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The Transnational Exchange of Law Through Climate Change Litigation

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THE TRANSNATIONAL EXCHANGE OF LAW THROUGH CLIMATE CHANGE LITIGATION

Natasha Affolder and Godwin E. K. Dzah*

Abstract: *Climate change litigation continues to bash holes in the view of domestic legal systems as hermetically sealed units. Domestic cases are inspired by litigation elsewhere, actively fostered by transnational advocacy communities, and the decisions themselves are indicative of transjudicial influences and sometimes even dialogue on climate change. This chapter, written in 2021 to reflect the transnationalism of early climate change litigation, takes a close look at practices of transjudicialism in climate change litigation. In so doing, it seeks to disrupt some default patterns of studying the spread of law. By problematizing the practices of 'finding' influential climate law cases, measuring their citation and impact, and assuming their directions of influence, we set out to remove some of the blinders that prevent us from appreciating the full picture of climate change litigation's transnationalism including the leadership of the Global South.*

1. INTRODUCTION

Judges occupy a unique role in addressing global warming. They are and will be the translators of what has been long approached as an abstract problem into the very immediate and real-world processes of fact-finding and legal relevance articulation. Given the intensely transnational nature of both climate change and climate change litigation, it is not surprising that claims of cross-citation, cross-fertilization, and transnational dialogue through climate cases are proliferating. We approach these terms, and these claims, cautiously, alert to the implication that they embed that citation practices are mutual, and that judicial dialogue involves courts speaking back and forth between themselves.

Climate cases are rapidly proliferating. This presents litigants, counsel, the judiciary and climate researchers with a very real challenge: information overload. As climate change issues permeate ever more legal spaces and issues, and litigation outpaces the ability of any person to know or appreciate the nuances of local let alone foreign case content, a starting point of empathy for the task facing the judiciary rather makes sense.

Transjudicialism in climate cases is a work in progress, as is the study of it. This chapter's ambition, then, is not to advance bold conclusions when many of the most significant

* The authors thank Daniel Draper for his superb research assistance, and data analysis work for this chapter.

cases worldwide are only a few years' old and their citation and impact still to be realized. What the chapter does instead is to offer preliminary observations, problematizing known patterns and practices and the knowledge and information access biases that set the terrain for the exchange of law and judicial decisions. In so doing, we seek to identify and disrupt some default patterns for exchanging law and studying this interchange, motivated by the need to foster decolonial approaches and more globally inclusive conversations.

This contribution might be best understood as offering three exploratory passes at a complex topic. First, we attempt to measure and map. We share an account of a network diagram we created of seven significant cases and their transjudicial reception, leading to several critical insights about existing and emerging practices of transjudicial citation. Second, we reflect critically on the map-creation exercise, pausing to take stock of the limits of our approach. Finally, and in response to the incomplete picture of transjudicial communication revealed through our map, we begin to address the question of how to meaningfully learn from the Global South experience of climate litigation.[1] Our goal is to expand interest in the transnational exchange of law through climate litigation beyond ideas of emulation and replication of those concepts, strategies, and *ratio* that "will travel".[2]

2. THE CHALLENGE OF STUDYING THE EXCHANGE OF LAW THROUGH CLIMATE LITIGATION

For decades, scholars have focused on explicit cross-citation practices as the dominant, and often singular, measure of transjudicial communication.[3] This is despite the fact that external citations may both overstate, or understate, the influence of a foreign decision. Transnational citations are not synonymous with transnational influence, nor the sole way to measure such influence. This may be particularly the case in climate litigation where foreign decisions have powerfully prompted "copycat litigation" and served as inspiration for cases in other jurisdictions, and climate judgments have caused significant impact and "ripples"[4] even where the core climate change arguments were not successful.[5]

Indeed, the seemingly dispassionate and mechanical exercise of counting citations between cases from different jurisdictions plays out against a more contested field of play familiar to anyone who tries to map 'the global'. This is a terrain quietly shaped by the

[1] This question is thoughtfully posed in another context by Sujith Xavier, 'Learning from Below: Theorising Global Governance Through Ethnographies and Critical Reflections from the Global South' (2016) 33 Windsor Yearbook of Access to Justice 229.
[2] William Twining, 'Have Concepts, Will Travel: Analytical Jurisprudence in a Global Context' (2005) 1 International Journal of Law in Context 5.
[3] Mads Andenas and Duncan Fairgrieve (eds), *Courts and Comparative Law* (Oxford University Press 2015).
[4] Brian J Preston, 'The Influence of the Paris Agreement on Climate Litigation: Causation, Corporate Governance and Catalyst (Part II)' (2021) 33 Journal of Environmental Law 227.
[5] Phillip Paiement, 'Urgent Agenda: How Climate Litigation Builds Transnational Narratives' (2020) 11 Transnational Legal Theory 121, 130.

asymmetries of access to data and decisions, the unconscious bias that creeps into decisions about inclusion and exclusion, concerns about the tactics of cross-jurisdictional citation in high visibility cases, and the challenge of even knowing about developments from courts that fail to feature in available databases.

Information availability remains a linchpin of knowledge transfer. The increased digital access to climate-related judgments in many jurisdictions may facilitate and promote comparative analysis, but it is not without challenges in terms of uneven coverage and English-language dominance. As our study identifies, despite the rise of special-purpose open-access climate law databases, access to knowledge about cases and the full texts of the cases themselves is far from even. Important efforts to identify and fill the gaps in national coverage of climate decisions are being employed including the use of peer-reviewers to identify country-specific cases that may be missing.[6] Judges have also expressly linked the cross-pollination of judicial thinking with increased access to case law from jurisdictions other than the United States (US) and United Kingdom (UK), acknowledging the influence of the fact that "judges and litigants, naturally, looked to places with the most easily accessible materials."[7]

But, of course, getting cases into print and making them digitally available is far from the extent of the challenge. More profoundly, practices of law's movement across borders, and the study of such movement, occur against a backdrop of comparative law practices that are largely "structured and dominated by the Global North."[8] The very questions of how we compare, where we look for comparison, what we compare, when and why we compare may be limited by their emergence in ideas of law that may not travel well, including "that of law as a semi-autonomous field of expertise and of community as being largely homogenous."[9] Citations to foreign law and awareness of foreign cases do not happen by chance. They are products of cases brought to a judge's attention by counsel, by her own or her staff's research efforts, and may be filtered by issues such as familiarity and comfort with the jurisdiction in question.[10]

The transnationalisation of law comes from a rich and varied cross-fertilization of influences, not simply the visible tip of explicit case citation. Indeed, it is useful to distinguish between the literal dialogue between judges that is fostered at conferences and through networks, and the more figurative phenomenon of judicial citation of foreign law.

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[6] See e.g. 'Global Network of Peer Reviewers on Climate Litigation | Sabin Center for Climate Change Law' <https://climate.law.columbia.edu/content/global-network-peer-reviewers-climate-litigation> accessed 6 April 2022.

[7] Claire L'Heureux-Dubé, 'The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court' (1998) 34 Tulsa Law Journal 15, 20.

[8] Lena Salaymeh and Ralf Michaels, 'Decolonial Comparative Law: A Conceptual Beginning' (2022) 86 Rabels Zeitschrift für Ausländisches und Internationales Privatrecht 166, 167.

[9] ibid 168.

[10] Education is a frequently-cited factor explaining which foreign jurisdictions judges turn to for inspiration and comparison. See L'Heureux-Dubé (n 7) 20.

