

**Submission by the Scholars of South Asian University, New Delhi, India (a regional university established by the South Asian Association for Regional Cooperation (SAARC) Nations)**

***in response to***

**Call for inputs**

**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”**

**Purpose**

To inform the Special Rapporteur on the promotion and protection of human rights in the context of climate change’s report on enhancing climate change legislation, support for climate change litigation and advancement of the principle of intergeneration justice, to be presented to the United Nations General Assembly in October 2023.

**Background**

One of the thematic priorities identified by the Special Rapporteur relates to enhancing climate change legislation, support for climate change litigation and advancement of the principle of intergeneration justice.

As countries meet their commitments under the Paris Agreement, many are developing national legislation. The Special Rapporteur wishes to understand, from the perspective of his mandate, whether countries are incorporating human rights considerations in their legislation and whether they are developing elements of legislation relating to Article 8 of the Paris Agreement which relates to loss and damage.

With respect to climate change litigation, a UNEP report[[1]](#footnote-1) states that the current levels of both climate ambition and climate action are inadequate to meet the challenge. As a consequence, individuals, communities, non-governmental organizations, business entities, governments and others have brought cases seeking to compel enforcement of those laws, replace them with stronger ones (and sometimes weaker ones), extend existing laws to address climate change, or define the relationship between human rights and the impacts of climate change. UNEP suggests that climate cases to date often fall into one or more of six categories: (a) climate rights; (b) domestic enforcement; (c) keeping fossil fuels in the ground; (d) corporate liability and responsibility; (e) failure to adapt and impacts of adaptation; and (f) climate disclosures and greenwashing.

The Special Rapporteur is particularly interesting in whether climate change litigation incorporates considerations of human rights.

The principle of intergeneration equity goes back to the Stockholm Declaration 1972. This principle occurs in many agreements including the preamble to the Paris Agreement. Nevertheless, the concept of intergenerational justice does not appear to be well advanced in international or national laws. Intergenerational justice in the context of climate change and human rights is founded on the principle that people must protect current and future generations from the adverse impacts of climate change.

The Special Rapporteur wants to explore whether intergeneration justice has been incorporated into international law, national constitutions and domestic laws and how it can be anchored in these key elements of law.

**Questionnaire**

The Special Rapporteur is therefore seeking input from States, business enterprises, civil society organizations and intergovernmental organizations on how to enhance climate change legislation, how to support climate change litigation, and how to advance the principle of intergenerational justice.

The Special Rapporteur invites and welcomes your answers to the following questions:

**Enhancing Climate Change Legislation:**

1. Can you provide examples of climate change legislation that incorporates human rights elements, or a reference to obligations relating to loss and damage?
* The climate Act of Uganda is an example incorporating human rights elements and obligations relating to loss and damage. https://climate-laws.org/documents/national-climate-change-act-2021\_0dc4
* The Draft Climate Act of Thailand is another example, which provides special attention to human rights aspects.
1. How to you think climate change legislation should frame a connection to human rights obligations?

Firstly, by specifying the right to a clean climate and recognizing explicitly the linkage between climate change on the enjoyment of various human rights, including the right to life, water, food, livelihood, etc. This can be done through enacting specific climate legislation or through inserting constitutional amendments. Human rights obligations can be an explicit part of the mandate of climate change strategies or the functional mandate of the institution in charge of climate change. For instance, Climate Legislation of Uganda https://climate-laws.org/documents/national-climate-change-act-2021\_0dc4

In addition to explicitly recognizing a substantive right to a clean climate, the legislation should provide procedural human rights to citizens. Such rights can include

* Receiving and access to climate change information
* Right to participate and be consulted in climate change actions and projects.
* Aarhus Convention on Access to Information, Public Participation in Decision-making, and Access to Justice in Environmental Matters can be a good template for incorporating and learning the best participation practices.

Secondly, climate legislations should identify vulnerable areas and populations which require special attention. Examples include a special mention of gender, old age, indigenous population, LGBTQ communities, children, coastal populations, etc. Identifying vulnerable areas and populations can be based on multiple parameters, like, income, access to resources, social capital, access to economic resources, social parameters, etc.

Thirdly, a specific mandate should be there to ensure that climate actions respect and protect the human rights guaranteed by the constitutions and at international law.

Fourthly, by specifying remedies for climate change. For example, The National Climate Act of Uganda provides for the jurisdiction of the High Court to provide relief against the government, an individual, or a private entity whose action or omission threatens or is likely to threaten efforts towards adaptation or mitigation of climate change.

