

Litigating for climate justice for the poor

Varun Mansinghka and Sonal Garg

Synopsis

Many of the recent successes in climate justice litigation have been achieved by lawyers working in a pro bono capacity. Through this chapter, other lawyers, who may be considering engaging in similar pro bono work, can acquire a broad understanding of the current trends, challenges and issues involved in climate justice litigation. This understanding will help assess whether, out of the many roles that lawyers can assume in the field of climate justice and the broader area of anti-poverty, climate justice litigation is a good fit for their or their firm's pro bono practice.

Climate change: the silent crisis

Climate change, like much adversity in our world, disproportionately affects the poorest the most. There is clear evidence to show that poorer nations which have contributed least greenhouse gas (GHG) emissions to the atmosphere are now first in line to face the worst consequences of climate change. At the same time, past emissions have enabled wealthier populations to insulate themselves from the immediate threats of climate change whereas the poor have remained defenceless to increasingly frequent extreme weather events. Given the global scale of this challenge, it is natural and intuitive to think initially of international treaty-making and cooperation as the appropriate legal response. The 2015 Paris Agreement is a significant leap forward in this respect and has led many states to formulate ambitious mitigation targets. Yet, internationally, there is no forum for ensuring that these targets are set and met. Of late, state courts are increasingly being called on to fill this gap.

With climate change threatening to push a greater proportion of the world's population further into poverty, initiating climate justice litigation against states is emerging as a critical means for lawyers to contribute towards poverty alleviation efforts in a pro bono capacity. Non-compliance of statutory law, both traditional environment protection statutes and newer climate change statutes, constitutes the cause of action in a large number of such cases. There have also been instances where plaintiffs have successfully argued that non-mitigation of climate change amounts to a breach of human rights. The legal underpinning for these arguments can be found either in state constitutions or conventions such as the European Convention on Human Rights, which has already been cited on numerous occasions in climate justice litigation before European state courts, with varying degrees of success. Another international convention which is increasingly forming the basis of climate

justice litigation is the 2015 Paris Agreement, with plaintiffs seeking strict observance of their state's contribution commitments under the agreement. But the standing of plaintiffs to initiate such cases and separation of powers, which may limit the reliefs that courts may grant in such cases, are two closely related hurdles which arise in a majority of climate justice cases. Together, these two questions form the issue of 'justiciability.'

The variance in the degree of rigidity of various state courts' test(s) of justiciability has resulted in contrasting judgments' even in cases with similarly placed plaintiffs and defendant states. As of yet, only a few state courts in Europe and courts of developing countries in the Global South have been seen to adopt a lenient approach in testing the justiciability of reliefs sought in climate justice litigation. Courts in other jurisdictions have been more cautious in their approach. Nevertheless, some common ground does exist among all state courts which have decided climate justice cases so far. For instance, almost all courts have concluded that there is sufficient proof of climate change and its adverse consequences. Similarly, there appears to be a broad agreement among courts that states are principally liable for trying to prevent these adverse consequences. At times, such in-principle findings have been sufficient to encourage governments to adopt more climate-friendly policies. In other cases, plaintiffs have managed to secure more specific pronouncements from courts, directing states to take adaptive or mitigating steps against climate change.

Introduction

Preventing climate change and addressing its various effects are key elements of the fight against poverty.¹ Contrary to the well-meaning and popular portrayal of climate change as a threat for future generations, climate change is a present-day reality for the world's poor. While its most devastating effects are still to reach the developed world, the present-day effects of climate change in many parts of the developing world are already catastrophic.² Despite climate change being an emerging threat that is due to worsen by all estimates, extreme weather events, rising sea levels and other tragedies caused by climate change have already been affecting the world's poor for some time.

Take for instance, the story of Abdul Gaffar from Bangladesh,³ a country where one in five of its citizens live in poverty.⁴ Bangladesh is also one of the most vulnerable places on

1 Kishan Khoday and Walid Ali, *Climate Change and the Rise of Poverty*, UN Development Programme Blog (19 December 2018) see www.undp.org/content/undp/en/home/blog/2018/Climate_Change_and_the_Rise_of_Poverty.html accessed 2 January 2021.

2 Meeting Coverage: Unprecedented Impacts of Climate Change Disproportionately Burdening Developing Countries, Delegate Stresses, as Second Committee Concludes General Debate, GA/EF/3516, UN General Assembly (8 October 2019), see www.un.org/press/en/2019/gaef3516.doc.htm accessed 2 January 2021.

3 The Climate Reality Project, *The Human Impact of Climate Change: Personal Stories from Bangladesh, India and China*, at 04:08 minutes, www.climaterealityproject.org/video/human-impact-climate-change-personal-stories-bangladesh-india-and-china accessed 2 January 2021.

4 *Basic Statistics 2020*, Asian Development Bank (April 2020), www.adb.org/sites/default/files/publication/601126/basic-statistics-2020.pdf accessed 2 January 2021; 'Bangladesh: One in five people live below poverty line', Al Jazeera (26 January 2020), www.aljazeera.com/news/2020/01/bangladesh-people-live-poverty-line-200126100532869.html accessed 2 January 2021.

earth to the impacts of climate change.⁵ Gaffar is a fisherman who used to own 1.2 hectares of land.⁶ By 2013, the island village in which he lived had shrunk by half due to rising sea levels and the resulting river bank erosion meant that Gaffar lost all his land.⁷ After losing their homes and livelihoods in rural coastal villages, many Bangladeshis have been forced to migrate to the state's already overcrowded cities.⁸ Rising sea levels are estimated to displace up to 13 million Bangladeshi citizens by 2050.⁹

Yet, the sufferings of climate refugees do not cease at being displaced from their homes. Each year, the rate of internal migration in Bangladesh reaches a new peak, with approximately 2,000 migrants arriving in Dhaka, the country's capital, every day.¹⁰ It is no wonder that today Dhaka is the most densely populated city in the world.¹¹ This means that migrants in the city live in overcrowded slums where, as a United Nations correspondent reports, it is 'hard to differentiate the humidity from the smells of food, garbage and sludge water.'¹²

Stories such as these are necessary to give a face to the present-day horrors of climate change encountered by the poor, a disaster that a 2009 report called the 'silent crisis.'¹³ Now, over a decade later, there is near-universal recognition of the effects of climate change on the poor. The 2015 Paris Agreement explicitly recognises 'the intrinsic relationship that climate change actions, responses and impacts have with equitable access to sustainable development and eradication of poverty'¹⁴ and states that 'sustainable development and efforts to eradicate poverty' provide the context for the global response to climate change.¹⁵ The International Bar Association (IBA) also recognises that lawyers have an important role to play in this global response, especially in a pro bono capacity.¹⁶ Similarly, the American

5 Marcin Szczepanski et al, 'Bangladesh: A Country Underwater, a Culture on the Move, on Earth', *NRDC* (13 September 2018) www.nrdc.org/onearth/bangladesh-country-underwater-culture-move accessed 2 January 2021; *Views of Bangladesh on Climate Change and its Possible Security Implications*, https://sustainabledevelopment.un.org/content/dsd/resources/res_pdfs/ga-64/cc-inputs/Bangladesh_CCIS.pdf accessed 2 January 2021.

6 *Ibid.*

7 *Ibid.*

8 Sonja Ayeb-Karlsson et al, 'A People centred Perspective on Climate Change, Environmental Stress and Livelihood Resilience in Bangladesh', (2016) 11 *Sustainability Science* 679–694, <https://doi.org/10.1007/s11625-016-0379-z> accessed 2 January 2021.

9 Kanta Kumari Rigaud et al, *Groundswell: Preparing for Internal Climate Migration*, World Bank Group Report (March 2018), at 148, <https://openknowledge.worldbank.org/handle/10986/29461> accessed 2 January 2021.

10 Kevin Moss, 'Leaders Share Global Climate Change Stories, Solutions', *Cornell Chronicle* (6 May 2020), <https://news.cornell.edu/stories/2020/05/leaders-share-global-climate-change-stories-solutions> accessed 2 January 2021.

11 Callum Brodie, *These are the world's most crowded cities*, World Economic Forum (22 May 2017), www.weforum.org/agenda/2017/05/these-are-the-world-s-most-crowded-cities accessed 2 January 2021.

12 Sonja Ayeb-Karlsson, *A Climate Migrant's Story from an Urban Slum in Dhaka*, Our World brought to you by UN University (16 November 2016), <https://ourworld.unu.edu/en/a-climate-migrants-story-from-an-urban-slum-in-dhaka> accessed 2 January 2021; See Poppy McPherson, 'The dysfunctional megacity: why Dhaka is Bursting at the sewers', *The Guardian* (London, 21 March 2018), www.theguardian.com/cities/2018/mar/21/people-pouring-dhaka-bursting-sewers-overpopulation-bangladesh accessed 2 January 2021.

13 Global Humanitarian Forum Geneva, *The Anatomy of a Silent Crisis: Human Impact Report Climate Change* (January 2009).

14 Conference of the Parties Twenty-first Session, UN Framework Convention on Climate Change, Paris Agreement, Preamble, UN Doc FCCC/CP/2015/10/Add.1 (12 December 2015)

15 *Ibid.*, Art 2.

16 IBA Climate Crisis Statement (5 May 2020), at para 1, see www.ibanet.org/Article/NewDetail.aspx?ArticleUid=cac6e15d-ec80-4669-9025-2773e9019519 accessed 2 January 2021.

Bar Association (ABA) has also urged lawyers to engage in pro bono activities to help in the fight against climate change.¹⁷ However, in the ABA's 2018 survey of over 47,000 lawyers, environmental law or climate change do not feature in a 32-item list of areas of law in relation to which United States lawyers have given pro bono representation.¹⁸

This is not to say that climate justice is more worthy of pro bono engagement than other areas of law. Just in the field of poverty eradication, as this book illustrates, there is a wide variety of pro bono activities in which lawyers can engage to make a difference. But, given the scale of the climate crisis and its severely disproportionate impact on the poor, the authors believe that the field merits more pro bono engagement than what has been observed until now. In support of these views, this chapter will first highlight the extent of climate change's disproportionate impact on the poor and discuss climate justice as one of the key roles for lawyers in the fight against poverty. This chapter will then examine litigation as a means of procuring climate justice and provide an overview of the current trends, issues and considerations at play in climate justice litigation, which can serve as the starting point for practising lawyers considering the inclusion of climate justice litigation in their or their firm's pro bono work.

Climate change and the poor

The unequal impact of climate change

According to the 2019 Global Climate Report of the US National Oceanic and Atmospheric Administration, annual temperature has increased at an average rate of 0.32°F (0.18°C) per decade since 1981, more than twice the annual growth rate since 1880.¹⁹ In its most recent report,²⁰ the UN Intergovernmental Panel on Climate Change (IPCC) concluded that it is extremely likely (which, as per the IPCC, signifies a probability of 95 to 100 per cent)²¹ that this acceleration in the growth rate of annual global temperature is mainly caused by anthropogenic emissions of GHG since the mid-20th century.²²

While populations around the globe are threatened by climate change, the magnitude and direction of its impact depends, to a large extent, on each country's location and level of development.²³ To further tip the scales, countries that have contributed the most towards

17 Resolution of the House of Delegates of the ABA (12–13 August 2019), www.americanbar.org/content/dam/aba/directories/policy/annual-2019/111-annual-2019.pdf accessed 2 January 2021.

18 ABA Standing Committee on Pro Bono and Public Service, *Supporting Justice: A Fourth Report on the Pro Bono Work of America's Lawyers* (April 2018) at 14, www.americanbar.org/content/dam/aba/administrative/probono_public_service/lis_pb_supporting_justice_iv_final.pdf accessed 2 January 2021.

19 National Centers for Environmental Information, *State of the Climate: Global Climate Report for Annual 2019* (January 2020), www.ncdc.noaa.gov/sotc/global/201913 accessed 2 January 2021.

20 Rajendra K Pachauri et al, *Climate Change 2014: Synthesis Report: Contribution of Working Groups I, II and III to the Fifth Assessment Report of the IPCC* (Core Writing Team, R K Pachauri and L A Meyer, eds, 2015).

21 *Ibid*, at 37.

22 *Ibid*, at 47.