It is this latter practice that often and perhaps somewhat misleadingly attracts the labels of "transnational judicial communication" or "global judicial dialogue".[11] Jacqueline Peel advances a much wider view of climate litigation's transnationalism in a recent commentary on the Australian *Gloucester Resources* case, one attentive to the contributions of climate science and scholarship as well as local and foreign law.[12] This view explains why transnationalism is perhaps unavoidable in the context of climate law where legal norms are forced to mediate "between the global nature of the problem of GHG pollution and the largely local scale at which decisions on polluting projects take place".[13]

Much of climate law has its moorings beyond the state. While our study has focused largely on national courts, international courts and tribunals are simultaneously developing climate jurisprudence and are a source of both exporting and importing ideas. Cross-jurisdictional inspiration equally emerges from engagement with environmental principles[14] and forms of knowledge and information exchange such as judicial networking and conferences.[15] Initiatives such as the ASEAN Chief Justices' Roundtable on the Environment, the Global Judicial Institute for the Environment, the European Union Forum of Judges for the Environment and the 2020 Report Series prepared by the Asian Development Bank on climate change litigation in the Asia Pacific region[16] provide an important yet distinct window into the transnationalisation of law that may be shaping climate cases, but in ways less visible and prone to easy measurement than case citations.[17]

In short, our traditional tools, methods and default patterns of studying the exchange of legal ideas through litigation together promise to send us down familiar 'rabbit holes'. We deal in the currency of the concrete and the available. We privilege explicit judicial cross-citation of cases, find and read cases that are known or judgments easily available, become familiar with and in response cite cases already well-covered by scholars and commentators. We frequently analyse cases without the opportunity of reading the underlying court documents to see what other legal sources were raised in argument but

[11] Elaine Mak and David S Law, 'Transnational Judicial Communication: The European Union' in David S Law (ed), *Constitutionalism in Context* (CUP 2022) 236-260.
[12] Jacqueline Peel, "The Land and Environment Court of New South Wales and the Transnationalisation of Climate Law: The Case of Gloucester Resources v Minister of Planning" in Elizabeth Fisher and Brian Preston eds., *An Environment Court in Action* (Bloomsbury 2022) 73.
[13] ibid 74.
[14] Eloise Scotford, *Environmental Principles Across Jurisdictions* (Hart Publishing 2019).
[15] Geetanjali Ganguly, 'Judicial Transnationalization' in Veerle Heyvaert and Leslie-Anne Duvic-Paoli (eds), *Research Handbook on Transnational Environmental Law* (Edward Elgar Publishing 2020) 301.
[16] Asian Development Bank, 'Climate Change, Coming Soon to a Court Near You: International Climate Change Legal Frameworks' (Asian Development Bank 2020) 5-7.
[17] Gitanjali N Gill and Gopichandran Ramachandran, 'Sustainability Transformations, Environmental Rule of Law and the Indian Judiciary: Connecting the Dots through Climate Change Litigation' (2021) 23 Environmental Law Review 228.

not addressed by the court. There are good reasons for all of these practices. But it is important to reflect on their consequences.

3. THE RANGE AND RICHNESS OF TRANSJUDICIAL CITATION IN CLIMATE CASES

3.1 Where We Began: A Network Diagram of Citation Practices of Seven Climate Cases

We set out to create a network diagram representing all transnational judicial references made by the end of 2021 to seven significant climate change cases decided in five jurisdictions: *Earthlife*[18] (South Africa), *Gloucester Resources*[19] (Australia), *Juliana*[20] (US), *Leghari*[21] (Pakistan), *Massachusetts v EPA*[22] (US), *Milieudefensie*[23] and *Urgenda*[24] (both the Netherlands). We selected these cases because they had, by 2021, received considerable attention in the literature rather than based on any independent assessment that they are the leading climate change cases in the world.[25] Indeed, mere months later, it would be possible to justify studying a different line-up of cases.

We employed network analysis for a number of reasons. We sought to create a picture of cross-citation practices through an amalgamated or collective lens, rather than simply analysing individual cases in an isolated way. We were also interested in what areas of the world featured in repeated patterns of dialogue (represented by the width of the lines) and which areas of the world were not present in these dialogues at all. Of course, the small sample size warns against relying on this diagram as anything other than illustrative.

[18] *Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others* (2017) ZAGPPHC 58.
[19] *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7.
[20] *Kelsey Cascadia Rose Juliana et al v United States of America et al* [2020] 947 F3d 1159 (United States Court of Appeals, Ninth Circuit).
[21] *Asghar Leghari v Federation of Pakistan* [2015] WP No 25501/2015 (Lahore High Court).
[22] *Massachusetts et al v Environmental Protection Agency et al* [2007] 549 US 497.
[23] *Milieudefensie et al v Royal Dutch Shell plc* ECLI:NL:RBDHA:2021:5339.
[24] *Urgenda Foundation v The State of the Netherlands (Ministry of Infrastructure and the Environment)* ECLI:NL:RBDHA:2015:7196; *The State of the Netherlands (Ministry of Infrastructure and the Environment) v Urgenda Foundation* ECLI:NL:GHDHA:2018:2610; *The State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v Stichting Urgenda* ECLI:NL:HR:2019:2007.
[25] The 2022 IPCC draft report, for example, specifically refers to three of these cases: *Urgenda*, *Juliana* and *Leghari.* Intergovernmental Panel on Climate Change, 'Working Group III Contribution to the Sixth Assessment Report' (2022) chapter 13.

Figure 1. Geographical distribution of judicial references to seven significant cases

Figure 1 offers a visual representation of the interrelationships between the states where the seven judgments were made and subsequently cited.[26] The components in such a diagram are known as nodes and the relationships between them are known as edges. The thickness of an edge indicates the number of references from cases in the target state to the chosen cases in the source state.

The figure illustrates that the United States and the Netherlands were easily the largest judicial reference exporters among those five states. It also suggests that the bulk of the transnational referencing occurred between Global North states – Canada, the United States, the United Kingdom, Ireland, The Netherlands, Belgium, Australia and New Zealand. These findings, on a very small scale, roughly align with much larger empirical studies of transjudicial legal citation in other legal domains. Such studies suggest that most transjudicial dialogue "is concentrated among a clique of countries – the United Kingdom, Canada, Australia, the United States and New Zealand."[27]

Figures like this one invite instant reactions and commentary, such as the suggestion that the Global North is dominating the market for judicial references to climate change cases. That said, Figure 1 is included here to prompt rather than replace deeper probing into climate law's transnational circulation. As we explore below, the real value of this

[26] Lothar Krempel, 'Network Visualization' in John Scott and Peter Carrington (eds), *The SAGE Handbook of Social Network Analysis* (SAGE Publications 2014) 558.
[27] D Hoadley and others, 'A Global Community of Courts? Modelling the Use of Persuasive Authority as a Complex Network' (2021) 9 Frontiers in Physics 18.

diagram perhaps lies in its shortcomings, shortcomings that force us to reconsider how we measure and map the global movement of law.

3.2 What We Learned (A): THE MULTIPLICITY OF WAYS THAT LITIGATION CAN INFLUENCE LAW ELSEWHERE

From our identification of cases citing these seven judgments, we sought to understand more fully the work that foreign law was doing in the individual case. We describe four of these roles below. This is not an exhaustive list but suggestive of roles for foreign law that will only expand and likely challenge traditional parameters of foreign law reference. Moreover, it reveals the way in which foreign and international law often intersect and interact in domestic climate cases.

3.2.1 *Urgenda* and the Urge to Distinguish and Dismiss

Urgenda is a highly significant and visible case from the Netherlands. It has served as a model for many cases worldwide, shaping litigation practice and yielding a literature on how to deploy the decision further afield.[28] And yet, its iconic status means that while it is raised frequently by counsel in cases worldwide, and cited in judgments, it is approached by a number of courts as rather easy to distinguish and dismiss given the uniqueness of the Dutch legal context. In comparative law terms, this would be considered a "negative" reference to a foreign case.[29] While *Urgenda* thus leads to many thick lines in Figure 1 and is routinely cited as evidence of judicial dialogue and cross-fertilization, the limits of those labels become apparent when courts cite the case only to dismiss its relevance.

