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## The Farmer or the Hero Litigator?: Modes of Climate Litigation in the Global South

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***The Farmer or the Hero Litigator?:  
Modes of Climate Litigation in the Global South***

Jolene Lin\* & Jacqueline Peel<sup>°</sup>

## 1. Introduction

Over the last 20 years, climate litigation has grown from a handful of cases to become a global phenomenon, casting courts as significant actors in global climate governance.<sup>1</sup> Whereas climate litigation began to emerge in the Global North in the 1990s, climate litigation in the Global South started almost 20 years later and has gained visibility only in the past few years. The vast majority of climate litigation scholarship focuses on court actions in the Global North, and typically on a small number of high-profile cases in the United States, Europe and Australia. However, we are beginning to see a growing body of scholarship that is focused on Global South litigation.<sup>2</sup>

This is a promising development. This analysis of the Global South experience of climate litigation is essential if transnational climate jurisprudence is to contribute meaningfully to global climate governance, and particularly, to ensuring that governments are held to account for the commitments they have made pursuant to the Paris Agreement.<sup>3</sup> Moreover, a richer understanding of transnational climate litigation – one that takes developments in the Global South into account – underscores that judicial contribution to global climate governance is not a purely Global North phenomenon. A number of courts in the Global South are taking bold steps and crafting innovative approaches to compel action on climate change.

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<sup>1</sup> See generally William C.G. & Hari M. Osofsky, *Overview: The Exigencies that Drive Potential Causes of Action for Climate Change*, in ADJUDICATING CLIMATE CHANGE: STATE, NATIONAL, AND INTERNATIONAL APPROACHES 1 (William C.G. Burns & Hari M. Osofsky eds, 2009); Hari M. Osofsky, *The Continuing Importance of Climate Change Litigation*, 1 CLIMATE LAW 3 (2010); Jolene Lin, *Climate Change and the Courts*, 32(1) LEG. STUD. 35 (2012); Jacqueline Peel, Lee Godden & Rodney J. Keenan, *Climate Change Law in an Era of Multi-Level Governance*, 1(2) TRANSNAT'L ENV'L L. 245 (2012).

<sup>2</sup> See, recent scholarship, e.g. Jacqueline Peel & Jolene Lin, *Transnational Climate Litigation: The Contribution of the Global South*, 113(4) AM. J. INT'L L. 679 (2019); Joana Setzer and Lisa Benjamin, *Climate Litigation in the Global South: Constraints and Innovations*, 9(1) TRANSNAT'L ENVTL L. 77 (2020).

<sup>3</sup> For discussion of the ‘bottom up’ approach of the Paris Agreement and its preservation of state autonomy in determining their contributions under the Agreement coupled with the provision for a transparency framework, see Lavanya Rajamani, *Ambition and Differentiation in the 2015 Paris Agreement: Interpretative Possibilities and Underlying Politics*, 65 INT'L & COMP. L. Q. 493 (2016) and Meinhard Doelle, *The Paris Agreement: Historic Breakthrough or High Stakes Experiment?* 6 CLIM. LAW 1 (2016).

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This chapter seeks to fill a lacuna in our developing understanding of Global South climate litigation concerning how such litigation emerges. In this regard, our focus is the different, prototypical modes of legal action in the Global South and how they are shaped by particular actors, including local activists, global non-profit foundations, and lawyers. We propose a theoretical framework to explain these modes and their implications for the emergence of climate litigation in the Global South. Our hope is that this model will provide valuable insights for both scholars and practitioners about the key drivers that make climate litigation more or less likely, as well as the conditions that support or obstruct the emergence of climate litigation.

The remainder of the chapter is structured as follows. Part 2 begins by elaborating our understanding of climate litigation, which eschews a narrow focus on lawsuits where climate change issues are central or ‘at the core’ of the case in favor of a broader understanding. It then proceeds to sketch the key characteristics of climate cases in the Global South—derived from our article published recently in the *American Journal of International Law*—as a basis for developing our framework of modes of climate litigation in the Global South.<sup>4</sup>

Part 3 focuses on this framework. We posit that there are five dominant modes of climate litigation in the Global South, which we have labelled “the grassroots activist”, “the hero litigator”, “the farmer”, “the enforcer” and “the engineer” respectively. These are all proactive modes of litigation, however, there are also some, still-limited examples of anti-regulatory litigation in the Global South. In Part 4, we conclude with observations on future research directions that can be taken to continue to build our collective knowledge of climate litigation in the Global South.

## 2. An Overview of the Global South Climate Docket

There has been a proliferation of scholarly efforts to define and classify climate litigation.<sup>5</sup> What is notable is that the most commonly applied definitions of climate litigation all share a focus on ‘core’ cases where climate change ‘is a central issue in the litigation’.<sup>6</sup> As a result, most of the scholarship on climate litigation in the Global North tends to be about high-profile mitigation cases, such as the U.S. Supreme Court decision in *Massachusetts v. Environmental Protection Agency (EPA)* or the recent judgment of the Dutch Supreme Court in the *Urgenda* case.<sup>7</sup>

By contrast, other types of cases receive minimal coverage. For instance, there is very little scholarship on adaptation cases as opposed to mitigation-focused ones, partly because the former tend to be lower-profile, smaller scale, and have more diffuse causal connections with

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<sup>4</sup> Peel & Lin, *supra* note 2.

<sup>5</sup> See, e.g., David Markell & J.B. Ruhl, *An Empirical Survey of Climate Change Litigation in the United States*, 40 ENV’L L. REV. 10644 (2010); David Markell & J.B. Ruhl, *An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence Or Business As Usual?*, 64 FLA. L. REV. 15 (2012); Chris Hilson, *Climate Change Litigation: An Explanatory Approach (or Bringing Grievance Back)*, in FABRIZIO FRACCHIA AND MASSIMO OCCHIENA, CLIMATE CHANGE: LA RISPOSTA DEL DIRITTO, at 421 (2010); JACQUELINE PEEL & HARI M. OSOFSKY, CLIMATE CHANGE LITIGATION: REGULATORY PATHWAYS TO CLEANER ENERGY (2015).