23 Nicholas H Stern and Cabinet Office – HM Treasury, *The Economics of Climate Change: The Stern Review* (2006) at 29.

altering the earth's climatic conditions are those which are both favourably located and are better equipped to insulate themselves from the catastrophic effects of climate change.²⁴ In fact, median income gains on account of temperature rise are estimated to be as large as 25 per cent for colder countries (which are mostly developed) for the period of 1960 to 2010.²⁵ By contrast, low-income and middle-income countries have benefitted least from fossil fuel combustion²⁶ but are disproportionately bearing the brunt of the climate catastrophe. This is due, in part, to the fact that the majority of the world's developing and least developed countries are disadvantageously located in hotter regions. Most of their citizens, especially those relying on the agricultural sector for subsistence, or those living in coastal areas or informal urban settlements, are extremely vulnerable to the recurring climate shocks of droughts, floods and heat waves.²⁷ As such, while the average rate of temperature rise is surely a cause for alarm in and of itself, a mere look at the average does not paint the complete picture of the unequal impact of climate change and global warming.

According to the UN's *World Social Report 2020*, climate change has widened the gap between the incomes of the richest and the poorest ten per cent of the global population by a staggering 25 per cent.²⁸ The *World Social Report* also points out that even within a country, the impact of climate change varies greatly in magnitude across different population groups. A country's poorer households are more susceptible to the damage caused by changing climatic conditions as, in comparison to their wealthier counterparts, they have limited access to the resources needed to cope with crises.²⁹

Another manifestation of the unequal impact of climate change is in the form of mortality risk associated with it. A study attempting to relate the temperature and wealth of a country to its future mortality risks has estimated that climate-induced mortality risks will vary drastically for rich and poor countries.³⁰ For example, while Accra in Ghana is projected to experience roughly 160 additional deaths per 100,000, Oslo in Norway is projected to save approximately 230 lives per 100,000.³¹

24 Sebastien Mejia et al, *Weather Shocks and Output in Low-Income Countries: Adaptation and the Role of Policies*, Working Paper No WP/19/178, International Monetary Fund (August 2019) at 6–7, www.imf.org/~media/Files/Publications/WP/2019/wp19178-print-pdf.ashx accessed 2 January 2021.

25 Noah S Diffenbaugh and Marshaal Burke, 'Global Warming has Increased Global Economic Inequality', (2019) 116(20) *Proceedings of the National Academy of Sciences* 9808–9813 at 9809–9810, <https://doi.org/10.1073/pnas.1816020116> accessed 2 January 2021.

26 Tamma A Carleton et al, *Valuing the Global Mortality Consequences of Climate Change Accounting for Adaptation Costs and Benefits*, National Bureau of Economic Research Working Paper No 27599 (July 2020), www.nber.org/papers/w27599 accessed 2 January 2021. For an interactive graph depicting this study, see Eric Roston et al, 'Life and Death in Our Hot Future will be Shaped by Today's Income Inequality' *Bloomberg* (New York 3 August 2020), www.bloomberg.com/graphics/2020-climate-heat-inequality/?srnd=green&sref=v5vOHa2G accessed 2 January 2021.

27 Robin Leichenko and Julie A Silva, 'Climate Change and Poverty: Vulnerability, Impacts and Alleviation Strategies', (2014) 5(4) *Wiley Interdisciplinary Reviews: Climate Change* 539–556 at 543, <https://doi.org/10.1002/wcc.287> accessed 2 January 2021.

28 UN Department of Economic and Social Affairs, *World Social Report 2020: Inequality in a Rapidly Changing World* (January 2020) at 88, www.un.org/development/desa/dspd/wp-content/uploads/sites/22/2020/02/World-Social-Report2020-FullReport.pdf accessed 2 January 2021.

29 *Ibid*, at 93–98.

30 Carleton et al, n 26 above.

31 *Ibid*, at 32.

In another study, a group of researchers at the International Monetary Fund have attempted to establish the relationship between a country's level of development and its capacity to insulate itself from the negative effects of climate change.³² The study uses provincial-level data to compare the impact of 1°C rise in temperature on the per capita output of hot regions of advanced economies with that of hot regions (with identical temperature) of developing countries. The result of the study strongly suggests that the impact of temperature shocks on hot areas in developing countries is significantly more than in areas with identical temperatures in developed countries.³³

A global justice concern

A healthy climate is a public good.³⁴ GHG emissions, emanating largely from developed countries, have adversely affected the global climate which is shared between the affluent and less prosperous populations of the world. This inequity is exacerbated since not only have the poor not contributed to the diminishing of this shared common good, but they are also additionally saddled with a higher cost of adapting to such diminishment. Of late, this tragic scenario has been quantified by 'social cost of carbon' (SCC)³⁵ analyses.

A higher degree of exposure to climate shocks imposes higher damage costs on developing countries, regardless of their contribution to GHG emissions. An analysis which calculated the country-level share of global SCC and compared it with the country's share in global emissions, concluded that developing countries such as India, Indonesia and Brazil would have to incur a much greater share of the global SCC in proportion to their contribution to global emissions.³⁶ On the other hand, the ratio of global SCC share to global emissions share is low for developed countries, including, such as the US and Japan.³⁷ At the extreme end of the SCC spectrum are cold countries such as Russia and the United Kingdom, which have a negative ratio and are expected to gain from the increased level of emissions and resultant global warming because of their location.³⁸ The ratios of some countries' share of global SCC to their share in global emissions are presented in the table below. With the exception of Russia and China, the ratio for developing countries is much higher than their developed counterparts.

³⁶ *Ibid.*, at 897 and 899.

³⁷ *Ibid.*

³⁸ *Ibid.*

Country	Level of development	Ratio of global SCC share to share in global GHG emissions*
US	Developed	3:4
Japan	Developed	1:2
UK	Developed	-1:2
Russia	Developing	-1:2
China	Developing	1:4
India	Developing	4:1
Brazil	Developing	4:1
Mexico	Developing	2:1
Indonesia	Developing	2:1

Source: Katharine Ricke, et al, 'Country-level Social Cost of Carbon', (2018) 8(10) 'Nature Climate Change' 895–900 (2018).

* A ratio greater than 1:1 (represented by the darker shades of grey) implies that a country's share of the global SCC exceeds its contribution to global GHG emissions. A ratio less than 1:1 shows that the country's share of the global SCC is less than its contribution to global emissions. A negative ratio indicates a negative SCC, that is, the country benefits economically from climate change and global warming.

When developed countries do not account for the damage costs in proportion to their share in exacerbating climate crisis, the financial burden of the climate crisis falls disproportionately on poorer countries. Furthermore, while the rich can afford to take measures to adapt to a changing climate, the poor lack the ability, resources and know-how to cope with it. This stark reality of climate change, which results in the exacerbation of inequality and poverty by unequally affecting those who are geographically and socio-economically disadvantaged, making it a 'global justice concern'.³⁹

Climate change exacerbates poverty

Poor people have limited assets to help them recover from natural calamities and their livelihoods are usually dependent on sectors that are sensitive to climate shocks. In addition, they are less likely to be insured against adverse climatic events and are equipped with only a limited knowledge and awareness about adaptation strategies and climate resilient practices.⁴⁰ Economic activities which require people to work outside or without air conditioning are bound to experience a dip in labour productivity due to rising temperatures.⁴¹ Additionally,

³⁹ Darrell Moellendorf, 'Climate Change and Global Justice' (February 2012) 3 Wiley Interdisciplinary Reviews: Climate Change 131–143, <https://doi.org/10.1002/wcc.158> accessed 2 January 2021; Simon Caney, 'Global Justice, Climate Change and Human Rights' in Douglas A Hicks and Thad Williamson (eds) *Leadership and Global Justice* (2012) 91–111.

⁴⁰ See n 27 above, at 542.

⁴¹ Julie Rozenberg and Stephen Hallegatte, 'Poor People on the Front Line: The Impacts of Climate Change on Poverty

spending long hours in heat can have detrimental effect on workers' health. In fact, sustained exposure to extreme heat can increase the mortality risk from stroke, cardiovascular disease and pulmonary conditions by 50 per cent.⁴²

Low-income households are also likely to live in areas that are more affordable. Paradoxically, climate change could impose huge costs in the form of loss of lives, shelter and livelihoods as such areas tend to be more disaster-prone.⁴³ High population density in areas that are prone to frequent climactic shocks can be a key contributing factor in increasing internal migration. According to World Bank projections, in the absence of urgent action, climate change can force more than 143 million people in the regions of Sub-Saharan Africa, South Asia and Latin America to migrate within their countries by 2050.⁴⁴ Taking Bangladesh's example again, under a worst-case scenario (high emissions and high inequality), climate migrants are projected to constitute over seven per cent of the state's total population by 2050.⁴⁵ However, the projection falls to a quarter of this value under more climate-friendly scenario (low emissions, unequal development), even if there is no change in the economic state of the poor.⁴⁶

It is also true that poorer households face more vulnerability to climate-related food price fluctuations.⁴⁷ Since food constitutes a major share of the total expenditure for low-income households, 'price and income elasticity of food demand'⁴⁸ is greater for the poor than for the rich.⁴⁹ Consequently, when climate-induced food supply shocks lead to rises in food prices, poorer households are left with no choice but to lower their food consumption or switch to inferior options, which in turn can lead to a rise in instances of malnutrition. In Tanzania, an increase in maize prices has been shown to reduce its intake among the rural poor, leading to vitamin A and iron deficiencies.⁵⁰ Similarly, frequent droughts and reduction in rice yields have had disastrous implications for 115 million Indonesian poor whose food and income is mainly dependent on rice production. An estimated 13 million Indonesian children suffer from malnutrition as households find it difficult to afford food amid drought-induced crop failures.⁵¹

in 2030' in Ravi Kanbur Henry Shue (eds), *Climate Justice: Integrating Economics and Philosophy* (2018)

42 Roston et al, n 26 above.

43 See n 28 above, at 9

44 Kanta Kumari Rigaud, et al, *op cit*, at 110–111.

45 *Ibid*, at 147–148.

46 *Ibid*.

47 See n 41 above, at 25.

48 Price (income) elasticity of demand is a measure of the responsiveness of a good's demand to price (income) changes. It is a ratio of percentage change in quantity demanded to percentage change in price (income).

49 Matin Qaim, 'Food Consumption Patterns in Developing Countries' in Pasquale Ferranti et al (eds) *Encyclopedia of Food Security and Sustainability* 556-560 (2019) <https://doi.org/10.1016/B978-0-08-100596-5.22445-1> accessed 2 January 2021.

50 Food and Agriculture Organisation of the UN, *The State of Agricultural Commodity Markets: Agricultural Trade, Climate Change and Food Security* (2018) at 15 citing Awudu Abdulai and Dominique Aubert, 'A Cross-section Analysis of Household Demand for Food and Nutrients in Tanzania' (February 2004) 31(1) *Agricultural Economics* 67–79.

51 See n 13 above, at 27.

Those who are already poor tend to have a higher exposure to climate shocks and, as stated above, lack the ability and resources to recover from effects of such shocks. This inability can have long-lasting effects by pushing the poor further below the poverty line, thereby making them even more susceptible to adverse climatic events than before. Such a ‘self-reinforcing mechanism which causes poverty to persist’ is known as a poverty trap,⁵² through which generations are condemned to suffer under poverty. The above analysis highlights the role of climate change in pushing the poor into the poverty trap, through the disproportionately high economic, social and human cost, both present and future, that it imposes on them. While inclusive sustainable development policies are key to eradication of poverty, the authors believe that addressing exacerbating factors such as climate change is also critical for achieving UN Development Programme’s Sustainable Development Goal No 1. As such, any work towards procuring climate justice would constitute a fine addition to a lawyer or a firm’s body of anti-poverty pro bono work.

Why litigate for climate justice?

The previous section highlights the disproportionate impact of climate change on the poor and sets the context for lawyers’ engagement in ensuring a drop in global GHG emissions and preventing the worst impacts of climate change. This engagement can take several forms. The IBA’s 2020 *Climate Crisis Statement* identifies several of them,⁵³ including ‘[engaging] in climate dispute resolution generally (including mediation, negotiation or litigation) and specifically on a pro-bono, volunteer or reduced fee basis, for those negatively affected by the climate crisis.’⁵⁴

At first glance, state courts may not appear to be the most suitable platform for seeking the large-scale policy reforms that are required to reduce GHG emissions or adapt to the changing climate. As some of the cases discussed later in this chapter will show, it is true that courts are not and cannot be, the first port of call for matters of governance and policy-making of the scale that the challenge of climate change requires. The executive and the legislative arms of governments are certainly more suited to this role. Yet, as seen below, courts of various states are increasingly being asked to play a more prominent role in the fight against climate change. It is not the case that governments are oblivious to the climate catastrophe. At the international level, the 2015 Paris Agreement constitutes an unprecedented recognition by 195 states of the need to prevent climate change and of their respective roles.⁵⁵ Given the scale of the challenge, such international cooperation is critical to the hopes of avoiding warming beyond 2°C and this is precisely what the Paris

52 Costas Azariadis and John Stachurski, ‘Poverty Traps’ in Philippe Aghion and Steven N Durlauf (eds), *Handbook of Economic Growth* (2005) 295–384.

