup> Peel and Lin (n 3) 685.

<sup>66</sup> *Rabab Ali* (n 4).

<sup>67</sup> These are co-ordinated by Our Children's Trust, a US based non-profit organisation. See: 'Our Children's Trust' (*Our Children's Trust*) <<https://www.ourchildrenstrust.org>> accessed 22 April 2020.

<sup>68</sup> *Rabab Ali* (n 4).

environment.<sup>69</sup> A significant concern is that ‘clean energy’ and technological ‘climate fixes’ can camouflage other environmental and social injustices.<sup>70</sup>

Take the example of wind power in India, which is exempted from requiring an Environmental Impact Assessment (“EIA”). In 2013, a challenge against the construction of a wind energy project was brought to the NGT in India.<sup>71</sup> The development of the wind farm, a Clean Development Mechanism project under the Kyoto Protocol, and its surrounding infrastructure saw significant changes being made to the surrounding ecology, impacting environment and livelihoods of residents.<sup>72</sup> The petitioners sought, among other things, a direction from the tribunal that wind projects require EIAs and environmental approvals. The NGT agreed with the overall premise that wind power did not need EIAs, agreeing with the government’s position that as a ‘green energy’ source there was no ‘adverse environmental impact’.<sup>73</sup> However, NGT did order that compensatory payments be made for afforestation, to mitigate the roads that were built alongside the windmills (hence acknowledging, in part, that there was damage).

Similar trends can be seen for hydropower projects. Hydropower has a reputation for being ‘clean’ or ‘green’ energy generation. However, such a framing is disputed, with recent studies showing significant greenhouse gas emissions from large hydropower reservoirs.<sup>74</sup> In addition, nationalistic discourses around nation-building, modernisation and development can accompany large hydropower projects, obfuscating the environmental and social costs.<sup>75</sup> The judiciary has on many instances showed its reverence for large hydropower. For example, the Supreme Court of Pakistan has set up a fund itself (with the chief justice contributing a large amount) to the building of the controversial and expensive Daimir-Bhasha dam.<sup>76</sup> A much earlier example is the *Narmada*<sup>77</sup> case in 2000, when the Supreme Court of India justified the approval of the project (which displaced hundreds of thousands of people, transformed the

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<sup>69</sup> See for example: Mary Finley-Brook and Curtis Thomas, ‘Renewable Energy and Human Rights Violations: Illustrative Cases from Indigenous Territories in Panama’ (2011) 101 *Annals of the Association of American Geographers* 863; Alexander Dunlap, ‘The “Solution” Is Now the “Problem:” Wind Energy, Colonisation and the “Genocide-Ecocide Nexus” in the Isthmus of Tehuantepec, Oaxaca’ (2018) 22 *The International Journal of Human Rights* 550.

<sup>70</sup> R Ahlers and others, ‘Framing Hydropower as Green Energy: Assessing Drivers, Risks and Tensions in the Eastern Himalayas’ (2015) 6 *Earth System Dynamics* 195.

<sup>71</sup> *Kallpavalli Vrishka Pempakamdarula Paraspara Sahayaka Sahakara Sangam Ltd. & Others v Union of India*, Application No. 92/2013, National Green Tribunal (Judgement, 1 July 2015).

<sup>72</sup> M Suchitra, ‘Green Energy Takes Toll on Green Cover’ [2015] *Down to Earth* <<https://www.downtoearth.org.in/news/green-energy-takes-toll-on-green-cover-34164>> accessed 22 April 2020.

<sup>73</sup> *Kallpavalli* (n 71) [16].

<sup>74</sup> Gwenaël Abril and others, ‘Carbon Dioxide and Methane Emissions and the Carbon Budget of a 10-Year Old Tropical Reservoir (Petit Saut, French Guiana)’ (2005) 19 *Global Biogeochemical Cycles*; Ivan BT Lima and others, ‘Methane Emissions from Large Dams as Renewable Energy Resources: A Developing Nation Perspective’ (2008) 13 *Mitigation and Adaptation Strategies for Global Change* 193.

<sup>75</sup> Marcus Nusser, ‘Technological Hydroscares in Asia: The Large Dams Debate Reconsidered’ in Marcus Nusser (ed), *Large dams in Asia: contested environments between technological hydroscares and social resistance* (Springer 2013).

<sup>76</sup> Elizabeth Ingram, ‘Fund to Build Diamer Basha and Mohmand Dams in Pakistan Reaches Nearly INR1 Billion’ *Hydro Review* (17 August 2018) <<https://www.hydroreview.com/2018/08/17/fund-to-build-diamer-basha-and-mohmand-dams-in-pakistan-reaches-nearly-inr1-billion/>> accessed 13 May 2020.

