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Climate Change Litigation and the Need for 'Radical Change'

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Abstract [En]: This article looks at climate change litigation with particular focus on the role of courts and the judiciary. It argues that contrary to current (conventional) approaches to the climate change movement, including climate change litigation, climate change is itself a novel, global, problem requiring 'radical change' to present approaches. This article reveals that present scholarship in the field of climate change litigation is unbalanced and greatly impacts the inclusion of Global South cases such that their contributions are overlooked, thus impeding the migration of knowledge. Within this, a major issue is the definition of «climate change litigation», for which a narrow approach has appeared to become the normative one despite broad agreement that the phrase is ambiguous. As global constitutionalism and rights-based claims now make headway into the Global North's fora of climate change litigation, we find that the Global South has in fact long demonstrated boldness and progressiveness to such cases; suggesting greater potential impact on litigation and the broader movement.

Abstract [It]: Questo articolo affronta il tema del contenzioso relativo ai cambiamenti climatici con particolare attenzione al ruolo della giurisprudenza. Si sostiene che, contrariamente agli attuali approcci (convenzionali) in materia di cambiamento climatico, incluso il contenzioso ad esso connesso, il cambiamento climatico sia di per sé un problema nuovo, globale, che richiede un "cambiamento radicale". Il saggio rivela che l'attuale letteratura in materia di contenzioso sui cambiamenti climatici trascura il contributo dei casi giurisprudenziali avvenuti nel Global South, così impedendo una reale contaminazione di esperienze e conoscenza. Obiettivo dell'elaborato è, tra l'altro, fornire una più precisa definizione di «contenzioso sul cambiamento climatico»: espressione polisemica per la quale, tuttavia, un'interpretazione univoca è divenuta la norma. Con riguardo al contenzioso in materia di cambiamento climatico, i tribunali del Global North stanno adesso sperimentando l'avanzata tanto del costituzionalismo globale quanto di ricorsi fondati sulla asserita lesione di diritti soggettivi. Tali "novità" sono state già vissute in modo pieno e progressivo dal Global South, così fornendo utili spunti e lezioni per il contenzioso sul cambiamento climatico e sulla sua evoluzione.

Keywords: Climate change litigation; Global South; global constitutionalism; human rights; role of the judiciary
Parole chiave: Contenzioso sui cambiamenti climatici; Global South; costituzionalismo globale; diritti umani; ruolo del formante giurisprudenziale

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1. Introduction

At the time of writing, the much anticipated COP26 held in Glasgow - presided by the UK in partnership with Italy - is well underway to mixed responses by diverse groups[1]. Barely three weeks in the leadup to

* Articolo sottoposto a referaggio.
[1] *COP26 awash with commitments but climate activists far from satisfied*, in *The Brussels Times*, 7 November 2021, available at The Brussels Times. COP26 was postponed in 2020 because of the COVID-19 pandemic and ran from 31 October 2021 to

this conference, the UN Human Rights Council declared that having a clean, healthy, and sustainable environment is a human right[2]. To go a mere few months back, Italy, in what appears to be a wave of climate claims against governments in the EU and indeed around the world, filed what has been hailed as its very first climate case in early June 2021[3]. Lesser known and more recent is a potential case before the International Criminal Court against Brazilian President Jair Messias Bolsonaro for crimes against humanity in relation to his role for damage and destruction to the Amazon forest[4].

As climate science has evolved, so too has awareness on the severity and urgency of the global environmental situation[5]. The pressure to seriously address climate change is mounting and if anything, appears poised to only increase. That world leaders used 118 private jets to attend this year's COP26 summit appears both hypocritical and much too ironic; not to mention creating further suspicion as to the seriousness of climate commitments[6]. At the summit's opening, Mia Mottley, Prime Minister of Barbados, emphasised that the «pandemic has taught us that national solutions to global problems do not work»[7]. Climate change is a singular problem «common to all»[8]. It is unique in that its occurrence, impact and solutions cannot be contained within man-made boundaries and jurisdictions. Yet, the ways in which climate change issues have been addressed appear largely limited to conventional approaches. By and large, «climate change is treated as a radical issue but forms part of the more routine practices of

12 November 2021; see further *COP26: In partnership with Italy*, available at UN Climate Change Conference UK 2021 in Partnership with Italy.

[2] United Nations Human Rights Council, *The Human Right to a Clean, Healthy and Sustainable Environment*, A/HRC/48/L.23/Rev.1, 5 October 2021; United Nations General Assembly, *Resolution adopted by the Human Rights Council on 8 October 2021*, A/HRC/RES/48/13, 18 October 2021. Russia, India, China and Japan abstained from the vote.

[3] C. PIOVANO, *Climate Change Litigation in Italy: The Dawn of a New Era?*, in *Clifford Chance*, June 2021, available at Clifford Chance; *Climate Claims against Governments in Europe*, in *Cleary* Gottlieb, 16 July 2021, available at Cleary Gottlieb; *Giudizio Universale*, available at Giudizio Universale: Invertiamo Il Processo (English version available at *Giudizio Universale*) («*The Last Judgment*»).

[4] ALLRISE, *Communication under Article 15 of the Rome Statute of the International Criminal Court regarding the Commission of Crimes Against Humanity against Environmental Dependents and Defenders in the Brazilian Legal Amazon from January 2019 to present, perpetrated by Brazilian President Jair Messias Bolsonaro and certain former and current principal actors of his administration*, 12 October 2021, available at Sabin Center for Climate Change Law; see also *The Planet v. Bolsonaro*, available at Sabin Center for Climate Change Law.

[5] H. LE TREUT – R. SOMERVILLE – U. CUBASCH – Y. DING – C. MAURITZEN – A. MOKSSIT – T. PETERSON – M. PRATHER, *Historical Overview of Climate Change Science*, in S. SOLOMON – D. QIN – M. MANNING – Z. CHEN – M. MARQUIS – K.B. AVERYT – M. TIGNOR – H.L. MILLER (edited by), *Climate Change 2007: The Physical Science Basis*, Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change, Cambridge University Press, Cambridge, 2007, p. 95, available at Intergovernmental Panel on Climate Change. See also *A Brief History of Climate Change*, in *BBC*, 20 September 2013, available at BBC News.

[6] O. WILLIAMS, *118 Private Jets Take Leaders To COP26 Climate Summit Burning Over 1,000 Tons Of CO2*, in *Forbes*, 5 November 2021, available at Forbes.

[7] S. AUSTIN, *Prime Minister Mottley: Closing Of Gaps Required*, in *Barbados Government Information Service*, 1 November 2021, available at Barbados Government Information Service.

[8] LORD R. CARNWATH, *Foreword*, in *Climate Change, Coming Soon to a Court Near You: Climate Litigation in Asia and the Pacific and Beyond*, Asian Development Bank, December 2020, p. xiii, available at Asian Development Bank.

disaggregated governance that typify our response to climate change»[9]. It is «radical change [that] is precisely what is required to address the climate crisis»[10].

As climate change issues gain traction and support, the methods through which these issues are addressed have contemporaneously developed to now involve a greater - and more diverse - pool of actors. Courts have begun to play an increasingly important role in addressing climate change, making the judiciary significant in the development of climate change action. Climate-related litigation has increased dramatically in the last few years, particularly when we look at the years since 2015 following the adoption of the Paris Agreement[11]. This applies to various levels and jurisdictions, whether domestic or international and before different judicial and quasi-judicial bodies[12]. It is within this context of necessary radical change that this article addresses climate change litigation and the role of courts. This article argues that "radical change" necessarily applies to all relevant fora of action including scholarship and courts. After all, one cannot expect a novel problem to be solved by plainly conventional approaches.