53 See n 16 above, at paras 1–3.

54 *Ibid*, at para 1.

55 UN Treaty Collection, Status of Treaties: Paris Agreement, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=_en accessed 2 January 2021.

Agreement aims to achieve.⁵⁶ However, even the ‘ambitious’ Paris Agreement⁵⁷ contains only voluntary pledges by states to reduce GHG emissions without any mechanism for ensuring the fulfilment of such pledges.⁵⁸ With 2020 being the first deadline for submission of updated and more ambitious voluntary pledges under the Paris Agreement, barely any state parties to the Paris Agreement have submitted their updated and more ambitious targets.⁵⁹ This is not a criticism of the Paris Agreement. Inherently, international treaties can never truly compel sovereign nations to reduce their emissions. This is where state courts and climate justice litigation come into play.

An annual study conducted by the London School of Economics estimates that a total of 1,587 cases of climate litigation were filed between 1986 and May 2020.⁶⁰ In an analysis of a smaller subset – decided non-US cases between 1994 and 2020, the study found that over half of the cases in this period had an outcome favourable to climate change policy.⁶¹

Climate justice litigation can have both direct and indirect positive impacts. Direct impact will flow from the order of the court itself, which may direct the government to take mitigating/adaptive steps or form policies in this respect, or cancel a licence granted to a new coal mine. But a favourable court decision is not the only measure of success of climate justice litigation. Even if a case is decided unfavourably, it may have positive knock-on effects on public discourse, government policy, political debates and even business practices, in apprehension of future litigation or an impact on stock prices. An unfavourable decision might also yield a dissenting judgment,⁶² which could potentially be a precedent for future cases with a different set of facts.⁶³

56 See n 14 above, Art 2, para 1 (a).

57 Michael Jacobs, *The Paris Agreement is Highly Ambitious and Very Clever*, Grantham Research Institute on Climate Change and the Environment, London School of Economics and Political Science (19 December 2015), www.lse.ac.uk/granthaminstitute/news/the-paris-agreement-is-highly-ambitious-and-very-clever accessed 2 January 2021; *What is the Paris Agreement?*, Process and Meetings, UN Framework Convention on Climate Change (undated) <https://unfccc.int/process-and-meetings/the-paris-agreement/what-is-the-paris-agreement> accessed 2 January 2021.

58 David Estrin, *Limiting Dangerous Climate Change: The Critical Role of Citizen Suits and Domestic Courts — Despite the Paris Agreement*, CIGI Papers No 101 (May 2016) at 14.

59 Fiona Harvey and Jennifer Rankin, ‘Paris Climate Deal: World Not On Track To Meet Goal Amid Continuous emissions’, *The Guardian* (London, 4 December 2019), www.theguardian.com/environment/2019/dec/04/paris-climate-deal-world-not-on-track-to-meet-goal-amid-continuous-emissions accessed 2 January 2021; Climate Action Tracker, Climate Target Update Tracker, <https://climateactiontracker.org/climate-target-update-tracker> accessed 2 January 2021.

60 Joana Setzer and Rebecca 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 (July 2020) at 4, www.cceep.ac.uk/wp-content/uploads/2020/07/Global-trends-in-climate-change-litigation_2020-snapshot.pdf accessed 2 January 2021, citing Litigation Cases, Climate Change Laws of the World, https://climate-laws.org/cclow/litigation_cases accessed 2 January 2021 and Climate Change Litigation Databases, Sabin Center for Climate Change Law, see <http://climatecasechart.com> accessed 2 January 2021.

61 *Ibid* at 11–12. These figures also include cases seeking abolition of pro-environment regulations/actions of the state ie, climate change litigation and *not* climate change justice litigation. While both categories of cases are statistically and legally relevant, the authors have focused on climate justice litigation in the following sections of this chapter.

62 *Kelsey Cascadia Rose Juliana et al v US et al*, No 18-36082, D C No 6:15-cv-01517- AA, Court of Appeals for the Ninth Circuit, Opinion (17 January 2020), <https://cdn.ca9.uscourts.gov/datastore/opinions/2020/01/17/18-36082.pdf> accessed 2 January 2021.

63 Setzer and Byrnes, n 60 above, at 25.

A favourable decision in climate justice litigation against the government, on the other hand, can make a profound pro-regulation impact. One of the most prominent examples of such an impact is the case of *Massachusetts v Environmental Protection Agency* (EPA).⁶⁴ In this case, the US Supreme Court had directed a reluctant EPA to start regulating CO₂ emissions by motor vehicles to address climate change as part of its mandate under the federal Clean Air Act, 1963. A more recent and equally prominent example comes from the Netherlands. In December 2019, the Dutch Supreme Court upheld a 2015 district court ruling which had directed the Dutch government to reduce the state's GHG emissions by 25 per cent from pre-1990 levels by 2020.⁶⁵ It has been argued that the decision of the Dutch Supreme Court, popularly known as the *Urgenda* decision, may mark the beginning of a trend where state courts 'help achieve what 20 years of UNFCCC [UN Framework Convention on Climate Change] negotiations did not and what the Paris Agreement fails to assure – actual, timely and sufficient reductions in carbon emissions to stop the global average temperature from increasing by more than 2°C'.⁶⁶ While replicating *Urgenda's* results in other jurisdictions may not be straightforward, the case has already inspired lawsuits in several other jurisdictions on similar grounds and each successful case is likely to encourage several others.⁶⁷ For courts and judges, although foreign precedents may not be binding, it is useful to know that they are not the first ones to decide such cases favourably and that others have already done it.⁶⁸

Unlike more particularised forms of anti-poverty pro bono action, the inherently collective nature of climate justice litigation allows lawyers to make a much greater impact. For instance, a court order directing any state's government to reduce its GHG emissions is inherently beneficial to everyone – parties before the court or not, in the state of the court or not and born or unborn – and even more so for the poor who are disproportionately vulnerable to climate change. Given the recent proliferation of climate justice litigation and the recall value effect on judges of the several high-profile victories in the past few years,⁶⁹ the IBA's call to lawyers to engage in pro bono climate justice litigation⁷⁰ could not have been better timed. The next section of this chapter provides a primer on climate justice

64 549 U S 497 (2007).

65 *State of the Netherlands v Stichting Urgenda*, No 19/00135, Hoge Raad (Supreme Court of the Netherlands), Judgment (20 December 2019).

66 See n 58 above, at 6–7.

67 See, eg, *Friends of the Irish Environment CLG v The Government of Ireland, Ireland and the Attorney General*, Appeal No 205 of 2019, Supreme Court, Judgment (31 July 2020); *Verein KlimaSeniorinnen Schweiz v Bundesrat*, No. A-2992/2017, Bundesgericht (Federal Supreme Court of Switzerland), Judgment (5 May 2020); *VZW Klimaatzaak et al v Kingdom of Belgium et al*, R G No 15/4585, *Tribunal De Premiere Instance Francophone De Bruxelles* (Brussels Court of First Instance) (pending) (further details about the case are available at www.klimaatzaak.eu/en accessed 2 January 2021).

68 Raveena Aulakh, 'Pakistan Judge Orders State to Enforce Climate Policies' *The Star* (Toronto, 3 October 2015), www.thestar.com/news/world/2015/10/03/pakistan-judge-orders-state-to-enforce-climate-policies.html accessed 2 January 2021 (quoting Michael Gerrard, Director of Columbia Law School's Sabin Center for Climate Change Law: '[e]ach successful ruling motivates people in other countries to try it...[I]t is useful to be able to say to a judge that you are not the first one to do this. Others have already done it. Having a precedent is not binding, but it's helpful.').

69 See n 65 above; *Friends of the Irish Environment CLG v The Government of Ireland*, n 67 above; *Thomson v Minister for Climate Change Issues*, (2017) NZHC 733 (New Zealand).

70 See n 16 above.

litigation to help lawyers rise to the IBA's call to action and assess whether climate justice litigation could be a good fit for their or their firm's anti-poverty work.

Issues and considerations in climate justice litigation

Climate justice litigation can take several forms. A broad categorisation would include cases seeking: mitigation measures; adaptation measures; and compensation for harm caused by climate change. The first two categories of cases are generally filed against governments, whereas the third is against private entities.⁷¹

Another way to categorise climate justice cases could be to draw a distinction between 'strategic' and 'routine' cases.⁷² It could be said that climate litigation wherein the litigant makes strategic decisions about who will bring the case, where and when the case will be filed and what legal remedy will be sought, is a strategic case.⁷³ An underlying aim of achieving outcomes such as change in policy or behaviour of state or state entities, which go beyond the individual litigant's interest, has also been identified as a characteristic of strategic cases.⁷⁴ A routine climate litigation case, on the other hand, could be where a specific licence or project permit is challenged on environmental grounds such as failure to undertake statutorily required Environmental Impact Assessment,⁷⁵ without any express objective of effecting broader policy change.⁷⁶ In their endeavour to provide a broad-based overview of issues and not focus on the environmental law of any particular jurisdictions, this chapter largely focuses on examples of strategic climate litigation in the following sections.

While the challenges of seeking climate justice before any state's courts will be unique, there are a number of issues that are typically addressed in most such cases. These include cause of action, standing of the plaintiff, separation of powers between the state and the judiciary and causation of harm (and evidence thereof). Some of the trends which have emerged from discussion of the above issues by courts in distinct parts of the world are analysed below. This analysis may serve as a helpful bird's eye view of 'what has worked', 'what could work' and 'what may not work' in future climate justice litigation. This section is not intended for seasoned environmental law or climate change experts, who are already keenly aware of these issues and are innovating arguments (both in courts and in academic discourse) to overcome the current limitations of climate justice litigation. Rather, this section draws inspiration from the work of such experts and is targeted at lawyers who are not practising environmental law but are looking to engage in pro bono work aimed at alleviation of poverty. Given this focus, the preference for addressing broader climate policy

71 IBA Climate Change Justice and Human Rights Task Force, *Model Statute for Proceedings Challenging Government Failure to Act on Climate Change* (February 2020) at 3.

72 Setzer and Byrnes 2020, n 60 above, at 4.

73 *Ibid.*

74 *Ibid.*

75 David Markell and J B Ruhl, 'An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual', (2012) 64(1) *Florida Law Review* 15 at 38.

76 Setzer and Byrnes, *Global Trends in Climate Change Litigation: 2019 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 (July 2019) at 2.

concerns⁷⁷ and the absence of any significant successful precedents at the time of writing,⁷⁸ the below discussion focuses on cases against states and state entities as opposed to ad hoc cases against private entities.

Cause of action

Traditionally, litigation for climate justice has arisen from environmental law statutes of states.⁷⁹ Much of such environmental litigation has focused on challenges to licences/approvals for emission-heavy projects on the grounds non-fulfilment of statutory requirements such as undertaking of an Environmental Impact Assessment.⁸⁰ But, as discussed below, it may be possible to initiate strategic cases with broader policy challenges under such environmental statutes, as well as more recent climate change statutes. Of late, climate justice litigation has also witnessed a trend towards causes of action founded in a broader set of sources including constitutional law, human rights law, tort law and various combinations of the above.

Statutory law

In countries such as the UK,⁸¹ which have dedicated climate change legislation, it could be possible to challenge plans and policies formulated under such legislations. This was recently accomplished in the *Friends of Irish Environment* case which came to be decided by the Supreme Court of Ireland in July 2020.⁸² Here, the government's mitigation plan under the Climate Action and Low Carbon Development Act, 2015 was challenged on the ground of being vague and not sufficiently specific.⁸³ According to the Supreme Court, a mitigation

77 IBA, *Achieving Justice and Human Rights in an Era of Climate Disruption* (2014) at 127 www.ibanet.org/PresidentialTaskForceClimateChangeJustice2014Report.aspx accessed 2 January 2021 ('The Task Force is conscious that litigation that secures declaratory or interim relief against states, whereby individuals can hold governments to account for their domestic regulation of GHGs, is preferable to ad hoc litigation against individual emitters that does not address broader climate concerns').