Fifthly, National Human Right Institutions should be represented in the institutional framework of climate change.

1. How do you think climate change legislation should engage the concept of loss and damage?
* Climate legislations should define loss and damage and establish an institutional framework to handle loss and damage claims.
* The definition of loss and damage should contain climate-induced natural disasters, slow-onset events, and non-economic losses.
* Develop tools and methodologies for risk assessment.
* Establish a clearinghouse for data and information on assessing loss and damage.
* Climate legislation should emphasize capacity building for the groups of people affected and at risk from climate change.
* Emphasize risk assessment and reducing the vulnerability of climate change
* Provide compensation for the loss and damage. The compensation calculation can be based on the nature/ extent of pollution /harm.
* The obligation of compensation should be imposed on both the public and private sectors.
* The compensation for loss and damage can be managed through the creation of funds or insurance mechanisms.
* The loss and damage mechanism should ensure that funding criteria fully align with human rights.
1. Should climate change legislation that incorporates loss and damage be different for major greenhouse gas emitting countries to those that are mostly affected by climate change? What would this difference look like?

Yes: For the major greenhouse emitting countries, the emphasis of loss and damage can be on risk assessment and resilience.

But for developing countries, the focus should not only be on risk assessment but also on capacity building and compensatory mechanisms for economic and non-economic losses. The compensation scheme can be used to improve the living conditions of the affected and vulnerable populations.

However, such a distinction may be difficult to maintain.

**Supporting Climate Change Litigation:**

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

As for India, there is no record of successful climate change litigation incorporating human rights considerations. Shibani Ghosh writes in American JIL (2020) that climate concerns are the “peripheral issues” to the mainstream environmental litigation in India.

However, in other countries, including in Global North (like Europe) and Global South (like Pakistan and Latin American countries), human rights considerations have been incorporated in several ways. For instance, in Pakistan, in the case of *Asghar Leghari v. Federation of Pakistan*, the Lahore High Court highlighted human rights considerations by observing that climatic variations have primarily resulted in heavy floods and droughts, raising serious concerns regarding water and food security. The Court further noted that on a legal and constitutional plane, this is a clarion call for the protection of the fundamental rights of the citizens of Pakistan, in particular, the vulnerable and weak segments of the society who are unable to approach this Court.

The courts have invoked human rights considerations in climate lawsuits through a wider interpretation of constitutional provisions guaranteeing the right to life, food, and water, among others.

In some cases, the right to a healthy environment as part of environmental statutes or the right to life enshrined in the constitution has been applied in climate litigation.

The courts have used constitutional provisions (such as the right to life, liberty, food, water, and a healthy environment) giving due consideration to human rights issues in climate litigation to perform the following functions:

* First, to ask the government to adopt and enforce climate legislation (a kind of positive obligation of states to prevent human rights violations resulting from a lack of legislation or lack of enforcement of the existing environmental legislation).
* Second, in countries having climate legislation, to refrain from harmful activities violating human rights (a kind of negative duty of states).
* Third, to fill up the gaps existing in the current environmental legislations and creates opportunities for better access to justice for climate litigants.
1. Are there issues with making the link between human rights and climate change litigation?

In India, in the famous, but unsuccessful case of *Ridhima Pandey v. Union of India*, 2019, an applicant attempted to highlight the link between human rights and climate change. For instance, it highlighted the adverse health impact of climate change on human beings. It also brought to the attention of the tribunal that climate change has adverse impact on food and water security caused by crop failure, ocean acidification, water and soil salinization, and species extinction. However, this case does not establish a direct link between human rights and climate change. The tribunal dismissed the petition by observing that it does not have ‘reason to presume that Paris Agreement and other international protocols are not reflected in the policies of the Government of India or are not taken into consideration in granting environment clearances.’

This observation suggests that the tribunal dismissed the petition in the absence of scientific evidence.

1. What do you think are the major barriers to initiating climate change litigation?

In India, an absence of climate change law is the major barrier to initiating climate change litigation since any litigation in India necessarily requires adjudicating upon the legal rights of a person. These legal rights could be in the form of human/fundamental rights or Statutory rights. Nevertheless, a few aspects of climate change, such as those relating to air pollution, could be adjudicated as part of a matter falling under environmental law.

Generally, the barriers in climate litigation could be identified in two ways: substantive barriers and procedural barriers.