For comparative purposes, a discussion on definitions of climate change litigation is imperative to achieving methodical soundness that accordingly includes definitional consistency and conceptual precision[13]. Accordingly, the following section addresses the definition of climate change litigation; discussing the apparent lack of an established definition, including some scholars' own attempts to capture in words, of what is meant by the term. This section reveals that despite agreeing that there is no fixed definition of climate change litigation, or climate litigation, scholars and practitioners have continuously applied a definition to the exclusion of potentially useful cases in their scholarship. Mostly, excluded cases hail from the Global South whose judiciaries have appeared to demonstrate more willingness to execute bold and novel attempts at addressing environmental issues.

Section 3 then reviews current literature on the role of courts and the judiciary vis-à-vis climate issues. It discusses the notion of judicial activism, particularly in jurisdictions where the political question doctrine applies, and whether climate issues are justiciable. It examines the underexplored potential of global constitutionalism and contributions that Global South cases could make that is presently impeded by definitional constraints as discussed in section 2.

Section 4 examines a few select cases that have not made it into influential climate change litigation databases namely, the Sabin Center for Climate Change Law («Sabin Center») and the Grantham Research

[9] K. BOUWER, *Lessons from a Distorted Metaphor*, in *Transnational Environmental Law*, vol. 9, n. 2, 2020, p. 354.
[10] J. U. GALPERIN – D. A. KYSAR, *Uncommon Law: Judging in the Anthropocene*, in J. LIN – D. A. KYSAR (edited by), in *Climate Change Litigation in the Asia Pacific*, Cambridge University Press, 2020, p. 35.
[11] P. TOUSSAINT, *Loss and Damage and Climate Litigation: The Case for Greater Interlinkage*, in *Review of European, Comparative & International Environmental Law*, vol. 30, n. 1, 2020, p. 17.
[12] *Ibid*.
[13] L. VANHALA – C. J. HILSON, *Climate Change Litigation: Symposium Introduction*, in *Law & Policy*, vol. 35, n. 3, 2013, p. 144.

Institute on Climate Change and the Environment («Grantham Institute»[14]). The assessment is by no means exhaustive, of course. Instead, through a few select cases, this article highlights why definitions of climate change litigation—particularly those employed by these influential databases—should be more inclusive to the benefit of the broader climate change movement[15]. Because of the extensive use of these two databases in scholarship and practice, they serve as a measure in this article for what presently appears to be normatively perceived as a climate change litigation case.

A restrictive definition of climate change litigation ultimately leads to an unbalanced and skewed understanding of the phenomena. It also creates and fosters a bias that unsurprisingly excludes the Global South and the contributions it has and can make to future litigation in the area. Embedded in these issues is an artificial division between what accounts for «environmental issues» and «climate change issues». Instead of asserting the distinctiveness of climate change, climate change should perhaps be viewed as a subset of an ecology of environmental issues all of which play a part in the healthy longevity of the Earth. If the climate change movement is to succeed in persuading authorities toward genuine change in attitudes and approaches, then the movement itself, including scholarship in the field, needs to similarly amend current approaches. Scholarship and practice will no doubt impact on the knowledge of judges amongst other actors, as well as its migration, creating a positive flow-on effect in the field.

This article therefore seeks to narrow the literature gap on climate change litigation in the Global South as well as to present a view on how Global South cases can contribute to Global North approaches, ultimately benefitting the climate change movement as a whole[16]. It broadly highlights what it views as fundamental issues within climate change scholarship and the wider movement, as well as the potential of courts and the contributions of Global South jurisprudence in the field. The matters raised in this article are by no means examined exhaustively nor to extensive depth due to space constraints; instead urging for and serving as an additional nudge towards further scholarship in these matters, particularly as cases such as *The Last Judgment* come before courts.

[14] Sabin Center for Climate Change Law, available at Sabin Center for Climate Change Law; Grantham Institute on Climate Change and the Environment, available at Grantham Institute on Climate Change and the Environment; see also M. BURGER – J. GUNDLACH, *The Status of Climate Change Litigation – A Global Review*, United Nations Environment Programme, New York, 2017, p. 10, fn 12.

[15] In this article, «climate movement» is used to refer to the global collective advocating for (stronger) action on climate-related issues. This includes what the Sabin Center refers to as «pro-climate litigants and their allies». Sabin Center for Climate Change Law, *About*, available at Sabin Center for Climate Change Law.

[16] J. SETZER – L. BENJAMIN, *Climate Change Litigation in the Global South: Constraints and Innovations*, in *Transnational Environmental Law*, vol. 9, n. 1, 2020, p. 84; J. SETZER – L. C. VANHALA, *Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance*, in *Wiley Interdisciplinary Reviews Climate Change*, vol. 10, n. 3, 2019, pp. 1-19.

2. What is Climate Change Litigation?

The matter of how one defines climate change litigation is as broad as the subject-matter of climate change itself, with «as many understandings of what counts as 'climate change litigation' as there are authors writing about the phenomenon»[17]. In theory, any case before a court, quasi-judicial body and/or local decision-making body that so much as brushes the subject-matter could conceivably fall under the category of climate change litigation[18]. Climate change litigation can range from matters of government permits for fossil fuels projects to the implementation of climate change adaptation plans[19]. It can also encompass «anything from a claimant appealing to a court to enforce existing climate laws to which the defendant is legally bound, to a claimant challenging the validity of a climate law»[20]. As Peel and Osofsky observe, the diversity in literature on the matter is reflective of «the breadth of climate change itself»[21]. Almost a decade ago, Vanhala and Hilson recognised the diversity of typologies that have sought to address the issue[22]. Peel's and Osofsky's more recent work outlines some of the different approaches to the issue of defining climate change litigation:

- Those that include only cases expressly raising issues of climate change policy or science;
- Those that include cases motivated by climate change concerns;
- Those that include consequences for addressing climate change even if the litigation itself is not expressly framed in climate change terms;
- Those that include judgments issued by courts;
- Those that include decisions issued by quasi-judicial bodies (including settlement decisions);
- Those that include only cases with pro-regulatory focus; and
- Those that include cases brought by industry players challenging regulatory measures[23].

Clearly, much variance exists as to what constitutes a climate change case or climate change litigation. This, however, should not prevent scholars and practitioners from attempting to develop one that most benefits the climate change movement.

[17] J. SETZER – L. C. VANHALA, *op. cit.*, p. 3.
[18] C. J. HILSON, *Climate Change Litigation: A Social Movement Perspective*, in *Legal and Criminological Consequences of Climate Change*, IISL, Onati, Spain, 29-30, April 2010, p. 2, available at SSRN.
[19] J. SETZER – L. BENJAMIN, Climate Change *Litigation in the Global South*, *cit.*, p. 83.
[20] H. VAN ASSELT – M. MEHLLING – C. K. SIEBERT, *The Changing Architecture of International Climate Change Law*, in G. VAN CALSTER – W. VANDENBERGHE – L. REINS (edited by), *Research Handbook on Climate Change Mitigation Law*, Edward Elgar, Cheltenham, 2015, p. 23.
[21] J. PEEL – H. M. OSOFSKY, *Climate Change Litigation*, in *Annual Review of Law and Social Science*, vol. 16, 2020, p. 23.
[22] L. VANHALA – C. J. HILSON, *Climate Change Litigation*, *cit.*, pp. 141-149.
[23] J. PEEL – H. M. OSOFSKY, *Climate Change Litigation*, *cit*, p. 23.

