THE JUDICIALIZATION OF CLIMATE CHANGE: THE TECHNIQUE AND ITS PROLIFERATION

ISLAM ATTIA*

—"Nothing falls beyond the purview of judicial review"[1]
— "Interpretation is the only game in town"[2]

On 29 March 2023, the UN General Assembly (UNGA) requested an advisory opinion from the International Court of Justice (ICJ) on the legal consequences of climate change under several regimes including international human rights law. Due to the failure of political processes, climate change is currently subject to "judicialization" by domestic, regional, and international courts, majorly through "rights-based" litigation. Judicialization by way of evolutive interpretation of human rights is of high potential as it could be juris-generative and law-creating. While these climate proceedings are mostly examined in isolation, this paper seeks to encourage different types of lawyers (international/domestic, generalists/specialists, practitioners/theorists, etc.) to speak and complement each other through common analytical frameworks. Accordingly, this paper addresses this phenomenon from the lens of "judicialization," which captures the commonality of all these climate proceedings. The paper reveals how climate change is subject to judicialization, the technique used by courts, its proliferation, in addition to the challenges and limits of this process.

* PhD candidate in international law, Geneva Graduate Institute (IHEID). A draft of this paper was presented at the American Society of International Law (ASIL) International Courts and Tribunals Interest Group (ICTIG) Work-in-Progress Conference, on February 3, 2023. An advanced draft of the paper was presented at the NYU Journal of International Law and Politics (JILP)'s annual symposium on March 1, 2024. The author would like to thank the NYU editors for their helpful editorial support and assistance. The views expressed herein are those of the author alone and do not necessarily reflect the views of any institution the author may be affiliated to. All errors remain the author's. For any comments or questions, please contact the author at islamattia144@gmail.com.

1. Ran Hirschl, *The Judicialization of Mega-Politics and the Rise of Political Courts*, 11 ANN. REV. OF POL. SCI., 93, 95 (2008) (citing former President of the Israeli Supreme Court Aharon Barak).

2. STANLEY FISH, IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES 355 (1980).

I. Introduction

On 29 March 2023, the General Assembly of the United Nations (UNGA) requested an advisory opinion from the International Court of Justice (ICJ) on, *inter alia*, the obligations of states, under different international legal regimes, including international human rights law and the 2015 Paris Agreement, to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases (GHG) for states and for present and future generations.[3] Additional advisory opinions on climate change were requested from the International Tribunal of the Law of the Sea (ITLOS) and the Inter-American Court of Human Rights (IACtHR).[4] There are also climate cases brought before the

3. G.A. Res. 77/276, at 3 (Mar. 29, 2023).

4. *Inter-American Court of Human Rights Asked to Issue Advisory Opinion on States' Obligation to Respond to the Climate Emergency*, Herbert Smith Freehills,

European Court of Human Rights (ECtHR),[5] the UN Human Rights Committee (HRC),[6] and other international courts and tribunals.[7] Besides, there have been more than 1200 climate cases filed before domestic courts in the last ten years,[8] and several domestic courts (among which Dutch, German, and South African courts already rendered remarkable awards).[9]

This "judicial revolution" in the field of climate change is taking numerous forms. While these proceedings are mostly examined in isolation, this paper seeks to encourage different types of lawyers (international/domestic, generalists/specialists, practitioners/theorists, etc.) to converse and complement each other's analyses through common frameworks under which such unprecedented and complex phenomena can be addressed. Hence, this paper seeks to examine all these climate proceedings from a common analytical lens. It argues that all these climate proceedings reveal that climate change is subject to "judicialization" due to the core deficiency of the climate change regime and the ongoing failure of domestic and international political processes in containing the apocalyptic consequences of this existential crisis. Among constitutional law theorists, "judicialization" refers to the expansion of judicial

(Feb. 2, 2023), https://hsfnotes.com/latamlaw/2023/02/02/inter-american-court-of-human-rights-asked-to-issue-advisory-opinion-on-states-obligation-to-respond-to-the-climate-emergency/#page=1. ITLOS rendered its advisory opinion on 21 May 2024.

5. *See Climate Change Fact Sheet*, ECTHR Press Unit (Feb. 2023), https://www.echr.coe.int/Documents/FS_Climate_change_ENG.pdf (accessed Feb. 18, 2023) (summarizing climate change cases brought before the ECtHR); *see also* Verein KlimaSeniorinnen Schweiz and Others v. Switzerland, App. No. 53600/20 (April 4, 2024) [hereinafter *KlimaSeniorinnen Schweiz II*] https://hudoc.echr.coe.int/eng/#{%22itemid%22:[%22002-14304%22]}.

6. *E.g.*, Ioane Teitiota v. New Zealand, Views of the UN Human Rights Committee, UN Doc. CCPR/C/127/D/2728/2016 (Jan. 7, 2020); Daniel Billy et al. v. Australia, Views of the UN Human Rights Committee, UN Doc. CCPR/C/135/D/3624/2019 (Sep. 22, 2022).

7. *See* Joana Setzer and Catherine Higham, Global Trends in Climate Change Litigation: 2022 Snapshot 9 (2022) (listing 15 courts and tribunals that have heard climate change cases).

8. *Id.* at 1.

