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SYMPOSIUM ON JACQUELINE PEEL & JOLENE LIN, "TRANSNATIONAL CLIMATE LITIGATION: THE CONTRIBUTION OF THE GLOBAL SOUTH"

CLIMATE CHANGE LITIGATION IN THE GLOBAL SOUTH: FILLING IN GAPS

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New scholarship has identified trends, constraints, and opportunities for climate litigation in the Global South. While countries in the Global South tend to experience a lack of capacity within government agencies, civil society, and the judiciary, the Global South is not a homogenous group. Where climate litigation has been identified, the judiciary is often implementing government policy prescriptions in the absence of detailed climate legislation or filling enforcement gaps. But there are also a number of countries where climate litigation is not taking place or where gaps exist between ongoing litigation and traditional definitions of climate litigation. The scholarship is yet to further explore the relationship between climate legislation and litigation in the Global South, in particular in circumstances where ripe policy and legislative conditions for climate litigation exist. Taking into account different regional and national experiences, this essay explores that relationship.

Trends in Climate Litigation in the Global South: The Legislation-Litigation Nexus

Until recently, we had a very limited understanding of how the Global South was engaging with climate change litigation.[1] Climate litigation in the Global South started almost twenty years later than in the Global North, and academic examination of climate litigation has been very North-centered.[2] In their timely article, Jaqueline Peel and Jolene Lin have countered this tendency and helped set the foundations for understanding climate litigation in the Global South.[3] Their scholarship has provided a more nuanced and sophisticated lens through which to understand trends, constraints, and opportunities for climate litigation in the Global South. Yet there is still a need to further explore the relation between climate legislation and litigation.[4]

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[1] Lisa Vanhala, *The Comparative Politics of Courts and Climate Change*, 22 Envtl. Pol. 447 (2013); Meredith Wilensky, *Climate Change in the Courts: An Assessment of Non-U.S. Climate Litigation*, 26 Duke Envtl. L. & Pol'y Forum 131 (2015); Joana Setzer & Lisa Benjamin, *Climate Litigation in the Global South: Constraints and Innovations*, 8 Transnat'l Envtl. L. 1 (2019).

[2] Joana Setzer & Lisa C. Vanhala, *Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance*, 10 WIREs Climate Change 1 (2019). Of the 130 articles identified up to September 2018, only five focused on litigation or litigation-related issues in the Global South.

[3] Jacqueline Peel & Jolene Lin, *Transnational Climate Litigation: The Contribution of the Global South*, 113 AJIL 679 (2019).

[4] Setzer & Vanhala, *supra note* 2, at 8. The same lacuna affects climate litigation in the Global North.

Among other contributions, Peel and Lin identified regional and national variation in terms of the types of cases observed across Global South countries. For instance, in Africa human rights figure in the majority of the cases identified. A rights-based approach might also prove fruitful in Latin America due to progressive constitutional protections for environmental rights in that region.[5] Another common trend in Global South climate litigation is that litigants in the cases identified tend to rely on existing non-climate-specific legislation, with climate change appearing in the "periphery" in 59 percent of cases.[6] Peel and Lin hypothesize that climate cases in the Global South only indirectly implicate climate change, among other reasons, because of (i) limited access to justice, (ii) absence of climate law frameworks, and/or (iii) poor implementation of existing frameworks.[7] This hypothesis raises questions around the relation between climate legislation and litigation in the Global South.

The principle of (i) access to justice, which is usually operationalized through rules on standing,[8] has been interpreted stringently in many developing countries.[9] Financial constraints further limit access to justice, as litigating often involves paying attorneys and court fees (and recovering costs from the defendant if successful), and legal aid for civil litigation is rationed in terms of types of cases and/or ability to pay. However, there are also countries in the Global South with progressive climate or environmental rights legislation where litigants have been able to overcome countervailing dynamics of capacity constraints.[10] Our analysis of Global South jurisdictions where cases of strategic climate litigation have been decided suggests that all of these countries allow citizen suits in their constitutions and/or environmental legislation.[11] Broad interpretations of constitutional provisions have also ensured access to the courts in some environmental cases.[12]

The (ii) absence of climate frameworks in itself cannot explain the limited number of explicit climate change cases in the Global South. Indeed, virtually all countries in the Global South have already adopted some sort of climate law or policy. The Grantham Research Institute's Climate Change Laws of the World database identifies climate laws and policies in ninety-six developing countries. These laws and policies introduce an overarching legislative framework or strategies to address climate change mitigation and/or adaptation.[13] While policies might not be justiciable, climate laws form a potential legal basis upon which further action can be built.