<sup>6</sup> Peel & Osofsky, *supra* note 5, 8.

<sup>7</sup> *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497 (2007); *Urgenda v. Netherlands*, Case No. 19/00135, Supreme Court of the Netherlands, Dec. 20, 2019.

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climate policy.<sup>8</sup> This has led to calls for a broader conceptualization of climate litigation that includes, for example, cases at sub-national levels of governance and cases where climate change issues are less ‘visible’ and the interface with domestic climate policy happens “inadvertently”.<sup>9</sup>

Similarly, we find that there is relatively little scholarly attention paid to climate litigation in the Global South. This is because the dominant definitions of climate litigation often do not capture these cases, which are ‘invisible’ or fly below the radar, because climate change tends to lie at the “periphery” rather than at the “core” of the litigation. We have argued elsewhere that this failure to capture developments in the Global South is problematic and that attention to the types of climate cases emerging in the Global South is helpful to promote a reframing of our understanding of climate litigation. This understanding can, in turn, inform advocacy, partnering initiatives and capacity-building efforts designed to foster more robust climate governance in the Global South, which is essential for the achievement of the global mitigation and adaptation goals articulated in the Paris Agreement.<sup>10</sup>

Thus, in our work on climate litigation in the Global South, we are looking beyond ‘core’ cases to include ‘peripheral’ cases where climate issues are subsidiary to other arguments (e.g. contravention of natural resource management laws) or one of a number of arguments or issues raised in a dispute. In applying this understanding to the case law review, we consider a case to be part of the “Global South docket” when it engages directly or indirectly with climate change in the pleadings, judgment, campaign materials or the media publicity. A case is excluded if climate change issues are mentioned incidentally or in passing but not otherwise considered in a meaningful way.

For example, the case law review has identified several cases about projects with potential environmental impacts, such as large infrastructure developments or natural resource activities, in which the court mentions climate change as one of the several environmental concerns at stake but does not consider it further in any meaningful way.<sup>11</sup> Such cases are not included in the “Global South docket” although we note these cases with interest as they suggest that petitioners and judges in future similar cases may begin to engage with climate change issues in a more sophisticated way.<sup>12</sup>

Based on our recent survey, we have identified three key characteristics of climate cases in the Global South. These characteristics can also be found in the Global North jurisprudence but are less pronounced. We therefore view these characteristics to be on a spectrum, with Global South cases presently concentrated at one end and Global North cases at the other end.<sup>13</sup>

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<sup>8</sup> However, see Jacqueline Peel & Hari M. Osofsky, *Sue to Adapt?*, 99 MINN. L. REV. 2177 (2015); Margaret Rosso Grossman, *Climate Change and the Individual*, 66 AM. J. COMP. L. 345, 371-375; X. He, *Legal and Policy Pathways of Climate Change Adaptation: Comparative Analysis of the Adaptation Practices in the United States, Australia and China*, 7(2) TRANSNAT’L ENVTL L. 347 (2018).

<sup>9</sup> See, e.g., Kim Bouwer, *The Unsexy Future of Climate Change Litigation*, 30(3) J. ENVTL. L. 483 (2018).

<sup>10</sup> See Paris Agreement, Dec. 12, 2015, UNTS I-54113 (*entered into force* Nov. 4, 2016) Art. 4(1) and (2) (on emissions reduction and mitigation measures), Art. 7(1) (establishing “the global goal on adaptation”).

<sup>11</sup> See, e.g., *Lahore Bachao Tehrik v. Canal Road Project, Government of Punjab, Lahore – SMC No. 25/2009* [2011] PKSC 34 (Sept. 15, 2011) (Pak.) (concerns the widening of Canal Road and removing surrounding green belt areas).

<sup>12</sup> Though we note that this is an assumption that remains to be tested.

<sup>13</sup> Peel & Lin, *supra* note 2, 713.

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Furthermore, these key characteristics do not apply across every jurisdiction in the Global South, which is a large grouping of countries with contrasting socio-economic conditions and political systems. Nonetheless, these characteristics are shared widely enough in the Global South case law for us to consider them as notable features that distinguish climate litigation in the Global South from that in the Global North.

### ***The Prevalence of Rights-based Claims***

A significant number of Global South climate cases, like the high-profile *Leghari v Pakistan*<sup>14</sup> and *Colombian Youths case*<sup>15</sup>, rely on constitutional rights or human rights, including alleged violations of the rights to life and/or a clean environment.<sup>16</sup> Rights-based claims, in contrast, have been less prominent in the Global North climate jurisprudence. That said, there is growing interest in rights-based claims in Northern jurisdictions, particularly after the decision in *Netherlands v Urgenda*, where the Dutch Supreme Court held that the Dutch government was required by international and European human rights legal obligations to increase the ambition and stringency of its climate mitigation targets.<sup>17</sup>

We have argued that the relatively high percentage of rights-based claims in the Global South docket is, at least in part, due to the fact that many of the national constitutions of Global South jurisdictions contain environmental rights and/or the right to life has been interpreted to include the right to live in a healthy and clean environment.<sup>18</sup> We also suggested that there is significant potential for the development of rights-based climate litigation in Latin America because there is a rich environmental constitutional jurisprudence in various Latin American jurisdictions which provides many 'hooks' for climate litigation.<sup>19</sup> The Inter-American Court of Human Rights in 2017 also issued an Advisory Opinion on Human Rights and the Environment, emphasizing the linkages between human rights and environmental protection and providing endorsement for rights-based environmental claims, including on issues of climate change.<sup>20</sup> Finally, successful cases led by local environmental organizations, such as

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<sup>14</sup> *Leghari v. Pakistan*, WP No. 25501/2015, Lahore High Court, Order of Sept. 4, 2015, para. 1 (Pak.), available at [https://elaw.org/PK\\_AsgharLeghari\\_v\\_Pakistan\\_2015](https://elaw.org/PK_AsgharLeghari_v_Pakistan_2015).

