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HUMAN RIGHTS: THE GLOBAL SOUTH'S ROUTE TO CLIMATE LITIGATION

César Rodríguez-Garavito[*]

After twenty-five years of climate litigation dominated by cases in the United States, Australia, and other jurisdictions in the Global North, a second wave of lawsuits arose in the mid-2010s that prominently feature cases filed in countries of the Global South. I argue that the use of human rights norms and strategies characterizes the "Global South route" to climate litigation, one that is firmly rooted in the trajectory of human rights adjudication and litigation in key Southern countries over the last three decades. I posit that, in order to understand the present and the future of this route, it is essential to (1) track its origins and features to the trajectory of "Global South constitutionalism" over the last three decades, especially litigation around socioeconomic rights, and (2) unpack the category of "Global South" countries, in order to avoid overgeneralizations and to identify the types of countries that are likely to see most climate litigation and court decisions. I close by suggesting that, in light of the planetary and urgent nature of the climate challenge, future research and advocacy should explore transnational forms of litigation that cut across the North-South divide and pay systematic attention to the impact of climate litigation.

The Door to Climate Litigation: Global South Constitutionalism

As Jacqueline Peel and Jolene Lin have documented, a distinctive trait of climate litigation in the Global South is the fact that human rights tend to provide the legal and moral basis for litigants' and courts' arguments to hold governments (and, to a lesser extent, corporations) accountable for climate harms.[1] Put differently, the climate emergency is framed, in most cases, as the source of human rights violations that courts are called upon to redress. This stands in contrast with cases based on statutory interpretation that predominate in jurisdictions such as the United States and Australia, where the majority of first-wave climate cases took place.[2]

My argument is that this Southern route to climate litigation is not serendipitous, or the result of the absence of specialized climate change legislation that litigants would otherwise have used in framing their cases. Instead, it is a route whose tracks were firmly laid over the last three decades through public interest law practice, research, and judicial activism regarding constitutional rights in general and socioeconomic rights (SERs) in particular. Indeed, lawsuits and judicial interventions to address situations of massive violations of SERs became widespread in some countries of the Global South beginning in the early 1990s, as new constitutions, constitutional amendments, and

* *Visiting Professor of Clinical Law, New York University School of Law.*

[1] Jaqueline Peel & Jolene Lin, *Transnational Climate Litigation: The Contribution of the Global South*, 113 AJIL 679 (2019); *see also* Joana Setzer & Lisa Benjamin, *Climate Litigation in the Global South: Constraints and Innovations*, Transnat'l Envtl. L. (forthcoming).

[2] Jaqueline Peel & Hari M. Osofsky, Climate Change Litigation (2015).

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judicial doctrines embraced an expansive understanding of human rights and the role of the judiciary. Among the most prominent examples of this type of Global South constitutionalism is the jurisprudence of the Supreme Court of India, which has tackled such fundamental problems as hunger and malnutrition; the South African courts' rulings on the rights to housing and health; and the activist decisions of Latin American courts (from Argentina to Brazil, Colombia, Ecuador, and Costa Rica) that have adjudicated hundreds of thousands of constitutional cases on the rights to health, education, work, housing, and many others.[3]

SERs opened the door to the Southern route to climate litigation for three reasons. First, on the demand side, SERs have been promoted by a vibrant community of civil society actors—from social movements to NGOs to think-do tanks—that are readily carrying over lessons from past advocacy to more recent efforts at tackling environmental harms, including those associated with global heating. Second, on the supply side, the same courts that have been receptive and proactive with regards to SERs are likely to extend to climate cases the human rights doctrines and remedies they have developed to protect SERs. For instance, courts in countries such as Colombia, India, Kenya, Pakistan, the Philippines, and South Africa have crafted doctrines and remedies geared towards addressing massive violations of SERs. This type of structural reform litigation exhibits many of the traits of climate cases, in that it has an impact on a large and geographically dispersed group of rights holders; involves numerous government entities whose actions, omissions, or lack of interagency coordination is alleged to be associated with pervasive policy failures that contribute to violations of human rights; and results in structural injunctive remedies and supervisory jurisdiction mechanisms to monitor compliance with the court's orders. Third, although conducted before national courts, SER litigation and rulings in many Global South jurisdictions are founded both on constitutional norms and international human rights treaties. Such multilevel framing makes the experience with SERs directly relevant to climate lawsuits, given the multilevel nature of the climate challenge and governance.[4]

Although not as developed across regions of the Global South, indigenous rights litigation and jurisprudence provide another, complementary track on the human rights route to climate litigation.[5] Especially in Latin America, the "multicultural turn" towards the protection of indigenous peoples' rights has been a central component of progressive constitutionalism since the early 1990s. In response to legal challenges brought by indigenous and human rights organizations, courts have developed a rich body of case law on issues such as procedural rights (especially free, prior, and informed consultation and consent) as well as land and cultural rights. Since indigenous peoples inhabit and have preserved ecosystems such as the Amazon and other tropical forests that are crucial for carbon emissions mitigation, those legal precedents will be consequential in climate litigation.