[5] *Id.* at 706–07.

[6] *Id.* at 703. Cases where climate change does not appear (or only appears in passing or incidentally) in the pleadings or judgments are not included in their analysis.

[7] Peel & Lin, *supra* note 3, at 692.

[8] Vanhala, *supra* note 1.

[9] Engobo Emeseh, *Limitations of Law in Promoting Synergy Between Environment and Development Policies in Developing Countries: A Case Study of the Petroleum Industry in Nigeria*, 24 J. Energy Nat. Resources, 574, 603 (2006).

[10] UN Env't Programme, Environmental Rule of Law: First Global Report 187 (2019).

[11] Setzer & Benjamin, *supra* note 1.

[12] Setzer & Benjamin, *supra* note 1 (citing *Shella Zia v. WAPDA*, PLD, 1994 SC 693, where the Pakistan Supreme Court held that the right to life in the Constitution included the right to a healthy environment; *Minors Oposa v. Secretary of Department of Environment and Natural Resources*, where the Supreme Court of the Philippines allowed plaintiffs to sue on behalf of future generations; and *Faroque* v. *Bangladesh,* where a broad interpretation of "aggrieved person" was found under the Bangladesh Constitution).

[13] These include laws (passed by national legislative branches) and policies (decrees, strategies, and plans issued by national executive branches). The Global South countries that have climate laws and/or policies are: Afghanistan, Algeria, Angola, The Bahamas, Bangladesh, Barbados, Belarus, Benin, Brazil, Burkina Faso, Cambodia, Cameroon, Chile, China, Colombia, Cook Islands, Costa Rica, Côte d'Ivoire, Cuba, Djibouti, Dominica, Dominican Republic, Ecuador, Egypt, El Salvador, Eritrea, Ethiopia, Fiji, Gabon, Gambia, Ghana, Grenada, Guatemala, Guyana, Haiti, Honduras, Indonesia, Jamaica, Jordan, Kenya, Kiribati, Lao People's Democratic Republic, Liberia, Madagascar, Malawi, Malaysia, Maldives, Mali, Marshall Islands, Mexico, Micronesia, Mongolia, Montenegro, Morocco, Mozambique, Myanmar, Namibia, Nauru, Nepal, Nicaragua, Niger, Nigeria, Niue, Pakistan, Palau, Panama, Papua New Guinea, Paraguay, Peru, Philippines,

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The (iii) implementation of climate laws and policies/plans is frequently where the challenges lie. Global South countries face well-known barriers to implementing legislation, including weak and fragmented institutions, incomplete legal foundations, and limited political will.[14] Many countries lack the resources, infrastructure, technology, and monitoring facilities needed to support effective enforcement. When environmental or climate institutions are established, these are often poorly resourced, with fragmented structures. Additionally, environmental and climate legislation may not match existing technical, economic, and human resource limitations.[15] Furthermore, climate policies and implementation efforts initiated by centralized ministries and departments are rarely replicated or replicable in provinces and remote areas.

However, the Global South is not a homogenous group. Countries in this category have varying levels and types of governance arrangements, administrative capacity, economic development, societal cohesion, inequality, and climate vulnerabilities. An exploration of the nexus between climate litigation and climate legislation across different national contexts reflects this diversity.

In China, for example, courts have acted as collaborators in the regulatory process, interpreting and engaging with strong government-led efforts to mitigate climate change.[16] Most of the litigation to date has involved contractual disputes (including in the area of energy services contracts), and courts have relied on government policy documents to fill in gaps in the absence of more detailed climate regulation.[17] In keeping with the country's civil law tradition, courts in China have contributed to the further entrenchment of climate regulation by actively relying on government-led climate policies.[18] This trend reflects the centralizing influence of the Chinese government (and its low-carbon policies) on the judiciary.[19]

In South Africa, courts are not only enforcing existing legislation, but also establishing new goals by interpreting existing legislation to require additional climate considerations. As in China, the government dominates the climate governance process. However, litigation offers a route for civil society to push for enhanced legislation and targets and to implement existing or inferred ones.[20] The *Earthlife Africa Johannesburg* case relied on existing environmental legislation to require climate considerations in environmental permitting.[21] Since the *Earthlife* decision, the government passed a Carbon Tax Act, which came into effect in June 2019.[22] The Government also proposed a Climate Change Bill that would establish a set of frameworks and a mandate to develop climate plans at national, provincial, and local government levels.[23] The draft Climate Change Bill, if adopted, would oblige the Minister of Environment, Forestry, and Fisheries to establish binding national greenhouse gas emission-reduction trajectories