<sup>15</sup> *Andrea Lozano Barragán et al. v. Presidencia de la República et al.*, Sentencia de la Corte Suprema de Justicia del 5 de abril del 2018, MP Luis Armando Tolosa Villabona, STC4360-2018, Radicación No 11001-22-03-000-2018-00319-01 (Colom.).

<sup>16</sup> The use of human rights discourse as a key feature of Global South climate litigation has also been identified by Joana Setzer and Lisa Benjamin, who also argue that the application of a human rights framework to the impacts of climate change is particularly relevant in the Global South because populations in these countries are highly vulnerable; see Setzer & Benjamin, *supra* note 2, 85, 90.

<sup>17</sup> Cf. decision of Ninth Circuit in *Juliana v United States*, No. 18-36082, D.C. No. 6:15-cv-01517-AA. On Jan. 17, 2020, by 2-1 vote the court dismissed the case on the basis that the plaintiffs lacked standing to assert a violation of a constitutional right to a 'climate system capable of sustaining life' (noting that a petition for rehearing en banc was filed on March 2, 2020).

<sup>18</sup> Peel & Lin, *supra* note 2, 712-4.

<sup>19</sup> For example, many of the constitutions of nations in this region contain environmental rights and provide mechanisms for expedited legal action to facilitate access to justice by reducing costs and delays: *Id* 707-8, 713-4.

<sup>20</sup> Inter-American Court of Human Rights, Environment and Human Rights, Advisory Opinion OC-23/17 of Nov. 15, 2017, Requested by the Republic of Colombia. Official Summary in English Issued by the InterAmerican Court, available at [http://www.corteidh.or.cr/docs/opinion/resumen\\_seriea\\_23\\_eng.pdf](http://www.corteidh.or.cr/docs/opinion/resumen_seriea_23_eng.pdf).

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Dejusticia, offer the potential for South-South cooperation to advance climate litigation in Latin America.<sup>21</sup>

Rodríguez-Garavito argues that rights-based route to climate litigation taken in the Global South "is not serendipitous, or the result of the absence of specialized climate change legislation that litigants would otherwise have used in framing their cases. Instead, it is a route whose tracks were firmly laid over the last three decades through public interest law practice, research and judicial activism regarding constitutional rights in general and socioeconomic rights (SERs) in particular."<sup>22</sup> More specifically, he argues that civil society actors have been advocating for SERs for a long time and are now carrying over lessons from this advocacy experience and applying them to climate change and other environmental harms.

The same judicial organs that have been receptive to arguments that advance the protection of SERs are more likely to be similarly receptive to rights-based arguments to advance climate protection particularly for those who are most vulnerable. Rodríguez-Garavito points out that both SERs litigation and rights-based climate litigation share a multilevel framing (i.e. while conducted in national courts, the litigation and rulings are founded on international treaties and constitutional norms) which makes the litigation experience with SERs "directly relevant to climate lawsuits".<sup>23</sup>

In their work, Joana Setzer and Lisa Benjamin also identify the application of human rights frameworks to be a key feature of climate change litigation in the Global South. They highlight that the socio-economic and political contexts of Global South jurisdictions are relevant explanatory factors. The post-colonial histories of many Global South jurisdictions feature exploitation by multinational corporations and the continuation of colonial practices by Northern countries in some cases, causing a drain on natural resources, ethnic conflicts, corruption and weak governance institutions. This has led to grave human rights violations and environmental destruction, but as a result, some national courts have been progressive in upholding human rights and environmental rights.<sup>24</sup>

### ***Enforcement of Existing Laws***

Regulating-forcing litigation or litigation that pursues a climate law reform rationale, akin to *Massachusetts v. EPA* and *Urgenda v the Netherlands*, is notably absent in the Global South docket. Instead, what we have identified from our case law survey is that the Global South climate cases demonstrate a preference for the enforcement of laws and policies that already exist (and which suffer from lax or non-enforcement) rather than pushing for new or better climate laws. In seeking enforcement of existing laws, we argue that plaintiffs in Global South jurisdictions are trying to address what they perceive to be more fundamental drivers of

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<sup>21</sup> Dejusticia (the NGO supporting the Columbian Youths case) specifies collaboration across the Global South and the Global North as one of its key objectives, see <https://www.dejusticia.org/en/how-we-work/internationalization/>.

<sup>22</sup> César Rodríguez-Garavito, *Human Rights: The Global South's Route to Climate Litigation in Symposium on Jacqueline Peel & Jolene Lin, "Transnational Climate Litigation: The Contribution Of The Global South"*, 114 AJIL UNBOUND 40 (2020).

<sup>23</sup> *Id* 41. For discussion, also see CONSTITUTIONALISM OF THE GLOBAL SOUTH (Daniel Bonilla Maldonado ed., 2013).

<sup>24</sup> Setzer & Benjamin, *supra* note 2, 89-90.

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climate change. For example, in the case of *Pandey v Union of India*, the nine-year-old claimant sought proper enforcement of the national forestry law, air pollution control law and the environmental impact assessment (EIA) law on the basis that the non-enforcement of these laws “has led to adverse impacts of climate change across the country”.<sup>25</sup>

Further, in bringing this type of enforcement lawsuits, litigants are able to rely on tried-and-tested case theories and judicial precedents to ground their pleadings. This increases the chances of obtaining a favorable judgment, a factor which, of course, weighs significantly on the minds of all litigators, but more so for those who have to work with fewer financial resources. A related point is that, by relying on fairly well-established legal arguments, Global South plaintiffs avoid the risk of judicial reluctance to address climate change directly for fear of the accusation of judicial over-reach.<sup>26</sup>

Setzer and Benjamin have also pointed out that Global South plaintiffs bring cases to address poor enforcement of existing planning and/or environmental laws because they are aware of the capacity constraints involved in passing new legislation on climate change.<sup>27</sup> Further, the Global South cases tend to involve efforts to protect important native ecosystems, e.g. the Amazon, and combat environmental degradation that has been going on for decades.<sup>28</sup>