2.1. A Normative Definition?

Given the variety of definitions on climate change litigation, scholars in the field appear to agree on one matter – that the «contours of what constitutes climate litigation are unclear»[24]. Yet, what has become evident, is that despite this broad agreement that a lack of definition exists, scholars and practitioners appear to have increasingly adopted a definition employed by leading institutions such as the Sabin Center and the Grantham Institute[25]. The latter explains the type of cases classified as climate change litigation included in their database:

To fall within the scope of the database, cases must satisfy two key criteria. Firstly, cases must generally be brought before judicial bodies (though in some exemplary instances matters brought before administrative or investigatory bodies are also included). Secondly, climate change law, policy or science must be a material issue of law or fact in the case. Cases that make only a passing reference to climate change, but do not address climate-relevant laws, policies, or actions in a meaningful way are not included[26].

Further, the Sabin Center notes that since 2018, cases that were not brought before judicial bodies as well as those involving other judicial actions and proceedings have been removed from the database. They estimate about 100 cases being removed from the database in November 2021[27]. The Center recognises the limits of its collection methodology, including «meaningful limits» on researchers, in order to «help define climate litigation as a distinct field»[28]. However, given the largely indivisible nature of climate change itself and «other» issues within the purview of the environment, such narrow focus on climate litigation appears artificial.

In sum, climate change litigation in scholarship and practice is thus frequently defined along Markell's and Ruhl's definition, as «any piece of federal, state, tribal, or local administrative or judicial litigation in which the party filings or tribunal decisions directly and expressly raise an issue of fact or law regarding the substance or policy of climate change causes and impacts»[29]. For instance, the Grantham Institute

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[24] J. SETZER – L. BENJAMIN, Climate Change *Litigation in the Global South*, *cit.*, p. 83; see also K. BOUWER, *The Unsexy Future of Climate Change Litigation*, in *Journal of Environmental Law* 2018, vol. 30, p. 487 («There is no universal or definitive boundary around what might be called 'climate change litigation'.»); D. HOURNUNG – D. A. KYSAR – J. LIN, *Introduction*, in J. LIN – D. A. KYSAR (edited by), in *Climate Change Litigation in the Asia Pacific*, Cambridge University Press, 2020, pp. 2-3; L. J. KOTZÉ – A. DU PLESSIS, *Putting Africa on the Stand: A Bird's Eye View of Climate Change Litigation on the Continent*, in *Environmental Law*, vol. 50, n. 3, 2020, p. 613 («the absence of generally accepted criteria that determine what a climate change case is»).

[25] M. BURGER – J. GUNDLACH, *The Status of Climate Change Litigation*, *cit.*, p. 10, fn 12.

[26] Grantham Institute on Climate Change and the Environment, *Methodology – Litigation*, available at Grantham Institute on Climate Change and the Environment; see also Sabin Center for Climate Change Law, *About*, *cit.*

[27] Sabin Center for Climate Change Law, *op.cit.*

[28] *Ibid.*

[29] D. MARKELL – J. B. RUHL, *An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual*, in *Florida Law Review*, vol. 64, n. 1, 2012, p. 27.

uses «lawsuits brought before administrative, judicial and other investigatory bodies, in domestic and international courts and organisations, that raise issues of law or fact regarding the science of climate change and climate change mitigation and adaptation efforts»[30]. This definition has also been employed by the United Nations Environment Programme, as reflected in their 2017 and 2020 reports on climate change litigation[31].

Two issues arise from the use of this definition. Firstly, while such a definition at once appears broad and can be most helpful in capturing a wide range of climate change litigation across jurisdictions, the employment of this definition excludes those that, while not necessarily using the words «climate change» in their filings, could also impact future litigation strategies and ultimately, regulation, policy, and the law on climate change. The argument for employing this definition is that although such cases may succeed in a court of law or equivalent decision-making body, they do not necessarily contribute to «any discrete body of law bearing a direct connection to climate change issues»[32]. However, and as the cases in section 4.1 will show, «instrumental effects will occur whether or not the full extent to which the subject matter of the litigation interfaces with climate change, is acknowledged»[33]. After all, the distinction between environmental issues and climate change is itself unclear[34]. While it may be that fewer climate change cases—in its strictest definition—arise from the Global South, the exclusion of cases that are not strictly focused on climate change, or that raise instances of law, fact, or policy relating directly to climate change, serves to disadvantage the broader climate movement as a whole.

Secondly, while scholars and practitioners seem to agree that «there is great variance of definitions in legal scholarship on the topic»[35], they have often contemporaneously employed the same definition used in the work of institutions such as the Sabin Center and the Grantham Institute[36]. As more scholarship

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[30] J. SETZER – R. BYRNES, *Global Trends in Climate Change Litigation: 2020 Snapshot*, Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science, London, July 2020, p. 5. See also D. MARKELL – J. B. RUHL, *An Empirical Assessment of Climate Change in the Courts*, *cit.*, pp. 15–86; M. BURGER – J. GUNDLACH, *The Status of Climate Change Litigation*, *cit.*

[31] M. BURGER – J. GUNDLACH, *The Status of Climate Change Litigation*, *op.cit*, p. 10 («[The report] counts as "climate change litigation" cases brought before administrative, judicial and other investigatory bodies that raise issues of law or fact regarding the science of climate change and climate change mitigation and adaptation efforts.»); M. BURGER – D. J. METZGER, *Global Climate Litigation Report: 2020 Status Review*, United Nations Environment Programme, Nairobi, 2020, p. 6, see especially fn 3 («This definition also guides the collection of cases included in the Sabin Center for Climate Change Law's U.S. and Non-U.S. Climate Change Litigation charts, as well as the Climate Change Laws of the World database, maintained jointly by the Sabin Center for Climate Change Law and the Grantham Research Institute at the London School of Economics») available at United Nations Environment Programme.

[32] D. MARKELL – J. B. RUHL, *An Empirical Assessment of Climate Change in the Courts*, pp. 26-27.

[33] K. BOUWER, *The Unsexy Future of Climate Change Litigation*, *cit.*, pp.485-486.

[34] I. ALGONA – E. CLIFFORD, *Climate Change Litigation: Comparative and International Perspectives*, British Institute of International and Comparative Law, London, 2021, p. 17, available at British Institute of International and Comparative Law.

[35] P. TOUSSAINT, *Loss and Damage and Climate Litigation*, *cit.*, p. 20.

[36] See, for e.g., I. ALGONA – E. CLIFFORD, *Climate Change Litigation*, *cit.*, pp. 2-3.

and research develop on the basis of this definition—and particularly when influential bodies in the field do—this definition of climate change litigation begins to cement to become the normative approach. This becomes problematic because, when seen in light of the cases captured under this definition, the exclusion of Global South cases is apparent. A question abounds, then, of whether the study of climate change litigation—and, perhaps, the climate change movement as a whole—has created and fostered a bias that ultimately mostly reflects the activities of the Global North.

Scholarship on climate change litigation is presently unbalanced with far greater focus on the Global North, particularly on a few select high-profile cases[37]. Further, Setzer and Benjamin also note that academic endeavours in the climate change field emanate largely from Global North scholars whose work concentrate on those select high-profile cases in North America, Europe, and Australia[38].

Additionally, hyper focus on select high-profile cases such as *Urgenda*[39] serves to undermine true understandings of where litigation can or cannot support climate change policy by overlooking «invisible» or «peripheral» cases. Bouwer suggests that a preferable way to think about the issue is to consider the distinction between litigation «in the context of climate change», and «litigation 'about' climate change» such that those «peripheral» cases are not overlooked[40]. As Bouwer highlights, «invisible» issues of climate change and inadvertent climate litigation through mundane matters that interact with domestic climate policy remain underexplored[41]. Maintaining what appears to increasingly be the normative approach to defining climate change litigation will inevitably exclude those cases that could contribute to more holistic and clearer understandings of how litigation impacts the climate change movement as a whole. Furthermore, that climate change itself is not a geographically and jurisdictionally isolated issue serves to further justify a more inclusive approach. As Alogna and Clifford point out, the vast majority of cases that come before courts are «routine» cases that «focus on more mundane aspects or results of climate change»[42].

