

SYMPOSIUM ARTICLE

Climate Litigation in the Global South: Constraints and Innovations[†]

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Abstract

Cases involving climate change have been litigated in the courts for some time, but new directions and trends have started to emerge. While the majority of climate litigation has occurred in the United States and other developed countries, cases in the Global South are growing both in terms of quantity and in the quality of their strategies and regulatory outcomes. However, so far climate litigation in the Global South has received scant attention from the literature. We argue that climate litigation in the Global South opens up avenues for progress in addressing climate change in highly vulnerable countries. We first highlight some of the capacity constraints experienced in Global South countries to provide context for the emerging trend of strategic climate litigation in the area. In spite of significant constraints experienced, the strategies adopted by litigants push the climate litigation agenda forward as a result of their outward-looking objective of combating ongoing environmental degradation, and, on a doctrinal level, the way in which they link climate change and human rights. Bearing in mind the limitations resulting from the selective nature of the cases examined, we draw upon Legal Opportunity Structures (LOS) approaches and identify two reasons for innovative cases and outcomes in Global South strategic climate litigation: (i) how litigants are either

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overcoming or using procedural requirements for access to environmental justice, and (ii) the existence of progressive legislative and judicial approaches to climate change. The strategies and outcomes from these judicial approaches in the Global South might be able to contribute to the further development of transnational climate change litigation.

Keywords: Climate change litigation, Global South, Human rights, Legal Opportunity Structures

1. INTRODUCTION

Cases involving climate change have been litigated in the courts for some time, but new directions and trends have started to emerge. While the majority of climate litigation has occurred in the United States (US) and other developed countries, cases in the Global South¹ are growing both in terms of quantity and in the quality of their regulatory outcomes. Over the past years, cases of strategic climate litigation have been initiated in Brazil, Colombia, India, Indonesia, Pakistan, the Philippines, and South Africa. These cases push forward climate jurisprudence in the chosen jurisdictions, and perhaps even beyond to other Global South countries. Despite resource and governance constraints, some strategic cases from the Global South have achieved bold outcomes. Yet, so far climate litigation in the Global South has received scant attention in the literature.

In this article we tease out some initial findings from a selection of strategic climate cases filed in the Global South. Admittedly, the reliance on a small number of strategic cases, in selected jurisdictions, offers a limited picture of climate litigation in the Global South. Nevertheless, this narrow focus is a useful entry point to investigate how climate change is being adjudicated in the area. We are interested in exploring how these positive judicial outcomes have been achieved, given the capacity constraints experienced by these and other countries in the Global South, particularly around the environmental rule of law. Ultimately, the strategies and outcomes from these courts in the Global South might be able to contribute to the development of transnational climate change litigation.²

¹ Defining the groupings of poorer countries in the world has been subject to much debate. The terms ‘Third World’, ‘developing world’ and ‘Global South’ originated in different periods and have been contested in terms of their utility and appropriateness. Today, the term ‘Global South’ (and its counterpart ‘Global North’) is the favoured option by scholars and policymakers. It is based on an earlier ‘North–South’ distinction of the 1980s, but the prefix ‘Global’ clarifies that this is not a geographical categorization of the world, but one based on economic inequalities, though with some spatial resonance in terms of where the countries are situated: S.H. Chant & C. McIlwaine, *Geographies of Development in the 21st Century: An Introduction to the Global South* (Edward Elgar, 2008), pp. 6, 11. Yet, within ‘Global South’ countries, there are different layers of development and legal capacity. The Global South countries that we consider in this article are all relatively affluent and have fairly strong civil societies and legal systems.

² Traditionally, the term ‘transnational litigation’ refers to claims involving foreign plaintiffs or defendants located outside the court’s jurisdiction, and/or the possibility of enforcing foreign judgments in domestic courts: see M.S. Quintanilla & C.A. Whytock, ‘Transnational Litigation: Foreign Courts, Foreign Judgments, and Foreign Law’ (2011) 18(1) *Southwestern Journal of International Law*, pp. 31–52, at 32. Looking specifically at transnational climate litigation in the US, see M. Byers, F. Kelsey & A. Gage, ‘The Internationalization of Climate Damages Litigation’ (2017) 7(2) *Washington Journal of Environmental Law & Policy*, pp. 264–319. Scholars of climate litigation also describe climate litigation as ‘transnational’ in that it is part of a ‘global’ climate justice movement, even where cases involve only domestic litigants and decisions of domestic courts: see J. Peel & J. Lin, ‘Transnational Climate Litigation: The Contribution of the Global South’ (2019) 113(4) *American Journal of International Law*, pp. 679–726.

We begin by considering the significant capacity constraints for climate litigation to develop in the Global South. This examination provides context for the characteristics of this initial trend of innovation in the countries where strategic climate litigation has been brought. We then identify initial trends in Global South climate litigation. To a certain extent, climate cases in this area follow trends observed in the Global North. However, Global South climate litigation has unique characteristics that are distinct from those observed in the Global North. Strategic approaches to and outcomes of litigation in the Global South reflect these different characteristics.

Even where the contours (for example, strategies and legal grounds) of Global North and Global South climate litigation are similar, we observe that the context and content of the filing is ‘painted in different colours’. This is the case with constitutional rights or human rights claims, on which litigants in both the Global North and South have relied. However, in Global South countries the character of human rights claims is arguably more desperate because of the high vulnerability of their populations to climate-induced risks and loss and damage, as well as their limited access to life-sustaining resources.³ For example, an innovative approach to corporate liability was used in the Carbon Majors Inquiry carried out by the Philippines Human Rights Commission in the context of loss and damage suffered by its citizens as a result of an extreme event which killed over 6,000 people.⁴ In *Future Generations v. Ministry of the Environment and Others*, the Supreme Court of Colombia also focused on the issue of human rights, but went further to discuss intergenerational equality and solidarity, private liability and accountability for climate change, human dependence on the environment, and recognized Colombia’s Amazon basin as an entity the subject of rights.⁵

Otherwise, the trends in Global South climate litigation reflect the priorities of the jurisdiction in which the action is commenced. These lawsuits are purposely adapted to address challenges that are generally more acute in developing countries. Indeed, while a number of landmark cases of strategic climate litigation in the Global North are targeted at driving governmental ambition on climate change, litigants from the Global South are more likely to use litigation to compel governments to enforce existing policies for mitigation and adaptation, attempting to overcome implementation constraints. For example, in *Ashgar Leghari v. Federation of Pakistan*, the court ordered a number of regulatory outcomes in the face of delay and lack of action on climate

³ L. Kotzé, ‘Human Rights, the Environment and the Global South’, in S. Alam et al. (eds), *International Environmental Law and the Global South* (Cambridge University Press, 2015), pp. 171–91, at 178–9.

⁴ The term ‘carbon majors’ and the Carbon Majors Inquiry are underpinned by a study published by R. Heede, ‘Tracing Anthropogenic Carbon Dioxide and Methane Emissions to Fossil Fuel and Cement Producers, 1854–2010’ (2014) 122(1–2) *Climatic Change*, pp. 229–41. Documents and other information about the Inquiry are available at: <https://essc.org.ph/content/nicc>.

⁵ P.A.A. Alvarado & D. Rivas-Ramírez, ‘A Milestone in Environmental and Future Generations’ Rights Protection: Recent Legal Developments before the Colombian Supreme Court’ (2018) 30(3) *Journal of Environmental Law*, pp. 519–26; and P. Villavicencio Calzadilla, ‘A Paradigm Shift in Courts’ View on Nature: The Atrato River and Amazon Basin Cases in Colombia’ (2019) 15(0) *Law, Environment and Development Journal*, pp. 1–11, available at: <http://www.lead-journal.org/content/19001.pdf>.

change adaptation by government agencies on the basis of human rights violations.⁶ In a related vein, Peel and Lin suggest that Global South litigation connects the ‘peripheral’ nature of climate issues to wider disputes over constitutional rights, environmental protection, land use, disaster management and natural resource conservation.⁷ For example, in *EarthLife Africa Johannesburg v. Minister of Environmental Affairs & Others*, the South African High Court determined that global climate change was a relevant consideration in the environmental review of plans for a new coal-fired plant.⁸

Based on these characteristics, and drawing upon Legal Opportunity Structures (LOS) approaches, we identify two related factors that are driving and contributing to the initial regulatory outcomes observed in Global South strategic climate litigation: (i) access to justice in conjunction with the existence of progressive climate and/or environmental rights legislation, and (ii) judicial opportunism. When these factors are combined, they have the potential to help actors in the Global South to overcome countervailing dynamics of significant capacity constraints in implementing environmental legislation and managing fragmented and under-resourced institutional structures, and can therefore contribute to progressive outcomes.

Taking into consideration the initial trends of climate litigation in the Global South and the factors that contribute to this movement, we anticipate that strategic climate litigation in this area is likely to increase in the coming years. Moreover, it may lead to outcomes that uphold or advance climate change protection, particularly around climate change adaptation, in jurisdictions that have adopted progressive procedural as well as regulatory approaches to environmental protection and justice. With more countries in the Global South implementing procedural and regulatory innovations in the environmental field, the new directions opened by progressive climate litigation could provide lessons and clear avenues for other litigants. Yet, it remains to be seen whether these specific instances of positive climate outcomes will remain cabined within the progressive judicial environments of these specific countries, or whether they may broaden to develop a distinct field of climate jurisprudence.

In [Section 2](#), the article briefly reviews the capacity constraints that many Global South countries experience in implementing international environmental law as well as domestic environmental law. [Section 3](#) identifies climate litigation trends in the Global South. [Section 4](#) identifies two key features of emerging Global South litigation, highlighting their innovative characteristics, and comparing them with similar efforts and outcomes of climate litigation in the Global North. [Section 5](#) discusses two reasons for these key features, which have arguably contributed to successful outcomes and innovative initiatives. The final section identifies potential lessons and the impacts of these successes in going forward.

