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Introduction to the Special Issue: Environmental Law and Governance in South Asia

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Environmental law in South Asia is standing at a cusp wherein critical environmental and developmental problems must be dealt with urgently with innovative thinking. In the twentieth century, the global environmental movement was led by western developed countries that prioritised environmental conservation and did not adequately integrate critical issues of development in the global South.¹ Despite the collective voices raised by the developing South in the numerous environmental negotiations, countries of the Asian region have been grappling with development and environmental sustainability issues for decades.² In the twenty-first century, Asian leadership will be crucial to address environmental and sustainability challenges both within the region and globally. The unique problems and issues faced by South Asian countries require not only an integration of international approaches but a strong emphasis on national and regional home-grown strategies.

The region of South Asia faces similar environmental challenges.³ The foremost amongst them is the link between environmental degradation and poverty. Globally, environmental benefits and risks are disproportionately distributed. However, in the context of South Asia, the problem of maldistribution is particularly acute and exacerbated by the pressure of pursuing economic development agenda, which concentrates, on large-scale infrastructure projects.⁴ Such large-scale infrastructure projects often require diversion of forestland. Unlike in developed countries, in rural areas, most indigenous and local communities have a symbiotic relationship with their hinterland, and diversion of forestland has an adverse impact on their ability to fulfil basic subsistence requirements.⁵ This has triggered numerous

conflicts between state authorities and communities. At the heart of this is conflicts are differing visions of what constitutes sustainable and equitable development.⁶ Climate change has exacerbated these underlying historical resource conflicts and has also brought urgency to policy interventions to change the developmental pattern to minimise effects and build resilience.⁷

Climate change and specifically micro-level climatic disruptions are increasingly common and are expected to create massive disruptions in agricultural productivity.⁸ Several countries in the region and also sub-national authorities have announced climate action plans, which are aimed at addressing these issues.⁹ State capacity to mobilise resources, implement plans and generally provide stable governance arrangements has been a serious challenge, and this challenge will be yet enhanced in the context of climate change. This will require innovative partnerships between public authorities and private actors, greater decentralisation and devolution of political powers and designing more opportunities for public participation and deliberation.¹⁰ At the same time, developing countries in this region would need to also collaborate with each other in pursuing joint actions to address transnational environ-

¹ Thomas N Hale and Denise L Mauzerall, 'Thinking Globally and Acting Locally: Can the Johannesburg Partnerships Coordinate Action on Sustainable Development?' (2004) 13(3) *Journal of Environment and Development* 220.

² Marc Williams, 'The Third World and Global Environmental Negotiations: Interests, Institutions and Ideas' (2005) 5(3) *Global Environmental Politics* 48.

³ Mabroor Hassan, Manzoor Khan Afridi, and Muhammad Irfan Khan, 'Environmental Diplomacy in South Asia: Considering the Environmental Security, Conflict and Development Nexus' (2017) 82 *Geoforum* 127.

⁴ C Visvanathan and Ulrich Glawe, 'Domestic Solid Waste Management in South Asian Countries – A Comparative Analysis' in *Promoting Reduce, Reuse, and Recycle in South Asia* (Asian Development Bank, Institute for Global Environmental Strategies and UNEP 2006) 27.

⁵ Sakti Padhi and Nilakantha Panigrahi, 'Tribal Movements and Livelihoods: Recent Developments in Orissa' (2011) *Chronic Poverty Research Centre-Indian Institute of Public Administration, Working Paper 51* <<https://assets.publishing.service.gov.uk/media/57a08ac840f0b652dd0008da/CPRC-IIPA-51.pdf>>.

⁶ M Gopinath Reddy and others, 'The Making of Andhra's Forest Underclass: An Historical Institutional Analysis of Forest Rights Deprivations' (2010) *Institute and Pro Poor Growth Discussion Paper 42* <<https://assets.publishing.service.gov.uk/media/57a08b29e5274a31e00009f2/dp42a.pdf>>.

⁷ W Neil Adger and others, 'Adaptation to Climate Change in the Developing World' (2003) 3 (3) *Progress in Development Studies* 179.

⁸ Charles Nhemachena and Rashid Hassan, 'Micro-Level Analysis of Farmers' Adaption to Climate Change in Southern Africa' (2007) *International Food Policy Research Institute Discussion Paper 00714* <https://www.researchgate.net/profile/Charles-Nhemachena/publication/5056602_Micro-Level_Analysis_of_Farmers'_Adaptation_to_Climate_Change_in_Southern_Africa/links/5aac8f91aca2721710f8aab5/Micro-Level-Analysis-of-Farmers-Adaptation-to-Climate-Change-in-Southern-Africa.pdf>.