<sup>77</sup> *Narmada Bachao Andolan v Union of India and Others* (n 32).

landscape and ecology of the region) on, among other things, the need for cleaner energy sources.<sup>78</sup>

This reflects a potential hazard for ‘climate litigation’, because if climate framings are reduced into a battle against carbon emissions, it can obscure the questions of livelihoods, environment, poverty and rights. Climate framings can be exploited to fetishize technological solutions at any cost. A relevant example is climate policy in the water sector in India. Matthew England’s empirical work on climate policy in India found that the ‘plasticity’ of discourses around climate change has meant that civil servants have utilised climate discourses as an additional justification to mobilise large projects that they had always supported.<sup>79</sup> That is, bureaucrats have used the flexibility of what climate change means, from a ‘solution’ point of view, to justify developing more large hydropower dams and other interventions. Moreover, as mentioned earlier, a key criticism of the judiciary in recent times has been its adherence to the economic ideology of the state, that includes decisions on energy and infrastructure development. Accordingly, these cases demonstrate a risk for litigants where a narrow climate framing is adopted in litigation. If climate language creates an opportunity to obscure material, social, and environmental justice issues, then there is very little reason for claimants to invoke climate change.

#### **IV. BEYOND ‘CLIMATE LITIGATION’: LITIGATION IN THE CONTEXT OF CLIMATE CHANGE**

##### *A. Litigation without emissions: mitigation and adaptation*

At the same time the judiciary has also been engaged with litigation ‘in the context’ of climate change. Bower draws attention to this line of thinking, stating ‘it is time to look beyond actions that are overtly about climate change, and to pay attention to the multiple ways in which climate change issues might be present but invisible.’<sup>80</sup> Indeed, on many instances, the courts have been dealing with the fundamental issues that climate change brings forth, without necessarily doing it under the language of climate change or emissions that is the focus of the majority ‘climate change litigation’ literature. It is important to analyse these cases because, as mentioned in Section II, civil society activists have struggled in scaling back climate discourses from the international to the local level.<sup>81</sup> Yet, climate issues still persist on the ground and are being litigated in the Courts.

When one scratches below the surface of any particular climate cause or impact (or mitigation and adaptation concern), a wide array of litigation can be found. Take, for example coal and mining issues in India. To date, there has been one decision of any note that mentions ‘climate change’ and falls under the cap of ‘climate litigation’. In *Ratandeep Rangari*<sup>82</sup>, the NGT heard an application regarding violations of a permission granted to a coal-based power station. The case was heard on air pollution grounds, regarding the ash content of the coal. Climate change was a peripheral issue, the NGT held that enforcing rules around maximum ash content were an important way to ensure ‘co-benefits’ of reductions in greenhouse gas emission.<sup>83</sup> The NGT

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<sup>78</sup> *ibid* 768.

<sup>79</sup> Matthew I England, ‘India’s Water Policy Response to Climate Change’ (2018) 43 *Water International* 1.

<sup>80</sup> Bower (n 5) 502.

<sup>81</sup> Fisher (n 16).

<sup>82</sup> *Ratandeep Rangari v State of Maharashtra & Others*, Application No. 19/2014 (WZ), National Green Tribunal (Judgement, 15 Oct. 2015).

<sup>83</sup> *ibid* [34].

ordered that the state government implement monitoring and compliance protocols for thermal power plants, based on this justification.<sup>84</sup>

Although this is one of the few cases to mention climate change and coal, there has been a rich jurisprudence developed through the courts drawing attention to many of the concomitant issues that arise from mining and coal that are particularly relevant from a climate justice perspective. For example, in *Goa Foundation*<sup>85</sup>, the Indian Supreme Court took strong regulatory action against rampant mining of iron ore in the state of Goa, where the state government had effectively turned a blind eye to environmental violations. The Court drew attention to the rights issues related to extraction (including the rights of people's livelihoods who worked on the mines). Most notably, the Court ordered that any future mining would have to contribute royalties to a Permanent Fund, that it established, to further intergenerational equity and sustainable development.<sup>86</sup> To be sure, the *Goa Foundation* case has global relevance, including in terms of furthering climate justice, for providing a novel approach to intergenerational equity.<sup>87</sup>