9. *Id.* at 9; Kumaravadivel Guruparan and Harriet Moynihan, *Climate Change and Human Rights-Based Strategic Litigation: The Recent "Rights Turn" in Climate Change Litigation is a Trend Set to Continue*, Chatham House (Nov. 11, 2021), https://www.chathamhouse.org/2021/11/climate-change-and-human-rights-based-strategic-litigation/different-types-rights-based.

decision-making into areas that used to be in the hands of political branches of power due to the failure of the latter.[10]

This paper focuses on the judicialization of climate change by way of the "rights-based" litigation through which litigants seek judicial intervention in states' climate (non)action based on human rights. Judicialization by way of an evolutive interpretation of human rights is of high potential. Given the generic and abstract nature of human rights, judges possess relatively wider discretion in their interpretation. Their decisions may go beyond mere interpretation *sensu stricto* and be jurisgenerative and law-creating. In this socio-legal process, courts participate in setting social policies and filling normative gaps by way of interpretation.[11] This kind of judicialization, as will be explained under parts III(B) and III(C) below, transforms the interpretation of a state-centric instrument like the Paris Agreement into a human-centric process that consolidates the shaky bindingness of several provisions in this Agreement and gears the interpretation of its deliberate ambiguities towards human protection. This conceptual framework of judicialization captures the proliferation of climate cases and helps in understanding this significant phenomenon.

The paper also reveals the limits of the judicialization of climate change, which helps in assessing its exact potential and hence best utilizing it with neither underestimation nor exaggeration. As judicialization is a form of judicial empowerment, the ability of each court to judicialize climate change differs according to the progressiveness and strength of its normative system. Accordingly, the robust constitutional system of domestic courts renders them more capable of judicializing climate change than the *quasi*-constitutional systems of human rights courts and the state-centric and fragmented system of the ICJ. Another limit is that judicialization of climate change is not happening in all countries. Moreover, judicialization is not the ultimate solution for climate change. It should be rather seen

10. *See* Hirschl, *supra* note 1, at 94 (defining judicialization as the "ever-accelerating reliance on courts and judicial means for addressing core moral predicaments, public policy questions, and political controversies).

11. *See* Andrea Bianchi, *The Game of Interpretation in International Law: The Players, the Cards, and Why the Game is Worth the Candle*, *in* 44 INTERPRETATION IN INT'L LAW 35, 38–9 (Andrea Bianchi, Daniel Peat & Matthew Windsor eds., 2015) (describing the predominant perception of the role of the European Convention on Human Rights as "an instrument to promote social policies by way of legal interpretation").

as a part of a wider socio-legal process in which courts influence policy, which in turn makes law.[12]

Accordingly, the paper first presents the concept of judicialization of politics and its many faces (Part II). Next, the paper turns to capture the reflections of that concept in the field of climate change (Part III). Finally, it examines the proliferation of the judicialization of climate change across domestic and international courts and identifies the challenges and limits of that process (Part IV).

II. Judicialization of Politics

Judicialization is a socio-legal concept that describes the growing involvement of courts in political questions. While there are studies on the existence of judicialization as a phenomenon,[13] its exact definition and contours are less clear and it may exist in different forms. Generally, courts do not judicialize *proprio motu*, but there is a complex set of factors that trigger a court to intervene in a political controversy. Accordingly, this section presents judicialization as a concept, its many faces, and its triggers.

A. *The Concept*

Judicialization refers, among constitutional law theorists, to the rising involvement of courts in highly political questions.[14] It finds its origin in constitutional law studies and is still underexplored in international law scholarship. Judicialization is a form of judicial empowerment that evolved after the installation of the principles of separation of powers and constitutional supremacy in connection with the power of judicial review over

12. *See* Harold Koh, *An Uncommon Lawyer*, 42 Harvard Int'l L. J. 7, 8 (2001) (noting that, like public law judges, public international lawyers are political actors who can "help shape policy decisions, which in turn shape legal instruments, which become internalized into bureaucratic decision-making processes.).

13. *See, e.g.*, Sandra Botero et al., *Working in New Political Spaces*, *in* The Limits of Judicialization: From Progress to Backlash in Latin America (Sandra Botero et al. eds., 2022); Jan Petrov, *(De-)Judicialization of Politics in the Era of Populism: Lessons from Central and Eastern Europe*, 26 Int'l J. of Hum. Rts. 1181 (2022).

14. Hirschl, *supra* note 1, at 94.

the activities of the legislature and executive.[15] The U.S. Supreme Court's intervention in electoral politics in *Bush v. Gore* is one famous manifestation of this concept.[16] The rise of "judicialization" as a concept can be traced back to 1995 with the release of the edited book *The Global Expansion of Judicial Power*.[17] While it was not the first time the term was used, this book was the first to discuss judicialization across a range of political systems and cultural traditions.[18] As Ran Hirschl argues, judicialization is a socio-legal process by which political choices are made by the judiciary, instead of elected politicians, and by way of judicial reasoning and interpretation, instead of public deliberation and policy-making process. Such intervention of judicial policymaking into areas that used to be in the hands of other branches of power may lead to the gradual erosion of what constitutional theorists call the "political question" doctrine.[19] Consequently, as Karen Alter, Emilie Hafner-Burton, and Laurence Helfer reveal, judicialization may diminish the role of executives and legislatures and has important implications for the study of international relations and world order.[20] Yesterday's policy questions that were in the hands of politicians may today be in the hands of judges. What was reserved for state