2.2. Towards a More Inclusive Definition

A definition of climate change litigation, or climate litigation, that can capture both cases «about» and «in the context of» climate change would improve the extent and quality of research in the field. Kotze and

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[37] J. SETZER – L. BENJAMIN, *Climate Change Litigation in the Global South*, *cit.*, p. 84; J. SETZER – L. C. VANHALA, *Climate Change Litigation*, *cit.*, pp. 1-19; D. HOURNUNG – D. A. KYSAR – J. LIN, *Introduction*, *cit.*, p.6.
[38] J. SETZER – L. BENJAMIN, *Climate Change Litigation in the Global South*, p. 84
[39] *The State of the Netherlands v Urgenda Foundation*, ECLI:NL:HR:2019:2007, No. 19/00135, 20 December 2020, English translation available at Urgenda: Samen Sneller Duurzaam («*Urgenda*»).
[40] K. BOUWER, *The Unsexy Future of Climate Change Litigation*, *cit.*, p. 484; see also J. PEEL – J. LIN, *Transnational Climate Litigation: The Contribution of the Global South*, in *The American Journal of International Law*, vol. 113, n. 4, 2019, p. 692.
[41] K. BOUWER, *The Unsexy Future of Climate Change Litigation*, *op. cit.*, p. 484.
[42] I. ALGONA – E. CLIFFORD, *Climate Change Litigation*, *cit.*, p. 4.

Du Plessis suggest that «climate change litigation could be defined as all litigious means offered by judicial and quasi-judicial fora to adjudicate juridical conflicts emanating directly from the risks and impacts of climate change»[43]. This then allows for capturing both the causes and consequences of climate change. The Asian Development Bank (ADB), adopts a broader definition too:

any case that is brought before judicial courts and administrative or specialized tribunals that (i) raises climate change as a central issue; (ii) raises climate change as a peripheral issue; or (iii) does not explicitly raise climate change but has ramifications for climate change mitigation or adaptation efforts, e.g., recognition of intergenerational responsibility[44].

The ADB recognises that while the «normative» approach as employed by the Sabin Center and Grantham Institute is broad enough to capture *some* cases that do not explicitly address climate issues, it remains too narrow to address issues such as biodiversity, ecosystem resilience and adaptive responses[45]. These matters not only have ramifications for climate change, but are more acutely experienced in the Asia and pacific regions. How scholars and practitioners define climate change litigation and the cases within, to the perhaps unwitting exclusion of certain large geographical areas, has served to disadvantage and even undermine the broader climate change movement.

3. The Role of the Judiciary

Do the Courts have a role in providing a forum for litigation wherein those injured by climate change may seek relief against parties allegedly causing or contributing to this phenomenon? My answer is: How could they not? These are the civil rights cases of the 21st Century. Civil rights cases have historically invoked the authority of all three branches of government, with each having an important and vital part in promoting and protecting the rights and liberties of the people[46].

Scholarly interest in climate change litigation since the early 2000s has seen a marked increase[47], leading to what Peel and Osofsky have identified as a «climate litigation explosion[48]». For instance, there is «a growing body of legal literature [that] considers the role of litigation in preventing and addressing loss and damage and finds that litigation risks for governments and business are bound to increase with

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[43] L. J. KOTZÉ – A. DU PLESSIS, *Putting Africa on the Stand*, *cit.*, p. 615.

[44] Asian Development Bank, *Climate Change, Coming Soon to a Court Near You*, *cit.*, p. 7, available at Asian Development Bank.

[45] *Ibid.*, pp. 8-9.

[46] JUDGE T. COFFIN, *American Courts in Climate Emergency*, in *International Union for Conservation of Nature*, 16 July 2019, p. 3, available at International Union for Conservation of Nature.

[47] J. SETZER – L. C. VANHALA, *Climate Change Litigation*, *cit.*, p. 2.

[48] J. PEEL – H. M. OSOFSKY, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy*, Cambridge University Press, Cambridge, 2015, p. xi.

improved understanding of impacts and risks as climate science evolves (high confidence[49])». The role of courts and the judiciary have thus been placed in larger spotlight, prompting questions—and examinations—of various issues including judicial activism[50], the role of the judiciary in adjudicating climate change matters in constitutional democracies[51], and responses of the judiciary to such cases before them[52]. More extreme opinions on the role of courts in climate change can typically be heard from one party to the proceedings. Shell, for instance, asserts that the issue of climate change should not be addressed by courts[53]. It seems as though, at the heart of these questions and examinations, is the fundamental issue of whether courts are the appropriate forum for what appear to be polycentric policy issues[54]. In other words, are matters of climate change justiciable? Do courts, as a forum to advance climate agendas (or, defend climate rights) risk strict separation of powers between the judiciary, legislative and executive such that «judicial activism» see judges attempt to fill a «governance gap»[55]?

3.1. Justiciability and Global Constitutionalism

Climate change cases have been subject to justiciability jurisprudence particularly in jurisdictions such as the United States and Canada where the political question doctrine presents a historical constitutional defence[56]. The political question doctrine serves to demarcate «the boundary between political and legal questions»[57]. Fernando argues that courts in the United States, particularly those lower than the Supreme Court, tend to employ a more «principled», «classic» approach to the question; whereas Canadian courts, having been more encouraged by jurisprudence of the United Kingdom, tend to centralise statutory interpretation thus framing the question of justiciability in climate change cases more broadly[58].

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[49] J. ROY – P. TSCHAKERT – H. WAISMAN, *Sustainable Development, Poverty Eradication and Reducing Inequalities*, in *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, 2018, p. 456, available at Intergovernmental Panel on Climate Change.

[50] H. COLBY – A. S. EBBERSMEYER – L. M. HEIM – M. K. RØSSAAK, *Judging Climate Change: The Role of the Judiciary in the Fight Against Climate Change*, in *Oslo Law Review*, vol. 7, n. 3, 2020, pp. 168-185.

[51] L. BURGERS, *Should Judges Make Climate Change Law*, in *Transnational Environmental Law*, vol. 9, n. 1, 2020, pp. 55-75.

[52] K. F. KUH, *The Legitimacy of Judicial Climate Engagement*, in *Ecology Law Quarterly*, vol. 46, 2019, pp. 731-764.

[53] *Milieudefensie zet klimaatzaak tegen Shell door*, 28 May 2018, available at Milieudefensie («Shell stelt vandaag dat de 'energietransitie niet in de rechtbank thuishoort'»).

[54] I. FERNANDO, *Litigating Climate Change – Of Politics and Political Questions: A Comparative Analysis of Justiciability of Climate Change in the United States and Canada*, in *Victoria University of Wellington Law Review*, vol. 49, 2018, pp. 315-340.

[55] L. VANHALA – C. J. HILSON, *Climate Change Litigation*, *cit*., p. 143.

[56] D. MARKELL – J. B. RUHL, *An Empirical Assessment of Climate Change in the Courts*, *cit*., p. 77; see, for e.g., *Comer v Murphy Oil USA* 585 F 3d 855 (5th Cir 2009); *Connecticut v American Electric Power Co Inc.* 582 F 3d 309 (2nd Cir 2009); *Friends of the Earth v Canada (Governor in Council)* 2008 FC 1183 [2009] 3 FCR 201; *Turp v Canada (Minister of Justice)* 2012 FC 893, [2014] 1 FCR 439.

[57] L. M. SOSSIN, *Boundaries of Judicial Review: The Law of Justiciability in Canada*, Carswell Legal Publications, Toronto, 1999, p. 133.