Revealing of such practices is the 2020 decision of the Norwegian Supreme Court where the court stated point-blank that, "[t]he judgment from the Netherlands has little transfer value for this case."[30] A similar approach can be seen in other recent climate cases from the UK and Ireland. In one such case, the court dismisses counsel's citation of *Urgenda* on grounds that, "I have not been given any comparison of the constitutional laws in play and between the powers of the Dutch and English courts in such matters."[31] Reference to *Urgenda* in the *Friends of the Irish Environment* case met a similar fate.[32]

This phenomenon is even more sharply on display in a 2022 UK Court of Appeal decision.[33] In that case, the court surveys what it labels "several cases in other jurisdictions, European and non-European, which related, in one way or another, to

[28] Lucy Maxwell, Sarah Mead and Dennis van Berkel, 'Standards for Adjudicating the Next Generation of Urgenda-Style Climate Cases' [2022] Journal of Human Rights and the Environment 35.
[29] Pierre Legrand, 'Negative Comparative Law' (2015) 10 Journal of Comparative Law 405.
[30] *Greenpeace Nordic Association v Ministry of Petroleum and Energy* (2020) HR-2020-2472-P para 173.
[31] *Plan B Earth Case and Others v Prime Minister* (2021) EWHC 3469 (Admin) para 55.
[32] *Friends of the Irish Environment v The Government of Ireland* (2020) IESC 49 paras 5.13-5.17.
[33] *Finch v Surrey County Council* (2022) EWCA Civ 187.

projects of hydrocarbon extraction, in which courts have considered the legal implications, in various contexts, of the impacts of 'downstream' greenhouse gas emissions."[34] The court then moves through each example of the foreign case law, citing and dismissing cases from the Netherlands, Australia, Norway and the US. It concludes that "we can gain no assistance from them in resolving the issues in this appeal, which arise on different facts under the legislative regime for environmental impact assessment in this jurisdiction, construed in light of the relevant case law of the CJEU [Court of Justice of the European Union] and the domestic courts."[35] Five entire paragraphs are devoted to explaining why specific foreign cases have no "direct bearing on the legal issues in the case before us."[36]

One is left with an unsatisfying sense that this sort of analysis misses the point of considering "optional" foreign jurisprudence cited for reasons other than its legally binding application. The *Urgenda* case is persuasive and helpful for foreign courts for many reasons. One reason is the court's direct engagement with the question of what is required of a country to meet its goals under the *Paris Agreement*. The presumption of conformity between domestic and international law (referenced in the decision as the "reflex effect")[37] is a legal doctrine recognized by many countries. Seeing how one court actively engages with this mechanism for synchronizing international and domestic law is instructive for other jurisdictions, even where their legal systems remain quite distinct.

3.2.2 Aggregating Influence

A second observation from our study reveals a tendency to aggregate foreign cases to make a larger point or add a sense of "global weight" to an argument. An example of this emerges from the High Court of New Zealand.[38] The court, considering *Urgenda and Massachusetts v EPA*, clarifies outright that "of course each of these cases is different from the present case", and explains their different legal bases in a footnote.[39] The more nuanced point the Court makes is that, *in aggregate*, the cases "illustrate that it may be appropriate for domestic courts to play a role in Government decision making about climate change policy."[40] The *legal* significance of the different settings is not lost on the court but a larger idea emerges from the cumulative impact of this global jurisprudence: that climate change need not be a "'no-go' area" for the judiciary.[41]

This same phenomenon is on display in the Supreme Court of Canada's consideration of the cumulative influence of a range of foreign cases in its 2021 Carbon Pricing

[34] ibid para 72.
[35] ibid para 78.
[36] ibid 72.
[37] *Urgenda* (n 24) para 4.43.
[38] *Sarah Thomson v The Minister for Climate Change Issues* (2017) NZHC 733.
[39] ibid para 33 (see footnote 147).
[40] ibid para 133.
[41] ibid 133.

Reference.[42] Chief Justice Wagner quotes from the decisions in *Massachusetts v EPA, Urgenda*, and *Gloucester Resources* to add the collective weight of these decisions to his rejection of Alberta's contention that since climate change is "an inherently global problem", each individual province's GHG emissions causes no "measurable harm" or fails to have "tangible impacts on other provinces."[43]

This phenomenon, of knitting together different cases from different places and covering distinct legal issues, reveals the persuasive value of conceptualizing climate cases collectively as part of a corpus of law rather than viewing each case in isolation. The causal links between failure to take regulatory action in a single location or by a single actor and global climate change are bolstered through this sort of analysis.[44] These links, developed across time and space, between localized action and inaction and global climate change, make it increasingly difficult for courts to accept that the individual emissions of an entity are inconsequential.

Courts adopting this approach of aggregating foreign case law are not doing so towards the end of advancing any sort of legal universalism or to define a singular "solution" to a complex legal issue. Rather, they are using case law from different places to affirm judicial capability and skill in adjudicating climate issues in a way that remains attentive to the unique needs of different peoples in different contexts and to the reality that law works differently in different places. This is a creative response to the emerging magnitude of case law and a way of responding to the identified challenge of information overload.

3.2.3 Climate Science: Capable of Scientific Proof

A third way in which foreign cases are used in climate litigation is to assist courts in finding that the facts in applicants' pleadings are capable of scientific proof. The Ontario Court of Appeal in Canada uses *Urgenda* in this way. The court notes the Supreme Court of the Netherlands recognized that "each additional molecule of GHG in the atmosphere causes a demonstrable increase in the harm, with a single molecule of carbon dioxide causing a warming effect."[45] It goes on to refer to counsel's citation of decisions in the US, New Zealand, Australia and Colombia, to affirm that "many countries have already found causal links between local government policies, emissions levels, and increased risks of harm from climate change, regardless of the emissions of other nations."[46]

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[42] *References re Greenhouse Gas Pollution Pricing Act* (2021) SCC 11.
[43] ibid para 188.
[44] Preston (n 4) 232. Preston draws attention to the *Future Generations v Ministry of the Environment* case coming out of the Colombian Supreme Court in this regard, where the court accepted the causal link between the failure to reduce deforestation in the Amazon, global climate change, and the specific consequences of climate change for the plaintiffs' human rights.
[45] *Mathur v Ontario* (2020) ONSC 6918.
[46] ibid para 94.

The international acceptance of climate science, thus, is a unifying touchpoint between domestic and foreign cases. In particular, courts have influenced practices in other jurisdictions by providing a model for certifying Intergovernmental Panel on Climate Change (IPCC) assessments as a knowledge base for climate litigation.[47] In the 2021 *Neubauer* case, for example, the German Constitutional Court relied heavily on the IPCCs' work, signalling its endorsement of this distinctly global source of climate science, in addition to national sources of knowledge. The court's use of climate science was a key factor in its finding of a state obligation to equitably distribute allowable emissions over time and generations.[48]

Moreover, the *Neubauer* decision reads the legal obligations under the *Paris Agreement* as not frozen when the Agreement was signed but seeks to interpret those obligations in the context of emerging science as articulated in the IPCC Reports. The decision thus tethers Germany's *Federal Climate Change Act* to the evolving science and to the 1.5 degree target that would reduce the probability of tipping points being crossed. In support of taking an approach to the Paris targets that is live and evolving with the documented international scientific consensus, the Court evokes decisions of courts in both the Netherlands and Ireland.[49]

Foreign cases are not only a source of persuasive value on the substance of climate science, but also can serve as inspiration in developing processes for accessing Indigenous and cultural knowledge of climate change and its impacts. A recent example is the determination by the Queensland Land Court that it will hear from Aboriginal and Torres Strait Islander witnesses "on Country" in accordance with First Nations protocols. This will allow the court to hear first-hand how climate change is impacting their lives and the potential impact of a proposed coal mine.[50] It is the sort of development that will likely attract foreign interest as judges in other jurisdictions navigate the issue of evidence gathering to draw on Indigenous and cultural knowledge.