15. *See* generally C. Neal Tate & Torbjöen Vallinder, *Judicialization and the Future of Politics and Policy*, *in* The Global Expansion of Judicial Power 515, 515–528 (C. Neal Tate & Torbjöen Vallinder eds., 1995). For more on 'judicialization', see Ran Hirschl, Towards Juristocracy: The Origins and Consequences of the New Constitutionalism (2007); Martin Shapiro & Alec Stone Sweet, On Law, Politics, and Judicialization (2002); Torbjörn Vallinder, *The Judicialization of Politics: A World-Wide Phenomenon: Introduction*, Int'l Pol. Sci. R. 91–99 (1994); Mary L. Volcansek, Law Above Nations: Supranational Courts and the Legalization of Politics (1997); John Ferejohn, *Judicializing Politics, Politicizing Law*, 64 L. & Contemp. Prob. 41–68 (2002); Julio Rios-Figueroa & Matthew M. Taylor, *The Institutional Determinants of the Judicialization of Policy in Brazil and Mexico*, 38 J. of Latin Am. Stud. 739–766 (2006).

16. Bush v. Gore, 531 U.S. 98 (2000).

17. The Global Expansion of Judicial Power (C. Neal Tate & Torbjöen Vallinder eds., (1995).

18. Rebecca Hamlin & Gemma Sala, *The Judicialization of Politics Disentangled*, *in* Oxford Rsch. Encyclopedia of Pol. (2018), https://oxfordre.com/politics/display/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-746;jsessionid=B985BE98BB22B4B12F83F7A72DC6365E.

19. Hirschl, *supra* note 1, at 98.

20. Karen J. Alter et al., *Theorizing the Judicialization of International Relations*, 63 Int'l Stud. Q. 449, 450 (2019).

negotiations, may become in the domain of international adjudication. Thus, states are no longer the sole players.

A key question in the judicialization context is what constitutes a substantively political question. In its ruling on the constitutionality of U.S. missile testing in Canada, the Canadian Supreme Court asserted its power over policy questions based on individual protection. As per Justice Wilson:

> The government's decision to allow the testing of the U.S. cruise missile in Canada, even although an exercise of the royal prerogative, was reviewable by the courts under s. 32(1)(a) of the *Charter*. It was not insulated from review because it was a "political question" since the Court had a constitutional obligation under s. 24 of the *Charter* to decide whether any particular act of the executive violated or threatened to violate any right of the citizen.[21]

Arguably, in many cases, there is no clear boundary between the legal and the political. Hence, as Hirschl argues, "[b]ecause there is no simple answer to the question 'what is political?' (. . .) there can be no plain and simple definition of the judicialization of politics either."[22] It varies from polity to polity and from time to another.[23] A decision on issues of religion may be controversial in more secular states but not in states with an official state religion.[24] Cases regarding national identity may be more inflammatory in multinational states than in more homogeneous ones.[25]

Thus, there are no strict criteria applicable across polities and over time. For example, abortion was illegal in the U.S. until 1973 when the U.S. Supreme Court decided in *Roe v. Wade* that abortion is protected as a fundamental right by the right to privacy implied in the 14th Amendment.[26] Then, after 49 years, the same court decided in the 2022 *Dobbs v. Jackson* case to overturn *Roe v. Wade* holding that abortion neither falls within the enumerated rights protected by the U.S. Constitution, nor is "deeply rooted in the Nation's history and tradition," nor "implicit in the

21. Operation Dismantle v. The Queen, 1 S.C.R. 441, 443 (1985).
22. Hirschl, *supra* note 1, at 99.
23. *Id.*
24. *Id.*
25. *See Id.* (comparing the polities of different states and what might be a controversial political issue in each).
26. Roe v. Wade, 410 U.S. 113, 152 (1973).

concept of ordered liberty."[27] The Supreme Court was dealing with a politically controversial question not addressed in the Constitution. And it was the Court, rather than political organs, that defined the Nation's history and tradition. Then, as the political climate changed over time, so did the Court's position on the same question. Consequently, while judicialization can participate in the evolution of a society, by the same token it can be vulnerable to political influences and may assist in social regression. The U.S. Supreme Court judgments on political controversies over marriage and health care are additional examples.[28]

Judicialization of political controversies is not limited to the U.S., but it exists worldwide. As Hirschl outlines in his work, this includes judicial determination of the political future of prominent leaders like in the cases of Pakistan's former Prime Minister Benazir Bhutto, Colombia's President Alvaro Uribe, Uganda's President Yoweri Museveni, and Russia's President Boris Yeltsin.[29] Other cases involved approval or disqualification of political parties and candidates,[30] intervening in core executive prerogatives,[31] and deciding on transitional justice.[32] Famous examples on the latter include the South African Constitutional Court's permission for the establishment of the quasi-judicial Truth and Reconciliation Commission,[33] and Argentina's Supreme Court upholding in 1987 of the amnesty laws aimed at shielding perpetrators of serious human rights

27. Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 260 (2022).

28. *See* Obergefell v. Hodges, 576 U. S. 644, 644 (2015) (holding that same-sex couples have a fundamental right to marry under the 14th Amendment); National Federation of Independent Business v. Sebelius, 567 U.S. 519, 572–580 (2012) (limiting the ability of Congress to expand Medicaid and permitting Congress to implement an individual healthcare mandate).