78 UN Environment Programme, *The Status of Climate Change Litigation: A Global Review* (May 2017) at 19–20 <https://wedocs.unep.org/bitstream/handle/20.500.11822/20767/climate-change-litigation.pdf> accessed 2 January 2021 ('Although several courts have recognized the scientific consensus regarding the causal relationship between anthropogenic GHG emissions, climate change and the adverse impacts resulting from climate change, no court has yet found that particular GHG emissions relate causally to particular adverse climate change impacts for the purpose of establishing liability').

79 See, eg, *Gray v Minister for Planning et al*, [2006] 152 LGERA 258 (Australia), where the approval of a coal mine was successfully challenged on the ground the government's failure to account for all the potential GHG emissions that could be caused by the mine; see also Jacqueline Peel and Hari M Osofsky, 'A Rights Turn in Climate Change Litigation?', (March 2018) 7(1) *Transnational Environmental Law* 37–67 at 39, <https://doi.org/10.1017/S2047102517000292> accessed 2 January 2021.

80 See n 75 above, at 38.

81 See Introductory Text, *Climate Change Act, 2008 (UK)* ('An Act to set a target for the year 2050 for the reduction of targeted greenhouse gas emissions; to provide for a system of carbon budgeting; to establish a Committee on Climate Change; to confer powers to establish trading schemes for the purpose of limiting greenhouse gas emissions or encouraging activities that reduce such emissions or remove greenhouse gas from the atmosphere; to make provision about adaptation to climate change...').

82 *Friends of the Irish Environment CLG v The Government of Ireland*, n 67 above, at paras 2.3, 4.1 and 4.2.

83 *Ibid*, at para 6.35.

plan that fails to state *how* future emissions reduction targets are to be met, would not be sufficiently specific.⁸⁴

Other than vagueness of mitigation policies, a failure to periodically review mitigation policies can also be challenged under climate change legislations. In respect of New Zealand's Climate Change Response Act, 2002, a court has held that the existing mitigation policy and its targets must be reviewed periodically, particularly, in this case, on release of the IPCC's Fifth Assessment Report which contained new scientific findings.⁸⁵ Naturally, an omission by the state or its instrumentality to fulfil its mandate under climate change/environment protection legislation can also be challenged. This was the case in the previously mentioned earlier decision of *Massachusetts v EPA*.⁸⁶ In this case from 2007, the EPA's decision of not regulating CO₂ emissions from motor vehicles was challenged and the US Supreme Court found EPA to have failed in its mandate under the Clean Air Act, 1963 and compelled it to begin regulating vehicular CO₂ as an 'air pollutant' under the act.⁸⁷

As such, judicial review of a state's decisions/actions/inactions in respect of applicable climate change and/or environmental statutes is possible in many jurisdictions. The extent of such review will vary between countries, but some of the common grounds observed

from recent cases include: inaction or omission; failure to fulfil the statutory mandate; and procedural deficiency.⁸⁸

HUMAN RIGHTS

Early commentators, while acknowledging climate change's 'increasingly obvious' impact on human rights, doubted whether this impact generates sufficient evidence for an actionable rights violation.⁸⁹ These concerns were echoed by the 2009 report of the UN Office of the High Commissioner for Human Rights (OHCHR).⁹⁰ But, at the time, OHCHR remained unconvinced if such impact can be categorised as a human rights violation in a strict legal sense (inter alia, due to the complex causal relationships at play).⁹¹ While the report was hailed for explicitly linking climate change with human rights, it was also criticised for overstating the chain of causation between states' emissions and the effects of climate change on human rights, which prevented it from concluding that at least some effects of climate change breach human rights.⁹²

84 *Ibid*, at paras 6.45–46.

85 *Thomson v Minister for Climate Change Issues*, n 69 above, at para 94.

86 *Massachusetts v Environmental Protection Agency*, 549 US 497 (2007).

87 *Ibid* at 522–525.

88 See Jutta Brunnée, et al, 'Overview of Legal Issues Relevant to Climate Change', in Richard Lord QC et al (eds), *Climate Change Liability: Transnational Law and Practice* (2012) at 31.

89 John H Knox, 'Climate Change and Human Rights Law' (2009) 50(1) *Virginia Journal of International Law* 163–218 at 166; cf more recent literature including Peel and Osofsky, n 79 above, at 46.

90 OHCHR, Report of the Office of the UN High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights, UN Doc A/HRC/10/61 (15 January 2009), <https://digitallibrary.un.org/record/647215?ln=en> accessed 2 January 2021.

91 *Ibid*, at para 70.

92 John H Knox, 'Linking Human Rights and Climate Change at the United Nations' (2009) 33(2) *Harvard*

Today, however, the link between climate change and human rights is more firmly established. In 2016, the UN Human Rights Council (UNHRC) acknowledged that OHCHR's 2009 conclusions may no longer be valid as 'scientific knowledge improves and the effects of climate change become larger and more immediate, tracing causal connections between particular contributions and resulting harms becomes less difficult'.⁹³ The Council also unequivocally noted that states are required to provide protection against the infringement of human rights by climate change.⁹⁴ The 2015 Paris Agreement also acknowledges the intrinsic link between human rights and climate change,⁹⁵ further fuelling the viability of human rights-based climate justice litigation. In light of this linking of climate change to human rights, violation of human rights is becoming a prominent cause of action in climate justice litigation.

The starting point for any discussion of human rights trends and considerations in climate justice litigation is generally the widely celebrated case of *Urgenda Foundation v State of the Netherlands*. In this case, the Dutch Supreme Court held that protection of rights under the European Convention on Human Rights, 1950 (ECHR) requires states to take preventive steps against the impact of climate change. Specifically, the court found breaches of Article 2 (which protects the right to life) and Article 8 (which protects 'right to respect for private and family life') of the ECHR by the Netherlands' insufficient mitigation policy.⁹⁶ In identifying these violations, the Supreme Court applied the European Court of Human Rights' (ECtHR) test of 'real and immediate risk' and interpreted 'immediate' to not refer to imminence in terms of time, but rather that the risk in question is directly threatening the persons involved.⁹⁷

The *Urgenda* case was closely followed globally and has influenced several similar lawsuits in other countries.⁹⁸ On the strength of the Dutch Supreme Court's decision in *Urgenda*, it is possible for future climate justice litigants to directly rely on the ECHR as a ground for seeking mitigation measures. However, results may not always be as favourable as the *Urgenda* case. In Switzerland, the Federal Court refused to find any violation of ECHR in a case brought forward by the Union of Swiss Senior Women for Climate Protection.⁹⁹ It held that the future threat of global warming does not constitute violation of any rights under the ECHR with the sufficient intensity.¹⁰⁰ The court seemed to disagree with the *Urgenda* court on the interpretation of 'imminence' and also found favour with the state's argument of lack of direct impact on the plaintiff's rights, an argument which was expressly rejected by the *Urgenda* court. Despite the ultimate rejection of the claim by the court, this case illustrates

Environmental Law Review 477–498 at 488.

93 UN Human Rights Council, Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment (1 February 2016) at 10.

94 *Ibid.*

95 Paris Agreement, n 14 above, Preamble.

96 *Ibid.*, at para 5.

97 *Ibid.*, at para 5.2.2.

98 See *Friends of the Irish Environment CLG v The Government of Ireland*, n 67 above; *Verein KlimaSeniorinnen Schweiz v Bundesrat*, n 67 above; *VZW Klimaatzaak et al v Kingdom of Belgium et al*, n 67 above.

99 *Verein KlimaSeniorinnen Schweiz v Bundesrat*, n 67 above.

100 *Ibid.*, at para 5.4.

an inherent benefit of formulating human rights arguments in climate justice litigation: replicability. Potentially, the replicability of human rights arguments, such as the ones deployed in *Urgenda* and the Swiss Federal Tribunal case is quite high given the similarities in formulations of rights in legal instruments available for future climate litigation, including international treaties and rights provisions of national constitutions.¹⁰¹ Indeed, in addition to the above Swiss case, the *Urgenda* decision has inspired lawyers in several countries first to theorise about the viability of *Urgenda*'s arguments in their jurisdictions¹⁰² and eventually initiate litigation relying on some of *Urgenda*'s arguments.¹⁰³

Endorsement of climate change's impact on human rights has also come from courts in developing countries. The most celebrated example of this comes from the Lahore High Court in *Leghari v Pakistan*, which involved a constitutional rights claim, as discussed in the next section.¹⁰⁴ Along with *Massachusetts v EPA*, the cases of *Urgenda* and *Leghari* have been identified as the three cases which have laid the foundations of climate justice litigation against governments.¹⁰⁵

Human rights-based arguments may also be deployed in future climate justice litigation seeking asylum for climate refugees. This was tried, albeit unsuccessfully, in relation to New Zealand's deportation of a climate refugee. Teitota, a refugee from the island of Kiribati, had argued that rising sea levels had forced him to leave his homeland and made him eligible for protection under the 1951 UN Convention relating to the Status of Refugees.¹⁰⁶ The New Zealand Supreme Court did not agree and held that Teitota did not face any serious harm if he were to return to Kiribati.¹⁰⁷ Teitota also filed a complaint against his deportation before the UN Human Rights Committee which came to be decided early in 2020.¹⁰⁸ The Committee held that it could not conclude that Teitota's rights under International Covenant on Civil and Political Rights¹⁰⁹ (ICCPR) were violated as the claimed threat of climate change was not imminent,¹¹⁰ and that this threat was still ten to 15 years away, during which time Kiribati could adopt sufficient adaptation measures.¹¹¹ Yet, promisingly for future climate justice litigation, both the New Zealand Supreme Court and the UNHRC noted that their opinions were without prejudice to future developments, when the threat of climate

101 Peel and Osofsky, n 79 above, at 40.

102 See, eg, Josephine van Zeben, 'Establishing a Governmental Duty of Care for Climate Change Mitigation: Will *Urgenda* Turn the Tide?' (October 2015) 4(2) *Transnational Environmental Law* 339–357, <https://doi.org/10.1017/S2047102515000199> accessed 2 January 2021; Don Anton, 'A Dutch Blueprint for Climate Change Litigation' *The Sydney Morning Herald* (Sydney, 2 July 2015), www.smh.com.au/opinion/a-dutch-blueprint-for-climate-litigation-20150702-gi3d5d.html accessed 2 January 2021.

103 See eg, *Friends of the Irish Environment CLG v The Government of Ireland*, n 67 above; *VZW Klimaatzaak et al v Kingdom of Belgium et al*, n 67 above.

104 *Ashgar Leghari v Federation of Pakistan*, Writ Petition No. 25501/2015, Lahore High Court, Order (4 September 2015).

105 IBA Climate Change Justice and Human Rights Task Force, *Model Statute for Proceedings Challenging Government Failure to Act on Climate Change* (February 2020) at 4–5.

106 *Ioane Teitota v The Chief Executive of the Ministry of Business, Innovation and Employment*, [2015] NZSC 107 at para 5.

107 *Ibid*, at para 12.

108 UN Human Rights Committee, Views Adopted by the Committee under Art 5 (4) of the Optional Protocol Concerning Communication No 2728/2016, CCPR/C/127/D/2728/2016 (7 January 2020).

109 International Covenant on Civil and Political Rights (1966), 999 UNTS 171.

110 See n 108 above, at para 9.6.

111 *Ibid*, at para 9.12.

change and its impacts may become sufficiently imminent to merit protection under the 1951 UN Convention relating to the Status of Refugees¹¹² or make deportation of a such persons untenable under ICCPR.¹¹³

As the above cases illustrate, imminence of the harm caused by climate change, or rather the absence of such imminence in the court's opinion, can be a hurdle in rights-based climate justice litigation. As seen in the next section, similar rights-based litigation in developing countries has relied more extensively on constitutional protections, wherein some courts have not deemed it necessary to undertake detailed factual analysis to determine whether the threat posed by climate change is indeed imminent.¹¹⁴

Constitutional right to a healthy environment

Apart from relatively recent constitutions, including those of several African countries,¹¹⁵ constitutions do not generally recognise an express right to healthy environment.¹¹⁶ India's constitution, for instance, despite specifying that it is the state's duty to protect the environment,¹¹⁷ makes this provision of the constitution non-justiciable.¹¹⁸ But India's courts have read a right to healthy environment into the constitutionally protected fundamental right to life.¹¹⁹ In at least one common law jurisdiction, however, such a right has been termed

112 See n 106 above, at para 13.

113 See n 108 above, at para 9.14.

114 See *Ashgar Leghari v Federation of Pakistan*, Writ Petition No 25501/2015, Lahore High Court, Order (25 January 2018) at para 2.