3.2.4 Normalizing the Use of International Law by Domestic Courts

It can be useful to think about cross-citation over time rather than as a series of unique, and quantifiable, one-stop measurements. Chief Justice Brian Preston, refers to the "ripple effect" of decisions in other jurisdictions.[51] This is a particularly apt metaphor as ripples cannot always be immediately detected, nor their reach fully understood. Climate cases thus sometimes only hint at the deeper flow of inspirations and juridical touchdown

[47] For a more detailed discussion see Ganguly (n 15).
[48] *Neubauer, et al v Germany* (2021) Case No. BvR 2656/18/1, BvR 78/20/1, BvR 96/20/1 para 266; On the wider contribution of this case see Louis J Kotzé, '*Neubauer et al. versus Germany*: Planetary Climate Litigation for the Anthropocene?' (2021) 22 German Law Journal 1423.
[49] *Neubauer*, ibid para 161.
[50] *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 5)* (2022) QLC 4 paras 18-22.
[51] Preston (n 4) 248.

points between international and foreign national case law, legislation and scholarship. The "consciously transnational" engagement of courts with foreign and international materials is unlikely to be a uniform phenomenon and may well vary between different sorts of climate cases given varying comfort levels with cross-jurisdictional citation.[52]

A larger point emerges here. Climate litigation demonstrates the analytical limits of attempting to maintain a strict separation among international, transnational and national law. A significant transnational dimension of many climate cases to date, including *Urgenda*, *Juliana*, and *Gloucester Resources*, is that they have normalized the use of the *Paris Agreement* in domestic litigation. They have done this not through a unilateral conversation between a domestic jurisdiction and an international treaty, but rather through using the *Paris Agreement* as a pivot point through which to bring other foreign decisions into the conversation. In this way, the *Paris Agreement* operates as connective tissue – justifying consideration of how courts in other jurisdictions have interpreted national obligations under that treaty.

As this practice evolves, it stands poised to dislodge the assumption that international law is mostly irrelevant to the daily diet of environmental, planning and climate-related cases, and only worth considering where domestic law is ambiguous or absent. The *Gloucester Resources* decision exemplifies this, sharply rejecting a view of the world where national and international law occupy separate spheres. Instead, Preston CJ approaches the problems of the case through situating domestic planning law in the context of the international goals of the *Paris Agreement* including the responsibility articulated in Article 4(4) of that agreement for developed countries "to take the lead in taking mitigation measures to reduce GHG emissions", a responsibility he tracks also to the *Urgenda* decision.[53] This is an example of what Lennart Wegener refers to as the synchronizing role of domestic courts, putting the *Paris Agreement* to work in local contexts in manner that prevents executive and legislative manoeuvring inconsistent with evolving international agreement.[54] It may be the very inadequacies of the *Paris Agreement* that have led to this state where international law and comparative law are forced to work together to make treaty obligations meaningful.

[52] Emily Barritt, 'Consciously Transnational: Urgenda and the Shape of Climate Change Litigation: The State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v Urgenda Foundation' (2020) 22 Environmental Law Review 296, 304. Barritt highlights the well-established tradition of citing foreign law in rights jurisprudence.
[53] *Gloucester Resources* (n 19) para 539.
[54] Lennart Wegener, "Can the Paris Agreement Help Climate Change and Vice Versa" (2020) 9(1) Transnational Environmental Law 17, 26.

3.3 What We Learned (B): THE LIMITATIONS OF EMPIRICAL ANALYSIS OF TRANSJUDICIAL PRACTICES

Our learning from the network diagram we created, and the cases it sent us to explore, represents only one layer of insight. Significantly, we learned much from what we see now as the limitations of our diagram and its underlying sources. In this section, we articulate some of these limitations and challenges as they illuminate the partiality of the study of transjudicial citation in climate cases using traditional tools.

Our network diagram, and the underlying cases upon which it is constructed, emerged by queries in seven legal databases: AfricanLII,[55] InforMEA,[56] Juricaf,[57] Sabin/Grantham,[58] vLex,[59] Westlaw,[60] and WorldLII.[61] Five of the databases - AfricanLII, InforMEA, Juricaf, Sabin/Grantham and WorldLII - are open access, while the content provided by each of vLex and Westlaw is only accessible with a paid subscription. After reviewing the search results, we mapped our leading case and referencing case pairs to geographical coordinates.[62] We then used Gephi[63] to generate a geographically-oriented directed graph, with the unique jurisdictions serving as nodes and the references from referencing-case states to leading-case states serving as edges. To complete the network diagram, we used GIMP[64] to overlay the graph produced by Gephi on a world map. Comparing the results returned by the various data sources illustrates that none of the data sources individually provides an exhaustive account of transnational judicial references to all seven leading cases, a conclusion readily apparent in Table I.

[55] 'African Legal Information Institute | Access and Shape African Law' <https://africanlii.org/> accessed 24 March 2022.
[56] 'InforMEA | United Nations Information Portal on Multilateral Environmental Agreements' <https://www.informea.org/en> accessed 24 March 2022.
[57] 'Juricaf' <https://juricaf.org/> accessed 24 March 2022.
[58] 'Climate Change Litigation Databases - Sabin Center for Climate Change Law' (*Climate Change Litigation*) <http://climatecasechart.com/> accessed 20 November 2022; Vizzuality, 'Climate Change Laws of the World' <https://climate-laws.org/litigation_cases> accessed 24 March 2022.
[59] 'VLex | Your World of Legal Intelligence | Legal Technology' (*vLex*) <https://vlex.com/> accessed 24 March 2022.
[60] 'Westlaw Canada | Better Results Faster' <https://www.westlawcanada.com/> accessed 24 March 2022.
[61] 'World Legal Information Institute (WorldLII)' <http://www.worldlii.org/> accessed 24 March 2022.
[62] For the mappings of state to geographical coordinates, we relied on 'Countries.Csv | Dataset Publishing Language' (*Google Developers*) <https://developers.google.com/public-data/docs/canonical/countries_csv> accessed 24 March 2022.
[63] 'Gephi - The Open Graph Viz Platform' <https://gephi.org/> accessed 24 March 2022.
[64] 'GIMP' (*GIMP*) <https://www.gimp.org/> accessed 24 March 2022.

Table I. Case reference count by data source

	Earthlife	Gloucester	Juliana	Leghari	Mass	Milieudefensie	Urgenda
AfricanLII	1	0	0	0	0	0	0
InforMEA	0	0	2	0	4	0	3
Juricaf	0	0	0	0	0	0	0
Sabin / Grantham	0	0	0	0	0	0	2
vLex	1	2	2	1	5	1	13
Westlaw	1	2	2	1	4	1	8
WorldLII	0	0	2	1	4	0	11

The numbers in Table 1 illustrate that vLex is the most comprehensive of the seven databases for the purposes of coverage of the cases we investigated. Furthermore, the fact that vLex returned the largest number of unique references in all seven cases raises the possibility that vLex's results could be a superset of the results returned by the other six data sources. Inspecting the referencing decisions, however, tells a different story. In the case of *Earthlife*, AfricanLII returned a decision from Kenya[65], while vLex returned a decision from Canada.[66] Similarly, for *Juliana*, InforMEA returned a decision from New Zealand,[67] while vLex returned two decisions from Canada.[68] This analysis reveals that the combined results across all seven cases from each data source at most intersect one another; and none of the combined result sets is a superset of all six of the others. The primary implication of this finding is that none of the seven data sets is exhaustive.