29. Hirschl, *supra* note 1, at 100.

30. *See id.* (noting that, for example, in Algeria, Bangladesh, Belgium, India, Israel, Spain, Thailand, and Turkey, courts have banned political parties from participating in national elections).

31. This includes increased judicial scrutiny of core executive prerogatives in fiscal policy, foreign affairs, and national security. *Id.* For example, in 2004, the UK Law Lords declared unconstitutional Britain's post-9/11 state-of-emergency legislation. A and Others v. Secretary of State for the Home Department [2004] UKHL 56.

32. Hirschl, *supra* note 1, at 102-103.

33. AZAPO v. President of the Republic of South Africa, 1996 (8) BCLR 1015 at 16 (S.Afr.).

violations committed during the military junta era, then declaring these laws unconstitutional in 2005.[34]

Other cases include judicial intervention in shaping the political definition of the nation by deciding questions of bilingualism and the political future of particular units of the state. A key example in that regard is the Canadian Supreme Court's ruling on the status of Quebec.[35] Also, in many cases, judges decide on the relationship between religion and the state. This includes decisions on the wearing of religious attire in the public education system,[36] the status of religious political parties,[37] the impact of religion on constitutional interpretation,[38] and questions of national identity.[39] While these cases may have legal dimensions, such cases reflect highly political questions that have been judicialized. From this lens, this paper addresses the extent and potential of judicial intervention in reviewing states' policy plans in fighting the most existential crisis of our time which is climate change. As the previous examples reveal, judicialization may have different faces and occur in different forms and techniques.

B. *Its Faces*

Judicialization may have different faces.[40] It is used sometimes to refer to different judicial activities with potentially

34. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 14/6/2005, "Julio Simón et al. v. Public Prosecutor," 17.768, S. 1767. XXXVIII (Arg.); *See* Hirschl, *supra* note 1, at 102-103 (similar cases in the Czech Republic and El Salvador).

35. Quebec Secession Reference, [1998] 2 S.C.R. 217 (Can.).

36. *See* the Headscarf Decision, [BVerfGE][Federal Constitutional Court] 2 BvR 1436/02, Sep. 24, 2003; R v. Headteacher and Governors of Denbigh High School [2006] UKHL 15.

37. *See* Refah Partisi (the Welfare Party) and Others v. Turkey, No. 41340/98 (Feb. 13, 2003) (dissolving two major Islamic parties); Lin Noueihed, *Egypt Court Dissolves Muslim Brotherhood's Political Wing*, Reuters, (Aug. 10, 2014), https://www.reuters.com/article/us-egypt-brotherhood-idUSKBN0G90AM20140810 (Egyptian courts dissolved the Muslim Brotherhood affiliated party).

38. Clark B. Lombardi, *Islamic Law as a Source of Constitutional Law in Egypt: The Constitutionalization of the Sharia in a Modern Arab State*, 81 Colum. J. Transnat'l. L. 81, 84–5 (1998).

39. *See* HCJ 7052/03 Adalah v. Minister of Interior, HCJ 2 TakEl 1754 (2006) (an example from Israel upholding a law limiting the powers of certain state actors to grant legal status to Palestinians from the West Bank and Gaza).

40. Tate & Valinder, *supra* note 15, at 517.

overlapping spheres, like judicial review, judicial activism, rise in judicial cases, adoption of quasi-judicial procedures in non-judicial contexts, etc.[41] Besides, judicialization may have different versions and techniques. Hence, assessing such a concept depends on the consideration of a complex set of factors including its subject matter, version, extent, and reasoning. For instance, when adopted excessively with poor legal reasoning, judicialization may easily evolve into a "juristocracy."[42] This indeed may have serious drawbacks as deeply divisive political questions can hardly be decided exclusively by courts in isolation from the *demos*. Highly political questions cannot be decided simply by judicial reasoning by unelected judges who may lack full comprehension of all the political, economic, and technical dimensions of such divisive controversies. Besides, an expansive judicial intervention that seeks to entirely substitute executive and political bodies (instead of supporting them) may be overturned by the latter and trigger a political backlash.[43]

In contrast, this paper focuses on a unique face of judicialization; the one that is the judicial face of constitutionalism, by which courts fill gaps and set social policies by way of evolutive interpretation of human rights. As will be elaborated in Sections III and IV below, this "right-based" judicialization is the most trending and promising technique in the field of climate change, as evidenced by the proliferation of climate cases mentioned in the introduction of this paper. Generally, the introduction of a bill of rights in the constitutional context is often perceived as a major shift in judicial power.[44] Constitutions contain a set of certain and knowable rights and judicial review is supposed to defend those rights from infringement by the political process (i.e. majority, negotiations, etc.). As Justice Robert H. Jackson of the U.S. Supreme Court mentions:

> The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.[45]