⁶ *Ashgar Leghari v. Federation of Pakistan*, Case No. 25501/2015, Lahore High Court, Order of 4 Sept. 2015, available at: <http://www.lse.ac.uk/GranthamInstitute/litigation/ashgar-leghari-v-federation-of-pakistan-lahore-high-court-green-bench-2015>.

⁷ Peel & Lin, n. 2 above, pp. 690–5, 703–4.

⁸ *Earthlife Africa Johannesburg v. Minister of Environmental Affairs & Others*, Case No. 65662/16, High Court, Order of 8 Mar. 2017, available at: <http://www.lse.ac.uk/GranthamInstitute/litigation/earthlife-africa-johannesburg-v-minister-of-environmental-affairs-others>.

2. THE NORTH-SOUTH DIVIDE AND CAPACITY CONSTRAINTS

Many Global South countries have not traditionally viewed climate change as one of their greatest threats, focusing instead on immediate needs for economic development, poverty reduction, and energy security,⁹ as well as more immediate environmental threats such as hazardous waste and safe drinking water.¹⁰ Because environmental issues are intertwined with economic issues, international environmental law has long been a site of intense contestation over environmental priorities and liability for past harm.¹¹ Some countries in the Global South viewed environmentalism as a luxury that low-income countries could not afford to implement, and as a hurdle in achieving poverty reduction and economic development.¹² Past histories of colonialism, and post-colonial global economic orders, have also led to environmental harm and poverty in the Global South, thereby engendering further mistrust by these countries regarding environmental protection efforts by the Global North.¹³

The international environmental law architecture also leads to constraints in implementation in countries in the Global South. Many multilateral environmental agreements have significant reporting requirements, as well as a number of annual conferences which take place all over the world.¹⁴ Limited human and financial resources in countries in the Global South mean they often struggle to maintain a presence at these meetings and to comply with reporting requirements. The primary needs for adequate financing, appropriate technology transfer, and effective dispute resolution mechanisms in order to aid implementation in the Global South are yet to be met.¹⁵ Partly as a result, countries in the Global South often lack the capacity to build and maintain effective environmental institutions, create strong scientific knowledge bases for environmental policymaking, effectively integrate environmental concerns into national economic development planning, and set up effective environmental monitoring and implementation schemes. In addition, conflicts between environmental protection and economic development are particularly pronounced in these countries as a result of policy priorities focused on development projects which target foreign direct investment.¹⁶

⁹ O. Mertz et al., 'Adaptation to Climate Change in Developing Countries' (2009) 43(5) *Environmental Management*, pp. 743–52, at 744; M. Bazilian et al., 'Interactions between Energy Security and Climate Change: A Focus on Developing Countries' (2011) 39(6) *Energy Policy*, pp. 3750–6, at 3750. However, there are a number of countries in the Global South where for many years climate change has been considered a priority (e.g., small island developing states).

¹⁰ S. Atapattu & C.G. Gonzalez, 'The North-South Divide in International Environmental Law: Framing the Issues', in Alam et al., n. 3 above, pp. 1–21, at 10.

¹¹ *Ibid.*, p. 2.

¹² R. Gordon, 'Unsustainable Development', in Alam et al., n. 3 above, pp. 50–73, at 50.

¹³ Atapattu & Gonzalez, n. 10 above, p. 5.

¹⁴ V.P. Nanda, 'Global Environmental Governance and the South', in Alam et al., n. 3 above, pp. 130–51, at 135.

¹⁵ *Ibid.*, p. 146.

¹⁶ E. Emeseh, 'Limitations of Law in Promoting Synergy between Environment and Development Policies in Developing Countries: A Case Study of the Petroleum Industry in Nigeria' (2006) 24(4) *Journal of Energy Natural Resources*, pp. 574–606, at 598; C. Lo & G. Fryxell, 'Enforcement Strategies among Environmental Protection Officials in China' (2003) 23(2) *Journal of Public Policy*, pp. 81–115, at 83.

Where environmental legislation exists, policymakers face an array of barriers to enforcement, including weak and fragmented institutions, incomplete legal foundations, and limited political will.¹⁷ Many countries lack the resources, infrastructure, technology, and monitoring facilities needed to support effective enforcement. Additionally, environmental legislation may be outdated, or may not match existing technical, economic, and human resource limitations.¹⁸ Environmental legislation also often requires the establishment of new institutions. Where established, these are often poorly resourced, with fragmented institutional structures where administrators may operate in silos. In Brazil, for example, budgetary constraints, inappropriately staffed agencies, as well as strong industrial and commercial lobbies have all hampered enforcement of environmental legislation.¹⁹ In South Africa, the legacy of apartheid and its consequential economic and spatial inequality has placed tremendous pressure on policymakers to ensure energy security through cheap, and often fossil-fuel intensive, energy sources.²⁰

Non-governmental organizations (NGOs) and environmental defenders often step into these governance gaps, working with local communities to identify environmental risks and impacts and promote human rights in the context of large-scale extraction projects through the protection of biodiversity, water, and forestry.²¹ Yet, some governments in the Global South restrict the activities of organizations that receive foreign funding on the basis of maintaining transparency and accountability.²² Between 1993 and 2012, 39 of the world's low and middle-income countries enacted laws that restrict the activities of these organizations.²³ Moreover, environmental defenders are often subjected to threats, intimidation, physical violence, and even death. Murders of environmental defenders are on the rise worldwide, and especially in resource-rich countries.²⁴ A report by Global Witness²⁵ names 207 activists killed in 2017, with Brazil, the Philippines, and Colombia listed as the most dangerous countries.

¹⁷ A. Blackman, 'Can Voluntary Environmental Regulation Work in Developing Countries? Lessons from Case Studies' (2008) 36(1) *The Policy Studies Journal*, pp. 119–41, at 120; G. Eskeland & E. Jimenez, 'Policy Instruments for Pollution Control in Developing Countries' (1992) 7(2) *The World Bank Research Observer*, pp. 145–69.

¹⁸ S. Singh & S. Rajamani, 'Issue of Environmental Compliance in Developing Countries' (2003) 47(12) *Water Science and Technology*, pp. 301–4, at 301.

¹⁹ *Ibid.*

²⁰ Bazilian et al., n. 9 above, p. 3754.

²¹ UN Environment, *Environmental Rule of Law: First Global Report* (UN Environment Programme (UNEP), 2019), available at: <https://www.unenvironment.org/resources/assessment/environmental-rule-law-first-global-report>.

²² *Ibid.*, p. 157.

²³ *Ibid.*

²⁴ *Ibid.*, p. 172.

²⁵ Global Witness, 'At What Cost? Irresponsible Business and the Murder of Land and Environmental Defenders in 2017', 24 July 2018 (updated Jan. 2019), available at: <https://www.globalwitness.org/en/campaigns/environmental-activists/at-what-cost>. On the other hand, activists and even researchers in the Global North suffer retaliation through the courts through strategic lawsuits against public participation (SLAPP) and lawsuits against researchers: see M. Poggio, 'Fossil Fuel Industry Ally Targets UCLA Law Professors' Climate Liability Work', *Climate Liability News*, 12 Dec. 2018, available at: <https://www.climateliabilitynews.org/2018/12/12/ucla-law-professor-ann-carlson-cara-horowitz-cei>.

Kellman has also documented threats to environmental public prosecutors who have attempted to enforce environmental regulations in Brazil.²⁶

Nevertheless, countries where progressive climate outcomes in litigation have been experienced are all on the list of countries that are the most dangerous for environmental defenders, as documented between 2000 and 2015. Brazil is at the top of this list with 527 defenders murdered, the Philippines is third with 115, Colombia fourth with 103; lower on the list are Indonesia with 11, Pakistan with five, and South Africa with one.²⁷ Considering these constraints and pressures, it is remarkable that strategic climate litigation in the Global South has appeared at all.

3. CLIMATE LITIGATION IN THE GLOBAL SOUTH

Over the last 20 years climate litigation has emerged as an alternative governance mechanism to address climate change.²⁸ The contours of what constitutes climate litigation are unclear, as the number of cases varies immensely, ranging from litigation around government permits issued for fossil fuel projects to implementation of climate change adaptation plans. Markell and Ruhl define climate litigation as any piece of federal, state, tribal or local administrative or judicial litigation in which party filings or tribunal decisions directly and expressly raise an issue of fact or law regarding the issue or policy of climate change, its causes or impacts.²⁹ Peel and Osofsky define it as involving cases that have the issue of climate change at their core, and that generally raise climate-specific arguments or judicial analysis referring to climate change.³⁰ They also provide a model for understanding the regulatory impact of climate change, with litigation focused on three main areas: (i) constitutional interpretation, (ii) statutory interpretation (including procedural and substantive requirements), and (iii) under common law, nuisance, negligence, and public trust areas of law.³¹

It is generally recognized that the first climate legal action was brought in the US in 1990,³² while the first case expressing itself as climate litigation is understood to have been initiated in New South Wales (Australia) in 1994.³³ As of May 2019, almost 1,300

²⁶ J. Kellman, 'The Brazilian Legal Tradition and Environmental Protection: Friend or Foe' (2002) 25(2) *Hastings International & Comparative Law Review*, pp. 145–67, at 164.

²⁷ UN Environment, n. 21 above, p. 173, Fig. 4.8.

²⁸ J. Peel & H.M. Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (Cambridge University Press, 2015), pp. 9–25.

²⁹ D. Markell & J.B. Ruhl, 'An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual?' (2012) 64(1) *Florida Law Review*, pp. 15–86, at 21.

³⁰ Peel & Osofsky, n. 28 above, p. 4.

³¹ *Ibid.*, p. 36.

³² B. Preston, 'Climate Change Litigation (Part 1)' (2011) 5(1) *Carbon and Climate Law Review*, pp. 3–14, at 8.