A further point to be gleaned from Table I is the limited coverage of cases in free, open-access databases. Two of the top three databases upon which we relied in terms of references returned – vLex and Westlaw – are commercial data sources whose content is only accessible through paid subscription. Combined, these two sources returned fourteen unique references that were not returned by any of the open-access databases. For researchers with limited financial resources who do not benefit from institutional access and cannot afford individual access to commercial services, access to vLex and/or Westlaw may not be attainable. All else being equal, a financial gap of this sort and the resulting barrier to access would have reduced the number of references represented on our network diagram from 34 to 20, a significant reduction of approximately 41%.

There are other omissions illuminated by our methods. Looking at the diagram that we created, there is a notable absence of referencing cases in Central America, South America, Eastern Europe, the Middle East and Asia. This absence is certainly not determinative from a coverage standpoint – vLex purports to provide extensive coverage of the courts of almost all states including in Latin America – but it is at least suggestive of possible gaps. The absence of these states from the data may also be caused by an

[65] *Mohamed Ali Baadi and Others v Attorney General and 12 Others* [2018] Case 22 of 2012 (High Court of Kenya at Nairobi).
[66] *Highlands District Community Association v British Columbia (Attorney General)* (2021) BCCA 232.
[67] *Thomson* (n 38).
[68] *Trans Mountain Pipeline ULC v Mivasair* (2019) BCSC 50; *Wang v Alberta* (2019) ABQB 948.

incompatibility between the characters in the query expressions and the characters employed in the decisions of a particular court. The potential for this incompatibility would arise whenever a given court produces decisions in a language whose written form does not rely on the Latin script. Courts that produce decisions in languages whose written forms do not rely on the Latin script are concentrated in Eastern Europe, the Middle East and Asia, conspicuously the same areas of the world that demonstrate an absence of referencing cases in the diagram that we created.

4. WHAT RISKS BEING MISSED: HOW THE GLOBAL SOUTH SHAPES CLIMATE LITIGATION

This section responds to our concern that climate cases coming out of the Global South are under-cited and under-utilized outside the jurisdictions in which they emerge and that unconscious defaults, education patterns and practices, and methods of comparative law work may be partially to blame. Citation practices and processes are themselves suggestive of the continuing coloniality of law.[69] To complement existing scholarship on these cases, we offer below a fine-grained reading of these cases that emphasizes their potential for greater transnational influence. This represents our small contribution to the larger question of how to meaningfully learn from the Global South.

The case for studying climate litigation in the Global South with a view to expanding its understanding and transnational significance is founded on several salient points. First, many Global South cases come from comparatively high carbon-emitting jurisdictions.[70] But, equally, there is a need to understand the contribution of cases from countries purely at the receiving end of the effects of climate change.[71] Moreover, the framing of Global South cases on climate change draws heavily on tools and approaches that are commonly used in the Global North,[72] whether they are styled as judicial review, constitutional interpretation, tort-based wrongs or human rights cases. And finally, some Global South cases are precedent-setting and their uniqueness a point inviting greater attention.[73]

The historical (and contemporary) habituation and political circumstances of these states can immobilise their uptake on the transjudicial jurisprudential pecking order. While Global South cases adopt different approaches and strategies, four possible advances are identified here: institutionalising climate change impact assessment; court-mandated executive action; community-led litigation; and climate constitutionalism. These

[69] Salaymeh and Michaels (n 8) 177-178.
[70] Hari M Osofsky, 'The Geography of Emerging Global South Climate Change Litigation' (2020) 114 AJIL Unbound 61.
[71] Harald Fuhr, 'The Rise of the Global South and the Rise in Carbon Emissions' (2021) 42 Third World Quarterly 2724.
[72] Joana Setzer and Lisa Benjamin, 'Climate Change Litigation in the Global South: Filling in Gaps' (2020) 114 AJIL Unbound 56, 57.
[73] Jacqueline Peel and Jolene Lin, 'Transnational Climate Litigation: The Contribution of the Global South' (2019) 113 AJIL 679, 682.

descriptors are not determinative of the emerging praxis of climate change litigation and are only for classificatory purposes. These cases highlight distinct dimensions of climate jurisprudence from different regions of the Global South: drawing on cases from Africa, Asia and Latin America. We are interested in them not only as siloed state-based interventions or isolated regional approaches but rather for the overlapping, interconnected and co-constitutive picture they present.

4.1. Institutionalising Climate Change Impact Assessment

A significant intervention in climate litigation is the introduction of climate change impact assessment (CCIA).[74] The South African courts have revolutionised the law on climate change by holding a CCIA as a distinct prerequisite separate from the traditional environmental and social impact assessment (ESIA). In the *Earthlife* case, the applicant challenged the decision of the Minister of Environmental Affairs to uphold the grant of environmental authorisation for the construction of a 1200MW coal-fired power station. The permit had been issued by the Chief Director of the Department of Environmental Affairs.[75] The grounds for the challenge was the sufficiency of the consideration of the climate change impacts of the proposed project. Under the *National Environmental Management Act (Act 107 of 1998)*, the Chief Director of the Department was required to consider "all relevant factors."[76] The applicant argued the legislative context of this section of the law demanded a CCIA as a separate condition for the grant of environmental authorisation, and thus initiated an administrative appeal before the Minister.[77]

During the determination of the administrative appeal, the Minister conceded that the climate change impacts of the power plant had not been comprehensively assessed before the Chief Director granted the authorisation. But the Minister did not remit the issue to the Chief Director. She rather chose to exercise her ministerial discretion under the Act, and directed the proponents of the project to undertake a CCIA subsequent to the authorisation.[78] The applicant appealed the Minister's decision to the high court which upheld the applicant's claim that a CCIA was a condition precedent to the approval process and remitted the issue to the Minister for a fresh determination of the administrative appeal.[79]

Earthlife combines constitutional guarantees, statutes, international obligations and international environmental law principles including sustainable development and the precautionary principle to foreground a world-first CCIA as prerequisite in assessing

[74] *Earthlife* (n 18).
[75] ibid paras 1-2.
[76] ibid para 12.
[77] ibid para 8.
[78] ibid paras 52-53.
[79] ibid para 126.

projects.[80] Its impact lies in its ability to read climate change impacts into a series of statutes; *Act 107 of 1998*, the *National Environment Management: Air Quality Act* (Act 39 of 2004), and the Constitution without undermining the existing procedural requirements for environmental permitting.[81] Beyond these domestic regulatory conditions, the court highlighted the interface between domestic law and international law by holding that, "the various international agreements on climate change are relevant to the proper interpretation [of domestic law]."[82]

This court's deft approach visibilised *Earthlife* beyond South Africa as the case has been cited by courts in the Global North. An example is the Canadian case of *Highlands* where an appellate court was confronted with a further review of a provincial mines inspector's approval of a proposed rock quarry.[83] The appellant claimed the inspector's exercise of discretion in approving the quarry was unreasonable as he had failed to consider climate change impacts. The appellate court affirmed the lower court's decision by holding that although the *Mines Act* permitted the inspector to consider climate change impacts, the law did not require the inspector to make his determination based on such consideration.[84]

Earthlife was central to the appellant's argument in *Highlands*. They contended the inspector ought to have exercised his discretionary power in accordance with Canada's international and domestic commitments under the *United Nations Framework Convention on Climate Change* and the *Paris Agreement*.[85] However, the appellant did not provide the inspector with scientific reports to support their claims in sharp contrast with the strategy of the applicants in *Earthlife* who offered scientific evidence of the power plant's climate footprint. The British Columbia appellate court emphasised this failing as a significant omission. In its view, the failure to submit a science-based report to the inspector meant there was little beyond mere public agitation to persuade the inspector to take climate issues seriously.[86]