### ***Stealthy Climate Litigation***

We use the term “stealthy” to convey the sense in which Global South climate litigation seeks to advance cautiously and quietly by packaging climate change issues with less controversial claims. This is done to dilute the political potency of climate issues and to avoid the political question doctrine (or non-justiciability doctrine) arguments that are likely to be raised by defence counsel. We have argued that an important reason why litigants in some Global South countries may prefer to pursue climate cases in a more indirect manner is because of traditions of judicial restraint and limited judicial review in these jurisdictions. This is the case in a number of Southeast Asian jurisdictions, which eschew notions of the kind of activist court that can be found in other Asian common law jurisdictions (such as India and Pakistan).<sup>29</sup>

More generally, we have observed that there is often a tailoring of legal claims in Global South climate cases to what is viewed to be the most important policy issue in the jurisdiction, which is not always climate change. An example is China, where urban air pollution has been a major concern for Chinese citizens and an issue at the top of the political agenda.<sup>30</sup> It is

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<sup>25</sup> *Pandey v. Union of India*, Original Application filed in March 2017 by the plaintiff, para. III, p. 2, available at [http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2017/20170325\\_Original-Application-No.-\\_\\_\\_\\_-of-2017\\_petition-1.pdf](http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2017/20170325_Original-Application-No.-____-of-2017_petition-1.pdf).

<sup>26</sup> Judicial over-reach is a commonly used argument by defendants in climate lawsuits; see, for example, *Urgenda v Netherlands*, *supra* note 7, paras. 8.1-8.3.5, and the court’s response to the argument.

<sup>27</sup> Setzer & Benjamin, *supra* note 2, 86.

<sup>28</sup> Setzer & Benjamin, *supra* note 2, 87-88.

<sup>29</sup> Jacqueline Peel & Jolene Lin, *Climate Change Adaptation Litigation: A View from Southeast Asia*, in CLIMATE CHANGE LITIGATION IN THE ASIA PACIFIC, *supra* note 2.

<sup>30</sup> For example, an online documentary on air pollution in China, ‘Under the Dome’, was watched by millions before being taken down by the government: Steven Mufson, *This documentary went viral in China. Then it was censored. It won’t be forgotten*, WASH. POST (Mar. 17, 2015), at <https://www.washingtonpost.com/news/energy-environment/wp/2015/03/16/this-documentary-went-viral-in-china-then-it-was-censored-it-wont-be-forgotten/>.

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unsurprising in this case that Chinese scholars, as well as prosecutors, see significant potential for public interest litigation (PIL) to tackle air pollution to serve as a pathway for the emergence of climate litigation in China.<sup>31</sup> We note that this “stealthy” characteristic of Global South climate litigation may change over time, particularly if there is greater judicial recognition of the links between climate change and well-established legal avenues (e.g. constitutional rights) or if an increasing number of Global South jurisdictions adopt climate change-specific laws in fulfilment of their Paris Agreement Nationally Determined Contributions (NDCs).<sup>32</sup>

### 3. Modes of climate litigation in the Global South

Strategic climate litigation in the Global North has been enabled by generous financial support from non-profit foundations, individuals through crowd-funding strategies and well-resourced environmental non-governmental organizations (NGOs).<sup>33</sup> In the United States, subnational actors such as the state attorney-general play a prominent role in bringing high-profile cases to challenge federal agencies to regulate climate change issues.<sup>34</sup> *Massachusetts v EPA* and *California v EPA* – a petition filed in November 2019 by a coalition of states led by California seeking review of, *inter alia*, the EPA’s proposal to withdraw the waiver it had previously provided to California for that state’s Greenhouse Gas and Zero Vehicle Emissions programmes under section 209 of the Clean Air Act – are just two examples.<sup>35</sup> Environmental law clinics, established firms with a thriving environmental law practice, and legal aid centres with environmental law expertise all contribute greatly to creating relatively favourable conditions for climate litigation in many Global North jurisdictions.<sup>36</sup>

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Additionally, China’s State Council has released a number of action plans for air pollution prevention and control (the first in 2013 and subsequent update in 2018).

<sup>31</sup> See Yue Zhao, Shuang Lyu & Zhu Wang, *Prospects for Climate Change Litigation in China*, 8 TRANSNAT’L ENVTL. L. 349 (2019). However, see Zhu for a contrasting view: Zhu Yan, *The Subordinate and Passive Position of Chinese Courts in Environmental Governance*, in CLIMATE CHANGE LITIGATION IN THE ASIA PACIFIC, (Jolene Lin & Doug Kysar eds., forthcoming 2020) (copy on file with the authors).

<sup>32</sup> Peel & Lin, *supra* note 2, 717.

<sup>33</sup> See, e.g., Children’s Investment Fund Foundation, *A Low Carbon World will Help Secure a Healthy and Prosperous Future for Children*, at <https://ciff.org/priorities/climate-change>; Global Legal Action Network launching crowdfunding campaign to help Portuguese children affected by forest fires to take governments to the European Court of Human Rights, see *Crowdfunding campaign for climate change legal action launched* (Sep. 25, 2017), at <https://www.glanlaw.org/single-post/2017/09/24/Crowdfunding-campaign-for-climate-change-legal-action-launched>; Climate Action Network, a network of over 1300 NGOs working to promote government and individual action to limit climate change, at <http://www.climateactionnetwork.org/about/about-can>.

<sup>34</sup> See Juliet Eilperin, *NYU Law Launches New Center to Help State AGs Fight Environmental Rollbacks*, WASH. POST (Aug. 16, 2017), at [www.washingtonpost.com/politics/nyu-law-launches-new-center-to-help-state-ags-fight-environmental-rollbacks/2017/08/16/e4df8494-82ac-11e7-902a2a9f2d808496\\_story.html?utm\\_term=.0bee17a4ca06](http://www.washingtonpost.com/politics/nyu-law-launches-new-center-to-help-state-ags-fight-environmental-rollbacks/2017/08/16/e4df8494-82ac-11e7-902a2a9f2d808496_story.html?utm_term=.0bee17a4ca06).