³³ B. Preston, 'Recent Climate Litigation Concerning Environmental Rights', presentation given at the Asia Pacific Judicial Colloquium on Climate Change: Using Constitutions to Advance Environmental Rights and Achieve Climate Justice, Lahore High Court in Pakistan, 26 Feb. 2018, available at: https://www.ajne.org/event/asia-pacific-judicial-colloquium-climate-change#quicktabs-event_tabs=2. Judge Preston was referring to *Greenpeace Australia Ltd v. Redbank Power Co.*, available at: <http://www.lse.ac.uk/GranthamInstitute/litigation/greenpeace-australia-ltd-v-redbank-power-co-land-and-environment-court-of-new-south-wales-1994> (in which the Land and Environment Court of New South

lawsuits and administrative investigations involving climate change were identified in 28 jurisdictions, with over 1,000 cases filed in the US.³⁴ The increase in the number of climate-related litigation cases has been attributed to worsening climatic conditions and to the use of litigation as a strategy aimed at drawing public attention to the issue of climate change and increasing the political will to tackle it.³⁵ These climate lawsuits are concentrated in a relatively small number of jurisdictions, most of them in the Global North. The US has been at the centre of the climate change litigation phenomenon.³⁶ Australia has also experienced a high number of climate litigation cases (97),³⁷ followed by the United Kingdom (46), New Zealand (16), Canada (14), and Spain (13). In the Global South, 32 cases of climate litigation have been identified, of which over half are in Asia (18 cases), five are in Africa, and nine in Latin America.

Whereas Global North climate litigation began in the 1990s, such litigation in the Global South started almost 20 years later, and became visible in the late 2010s.³⁸ We still have a very limited understanding of how the Global South is engaging with climate change litigation,³⁹ and the legislation and procedures that allow or facilitate legal claims in that context.⁴⁰ Academic examination of climate litigation has been produced mostly by scholars from the Global North and has focused primarily on a small number of high-profile cases concentrated in North America, Europe, and Australia. The systematic analysis of climate litigation scholarship by Setzer and Vanhala confirms this imbalance, and calls for comprehensive studies focused on Global South litigation.⁴¹

Wales upheld a state council decision granting development consent for the construction of a power station. Greenpeace asserted that air emissions from the power station would exacerbate the greenhouse effect).

³⁴ For US cases, see the database maintained by the Sabin Center for Climate Change Law, in collaboration with Arnold & Porter Kaye Scholer LLP, available at: <http://climatecasechart.com/us-climate-change-litigation>. For cases in other jurisdictions, see the Climate Change Litigation of the World database, jointly produced by the Sabin Center and the Grantham Research Institute on Climate Change and the Environment at the London School of Economics, available at: <http://www.lse.ac.uk/GranthamInstitute/climate-change-laws-of-the-world>. Examining trends in litigation, see J. Setzer & M. Bangalore, 'Regulating Climate Change in the Courts', in A. Averchenkova, S. Fankhauser & M. Nachmany (eds), *Trends in Climate Change Legislation* (Edward Elgar, 2017), pp. 175–92.

³⁵ UN Environment and Sabin Center for Climate Change Law at Columbia University, *The Status of Climate Change Litigation: A Global Review* (UNEP, 2017), p. 4, available at: <http://wedocs.unep.org/handle/20.500.11822/20767>.

³⁶ *Ibid.*, p. 10.

³⁷ J. Peel & H.M. Osofsky, 'Climate Change Litigation's Regulatory Pathways: A Comparative Analysis of the United States and Australia' (2013) 35(3) *Law & Policy*, pp. 150–83.

³⁸ For a comprehensive survey of these cases, see Peel & Lin, n. 2 above.

³⁹ J. Lin, 'Climate Change and the Courts' (2012) 32(1) *Legal Studies*, pp. 35–57; J. Lin, 'Climate Change Litigation in Asia and the Pacific', in G. van Calster, W. Vandenberghe & L. Reins (eds), *Research Handbook on Climate Change Mitigation Law* (Edward Elgar, 2015), pp. 578–602; L. Vanhala, 'The Comparative Politics of Courts and Climate Change' (2013) 22(3) *Environmental Politics*, pp. 447–74; M. Wilensky, 'Climate Change in the Courts: An Assessment of Non-U.S. Climate Litigation' (2015) 26(1) *Duke Environmental Law & Policy Forum*, pp. 131–79.

⁴⁰ Peel & Osofsky, n. 28 above, p. 62.

⁴¹ J. Setzer & L. Vanhala, 'Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance' (2019) *WIREs Climate Change* online articles, available at: <https://onlinelibrary.wiley.com/doi/abs/10.1002/wcc.580>. Of the 130 articles identified up to Sept. 2018, 76% (99) focus on Global North jurisdictions, 20% (26) have an international focus or cover jurisdictions in both the North and South. Only 5 of the identified journal articles looked at litigation or litigation-related issues in the Global South: X. He, 'Legal and Policy Pathways of Climate Change Adaptation: Comparative

In other areas of law, scholars have pointed to the fact that jurisprudence coming from the South might be used to develop legal jurisprudence and political issues in Northern jurisdictions. While Global South scholars and legal institutions occupy a marginal position in the interpretation, use, and transformation of modern constitutionalism, a number of creative courts in the Global South have contributed (or have attempted to contribute) to the structural transformation of the public and private spheres of their countries.⁴² A study of courts in Asia, Africa, and Latin America concludes that many of these are ‘activist tribunals’, and that some of their jurisprudence contributes directly to the ongoing global conversation on constitutionalism, bringing new light to interpreting the principle of separation of powers, connecting social and economic rights with the principle of human dignity and strategies to allow poor individuals access to justice.⁴³

4. TWO KEY FEATURES OF GLOBAL SOUTH CLIMATE LITIGATION

We compare Global South strategic climate litigation with that of the Global North, highlighting two key features of emerging Global South litigation: the outward-looking objective of combating ongoing environmental degradation, and, on a doctrinal level, the use of rights-based principles.⁴⁴ Unlike strategic climate litigation in the Global North, litigants in the Global South currently do not focus on eliciting new regulatory targets or instruments from governments on reducing emissions. Rather, they use existing legislative tools and human rights discourses to highlight the vulnerability of their populations to climate change and protect their valuable ecosystems. By comparing the two approaches, we do not diminish either strategy, but rather aim to contrast a more recent trend in litigation in the Global South in relation to the more established trend in the Global North. There are different levels of synergies and distinctions between litigation in the Global South and the Global North, and these are also highlighted below.

Analysis of the Adaptation Practices in the United States, Australia and China’ (2018) 7(2) *Transnational Environmental Law*, pp. 347–73; T.-L. Humby, ‘The Thabametsi Case: Case No 65662/16 Earthlife Africa Johannesburg v Minister of Environmental Affairs’ (2018) 30(1) *Journal of Environmental Law*, pp. 145–55; C. Nyinevi, ‘Universal Civil Jurisdiction: An Option for Global Justice in Climate Change Litigation’ (2015) 8(3) *Journal of Politics and Law*, pp. 135–48, available at: <https://ssrn.com/abstract=2650371>; J. Williams, ‘The Impact of Climate Change on Indigenous People: The Implications for the Cultural, Spiritual, Economic and Legal Rights of Indigenous People’ (2012) 16(4) *The International Journal of Human Rights*, pp. 648–88; B. Ugochukwu, ‘Litigating the Impacts of Climate Change: The Challenge of Legal Polycentricity’ (2018) 7(1) *Global Journal of Comparative Law*, pp. 91–114. Since their assessment other articles have been published, including Alvarado & Rivas-Ramírez (n. 5 above), and a forthcoming comprehensive analysis by Peel and Lin (n. 2 above).

⁴² M. Hailbronner, ‘Transformative Constitutionalism: Not only in the Global South’ (2017) 65(3) *American Journal of Comparative Law*, pp. 527–65.

⁴³ D.B. Maldonado, *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia* (Cambridge University Press, 2013).

⁴⁴ Peel & Lin (n. 2 above) identify a number of key characteristics of climate cases in the Global South, including reliance on constitutional rights or human rights claims, and that individuals and NGOs in the Global South are using litigation to compel their governments to implement and enforce *existing* policies for mitigation and adaptation – and, rather surprisingly, most cases currently comprise mitigation.

4.1. Combating Ongoing Environmental Degradation

A number of landmark strategic climate litigation cases in the Global North are targeted at driving governmental ambition on climate change. The *Urgenda* case has so far been successful in determining that the Dutch government needs to reduce its emissions to 25% below 1990 levels by 2020.⁴⁵ In *Juliana v. United States* the plaintiffs claim that governmental failure to take action on climate change will deprive future generations of the same protection provided to previous generations.⁴⁶ While the case has faced significant procedural hurdles regarding standing,⁴⁷ if successful it could direct the US government to develop a plan to reduce carbon dioxide (CO₂) emissions.⁴⁸ *Urgenda* and *Juliana* have inspired other cases, including a lawsuit brought by Friends of the Irish Environment against the Irish government for alleged failure to mitigate climate change, and a legal challenge brought by the NGO ENvironnement JEUnesse against the Canadian government for alleged failure to protect the fundamental rights of young people.⁴⁹ Similarly, in France four NGOs have taken a first step towards a lawsuit against the state by submitting a formal notice to the French Prime Minister and 12 members of the government for their inadequate efforts to effectively tackle climate change, in violation of a statutory duty to act.⁵⁰

In contrast to this approach, rather than requesting direct regulatory action on climate change by governments, plaintiffs in the Global South take a more indirect route. Cases are brought to address poor enforcement of existing planning and/or environmental legislation, possibly acknowledging the capacity constraints involved in passing new legislation on climate change in some jurisdictions. In addition, these cases tend to include efforts to protect important native ecosystems. A common strategy in the Global South has been for governments to engage with climate change arguments through taking action against defendants for enforcement of existing environmental

⁴⁵ *Stichting Urgenda v. Government of the Netherlands (Ministry of Infrastructure and the Environment)*, ECLI:NL:RBDHA:2015:7145, Rechtbank Den Haag, C/09/456689/HA ZA 13-1396 (*Urgenda*). See also J. van Zeven, 'Establishing a Governmental Duty of Care for Climate Change Mitigation: Will *Urgenda* Turn the Tide? (2015) 4(2) *Transnational Environmental Law*, pp. 339–57.