Litigation has also been brought to fight against exploitative and harmful extractive practices. The NGT put in measures to prevent the practice of 'rat hole mining', an extremely controversial method that involves digging small holes sideways (around 3-4 feet in diameter) into hills and crawling into the holes to manually extract coal.<sup>88</sup> The practice has a significant human cost, such as deaths, accidents, the use of child labour, and human trafficking.<sup>89</sup> The method of mining also leads to significant water and environmental issues around the mining sites (and of course greenhouse gas emissions down the line in using the coal extracted).<sup>90</sup> Implementation of the NGT's ban remained a problem because of the nexus between the mine operators and the state.<sup>91</sup> Nevertheless, in 2019, the Supreme Court upheld the NGT's ban on the practice of rathole mining.<sup>92</sup>

Litigation has also been critical to alleviating vulnerability to climate change, contributing to climate (adaptation) policy. For example, in *Swaraj Abhiyan v Union of India*<sup>93</sup>, a petition was brought against state governments that were refusing to declare a drought, as well as the central government for the lack of implementation of essential aspects of the Disaster Management Act 2005 and several aspects of drought relief measures. The facts in *Swaraj Abhiyan* highlight

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<sup>84</sup> *ibid* [40].

<sup>85</sup> *Goa Foundation v Union of India* (2014) 6 SCC 590.

<sup>86</sup> *ibid* 636.

<sup>87</sup> Edith Brown Weiss, 'Intergenerational Equity in a Kaleidoscopic World' (2019) 49 *Environmental Policy and Law* 3.

<sup>88</sup> *Impulse NGO Network and All Dimasa Students Union Dima Hasao Dist. Committee Vs. State of Meghalaya and Ors*, Application no. 13/2014, National Green Tribunal (Judgement, 9 June 2014).

<sup>89</sup> Baniateilang Majaw, 'Ending Meghalaya's "Deadly Occupation": India's National Green Tribunal's Ban on Rat-Hole Mining' (2016) 49 *Law and Politics in Africa, Asia and Latin America* 34, 41.

<sup>90</sup> *ibid*.

<sup>91</sup> *ibid* 49–51.

<sup>92</sup> *State of Meghalaya v All Dimasa Students Union, Dima Hasao District Committee & Ors.*, Civil Appeal No. 2968 of 2019, Supreme Court of India (Judgement, 3 July 2019).

<sup>93</sup> *Swaraj Abhiyan v Union of India & Ors* (2016) 7 SCC 498 (Supreme Court of India).

the common failings of governments in responding to droughts that show blatant disregard for lives and livelihoods.<sup>94</sup>

In *Swaraj Abhiyan*, the Court commented on the ‘ostrich-like attitude’ of state governments towards the drought situation crisis that causes suffering to millions.<sup>95</sup> The Supreme Court passed orders that mandated the operationalisation of critical aspects of the Disaster Management Act<sup>96</sup> that were yet to be implemented, such as setting up a relief fund and the development of a national plan. The Court paid detailed attention to policy documents like ‘drought manuals’, that were the main instrument to guide state governments before, during and after a drought. The Court oversaw, through a *continuing mandamus*, the mandatory revision of drought manuals. The manuals were held to be out of date and allowing states circumvent their relief obligations. Accordingly, while the judgement in *Swaraj Abhiyan* did not mention climate change, the substance of the ruling has a significant impact on the governance of climate adaptation in the country through shifting the paradigm on drought relief and management.

These cases demonstrate how material shifts in adaptation and mitigation can be made without having to use a climate framing (that may at times obscure the justice issues). The Courts in India and Pakistan are familiar with the many issues that arise from the impacts of climate change, such as floods and droughts. Given the complexity of climate framings, discussed earlier, petitioners will remain careful in whether choosing to bring attention to climate issues. The importance of human rights, intergenerational equity, in these cases demonstrate also the development of litigation in the context of climate justice in the region.

## V. CONCLUSION

The discussion above has highlighted both challenges and opportunities for litigation on climate change in India and Pakistan. Despite the complex and conflicting legacy of the judiciary, it remains a forum that will be utilised to advance claims concerning climate-related issues. As Hilson highlights, for social and environmental movements, a lack of political opportunity may influence the adoption of litigation as a strategy in place of lobbying and participation.<sup>97</sup> In Pakistan and India, there are often limited or ineffective political opportunities to enact change. Many of the cases discussed above illustrate the continuing potential for the courts to affect change.

This chapter has analysed the development of climate litigation in India and Pakistan. The international framing of climate change, as pointed out earlier, has hindered the development of capturing climate language and climate justice challenges at the local level. Litigation that expressly incorporates climate language or reasoning has accordingly been limited. Where it has appeared, climate change has largely been a peripheral issue.