<sup>35</sup> See Attorney General Press Release, *Attorney General Becerra Files Lawsuit Against EPA for Attacking California’s Advanced Clean Car Standards* (Nov. 15, 2019), at <https://oag.ca.gov/news/press-releases/attorney-general-becerra-files-lawsuit-against-epa-attacking-california%E2%80%99sand> at <https://oag.ca.gov/system/files/attachments/press-docs/Waiver%20PFR%20file.pdf>. See also Ronald Brownstein, *Trump’s War on Blue America*, ATLANTIC (Sept. 19, 2019), at <https://www.theatlantic.com/politics/archive/2019/09/trump-epa-california-car-emissions/598381/>.






<sup>36</sup> For analysis of how these organisations are overcoming costs barriers of litigation in the Global North see Peel & Osofsky, *supra* note 5, 279-283. For more general review of the literature on climate change litigation see Joana Setzer & Lisa C. Vanhala, *Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance*, WIREs CLIMATE CHANGE (2019), at <https://onlinelibrary.wiley.com/doi/abs/10.1002/wcc.580>.



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In comparison, much less is currently understood about the modes of climate legal action in the Global South and the constellation of actors needed to support them. Our survey of climate litigation in the Global South, as well as our consultancy work for the Children’s Investment Fund Foundation (CIFF) – a philanthropic organization that provides financial support to various climate litigation initiatives in both the Global North and Global South – have yielded some observations which we present here as five prototypical modes of legal action (see Table 1).<sup>37</sup> We also draw from our understanding of the litigation pathways that have been undertaken in Global North jurisdictions to develop a number of hypotheses about the modes of action that could emerge in the Global South. As this is a work-in-progress, and we are at an early stage of trying to gain a fuller picture of how particular actors – local activists, global charities, and lawyers, for example – are contributing to the emergence of climate litigation in the Global South, this framework is preliminary in nature but could serve as a useful starting point for further investigation.

*Table 1: Prototypical modes of climate litigation in the Global South*

<b>Grassroots activist</b> 	<ul style="list-style-type: none"> <li>• Local activists and community groups sue governments or companies to realize more ambitious climate action.</li> <li>• Little or no collaboration with actors from other Global South jurisdictions (South-South cooperation) or with actors from Global North jurisdictions (North-South cooperation).</li> </ul>
<b>Hero litigator</b> 	<ul style="list-style-type: none"> <li>• A dominant figure – the activist lawyer – drives the litigation strategy and process.</li> <li>• The hero litigator sees himself or herself as an unequivocal force for good.</li> <li>• Can be a local lawyer or a foreign lawyer who is inspired to fight for climate justice on behalf of the community.</li> </ul>
<b>The farmer</b> 	<ul style="list-style-type: none"> <li>• Foundations and other non-profit organizations provide funding to local lawyers and environmental non-governmental organizations to ‘seed’ new climate litigation.</li> <li>• May be the basis for significant local capacity-building, which could have a positive multiplier effect for more climate litigation.</li> </ul>
<b>The engineer</b> 	<ul style="list-style-type: none"> <li>• A transnational actor seeks to replicate the success of a particular legal strategy in other jurisdictions deemed to have suitable conditions for successful transplantation.</li> <li>• Builds upon the vast literature on legal transplants.<sup>19-20</sup></li> <li>• Advances a new line of enquiry about the suitability of a legal transplant approach in climate litigation.</li> </ul>
<b>The enforcer</b> 	<ul style="list-style-type: none"> <li>• Prosecutors or government agencies bring lawsuits to enforce local laws</li> </ul>

<sup>37</sup> Children’s Investment Fund Foundation, at <https://ciff.org/about-us/>.

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	<ul style="list-style-type: none"><li>• Local NGOs may engage with enforcement agencies to support these actions</li></ul>
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### ***The Grassroots Activist***

This category refers to the type of litigation that arguably is most likely to emerge in jurisdictions with a tradition of PIL for the protection of environmental and socio-economic rights. In these jurisdictions, e.g. Pakistan, India, the Philippines and Colombia, PIL has been enabled by legal reforms and institutional mechanisms that facilitate access to justice for vulnerable groups in society.<sup>38</sup> Requirements such as the submission of formal petitions to commence proceedings, hefty court fees, and restrictive *locus standi* rules are typically removed to make it easier for citizens to approach the court.<sup>39</sup> As a result, PIL is perceived to be a viable route to protect rights and local activists and communities have pursued it in many environmental claims.<sup>40</sup> It is then an incremental – but crucial – step for local communities and activists to use PIL as a pathway for climate litigation by pressing for enforcement of existing laws and protection of their constitutional rights.

Apart from PIL that is typically pursued against government agencies, the Grassroots Activist Model also includes litigation by local communities and activists against companies. This is most likely in the natural resource extractive sector, such as oil and gas production, mining and timber logging. In some Global South jurisdictions, environmental activists and local communities have endured long struggles to prevent multinational corporations from engaging in industrial activities that cause significant damage to their land and ecology.<sup>41</sup> Some communities have also turned to the courts to seek compensation from corporations that have caused pollution and environmental degradation.<sup>42</sup> These campaigning and litigation experiences provide Grassroot Activists with the knowledge and expertise to undertake climate litigation. From a different perspective, climate litigation emerges when these activists and local communities include climate change as one of the issues in the litigation, either because climate change worsens the environmental problems that they have been trying to address (e.g. flooding and extreme weather patterns) or the remedy sought by the activists will have climate change co-benefits (e.g. protection of native ecosystems such as glaciers).

The cases within the emerging “Global South climate docket” that fall within the Grassroots Activist category offer scant evidence that the participants in the litigation (the activists, the local community, or the legal team) collaborate with actors from other Global South jurisdictions (South-South cooperation) or with actors from Global North jurisdictions

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<sup>38</sup> Peel & Lin, *supra* note 2, 705-708.