Rwanda, Saint Lucia, Samoa, Seychelles, Sierra Leone, Solomon Islands, South Africa, Sri Lanka, Suriname, Swaziland, Taiwan, Tajikistan, Tanzania, Thailand, Tonga, Trinidad and Tobago, Turkmenistan, Tuvalu, Uganda, Ukraine, United Arab Emirates, Uruguay, Vanuatu, Vietnam, Zambia, and Zimbabwe.

[14] Allen Blackman, *Can Voluntary Environmental Regulation Work in Developing Countries? Lessons from Case Studies*, 36 Pol'y Stud. J. 119, 120 (2008).

[15] Sarika Singh & Sriram Rajamani, *Issue of Environmental Compliance in Developing Countries*, 47 Water Sci. & Tech. 301, 301 (2003).

[16] Yue Zhao et al., *Prospects for Climate Change Litigation in China*, 8 Transnat'l Envtl. L. 351 (2019).

[17] *Id.* at 358–59.

[18] *Id.* at 364.

[19] *Id.* at 352.

[20] Louis J. Kotzé & Anél du Plessis, *Putting Africa on the Stand: A Bird's Eye View of Climate Litigation on the Continent*, Or. J. Envtl. L. & Litig. (forthcoming).

[21] (19529/2015) [2017] ZAWCHC 50.

[22] *See* Climate Change Laws of the World, Grantham Research Institute on Climate Change and the Environment (2019) (reporting on the Carbon Tax Act).

[23] Climate Change Bill 2018, Government Gazette, Vol. 636, No. 41689 at 8 (June 2018).

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and to allocate targets for sectors and subsectors. Despite these new regulatory developments, the most immediate pressure for climate action may come from enhanced use of existing laws.[24]

The picture in India looks different, with courts issuing orders to implement existing non-climate-specific regulation in the areas of tourism and transportation, combined with general environmental constitutional provisions, to ensure more climate-friendly outcomes. Decades-long traditions of progressive environmental constitutionalism, public interest litigation, and judicial activism have led to increased regulatory action by the judiciary, supplementing administrative capacity and implementation gaps. In the *Rohtang Pass* case, the National Green Tribunal in India connected poorly implemented traffic regulations and unregulated tourism to climate change-related glacial retreat.[25] Based on environmental provisions in the Indian Constitution, the judge ordered the immediate reforestation of the area, as well as a number of regulatory actions, including less vehicular traffic, a ban on heavy vehicles or vehicles over fifteen years of age, and a green tax on vehicles.[26]

In Pakistan, dynamic judicial and legislative interactions illustrate new opportunities for advancing climate action in highly vulnerable countries. The *Ashgar Lehari* petition led to the establishment by the judge of a Climate Change Commission, pursuant to the existing National Climate Change Policy 2012, which had yet to be implemented. The Commission invited members from government ministries and departments, as well as civil society organizations, academia, and the scientific community, and issued sixteen recommendations that were all accepted by the judge. One recommendation was to establish a Climate Change Authority, which was later included in the Climate Change Act of 2017.[27] But while the decision ensured that government departments build their capacities, there is still a need for committed political will, as well as resources for implementation of climate actions.

Where Climate Litigation is Absent

What is less well understood is the absence of climate litigation in countries that experience delayed or lack of implementation of climate legislation. Indeed, there are Global South jurisdictions where conditions appear ripe for climate litigation (e.g., jurisdictions where there is existing climate legislation and access to justice) but the issue of climate change has yet to reach the courts, or at least has not done so in an explicit way. An area of further research would be to explore potential avenues for climate litigation in jurisdictions where no climate cases or only non-climate-explicit cases have been brought but where ripe legislative and procedural conditions exist.