115 The Constitution of the Republic of South Africa, 1996, Art 24 ('Everyone has the right – (a) to an environment that is not harmful to their health or wellbeing; and (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that – (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development'); The Constitution of Kenya, 2010, A 42 ('Every person has the right to a clean and healthy environment, which includes the right – (a) to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and (b) to have obligations relating to the environment fulfilled under Article 70'); The Constitution of the Tunisian Republic, 2014, Art 45 ('The state guarantees the right to a healthy and balanced environment and the right to participate in the protection of the climate. The state shall provide the necessary means to eradicate pollution of the environment.').

116 Cf *Friends of the Irish Environment CLG v The Government of Ireland*, n 67 above, at para 8.13.

117 See also Constitution of the Federal Republic of Nigeria, 1999, Art 20 ('The State shall protect and improve the environment and safeguard the water, air and land, forest and wild life of Nigeria').

118 The Constitution of India, 1949, Art 48A ('The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country'); but see the Constitution of India, 1949, Art 37 ('The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws').

119 See *Virender Gaur et al v State of Haryana et al*, (1995) 2 SCC 577 (India), at para 7 ('Article 21 protects right to life as a fundamental right. Enjoyment of life and its attainment including their right to life with human dignity encompasses within its ambit, the protection and preservation of environment, ecological balance free from pollution of air and water, sanitation without which life cannot be enjoyed. Any contra acts or actions would cause environmental pollution. Environmental, ecological, air, [and] [sic] water pollution, etc. should be regarded as amounting to violation of Article 21.'). A *P Pollution Control Board II v MV Nayudu et al*, (2001) 2 SCC 62 (India) at para 6 ('Our Supreme Court was one of the first Courts to develop the concept of right to "healthy environment" as part of the right to "life" under Article 21 of our Constitution').

as superfluous (ie, not extending beyond the right to life), vague and ill-defined.¹²⁰ Yet, in Pakistan, another common law country, the right to a healthy environment, as part of the right to life, has been judicially extended to include protection against climate justice within its ambit.¹²¹ In fact, the Lahore High Court has termed extreme weather impacts caused by climate change to be a ‘clarion call’ for protection of the fundamental right of life.¹²²

Similarly, developing countries with civil law systems have also recognised climate change as a facet of constitutionally guaranteed rights. The Supreme Court of Colombia has found the government’s inaction against changing climate as a breach of several constitutional rights.¹²³ The court has held constitutional right to life, health and dignity to be ‘substantially linked and determined by the environment and the ecosystem’ and found lack of efforts to prevent climate change and deforestation to be in violation of these rights.¹²⁴ Although not directly addressing climate change, courts in Argentina have also allowed constitutional rights-based claims for a healthy environment. These were cases brought by natives against proposed and ongoing deforestation.¹²⁵ A similar trend is also observable in India where, despite playing a very active and influential role in environmental protection, courts have not yet discussed ‘climate change’ per se, focussing instead on more particular issues such as deforestation or pollution.¹²⁶

In civil law jurisdictions from the developed world, results in constitutional rights-based climate litigation have been mixed. In Germany, a court has held that the government must provide adequate protection to constitutional rights including right to life and property against the impact of climate change.¹²⁷ Constitutional rights-based arguments were pressed before the Swiss Federal Tribunal as well, where the plaintiffs, women aged over 75, claimed that they were particularly susceptible to heat waves caused by climate change and sought more ambitious mitigation targets for Switzerland on the ground of a breach of their constitutional right to life.¹²⁸ However, the court found the injury complained of to be too far in the future¹²⁹ to be ‘legally relevant’.¹³⁰ It was held that the constitutional rights of

120 *Friends of the Irish Environment CLG v The Government of Ireland*, n 67 above, at para 9.5.

121 See n 104 above, at paras 6–7.

122 *Ibid.*

123 *Demanda Generaciones Futuras v Minambiente*, STC4360-2018, Corte Suprema de Justicia (Supreme Court of Justice of Colombia), Judgment (4 May 2018).

124 *Ibid.*, at 13.

125 See *Comunidad Indígena del Pueblo Wichi Hoktek T’Oi v Secretaría de Medio Ambiente y Desarrollo Sustentable*, Corte Suprema de Justicia de la Nación (Supreme Court of Argentina), Judgment (11 July 2002); *Salas, Dino y otros v Salta, Provincia de y Estado Nacional*, Corte Suprema de Justicia de la Nación (Supreme Court of Argentina), Judgment (26 March 2009).

126 See *M C Mehta v Union of India*, 1987 (4) SCC 463; *M C Mehta v Union of India*, 1988 AIR 1115; *Indian Council for Enviro-Legal Action v Union of India*, AIR 1999 SC 1502; *M C Mehta v Union of India*, 2001 (4) SCC 577.

127 *Family Farmers and Greenpeace Germany v. Germany*, Verwaltungsgericht Berlin (Administrative Court Berlin), Judgment (31 October 2019) (ultimately, the claim for seeking adherence to the state’s previously announced goal of 40 per cent reduction in emissions by 2020 (as compared to 1990 levels) was dismissed as the court found the said goal to not be binding on the government and the projected reduction of 32 per cent to be adequate).

128 *Verein KlimaSeniorinnen Schweiz v Bundesrat*, n 67 above.

129 *Ibid.*, at paras 5.4 and 6.1.

130 *Ibid.*, at para 6.2.

the plaintiffs were not affected with a sufficient intensity at the present time by the alleged inadequacy of Switzerland's mitigation targets.¹³¹

It could be advisable to consider bringing future climate justice litigation in jurisdictions which have either express constitutional guarantees against adverse changes to the environment and/or a duty cast on the state to protect the environment. The same can also be said of jurisdictions where the courts have read the right to healthy environment into express constitutional rights. But such a derivative right or even a duty of the government to protect the environment may not always be justiciable. The threshold challenge of justiciability and its implications in climate justice litigation are discussed in more detail in the one of the following sections.

Torts of nuisance and negligence

In the US, common law claims for torts of nuisance on account of GHG emissions will face substantial resistance. This is so as the Supreme Court has held that the Clean Air Act, 1963 displaces any common law action for nuisance against the state,¹³² a reasoning which has been extended to such claims against private GHG emitters as well.¹³³ This could be due to

the requirement of proof for attribution, foreseeability and negligent conduct to establish tortious liability.¹³⁴

Given their origin in common law, tort liability for negligence and nuisance may not typically be applicable in civil law jurisdictions. However, statutory law may at times create tortious liability, as is the case in the Netherlands, but the proof requirement of attribution and fault will apply here as well.¹³⁵

In the environmental context, an extremely large body of tort law jurisprudence exists in India which gives effect to principles such as 'polluter pays'¹³⁶ and 'public trust',¹³⁷ and incorporates global environmental law maxims of 'inter-generational equity'¹³⁸ and the precautionary principle into Indian law.¹³⁹ The tradition of environmental activism by India's courts is also very well established and, alongside environmental activists and

131 *Ibid*, at para 5.4.

132 *American Electric Power v Connecticut*, 564 US 410 (2011) at 415.

133 *Native Village of Kivalina v ExxonMobil Corp*, 696 F.3d 849, 858-59 (9th Cir 2012); *Native Village of Kivalina v ExxonMobil Corp*, 133 S Ct 2390 (2013) (*writ of certiorari* was denied by the US Supreme Court without comment).

134 See Justice Brian Preston, *Climate Change Litigation* (Part I), 5 *Climate & Carbon Law Review* 3-14 (2011) at 4; Robert Blomquist, *Comparative Climate Change Torts*, 46(4) *Valparaiso University Law Review* 1053-1075 (2012) at 1064-65.

135 See, eg, Dutch Civil Code, Art 6:162 ('1. A person who commits a tortious act (unlawful act) against another person that can be attributed to him, must repair the damage that this other person has suffered as a result thereof. 2. As a tortious act is regarded a violation of someone else's right (entitlement) and an act or omission in violation of a duty imposed by law or of what according to unwritten law has to be regarded as proper social conduct, always as far as there was no justification for this behaviour. 3. A tortious act can be attributed to the tortfeasor [the person committing the tortious act] if it results from his fault or from a cause for which he is accountable by virtue of law or generally accepted principles (common opinion)').

136 *Vellore Citizens Welfare Forum v Union of India*, AIR 1996 SC 2718.

137 *M C Mehta v Kamal Nath*, 1996 (1) SCC 38.

138 *State of Himachal Pradesh v Ganesh Wood Products*, AIR 1996 SC 149.

139 *Vellore Citizens Welfare Forum v Union of India*, AIR 1996 SC 2718.

non-governmental organisations (NGOs), courts themselves frequently initiate *suo motto* inquiries into environmental matters.¹⁴⁰ In this backdrop, the authors believe that it could be very worthwhile to initiate previously untried climate justice litigation in India, relying on the vast body of environmental tort jurisprudence.

The 2015 Paris Agreement

Ratification of the Paris Agreement could potentially be a legal basis for citizens of ratifying states to proceed against their governments. As noted earlier, while the Paris Agreement itself does not contain enforceable obligations, the commitments of state signatories can be used to persuade domestic courts to take judicial notice of any state actions which are inconsistent with these internationally declared goals.¹⁴¹ In *Urgenda*, the Dutch Supreme Court held that all parties to the Paris Agreement are individually bound to meet their commitments.¹⁴² In the same vein, the Colombian Supreme Court has held that the government's failure to meet its commitment under the Paris Agreement – inter alia, to achieve zero-net deforestation in the Colombian Amazon by 2020 – violated the plaintiffs' fundamental rights under the constitution.¹⁴³ With 2020 marking the formal start of the commitments made by countries under the Paris Agreement, the stage could be set for a surge in climate justice litigation across the globe.¹⁴⁴

But the success of such litigation may not be guaranteed, especially before courts where 'imminence' of the threats occasioned by climate change is considered as a necessary ingredient for grant of relief. As such, the Swiss Federal Tribunal has ironically relied on the Paris Agreement to find support for the state's mitigation policy which was inconsistent with Switzerland's Nationally Determined Contribution (NDC) under the Paris Agreement. The Federal Tribunal noted that the Paris Agreement acknowledges that the limit of 2°C warming will not be breached in the immediate future and consequently, given the long-term goals of the Paris Agreement, Switzerland's 2030 NDC commitments cannot be sought to be enforced until the limit of 2°C warming is reached.¹⁴⁵ The Swiss court also relied on the IPCC's reports which indicated that global warming will reach 1.5°C around 2040, even at the current rate of 0.2°C per decade and therefore concluded that there was

140 See eg, *M C Mehta v Union of India*, Writ Petition (Civil) No 13029 of 1985, Supreme Court of India, Order (25 November 2019) at para 2 ('We have *suo moto* taken note of the water pollution in Delhi and other places as it appears that there are reports that impure water is being supplied to the people and there are reports to the contrary that samples have been manipulated. We cannot leave the matter at that. As a matter of fact, in such a matter of air and water pollution, it is the Constitutional duty enjoined upon all the stakeholders to do the needful for providing better air and potable water. It was also stated by the Chief Secretary to the Govt. of Delhi that there are certain problems of governance. The problem of governance, if any, cannot come in the way to deal with such matters. It is expected from the Government machineries not to enter into the rival claims, but to sit down together, work it out how to improve the air quality and whether potable water is being supplied or not and how to improve the water management.').