⁴⁶ *Juliana et al. v. United States of America et al.*, F.Supp.3d 1224, 1236 (D. Or. 2016); M.C. Blumm & M.C. Wood, 'No Ordinary Lawsuit: Climate Change, Due Process and the Public Trust Doctrine' (2017) 67(1) *American University Law Review*, pp. 1–87.

⁴⁷ In Oct. 2018 Chief Justice Roberts granted a temporary halt in response to a request by the federal government. The Supreme Court subsequently lifted the stay on 2 Nov., and the Department of Justice subsequently requested a stay from the US District Court for the District of Oregon, which granted in part a temporary stay on 9 Nov. 2018.

⁴⁸ Blumm & Wood, n. 46 above. See also J. Peel & H.M. Osofsky, 'A Rights Turn in Climate Change Litigation?' (2018) 7(1) *Transnational Environmental Law*, pp. 37–67, and P. Singer, 'The Trial of the Century, Fighting for a Healthier Planet', *The Daily Star*, 15 Sept. 2018, available at: <http://www.daily-star.com.lb/Opinion/Commentary/2018/Sep-15/463429-the-trial-of-the-century-fighting-for-a-healthier-planet.ashx>.

⁴⁹ *Friends of the Irish Environment v. Ireland*, available at: <http://www.lse.ac.uk/GranthamInstitute/litigation/friends-of-the-irish-environment-v-ireland>; *ENvironnement JEUnesse v. Canada*, available at: <http://www.lse.ac.uk/GranthamInstitute/litigation/environnement-jeunesse-v-canada>.

⁵⁰ See Greenpeace France et al., 'Inaction over Climate Change : Let's Fight for Justice', available at: <https://notreaffaireatous.org/wp-content/uploads/2018/12/CP-ANGLAIS.pdf>.

and planning legislation.⁵¹ This is the case for enforcement actions brought by the Ministry of Environment of Indonesia against companies in the extractive sector (mining, oil palm, and timber logging) for violations of natural resource management laws.⁵² This strategy has also been used in different environmental class actions brought by the Brazilian Prosecutor's office for violations of natural resource management laws (e.g., unauthorized clearing of forest for the development of economic activities).⁵³

NGOs in the Global South have also started to use the courts to enforce legislation regarding the licensing of polluting activities. Peel and Lin⁵⁴ identify five out of the 32 cases in the Global South docket that referred to environmental impact assessment (EIA) or used this as one of the grounds of action. Some of these cases have climate change in the 'periphery' of the claim (e.g., the final decision might result in benefits from a climate mitigation perspective⁵⁵), while others have climate change as their 'core' (e.g., the lack of consideration of climate impacts challenges the validity of the approval given). The case of *Earthlife Africa Johannesburg v. Minister of Environmental Affairs and Others* provides an example of climate change being central to the case. Humby argues that the case made a 'meaningful contribution' to climate change litigation as, notwithstanding the absence of an express legal obligation to conduct a focused climate change impact assessment, the Gauteng High Court ruled that climate change is a relevant consideration when granting an environmental authorization.⁵⁶

Other climate litigation suits in the Global South focus on the destruction of emblematic ecosystems. By doing this, climate litigation gives continuity to ongoing efforts in the environmental movement. For example, in *Future Generations v. Ministry of the Environment and Others*, a group of 25 children and young adults between the ages of 7 and 26 required the government to comply with its prior commitment to stop deforestation in the Amazon forest by 2020. This lawsuit was the first on climate change and future generations in Latin America and concerned a long-standing problem: the conservation, maintenance, and restoration of the Amazon forest. Attempts to address deforestation in the Amazon have been made for over several

⁵¹ Peel & Lin, n. 2 above, p. 717.

⁵² For a discussion about climate change litigation in Indonesia, see A.G. Wibisana & C.M. Cornelius, 'Climate Change Litigation in Indonesia', working paper presented at the Climate Change Litigation Scholarship Workshop, Faculty of Law, National University of Singapore, 7–8 June 2018.

⁵³ For an analysis of cases decided by the Brazilian courts, see G. Wedy, 'Climate Legislation and Litigation in Brazil', *Sabin Center for Climate Change Law Working Papers*, Oct. 2017, available at: <http://columbiaclimatelaw.com/files/2017/10/Wedy-2017-10-Climate-Legislation-and-Litigation-in-Brazil.pdf>; and, in Portuguese, J. Setzer, K. Cunha & A. Botter-Fabri (eds), *Climate Litigation: New Frontiers for Environmental Law in Brazil* (Thompson Reuters/Revista dos Tribunais, 2019).

⁵⁴ Peel & Lin, n. 2 above pp. 704–5. Of these 5 cases they identify, 1 was in Asia and 4 in Africa.

⁵⁵ However, as Bouwer argues, 'peripheral' climate litigation cases that interface with climate policy might also undermine domestic climate change policy: K. Bouwer, 'The Unsexy Future of Climate Change Litigation' (2018) 30(3) *Journal of Environmental Law*, pp. 483–506.

⁵⁶ Humby (n. 41 above) analyzes the *Thabametsi* case through the lens of Preston's conceptual framework for the judiciary to make a 'meaningful contribution' to tackling climate change: see B. Preston, 'The Contribution of the Courts in Tackling Climate Change' (2016) 28(1) *Journal of Environmental Law*, pp. 11–7.

decades through various legal and non-legal strategies,⁵⁷ but this particular case is being framed in terms of its climate impacts and brought as a climate lawsuit.⁵⁸

4.2. Vulnerability and Rights-based Claims in the Global South

Despite human rights and climate change linkages becoming increasingly understood,⁵⁹ courts were initially reluctant to adjudicate in ways that highlight these linkages.⁶⁰ However, the international framework of human rights is well established and can provide existing principles and frameworks within which climate litigation and judicial decision making operate. For instance, the human rights-based approach established by the United Nations (UN) can provide procedural and substantive protection to citizens in the context of climate impacts, and can help to ensure that development-based projects do not result in adverse human rights consequences.⁶¹

Consequently, over the last few years the legal relationship between human rights and climate change has started to emerge in courts to a point where Peel and Osofsky have identified a ‘rights-based turn’ in climate litigation.⁶² The lawsuits brought by *Urgenda*, *Juliana et al.* and *JEUnesse* all focused on issues of vulnerability and human rights violations. *Urgenda* grounded the case on the duty of care under Article 21 of the Dutch Constitution and Article 6:162 of the Dutch Civil Code to ensure ‘the livability of the country and the protection and improvement of the living environment’.⁶³ The District Court of the Hague decided that Article 6:162 of the Civil Code was breached by a tortious act committed by the state – the act of hazardous negligence of not taking adequate action to prevent climate harm. Interestingly, on appeal, rather than accepting the duty of care from tort law, the Court of Appeal ruled that the duty of care was informed by human rights. The Court recognized a ‘positive obligation [of the state] to take concrete actions to prevent a future violation of Articles 2 and 8 ECHR [European Convention for the Protection of Human Rights

⁵⁷ Kellman, n. 26 above, p. 145.

⁵⁸ The plaintiffs request the Court to order the state to act in various ways, which include (i) the design and implementation of a national action plan as well as an intergenerational agreement to reduce deforestation; (ii) upgrading the ‘Territorial Management Plan’; (iii) suspending the main activities that are the cause of deforestation; (iv) investigating illicit activities that contribute to deforestation; and (v) revising all public resources destined for the reduction of deforestation; available at: <http://www.lse.ac.uk/GranthamInstitute/litigation/future-generation-v-ministry-environment-others>.

⁵⁹ See J. Knox, ‘Climate Change and Human Rights Law’ (2009) 50(1) *Virginia Journal of International Law*, pp. 163–218; and S. Humphreys & M. Robinson, *Human Rights and Climate Change* (Cambridge University Press, 2010).

⁶⁰ Setzer & Vanhala, n. 41 above; also S. Atapattu, *Human Rights Approaches to Climate Change: Challenges and Opportunities* (Routledge, 2016).

⁶¹ D.S. Olawuyi, ‘Advancing Climate Justice in National Climate Actions: The Promise and Limitations of the United Nations Human Rights-Based Approaches’, in R.S. Abate (ed.), *Climate Justice: Case Studies in Global and Regional Governance Challenges* (Environmental Law Institute, 2016), pp. 3–24, at 7.

⁶² Peel & Osofsky, n. 48 above.

⁶³ *Stichting Urgenda v. Government of the Netherlands (Ministry of Infrastructure and the Environment)*, Rechtbank Den Haag, 24 June 2015, ECLI:NL:RBDHA:2015:7196, para. 4.36, English translation available at: <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2015:7196>. See van Zeben, n. 45 above.

and Fundamental Freedoms⁶⁴’.⁶⁵ In doing so, the Court of Appeal ruled that dangerous climate change would result ‘in the serious risk that the current generation of citizens will be confronted with loss of life and/or a disruption of family life’.⁶⁶ In *Juliana v. United States*, young people claim that failure by the government to take action on climate change violates their Fifth Amendment rights by denying protection to future generations of essential natural resources, including a safe climate.⁶⁷ The plaintiffs are also relying on the public trust doctrine, and the violation of rights to life, liberty and property, as well as failing to protect public natural resources. The *Environment JEUnesse* case against the Canadian government claims violation of the fundamental rights of young people under the Canadian Charter of Rights and Freedoms and the Québec Charter of Rights and Freedoms.⁶⁸

The application of the human rights framework to the impacts of climate change has been one of the key features of litigation in the Global South. In addition to the reasons why rights-based cases are being brought in the Global North, many countries in the Global South have constitutions which already provide for human rights protection, as well as agencies or commissions which oversee the implementation and operationalization of those rights.⁶⁹ Also, historically marginalized communities in the Global South have successfully vindicated collective human rights in regional human rights bodies, and some national courts have a record of innovation in human rights and environmental rights.⁷⁰ The role of progressive legislation and judges will be further discussed in the next section when we examine the rationale for strategic climate litigation and innovative decisions in the Global South.