[58] I. FERNANDO, *Litigating Climate Change*, *cit*., pp. 316-317.

This is contrasted with other jurisdictions such as the European Union where «there is no obvious political question doctrine in EU law» and where instead, «hints» of such doctrine exist through caselaw[59]. Other constitutional defences can include the standing doctrine, and procedural and substantive due process[60]. From the climate cases that have come before courts, courts generally do not appear receptive to claims that seek to advance climate justice[61]. However, with more recent developments in high-profile cases such as *Leghari*[62] and *Urgenda*,[63] constitutionalism—and accordingly, rights-based claims—appears to provide a way forward for the climate change movement through litigation[64]. As Pustorino suggests, national jurisprudence on this front is crucial to filling in the gaps on environmental protection particularly where legislative provisions are ambiguous or silent[65].

The underexplored potential impact of global constitutionalism – defined as «constitutional ideas [that] have migrated (or have served as negative models) around the world» – on climate change issues should therefore be addressed[66]. The underexploration of this area is probably unsurprising given most national constitutions do not contain explicit rights pertaining to the climate or environment in general; and that arguably this is part of what the climate change movement seeks to achieve. Italy's Constitution, for instance, «does not include a provision giving its citizens a right to a healthy environment»[67]. Pozzo's conclusion therefore, is that, «unfortunately—the possibility for individuals to act on such a provision is not possible»[68].

[59] G. BUTLER, *In Search of the Political Question Doctrine in EU Law*, in *Legal Issues of Economic Integration*, vol. 45, n. 4, 2018, pp. 329 – 354.
[60] B. MANK, *Standing for Private Parties in Global Warming Cases: Traceable Standing Causation Does Not Require Proximate Causation*, in *Michigan State Law Review*, 2012, pp. 869-932; J. R. MAY, *Fashioning Procedural and Substantive Due Process Arguments in Toxic and Other Tort Actions Involving Punitive Damages After Pacific Mutual Life Insurance Co v. Haslip*, in *Environmental Law*, vol. 22, n. 2, 1992, pp. 573-622.
[61] J. R. MAY – E. DALY, *Global Climate Constitutionalism and Justice in the Courts*, in J. JARIA-MANZANO – S. BORRÁS (edited by), *Research Handbook on Global Climate Constitutionalism*, Edward Elgar Publishing Ltd., Cheltenham, 2019, p. 238.
[62] *Ashgar Leghari v. Federation of Pakistan*, Lahore High Court Green Bench (W.P. No. 25501/2015), 4 September 2015 ('*Leghari*').
[63] *Urgenda*, *cit.*
[64] The term «constitutionalism» is used broadly in this article. It refers to a State's constitution as well as other bodies of law that guarantee the fundamental rights of a people or community such as the African Charter on Human and People's Rights ('Banjul Charter'). Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights* ('Banjul Charter'), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).
[65] P. PUSTORINO, *Cambiamento Climatico e Diritti Umani: Sviluppi Nella Giurisprudenza Nazionale*, in *Ordine Internazionale e Diritti Umani*, (2021), p. 599 («*la giurisprudenza nazionale sembra prefiggersi il duplice obiettivo, da un lato di colmare le lacune di natura e contenuto di taluni obblighi pattizi in materia di protezione dell'ambiente, dall'altro lato di verificare la conformità rispetto alla disciplina sui diritti umani delle legislazioni nazionali adottate, per ragioni di adeguamento alle norme previste nell'Accordo di Parigi, in tema di contrasto al cambiamento climatico*»).
[66] R. ABERYRATNE, *Global Constitutionalism Reconfigured through a Regional Lens*, in *Global Constitutionalism*, vol. 10, n. 2, 2021, p. 331.
[67] B. POZZO, *The Italian Path to Climate Change: Nothing New Under the Sun*, in F. SINDICO – M. M. MBENGUE (edited by), *Comparative Climate Change Litigation: Beyond the Usual Suspects*, Springer, Cham, 2021, p. 474.
[68] *Ibid.*

However, *The Last Judgment*—hailed as Italy's first climate case—bases its claims against the state, *inter alia*, on Articles 2 and 32 of the Italian Constitution where Article 32 enshrines the fundamental right to health[69]. The suit brought against the Italian state alleges violation of the Italian Constitution and points to the disparity between declaration and action[70]. While this certainly does not necessarily mean that the Italian court would find in favour of the plaintiffs based on interpretation of the constitution, it does reflect the growing use of constitutionalism in climate-related cases. Furthermore, Article 117 of the Italian Constitution not only empowers legislative functions on the State vis-à-vis its EU and international obligations, but more specifically in its function to legislate for the «protection of the environment [and] the ecosystem»[71]. As Greco points out, a constitutional provision that speaks specifically to the protection of the environment is insufficient; balance of principles and interpretation are key to the application of such provisions in climate cases[72].

Importantly for our purposes, a lack of attention in this area leaves out those jurisdictions whose constitutions not only explicitly and directly protect such rights, but also those whose constitutions have the potential to do so. Additionally, though many states whose constitutions speak directly to environmental or climate rights are located in the Global South, scholarship on those jurisdictions remain absent[73]. The irony is that courts in the Global South have long relied on constitutional, or rights-based, interpretation to advance environmental rights; but because such cases have not been captured as climate change litigation, they have often been excluded in the study of the subject.

Interestingly, the Netherlands – where «superstar» case *Urgenda* was adjudicated – adopts what Jackson identifies as the Convergence Model vis-à-vis the relationship between domestic constitutions and law with transnational sources[74]. Articles 93 to 94 of the Constitution of the Netherlands provides that national regulations must not contravene binding international treaties and resolutions[75]. To this end, the case of *Urgenda* and the interpretation of Articles 2 and 8 of the European Convention on Human Rights

[69] C. PIOVANO, *Climate Change Litigation in Italy*, *cit*.

[70] L. SALTALAMACCHIA – R. CESARI – M. CARDUCCI, *"Giudizio Universale" Quaderno di Sintesi dell'Azione Legale*, pp. 6-7, see section 3, «Dovere è agire: la contraddizione statale tra il dire e il fare» available at Giudizio Universale.

[71] Article 17(q), Italian Constitution, English available at Ministero dell'Interno. See further Italian Constitutional Court (2007) decisions n. 348 and n. 349 on the right to health.

[72] M. GRECO, *La dimensione costituzionale dell'ambiente. Fondamento, limiti e prospettive di riforma*, in *Quaderni Costituzionali*, vol. 41, n. 2, June 2021, p. 290. («*Detto altrimenti, l'affermazione di un valore ambientale in seno alla Costituzione, per quanto fondamentale, non consentirebbe da sola di sciogliere i nodi problematici attorno alla misura entro cui lo stesso è condiviso nell'ordinamento costituzionale e quindi nel definire quale peso debba essere assegnato al suddetto valore nelle operazioni di bilanciamento con altri interessi costituzionalmente rilevanti*»). See further Italian Constitutional Court Ruling no. 85/2013.

[73] See, for e.g., Constitution of the Dominican Republic (2015), Title IC, Ch. 1, Article 194; Constitution of Venezuela (2009) Title III, Ch. IC, Article 127; Constitution of Vietnam (2013), Ch. III, Art. 63, Sec. 1; Constitution of Tunisia (2014), Title 2, Art 45; see, especially, Constitution of Thailand (2017), Chapter XVI, Sec. 258(g)(1); Constitution of Ecuador (2008), Tit. VII, Ch 2, Section 7, Art 414; Constitution of Tunisia (2014), Tit 2, Art. 45.