<sup>39</sup> See, for example, the Supreme Court in the Philippines introduced Rules of Procedure for Environmental Cases to facilitate the protection and advancement of the constitutional right to a balanced and healthful ecology.

<sup>40</sup> Peel & Lin, *supra* note 2, 720.

<sup>41</sup> A recent example is the industrial pollution from Indian pharmaceutical companies that make medicines for nearly all major global drug companies. For discussion, see Madlen Davies, *Big Pharma’s Pollution is Creating Deadly Superbugs While the World Looks the Other Way*, THE BUREAU OF INVESTIGATIVE JOURNALISM (May 6, 2017) at <https://www.thebureauinvestigates.com/stories/2017-05-06/big-pharmas-pollution-is-creating-deadly-superbugs-while-the-world-looks-the-other-way>.

<sup>42</sup> A prominent example is *Gbemre v. Shell Petroleum Development Company of Nigeria Ltd. and others* (Suit No. FHC/B/CS/53/05; AHRLR 151 (NgHC 2005)).

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(North-South cooperation). We would hypothesize that, as Global South climate litigation develops, there will be more South-South cooperation and North-South cooperation as participants increasingly engage in global networks and platforms to share their knowledge and expertise.<sup>43</sup>

### ***The Hero Litigator***

The Hero Litigator is a lawyer-activist who is passionate about the use of litigation and other legal tools to champion for climate justice. She is a dominant figure who has a high-profile role in relation to the litigation, often raising publicity for the case (and climate litigation more broadly), through press conferences and appearances on television programs. The hero litigator drives the litigation strategy and process.

In the Global North climate caselaw, there are a number of cases which have been fought by “hero litigators”. An example is *Juliana v the United States*, the constitutional climate change case brought by twenty-one youths against the U.S. government for violating their Fifth Amendment rights to life, liberty, property and public trust resources. The lead counsel in *Juliana* is Julia Olson, the Executive Director and Chief Legal Counsel of Our Children’s Trust. Julia Olson founded Our Children’s Trust to serve as a non-profit public interest law firm that supports litigation by youths “to secure the legal right to a stable climate and healthy atmosphere”.<sup>44</sup> This goal underpins the litigation strategy (i.e. rights-based constitutional challenges by youth plaintiffs) adopted in *Juliana* and other cases around the world that are supported by Our Children’s Trust.<sup>45</sup>

Another example of a hero litigator is Roda Verheyen, a partner in a Hamburg law firm who has been involved in climate action for a long time.<sup>46</sup> Roda Verheyen is the lead counsel in at least four ground-breaking climate lawsuits, including *Lliuya v RWE, Carvalho & others v Parliament & Council* (the *People’s Climate Case*), the *Farming Families* case and the *German Youths* case.<sup>47</sup> At the time of writing, the *German Youths* case had recently been filed. Roda Verheyen will be representing a group of youth plaintiffs who are seeking review by the Federal Constitutional Court of Germany’s new climate protection law that was passed in November 2019. The youth plaintiffs argue that the German government’s new climate policy fails to protect their fundamental rights, and will be making arguments similar to those advanced in *Urgenda v the Netherlands*.<sup>48</sup>

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<sup>43</sup> *Litigating the Climate Crisis: Lessons and Strategies* (Centre for Human Rights and Global Justice and Global Justice Clinic, NYU School of Law) is an example of a global network/platform that can facilitate North-South and South-South cooperation.

<sup>44</sup> See <https://www.ourchildrenstrust.org/our-team>.

<sup>45</sup> See, e.g. *Pandey v India, Ali v Pakistan, Carbon Majors Petition* (the Philippines), *Kenneth Kakuru and Greenwatch v Attorney General of Uganda*.

<sup>46</sup> A profile of Roda Verheyen is in Tim Altegör, *A champion of climate justice*, NEW ENERGY (Oct. 17, 2018), at <https://www.newenergy.info/people/portraits/a-champion-of-climate-justice>.

<sup>47</sup> *Lliuya v RWE* (<http://climatecasechart.com/non-us-case/liuya-v-rwe-ag/>); *People’s Climate Case* (<https://peoplesclimatecase.caneurope.org/>). The *Farming Families* case (<https://www.climateabilitynews.org/2019/10/31/germany-climate-case-dismissed/>).

<sup>48</sup> See comment from Verheyen that: “We rely very much on the reasoning and methods of the Dutch Supreme Court”. (Dana Drugmand, *Youth Lawsuit Challenges Germany’s Newest Climate Law*, CLIM LIABILITY NEWS (Jan. 21, 2020), at <https://www.climateabilitynews.org/2020/01/21/germany-climate-lawsuit-youth/>).

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As climate litigation develops in the Global South, we hypothesize that some cases following the Hero Litigator model are likely to emerge. In India, for example, M.C. Mehta is widely celebrated as the country’s environmental champion who has filed a record number of PIL suits addressing a wide range of environmental concerns. These include issues of air quality in New Delhi and the prevention of industrial water pollution in the Ganga, which is one of the most sacred rivers to the Hindus and a lifeline to a billion Indian citizens who live along the course of this river.<sup>49</sup> There are many environmental lawyers in India today who aspire to follow in the footsteps of M.C. Mehta. In this context, it would not be surprising to witness the emergence of a number of hero litigators who seek climate justice particularly for the most vulnerable and marginalized sectors of Indian society.<sup>50</sup> It is also noteworthy that some international organizations working in the Global South seek to cultivate “environmental law champions”, including the hero litigator.<sup>51</sup>