Nevertheless, there are a number of emerging petitions that demonstrate potential. In Pakistan, the legacy of *Leghari*<sup>98</sup> has already inspired further action through the courts, such as *Maria*

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<sup>94</sup> See for example: Jitendra, ‘Farmers Suffer as States yet to Declare Drought’ [2018] *Down to Earth* <<https://www.downtoearth.org.in/news/agriculture/farmers-suffer-as-states-yet-to-declare-drought-62079>> accessed 22 April 2020.

<sup>95</sup> *Swaraj Abhiyan v Union of India & Ors.* (n 93) 498.

<sup>96</sup> Disaster Management Act, 2005.

<sup>97</sup> Chris Hilson, ‘New Social Movements: The Role of Legal Opportunity’ (2002) 9 *Journal of European Public Policy* 238.

<sup>98</sup> *Ashgar Leghari vs. Federation of Pakistan* (n 1).

*Khan*<sup>99</sup> and *Rabab Ali*<sup>100</sup>. Indeed, the use of PIL will remain an important part of the ongoing transnational climate activism aimed at ‘flooding the courts’ and utilising judicial flexibilities.<sup>101</sup> At the same time, the chapter has also argued that there are hazards to narrow climate framings in litigation. An overly narrow focus on emissions, for example, can produce results that ignore wider livelihoods, rights and ecological issues as seen in the cases in India concerning hydropower and wind energy.

Moreover, this chapter also demonstrates that climate change has indeed been alive in the courts in other ways. The integral issues associated with mitigation and adaptation, even if the language of ‘climate change’ has been absent, have been litigated regularly. These cases, in fact, have produced some of the more innovative judgements from a rights and (climate) justice perspective.

Finally, the lasting challenge of litigation will be whether it can deliver practical and substantive change to alleviate the suffering or climate impacts and/or deliver just transitions. Although the *Leghari* case has been noted for its ‘symbolic value’<sup>102</sup> as a leading case at a global level, the more important question from a domestic perspective is how climate litigation will go from symbolic to transformational. The courts in India and Pakistan have a legacy of incorporating numerous principles of international environmental law and of expanding constitutional rights to incorporate environmental rights. The courts may in time incorporate principles of climate change law and climate language, in the way *Leghari*<sup>103</sup> has begun to do. It may also provide numerous examples of cases concerning climate change that provide important rights language and justice principles. However, there are reasons to be cautious about such potential too, given the history of environmental litigation in the region.

An analogous example is the case of water law and policy in India. Courts in India have provided a rich jurisprudence that draws attention to the human and environmental aspects of water, in a way legislation and policy have failed to. The judiciary has expanded the right to life to include the human right to water, as well as drawn upon the relevance of principles of international environmental law, such as the precautionary principle, polluter-pays, and sustainable development in cases concerning water.<sup>104</sup> However, beyond pronouncements of principles and rights, the judiciary have not provided much detail of ‘how’ these principles apply. Moreover, the legislature and the executive have largely ignored these principles in formulating new legislation and policies. Thus, while there have been progressive pronouncements by the courts, and at times they have taken strong action to prevent acts of environmental harm, there have been limited improvements in shifting the overall framework of water law and policy to make a more structural difference in the lives of people.<sup>105</sup>

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<sup>99</sup> *Maria Khan et al. v Federation of Pakistan et al* (n 56).

<sup>100</sup> *Rabab Ali v Federation of Pakistan & Another* (n 4).

<sup>101</sup> Adela Suliman, ‘Citizens Must “Flood the Courts” in Fight for Climate Justice: Economist’ *Reuters* (4 October 2017) <<https://www.reuters.com/article/us-global-climatechange-lawsuit/citizens-must-flood-the-courts-in-fight-for-climate-justice-economist-idUSKBN1C929Z>> accessed 20 April 2020.

<sup>102</sup> *Barritt and Sediti* (n 7).

<sup>103</sup> *Asghar Leghari vs. Federation of Pakistan* (n 1).

<sup>104</sup> For an overview see: Philippe Cullet and Sujith Koonan, *Water Law in India: An Introduction to Legal Instruments* (2nd edn, Oxford University Press 2017) 9–13, 47–67.

<sup>105</sup> Philippe Cullet, ‘A Meandering Jurisprudence of the Court’ in Mayur Suresh and Siddharth Narrain (eds), *The Shifting Scales of Justice: The Supreme Court in Neo-liberal India* (Orient BlackSwan 2014) 144.

This outlines the challenge for lawyers, academics and activists interested in climate litigation, to analyse and ensure the impacts of such litigation, on whether it provides more than symbolic value. Ultimately, litigation will remain just one avenue of change. But, unless litigation can become a tool for broader legislative and political change, its impacts may remain removed from the daily lives and struggles of hundreds of millions across India and Pakistan who will bear the brunt of the climate crisis.