141 See n 78 above, at 8.

142 See n 65 above, at para 5.7.3.

143 See n 123 above, at para 11.3.

144 Peel and Osofsky, n 79 above, at 66-67.

145 *Verein KlimaSeniorinnen Schweiz v Bundesrat*, n 67 above, at para 5.3.

no immediate cause of action which could be addressed by the court.¹⁴⁶ While a refusal to undertake judicial review of the state's failure to meet NDC commitments may meet greater success elsewhere, more ambitious climate justice litigation which seeks changes to a state's NDC itself may not. In New Zealand, the state's 2030 NDC under the Paris Agreement was challenged on grounds of insufficiency or 'unreasonability'.¹⁴⁷ The High Court held that the state's 2030 commitment of 30 per cent GHG emissions reduction from 1990 levels could not be challenged.¹⁴⁸ It was held that even if the 2030 NDC was less ambitious than New Zealand's 2050 NDC and other countries' 2030 NDCs, it was not inconsistent with the overall goal of the Paris Agreement¹⁴⁹ and, in such a scenario, judicial review was uncalled for even if the 2030 NDC were an insufficient response to the dangers of climate change.¹⁵⁰ The contours of judicial review in the context of climate justice litigation are discussed in more detail in the following section.

Justiciability

Generally, justiciability has two elements: standing of the plaintiff to bring the claim; and permissibility of the relief sought under the doctrine of separation of powers between the judiciary and other organs of the state.

Standing

It is common for the standing of a non-profit entity/NGO to be called into question in climate justice litigation. As such, it may be difficult for an NGO or a corporate entity to rely on rights-based arguments, either constitutional or under international instruments.¹⁵¹ Specifically, it has been held that in the ECHR context, such an entity does not have standing as it does not have any rights under the ECHR in the first place.¹⁵² As noted by the Irish Supreme Court, *prima facie* an NGO or a corporate entity does not have any constitutional rights or rights under the ECHR and therefore would not have standing to commence rights-based climate justice litigation.¹⁵³ However, depending on the constitutional jurisprudence of a state, standing could be accorded to persons or entities when there is a real risk that important rights would not be vindicated unless a more relaxed attitude to standing were adopted.¹⁵⁴ This has been done in the Netherlands, where the Supreme Court permitted *Urgenda*, an NGO, to represent the interests of Dutch residents and further found such

146 *Ibid*, para 5.3.

147 *Thomson v Minister for Climate Change Issues*, n 69 above, at paras 160, 164, 168 and 179.

148 *Ibid*.

149 *Ibid*, at para 176.

150 *Ibid*, at para 160.

151 *Friends of the Irish Environment CLG v The Government of Ireland*, n 67 above, at paras 7.5, 7.22 and 9.4.

152 *Ibid*, at paras 7.6, 7.23 and 9.4.

153 *Ibid*, at paras 7.5, 7.6, 7.23, 7.24 and 9.4.

154 *Ibid*, at para 7.21; *Haughton v Minister for Planning and Macquarie Generation; Haughton v Minister for Planning and TRUenergy Pty Ltd* [2011] NSWLEC 217 (Australia), at paras 69–75.

pooling of interests to be desirable in environmental cases.¹⁵⁵ Here, it may be noted that for adopting this view on *Urgenda's* standing, the court relied on a provision of the Dutch constitution and was not remiss to note that in its absence, say in a case before the ECtHR or any non-Dutch European court, an NGO such as *Urgenda* would *not* have standing in light of Article 34 of the ECHR.¹⁵⁶

Even individuals may not have standing before European courts unless they can exhibit present and immediate danger, a threshold not met by future warming of 2°C as per the Swiss Federal Tribunal.¹⁵⁷ The General Court of the European Union has also rejected a group of individuals' challenge to the EU's emission reduction legislation on the ground that such individuals were not specifically affected by climate change or the EU's mitigation policies.¹⁵⁸ Even if the effects of climate change felt by each individual may vary, the same does not confer *locus standi* on any particular individual to challenge EU mitigation measures which are of general application.¹⁵⁹

However, special consideration may be accorded in cases brought by a constituent state, as was done in *Massachusetts v EPA*.¹⁶⁰ The US Supreme Court relied on Massachusetts' status as a quasi-sovereign and its responsibilities to prevent the harms of climate change to accord standing.¹⁶¹ Another finding of the US Supreme Court which could be advantageously referred to in future climate justice litigation is that as holder of 'territory alleged to be affected', the state of Massachusetts had standing to challenge EPA's decision to not regulate CO₂ emissions from motor vehicles.¹⁶² In the US, going by recent trends, even individual plaintiffs may have standing to initiate climate justice litigation. According to the court in *Juliana v US*, to have standing for a constitutional claim, a plaintiff must have a concrete and particularised injury that is caused by the challenged conduct and is likely redressable by a favourable judicial decision.¹⁶³ For this purpose, having to move houses due to water scarcity or dilution in property value due to rising sea levels have been found to be concrete and sufficiently particularised injuries.¹⁶⁴ For causation, it is sufficient to show that the US state contributes substantially to GHG emissions and that the injuries complained of are generally caused by climate change.¹⁶⁵ Another limb of causation is the state's grant of permission for extraction of fossil fuels, which shows its role in causing of the harm caused by GHG emissions and resultant climate change.¹⁶⁶ Yet the third limb of the test, whether the claim

155 See n 65 above, at para 5.9.2.

156 *Ibid*, at para 5.9.3.

157 *Verein KlimaSeniorinnen Schweiz v Bundesrat*, n 67 above, at paras 5.4 See 5.5.

158 *Armando Ferrão Carvalho et al v The European Parliament and the Council*, Case T-330/18, General Court of the European Union (8 May 2019) (an appeal against this decision is pending before the Court of Justice of the EU).

159 *Armando Ferrão Carvalho and Others v The European Parliament and the Council*, Case T-330/18, General Court of the European Union, Order (8 May 2019) at paras 49–50.

160 See n 86 above, at 513.

161 *Ibid*, at 516.

162 *Ibid*, at 516.

163 *Juliana v US*, n 62 above, at 18.

164 *Ibid*, at 18-19.

165 *Ibid*, at 20.

166 *Ibid*.

is redressable by a judicial decision, a question not of standing but of separation of powers, is vexed and presents more difficult obstacles for such litigation in the US. This is discussed in the following section.

Generally, the courts of developing countries have been seen to scrutinise standing to a much lesser degree. Individual plaintiffs have been permitted to bring forward constitutional claims on the ground of present and future impact of climate change in several jurisdictions, without any detailed investigation by courts of the scientific evidence of causation of such impact.¹⁶⁷ In the case of *Leghari* in Pakistan, the plaintiff was a farmer who had complained that he had suffered losses due to extreme weather events in Pakistan and had sought implementation of the state's climate change adaptation plan. Other than noting that Leghari was a citizen seeking to enforce his fundamental rights, the Lahore High Court did not otherwise discuss the issue of standing.¹⁶⁸ Since the court considered the matter to be 'environmental public interest litigation',¹⁶⁹ there was no need for formal inquiry into the standing of the plaintiff and the court ultimately went on to oversee a two-and-a-half year-long process of ensuring that Pakistan's climate change adaptation plan is effectively implemented.¹⁷⁰

Questions of standing are unlikely to arise in South Asian countries such as India and Pakistan, where the judicially developed concept of 'public interest litigation' expressly permits filing of cases by persons who would otherwise have no standing, so as to represent the interests of either the public at large or any specific subset of persons.¹⁷¹ Such litigation is frequently initiated on behalf of the poor,¹⁷² an approach that could be suitable for future climate justice litigation as well. While most prominently prevalent in South Asia, public interest litigation as a means is available and has also been put into practice in other regions.¹⁷³ Given that the poor, who are the worst affected by climate change, tend to have

167 See n 114 above; See n 123 above.

168 *Ashgar Leghari v Federation of Pakistan*, Writ Petition No. 25501/2015, Lahore High Court, Order (14 September 2015) at para 1.

169 See n 114 above, at para 4.

170 *Ibid.*

171 See Supreme Court of India, Compilation of Guidelines to be Followed for Entertaining Letters/Petitions received in this Court as Public Interest Litigation (undated), see <https://main.sci.gov.in/pdf/Guidelines/pilguidelines.pdf> accessed 2 January 2021 (The guidelines include 'Petitions pertaining to environmental pollution [and] disturbance of ecological balance' in the list of categories of petitions which may be entertained as Public Interest Litigation by the court); Zachary Holladay, 'Public Interest Litigation in India as a Paradigm for Developing Nations' (2012) 19(2) *Indiana Journal of Global Legal Studies* 555–573, www.repository.law.indiana.edu/ijgls/vol19/iss2/9 accessed 2 January 2021; but see Manoj Mate, *Public Interest Litigation and the Transformation of the Supreme Court of India in Consequential Courts: Judicial Roles in Global Perspective* (Diana Kapizewski et al eds, April 2013) <https://doi.org/10.1017/CBO9781139207843.013> accessed 2 January 2021.

172 See Parvez Hassan and Azim Azfar, 'Securing Environmental Rights through Public Interest Litigation in South Asia', (2004) 22(3) *Virginia Environmental Law Journal* 215–247; Prashant Bhushan, 'Supreme Court and PIL: Changing Perspectives under Liberalisation', (2004) 39(18) *Economic and Political Weekly* 1770–1774.

173 See Karen Kong, 'Public Interest Litigation in Hong Kong: A New Hope for Social Transformation?', (2009) 28(3) *Civil Justice Quarterly* 327–343, see <http://www.law.hku.hk/hrportal-tc/wp-content/uploads/file/Public-Interest-Litigation-in-Hong-Kong-A-New-Hope-for-Social-Transformation.pdf> accessed 2 January 2021; Steven Budlender et al, *Public Interest Litigation and Social Change in South Africa: Strategies, Tactics and Lessons* (October 2014) 25–77, see www.atlanticphilanthropies.org/wp-content/uploads/2015/12/Public-interest-litigation-and-social-change-in-South-Africa.pdf accessed 2 January 2021; Oryem Nyeko, 'Public Interest Litigation Under Threat in Tanzania', (18

restricted access to the judiciary, public interest litigation is a promising avenue which should be further explored for the purpose of achieving climate justice. Naturally, the prospects of success of such litigation would, among other factors, depend on the strictness of the standing requirements in any given jurisdiction.¹⁷⁴

Separation of powers

According to the Dutch Supreme Court, while the state is free to decide how to reduce its GHG emissions, the court is empowered to direct it to do so, that, courts can issue a declaratory decision to the effect that the state's inaction or inadequate action is unlawful.¹⁷⁵ Courts may also order the state to take measures in order to achieve a certain goal – a 25 per cent reduction by 2020 from 1990 levels, in *Urgenda's* case – as long as such order does not amount to an order to create legislation/policy with particular content.¹⁷⁶ However, in a way, by directing that the mitigation plan must achieve a 25 per cent reduction, the Dutch Supreme Court did dictate the creation of a portion of the state's policy.

This view of the Dutch Supreme Court is very progressive. A similar but more conservative view had earlier been adopted by the Canadian Federal Court of Appeal in *Friends of the Earth v Canada*.¹⁷⁷ Here, it was held that judicial review extends to failure of the government to prepare a mitigation plan, but not to an evaluation of the contents of such a plan.¹⁷⁸ Other courts may adopt an even stricter test of justiciability. In dismissing a case where the relief sought was almost identical to that in *Urgenda*, the Swiss Federal Tribunal held that such claims can only be advanced by political means and not by legal action.¹⁷⁹

In a common law setting, it has been held that judicial review is permissible in respect of a mitigation policy if such policy is issued under a specific legislation and is alleged to not comply with some of the statutory requirements of such legislation.¹⁸⁰ In the US, separation of powers is a long-held argument against climate justice litigation. In the recent *Juliana* case, a divided bench dismissed the case on the grounds of separation of powers.¹⁸¹ In the decision

June 2020) Human Rights Watch, www.hrw.org/news/2020/06/18/public-interest-litigation-under-threat-tanzania accessed 2 January 2021; Salvador Herencia Carrasco, 'Public Interest Litigation in the Inter-American Court of Human Rights: The Protection of Indigenous Peoples and the Gap between Legal Victories and Social Change', Herencia Carrasco, Salvador, 'Public Interest Litigation in the Inter-American Court of Human Rights: The Protection of Indigenous Peoples and the Gap between Legal Victories and Social Change', (2015) *Revue Québécoise de Droit International* 199–220, <https://ssrn.com/abstract=2441536> accessed 2 January 2021; Helen Hershkoff and Aubrey McCutcheon, 'Public Interest Litigation: An International Perspective' in Mary McClymont and Stephen Golub (eds), *Many Roads to Justice: The Law-Related Work of Ford Foundation Grantees Around the World* (February 2000) 283–296.