[74] V. C. JACKSON, *Constitutional Comparisons: Convergence, Resistance, Engagement*, in *Harvard Law Review*, vol. 119, 2005, p. 112.

[75] Constitution of the Netherlands (2008), Articles 93-94.

('ECHR') relied foremost on such convergence. The Supreme Court of the Netherlands found that «[p]ursuant to Articles 93 and 94 of the Dutch Constitution, Dutch courts must apply every provision of the ECHR that is binding on all persons»[76].

While the Netherlands exemplifies one type of «convergence» so provided for in the constitution itself, judicial review where national judges adopt «generic» constitutional law into their own systems provides another example of such possibility[77]. Law explains that «[t]o expound a constitution—any constitution—is to draw upon and contribute to a body of principle, practice, and precedent that transcends jurisdictional boundaries. Commonalities emerge across jurisdictions because constitutional law develops within a web of reciprocal influences, in response to shared theoretical and practical challenges»[78]. The exclusion of cases—particularly Global South cases—thus serves to disadvantage the climate change movement as a whole when examining the strategic employment of litigation to achieve broader climate goals[79]. «Cross-pollination» across jurisdictions within regions and the Global North and South, no doubt, needs to occur alongside civil collaboration in order to create the momentum for necessary change[80]. Perhaps, had this happened sooner, *Urgenda* could have been an earlier victory.

Within this landscape, judicial interpretation becomes key. The methods and reasonings through which judges interpret constitutional provisions, or other provisions of law for that matter, will evolve and serve to develop the law overtime. In this regard, judges are also responsible for the evolution of society. In Justice Kennedy's words, «The nature of injustice is that we may not always see it in our own times…[the authors] entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord… a claim to liberty must be addressed»[81]. Judicial action in matters of climate change «is not misplaced activism»; global constitutionalism fits too with adopting truly global approaches to a global problem[82].

4. Climate Change Litigation in the Global South

Peel's and Lin's examination of the contribution of climate change litigation in the Global South reveals that much of these cases have «taken place largely below the radar»[83]. In large part, this is due to the definition of climate change litigation that has served to exclude such cases. In their assessment of 34

[76] *Urgenda*, *cit.*
[77] D. S. LAW, *Generic Constitutional Law*, in *Minnesota Law Review*, vol. 89, n. 3, 2005, pp. 652-742.
[78] *Ibid.*, p. 659.
[79] See, generally, Asian Development Bank, *Climate Change, Coming Soon to a Court Near You*, *cit.*
[80] I. ALGONA – E. CLIFFORD, *Climate Change Litigation*, p. 17.
[81] *Obergefell et al. v. Hodges et al.* 576 U.S.__(2015), p. 11.
[82] Asian Development Bank, *Climate Change, Coming Soon to a Court Near You*, *cit*, p. 224; S. AUSTIN, *Prime Minister Mottley*, *cit*.
[83] J. PEEL – J. LIN, *Transnational Climate Litigation*, *cit.*, p. 701.

cases from the Global South, and using a more inclusive definition of climate change litigation, Peel and Lin observe that «notable case law developments» have taken place in the Global South[84].

Peel's and Lin's work has been important in identifying key trends among Global South cases in the field. Namely, that Global South cases (a) tend to feature climate change at the periphery; (b) indicate that the use of an Environmental Impact Assessment as a ground of action or requirement is a potential area of growth in climate litigation; (c) make up a substantial number of rights-based litigation; (d) make little reference to the Paris Agreement or seek to enforce climate legislation; (e) reveal receptiveness to arguments based on the public trust doctrine compared to Global North jurisdictions; and (f) feature a high degree of NGO support[85].

The authors also identify three characteristics of Global South cases. Aside from a prevalence in rights-based claims, Global South cases also exhibit a preference for the enforcement of existing laws «rather than pushing for new or better climate laws»[86]; and address climate change «in a more indirect fashion because of traditions of judicial restraint and limited judicial review operating in these jurisdictions»[87]. While the preceding appear true of climate change cases in the Global South, it also appears that judges in the Global South demonstrate greater willingness in offering broader interpretations of constitutional provisions and other rights-based bodies of law compared to their Global North counterparts when it comes to environmental protection that impacts climate change.

4.1. The Impact of Global South Cases: A Case for Greater Inclusion

Minors Oposa[88] is considered a landmark case in environmental law. In the early 1990s in the Philippines, a petition was granted to cancel existing timber licence agreements and to halt receiving, accepting, processing, renewing or approving new timber licence agreements[89]. The Supreme Court of the Philippines found that while the right to a balanced and healthful ecology is not contained in the Bill of Rights, but instead in the Declaration of Principles and State Policies, it is not less important than any other civil or political rights. The Court found:

[84] I*bid*., p. 701. Peel's and Lin's study surveyed 21 cases that were included in the Sabin Center's and Grantham Institute's databases; and 13 others that were not in these databases but whose argument or decision included climate change 'at the periphery'.
[85] *Ibid*., pp. 702-710.
[86] *Ibid*., p. 715.
[87] *Ibid*., 716.
[88] Supreme Court of the Philippines, *Minors Oposa v. Secretary of the Department of Environment and Natural Resources (DENR)*, 33 I.L.M. 173, 30 July 1993 («*Minors Oposa*»).
[89] *Ibid*.

Such a right belongs to a different category of rights altogether for it concerns nothing less than self-preservation and self-perpetuation — aptly and fittingly stressed by the petitioners — the advancement of which may even be said to predate all governments and constitutions…[T]hese basic rights need not even be written in the Constitution for they are assumed to exist from the inception of humankind…[U]nless the rights to a balanced and healthful ecology and to health are mandated as state policies by the Constitution itself, thereby highlighting their continuing importance and imposing upon the state a solemn obligation to preserve the first and protect and advance the second, the day would not be too far when all else would be lost not only for the present generation, but also for those to come — generations which stand to inherit nothing but parched earth incapable of sustaining life[90].

In *Siraji Waiswa v. Kakira Sugar Works Ltd* in November 2001, a temporary injunction was sought by the farmers of Butamira forest reserve to restrain Kakira Sugar Works Ltd from uprooting the forest, and from intimidating, threatening, evicting, or interrupting in any way Butamira's residents use and occupation of the land prior to the conclusion of the main suit[91]. The High Court of Uganda found that «a matter to do with destruction of the environment would affect not only parties to this suit but also current generations to generations to come. Damages to the applicant alone would not remedy the injury to mankind as a whole»[92]. The injunction was accordingly granted.

The main suit, *Advocates Coalition for Development and Environment (ACODE) v. Attorney General* was grounded, *inter alia*, on contravention of the Ugandan Constitution and statutory provisions by issuing Kakira Sugar Works Ltd a permit to use the land and grow sugar cane in Butamira forest reserve; and in the absence of an Environmental Impact Assessment («EIA»)[93]. Firstly, the Ugandan High Court found that under Article 50 of the constitution, the Butamira people had standing to bring suit[94]. Secondly, the Court found that the public trust doctrine is enshrined in the Ugandan Constitution within Article 237 and that Butamira land was held by the government in public trust and can only grant concessions in relation to the use of the land «with authority from parliament and with consent from the local community in the area or district where the reserved land is situated»[95]. Thirdly, and borrowing from the Indian Supreme Court in *MC Mehta Vs Umar of Indian and others*, the Court found that the right to a clean

[90] *Ibid.*, pp. 187-188.
[91] High Court of Uganda at Jinja, *Siraji Waiswa v. Kakira Sugar Works Ltd*, Misc. Application No. 230/2001(Arising from Civil Suit No. 69/2001), 29 November 2001.
[92] *Ibid.*, p. 3.
[93] High Court of Uganda at Kampala, *Advocates Coalition for Development and Environment (ACODE) v. Attorney General*, Miscellaneous Case No. 0100 of 2004, 13 July 2005 ('*ACODE*').
[94] Constitution of Uganda (1995), Article 50 «Enforcement of Rights and Freedoms by Courts:
(1) Any person who claims that a fundamental or other right or freedom guaranteed under this Constitution has been infringed or threatened, is entitled to apply to a competent court for redress which may include compensation.
(2) Any person or organisation may bring an action against the violation of another person's or group's human rights».
[95] High Court of Uganda at Kampala, *Advocates Coalition for Development and Environment (ACODE) cit.*, p. 16

and healthy environment contained within the National Environment Act «covers intellectual, moral, cultural, spiritual, political and social wellbeing»[96]. Accordingly, the Butamira people should not have been deprived of their land without consultation and without performance of an EIA; to do so would have violated «constitutional and statutory duty to conserve the environment and natural resources equitably and for the benefit of both the present and future generations»[97].