Finally, the most obvious antecedent, albeit the least developed, is environmental jurisprudence in Global South courts. Given that most Southern countries joined—and, on some occasions, led—the "environmental rights revolution" by incorporating a right to a healthy environment in their constitutions and legal frameworks, climate litigants in these countries can rely on an emerging body of constitutional caselaw on issues such as water pollution, air quality, and the rights of local communities to participate in environmental decision-making.[6]

One of the cases referenced by Peel and Lin and other analysts illustrate the workings of this human rights route. Along with colleagues at Dejusticia, I represented before the Colombian courts the twenty-five young plaintiffs

[3] César Rodríguez-Garavito, *Empowered Participatory Jurisprudence: Experimentation, Deliberation and Norms in Socioeconomic Rights Adjudication*, *in* The Future of Economic and Social Rights 233 (Katharine Young ed., 2019).

[4] César Rodríguez-Garavito, *Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America*, 89 Tex. L. Rev. 1669 (2011).

[5] James Anaya, Indigenous Peoples in International Law (2004).

[6] David Boyd, The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights and the Environment (2012); The Human Right to a Healthy Environment (John Knox & Ramin Pejan eds., 2018).

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who sued the Colombian government for not fulfilling its own commitment to limit deforestation in the Amazon region, as part of the country's international pledge to reduce deforestation to net zero by 2020. Both in our initial filing and in the Supreme Court's 2018 decision that ruled in favor of the young plaintiffs, the case was squarely based on human rights arguments.[7] For each plaintiff, we documented how their constitutional rights—including the rights to life, physical integrity, health, housing, and a healthy environment—were directly violated or threatened by the climate emergency, which increasing deforestation made only worse. Both the Court and the plaintiffs invoked human rights norms enshrined in the Colombian Constitution and in international treaties, declarations, and soft-law norms. In choosing this framing and legal basis, we built on the advocacy experience and jurisprudence that Colombian and Latin American NGOs and courts have accumulated in the field of SER litigation.

The case and the ruling of the Court—ordering the Colombian government to issue an effective plan of action against deforestation in the Amazon, declaring the Colombian Amazon a subject of rights, and mandating the government to sign an "intergenerational pact" against climate change—entered the route of climate litigation on the back of SERs and environmental litigation. The connection between the case and the trajectory of Global South constitutionalism is also visible in the ongoing process of implementing the Court's orders. In mid-2019, we proposed that the Court keep supervisory jurisdiction by convening public hearings in which the government would report on progress towards the fulfillment of the Court's orders and the plaintiffs and civil society organizations would have an opportunity to participate as well. By doing so, we took a page from the Indian Supreme Court's and the Colombian Constitutional Court's monitoring of their decisions on structural cases on the right to food and the rights of internally displaced people, respectively. The Supreme Court accepted the petition and entrusted the Bogota High Tribunal with the task of holding the hearings, which were held in late 2019, with the participation of key government agencies, some of the plaintiffs, Dejusticia, and other civil society organizations.

The Stops on the Route: Which Global South Countries?

As Peel and Lin note, while the category of the Global South is useful to capture North-South differences in climate litigation, such as the predominance of a human rights route in the South, greater empirical nuance is needed in order to explain and anticipate developments in climate advocacy and jurisprudence. For differences *among* Global South countries with regards to relevant variables—judicial independence, civil society activism, legal culture, democratic governance, etc.—are as consequential or even more consequential in explaining the volume and traits of climate litigation as differences *between* Southern and Northern countries.

Therefore, in order to advance the analytical agenda of climate litigation research, the following question needs to be addressed: why have most climate cases in the Global South taken place in a handful of countries such as Brazil, Colombia, Indonesia, Pakistan, South Africa, and the Philippines? The answer, I think, is to be found in the institutional and social variables that have been shown to encourage litigation in other policy fields. Again, research on socioeconomic rights litigation provides useful data and lessons—and it gives rise to a hypothesis that I submit for empirical scrutiny: it is likely that the Global South jurisdictions that will lead the human rights route in climate cases will be the same ones that have led socioeconomic rights litigation and jurisprudence.