174 See, eg, a comparison of public interest litigation's success in India and Australia, Christine M Forster and Vedna Jivan, 'Public Interest Litigation and Human Rights Implementation: The Indian and Australian Experience' (2008) 3 *Asian Journal of Comparative Law* 1–32, <https://doi.org/10.1017/S219460780000017X> accessed 2 January 2021.

175 See n 65 above, at para 8.2.6–8.2.7.

176 *Ibid*, at para 8.2.6–8.2.7.

177 *Friends of the Earth v The Minister of the Environment and the Governor in Council*, [2009] 3 FCR 201; *Friends of the Earth v The Minister of the Environment and the Governor in Council* (appeal dismissed).

178 *Ibid*, at paras 33–34.

179 *Verein KlimaSeniorinnen Schweiz v Bundesrat*, n 67 above, at para 5.5.

180 *Friends of the Irish Environment CLG v The Government of Ireland*, n 67 above, at para 6.27.

181 See n 62 above.

of the Ninth Circuit court which is under appeal, it has been held that it is beyond the court's power to 'order, design, supervise, or implement the plaintiffs' requested remedial plan [...] [as] any effective plan would necessarily require a host of complex policy decisions entrusted, for better or worse, to the wisdom and discretion of the executive and legislative branches [...] which must be made by the People's elected representatives, rather than by federal judges.'¹⁸² As the court noted and future climate justice litigants must also note, the nature of relief sought can be the determining factor as to whether or not judicial review is permissible. In *Juliana*, the plaintiffs had sought several wide-ranging broad as well as particularised reliefs against a host of parties, including directions to the state to prepare 'a consumption-based inventory of US CO₂ emissions' and 'a national remedial plan to phase out fossil fuel emissions and draw down excess atmospheric CO₂'.¹⁸³ This is in contrast to the bare statutory claim under the Clean Air Act, 1963 in *Massachusetts v EPA*,¹⁸⁴ which was found to be subject to judicial review.¹⁸⁵

'Proof' of climate change's impact and the state's responsibility for it

The Dutch Supreme Court in *Urgenda* relied extensively on the IPCC's work to establish the hazards of climate change and that emissions have to be reduced to prevent such hazardous climate change.¹⁸⁶ Reliance on IPCC reports is likely to become more prominent in climate justice litigation with courts considering the findings of the IPCC as determinative.¹⁸⁷ In 2020 itself, the High Court of New Zealand has also explicitly confirmed that IPCC reports are not only reflective of scientific consensus, but that they form the factual basis for the state's climate change policy decisions, which must in turn be reviewed if a new IPCC report is published.¹⁸⁸ Here, other scientific and legal resources may be useful too. For instance, for

182 *Ibid*, at 25; see also *ibid*, at 32 ('We reluctantly conclude, however, that the plaintiffs' case must be made to the political branches or to the electorate at large, the latter of which can change the composition of the political branches through the ballot box. That the other branches may have abdicated their responsibility to remediate the problem does not confer on Article III courts, no matter how well-intentioned, the ability to step into their shoes.').

183 *Kelsey Cascadia Rose Juliana et al v US et al*, Complaint for Declaratory and Injunctive Relief, United State District Court, District of Oregon (Eugene Division), at 94–95, http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2015/20150812_docket-615-cv-1517_complaint-3.pdf accessed 2 January 2021 ('1. Declare that Defendants have violated and are violating Plaintiffs' fundamental constitutional rights to life, liberty and property by causing dangerous CO₂ concentrations in the atmosphere and dangerous government interference with a stable climate system; 2. Enjoin Defendants from further violations of the Constitution underlying each claim for relief; 3. Declare the Energy Policy Act, Section 201, unconstitutional on its face; 4. Declare DOE/FE Order No. 3041, granting long-term multi-contract authorization to Jordan Cove Energy, unconstitutional as applied and set it aside; 5. Declare Defendants' public trust violations and enjoin Defendants from violating the public trust doctrine underlying each claim for relief; 6. Order Defendants to prepare a consumption-based inventory of U.S. CO₂ emissions; 7. Order Defendants to prepare and implement a an enforceable national remedial plan to phase out fossil fuel emissions and draw down excess atmospheric CO₂ so as to stabilize the climate system and protect the vital resources on which Plaintiffs now and will depend; 8. Retain jurisdiction over this action to monitor and enforce Defendants' compliance with the national remedial plan and all associated orders of this Court...').

184 See n 86 above, at 499.

185 *Ibid*, at 522.

186 See n 65 above, at para 2.1.

187 See n 58 above, at 8.

188 *Thomson v Minister for Climate Change Issues*, n 69 above, at paras 94, 133 and 178.

establishing the urgent need to reduce GHG emissions, the *Urgenda* court relied on the Kyoto Protocol, UN Environment Programme reports, the 2015 Paris Agreement, EU's Emissions Trading System and NDCs committed by the Dutch government itself.¹⁸⁹ But, practically speaking, this was merely an academic exercise as the government had expressly agreed with *Urgenda* that climate change presented a 'serious risk that the current generation of citizens will be confronted with loss of life and/or a disruption of family life [...] if global emissions of greenhouse gases are not adequately reduced'.¹⁹⁰ While the Dutch Supreme Court still took recourse to scientific material to satisfy itself of the risks posed by climate change, other courts may not require climate justice litigants to necessarily do so.

Like the Dutch government, the government of Ireland also made a similar admission about the risks of climate change in a recent case before the Irish Supreme Court.¹⁹¹ As such, the Irish Supreme Court could begin its legal analysis, without any fact-finding on the proof of climate change's impacts, on the position that 'consequences of failing to address climate change are accepted by both sides as being very severe with potential significant risk both to life and health throughout the world but also including Ireland'.¹⁹²

It is possible that specificity of the relief sought from the Dutch Supreme Court – a 25 per cent reduction in emissions to be achieved by 2020 – may have necessitated a closer look at IPCC reports and other materials. For lawyers considering future climate justice litigation in other jurisdictions, this could be a factor in deciding which remedy to seek. Additionally, the Dutch Supreme Court's aforesaid analysis helped the court overcome the government's argument that the Netherlands had a negligible gross contribution to global GHG emissions and thus did not have any enforceable individual responsibility to take mitigation measures. The court held that the ECHR imposes a responsibility on each state to play its part in preventing dangerous climate change, even though it is a global problem.¹⁹³ For this, the Dutch Supreme Court relied on the UNFCCC and held that while distribution of the measures to be taken against climate change must not be based solely on a country's past emissions, this does not detract from the underlying principle that 'partial fault' also justifies 'partial responsibility'.¹⁹⁴ In fact, the court went a step further in rejecting the Dutch government's contentions about other states' non-compliance with their mitigation goals under UNFCCC and the relatively small contribution that any Dutch reduction in emissions would make, with the express declaration that each country must effectively be called to account for its share of emissions.¹⁹⁵

The above argument of the Dutch government is also unlikely to succeed in other jurisdictions. As far back as 2007, the US Supreme Court had found GHG emissions to be attributable to the state and held it liable for failing to regulate them.¹⁹⁶ The argument of

189 See n 65 above, at para 2.1.

190 *Ibid.*, paras 4.7–4.8.

191 *Friends of the Irish Environment CLG v The Government of Ireland*, n 67 above, at para 3.6.

192 *Ibid.*

193 See n 65 above, at para 5.7.1

194 *Ibid.*, at para 5.7.6.

195 *Ibid.*, at para 5.7.7.

196 See n 86 above.

state's efforts only being capable of yielding limited results, in light of other states' emissions, therefore seems to be one which courts do not have much difficulty in surmounting since, in the words of the US Supreme Court, 'reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere.'¹⁹⁷

Climate justice litigation seeking adaptation measures should anticipate even lesser reluctance from courts in accepting risks of climate change as proved. The *Leghari* court for instance, did not deem it necessary to undertake any investigation of the issue since, in the court's view, climate change had already resulted in floods and droughts and had raised concerns regarding water and food security in Pakistan.¹⁹⁸ Such a non-legalistic approach is not surprising. As the UNFCCC and the 2015 Paris Agreement unequivocally show, 195 states have recognised the challenge of climate change¹⁹⁹ and their role in redressing it by making international commitments to prevent the worst effects of climate change.²⁰⁰ With an increasing number of states also formulating domestic laws and policies to tackle climate change, courts will increasingly not feel the need to look for scientific proof linking a particular state's emissions to a particular instance of climate tragedy. An admission before the court of the risks of climate change was deemed as sufficient by the Irish Supreme Court to avoid factual scientific inquiry. It is likely that going forward, the above actions of states in recognition of the risks posed by climate change could, in and of themselves, be seen by courts as sufficient admission of the risks and their responsibility of addressing such risks.²⁰¹

As such, promisingly for future climate justice litigation and contrary to some conservative expectations,²⁰² courts have generally found little difficulty in attributing climate change and the responsibility to take adaptation or mitigation action against it, to states. As seen above, even the cases which were ultimately dismissed were unsuccessful due to legal obstacles

197 *Ibid*, at 520.

198 See n 168 above, at para 6.

199 UN Treaty Collection, Status of Treaties: UN Framework Convention on Climate Change, https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=IND&mtdsg_no=XXVII-7&chapter=27&Temp=mtdsg3&clang=_en accessed 2 January 2021; UN Treaty Collection, Status of Treaties: Paris Agreement, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=_en accessed 2 January 2021.

200 Paris Agreement, n 14 above, Art 4.

201 See UN Environment Programme, n 78 above, at 8–9 ('The Paris Agreement makes it possible for constituents to articulate more precisely and forcefully concerns about the gaps between current policy and the policy needed to achieve mitigation and adaptation objectives. In ratifying countries in particular, constituents can now argue that their governments' politically easy statements about rights and objectives must be backed up by politically difficult, concrete measures like restricting coastal development, foregoing development of coal-fueled power plants and imposing fees and taxes on activities reliant on fossil fuels. ... [Paris Agreement] it makes it possible for litigants to place the actions of their governments or private entities into an international climate change policy context. Placing actions at the national or regional level into that context makes it easier, in turn, to characterize those actions as for or against both environmental needs and stated political commitments.') <https://wedocs.unep.org/bitstream/handle/20.500.11822/20767/climate-change-litigation.pdf> accessed 2 January 2021.

202 See Myles Allen, 'The scientific basis for climate change liability' in *Climate Change Liability: Transnational Law and Practice* (Richard Lord QC, et al, eds, 2012) at 8 (In the context of liability of states/corporations, it is stated that '[c]limate change lawyers need not be scientists, but they need to understand the application of science, in terms of its uses and limits. This is likely to be crucial in considerations of liability for climate change, which often entails enquiry into two closely related matters: first, 'proof' of causes of climate change itself, in terms of large-scale temperature rise; and second, 'proof' of its effects in terms of specific weather events (storms, floods, heatwaves) or localised climate changes (temperature change, precipitation, wind and so on)').

of standing, limitations of judicial review or lack of imminence of the rights' violation, as opposed to lack of scientific proof or causation or the absence of states' responsibility or accountability for climate change.

Remedies to seek

As the above sections illustrate, there is a broad variety of remedies that can be sought by plaintiffs in climate justice litigation. Ultimately, changes to laws and policies will have to come from governments as separation of powers may prevent courts from formulating or dictating what policies/laws should be formulated. Even the revolutionary decision in *Urgenda* acknowledged that what measures are to be taken to address climate change is primarily a function of the political domain of the state.²⁰³ But the Dutch Supreme Court also held that the emission reduction commitments that the Netherlands had made internationally, through UNFCCC agreements, could be considered the state's 'minimum fair share' with which the court was empowered to ensure compliance.²⁰⁴ As such, relying on *Urgenda*, domestic climate justice litigation can potentially be initiated against any and all states failing to meet their own individual share of commitments under UNFCCC agreements.²⁰⁵ In EU countries for instance, even though the EU is on track to achieve the 20 per cent GHG emissions reduction in 2020 as compared to 1990 levels,²⁰⁶ plaintiffs can file cases before domestic courts seeking further reductions from their respective Member States if their individual commitments under the Paris Agreement have not been met.