The socio-economic and political contexts of Global South jurisdictions are also relevant. Colonial and postcolonial activities of Northern countries, combined with multinational corporate actors, have caused drains on wealth, dysfunctional institutions, rent-seeking elites, and ethnic conflicts, which have led to grave human rights abuses and environmental destruction.⁷¹ Consequently, the environment/human rights nexus is often closely related to issues of equity, survival, security, human capital

⁶⁴ Rome (Italy), 4 Nov. 1950, in force 3 Sept. 1953, available at: <http://www.echr.coe.int/pages/home.aspx?p=basictexts>.

⁶⁵ Court of Appeal of the Hague, *The State of the Netherlands (Ministry of Infrastructure and the Environment) v. Urgenda Foundation*, C/09/456689 / HA ZA 13-1396, 9 Oct. 2018, para. 41 (quotations from the translation provided by the Court) available at: <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2018:2610>. See also B. Mayer, *The State of the Netherlands v. Urgenda Foundation: Ruling of the Court of Appeal of The Hague (9 October 2018)* (2019) 8(1) *Transnational Environmental Law*, pp. 167–92.

⁶⁶ *Urgenda*, *ibid.*, para. 45.

⁶⁷ N. 46 above.

⁶⁸ N. 49 above.

⁶⁹ This is the case for the countries mentioned in this article. See ‘Constitute Project’, available at: <https://www.constituteproject.org>; and UN High Commissioner for Human Rights (OHCHR), *Human Rights and Constitution Making* (UN, 2018), available at: https://www.ohchr.org/Documents/Publications/ConstitutionMaking_EN.pdf.

⁷⁰ See C.G. Gonzalez, ‘Environmental Justice, Human Rights, and the Global South’ (2015) 13(1) *Santa Clara Journal of International Law*, pp. 151–96, at 165; also Maldonado, n. 43 above and Section 5 below.

⁷¹ Kotzé, n. 3 above, pp. 178–9.

development, and defunct governance practices, making human rights violations particularly pertinent in the Global South.⁷²

The application of a human rights framework to the impacts of climate change is particularly relevant in the Global South because populations in these countries are extremely vulnerable. The most recent report of the Intergovernmental Panel on Climate Change (IPCC) states that climate-related risks for natural and human systems are higher for global warming of 1.5 degrees Celsius (°C) than is the case at present, but are lower than for the risks related to a 2°C rise above pre-industrial levels.⁷³ The impact of the risks will depend not only on the magnitude and rate of warming but also on geographic locations, levels of development and vulnerability, and choices of adaptation and mitigation.⁷⁴ Disadvantaged and vulnerable populations, indigenous people, and local communities who are highly dependent on agriculture or coastal livelihoods are at disproportionately higher risk.⁷⁵ Poverty and disadvantage are likely to increase in vulnerable populations as global warming increases.⁷⁶ Countries in the tropics and southern hemisphere subtropics have populations that will be exposed to the greatest impacts on economic growth as a result of climate change should global warming increase from 1.5°C to 2°C, and the number of people who are exposed to climate-related risks and are susceptible to poverty may reach up to several hundred million by 2050.⁷⁷

For the above reasons, a human rights framework is particularly relevant in building a compelling climate justice narrative in the Global South. This narrative enhances political will for greater ambition in climate policy formation, and also provides vulnerable countries and communities with the opportunity to account for their experience of climate impacts.⁷⁸

However, the adoption and implementation of a human rights approach in the context of climate change in the Global South is a complex issue for a number of reasons. Firstly, the traditionally vertical relationship between the state and individual for the enforcement of human rights violations does not take into account the historic responsibility of the Global North for the impacts of climate change. A human rights approach also imposes obligations, with consequential costs, to manage and mitigate the impacts of climate change on some countries that are least responsible for climate change, which has obvious equity implications. Therefore, a climate justice framework may be more

⁷² Ibid., p. 179.

⁷³ IPCC, 'Summary for Policymakers', in V. Masson-Delmotte et al. (eds), *Global Warming of 1.5°C: An IPCC Special Report on the Impacts of Global Warming of 1.5°C above Pre-industrial Levels and Related Global Greenhouse Gas Emission Pathways, in the Context of Strengthening the Global Response to the Threat of Climate Change, Sustainable Development, and Efforts to Eradicate Poverty* (IPCC, 2018 forthcoming), pp. 1–24, p. 5, available at: <https://www.ipcc.ch/sr15>.

⁷⁴ Ibid., p. 8.

⁷⁵ Ibid., p. 11.

⁷⁶ Ibid.

⁷⁷ Ibid., pp. 11–2.

⁷⁸ E. Cameron & M. Limon, 'Restoring the Climate by Realizing Rights: The Role of the International Human Rights System' (2012) 21(3) *Review of European Community & International Environmental Law*, pp. 204–19, at 204.

appropriate, particularly for smaller nations.⁷⁹ Despite these inequities, developing countries have agreed to take on obligations under the Paris Agreement⁸⁰ to address climate change, albeit in an approach that is nationally determined with differentiated obligations for developing countries.⁸¹

In addition, human rights-based approaches face practical constraints at the national level in Global South countries.⁸² As Olawuyi notes, human rights have varying levels of protection and implementation in countries where climate injustices are most severe, and local challenges such as the inadequacy or absence of climate change laws, restrictive property laws or inadequate capacity and lack of resources impacts upon the capacity of vulnerable groups to invoke human rights norms to seek redress.⁸³ Vulnerable countries may fear using a human rights narrative which would invite the international community to interrogate their own questionable human rights records, particularly in the area of political and civil rights.⁸⁴

Notwithstanding these considerable complexities and constraints, a number of cases in the Global South have invoked the issue of human rights violations arising from the impacts of climate change, and they have seen progressive outcomes. In *Leghari v. Federation of Pakistan*⁸⁵ Judge Syad Mansoor Ali Shah provided an extensive decision, in which he listed the impacts of climate change in Pakistan and focused on the vulnerability of citizens in that country, referring to climate change as ‘a defining issue of our time’.⁸⁶ While the Pakistani Constitution did not contain a specific right of environmental protection, the judge focused on Articles 9 and 11 of the Constitution protecting the rights to life, human dignity, property, and access to information, combined with international environmental law principles such as sustainable development, the precautionary principle, the public trust doctrine, and inter-generational equity. He determined that together these provisions provided a sufficient judicial toolkit for him to make a positive decision on the impacts of climate change.

A further case brought by a youth petitioner in Pakistan claims that climate change harm continuously threatens mental and physical health and quality of life. It violates the constitutionally guaranteed right to life, and the fundamental rights of the youth

⁷⁹ S. Atapattu, ‘Justice for Small Island Nations: Intersections of Equity, Human Rights and Environmental Justice’, in Abate, n. 61 above, pp. 299–322.

⁸⁰ Paris (France), 12 Dec. 2015, in force 4 Nov. 2016, available at: https://unfccc.int/sites/default/files/english_paris_agreement.pdf.

⁸¹ Art. 3 Paris Agreement states that all countries are to take ambitious action. Moreover, Art. 4(3) notes that all states’ nationally determined contributions will reflect their highest possible ambition while respecting common but differentiated responsibilities and respective capabilities, in the light of differing national circumstances. Art. 4(4) also folds in an element of differentiation by stating that developed countries should take the lead by instituting economy-wide absolute emission reductions and developing countries should enhance mitigation action and move, over time, towards economy-wide emissions reductions or limitation targets.

⁸² Olawuyi, n. 61 above, pp. 6–7.

⁸³ *Ibid.*

⁸⁴ Cameron & Limon, n. 78 above, p. 206.

⁸⁵ N. 6 above.

⁸⁶ *Ibid.*

petitioner, as well as future generations in Pakistan.⁸⁷ While the judicial approach in the *Leghari* case may seem unusual, there is already a judicial precedent in Pakistan which lends itself to such interventionist judicial activity. In 2012, the High Court of Lahore ordered the establishment of the River Ravi Commission to manage the restoration of the river, held periodic hearings on the Commission's progress, and ordered full-scale implementation of the bioremediation project in 2015.⁸⁸

Similarly, in the Colombian climate case, *Future Generations v. Ministry of the Environment and Others*, the Supreme Court was asked to rule on the impacts of climate change on the rights of future generations. The plaintiffs argued that the government had failed to respect the constitutional rights of existing children to a healthy environment, life, health, nutrition and water, as well as failing to protect the rights of future generations.⁸⁹ The Court's decision relied on the 'future generations' argument to press the government to take action on climate change, including to mandate the formulation and implementation of action plans to address deforestation in the Amazon.⁹⁰ With regard to standing, the decision applied the same constitutional provisions used for the protection of the environment for current generations, but this time to protect future generations, thereby substantially expanding the limits of such rights.⁹¹

A new angle to existing human rights strategies was introduced by the Carbon Majors Inquiry. The Philippines Commission on Human Rights is investigating whether a relatively small group of Northern corporations is aggravating the already vulnerable livelihoods of Philippine citizens.⁹² This first legal action against fossil fuel-intensive corporations in the Global South has been innovative in that it eschews the normal tort-based approaches⁹³ and focuses instead on an investigation of the

⁸⁷ *Rabab Ali v. Federation of Pakistan*, Supreme Court of Pakistan (2016), available at: <http://www.lse.ac.uk/GranthamInstitute/litigation/ali-v-federation-of-pakistan-supreme-court-of-pakistan-2016>.