In the *SERAC* case, the Social and Economic Rights Action Centre and the Center for Economic and Social Rights filed a complaint to the African Commission on Human and Peoples' Rights («African Commission») against the Nigerian government for violating the rights of the people of Ogoni by virtue of the government's action and inaction in regulating multinational corporations engaged in oil exploitation in Ogoniland[98]. Among the complaints is the refusal of the government to require an EIA, the destruction of the Ogoni people's environment, and the «resulting contamination of water, soil and air» by the activities of the oil companies[99]. The African Commission found that Articles 16 and 24 of the African Charter recognises «the importance of a clean and safe environment that is closely linked to economic and social rights in so far as the environment affects the quality of life and safety of the individual»[100]. The Commission further noted that Article 24 of the African Charter «imposes clear obligations upon a government. It requires the State to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to ensure an ecologically sustainable development and use of natural resources»[101]. The decision also cited Article 12 of the International Covenant on Economic, Social and Cultural Rights, reiterating a government's responsibility to take necessary steps to improve all aspects of environmental and industrial hygiene[102].

All cited cases above are not found within the Sabin Center's nor the Grantham Institute's databases; they are not defined as a «climate change litigation» case. In their latest 2021 Policy Report on climate change litigation trends, Setzer and Higham point out that «[j]udicial decisions are particularly material in 'climate commitment' cases brought against governments, but it should be noted that climate-related cases of all types – even those that contain no explicit mention of climate change – may have important

[96] Indian Supreme Court, *MC Mehta Vs Umar of Indian and others AIR 1988* Supreme Court 1037; *Ibid.*, p. 22
[97] High Court of Uganda at Kampala, *Advocates Coalition for Development and Environment (ACODE)*, *op.cit.*, p. 22
[98] African Commission on Human and Peoples' Rights, *Social and Economic Rights Action Centre and the Center for Economic and Social Rights v Federal Republic of Nigeria*, Decision, Communication 155/96, at the 30th Ordinary Session in Banjul, The Gambia, 13-27 October 2001 («*SERAC*»).
[99] *Ibid.*, paras. 1-5.
[100] *Ibid.*, para. 51.
[101] *Ibid.*, para. 52.
[102] *Ibid.*

regulatory consequences»[103]. What is deemed a non-climate litigation case may have equal and/or as much meaningful contribution to climate change issues as those defined as «climate change litigation».

In fact, in *In Greenpeace Southeast Asia and Others* (more commonly known as the «Carbon Majors case»)—a case that is listed on both the Sabin Center's and Grantham Institute's databases—the petition to the Philippines' Commission on Human Rights against «carbon majors» on their obligations and responsibilities under the UN Guiding Principles on Business and Human Rights («UNGP») is, in part, grounded in the findings of *Minors Oposa*[104].

«Adjunct» environmental rights were included in the petition to the extent that such rights are human rights involving civil and political rights and therefore holds jurisdiction within the Commission on Human Rights[105]. In the Petitioners' following Memorandum to the Commission, *Minors Oposa* was again raised, urging the interpretation of the UNGP in accordance with, *inter alia*, the «*Oposa Doctrine*» of «intergenerational responsibility»[106]. *Minors Oposa*'s finding that the «right to a healthy environment is a basis for the enjoyment of other human rights» speaks directly to the «carbon majors» climate polluting activities[107]. Although the Commission has yet to publish its findings allowing for closer examination, an announcement was made as to its findings. The Commission found that while legal responsibility under international human rights law does not yet exist for climate damage, «carbon majors» have a clear moral responsibility. Further, on civil laws in the Philippines, «it may also be possible to hold companies criminally accountable "where they have been clearly proved to have engaged in acts of obstruction and willful obfuscation"»[108]. It is foreseeable that such «moral responsibility» stems, at least in part, from intergenerational responsibility as well as the enjoyment of other human rights.

Similarly, the 1994 case of *Shehla Zia and others vs. WAPDA* was a watershed moment in Pakistan's environmental law and yet is not included in these influential databases despite forming the basis for many future environmental cases including those strictly considered climate cases[109]. By defining the term

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[103] J. SETZER – C. HIGHAM, *Global Trends in Climate Change Litigation: 2021 Snapshot*, Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science, London, July 2021, p.18.

[104] Republic of the Philippines, Commission on Human Rights, «Petition To the Commission on Human Rights of the Philippines Requesting for Investigation of the Responsibility of the Carbon Majors for Human Rights Violations or Threats of Violations Resulting from the Impacts of Climate Change», *In Re: National Inquiry on the Impact of Climate Change on the Human Rights of the Filipino People and the Responsibility therefor, if any, of the "Carbon Majors"*, Case No. CHR-NI-2016-0001, 22 September 2015, available at Sabin Center for Climate Change Law.

[105] *Ibid.*, pp 6, 18.

[106] Republic of the Philippines, Commission on Human Rights, «Memorandum for the Petitioners», *In Re: National Inquiry on the Impact of Climate Change on the Human Rights of the Filipino People and the Responsibility therefor, if any, of the "Carbon Majors"*, Case No. CHR-NI-2016-0001, 19 September 2019, para. 6.9, available at Sabin Center for Climate Change Law.

[107] *Ibid.*, para. 8.65.

[108] *In re Greenpeace Southeast Asia and Others*, available at Sabin Center for Climate Change Law; *In re Greenpeace Southeast Asia et al*, available at Grantham Research Institute on Climate Change and the Environment.

[109] *Shehla Zia and Others v.s. WAPDA*, P L D 1994 Supreme Court 693 («*Shehla Zia*»).

«life» in Article 9 of the Constitution of Pakistan, and by reading the provision with Article 14, the Court allowed the petition and effectively found that a fundamental and constitutional right to life includes the right to a clean and healthy environment[110]. The Court in this instance also found that «[c]onstitutional rights are higher than the legal rights conferred by law be it municipal law or the common law», thus paving the way for rights-based claims[111]. The Court's findings were guided, *inter alia*, by the U.S. Constitution and its definition of «life», as well as constitutional and public interest cases in India, and international environmental instruments such as the Rio Declaration 1972[112]. In particular, *Shehla Zia* formed an important part of the «superstar» climate case, *Leghari*, where violations to Mr. Leghari's fundamental rights enshrined in Articles 9 and 14 were alleged to have occurred[113]. The Court in *Leghari* found that Pakistan's «environmental jurisprudence from *Shehla Zia case* to *Imrana Tiwana case*… has weaved [Pakistan's] constitutional values and fundamental rights with the international environmental principles»[114]. These two cases further lends credence to Greco's suggestion that specific constitutional provisions speaking directly to environmental rights or protections are insufficient; balance of principles and interpretation are key[115].