It is true that not all courts may be willing to pass directions as specific as the ones passed by the *Urgenda* court. But even a non-specific direction from the court to the government to review its climate change policies can have profound results. This was the case in Ireland where its Supreme Court had asked for the state's mitigation plan to be more specific, without passing any further direction. Yet, the case and the accompanying change in government resulted in the executive committing to 'an average 7% per annum reduction in overall greenhouse gas emissions from 2021 to 2030, equivalent to a 51% reduction over the decade and to achieving net zero emissions by 2050'.²⁰⁷ Similar success was achieved in New Zealand in 2017 when during the pendency of a case seeking upward revision of the state's mitigation targets, the newly elected government committed to an even higher target of eliminating the country's GHG emissions by 2050.²⁰⁸ This commitment has been solidified by enactment of the Climate Change Response (Zero Carbon) Amendment Act, 2019.²⁰⁹ In the Netherlands, *Urgenda*, the plaintiff NGO, submitted a '54 Climate Solutions

203 See n 65 above, at para 6.2.

204 *Ibid*, at paras 6.2–6.6 and 7.1.

205 *Ibid*, at paras 7.3.1–7.3.6.

206 EU Climate Action, Progress Made in Cutting Emissions (undated, retrieved on 30 August 2020), see https://ec.europa.eu/clima/policies/strategies/progress_en accessed 2 January 2021.

207 BBC News, Climate change: 'Huge' Implications to Irish Climate Case Across Europe (1 August 2020), www.bbc.com/news/world-europe-53619848 accessed 2 January 2021.

208 *Thomson v Minister for Climate Change Issues*, n 69 above, at para 72 (internal citations omitted).

209 Climate Change Response (Zero Carbon) Amendment Act 2019, S 5Q, ('Target for 2050 (1) The target for emissions reduction (the 2050 target) requires that – (a) net accounting emissions of greenhouse gases in a calendar year, other

Plan’ proposal to the government after its initial victory before the District Court in 2015.²¹⁰ Following the 2020 decision of the Dutch Supreme Court, the government has announced its plan to comply with the directed 25 per cent reduction by the end of the year, a plan which adopts much of its content from *Urgenda’s* proposal.²¹¹

The above examples go to show that even an in-principle direction/declaration from the courts may be sufficient to promote large-scale desirable climate policy changes. As such, in jurisdictions with more pronounced separation of power jurisprudence, it may be prudent for at least some of the future climate justice litigation to seek more generalised remedies.

Alongside seeking enforcement of mitigation commitments under UNFCCC agreements, it may be possible to seek adaptation measures in parallel from states as mitigation and adaptation efforts are independent of each other.²¹² Crucially for future climate justice litigation in developing countries where emissions have still to peak, plaintiffs can arguably still seek mitigating reliefs since adaptation does not avoid the consequences of climate change and global warming.²¹³

This has already been successfully tried in Colombia where the government was directed to take *both* mitigating and adaptive steps.²¹⁴ The Colombian Supreme Court, before which the thrust of the argument was on deforestation, directed several government bodies to formulate short, medium, as well as long-term action plans to reduce deforestation in the Colombian Amazon to zero, reduce emissions and to adopt adaptation measures in response to impacts of climate change.²¹⁵

Before the activist courts of South Asia, it is also possible to ensure monitoring of the implementation of courts’ orders through a ‘continuing mandamus/rolling review’ wherein the court oversees the implementation of its directions by the executive.²¹⁶ For this purpose, commissions can also be appointed by the court, which work with the executive to ensure compliance of courts’ orders. In the context of climate justice litigation, the court-appointed Climate Change Commission in the *Leghari* case – whose proceedings were minutely monitored by the Lahore High Court for over two years – ensured that over 66 per cent of the priority items on Pakistan’s climate change policy were implemented.²¹⁷ And yet, the court did not dismiss the case even after this achievement and dissolution of the Climate Change Commission. Instead, the court appointed a Standing Committee on Climate Change and gave it the liberty to approach the court under the existing *Leghari* case for ‘appropriate

than biogenic methane, are zero by the calendar year beginning on 1 January 2050 and for each subsequent calendar year...’).

210 *Urgenda*, 54 Climate Solutions: CO2 Reduction Plan: 25 per cent in 2020, www.urgenda.nl/en/themas/climate-case/dutch-implementation-plan accessed 2 January 2021.

211 *Ibid.* (‘About 30 of these measures are lifted from *Urgenda’s* “54 Climate Solutions Plan”).

212 See n 65 above, at para 7.5.2.

213 *Ibid.*

214 See n 123 above.

215 *Ibid.*, at 45.

216 See n 114 above, at para 4.

217 *Ibid.*, at para 19.

order [sic] for the enforcement of the fundamental rights of the people in the context of climate change, if and when required'.²¹⁸

The approach of the Lahore High Court in Leghari has been termed by one commentator as 'a model for fast track adjudication of climate change-related issues that are too often dismissed as too complicated for the courts to handle'.²¹⁹ While the Leghari court may fairly be seen to be crossing the boundaries of separation of powers, such an intensive involvement of courts is not unwarranted in the face of lax governance. As the court noted in Leghari, most of the members of the court-appointed Climate Change Commission, who were serving government officials,²²⁰ failed to turn up at the first meeting of the commission and the court had to issue a specific direction mandating their presence.²²¹ Furthermore, before the court's involvement, Pakistan's National Climate Change Policy, 2012 and Framework for Implementation of Climate Change Policy (2014-2030) had remained 'almost untouched' by the government.²²²

What the examples from Pakistan and Colombia illustrate is that courts in developing countries might be relatively less restrained in terms of remedies that may be granted and can potentially even go beyond the remedies sought by the plaintiffs. As such, there is a possibility of achieving significant victories for climate justice before these courts. Accordingly, any lawyers keen to undertake pro bono work in the field of climate justice litigation would be well advised to consider not only initiating cases in their own jurisdictions, but also, to the extent possible, before the courts in developing countries. This is advisable not only on account of the aforementioned scope of reliefs achievable, but more crucially since the vast majority of the world's poor reside in the developing world²²³ and stand to benefit the most from climate justice.

Next steps, first steps

Just as it is 'useful to be able to say to a judge that you are not the first one to do this. Others have already done it' in climate justice cases,²²⁴ it is useful for lawyers to know that other practising lawyers and firms have also engaged in pro bono climate justice litigation in the past. In arguably the biggest climate justice litigation victory as of date, *Urgenda* was represented pro bono by two Dutch international law firms, Höcker and NautaDutilh.²²⁵

218 *Ibid*, at paras 25–26.

219 Malini Mehra, 'Pakistan Ordered to Enforce Climate Law by Lahore Court', *Climate Change News* (London, 20 September 2015) www.climatechangenews.com/2015/09/20/pakistan-ordered-to-enforce-climate-law-by-lahore-court accessed 2 January 2021.

220 See n 168 above, at para 11.

221 *Ashgar Leghari v Federation of Pakistan*, Writ Petition No 25501/2015, Lahore High Court, Order (5 October 2015) at para 10.

222 *Ashgar Leghari v Federation of Pakistan*, Writ Petition No 25501/2015, Lahore High Court, Order (18 January 2016) at para 3.

223 World Bank, *Poverty and Shared Prosperity 2018: Piecing Together the Poverty Puzzle* (2018) at 29–30, <https://openknowledge.worldbank.org/bitstream/handle/10986/30418/9781464813306.pdf> accessed 2 January 2021.

224 Aulakh, n 68 above. (quoting Michael Gerrard).

225 Venis, *Climate Litigation: European Rulings Set Legal Precedents for Government Accountability*, IBA (21 April 2020) www.ibanet.org/Article/NewDetail.aspx?ArticleUid=3CB09942-0EE5-406D-A791-21A7A9033989 accessed 2 January

The co-lead counsel in the pending *Juliana v US* case is also a practising lawyer working pro bono.²²⁶

There is also a growing network of specialist climate justice litigation experts, one of which is the Climate Litigation Network. Started by the lawyers involved in the *Urgenda* case, the network is reported to have been involved in the recently successful decision of the Irish Supreme Court as well.²²⁷ Lawyers looking to dedicate their pro bono hours to climate justice litigation can liaise with such networks to either procure support for initiating climate justice litigation or for volunteering to aid their work on a pro bono basis. There is also a growing repository of climate justice litigation data that can be relied on for research. One of the most prominent such repositories is run by Columbia Law School, in association with the US international law firm Arnold & Porter.²²⁸ It merits mentioning that Arnold & Porter is also directly involved in pro bono climate justice litigation cases.²²⁹ Another extensive database of climate justice litigation and related resources, is managed by the London School of Economics.²³⁰ These databases are freely accessible and they document proceedings from across the world. Presently, these databases indicate an increasing proliferation of climate justice litigation in most jurisdictions. A recent ‘Pro bono guide to the climate crisis’ by the Australian Pro Bono Centre could be another useful starting resource, which includes a very helpful guide for dealing with commercial conflicts of interest that may come up while considering pro bono engagement in climate justice litigation.²³¹

As stated earlier, policy and legislative actions are certainly more appropriate responses to the threat of climate change.²³² Lawyers will have to assess on a case-by-case and jurisdiction-by-jurisdiction basis whether litigation is the appropriate tool for achieving climate justice or if their skills would be better put to use in a different form of climate justice initiative. As the discussion in the previous sections shows, litigation has the proven potential to be a particularly useful tool for seeking enforcement, review or formulation of legislative and policy measures against climate change. With several landmark victories in the past few years, there is increasing momentum behind climate justice litigation. As a recent report puts it, today ‘outside of the US, climate litigation is more likely than not to lead to favourable

2021; *NautaDutilh, Procurator General and Attorney General Advise to Uphold Urgenda Ruling* (13 September 2019), www.nautadutilh.com/en/information-centre/news/procurator-general-and-attorney-general-advise-to-uphold-urgenda-ruling accessed 2 January 2021.

226 Darlene Ricker, Lawyers are ‘Unleashing a Flurry of Lawsuits to Step Up the Fight Against Climate Change’, (1 November 2019) *American Bar Association Journal*, www.abajournal.com/magazine/article/lawyers-are-unleashing-a-flurry-of-lawsuits-to-step-up-the-fight-against-climate-change accessed 2 January 2021.

227 See n 207 above. (‘The Irish SC’s ruling is the second win for a group called the Climate Litigation Network, which helps activist groups sue their own governments. The network was formed while the case *Urgenda* was underway – it was the first high-profile climate lawsuit to have a major win, which ended in the Netherlands in December 2019’).

228 Climate Change Litigation Databases, Sabin Center for Climate Change Law, see <http://climatecasechart.com> accessed 2 January 2021.

229 See n 226 above.

230 Climate Change Laws of the World, Grantham Research Institute on Climate Change and the Environment, London School of Economics and Political Science, <https://climate-laws.org> accessed 2 January 2021.

231 Australian Pro Bono Centre, *Pro Bono Guide to the Climate Crisis* (August 2020) at 38, www.probonocentre.org.au/wp-content/uploads/2020/08/Pro-Bono-Guide-to-the-Climate-Crisis-FINAL-27-August-2020-1.pdf accessed 2 January 2021.

232 See n 88 above, at 36.

outcomes for climate policy'.²³³ With rapid environmental deregulation underway in the garb of economic recovery measures necessitated by Covid-19,²³⁴ there has never been a time when advocacy and litigation have been required more for the cause of climate justice. In these times, the pro bono contributions of lawyers and firms would go a long way in safeguarding climate justice for the poor and aiding the fight against the overarching challenges of poverty.

About the authors

Varun Mansinghka is a dispute resolution lawyer based in Mumbai, India. His practice focuses on domestic and international commercial litigation and arbitration.

Sonal Garg is a development economics researcher, based in New Delhi. She is currently working at Research and Information System for Developing Countries (RIS), a New Delhi-based leading policy think tank in the field of international economic development. Garg holds a post graduate degree in economics and specialises in evidence-based policy research in the area of international development.

²³³ Setzer and Byrnes 2020, n 60 above, at 27.

²³⁴ See eg, Emily Holden, 'Trump Dismantles Environmental Protections Under Cover of Coronavirus' *The Guardian* (London, 11 May 2020), www.theguardian.com/us-news/2020/may/10/trump-environmental-blitzkrieg-coronavirus accessed 2 January 2021; Emma McIntosh, 'Here's Every Environmental Protection in Canada That Has Been Suspended, delayed and cancelled during COVID-19', *Canada's National Observer* (Vancouver, 3 June 2020) www.nationalobserver.com/2020/06/03/news/heres-every-environmental-protection-canada-has-been-suspended-delayed-and-cancelled accessed 2 January 2021.