A very few cases raising climate concerns have been dismissed by the judiciary on procedural grounds, such as a failure by the applicant to raise objections about the alleged violation of environmental norms in the beginning.

However, some climate ligations have successfully sought to enforce procedural environmental rights, such as access to information, access to justice, and public participation in the decision-making of a state affecting the environment and climatic atmosphere.

Substantive barriers are related to the lack of having adequate climate legislation explicitly linking human rights to climate change. In some climate litigations, courts have rejected the petition because it could not find any substantive basis for it under the existing legislation.

Another potential challenge could be related to trade-off between the development needs of a country (especially developing country like India) and its climatic considerations affecting the human rights of people.

1. Are the barriers different in different parts of the world? What are they?

Broadly they are the same; with a minute difference that the courts in Global South are more flexible as far as the question of *locus standi* is concerned.

1. Is the judiciary in your country well equipped to understand the connection between human rights and climate change?

Theoretically, Indian judiciary is well equipped both at the level of jurisdiction and merit. We have constitutional provisions, articles 226 and 32, empowering the High Courts and Supreme Court, respectively, to entertain any case concerning violation of constitutional or other legal ‘rights’ (including the right to a healthy environment). Both the courts have competence to pass a judgment establishing a link between human rights and climate change and upholding the people’s ‘rights’ affected by climate change’s adverse impact.

Psychologically, as for the mindset of Indian judges, they have shown a positive attitude towards environmental protection generally through wider/liberal interpretation of constitutional provisions, particularly Article 21 (right to life and liberty). However, this attitude is yet to be seen to be fully observed in climate litigations.

Technologically, to understand the connection between human rights and climate change on technical points, we have five independent National Green Tribunals having competence (under articles 14 and 15 of the NGT Act of 2010) to particularly deal with environmental cases, including climate change. In this regard, please refer to the following articles:

* ‘Procedural and substantive innovations propounded by the Indian judiciary in balancing protection of environment and development: a legal analysis by Stellina Jolly and Zen Makuch in *Courts and Environment,* (Christina Voigit and Zen Makuch)Edward Elgar, 2018, 142-168.
* ‘[Critiquing sustainable development and analyzing avenues for just sustainability in India](https://www.texenrls.org/wp-content/uploads/2022/02/txe_51-2.pdf)’ by Stellina Jolly and Siddharth Singh 51(2) *Texas Environmental Law Journal* 187 (2021).
1. How could this be improved?

It could be improved in two ways: First, by adopting climate legislation; second, by explicitly recognizing the right to a healthy environment in relation to climate change, though this right is already a part of the right to life generally.

1. Are there particular issues with getting access to the courts?

In India, the High Courts, the Supreme Court and the NGT have sufficient jurisdictional competence to adjudicate climate change litigation.

Indian judiciary is liberal in its attitude towards *locus standi* in environmental matters. In fact, the whole concept of ‘public interest litigation’ has been developed in India mainly to relax jurisdictional constraint in environmental matters.

However, in developing countries having large population (like India), overburdened judiciary is a big challenge to adjudicate the cases, including environmental cases, on time. For instance, the famous *Ridhima Pandey* case was filed in 2017 and decided in 2019 by the National Green Tribunal. Since then, it is still pending before the Supreme Court of India in an appeal against the Tribunal’s order.