Brazil, for example, has a promising but still untested legislative toolbox for climate litigation. It has a robust legal system, a well-established judiciary, and a wide range of independent political actors with legal capacity to file class actions involving state and private liability for environmental and human rights offences.[28] The Brazilian legal system offers a broad range of legal tools that can be used in both judicial and administrative proceedings. The precautionary principle, the polluters-pay principle, and the duty to protect the environment for current and future generations are all enshrined in the Constitution, and the parliament has passed an environmental criminal law (1998), a well-crafted National Climate Law (2009), and a comprehensive Forest Code (2012). The country

[24] Brendon Abdinar, *Explainer: Here's How Climate Change Law Will Affect the Way You Do Business in South Africa*, Daily Maverick (July 11, 2019).

[25] Sher Singh v. State of Hp, National Green Tribunal, Principal Bench, New Delhi (Feb. 6, 2014).

[26] *Id.* at paras. 22–30.

[27] Parvez Hassan, *Judicial Commissions and Climate Justice in Pakistan*, Asia Pacific Judicial Colloquium on Climate Change: Using Constitutions to Advance Environmental Rights and Achieve Climate Justice, Lahore, Pakistan (Feb. 26–27, 2018).

[28] Joana Setzer et al., Climate Litigation: New Frontiers for Environmental Law in Brazil (Editora Revista dos Tribunais, 2019).

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also has transparency legislation (2011) and a highly regulated financial system, which demands environmental and social risk assessment from financial institutions.[29]

While poor implementation of legislation is endemic, most civil society organizations in Brazil refrain from relying on courts to apply existing legislative tools. Instead, public prosecutors and public defenders are key players in the country's litigation landscape, filing thousands of environmental lawsuits every year. For example, in 2018 the Federal Public Prosecutor's office alone filed over 1,400 cases to tackle deforestation or demand compensatory measures for environmental damage. However, the obvious relationship between deforestation and climate change is not mentioned once in the filings.[30] So far, only a handful of cases have mentioned climate change as an issue related to the claims.[31]

The Brazilian example illustrates how conditions such as climate legislation combined with access to justice are not the only ingredients necessary for litigants. This may be symptomatic of other developing countries that are "missing" any, or at least any explicit, climate litigation cases. Are these gaps intentional, due to "stealthy" strategies where climate change is packaged with other environmental issues that are less controversial?[32] Or are the gaps unintentional, simply due to broader capacity issues? Where environmental or climate legislation exists, lack of implementation is rife,[33] but a combination of intentional and unintentional factors may affect rates of climate-explicit litigation. Civil society organizations that attempt to fill governance gaps can be subject to threats and intimidation and even killed.[34] Cases where climate change is not mentioned could still be relevant for reducing emissions and promoting adaptation, even if not explicitly framed as climate litigation.

Conclusion

In an ideal world, governments, civil society, and the private sector would be investing their efforts in climate action, rather than bringing and being involved in litigation. However, a growing sense of the "climate emergency" is turning strategic litigation into a tool to address climate change. Around the globe, particularly in the Global North, advocates resort to courts to press national governments into climate action and seek compensation from major emitters. In spite of significant constraints, litigants in the Global South are starting to use climate change arguments in efforts to combat ongoing environmental degradation and, on a doctrinal level, to link climate change and human rights.

Climate change still suffers from a lower public policy salience in Global South countries. While stealthily packaging climate change matters with a range of other issues is not a problem per se, combining rights consciousness with a willing and able judiciary creates an opportunity to highlight the imperatives of climate change generally, and might improve the outlook for a rights revolution.[35] If litigation is to contribute to a climate change rights revolution, litigants and the judiciary in the Global South will need support. Limited specialist knowledge in the policy-science nexus can severely constrain access to justice. In addition, climate litigation trends will only broaden and deepen if public prosecutors, public defenders, civil society groups, and judges in the Global South have more specific knowledge about climate change, its policies and laws, and the ways in which climate litigation is taking place in other jurisdictions.

[29] Brazilian Central Bank Resolution 4,327/14.

[30] *MPF Instaura 1,4 Mil Ações Contra Desmatamentos Ilegais com área Igual ou Superior a 60 Hectares na Amazônia*, Ministerio Publico Federal (May 6, 2019).

[31] *See* Peel & Lin, *supra* note 3, at 704; Climate Change Laws of the World, *supra* note 22; Setzer et al., *supra* note 28.

[32] Peel & Lin *supra* note 3, at 685.

[33] Singh & Rajamani, *supra* note 15.

[34] Setzer & Benjamin, *supra* note 1; UN Env't Programme, *supra* note 10, at 172.

[35] Charles R. Epp, The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective 17 (1998).

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