⁹ Angel Hsu and others, 'Beyond States: Harnessing Sub-National Actors for the Deep Decarbonisation of Cities, Regions, and Businesses' (2020) 70 (2) *Energy Research & Social Science* 1.

¹⁰ Md Nawrose Fatemi and others, 'Multi-Level Climate Governance in Bangladesh via Climate Change Mainstreaming: Lessons for Local Climate Action in Dhaka City' (2020) 4(2) *Urban Science* 24.

mental problems. In this scenario, adequate focus on comparative law research can showcase the main features of legal initiatives providing a strong foundation for co-learning.

Comparative law provides a rich intellectual tradition and needs to be embraced within the region. Most comparative legal scholarship within environmental law in south Asia is a function of personal friendships and coincidental academic contacts. It reflects a lack of appreciation and attention to utility of adopting such an approach. Environmental issues are not jurisdiction specific and indeed particular issues like deep-sea fishing, climate change, biodiversity protection, and waste management are inherently regional in orientation. Additionally, the region shares similar social and economic indicators, therefore the political economy context is common.¹¹ Finally, the common history of colonialism is also represented in a unique and common legal culture.¹² Developmental challenges are similar and therefore the opportunity for learning across jurisdictions is more sustainable.¹³ The challenge of the Anthropocene also underlines this imperative of undertaking research across regions. Academics are particularly suited for this task (unlike say policymakers or technocrats), since humanity is their canvas rather than narrow national interests, which may impede the resolution of environmental issues. Judicial decision-making has shown remarkable openness in this sense, as judges have taken cognisance of developments in other jurisdictions. The Indian judiciary has mostly looked towards developments in common law jurisdictions of the West (mostly the UK and USA).¹⁴ Regionally, however, Indian jurisprudence has been used as a resource and relied on by the Courts in Bangladesh, Sri Lanka and Pakistan. Cross-conversations are necessary and

this may become a basis for an intra-regional jurisprudence that develops.

Academic scholarship on environmental law from this region has expanded rapidly and indeed, this is evident from the environmental law scholarship and also standalone environmental law journals being published from the region.¹⁵ However, the representation of environmental law scholarship within international journals published in the Anglo-Saxon world has been limited. Largely, environmental law scholarships commenting on South Asia within such journals have been by academics from the region working in institutions based in the global North. This is not to deny the legitimacy of such scholarship, however given their own distance away from the location of their scholarship, there is a possibility of missing the local imperatives and triggers, which influence law and policy developments. Risks of such scholarship from afar¹⁶ further increase considerably as social movements play a critical role in environmental law and governance and this aspect may be difficult to follow due to this dislocation.¹⁷ It is therefore necessary to expand opportunities for scholars from this region to publish in international journals in the Anglo Saxon world.

Representation *per se* is not the only aim of such projects. Equally important is to recognise that scholarship from this region will focus on the diverse issues from the region, which are fundamentally different. Further, the ways of doing this scholarship may also come across as different. Consider for instance, that scholarship from the region when it is compared with scholarship from the Anglo Saxon world is usually dismissed for being less analytical and more descriptive.¹⁸

¹¹ Asha Pandey and Muhammad Asif, 'Assessment of Energy and Environmental Sustainability in South Asia in the Perspective of the Sustainable Development Goals' (2022) 165 *Renewable and Sustainable Energy Reviews* 112492.

¹² Roger Cotterrel, 'Comparative Law and Legal Culture' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (1st edn, OUP 2006) 710.

¹³ Muhammad Asif (ed), *Energy and Environmental Outlook for South Asia* (CRC Press 2021).

¹⁴ Christopher McCrudden, 'Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights' (2000) 20(4) *Oxford Journal of Legal Studies* 499.

¹⁵ Shawkat Alam and others (eds), *International Environmental Law and the Global South* (CUP 2015); Ben Boer, 'The Rise of Environmental Law in the Asian Region' (1999) 32 (5) *University of Richmond Law Review* 1503; Benjamin J Richardson, 'Environmental Law in Postcolonial Societies: Straddling the Local - Global Institutional Spectrum' (2000) 11(1) *Colorado Journal of International Environmental Law and Policy* 1.

¹⁶ David T Hill, 'Knowing Indonesia from Afar: Indonesian Exiles and Australian Academics' (2009) 43(1) *Review of Indonesian and Malaysian Affairs* 147.