### *The Farmer*

This mode of climate litigation refers to the efforts by foundations and other non-profit organizations to “seed” climate lawsuits in the Global South. In the Global North, a number of foundations and global environmental NGOs have played an instrumental role in providing financial and knowledge support to local lawyers and environmental NGOs to launch strategic climate litigation. For example, the *People’s Climate Case* is funded by a German NGO (Protect the Planet) and Climate Action Network (a large coalition of European NGOs working on energy and climate issues). In the case of *Lliuya v RWE*, another German NGO (Germanwatch) funded the litigation. Efforts to promote climate change litigation in Europe received a boost from the Children’s Investment Fund Foundation (CIFF), a non-profit philanthropy based in London, which aims to reduce carbon dioxide emissions from existing coal plants, improve air quality and reduce emissions from the corporate sector by funding strategically-selected legal cases. CIFF has awarded a multi-year grant to the UK environmental law firm ClientEarth to “support strategic litigation to accelerate Europe’s low carbon transition and secure Europe’s climate leadership by putting it on a path to net zero carbon emissions by 2030”.<sup>52</sup>

While ClientEarth’s *modus operandi* in Europe has been about holding governments and companies accountable for their climate actions and policies, ClientEarth’s China program focuses on building legal and judicial capacity for environmental governance more broadly. For example, ClientEarth (China) has an on-going initiative that involves cooperation with the Supreme People’s Procuratorate (SPP) to develop the relatively new system of prosecutor-led environmental PIL.<sup>53</sup> It can be argued that through its work with the SPP, ClientEarth (China)

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<sup>49</sup> These cases include *M.C. Mehta v. India*, WP (Civil) No. 13381 of 1984 (Supreme Court of India) (India); *M.C. Mehta v. India* (1991) 2 SCC 353 (India); and *M.C. Mehta v. India*, WP (Civil) No. 3727 of 1985 (Supreme Court of India) (India).

<sup>50</sup> We note that there has also been a backlash and a degree of disillusionment with the efficacy of PIL to promote environmental governance in India, see e.g., Lavanya Rajamani, *Public Interest Environmental Litigation in India: Exploring Issues of Access, Participation, Equity, Effectiveness and Sustainability*, 19(3) J. ENVTL L. 293 (2007).

<sup>51</sup> See, for example, <https://www.unenvironment.org/ru/node/24078> and ADB’s work on climate litigation in Asia.

<sup>52</sup> See *ClientEarth Phase II*, at <https://ciff.org/grant-portfolio/clientearth-phase-ii/>.

<sup>53</sup> Dimitri de Boer, *ClientEarth helps build system for public interest cases by Chinese prosecutors*, CLIENTEARTH (July 18, 2018), at <https://www.clientearth.org/clientearth-helps-build-system-for-public-interest-cases-by-chinese-prosecutors/>.

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is providing valuable knowledge support to a set of actors that is widely recognized to be uniquely placed to hold state-owned enterprises, provincial authorities, and private companies accountable for their compliance with environmental and energy laws using prosecutorial enforcement powers.<sup>54</sup>

In contemporary China, there is a fairly well-established tradition of foreign organizations bringing in foreign ideas, money or experts. In 1947, the Rockefeller Foundation alone invested US\$45 million in Chinese medical programs.<sup>55</sup> In more recent times, the Clinton and Bush administrations gave strong support to rule-of-law programs in China, which were not too different from earlier American efforts to bring legal assistance to Latin America, Africa and parts of Southeast Asia during the law and development movement of the 1960s.<sup>56</sup> According to Rachel Stern, between 2001 and 2008, at least eight organizations, including the American Bar Association, the Natural Resources Defense Council, Ford Foundation and Environmental Defense Fund, ran programs on environmental information, legal aid and public participation in environmental decision-making in China.<sup>57</sup> Rachel Stern argues that many American donors seldom support the costs of litigation and generally opt for “soft support: investing instead in skills to make future litigation and advocacy possible”. This is not surprising as the “toll of state surveillance (both real and imagined) helps explain the enthusiasm for soft support programs...many Beijing-based representatives of American NGOs and foundations agree that direct financial support for an environmental lawsuit falls beyond their comfort zone...Their goal is to support local reformers, not to be expelled from China or draw attention to themselves.”<sup>58</sup>

It is arguable that the Farmer mode of climate litigation in the Global South could either take the form of (a) Global North non-profit organizations beginning to expand their programs to fund climate litigation in Global South jurisdictions which are highly vulnerable to the impacts of climate change or which are major GHG emitters (e.g. Brazil) or (b) broad “soft support” programs (to borrow Rachel Stern’s terminology). Either route could be the basis for significant local capacity-building, which could have a positive multiplier effect for climate litigation.

## The Engineer

In the Global North, the Engineer Model is most clearly illustrated by Urgenda, the organization behind the ground-breaking legal victory that has compelled the Dutch government to increase the stringency of its GHG emission reduction targets. Urgenda’s case theory is heavily influenced by Roger Cox, whose book explicitly endorses a transplant model

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<sup>54</sup> For discussion, see Zhao, Lyu & Wang, *supra* note 31; Jiangfeng Li, *Climate Change Litigation: A Promising Pathway to Climate Justice in China?*, 37(44) VA. ENVTL. L.J. 134 (2019).

<sup>55</sup> Quisha Ma, *The Peking Union Medical College and the Rockefeller Foundation’s Medical Programs in China*, in *ROCKEFELLER PHILANTHROPY & MODERN BIOMEDICINE - INTERNATIONAL INITIATIVES FROM WORLD WAR I TO THE COLD WAR*, at 159 (William H. Schneider ed., 2002); Rachel Stern, *ENVIRONMENTAL LITIGATION IN CHINA: A STUDY IN POLITICAL AMBIVALENCE*, 184 (2013); Fengshi Wu, *Double-Mobilization: Transnational Advocacy Networks for China’s Environment and Public Health*, at 7 (2005) (Ph.D. Dissertation, University of Maryland).

<sup>56</sup> Stern, *supra* note 55, 184.

<sup>57</sup> *Id.*, 186.

<sup>58</sup> *Id.*, 189.