41. Hamlin & Sala, *supra* note 18.

42. Leslie Friedman Goldstein, *From Democracy to Juristocracy*, 38 L. & SOC'Y. REV. 611 (2004).

43. Botero, *supra* note 14, at 5–6; Petrov, *supra* note 13, at 9.

44. Hamlin & Sala *supra* note 18.

45. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

Thus, judicialization is possible when constitutional rights are vague and courts are their final interpreter.[46] Human rights are blanket principles and normally their ambiguity widens the courts' decisional leeway.[47] As the ECtHR recently mentioned, "where complaints raised before the Court relate to State policy with respect to an issue affecting the Convention rights of an individual or group of individuals, this subject matter is no longer merely an issue of politics or policy but also a matter of law."[48] Hence, in this event, and as Ronald Dworkin reveals, the judge is portrayed not as exercising policy discretion, but simply as enforcing pre-existing legal rights.[49] Nevertheless, that does not change the fact that evolutive interpretation of human rights can be juris-generative and law-creating. As a result, reliance on courts and judicial means for addressing core moral predicaments, public policy questions, and political controversies by way of evolutive interpretation of individual rights is arguably one of the most significant phenomena of late 20th and early 21st-century government.[50] While in many countries there is a "political question" doctrine – questions reserved to the political domain, that doctrine may get stretched or diminished based on the political environment and other factors (see part II(C) below). That led a former president of one supreme court to go to the extent of mentioning that today "nothing falls beyond the purview of judicial review; the world is filled with law; anything and everything is justiciable."[51]

By the evolutive interpretation of human rights (e.g. right to life, privacy, family, security, environment, employment, etc.), judges set social policies. Hence, judicialization of a moral or political controversy is not typical of traditional "interpretation" though it usually occurs through (or under

46. Hamlin & Sala, *supra* note 18.

47. *Id.*

48. *Verein KlimaSeniorinnen Schweiz II*, App. No. 53600/20, at ¶ 450.

49. Martin Shapiro, *Juridicalization of Politics in the United States*, 15(2) Int'l. Pol'T. Science Rev. 101–12, 110 (1994) (citing R. Dworkin, Taking Rights Seriously (1977)).

50. *See* Charles Epp, The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective 30–31 (1998) (explaining that the Supreme Court's ruling that the Bill of Rights applied only to the federal government was reaffirmed in the 19th and early 20th centuries and that increased judicial attention to individual rights began long after the 14th Amendment was passed).

51. Hirschl, *supra* note 15, at 169.

the guise of) interpretation. Also, judicialization differs from mere judicial review, as the former occurs after judicial review has already been established. Meanwhile, judicialization is not merely judicial activism as the former is more jurisdictional than behavioral.[52]

Unlike other excessive and poorly reasoned modes of judicialization, "rights-based" judicialization can be an efficient and successful mode when used within reasonable limits and regarding imminent and existential problems like climate change as will be presented in Section III.B. Its unique human rights foundation gives judicial decision-making considerable weight and persuasion.[53] It gives judicial intervention a popular face that is widely encouraged by society and hardly resisted by politicians. When used reasonably without seeking to take over the role of political institutions, this mode of judicialization can be *demos*-enhancing rather than *demos*-substituting.[54] Importantly, this judicialization technique can set normative baselines that exclude untenable positions and narrow down the political controversy as will be shown in the field of climate change in Section IV.D below.

C. *Its Triggers*

Judicialization of political controversies assumes judicial empowerment. This renders judicialization not an easy task for a court as it goes beyond the traditional adjudicatory function *senso stricto* and may cause an institutional clash. So, courts would not be generally inclined to judicialize *proporio motu* (on their own initiative). Rather, there is a complex set of factors and conditions that encourage courts to engage in highly political controversies as follows.

---

52. Hamlin & Sala, *supra* note 18.

53. *See* David S. Law, *Constitutions*, *in* The Oxford Handbook of Empirical Legal Research 384, 385 (P. Cane & H. Kritzer eds., 2011) (stating that judicialization and constitutionalization form a virtuous circle in that by enforcing constitutions, judges acquire power and by exercising their power, judges give effect to constitutions).

54. Bjoern Dressel & Marcus Meitzner, *A Tale of Two Courts: The Judicialization of Electoral Politics in Asia*, 25 Governance 391, 392–93 (2012) (showing that the Indonesian court is praised for professionalism and independence while the Thai court is accused of biased and politicized decisions because the Thai court repeatedly intervenes to curb political participation by nontraditional constituencies).

Political failure. Divided political institutions generally lead to busier courts. Political fragmentation releases courts from political pressures, leading people seeking dispute resolution to gravitate towards decisive courts over paralyzed political institutions.[55] This becomes more likely when there is a widely perceived failure or corruption of political institutions and bargaining. C. Neal Tate and Torbjorn Vallinder claim that the distrust of ministers and members of parliaments is now more marked than the distrust of judges in many countries.[56] Studies reveal that courts in most constitutional democracies are enjoying greater public legitimacy and support than political institutions.[57] Besides, as Duncan Kennedy once mentioned, fractions tend to litigate issues they cannot successfully achieve through the ordinary political process.[58] Consequently, the failure of domestic and international political processes to fight climate change has triggered its judicialization.

Public support. Successful judicialization would not originate from above but would arise from below. Constitutional courts are more likely to judicialize when there is wide public support for judicial intervention by social movements, interest groups, political activists, etc. This is supported by the proliferation of interest groups that generate rights-based litigation along with philanthropic donors and activist lawyers who support it.[59] The legal profession itself is one major advocate of judicial empowerment.[60] The present rise of rights-based cases related to climate change reveals the deficiency of political institutions and the rise of public support for judicial intervention.