¹⁷ Richard Maidment, David Goldblatt, and Jeremy Mitchell (eds), *Governance in the Asia-Pacific* (Routledge 1998); Gail Omvedt, 'Peasants, Dalits and Women: Democracy and India's New Social Movements' (1994) 24 (1) *Journal of Contemporary Asia* 35; Michele Ford, 'Social Activism in Southeast Asia: An Introduction' in Michele Ford (ed), *Social Activism in Southeast Asia* (Routledge 2013) 1.

Scholarship, which is richly descriptive is necessary also because one may be addressing an issue which is sui generis to a region and so imbued by a specific set of local circumstances and actors that without the description, one could not proceed towards analysis. Description therefore is the first act of establishing difference, and therefore needs to be appreciated on its own terms and to be dismissive of such scholarship on pedantic measures impoverishes environmental law scholarship.

The special issue of *LEAD Journal* originated in the idea of imbibing comparative approaches and non-doctrinal methods in expanding and deepening environmental law scholarship by providing mentorship to younger academic voices from the region. Three institutions collaborated (Centre for the Study of Law and Governance, Jawaharlal Nehru University, Faculty of Law, South Asian University and Gujarat National Law University) to organise the South Asian Research Colloquium on Environment and Climate Change (SARCECC). The colloquium included two virtual workshops. The first workshop was designed to introduce academics to imbibe more social science methodologies, as a multi-disciplinary lens is especially useful in environmental law research. Participants presented their papers in the second workshop as part of thematic panels and academics commented on the papers.

We would like to acknowledge the immense mentorship provided by the reviewers in hand holding the participants through this mentorship process. We thank Mr Matthew Baird, Prof. Nazrul Islam, Dr Abdullah Al Arif, Dr Sujith Koonan, Prof. L. Pushakumar, Dr Meena Panicker, Dr K. Parameswaran, Prof. Camena Guneratne, Dr Hanim Kamaruddin, Ms Shibani Ghosh, Prof. Shiju M V, Prof. Sairam Bhat, Prof. Gitanjali Nain Gill, Prof. Usha Tandon, Prof. Deepa Badrinarayana, Dr Balraj Kaur Sidhu, Dr Salman MA Salman, Prof. Naazima Kamardeen, Dr Deva Prasad, Dr Ravi Srinivas, Prof. Prabhash Ranjan, Prof. Inayat Ullah Khan, Dr Anwar Sadat, Mr Amit Sinha, Dr Wasiq Abass Dar, Dr Nafees Ahmad, Dr Taniya Malik, Dr P. Puneeth, Prof. Kokila Konasinghe, Prof. Tony George, Prof. Anil Variath, Dr M. Sakthivel, Ms Sharawat Shamin, Prof. Charu Sharma, Dr Namita Wahj, Ms Amma Kannu S, Dr Chhaya Bhardwaj, Prof. Bharti, Dr Hanim Kamaruddin,

¹⁸ Max Besbris and Shamus Khan, 'Less Theory More Description' (2017) 35(2) *Sociological Theory* 147.

and Prof. Shobhalata Udupudi for their time and support. Dr Mrinalini Banerjee helped with the coordination of the SARECC and provided excellent logistical assistance. We appreciate the support of Ms Christina Pak, Ms Cristina Velez, Mr Angelo Jacinto and Ms Emie Alcala from the ADB for believing in the vision of the SARECC. Ultimately three papers were selected to be published. We are happy to collaborate with *LEAD Journal* to publish the papers as a special issue because it is an open access international journal from the region. We believe the three papers highlight issues unique to South Asia.

Masrur Salekin's paper titled "An Empirical Study on the Role of the Courts in Environmental Protection in India, Bangladesh and Ireland: Bridging the Gaps between Academics and Practitioners" focus on the role and process of judicial decisions in environmental protection. It is a fact that the judiciary in South Asia has played an active role in shaping the jurisprudence and also had an enormous influence in environmental policymaking.¹⁹ This aspect has been commented on extensively in the last few decades.²⁰ Yet, we have limited understanding of the imperatives driving judicial decision-making. Consider for instance what is the import of academic writings on judicial pronouncements? How do environmental academics view judicial decision-making on environmental matters? These questions cannot be addressed only through doctrinal methods. Salekin uses qualitative analysis and grounded situated within the intellectual tradition of socio-legal research. Interviews were conducted with judges, lawyers, litigants and academics in India, Ireland and Bangladesh. It is a cross jurisdictional study. Similarities exists since all of them are common law jurisdiction, however they are socio-political differences. Salekin's analysis establishes that environmental jurisprudence requires accessing resources across disciplines and underlines the need for judges to be attentive to academic writings within law but also in other areas of social sciences.