**Advancement of the principle of intergenerational justice**

1. What examples do you have of how intergenerational justice, as it applies to climate change and human rights, has been incorporated into international law, national constitutions or domestic law?
2. International Law – Several international law instruments incorporated the provisions relating to intergenerational justice concerning climate change and/or human rights:
3. Universal Declaration of Human Rights, Preamble: “Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”
4. Stockholm Declaration, Principle 2: safeguarding the earth’s natural resources for present and future generations.
5. Brundtland Report - Our Common Future, 1987: define sustainable development as “the development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”
6. Rio Declaration, Principle 3: described the right to development to equitably meet the development and environmental needs of both present and future generations.
7. UNFCCC, Preambular paragraph: highlights the determination to protect the climate system for present and future generations.
8. UNFCCC, Article 3: requires the Parties to protect the climate system for the benefit of present and future generations of humankind, based on equity and in accordance with their common but differentiated responsibilities and respective capabilities.
9. The provisions of General Assembly resolution 44/228 of 22 December 1989 on the United Nations Conference on Environment and Development, and resolutions 43/53 of 6 December 1988, 44/207 of 22 December 1989, 45/212 of 21 December 1990, and 46/169 of 19 December 1991 on the protection of global climate for present and future generations of humankind.
10. Declaration on the Responsibilities of the Present Generations Towards Future Generations, 1997: outlines the responsibilities of the present generation to provide a better future to upcoming generations by safeguarding the earth and its resources and catena of human rights.
11. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters: ensures democratic rights and creates obligations to secure a healthy environment for the present and future generations.
12. Paris Agreement, 2015, Preambular paragraph: “Acknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity.”
13. General Assembly Resolution 70/1-Transforming Our World-the 2030 Agenda for Sustainable Development: Securing the needs of the present and future generations through sustainable development.
14. General Assembly resolution 69/283-Sendai Framework for Disaster Risk Reduction 2015-2030: “The realization of the new framework depends on our unceasing and tireless collective efforts to make the world safer from the risk of disasters in the decades to come for the benefit of the present and future generations.”
15. Human Rights Council resolution 32/33: required OHCHR to prepare a panel discussion on the impacts of climate change on the enjoyment of the rights of the child. It further asked OHCHR to consult with Member States and other relevant stakeholders to prepare an analytical study on the relationship between climate change and the full and effective enjoyment of the rights of the child.
16. National Constitutions –
17. Algeria, Preamble: “The people remain concerned with environmental degradation and the negative effects of climate change, and they are eager to ensure protection of the natural environment and the rational use of natural resources in order to preserve them for future generations.”
18. Côte d'Ivoire, Preamble: “We, the People of Côte d'Ivoire;....Express our commitment to:....contributing to climate protection and to maintaining a healthy environment for future generations;....”
19. Cuba, Article 16: “The Republic of Cuba bases its international relations on the exercise of its sovereignty as well as on the antiimperialist and internationalist principles in accordance with the interests of the people and, in consequence:....(f.) Promotes the protection and conservation of the environment as well as responding to climate change, which threatens the survival of the human species, through the recognition of common, yet differential, responsibilities; the establishment of a more just and equitable international economic order as well as the eradication of irrational patterns of production and consumption;....”
20. Venezuela, Article 127: “It is the right and duty of each generation to protect and maintain the environment for its own benefit and that of the world of the future. Everyone has the right, individually and collectively, to enjoy a safe, healthful and ecologically balanced life and environment. The State shall protect the environment, biological and genetic diversity, ecological processes, national parks and natural monuments, and other areas of particular ecological importance. The genome of a living being shall not be patentable, and the field shall be regulated by the law relating to the principles of bioethics. It is a fundamental duty of the State, with the active participation of society, to ensure that the populace develops in a pollution-free environment in which air, water, soil, coasts, climate, the ozone layer and living species receive special protection, in accordance with law.”

Some examples of constitutional provisions relating to Intergenerational justice with no express mention of climate change:

1. Argentina, Article 41, clause 1: “All inhabitants are entitled to the right to a healthy and balanced environment fit for human development in order that productive activities shall meet present needs without endangering those of future generations; and shall have the duty to preserve it. As a first priority, environmental damage shall bring about the obligation to repair it according to law.”
2. Brazil, Article 225, clause 1: “All persons are entitled to an ecologically balanced environment, which is an asset for the people’s common use and essential to healthy life, it being the duty of the Government and of the community to defend and preserve it for present and future generations.”
3. Czech Republic, Charter of Fundamental Rights and Freedoms Preamble: “The Federal Assembly,....recalling its share of responsibility towards future generations for the fate of life on this Earth,....has enacted this Charter of Fundamental Rights and Freedoms.”
4. Finland, Article 20: “Nature and its biodiversity, the environment and the natural heritage are everybody’s responsibility. The public authorities shall endeavour to guarantee for everyone the right to a healthy environment and for everyone the possibility to influence the decisions that concern their own living environment.”
5. Germany, Article 20a: “Mindful also of its responsibility toward future generations, the State shall protect the natural bases of life by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order.”
6. Poland, Preamble: “Recalling the best traditions of the First and the Second Republic, obliged to bequeath to future generations all that is valuable from our over one thousand year’ heritage.”
7. Switzerland, Preamble, “In the name of God Almighty! Whereas, we are mindful of our responsibility towards creation;....are conscious of our common achievements and our responsibility towards future generations;....”
8. How would you best define intergenerational justice in the context of climate change and human rights?

Intergenerational justice incorporates the duty of the present generation to limit their carbon emissions and increase climate resilience to provide a healthy and sustainable environment and maximum opportunity for wholesome development to future generations.