⁸⁸ *Public Interest Litigation Association of Pakistan v. Government of the Punjab*, W.P. No. 9137/2012, Lahore High Court, available at: <http://sys.lhc.gov.pk/greenBenchOrders/WP-Environment-9137-12-30-12-2015.pdf>.

⁸⁹ See Alvarado & Rivas-Ramírez, n. 5 above; Villavicencio Calzadilla, n. 5 above.

⁹⁰ Supreme Court decision in Spanish and unofficial translation of excerpts into English are available at: <http://www.lse.ac.uk/GranthamInstitute/litigation/future-generation-v-ministry-environment-others>.

⁹¹ Alvarado & Rivas-Ramírez, n. 5 above, p. 524.

⁹² See n. 4 above, and A. Savaresi & J. Hartmann, 'Using Human Rights Law to Address the Impacts of Climate Change: Early Reflections on the Carbon Majors Inquiry', presented at the workshop 'Climate Change Litigation in the Asia Pacific', University of Singapore, June 2018, available at: <https://ssrn.com/abstract=3277568> (which charts the human rights dimensions of the case). Also S. Seck, 'Revisiting Transnational Corporations and Extractive Industries: Climate Justice, Feminism and State Sovereignty' (2017) 26(2) *Transnational Law & Contemporary Problems*, pp. 383–413 (who critiques the choice of entity as only investor-owned carbon majors as well as the underlying assumptions of international law and the detrimental impacts on climate justice that they entail).

⁹³ Climate litigation scholarship coming from the Global North generally approaches liability from tort-based claims. However, as Kysar argues, tort-based climate change claims for damages in the US and in other common law systems in the Global North face a legal system filled with doctrines that are premised on a classical liberal worldview in which threats such as global climate change simply do not register, making it difficult for climate change plaintiffs to obtain favourable judicial decisions. Although legal principles such as joint and several liability might provide a mechanism by which to overcome these obstacles, judges have expressed reluctance to attribute responsibility for climate change to any particular individual or group of plaintiffs: D.A. Kysar, 'What Climate Change Can Do About Tort Law' (2011) 41(1)

role of carbon major corporations in specific extreme events. The petition was submitted by Greenpeace Southeast Asia, the Philippine Rural Reconstruction Movement to the Philippines Commission on Human Rights and a group of Filipino citizens. It specifically situated its requests in the context of the extreme events and slow onset events experienced by residents in the Philippines and, in particular, the events of Typhoon Haiyan. The costs of this and other extreme events experienced in the Philippines in terms of human lives, financial costs to the state, and additional impacts of climate change on traditional livelihoods such as fishing and agriculture, are extensive and are highlighted in the petition.

The Commission responded to the petition by opening an investigation, and its approach has also been innovative. The work of the Commission is framed as a dialogue which highlights the voices and experiences of the climate vulnerable, with a focus on the responsibilities of corporations headquartered in the Global North.⁹⁴ While the Commission cannot impose fines or force the defendants to reduce emissions, it can seek the assistance of the UN to encourage the defendants to cooperate, make recommendations to the government, and issue a fact-finding report.⁹⁵ The legal conclusions of this investigation may influence further suits in the Global South as well as in the Global North. In terms of underlying narratives, the investigation can help to expose the relationship between major emitters based in the Global North and the suffering experienced by people living in the Global South.

Also targeting one of the carbon majors, but crossing the North-South divide, the ongoing case of *Saúl Luciano Lliuya v. RWE* was brought in Germany by a plaintiff from, and in respect of damage incurred in the Global South. Lliuya, a farmer and mountain guide in Peru, claimed liability from RWE, a pan-European energy company based in Germany. The damages claimed were proportionate to RWE's share of global greenhouse gases, amounting to approximately €17,000. Lliuya based his claim on paragraph 1004 of the German Civil Code, which deals with interference with property.⁹⁶ The Peruvian Ministry of Health and the National Authority for Civil Protection determined that Lliuya and the lives of people in his village would be especially affected by the potential for flooding. The Civil High Court in Hamm in an oral hearing accepted Lliuya's reasoning that the defendant's emissions 'advanced, to a not irrelevant degree' the probability of glacial flooding.⁹⁷ This unusual and daring lawsuit

Environmental Law, pp. 1–71. For examples of unsuccessful use of tort-based climate change claims against carbon majors in the Global North, see *Native Village of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 877 (N.D. Cal 2009), aff'd, 696 F.3d 849 (9th Cir. 2012).

⁹⁴ Since it began the investigation, the Philippines Commission on Human Rights has held several hearings around the world, garnering significant public attention, with three sittings in the Philippines as well as in New York (27–28 Sept. 2018) and London (6–9 Nov. 2018). Carbon-major corporations are also facing litigation claims in the Global North: see L. Benjamin, 'The Road to Paris Runs Through Delaware: Climate Litigation and Directors' Duties' (2020 forthcoming) *Utah Law Review*, available at: <https://www.ssrn.com/abstract=3379848>.

⁹⁵ M.L. Banda & S. Fulton, 'Litigating Climate Change in National Courts: Recent Trends and Developments in Global Climate Law' (2017) 47(2) *Environmental Law Reporter*, pp. 10121–34, at 10132.

⁹⁶ *Lliuya v. RWE*, 23 Nov. 2015 (unauthorized translation provided by Germanwatch e.v.).

⁹⁷ The *voltum* was read out in court in Nov. 2017 as a preparatory opinion, but this is an internal court document and is not publicly available.

is a real case study to educate judges and the public on how vulnerable populations in the Global South are disproportionately affected by carbon intensive corporations headquartered in the Global North.

While there are synergies in Global North and Global South strategic climate litigation, with an increasing focus on both the role of human rights and carbon major corporations in climate change, the approach taken by litigants in the Global South is particularly relevant given the precarious nature of law enforcement and human rights protection in these countries. Following this discussion of key features of emerging climate jurisprudence, we now identify what may be the main reasons underpinning innovative approaches and outcomes in Global South strategic climate litigation.

5. RATIONALE AND OUTCOMES

Pursuing a legal campaign is a lengthy, costly, and risky process for litigants, in both wealthier and poorer countries. As highlighted in [Section 2](#), litigants in Global South jurisdictions face additional challenges, from significant capacity constraints to death threats. Differing legislative backgrounds, judicial histories, and social and political contexts contribute greatly to the contrasts between Global North and Global South climate litigation. It is therefore surprising that organizations in the Global South have been investing time and resources to bring legal cases dealing with climate change, and that some have achieved a certain degree of success. The Legal Opportunity Structures approaches offer a useful framework for explaining the variables that condition access to judicial governance and also seek to account for the role of judges in the policy output process.⁹⁸ Bearing in mind the limitations resulting from the selective nature of the cases examined, we identify two reasons for innovative strategies and outcomes in the Global South: (i) how litigants are either overcoming or using procedural requirements for access to environmental justice, which in turn is combined with (ii) the existence of progressive legislation and judicial approaches to climate change.

5.1. Access to Justice

The existence of a court is only one of the conditions for granting access to justice. Litigants depend on rules relating to standing, which vary across jurisdictions, in order to be granted the right of access to courts – individually, collectively, or as a third party or *amicus curiae*. Rules governing standing to sue are a crucial dimension of Legal Opportunity Structures approaches for environmental litigation.⁹⁹

⁹⁸ Hilson was among the first to deploy the terms ‘legal opportunity’ and ‘legal opportunity structure’ to describe the conditions for social movements to pursue their goals through litigation: C. Hilson, ‘New Social Movements: The Role of Legal Opportunity’ (2002) 9(2) *Journal of European Public Policy*, pp. 238–55. Since then many other researchers have been using and developing this framework: see, e.g., B.M. Wilson & J.C.R. Cordero, ‘Legal Opportunity Structures and Social Movements: The Effects of Institutional Change on Costa Rican Politics’ (2006) 39(3) *Comparative Political Studies*, pp. 325–51; and L. Vanhala, ‘Legal Opportunity Structures and the Paradox of Legal Mobilization by the Environmental Movement in the UK’ (2012) 46(3) *Law & Society Review*, pp. 523–56.

⁹⁹ Vanhala, *ibid.*

In many developing countries, the requirements for standing have been interpreted stringently by courts.¹⁰⁰ Yet, the Global South countries where cases of strategic climate litigation have been decided (see Table 1) all allow citizen suits in their constitutions and environmental legislation.¹⁰¹ Countries such as India and the Philippines have allowed broad standing for individuals and organizations, extending to the unborn in the Philippines.¹⁰² South Asian courts, in particular, have seen much success in using public interest litigation to address environmental concerns, partly because of judicial support for the achievement of sustainable development.¹⁰³ Emeseh cites a number of cases in this region where technical standing restrictions were done away with, and very broad interpretations given to constitutional provisions to ensure access to the courts in environmental cases.¹⁰⁴ Some of these countries have also attempted to address the geographical remoteness of litigants by sending specialized buses to remote regions, as illustrated by the Philippines Supreme Court and the Brazilian state of Amazonia's Court of Environment and Agrarian Issues.¹⁰⁵ The progressive judicial outcomes identified in strategic climate litigation in the Global South can be understood as part of the history of environmental jurisprudence in these countries, combined with progressive procedural requirements which aid class action suits.

In addition to standing, financial resources and lack of expertise are yet another hurdle that litigants in the Global South need to overcome in order to secure access to justice.¹⁰⁶ The existence of legal opportunities is no guarantee that litigants will be successful in their claims. As Epp argues, 'combining rights consciousness with a bill of rights and a willing and able judiciary improves the outlook for a rights revolution, but material support for sustained pursuit of rights is still crucial'.¹⁰⁷ In the context of climate issues, the adjudication of climate cases often involves complex intersections

¹⁰⁰ Emeseh, n. 16 above, p. 603.