¹⁹ Parvez Hassan and Azim Azfar, 'Securing Environmental Rights through Public Interest Litigation in South Asia' (2004) 22(3) *Virginia Environmental Law Journal* 215; Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (CUP 2003).

²⁰ Anuj Bhuwania, *Courting the People: Public Interest Litigation in Post-Emergency India* (CUP 2016); Keith E Whittington, R Daniel Kelemen and Gregory A Caldeira (eds), *The Oxford Handbook of Law and Politics* (OUP 2010).

Zelina Sultana and Nasrin Akter's paper titled "Will We Care for the Soil Surrounding Us? An Analysis of Legal Framework for Soil Protection in Bangladesh" focuses on soil pollution, an environmental issue that has not gained adequate attention in the South Asian Region. Soil pollution is an endemic problem in South Asia. Various natural factors like erosion coupled with unsustainable urbanisation and industrialisation have had led to the rapid denudation and degradation of soil quality. It is also a regional problem but surprisingly has attracted scant policy attention and academic studies in South Asia. Sultana and Akter undertakes an in-depth review of the extant legislative and policy framework that addresses soil pollution, contamination and degradation in Bangladesh. The review reveals the inadequacy of the current legislative framework and underlines the need to have standalone legislation and stresses on the need to create mass awareness to this silent problem. Sultana and Akter draw attention to the need to expand public participation in terms of reducing litigation barriers in environmental courts in this context.

Moving from soil pollution, Ravneet Sandhu and Niroshika Liyana Muhandiram's paper titled "Environmental Concerns in Model BITs: A Comparative Study of India and Sri Lanka" focuses on an area of contemporary relevance for the region. Bilateral investment treaties (BITs) have attracted a fair amount of criticism from public international lawyers and environmental law academics for their singular pursuit of investor interest and narrowing the public policy space for the country attracting such investments. The development and widespread international consensus in taking domestic actions to pursue Sustainable Development Goals (SDGs) have opened up more room to manoeuvre for countries. Reflecting on this trend in the context of Bilateral Investment Treaties (BITs), Muhandiram and Sandhu trace and review the reframing of Model BITs by Sri Lanka and India. Historically, both countries have witnessed large scale environmental disasters triggered by the actions of foreign capital and consequently this has made them wary of entering into such BITs. Adopting a comparative perspective is a useful lens to review how both countries have pursued distinct strategies to balance investor protection while securing domestic policy space within their Model BITs.

Together the selection and publication of these articles in this special issue of *LEAD Journal* highlights the sui generis accounts of legal developments from the region. Salekin's article portrays the utility of socio-legal research in researching legal questions, which have been addressed extensively by doctrinal methods. By comparing common law jurisdictions he demonstrates the disparate paths taken by the Irish, Bangladesh and Indian judiciary in referencing academic research on environmental issues. Whereas the Irish judiciary has had a self-conscious moment of reckoning in realising the need to develop indigenous jurisprudence by referencing the work of Irish academics, such a movement is still not apparent in any substantial scale. Sultana and Akter's article delves deep into the problem of soil pollution by providing an in-depth review of numerous Bangladeshi legislations and in doing so it breaks new ground. They also highlight in granular details the challenges of accessing the Courts and its impact on environmental litigation on this issue. Finally, Muhandiram and Sandhu's article represents academic collaboration between first time collaborators who got introduced and worked together through the process of SARCECC. The article's comparative perspectives enrich studies on investment agreements and hopefully will inspire others towards academic collaboration within South Asia.

LEAD Journal is a peer-reviewed journal which publishes - on lead-journal.org - articles, case notes and documents of interest to professionals, practitioners, researchers, students and policy-makers in the field of international and regional environmental law and domestic environmental laws of developing countries. It emphasises a comparative approach to the study of environmental law and is the only journal in the field to carry a North-South focus. It is unique in providing perspectives from both developed and developing countries. Bearing in mind the principles of "sustainable development", LEAD Journal also solicits writings which incorporate related concerns, such as human rights and trade, in the study of environmental management, thus adopting a contextual approach to the examination of environmental issues. LEAD Journal encourages scholarship which combine theoretical and practical approaches to the study of environmental law and practice.