In arriving at its decision, the court held that the provincial *Environmental Assessment Act* required the inspector to consider climate change for large quarries. Given that the quarry in question was categorised as small, the person challenging the approval process bore the burden of disproving the classification using scientific evidence to back their claim.[87] In its analysis, the appellate court distinguished *Earthlife* from *Highlands* by limiting itself to the statutory categorisation of large and small projects and not the impact or cumulative effect of the proposed activity. Based on this analytical scheme, the

[80] Tracy-Lynn Humby, 'The Thabametsi Case: Case No 65662/16 Earthlife Africa Johannesburg v Minister of Environmental Affairs' (2018) 30 Journal of Environmental Law 145, 149-155.
[81] Setzer and Benjamin (n 72) 58.
[82] *Earthlife* (n 18) para 83.
[83] *Highlands* (n 66).
[84] ibid para 38.
[85] ibid para 52.
[86] ibid para 58.
[87] ibid paras 57-62.

appellate court dismissed *Earthlife* as inapplicable on grounds that consideration of climate change impacts is not part of the permitting process for small quarries in British Columbia.[88]

Reading *Highlands* and *Earthlife* together is a revealing exercise. *Highlands* turned on a standard of review of reasonableness involving the court assessing the factors the inspector considered in exercising his discretion.[89] In its analysis, the court stated that where a legislative scheme did not impose mandatory requirements on the inspector to consider climate issues, the inspector *may* take climate change into account. However, the inspector was not duty-bound to give similar consideration in the instant case as it should if it was a big quarry.[90]

The court in *Highlands* simply limited itself to the classification of big and small quarries. This approach risks advancing a blindness to climate risks, missing the opportunity for the court to assess the climate risks of the proposed quarry within a broader mining scheme. It is in this sense that *Earthlife* provides supportive guidance as the South African court *read in* a CCIA into section 24O of *Act 107 of 1998* by invoking the words – "all relevant factors" – and connecting those words to the legislative purpose of *Act 39 of 2004* and Article 24 of the South African Constitution on environmental rights.[91] While the learning point from *Highlands* may be the value of explicit inclusion of compelling scientific and technical evidence, the consideration of *Earthlife* by the British Columbia court is indicative of a greater potential for this case to be used by litigants and courts in solidifying the recognition of climate change impact assessment as an emerging global norm.[92]

4.2. Court-Mandated Executive Action

The two-part judgment in *Asghar Leghari v Federation of Pakistan* has already been cited well beyond Asia for its contribution to understanding the role of courts in impelling executive action. The case is recognized as "the first climate change case from the Global South to attract worldwide scholarly and journalistic attention" and encompasses two judgments, from 2015[93] and 2018.[94] The petitioner in the case was a farmer who asked the court to compel the government to implement Pakistan's 2012 national climate policy framework.[95] While the petitioner did not expressly plead the right to an environment that

[88] ibid 54.
[89] ibid paras 27-28.
[90] ibid para 46.
[91] Jacqueline Peel and Hari M Osofsky, 'A Rights Turn in Climate Change Litigation?' (2018) 7 Transnational Environmental Law 37, 59-60.
[92] See further Benoit Mayer, 'Climate Assessment as an Emerging Obligation Under Customary International Law' (2019) 68 International and Comparative Law Quarterly 271.
[93] *Leghari v Federation of Pakistan* (2015) WP No. 25501 (*Leghari No. 1*).
[94] *Leghari v Federation of Pakistan* (2018) PLD Lahore 364 (*Leghari No. 2*).
[95] *Leghari No. 1* (n 93) 2.

is not harmful to their health or wellbeing, the court adopted a purposive interpretation and engaged with the right to life and the right to a healthy environment.[96]

In advancing the case, the court established a commission comprising focal persons on climate change and assigned duties to the commission.[97] In rebuking the executive branch for failing to performing its functions, the court further directed government agencies implicated in climate policies to work towards priority areas in the national framework.[98] The second part of *Leghari* concluded the court's supervisory jurisdiction over the court-directed commission following satisfactory performance of its court-commissioned responsibilities.[99] Thereafter, the court dissolved the commission and transferred its functions to the executive branch.[100] However, it never fully closed the case as it consigned it to the record and established a standing committee to coordinate between the executive branch and the judiciary on the implementation of the national climate policy and report to the court.[101]

Leghari has been cited in Global North climate cases including a recent reference by the Supreme Court of British Columbia in the Canadian case of the *Trans Mountain Pipeline ULC v. Mivasair*.[102] In this case, the court acknowledged *Leghari* as demonstrating a link between climate change impacts and human life in the context of international law and constitutional guarantees to life.[103] In *Trans Mountain*, the defendants-applicants were arrested for protesting climate change impacts of the Trans Mountain pipeline.[104] The protestors' justification for breaching an injunction was necessity, as they argued climate change impacts required a response in defence of the environment and life.[105] Reflecting, perhaps, our earlier-described tendency of courts to approach foreign cases with an urge "to distinguish and dismiss", the court acknowledged foreign decisions but rejected the arguments on life and dignity that had been modelled on *Leghari*. It held that those climate law cases from "India, Pakistan or the Netherlands" arose in civil action and not criminal proceedings, as they invoked international obligations and constitutional violations.[106] Thus, they were inapplicable. The court's rather terse assertion that "there is Canadian jurisprudence by which I am bound"[107] suggests foreign cases might only be

[96] ibid 5.
[97] ibid.
[98] ibid 6-8.
[99] *Leghari No. 2* (n 94).
[100] ibid 24-25.
[101] ibid 25-26.
[102] *Trans Mountain Pipeline ULC v Mivasair* (2019) BCSC 50.
[103] ibid para 49.
[104] ibid para 5.
[105] ibid paras 10-12.
[106] ibid para 61.
[107] ibid para 61.

seen as instructive in filling gaps where Canadian jurisprudence is lacking, a clearly impoverished vision of the use of foreign case law.

Irrespective of its restrictive consideration in that British Columbia case, *Leghari* can enrich judicial thinking as courts in many different places are confronted with calls to impel executive action on climate change. The way in which the court in *Leghari* linked constitutional rights, statutory provisions and policies to foreground the state's duty to address climate change impacts bears greater reflection. The court navigated the complicated political question doctrine that continues to frustrate climate litigation in other jurisdictions by first adapting its judicial power into a fact-finding authority, and then proceeding to make orders based on its findings.[108] Moreover, the case issued a widely-applicable reminder of the judicial task of protecting fundamental rights of "the vulnerable and weak segments of the society who are unable to approach this Court."[109]

Our larger point here is to flag the need to resist that which immediately seems different, comes from jurisdictions that may be unfamiliar, and indeed is categorised as "creative" (this being a bad thing) and suspicious "judicial activism". These labels have a way of fostering otherness and of undermining the contributions of key cases, particularly from the Global South. In *Earthlife* and *Leghari*, the courts did not create new law. They only gave effect to existing law by making evident what had always been hidden in plain sight.