¹⁰¹ UN Environment, n. 21 above, p. 187.

¹⁰² Supreme Court Rules of Procedure, The Philippines, A.M. No. 09-6-8-SC (2010). The Philippines has a history of progressive environmentalism, as highlighted by *Minors Oposa v. Secretary of the Department of the Environment and Natural Resources* (1994) 33(1) *International Legal Materials*, pp. 173–206, in which the Supreme Court ruled that the plaintiffs had standing to represent generations unborn in the protection of environmental rights.

¹⁰³ Emeseh, n. 16 above, p. 602.

¹⁰⁴ *Ibid.*, citing *Shella Zia v. WAPDA*, PLD 1994 SC 693 (in which the Pakistan Supreme Court held that the right to life in the Constitution included the right to a healthy environment), *Minors Oposa*, *ibid.* (in which the Supreme Court of the Philippines allowed the plaintiffs to sue on behalf of future generations), and *Faroque v. Bangladesh*, No. 3 Sri Lanka 4–6 July 1997 (in which a broad interpretation of 'aggrieved person' was found under the Bangladesh Constitution).

¹⁰⁵ UN Environment, n. 21 above, p. 186.

¹⁰⁶ Other constraints are geographical remoteness and scarce government resources: *ibid.*, pp. 184–6.

¹⁰⁷ C.R. Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (University of Chicago Press, 1998), p. 17. Whereas the costs rules of a legal system are usually understood as part of Legal Opportunity Structures (e.g., loser-pays acts as a disincentive in taking litigation because of the risk and uncertainty), financial resources are often not conceptualized. Further discussions regarding financial hurdles in strategic litigation can be found in C.L. Arrington, 'Hiding in Plain Sight: Pseudonymity and Participation in Legal Mobilization' (2019) 52(2) *Comparative Political Studies*, pp. 310–41; L. Vanhala, 'Shaping the Structure of Legal Opportunities: Environmental NGOs Bringing International Environmental Procedural Rights Back Home' (2018) 40(1) *Law & Policy*, pp. 110–27; L. Vanhala, 'Is Legal Mobilization for the Birds? Legal Opportunity Structures and Environmental Nongovernmental Organizations in the United Kingdom, France, Finland, and Italy' (2018) 51(3) *Comparative Political Studies*, pp. 380–412.

Table 1 Selection of Global South Strategic Climate Litigation mentioned in this Article, with an Indication of the Issue Areas They Address

Country	Case	Mitigation, Adaptation, Loss and Damage	Human Rights and/or Environmental Degradation
The Philippines	<i>Philippine Reconstruction Movement and Greenpeace v. Carbon Majors</i>	Adaptation / loss and damage	Human rights
Colombia	<i>Future Generations v. Ministry of the Environment and Others</i>	Mitigation	Environmental degradation
Germany	<i>Saúl Luciano Lliuya v. RWE</i>	Adaptation / loss and damage	Environmental degradation and human rights (through the impact of loss and damage)
South Africa	<i>EarthLife Africa Johannesburg v. Minister of Environmental Affairs and Others</i>	Mitigation	Environmental degradation
Pakistan	<i>Ashgar Leghari v. Federation of Pakistan</i>	Adaptation	Human rights

between social, economic, and political interests. Limited specialist knowledge in the policy-science nexus can thus severely constrain access to justice.¹⁰⁸

To support strategic climate litigation in the Global South, philanthropists have been providing financial resources as well as technical expertise to allow cases in the Global South to be filed, and some Northern NGOs have been providing strategic support (e.g., defining media and communications strategy) to partner organizations in the Global South.¹⁰⁹ As a result, Global South climate cases brought by local communities or individuals often enjoy the support of local NGOs, which in turn are supported by transnational cooperation with NGOs located outside the jurisdiction in which the case was brought.

5.2. Progressive Legislation and Judicial Approaches

Domestic legislation is another important dimension of Legal Opportunity Structures. An existing legal framework that recognizes environmental and human rights facilitates the defence of these rights in courts. Similarly, progressive judicial approaches are central in determining precedents in strategic cases.

Cases of strategic climate litigation in the Global South have relied on using existing constitutions and legislation rather than adopting the tort-based approaches found in some cases in the Global North. The adoption of constitutions by many countries around the world over the past two decades has also been accompanied by an ‘environmental rights revolution’, with environmental problems increasingly being addressed

¹⁰⁸ UN Environment, n. 21 above, p. 183.

¹⁰⁹ Peel & Lin (n. 2 above) conducted an analysis of *amicus curiae* briefs as well as interviews with stakeholders and found that 43% of Global South litigation enjoyed local or non-local NGO support and, of those cases, 57% of non-local NGO support was from the Global North.

through the prism of human rights and constitutionalism.¹¹⁰ A number of countries in the Global South – such as Brazil, Colombia, Kenya, and Mexico – have constitutional provisions that recognize the right to a healthy environment and the role of the public prosecutor's office in the enforcement of this right against private corporations or the government. In addition to the legal culture and background doctrinal frameworks, which can provide different interpretive outcomes of climate legislation,¹¹¹ all countries in the Global South have already adopted some sort of climate law or policy.¹¹² The combination of constitutional provisions with a growing body of robust climate change legislation provides an increasingly solid basis for climate litigation.¹¹³

Yet, ultimately, the decision to enforce existing progressive environmental and/or climate legislation or, in its absence, to decide favourably for litigants in strategic regulatory climate litigation, depends on the judges. Some judges in the Global South have been drivers of innovative approaches to climate change. They have explicitly challenged legal formalism, and have been active outside the courtroom on climate change. Perhaps the clearest example of progressive judicial decision making which attempts to overcome institutional lethargy by the government can be found in the *Leghari* case.¹¹⁴

Judge Syad Mansoor Ali Shah identified adaptation as the way forward for Pakistan and developing countries generally, and interpreted existing national policies accordingly, focusing on adaptation as an integral and synergistic complement to future national planning on climate change.¹¹⁵ The Court ordered the appointment of a national focal point on climate change and members of the Climate Change Commission, and retained jurisdiction to hear progress reports. The Commission subsequently submitted a number of progress reports to the Court. In 2018 the Commission and Court determined that the remaining items on the agenda of the Commission could be implemented by the government, thereby dissolving the Climate Change Commission and replacing it with a Standing Committee on Climate Change to assist and ensure the continued implementation of Pakistan's 2012 National Climate Change Policy and its framework Climate Change Policy (2014–30). During the progress of the case, a new Climate Change Act was passed

¹¹⁰ G. Ganguly, J. Setzer & V. Heyvaert, 'If at First You Don't Succeed: Suing Corporations for Climate Change' (2018) 38(4) *Oxford Journal of Legal Studies*, pp. 841–68. R. O'Gorman, 'Environmental Constitutionalism: A Comparative Study' (2017) 6(3) *Transnational Environmental Law*, pp. 435–62, at 435–6.

¹¹¹ E. Scotford & S. Minas, 'Probing the Hidden Depth of Climate Law: Analysing National Climate Legislation' (2019) 28(1) *Review of European, Comparative and International Environmental Law*, pp. 67–81, at 72.

¹¹² Some countries have climate laws or policies which are broad and integrative in scope, such as Mexico's General Law on Climate Change. Others that do not have discrete climate legislation rely on climate-compatible development plans and adaptation and disaster management: M. Nachmany et al., 'The 2015 Global Climate Legislation Study: A Review of Climate Legislation in 99 Countries. Summary for Policy-makers', GLOBE & Grantham Research Institute on Climate Change and the Environment, 2015, p. 16; see also Townshend et al., 'How National Legislation Can Help to Solve Climate Change' (2013) 3(5) *Nature Climate Change*, pp. 430–4, at 430.

¹¹³ Environmental Law Alliance Worldwide (ELAW), 'Holding Corporations Accountable for Damaging the Climate', 2014, available at: <https://www.elaw.org/system/files/elaw.climate.litigation.report.pdf>.

¹¹⁴ *Ashgar Leghari v. Federation of Pakistan*. n. 6 above.

¹¹⁵ *Ibid.*, paras 6–7.

in 2017, illustrating how climate litigation and regulatory progress can have a cooperative relationship. While there is some scepticism as to whether the new Act will be fully implemented,¹¹⁶ the objects and reasons section of the Act notes the extreme vulnerability of the country to climate change, and the Act was passed as a result of renewed political will on the issue.¹¹⁷ The judiciary in this case took on significant policy and regulatory activities, essentially stepping into the shoes of government and establishing and directing policymaking initiatives and institutions.

Similarly, a progressive and heterodox legal reasoning was followed by the Colombian Supreme Court in the decision adopted in *Future Generations v. Ministry of the Environment and Others*. Alvarado and Rivas-Ramírez highlight how different this outcome was from the traditionally moderate jurisprudence usually adopted when applying public interest-oriented constitutional rights. The decision discussed ‘inter-generational equality and solidarity, private liability and accountability for climate change, and human dependence on the environment – topics rarely, if ever, debated by the Supreme Court’.¹¹⁸ However, the implementation of ambitious judicial orders can be challenging. Despite the decision, deforestation in the Amazon has increased over the past year, prompting the plaintiffs to seek a declaration that the government and other defendants have failed to fulfil the orders of the Supreme Court.¹¹⁹

These progressive judicial approaches may be an attempt by the judiciary to acknowledge the extreme vulnerability of their populations to climate change, while at the same time circumventing deficiencies in existing legislation or capacity constraints in enforcement. Indeed, decisions given in these strategic cases suggest that judges in the Global South are open to adapting their traditional role of administering justice to the challenges posed by climate change litigation, even if this means holding their own government accountable.¹²⁰ It is possible that climate litigation finds a stronger footing in jurisdictions that have express constitutional provisions on environmental protection.¹²¹ Nevertheless, these cases demonstrate that progress can also be made where

¹¹⁶ R.S. Khan, ‘Pakistan Passes Climate Change Act, Reviving Hopes – and Skepticism’, *Reuters*, 24 Mar. 2017, available at: <https://www.reuters.com/article/us-pakistan-climatechange-lawmaking/pakistan-passes-climate-change-act-reviving-hopes-and-skepticism-idUSKBN16V19N>.