Constitutional system. One key factor that enables judicialization is the rise of (quasi)constitutional legal systems globally as a result of the global civil and human rights movement. The latter resulted with the installation of bills of rights on the domestic level and human rights instruments and courts on regional and global levels. In such (quasi)constitutional systems, human rights are privileged to rest at the top of the normative hierarchy

---

55. Ferejohn, *supra* note 15, at 57, 60.

56. C. Neal Tate & Torbjöen Vallinder, *The Global Expansion of Judicial Power: The Judicialization of Politics*, *in* The Global Expansion of Judicial Power 1, 3 (C. Neal Tate & Torbjöen Vallinder eds., 1995).

57. Hirschl, *supra* note 1, at 107.

58. Duncan Kennedy, A Critique of Adjudication (Fin de Siecle) 226 (1997).

59. Epp, *supra* note 50, at 20-21.

60. Hirschl, *supra* note 15, at 48.

in relation to other norms and regimes. As will be elaborated further under parts IV(A) and (B), these (quasi)constitutional systems provide hierarchical relationships among legal regimes and courts. They ensure the supremacy of constitutional and human rights over other regimes, and of constitutional and human rights courts over other courts. Meanwhile by virtue of their generality and abstraction, human rights can be interpreted to relate to any political controversy, with the consequence of becoming the Trojan horse that carries judicial intervention into the realm of mega-politics. As will be elaborated further under Part IV, this institutional factor renders domestic courts more capable of judicializing than regional human rights courts (i.e. ECtHR, IACtHR) and international courts (i.e. ICJ), given the different legal systems in which these courts operate.

Interpretive technique. A constitutional legal system in which human rights rest at the top of the normative hierarchy is not enough reason for a court to judicialize. A court should be acquainted with creative interpretative techniques by which judicialization can be persuasive and efficient. Hence, lawyers have a critical role to play. As Myres McDougal put it, lawyers are "skilled expert[s] in the use of authoritative language and authoritative procedures for affecting or influencing decisions."[61] They possess the power to persuade and their legal arguments matter in the shaping of decisions.[62] Hence, lawyers would need to engage in the game of interpretation which is, according to Stanley Fish, "the only game in town."[63] Lawyers may employ interpretation rules in creative ways to achieve their objectives. As Andrea Bianchi says, interpretation of rules can always be "twisted and bent, turned upside down, and… prioritized to one's liking."[64] So, counsels may put before their judges interpretative elements that allow the court to judicialize without frustrating the court's clientele. As will be elaborated in Section III.C, a rising interpretive strategy in the field of climate change is one that seeks a general *humanization* of the interpretation process coupled with the *integration* of the norms of the

61. Myres S. McDougal, Law as a Process of Decision: A Policy-Oriented Approach to Legal Study, NAT. L. F. 53, 53 (1956).

62. *See* Koh, *supra* note 12, at 9 (noting that "[e]verywhere [lawyer Abe Chayes] went, he influenced and persuaded").

63. FISH, *supra* note 2.

64. *See* Andrea Bianchi, *supra* note 11 (describing interpretation of the Vienna Convention on the Law of Treaties).

Paris Agreement in such a process. Such strategy could be pursued by specific interpretive elements (i.e. evolutive interpretation, systemic integration) as will be addressed in Section IV. After presenting the concept of judicialization, the next section shows how it applies to climate change.

III. Judicialization of Climate Change

The legal regime governing climate change is primitive and lacks enforcement mechanisms due to the deep political divisions and controversies underlying the field.[65] Against this political failure and based on wide public support, the judicialization of climate change is taking place with the goal of strengthening climate norms through judicial decisions. Accordingly, this part first highlights the incomplete attempt to legalize climate change, which eventually led to its judicialization. After, it shows how climate change is in the process of being judicialized by domestic, regional, and international courts. Then, it unpacks the rights-based judicialization technique employed by courts so far in that complex field.

A. *Legalization of Climate Change*

Climate change is a complex global problem with substantial political, economic, and scientific dimensions. Hence, an entire special regime has been designed for that field, which is now called the International Law of Climate Change. This relatively new field is now being taught through specialized courses at many universities. Key climate change instruments include the 1992 United Nations Framework Convention on Climate Change (UNFCCC),[66] the 1997 Kyoto Protocol,[67] and the 2015 Paris Agreement.[68] The latter does not replace but complements

65. *See generally* Ralph Bodle & Sebastian Oberthür, *Legal Form of the Paris Agreement and Nature of its Obligations*, *in* The Paris Agreement on Climate Change: Analysis and Commentary 91 (Daniel Klein et al. eds., 2017) (describing and analyzing the structure of the Paris Agreement).

66. United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107.

67. Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, 2303 U.N.T.S. 162.

68. United Nations Paris Agreement on Climate Change, Dec. 12, 2015, 3156 U.N.T.S. 79.

the UNFCCC. It refers to and incorporates existing elements of the climate regime through different legal techniques.[69] Unlike the unsuccessful Kyoto Protocol which adopted a "top-down" strategy by including quantified emission targets on states, the Paris Agreement is, at least partly, based on a globally agreed "bottom-up" strategy that defers to nationally-determined climate commitments as guided by few principles. Generally, the Agreement is state-centric and suffers from political sensitivity and legal ambiguities. Although some of the provisions of the Agreement show precision and prescriptiveness, they are combined with ambiguity and softeners in the details.[70] The Agreement uses a broad range of wordings and qualifiers which give parties flexibility or discretion regarding whether and how to implement its provisions.[71] The Agreement frequently uses ambiguous terms like "will", "are to", and "should."[72]