4.3. Community-Led Climate Litigation

Community-led climate litigation is a third area we highlight to illuminate the public-facing character of climate law as taking peoples and their communities seriously. *Save Lamu et al v. National Environmental Management Authority and Amu Power Company Limited*[110] is a case where Kenya's National Environment Tribunal set aside an environmental licence issued by the National Environmental Management Authority for the construction of a coal-fired power plant. The tribunal held that the ESIA process conducted by the proponents and the authority did not comply with legislative and other regulatory requirements in so far as the proposed mitigation measures for the power plant were not adequately subjected to public participation.[111]

Like the facts in *Earthlife*, the Kenyan Government had proposed to construct a power plant to boost industrialisation. The proposed location was close to a UNESCO world heritage site; exposing the local community to environmental and social impacts including air pollution, water shortage and health risks. The community applied to the

[108] Esmeralda Colombo, 'Enforcing International Climate Change Law in Domestic Courts: A New Trend of Cases for Boosting Principle 10 of the Rio Declaration?' (2017) 35 UCLA Journal of Environmental Law and Policy 98, 138.
[109] *Leghari No. 2* (n 94).
[110] *Save Lamu et al v National Environmental Management Authority and Amu Power Company Limited* (2019) eKLR (NET 196 of 2016).
[111] ibid paras 146-151.

tribunal to set aside the licence granted by the authority and asking the tribunal to order a new ESIA study which would involve greater public participation.[112]

The tribunal held that public consultation was fundamental to environmental permitting as required by law.[113] It described public participation as "the oxygen by which the EIA study and the report are given life" and suggested that absent public participation, "the EIA study process is a still-born and deprived of life".[114] In conducting its analysis, the tribunal formulated a test of effectiveness to determine compliance with the public participation requirement.[115] This test drew upon international and comparative law influences including Principle 10 of the Rio Declaration on Environment and Development and relevant jurisprudence on public participation in environmental proceedings.[116] The tribunal applied this test and held that, "the omission to consider the provisions of the Climate Change Act 2016" was a "significant" issue.[117] The tribunal went on to hold that if public participation was not in accordance with law, it did not pass constitutional muster.[118] The tribunal concluded its analysis on the importance of the ESIA report by stating that, "[b]y all accounts, it was an impressive piece of literal work but devoid of public consultation content, in the manner prescribed by the law."[119] Therefore, in setting aside the licence, the tribunal took a critical stance on the ESIA and its proposed mitigation measures as a "complete disregard of the people of Lamu and their views."[120]

The community-based approach in *Lamu* elevates its profile in climate litigation. It also spotlights community-oriented action as a litigation strategy. Admittedly, public interest environmental litigation tends to build around communities. Yet, *Lamu* reveals the possibility of synergies between community-informed advocacy and broader community-level organisation. The intersection of the two marks *Lamu*, revealing an intentional emphasis on civic engagement in and out of the courtroom.[121] In this sense, this case is described as a "litigation 'plus' approach" based on the power of community action in evidence gathering.[122] And so, *Lamu*'s success "lies not only in the positive judgment of the Tribunal but also the community-led movements and initiatives that together laid a firm foundation for exploring evidence based (climate) litigation."[123]

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[112] ibid paras 2-4.
[113] ibid para 21-22.
[114] ibid para 73.
[115] ibid para 26.
[116] ibid 23.
[117] ibid para 138.
[118] ibid 21.
[119] ibid para 73.
[120] ibid para 50.
[121] Thijs Etty and others, 'Broadening the Branches and Deepening the Roots of Transnational Environmental Law' (2021) 10 Transnational Environmental Law 1, 4.
[122] Eva Maria Anyango Okoth and Mark Odhiambo Odaga, 'Leveraging Existing Approaches and Tools to Secure Climate Justice in Africa' (2021) 15 Carbon & Climate Law Review 129, 130.
[123] ibid 136. Community-centered action is common in climate activism and not unique to the *Lamu* case.

The community dimensions of *Lamu* register its transjudicial significance by shifting discourse on public participation in an environmental permitting process from proceduralisation to substantive inclusion of transparency and public accountability.[124] In this sense, even though this case does not expressly refer to *Earthlife*, the striking similarities in the factual circumstances of both cases are hard to miss. Even more so when the tribunal cited South African jurisprudence in arriving at its conclusion.[125] Since the high profile *Earthlife* was decided in 2017, two years before *Lamu*, it would have been hard for the Kenyan tribunal to miss *Earthlife* based on these similarities and *Earthlife*'s discussion in the literature. As Hesselman suggests, *Earthlife* and *Lamu* represent the "possible promise of the principle of EIA in achieving oversight on the impacts of single large emissions sources, including the possible rejection or amendment of permits on such basis."[126] Moving forward, these cases are foundational to climate law transnationalism even if users of this pioneering jurisprudence are silent on the sources of inspiration.

4.4. Climate Constitutionalism

The last port of call in this preliminary review of areas where the leadership of Global South climate litigation risks being obscured is climate constitutionalism. Long before climate constitutionalism, environmental constitutionalism was actively incorporating the environment into constitutional analysis.[127] But, the advent of climate constitutionalism promises to be an interesting twist to transnationalism. It is already prominent in Latin America where it is based on the interplay of constitutional guarantees and related rights.[128] Here, we focus on Brazil as richly revealing of this emergent practice.[129]

In the first case, four opposition political parties instituted a suit at the Supreme Court challenging the federal government's failure to take steps to realise the objectives of the Amazon Fund.[130] This fund was established to combat deforestation and finance Brazil's Reduction of Emissions from Deforestation and Forest Degradation (REDD+) programme. The parties alleged the government failed to initiate any project under the programme since 2019, and also interfered in the fund's governance. The same parties launched a second case where they argued the government failed to operationalise the Climate Fund.[131] In advancing similar arguments in both cases, the applicants invoked

[124] ibid 134.
[125] *Lamu* (n 110) paras 25, 26, and 149.
[126] Marlies Hesselman, 'Domestic Climate Litigation's Turn to Human Rights and International Climate Law' in Malgosia Fitzmaurice and others (eds), *Research Handbook on International Environmental Law* (Second Edition, Edward Elgar Publishing 2021) 367-368.
[127] Joana Setzer and Delton Winter de Carvalho, 'Climate Litigation to Protect the Brazilian Amazon: Establishing a Constitutional Right to a Stable Climate' (2021) 30(2) RECEIL 197, 201. See *Gbemre v Shell Petroleum Development Company of Nigeria Limited and Others* AHRLR 151 (NgHC 2005).
[128] Setzer and Benjamin (n 73) 57.
[129] Setzer and Winter de Carvalho (n 127).
[130] *PSB et al v Brazil (on Amazon Fund)* (2020) ADO 59/DF Federal Supreme Tribunal.
[131] *PSB et al v Brazil (on Climate Fund)* (2020) ADPF 708 Federal Supreme Tribunal.

Article 225 of Brazil's Constitution on the right to a healthy and ecologically balanced environment to foreground their claims. By way of strategy, they argued Article 225 imposes a constitutional obligation on the government to take steps to address climate change.[132] The use of the constitution demonstrates the connection between climate constitutionalism to existing law, including statutory law and relevant policies.[133] This approach, however, is not altogether new as previous environment-related cases including the control of greenhouse gas emissions in Brazil engaged with the constitution and legislation.[134]

The *Amazon Fund* and *Climate Fund* cases have together enhanced constitution-based climate litigation.[135] The ways in which these two cases knit constitutional and statutory law together in a climate change context resonates with approaches taken in *Earthlife* and *Leghari*. The Brazilian cases invoked Article 225 and then connected that Article to the laws and policies on the Amazon Fund and Climate Fund. *Earthlife* joined *Act 107 of 1998* to both *Act 39 of 2004* and Article 24 of the South African Constitution. Similarly, *Leghari* found an environmental right as existing under Article 14 of the Pakistani Constitution and then joined it to climate-related laws. Accordingly, the common strategy in these cases involved adapting constitutional principles to navigate around the political question doctrine.

Brazilian jurisprudence on climate constitutionalism has since moved on. Recent cases have called for "the recognition of a fundamental right to a stable climate."[136] In the *IEA v. Brazil* case, the applicants instituted a class action demanding a right to a stable climate under the constitution and a resulting compliance with climate change laws.[137] While the *Amazon Fund* and *Climate Fund* cases and others like *Leghari* and *Urgenda* utilised existing laws as vehicles for constitutional analyses, *IEA v. Brazil* is novel as the applicants broke from this convention by seeking a distinct right under the constitution for a stable climate.[138] While *IEA v. Brazil* recognises the comparative value of foreign cases, its main point of departure is that a new legal norm – a right to a stable climate – is urgently needed and discrete from the piecemeal results obtained through enforcing existing constitutional provisions, legislation and related policies.