¹¹⁷ *Ibid.*

¹¹⁸ Alvarado & Rivas-Ramírez, n. 5 above, pp. 522–4. Nevertheless, the Colombian courts have a judicial history in innovative approaches to environmental protection. For example, in 2016, the Sixth Chamber of Review of the Constitutional Court of Columbia granted rights to the Atrato River, its basin and tributaries (*Center for Social Justice Studies et al. v. Presidency of the Republic et al.*, Constitutional Court of Colombia, Judgment T-622/16, unofficial English translation available at: <http://files.harmonywithnatureun.org/uploads/upload838.pdf>).

¹¹⁹ S.A. Sierra, ‘The Colombian Government Has Failed to Fulfil the Supreme Court’s Landmark Order to Protect the Amazon’, *Dejusticia*, 5 April 2019, available at: <https://www.dejusticia.org/en/the-colombian-government-has-failed-to-fulfill-the-supreme-courts-landmark-order-to-protect-the-amazon>.

¹²⁰ Banda & Fulton, n. 95 above, p. 10131. The engagement of activist judges with climate change is also observed transnationally in the Oslo Principles on Global Climate Change Obligations to Reduce Climate Change (available at: <https://globaljustice.yale.edu/oslo-principles-global-climate-change-obligations>) and the Climate Principles for Enterprises (available at: <https://climateprinciplesforenterprises.org>). While the Principles may remain a progressive interpretation of fiduciary duties, judicial experts anticipate more progressive judicial decision making along these lines, particularly by activist jurists, as the threat of climate change and associated damage further materializes.

¹²¹ *Ibid.*, p. 10123.

no environmental constitutional provisions exist, provided judges are willing and able to take action on climate change. As exemplified by the *Leghari* case, a court that is willing to exercise an active role can guide and build regulatory capacity even where the statutory and institutional framework is ineffective.¹²² However, it might also be that in some of these cases judges have taken bold decisions on climate cases without realizing the extent to which their decisions are innovative.¹²³

6. LESSONS AND PROSPECTS

Based on the initial trends of strategic climate litigation in the Global South and taking into consideration factors that contribute to this movement, some lessons can be gleaned. In contrast to Global North cases, strategic climate litigation in the Global South is generally not asking for more ambitious regulatory action to be taken by governments, even if this is an indirect outcome of the case. This may be an implicit acknowledgement of capacity constraints as well as recognition of the climate equity implications involved. Asking national governments to implement stringent mitigation measures at the expense of poverty reduction, energy security needs or other development agendas will be taxing for the judiciary in the Global South. This is particularly pertinent in small developing countries. However, enforcing existing environmental legislation, protecting ecosystems, boosting adaptation efforts, and enhancing institutional structures – all of which may have mitigation co-benefits – can be easier tasks to achieve through the courts.

Similarly, strategic climate litigation in the Global South does not rely extensively on traditional tort-based approaches to climate damage against either state or non-state actors. Instead, litigation in the Global South relies on existing legislation to achieve climate aims, and utilizes human rights-based approaches. These approaches can find synergies with litigation in the Global North which also, and so far successfully, adopts rights-based approaches. Yet, rights-based approaches to climate litigation in the Global South make even more sense considering the high vulnerability of their populations to climate impacts. Where specific climate legislation does not exist, plaintiffs instead focus on existing legislation or human rights instruments to achieve climate-related goals.

In this context, climate litigation in the Global South may continue to lead to successful outcomes and regulatory progress. These key features of strategic climate litigation in the Global South may establish new strategic directions in climate litigation going forward.

Furthermore, it would be particularly helpful to most vulnerable populations if climate litigation in the Global South were to target addressing adaptation to climate change. While, so far, most Global South climate lawsuits focus on mitigation issues (e.g., challenging coal-fired power plants and mining of coal, preventing

¹²² *Ibid.*, p. 10134.

¹²³ Wibisana & Cornelius (n. 52 above) argue that judges might have been oblivious to the fact that they had established a novel and unique jurisprudence.

carbon-intensive practices such as timber logging and oil palm cultivation),¹²⁴ adaptation efforts by governments pay dividends in that they save lives and can be compatible with existing development plans and efforts. Finding co-benefits between developmental and climate mitigation and adaptation efforts may be a key innovation by Global South judges, which in turn can inform policymakers in the Global South.¹²⁵

It is also possible that climate litigation in the Global South will gather pace as the impacts of climate change become more frequent and severe in these countries.¹²⁶ For instance, the island state of Vanuatu is considering litigation for climate impacts from both Global North governments and corporations located in the Global North.¹²⁷ While it is unclear whether the positive outcomes so far achieved will spread to other countries in the Global South which lack these legal characteristics, it is also important not to reduce the significance of a judgment to its dispositive part. Even if a claim is dismissed, a judicial decision may highlight a need for legal change and/or help to raise social awareness, thus contributing to behavioural change.¹²⁸

Another question is whether the regulatory impacts and frameworks established in the context of Global North cases should be applied, and if necessary adjusted, in the context of the growing number of climate litigation cases in the Global South. Synergies with litigation in the Global South appear in the EIA realm. The African EIA climate cases – especially if their results are amplified by South-South partnering in subsequent cases – signal a potential growth area for future Global South climate litigation.¹²⁹ While there have not been many cases in Africa, and procedural difficulties remain,¹³⁰ if this trend takes off it would mirror the development of jurisprudence in climate litigation ‘hotspots’ in the Global North such as the US and Australia. In addition, given the history of judicial activism on environmental provisions in South Asian courts, we might observe more cases that uphold or advance climate change protection in this region as well.

¹²⁴ This was a surprising finding for Peel & Lin, n. 2 above, p. 685.

¹²⁵ Some governments in the Global South (e.g., Ethiopia, Rwanda, South Korea) are already passing legislation which focuses on climate-resilient development and green-growth strategies: see Townshend et al., n. 112 above, p. 431.

¹²⁶ UN Environment and Sabin Center for Climate Change Law, n. 35 above, p. 25, and Sabin Center, n. 34 above, p. 25.

¹²⁷ D. Drugmand, ‘Tiny Pacific Island Could File First National Climate Liability Suit’, *Climate Liability News*, 26 Nov. 2018, available at: <https://www.climateliabilitynews.org/2018/11/26/vanuatu-climate-liability-suit>.

¹²⁸ Ganguly, Setzer & Heyvaert, n. 110 above, p. 866.

¹²⁹ Peel and Lin, n. 2 above. In Australia, EIA climate cases have consolidated the practice of including climate change considerations in EIA undertaken for projects with substantial greenhouse gas emissions or the potential to be affected by climate change consequences such as sea level rise: see J. Peel, H. Osofsky & A. Foerster, ‘Shaping the “Next Generation” of Climate Change Litigation in Australia’ (2017) 41(2) *Melbourne University Law Review*, pp. 793–844, at 796.

¹³⁰ Emeseh, n. 16 above.

7. CONCLUDING REMARKS

For decades, Northern countries have been advocating collective action to protect the environment, while Southern countries have insisted that Northern countries take the lead in addressing climate change. This divide is motivated in part by tensions regarding historic responsibility for environmental degradation, concerns regarding sovereignty over natural resources, and the desire to prioritize poverty reduction and development over environmental conservation in the Global South. The new climate litigation emerging in the Global South could help to reframe the limitations observed by the climate justice movement in the context of a persistent divide between countries in the Global North and the Global South over core environmental issues. To achieve positive outcomes plaintiffs and judicial actors in the Global South are finding innovative ways to overcome significant capacity constraints, legislative deficiencies, procedural and implementation hurdles, and sometimes unsafe political environments.

Litigation does not only circumvent and bypass political partisan divides;¹³¹ it can also create fluid pathways between multiple actors at the subnational, national, and international levels.¹³² However, litigation can perhaps be more useful in the Global South in its regulatory role of creating pathways between fragmented institutional actors. It could bind together previously fragmented governance structures in the Global South to ensure that they focus on national climate goals, whether they be mitigation, adaptation, disaster management, or a combination of those aims. This regulatory outcome has already been highlighted by the progressive outcomes of the *Leghari* case where the judge mandated coherent action by government actors over time until institutional coherence on the issue was achieved.

The valuable role of litigation as a regulatory tool has begun to be seized upon in the Global South. As populations in these countries are the most vulnerable to climate impacts, and as impacts increase, the observations gleaned from an initial spate of cases may solidify into a litigation trend. The regulatory impact of this litigation in the context of the Global South may therefore provide lessons and open up new avenues for progress on climate change in these highly vulnerable countries which suffer from capacity constraints. Despite these constraints, this initial spate of strategic litigation attempts to overcome the traditional North-South divide, with litigants relying on human rights arguments, existing legislation, and progressive procedural rules to achieve climate-resilient development. The latest strategies and decisions from courts in the Global South suggest that it might be possible for the Global South to innovate and establish new trends towards climate change adaptation and mitigation in an ever more transnational climate jurisprudence.

¹³¹ H.M. Osofsky & J. Peel, 'Energy Partisanship' (2016) 65(3) *Emory Law Journal*, pp. 695–794, at 695 (although the authors note (at 761) that courts are not a 'panacea' for partisanship).

¹³² H.M. Osofsky, 'The Role of Climate Change Litigation in Establishing the Scale of Energy Regulation' (2011) 101(4) *Annals of the Association of American Geographers*, pp. 775–82.