1. Has the concept of intergenerational justice been incorporated into climate change litigation?

With increased climate change litigation, intergenerational justice issues are also gaining attention in courtrooms. In *Juliana v. United States* (217 F. Supp. 3d. 1224), the group of children and young adults, along with an NGO and purported guardian for future generations, brought an action for declaratory and injunctive relief against the US government stating that through its policies, the latter allowed the escalation of carbon dioxide emissions leading to climate change. The District Court did not require future generations of plaintiffs to establish their standing since the youth plaintiffs had already established the case for climate harm. A similar argument was made in *Netherlands v Urgenda* (Case No. 200.178.245/01), where the Hague Court of Appeal did not decide whether the plaintiffs could represent future generations since the claim raised by the present generation was already admissible. In paragraph 37, the Court held that it was “clearly plausible that the current generation of Dutch nationals, in particular but not limited to the younger individuals in this group, will have to deal with the adverse effects of climate change in their lifetime if global emissions of greenhouse gases are not adequately reduced.”

In Germany, the First Senate of the Federal Constitution Court discussed the compatibility of the Federal Climate Change Act that governs long-term emission reductions with fundamental rights. While broadly discussing the intergenerational obligation aspects, the German court (BVerfG, Order of the First Senate of 24 March 2021 – 1 BvR 2656/18) emphasized that the State’s duty to provide care and protection against risks to life and health can be extended to create a duty to protect future generations. *Asghar Leghari v Federation of Pakistan, etc.* (2015 W.P. No. 25501/201) is yet another case that recognized the relationship between inter-generational equity and fundamental rights. The petitioner brought the case against the government’s failure to meet its climate change adaptation targets impacting the country's food, water, and energy.

In *Ridhima Pandey v. Union of India* (Application No. 187/2017)*,* though the National Green Tribunal of India, the adjudicatory body in the case, dismissed the matter, it is pertinent to mention that this case was brought by a nine-year-old child seeking directions regarding government’s obligation towards climate change. Among other issues, the petitioner relied on intergenerational equity to argue that climate change disproportionately affects children, and she, along with other children and future generations, has a right to a healthy environment.

1. What options are available for enshrining the principle of intergenerational justice in international law?

Irrespective of uncertainty on its legal character, the intergenerational justice principle has gained momentum as a moral obligation. It is a powerful tool that could be utilized by the people on the ground to raise awareness and compel States to undertake measures in this direction.

Presently, the International Court of Justice (ICJ) is seeking written statements from the Member States on the obligation of States towards climate change. Since the questions are to be answered in light of present and future generations, Member States can incorporate intergenerational justice considerations within their responses. In addition, similar to the Vanuatu-led initiative before the General Assembly, States may consider seeking separate advisory opinions of the ICJ or other international or regional bodies focusing on the implications of the intergenerational justice principle.

1. How can States incorporate the concept of intergenerational justice in their national constitutions and legislation? What are some good practices in that respect?

Some States have incorporated the concept of intergenerational justice within the Preamble of their Constitution. Such provisions primarily hold aspirational value and guide the States to design and implement their domestic laws in accordance with these ideas. Moving beyond, States like Cuba and Venezuela have incorporated these provisions within their Constitutions as a part of the environmental rights available to citizens.

Many Constitutions oblige the State and the present generation to act to provide better living conditions for future generations. Advancing such obligations, States should indicate intergenerational justice as their long-term policy objectives within the Preamble, working in collaboration with other goals. Such provisions on intergenerational justice should be further incorporated as constitutional and legal rights accompanied by enforceability and justiciability. Moreover, States should structure them with an implementation scheme and action plan rather than keeping them open-ended.

1. Can you share some good practices that allow youth to be represented in courts and to have their views and concerns properly expressed in the judicial process?

In *Juliana v United States*, several children, young adults, and youth activists approached the court, raising their disagreements with the governmental policies regarding the continuous usage of fossil fuels and causing climate-led injuries to the plaintiffs.

Likewise, the *Ridhima Pandey v Union of India* case allowed a nine-year-old child to argue a range of climate issues and seek direction from the tribunal asking government and environmental agencies to incorporate climate considerations while making decisions.

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1. UNEP, *Global Climate Litigation Report: 2020 Status Review* (Nairobi, 2020), https://www.unep.org/resources/report/global-climate-litigation-report-2020-status-review. [↑](#footnote-ref-1)