IEA v. Brazil is novel and may flourish in Latin America due to its near-homogeneous civil law tradition. The "constitutional commonalities" across the region and the work of

[132] Setzer and Winter de Carvalho (n 127) 199.
[133] Alessandra Lehmen, 'Advancing Strategic Climate Litigation in Brazil' (2021) 22 German Law Journal 1471, 1476.
[134] Geetanjali Ganguly, Joana Setzer and Veerle Heyvaert, 'If at First You Don't Succeed: Suing Corporations for Climate Change' (2018) 38 Oxford Journal of Legal Studies 841, 863.
[135] Lehmen (n 134) 1476.
[136] Setzer and Winter de Carvalho (n 127) 200.
[137] *Instituto de Estudos Amazônicos v Brazil* (2020) 11th Lower Federal Court of Curitiba (5048951-39.2020.4.04.7000) (*IEA v. Brazil*).
[138] Setzer and Winter de Carvalho (n 127) 203-204.

the Inter-American Court of Human Rights are helping with this South–South exchange of climate jurisprudence.[139] While *IEA v. Brazil* is ongoing like the *Amazon Fund* and *Climate Fund* cases, the reaction of other jurisdictions to novel uses of constitutionalism in the wake of this 'new' Brazilian example remains a place to watch.[140]

Even so, the ways in which *IEA v. Brazil* might influence foreign courts will be open to contestation particularly in Global North courts where some top emitting countries have no express environmental right, let alone a constitutional right to a stable climate.[141] An example emerges from the Federal Court of Australia which, in a 2022 case concerning the approval of a coalmine expansion, held that the Minister for the Environment bore no duty of care to Australia's present and future generations relative to climate change.[142] In allowing the Minister's appeal, the court in *Sharma* held that the "issues inevitably slide into political considerations", "are inappropriate for judicial resolution", and "for all the above reasons there is not a sufficient basis to be satisfied that a duty of care can sit coherently with the political and policy issues that arise."[143] This decision gives us a glimpse of the possible contestations to come in litigating a new norm founded on the right to a stable climate.

Whether through recognizing new norms or by repurposing old ones, courts face formidable challenges in ensuring that, in the long-term, climate litigation aligns with the aims of climate justice. This is an evolving concern. From the vantage point of legal standing to initiate climate change cases, rights-based approaches, especially a strategy tied to constitutionally-guaranteed rights to the environment, are often the stopping-place. Such rights-focused approaches are appealing to litigants for strategic reasons. Yet, while these approaches collectively operate as a convenient scheme for litigants, the goals of a rights-based approach might not always align with the multidimensional interests embedded in climate justice. For instance, Indigenous peoples are obliged to file claims as rights violations even if that process may be at variance with Indigenous cosmologies.[144]

A second concern with rights-based approaches is how rights claims collapse distinct interests into familiar legal forms to ensure the best chances of success in litigation. In

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[139] Juan Auz, 'Human Rights-Based Climate Litigation: A Latin American Cartography' (2022) 13 Journal of Human Rights and the Environment.
[140] Ademola Oluborode Jegede, 'Climate Change and Environmental Constitutionalism: A Reflection on Domestic Challenges and Possibilities' in Erin Daly and James R May (eds), *Implementing Environmental Constitutionalism* (1st edn, Cambridge University Press 2018) 92-93.
[141] See generally for a discussion on the Irish Supreme Court's refusal to find an environmental right as derivate of the constitution: Victoria Adelmant, Philip Alston and Matthew Blainey, 'Human Rights and Climate Change Litigation: One Step Forward, Two Steps Backwards in the Irish Supreme Court' (2021) 13 Journal of Human Rights Practice 1, 17-18.
[142] *Minister for the Environment v Sharma* (2022) FCAFC 35.
[143] ibid para 868.
[144] Brian J Preston, 'The Evolving Role of Environmental Rights in Climate Change Litigation' (2018) 2 Chinese Journal of Environmental Law 131, 155-160.

addressing the relationship between the Inter-American court and domestic courts in Latin America, for example, Juan Auz cautions of a danger where climate litigation relies on the right to a healthy environment as one of many rights invoked. When "the environment is not being considered from the voices that live with and in it" the adequacy of remedial measures and proper redistribution of environmental benefits can both be compromised.[145] Auz's observation may well account for why even though the Global South engages with climate change impacts on Indigenous ways of life, it is difficult to find cases where Indigenous cosmologies are taken seriously.

The courts will remain an important vehicle for recognising Indigenous law on its own terms. This is an area where climate litigation shares ideas and inspires based not just on commonality and transferability but because of the unique arguments raised by Indigenous litigants. To date, many examples across both South[146] and North[147] continue to be framed in rights language. The story is no different with climate interests before international tribunals.[148] However, not all Indigenous claims are best viewed through the prism of rights. New approaches and ontologies require a willingness to listen to Indigenous law. For example, Robert Clifford writes of how a WSÁNEĆ framework requires a greater attribution of "being" and "agency" to land, with an emphasis on repairing and maintaining relationships in an encompassing way. His work is attentive to the dispossession of Indigenous peoples through climate change and the opportunities to rethink traditional approaches to the legal concepts of "jurisdiction" and "remedy" based on WSÁNEĆ law.[149] This work reminds us of the dangers of framing climate cases for Indigenous communities as Eurocentrism erases Indigenous ways of knowing and seeing the world.[150]

5. CONCLUDING THOUGHTS: WHEN THE WHOLE IS MORE THAN THE PARTS

The broader picture of transjudicial communication through climate litigation is far greater than the parts we have been able to distill in this short chapter. Much remains to be said and studied about the exchange of climate law among nations through litigation. Indeed, there are many reasons why climate judgments will be marked and shaped by transnational legal engagements.

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[145] Juan Auz, '"So, This Is Permanence": The Inter-American Human Rights System as a Liminal Space for Climate Justice' (2021) 22 Melbourne Journal of International Law 1, 27.
[146] *Salas, Dino and others v Salta Province* (2009) (CSJN (Arg), S1144.XLIV; Preston (n 94) 155-156.
[147] *Pabai Pabai v Commonwealth of Australia* (2021) VID622/2021 (pending).
[148] *Petition of Torres Strait Islanders to the United Nations Human Rights Committee Alleging Violations Stemming from Australia's Inaction on Climate Change* (2019) United Nations Human Rights Committee.
[149] Robert YELḰÁTŦE Clifford, 'WSÁNEĆ Legal Theory and the Fuel Spill at SELEK-TEL- (Goldstream River)' (2016) 61 McGill Law Journal 755.
[150] Gordon Christie, *Canadian Law and Indigenous Self-Determination: A Naturalist Analysis* (University of Toronto Press 2019).

We have sought to be alert to parochial and colonially-informed patterns of citation and attempted to highlight examples of courts as effective listeners as well as contributors to global conversations. But we have undoubtedly incorporated unevenness and unintended biases in our own work. Navigating the terrain of the global is precarious work. It helps, perhaps, to reflect on why we bother to look beyond national borders. Looking to other jurisdictions is not just about finding solutions to common problems but motivated by a more profound desire to learn.

Scholars have drawn attention to the fact that climate cases from the Global South predominantly consider climate change issues as 'peripheral' issues rather than as the core ground of the litigation.[151] This is a critical observation. We ignore peripheries at our peril. And it may well be that it is within cases where climate change seems to be a peripheral issue that much of quiet, routine, but nonetheless transformational action in climate change litigation's future might lie.

[151] Peel and Lin (n 73) 703.