**Submission to the United Nations Special Rapporteur on the promotion and protection of human rights in the context of climate change**

**“Enhancing climate change legislation, support for climate change litigation and advancement of the principle of intergeneration justice”**

**Submission by Parul Kumar (LL.M.),** [**PhD Candidate at the Faculty of Law and Criminology, KU Leuven**](https://www.kuleuven.be/onderzoek/portaal/#/projecten/3H230191?hl=en&lang=en) **in response to Question 5 (May 25, 2023)**

1. ***How are human rights considerations being incorporated into climate change litigation?***

***The “rights turn” in climate litigation***

Climate litigation has been described as having taken shape across three waves: the first wave was dominated by challenges in the period between the mid-1980s and the mid-2000s against the government predominantly in the United States of America (USA) and Australia; the second wave in the early and mid-2000s was characterised by cases with a wider variety, including those with a focus on filling gaps in climate legislation; the third wave, which is considered to have begun around 2015 - the year of the adoption of the Paris Agreement - has seen more strategic climate litigation, with the adoption of human rights and constitutional law arguments forming a key feature of such litigation (Setzer, Narulla, Higham, & Bradeen, 2022).

The shift towards using human rights considerations in climate litigation has been referred to as the “rights turn” in climate litigation, initially in the context of six cases from different jurisdictions: Pakistan, the Netherlands, Austria, the USA, the Philippines, and South Africa (Peel & Osofsky, 2018). In recent years, rights-based arguments have successfully been before the European Court of Human Rights and the German Constitutional Court, and cases based on human rights arguments have also been filed in other European countries such as Norway, Belgium, and Italy (Peel & Osofsky, 2018).

Human rights claims are being brought before domestic courts using national constitutional law provisions (e.g. *Louisa Neubauer et al. v. Germany* (Germany)) as well as before international courts such as the European Court of Human Rights under human rights conventions such as the European Convention of Human Rights (ECHR) (e.g. *Urgenda Foundation v. State of the Netherlands* (the Netherlands)).

***Litigants and stakeholders involved in human rights-based climate litigation***

Human rights-based claims in climate litigation are often brought by groups who argue that their rights are being violated by inaction or inadequate action by governments on climate protection and climate change mitigation. Some examples of litigators include children and youth (e.g. *Louisa Neubauer et al. v. Germany; Indonesian Youths and others v. Indonesia; Pandey v. India (India)*), older citizens (e.g. *KlimaSeniorinnen v. Switzerland* (ECtHR); *The Norwegian Grandparents’ Climate Campaign and others v. Norway* (ECtHR)) and indigenous communities (e.g. *Wayúu Indigenous community and others v. Ministry of Environment and others* (Colombia), *Decision SU-698/17 of November 28, 2017* (Colombia), *Arayara Association of Education and Culture and others v. FUNAI* (Brazil), *Copelmi Mineração Ltda. and FEPAM (Mina Guaíba Project and affected indigenous communities)* (Brazil)).

At present, the Sabin Center for Climate Change Law indicates that human rights-based climate litigation cases brought against the government outside USA include 21 cases brought by youth and children, 10 cases brought by indigenous groups, and 2 cases brought by women (Non-U.S. Climate Change Litigation, 2023). These cases underscore the significance of human rights and constitutional law as avenues enabling marginalised or vulnerable groups to make legal claims against the state, and also highlight the intersection of climate impacts and specific circumstances for groups and communities that could exacerbate those risks.

***The reliance on human rights in framework litigation in the Global North***

Framework cases against governments are a sub-category of climate litigation cases, where the litigants’ challenge is made in relation to the government’s overarching response to climate change, rather than a specific project or individual policy (Higham, Setzer, & Bradeen, 2022). Most of these cases have been brought in the Global North (Higham, Setzer, & Bradeen, 2022) and have often relied on making a rights-based claim under constitutional law, or under regional or international human rights law (Maxwell, Mead, & van Berkel, 2022). These cases usually centre around the conduct of a State in connection with the reduction of Greenhouse Gas (GHG) emissions, failure to meet its carbon budgets or emission reduction targets, diluting or postponing emission reduction targets, etc. (Maxwell, Mead, & van Berkel, 2022). As observed in the case of *Louisa Neubauer et al. v. Germany*, the challenge in such framework litigation is often brought within the framework of an existing legislation with the invocation of human rights (in this case, the constitutional protection of future generations).

***The role of human rights in climate litigation in the Global South***

The focus on human rights has shown a natural path for climate litigation in the Global South. Several countries in the Global South have developed a strong tradition of judicial activism based on constitutional rights in previous decades, which also specifically encompass socio-economic rights, with these features embodying the “Global South route” to climate litigation (Rodríguez-Garavito, 2020). In contrast to the framework litigation cases in the Global North, the claims in many Global South jurisdictions are usually not located in the context of an existing legislation, since many of these countries do not have a climate law. Further, the avoidance of an explicit climate change framing in these cases is often a deliberate “stealth” strategy to litigate instead with reliance on claims considered less controversial, combined with arguments and legal precedent from other areas of law that have already been tested in court and can indirectly address climate change (Peel & Lin, Transnational Climate Litigation: The Contribution of the Global South, 2019).

The emission-reduction framing in the context of framework legislation in Global North European jurisdictions (e.g. in *Urgenda* in the Netherlands and *Louisa Neubauer* in Germany) which employ human rights as a litigation strategy can, therefore, be contrasted with much of the litigation in the Global South, where environmental rights have been closely linked to health and safety. For example, in India environmental rights have often been linked to the immediate concerns of citizens such as pollution-free water and air (e.g. *Subash Kumar v. State of Bihar*; *M.C. Mehta v. Union of India*; *Virender Gaur v. State of Haryana*), as well as environmental protection in the context of natural resources (e.g. *Intellectuals Forum, Tirupathi v. State of Andhra Pradesh*). It has been argued that a narrow focus on emission reduction can, in fact, lead to ecological damage and human rights issues being overlooked (Ohdedar, 2021).

Arguably, the value of rights-based environmental jurisprudence in Global South countries pre-dating the Paris Agreement (and by extension, pre-dating the commencement of the third wave of climate litigation typically characterised as being associated with human rights claims) should not be disregarded for its contribution to climate change mitigation, merely because climate change features only peripherally in these cases, or is entirely absent from discussion. India offers an important example of a jurisdiction with judgments that have read environmental rights into the constitutional rights scheme (Bhullar, 2019), most prominently with reference to Article 21 of the Constitution, which guarantees the fundamental right to life.

Scholars have now posited a broader definition of the term “climate litigation” to include not just cases with climate change as the central issue, but also cases with climate change as a peripheral issue, or cases where climate change is a motivating factor even when not raised as an issue, as well as cases which do not have a climate change framing but nonetheless have implications for climate mitigation and adaptation (Peel & Osofsky, Climate Change Litigation: Regulatory Pathways to Cleaner Energy, 2015). A broader conceptualisation of climate litigation is also important for addressing human rights issues closely connected to the environment, even if litigated without an explicit climate change framing or reference to emission reduction targets.

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