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to climate litigation.<sup>59</sup> Urgenda’s vision is that its success can be replicated elsewhere, and it has led to similar litigation in Belgium, Germany, Ireland and the UK.<sup>60</sup> The Engineer is typically proactively involved in the transplant efforts (e.g. by actively sharing information about its legal strategy and working with local lawyers in the ‘target jurisdiction’).

There is a vast literature on legal transplants, which seeks to address questions such as the essential conditions for successful legal transplant and how imported legal institutions and rules perform in the long run.<sup>61</sup> While we seek to draw lessons from this literature, we use the term ‘legal transplant’ in a more deliberate manner than how it is commonly used in the literature. Our use refers to a concerted effort by a transnational actor to replicate the success of a particular climate litigation strategy elsewhere outside its home jurisdiction, with the aim of driving change in that jurisdiction’s climate law and policy. Our review of the Global South caselaw has not revealed that there are currently cases driven by the Engineer’s mode of action, but we hypothesize that the growing interest in Global South climate litigation could lead to a transnational actor seeking to replicate its success in the Global South.

## The Enforcer

In this mode, cases are initiated by prosecutors or law enforcement authorities in a country, sometimes with technical (scientific and legal) support provided by non-governmental organizations. In Brazil and Indonesia, for instance, the plaintiff in the majority of climate litigation cases has been the public prosecutor or a government ministry seeking enforcement of domestic laws.<sup>62</sup> For example, both *Ministry of Environment and Forestry v. PT Jatim Jaya Perkasa* and *MoEF v. PT Waringin Agro Jaya* were enforcement actions brought by the Indonesian Ministry of Environment and Forestry against palm oil companies for illegally setting fire to the land to clear it for palm oil cultivation. The ministry sought restoration measures, including compensation for carbon released into atmosphere.<sup>63</sup> In China, as previously mentioned, the prosecution service has been granted extensive powers to pursue environmental enforcement litigation in the public interest and this has led to cases to address urban air pollution (which have co-benefits of climate change mitigation).<sup>64</sup>

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<sup>59</sup> Roger Cox, *REVOLUTION JUSTIFIED: WHY ONLY THE LAW CAN SAVE US NOW* (2012); Roger Cox, *A climate change litigation precedent: Urgenda Foundation v The State of The Netherlands*, 34(2) J. ENER. & NAT. RESOURCES L. 143, 161 (2016).

<sup>60</sup> See *Global Climate Litigation*, at <https://www.urgenda.nl/en/themas/climate-case/global-climate-litigation/>.

<sup>61</sup> See, e.g., Alan Watson, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (1974); William Ewald, *Comparative Jurisprudence (II): The Logic of Legal Transplants*, 43(4) AM. J. COMP. L. 489 (1995); Natasha Affolder, *Contagious Environmental Lawmaking*, 31 J. ENVTL L. 187 (2019); Jonathan B. Wiener, *Something Borrowed for Something Blue: Legal Transplants and the Evolution of Global Environmental Law*, 27(4) ECOL. L. Q. 1295 (2001).

<sup>62</sup> In Brazil: see *Public Prosecutor’s Office v. Oliveira* (2008), *Sao Paulo Public Prosecutor’s Office v. United Airlines & others* (2014), *Public Prosecutor’s Office v. H Carlos Scheider S/A Comercio e Industria* (2007). In Indonesia: see *MoE v. Selatnasik and Simpang* (2010), *MoE v. PT Merbau Pelalawan Lestari* (2014), *MoE v. PT Kalista Alam* (2013), *MoEF v. PT Bumi Mekar Hijau* (2016), *MoEF v. PT Jatim Jaya Perkasa* (2016), *MoEF v. PT Waringin Agro Jaya* (2017). For further details of these cases, please visit Case Appendix supplementary to Peel & Lin, *supra* note 2: <https://www.cambridge.org/core/journals/american-journal-of-international-law/article/transnational-climate-litigation-the-contribution-of-the-global-south/ABE6CC59AB7BC276A3550B9935E7145A#fndtn-supplementary-materials>.

<sup>63</sup> *Id.*

<sup>64</sup> The first tort-based public interest litigation case on air pollution was brought by public prosecutors in May 2018: see Zhao, Lyu & Wang, *supra* note 31, 367.

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Our caselaw review did not include consideration of whether external actors (e.g. environmental NGOs) provided assistance to the enforcement agencies in bringing these cases. However, informal discussions with our contacts in civil society and government-affiliated research institutions have indicated that it is not uncommon for enforcement agencies in Global South jurisdictions, which are typically under-resourced, to work with external actors who can provide valuable information from their programs and expert evidence.<sup>65</sup>

We suggest that the Enforcer mode has the potential to advance climate litigation in the Global South, particularly with greater recognition of the link between enforcement of existing environmental and natural resource management laws and climate change.

#### **4. Conclusion**

This chapter has sought to provide a brief overview of our current understanding of climate litigation in the Global South. We started by elaborating our understanding of climate litigation and highlighting a number of key characteristics that we believe distinguish Global South climate litigation. We then proposed a framework that elucidates the different, prototypical modes of legal action in the Global South and how they are shaped by particular actors, including local activists, global non-profit foundations, and lawyers.

There is currently an unprecedented level of scholarly interest as well as practical action in the climate litigation space. There is also an emerging transnational climate litigation community comprising of environmental activists, lawyers, scholars and judges that is interacting with other transnational climate social movements such as FridaysforFuture. With the Global North having twenty years of climate litigation experience ahead of the Global South, it could be tempting to replicate familiar patterns of knowledge diffusion premised on the notion of the Global South learning and receiving resources from the (advanced) North. This temptation should be resisted, and the climate litigation space shows that the Global South experience is a rich and powerful one that offers many interesting opportunities for multi-directional learning.

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<sup>65</sup> See other chapters in this book, e.g. Caio Borges and Alice Amorim note that public interest NGOs (who already work with prosecutors) are in the early stages of embedding climate change into their programs in Brazil: *Challenges and Possibilities for Stepping Up Climate Change Litigation in the Global South: Reflections from Brazil*.