The Paris Agreement's overarching goal is to limit global warming to well below 2°C along with "pursuing efforts" to limit that warming to 1.5°C.[73] To reach this goal, the Agreement requires states to mitigate climate change according to the principle of "common but differentiated responsibilities."[74] Yet, due to its political sensitivity, the Agreement failed to provide further guidance on how to identify the "fair share" of each state in that regard.[75] Instead, the Agreement left that to be decided nationally through the state's nationally-determined contributions (NDCs).[76] Consequently, most states refuse to recognize any specific "individual" obligation on the basis that the Agreement does not impose more than a "joint" obligation on all states and leaves "individual shares" to be

69. Ralph Bodle & Sebastian Oberthür, *Legal Form of the Paris Agreement and Nature of Its Obligations, in* THE PARIS AGREEMENT ON CLIMATE CHANGE: ANALYSIS AND COMMENTARY 91 (D. Klein et. al. eds., 2017).

70. *Id.* at 102.

71. *Id.* at 103.

72. *Id.* at 98.

73. 2015 Paris Agreement Art. 2(1); Halldór Thorgeirsson, *Objective (Article 2.1), in* THE PARIS AGREEMENT ON CLIMATE CHANGE: ANALYSIS AND COMMENTARY 123 (D. Klein et. al. eds., 2017).

74. 2015 Paris Agreement Art. 2(2).

75. *See id.* at Art. 2(2) (referencing an omission from the text rather than the text itself).

76. *Id.* at Art. 3.

freely determined nationally through their NDCs.[77] Regretfully, the Agreement neither specifies the content nor quality of an NDC,[78] nor provides guidance on the consequences if a state fails to achieve its own NDC. The Agreement instead obscurely requires states' contributions to "reflect [their] highest possible ambition" and achieve "progression" in their NDCs,[79] without providing a mechanism to review an NDC for that purpose. That is why there are neither consequences nor incentives for states to deliver their commitments under the Agreement.

In conclusion, the Agreement essentially sets a sort of guiding standards coupled with a process through which states shall develop more specific measures for safeguarding "ambition" and making the legal and political narrative of the Agreement effective.[80] However, states' negotiations and political processes have so far failed in this task. Since the adoption of the Paris Agreement in 2015 and until now, states have failed to achieve, or even get close, to the aforementioned objectives.[81] Consequently, the judicialization of climate change is taking place, by which courts are asked to fill the critical gaps that the Paris Agreement missed and which political processes failed to achieve.

B. *Judicialization of Climate Change*

Given the global wave of frustration among the public, youth, activists, NGOs, and lawyers, numerous climate

77. *See, e.g.*, HR 20 December 2019, JBPr 2020, 20 m.nt. HW Wiersma (Urgenda Foundation/The State of the Netherlands (Ministry of Economic Affairs and Climate Policy)) (Neth.), ¶ 4.8 (stating the Dutch government's argument that it is not obliged to take individual measures).

78. Lavanya Rajamani, *Guiding Principles and General Obligation (Article 2.2 and Article 3), in* THE PARIS AGREEMENT ON CLIMATE CHANGE: ANALYSIS AND COMMENTARY 139 (D. Klein et. al. eds., 2017).

79. 2015 Paris Agreement, Article 4(3).

80. Bodle and Oberthür, *supra* note 65, at 103.

81. Press release, United Nations Climate Change, New Analysis of National Climate Plans: Insufficient Progress Made, COP28 Must Set Stage for Immediate Action, U.N. Press Release (Nov. 14, 2023) https://unfccc.int/news/new-analysis-of-national-climate-plans-insufficient-progress-made-cop28-must-set-stage-for-immediate?gad_source=1&gclid=CjwKCAjwmrqzBhAoEiwAXVpgohvPwNbaMkh6fh2xlgTwGab6Mazw1GnvgfBksGTyCd5aBtqPezR8bBoC6yQQAvD_BwE.

proceedings have been initiated before domestic, regional, and international courts. There is well-established jurisprudence that states have to respect, protect, and fulfill the human rights of individuals within their jurisdiction.[82] These arguments have been developed in the context of rights-based environmental litigation, which led to the judicialization of the field over the past 20 years.[83] Now, litigators seek to extend the same strategy to climate change by challenging the states' climate policies and NDCs *inter alia*. Litigants seek judicial intervention on questions including *identifying* the state's individual "fair share" and *assessing* the "ambition" and "progression" of its climate plan, including its fair participation in achieving the temperature goal of the Paris Agreement. Litigants are bringing these cases on numerous bases, the most trending of which is human rights, especially since the Agreement is the first climate treaty to explicitly recognize the relevance of human rights to climate change and that climate actions must comply with human rights obligations.

Reports indicate that over 1200 climate cases were filed just in the last ten years,[84] the majority of which are before domestic courts, signaling that a "judicial revolution" is underway in the field of climate change. As it is not feasible to examine all climate cases before domestic courts, this paper focuses on selected cases among those brought based on human protection and that were already decided by courts. The purpose is to stimulate more research and empirical studies on the topic. In relation to the role of domestic courts here, the South African High Court in the 2017 *Earth life* case read the human right to the environment along with the UNFCCC and Paris Agreement to find that South Africa had to consider climate change as part of the environmental impact assessment (EIA) required before deciding on the authorization of a coal-fired power plant.[85]

Additionally, the Dutch Supreme Court in its ground-breaking judgment in the 2019 *Urgenda* case found that reducing emissions with the highest possible level of ambition amounts to

82. *See* the Universal Declaration of Human Rights (UDHR), General Assembly Resolution 217 A, 10 December 1948 (establishing the fundamental rights states must protect).