Following law and development literature, I have elsewhere characterized the countries of the Global South where human rights litigation and adjudication have been most prolific and consequential as falling into the

[7] *Andrea Lozano Barragán et al. v. Presidencia de la República et al.*, Sentencia de la Corte Suprema de Justicia del 5 de abril de 2018, MP Luis Armando Tolosa Villabona, STC4360-2018 (Colom.).

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category of Middle Income Countries (MICs).[8] These countries are located, by definition, in an intermediate socio-economic space between the Global North and the lowest-income countries of the Global South. In terms of the capacity of state institutions, MICs also tend to exist in an in-between category on this North-South continuum. Their institutional fields are hybrid, in that they exhibit elements of capacity and incapacity, and are marked by contrast—for example, between an authoritarian executive captured by private interests on the one hand, and an independent judiciary that protects rights on the other. Discontinuity is also common within a single institution. For example, an environmental protection agency may be efficient in the cities, but absent or weak in the periphery of the country.

This institutional contrast creates conditions that are conducive to the judicialization of policy debates, such as those related to the climate emergency and the environment writ large. While state institutions are not strong enough to address rights-holders' demands and avoid major policy flaws, they tend to be strong enough to be able to fulfill courts' orders, albeit to a limited extent. When courts are independent and have adequate institutional capacity, the judicial route is a particularly attractive one for litigants frustrated with the government's or corporations' actions or omissions with regards to environmental protection.

Whether or not advocates take advantage of this favorable structure of opportunities for litigation depends on a number of other variables. Among them are the strength of constitutional protection of human rights in general and environmental rights in particular, the incorporation of international human rights law into domestic law, courts' activism with regards to the protection of rights, and the existence of a tradition of public interest law litigation. Who the predominant litigants are also depends on institutional variables: while litigants are often NGOs in India, South Africa, and most of Latin America, in other countries they tend to be state agencies such as public prosecutors (as will probably be the case in Brazil) or human rights ombudsman's offices (as is currently the case in the Philippines).

Given that the same set of variables has proved decisive to the judicialization of SERs, it is to be expected that a large percentage of climate cases will arise in the MICs in which courts have been particularly proactive in adjudicating SERs, such as South Africa, India, Pakistan, Brazil, Colombia, Indonesia, Argentina, and Costa Rica. The fact that several of these countries are already represented in the existing Global South docket of climate cases is not coincidental.

The Road Ahead: Transnational Litigation Across the South-North Divide

Peel and Lin and other analysts such as Joana Setzer and Lisa Benjamin should be praised both for having flagged the gap in documentation of climate litigation taking place in the Global South, and for contributing to filling it. Together with the growing literature on climate litigation in the Global North, these and other contributions hold out the prospect of a more balanced and empirically rich assessment of the ongoing, second wave of climate litigation from the viewpoint of comparative law.

In closing, I want to suggest that future research and practice needs to take two additional steps so as to address the unique features of the climate challenge. First, in order to match the planetary scale of the climate emergency and advance climate justice, research and litigation need to complement the comparative law framework (including South-North comparisons) with a focus on transnational litigation that cuts across national jurisdictions and the South-North divide. As a preliminary typology, I posit that transnational litigation includes three kinds of cases that merit systematic attention: (1) lawsuits before courts in the North that include Southern plaintiffs holding Northern governments and corporations accountable for climate harms in the Global South; (2) litigation in

[8] The following discussion is based on César Rodríguez-Garavito, *The Judicialization of Health Care*, *in* LAW AND DEVELOPMENT OF MIDDLE-INCOME COUNTRIES 246 (Randall Peerenboom & Tom Ginsburg eds., 2014).

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Southern courts against Northern states or corporations for climate harms in the South; and (3) simultaneous, synchronized litigation in Northern and Southern courts against corporate or state actors from both regions (for instance, against carbon majors, that is, the state and private companies that have produced most fossil fuels).

Second, we need to complement the extant literature documenting climate rulings with efforts to assess the *impact* of litigation. In addition to having scholarly value, a new emphasis on impact would shed light on pressing practical questions. Given the unique challenge posed by climate change, what types of litigation efforts may contribute to attaining the urgency that, according to science, is needed for climate action to be timely and impactful? In tackling this type of question, we are well advised to take advantage of the lessons of three decades of research and practice on socioeconomic rights in the Global South, which has crucially included analysis of implementation and impact.[9]

[9] Varun Gauri & Daniel Brinks, Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World (2009); César Rodríguez-Garavito & Diana Rodríguez-Franco, Radical Deprivation on Trial: The Impact of Judicial Activism on Socioeconomic Rights in the Global South (2015).

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