The preceding cases, while neither all nor exclusively reliant on interpretations of the constitution per se, demonstrate not only boldness in addressing environmental issues related to rights-based environmental claims and ultimately issues related to climate change; but also a migration of ideas. *SERAC* reiterates and reaffirms that human rights are indivisible; and was progressive in its indication that the African Commission «will not hesitate to make thorough and detailed recommendations that urge governments to oblige with their socio-economic obligations, as set out in the African Charter, beyond the boundaries of available resources and progressive realization»[116]. Although the African Commission is a quasi-judicial body and has no power to issue orders, its non-binding decisions carry normative weight that are crucial to the region's human rights system as well as broader movements in the field[117]. In *ACODE* the public trust doctrine was upheld *vis* the environment within the context of the constitution and bolstered by the

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[110] *Ibid.*, pp 712-715; see also Q. UZ-ZAMAN, *Pakistan's Judiciary weighs in on environmental challenges with some success*, in *The Third Pole*, 24 February 2021, available at The Third Pole. Article 9 of the Constitution of the Islamic Republic of Pakistan 1973 reads «No person shall be deprived of life or liberty save in accordance with law». Article 14 of the Constitution of Pakistan reads «(1) The dignity of man and, subject to law, the privacy of home, shall be inviolable. (2) No person shall be subjected to torture for the purpose of extracting evidence», available at Pakistani.org.
[111] *Shehla Zia*, *cit.*, p. 712.
[112] *Ibid.*, p. 715.
[113] *Leghari*, *cit.*, paras. 3, 20.
[114] *Ibid.*, para. 20.
[115] M. GRECO, *La Dimensione Costituzionale dell'Ambiente*, *cit.*, p. 290.
[116] M. VAN DER LINDE – L. LOUW, *Considering the Interpretation Implementation of Article 24 of the African Charter on Human and Peoples' Rights in light of the SERAC Communication*, in *African Human Rights Law Journal*, vol. 3, 2003, pp. 178, 186.
[117] F. ABIOYE, *Advancing Human Rights Through Environmental Rule of Law in Africa*, in M. ADDANEY – A. O. JEGEDE (edited by), *Human Rights and the Environment Under African Union Law* (Palgrave Macmillan, Cham, 2020, p. 91.

use of an external jurisdiction's interpretation. It demonstrates the court's willingness and readiness to ensure—and advance—environmental protection that will no doubt impact on climate change and its broader movement[118]. Likewise, *Minors Oposa* and *Shehla Zia* were instrumental in advancing broader environmental rights-based claims that have formed the basis for recent high-profile climate change litigation cases where the latter is often cited as «the case that set the ball rolling for environmental law litigation in Pakistan»[119]. The examples above also reflect the importance in the migration of ideas and «cross-pollination», to which scholarship is central.

Comparing these cases and the respective decisions or judgments to a more recent, high-profile «climate change litigation» case, the majority in the Ninth Circuit Court of Appeals in *Juliana v. United States* found that courts could not «step into» the shoes of other branches of government[120]. Two judges had moved to dismiss the case for lack of standing and that their «claimed injuries» are not «redressable»[121]. The majority found that «courts must on occasion refrain from answering those questions that are truly reserved for the political branches, even where core constitutional precepts are implicated»[122]. May and Daly argue that the court could have reached a different conclusion by not re-animating the political question doctrine under the guise of the standing doctrine; and by making clear that the plaintiffs sought *declaratory* relief rather than a remedial plan[123].

Of course, the facts, contexts and legal arguments of each case differ; not to mention the legal, political, social and economic traditions as well as landscapes in which these cases have been adjudicated. One can also argue that seeking declaratory relief and where appropriate ordering the government to develop and implement a plan to reduce emissions is quite different from putting a halt to the issuance of logging licences and the like[124]. However, when one considers, for instance, that the Supreme Court of the Philippines was so bold as to declare that there are «basic rights [that] need not even be written in the Constitution for they are assumed to exist from the inception of humankind», the court in *Juliana* appears regressive in comparison. Consider, too, that the preceding cases occurred decades before high-profile cases such as *Juliana* and *Urgenda* and were not only considered progressive for their time but continue to be so even when measured by present-day litigation developments.

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[118] C. SOYAPI, *A Multijurisdictional Assessment of the Judiciary's Role in Advancing Environmental Protection in Africa*, in *Hague Journal on the Rule of Law*, n. 12, 2020, p. 323.

[119] W. MIR, *From Shehla Zia to Asghar Leghari: Pronouncing Unwritten Rights is More Complex than a Celebratory Tale*, in J. LIN and D. KYSAR (edited by), *Climate Change Litigation in the Asia Pacific*, Cambridge University Press, 2020, p. 270.

[120] United States Court of Appeals for the Ninth Circuit, 17 January 2020, *Juliana v. United States*, 947 F.3d 1159, 1164 (9th Cir. 2020), 1172-1173.

[121] *Ibid.*, 1169.

[122] *Ibid.*, 1185.

[123] J. MAY and E. DALY, *Can the U.S. Constitution Encompass a Right to a Stable Climate? (Yes, it Can.)*, in *Journal of Environmental Law and Policy*, vol. 39, n. 1, 2021, pp. 61-62.

[124] *Ibid.*, p. 62.

5. Conclusion

To argue for the exclusion of cases such as those above on the basis that they do not contribute to «any discrete body of law bearing a direct connection to climate change issues»[125], is to cement the artificial division between «environmental issues»/«environmental law» and «climate change issues»/«climate change law». This plays into the same conventional wheel of approaches that governments and institutions have adopted in response to climate change – «a radical issue» that uses «routine practices of disaggregated governance»[126]. While the potential for courts and their judiciaries to advance climate change responses remain, scholarship in the field needs to contemporaneously adopt more inclusive (and therefore more progressive) approaches. The migration of knowledge and ideas, including means of legal interpretation and other legal scholarship, necessarily demands such an approach[127].

Furthermore, excluding Global South jurisdictions in analyses of climate change litigation not only leaves out those who presently feel the impact of climate change the most, but also serves to impede broader strategies of the movement globally and regionally. Ultimately, this impacts those populations who more acutely experience the consequences of climate change. To this end, it is notable that at no stage of the proceedings in *Urgenda* was the impact of climate change already existent in the Dutch Caribbean raised—category five hurricane, Irma, for instance[128].

«Cross-pollination» across jurisdictions, and greater collaboration and inclusion needs to occur to bring effective moment and change to the climate change movement[129]. As Judge Saton remarked, «[n]o case can singlehandedly prevent the catastrophic effects of climate change…the mere fact that [a] suit cannot alone halt climate change does not mean that it presents no claim suitable for judicial resolution»[130]. Progression in the climate change movement requires progression across all relevant fora of action.

125 D. MARKELL – J. B. RUHL, *An Empirical Assessment of Climate Change in the Courts*, *cit.*, p. 26-27.
126 K. BOUWER, *Lessons from a Distorted Metaphor*, *cit.*, p. 354.
127 Wewerinke-Singh and McCoach, for instance, highlight that «legal scholarship has a role to play in explaining how equity and CBDRRC are operationalized in these scenarios so that decision-makers, litigants and judges can make informed decisions about their use in practice». M. WEWERINKE-SINGH – A. MCCOACH, *The State of the Netherlands v Urgenda Foundation: Distilling Best Practice and Lessons Learnt for Future Rights-based Climate Litigation*, in *Review of European, Comparative and International Environmental Law*, vol. 30, n. 2, 2021, p. 280.
128 *Ibid.*, p. 281.
129 I. ALGONA – E. CLIFFORD, *Climate Change Litigation*, *cit.*, p.17.
130 *Juliana v. United States*, *cit.*, 1175, Staton J dissenting.