



CLIMATE CHANGE LIABILITY

Transnational Law and Practice

EDITED BY

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CLIMATE CHANGE LIABILITY

As frustration mounts in some quarters at the perceived inadequacy or speed of international action on climate change, and as the likelihood of significant impacts grows, the focus is increasingly turning to liability for climate change damage. Actual or potential climate change liability implicates a growing range of actors, including governments, industry, businesses, non-governmental organisations, individuals and legal practitioners. *Climate Change Liability* provides an objective, rigorous and accessible overview of the existing law and the direction it might take in seventeen developed and developing countries and the European Union. In some jurisdictions, the applicable law is less developed and less the subject of current debate. In others, actions for various kinds of climate change liability have already been brought, including high-profile cases such as *Massachusetts v. EPA* in the United States. Each chapter explores the potential for and barriers to climate change liability in private and public law.

RICHARD LORD QC is a London-based commercial litigator with over twenty-five years' experience, particularly of international disputes in the Commercial Court and in arbitration, and with a particular interest in private law aspects of climate change.

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FOREWORD

Mary Robinson, Honorary President Oxfam International and President of Mary Robinson Foundation – Climate Justice

Climate justice links human rights and development to achieve a human-centred approach, thus safeguarding the rights of the vulnerable and sharing the burdens and benefits of climate change and its resolution equitably and fairly. As such, climate justice incorporates the principle of corrective justice – the idea that those who have contributed most to the global stock of greenhouse gas emissions have a moral obligation to make significant emissions reductions in order to avoid dangerous climate change. This is necessary as the countries and people who are most vulnerable to climate change are those who contributed least to the problem.

Climate justice can also be used to assign liability for past and projected contributions to climate change. This can assist the most marginalised and disenfranchised in our global community to find justice through the courts, thus paving the path for financial reparations through distributive justice. It can also be used, along with moral suasion and multi-lateral political and legal agreements, to insist on equitable burden-sharing and greater equality through financial assistance and technology transfer.

However, assigning climate change liability for those seeking redress or basic compensation from corporations or governments who refuse to act and who are seen to have violated basic human rights creates a number of problems. First, it is difficult to establish causality between the harm done or tortious act and the direct damage suffered. Secondly, it is difficult to establish liability and apportion damages accordingly. Thirdly, it may be difficult to establish legal standing or *locus standi* for petitioners before the courts.

This book sets out the legal principles underpinning climate change liability. It offers an extensive and comprehensive overview of national climate change policies and legislation as well as different rights-based legal

arguments in various jurisdictions that could be used to achieve climate justice at a national level. Notwithstanding the climate justice opportunities potentially afforded by litigation, the need for a new legally binding agreement under the United Nations Framework Convention on Climate Change (UNFCCC) remains vital. Only a legally binding international framework can ensure that actions will be taken to reduce emissions and to protect the most vulnerable from the potentially catastrophic impacts of climate change.

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We acknowledge with gratitude the support and assistance which we, and this book, have received from so many quarters. All those associated with this project have given generously of their time and their wisdom. Some deserve particular recognition.

We owe a debt of gratitude to those who first conceived the idea of a comparative study of national laws pertaining to climate change liability, and especially to Jaap Spier, Advocate-General in the Supreme Court of the Netherlands and Honorary Professor of comparative insurance law at Maastricht University. We are pleased to have Professor Spier as an Editorial Board member, providing continuity between the first seeds of an idea and the current book.

Whilst the book is a rigorous academic study independent from any political influence by any organisation, we would like to thank Jasper Teulings, General Counsel of Greenpeace International, Joss Saunders, General Counsel of Oxfam and Niall Watson, Programmes Legal Adviser at WWF-UK for their continued support and encouragement.

Special thanks are also due to Oxfam for funding a conference in January 2011 which enabled authors and editors of this book to exchange ideas and which sowed the seeds for a very fruitful cooperation between authors across various jurisdictions.

All of the authors and Editorial Board members have toiled diligently, and without complaint or reward, to create what we hope is a rich store of information and learning and distil it into a book which, if not quite pocket size, will be portable and accessible to many.

Cambridge University Press, our publishers, have been supportive and understanding of the difficulties in finalising within a short timeframe a book to which so many have contributed. We are grateful to them in making possible our ambition to publish the book in time for COP 17 in Durban.

Finally, and in a class of her own, it is impossible to overstate the importance of the pivotal role in this book played by Pascale Bird, our