83. Guruparan and Moynihan, *supra* note 9.

84. SETZER AND HIGHAM, *supra* note 7, at 1.

85. Earthlife Africa Johannesburg v. Minister of Environmental Affairs and Others 2017, 2 All SA 519 (GP) at 555 para. 91 (S. Afr.).

a "due diligence standard" for complying with human rights obligations, and hence the Court obliged the Netherlands to achieve an emission reduction of at least 25% in 2020.[86] Further, the German Constitutional Court in the 2021 *Neubauer* case relied on "fundamental rights" to strike down the national climate targets and the annual emission amounts until 2030,[87] which prompted the government to increase its 2030 emissions reduction target. While acknowledging that climate change mitigation is a global responsibility, both courts (the Dutch and the German) required each of the Netherlands and Germany to do "their parts" based on human protection.[88]

More importantly, domestic courts are extending the human rights obligation to fight climate change to corporates (which are the main producers of GHG). For example, the Hague District Court in the 2021 *Shell* case delivered a victory in favor of 17 NGOs and more than 17,000 individuals who sought a declaration that the annual carbon dioxide (CO_2) emissions of the global Shell group constituted an unlawful act against the claimants under the Dutch Civil Code when interpreted in light of ECHR Articles 2 (right to life) and 8 (right to a private and family life).[89] The Court, accordingly, ordered Shell to reduce its CO_2 emissions by a net rate of 45% at the end of 2030 through its group corporate policy. The court acknowledged that "[Shell] cannot solve this global problem on its own. However, this does not absolve [Shell] of its *individual* partial responsibility to do its part regarding the emissions of the Shell group, which it can control and influence."[90]

Regarding human rights courts, the ECtHR was seized, in 2020, of the *Agostinho v. Portugal and 32 Other States* case in which young Portuguese nationals were suing 33 member states alleging that the States failing to comply with their positive obligations to protect the nationals' right to life and right to private and family life, when read in conjunction with the

86. *Urgenda,* HR 20, at ¶ 7.4.1–8.3.5.

87. Federal Constitutional Court Press Release 31/2021, Constitutional Complaints against the Federal Climate Change Act Partially Successful (Apr. 29, 2021); BVerfG, 1 BvR 2656/18 (*Neubauer* case), Mar. 24, 2021, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2021/03/rs20210324_1bvr265618en.html.

88. *See Urgenda,* HR 20, at ¶¶ 5.6.1–5.8; *Neubauer,* 1 BvR 2656/18, at 3.

89. *Milieudefensie et al. vs Royal Dutch Shell PLC,* The Hague District Court C/09/571932, ¶¶ 4–5 (2021).

90. *Id.* at 4.4.49.

States' undertakings under the Paris Agreement.[91] Further, in the 2021 *Carême v. France,* the applicant submitted that France has not complied with the levels of GHG emissions reductions according to the Paris Agreement which entails a violation of the applicant's right to life and private and family life.[92] The Court, however, found the aforementioned two cases inadmissible. The Court was also seized in 2020 of *KlimaSeniorinnen v. Switzerland* in which a group of elderly people concerned about the impact of global warming on their health submitted that Switzerland has failed to fulfill its positive obligations to protect life and ensure respect for their private and family life.[93] They requested Switzerland "to take the necessary measures to meet the 2030 goal set by the 2015 Paris Agreement on climate change (COP21), in particular, to limit global warming to well below 2 degrees Celsius compared to pre-industrial levels."[94] In its judgment rendered on April 9, 2024, the ECtHR ruled for the first time that a state's failure to take actions to mitigate climate change breached, *inter alia*, Article 8 (right to respect for private and family life) of the Convention. The Court's decision was based on its finding that Switzerland had failed to adopt a domestic regulatory framework to quantify national GHG emissions and meet its own emission reduction targets.[95] The Court decided that a respondent state "should not evade its responsibility by pointing to the responsibility of other States, whether Contracting Parties to the Convention or not."[96]

The IACHR is also considering a petition filed in 2019 by organizations from multiple countries about the impact of climate change on indigenous peoples, claiming violations of their right to health, property, and culture.[97] The court is also currently hearing a petition filed by a group of Canadian

91. ECtHR Press Release, Climate Change Fact Sheet, (Feb. 2023), https://www.echr.coe.int/Documents/FS_Climate_change_ENG.pdf.

92. *Id.*

93. *Id.*

94. Verein KlimaSeniorinnen Schweiz and Others v. Switzerland, App. No. 53600/20 (Information Note on the Court's Case-Law), (2022), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22002-13649%22]}.

95. *Verein KlimaSeniorinnen Schweiz II*, App. No. 53600/20.

96. *Id.* at ¶442.

97. Hearing on Climate Change Before the Inter-American Commission on Human Rights, Climate Change Litigation Databases (2019), http://climatecasechart.com/non-us-case/hearing-on-climate-change-before-the-inter-american-commission-on-human-rights/.

indigenous people alleging a lack of action on the part of Canada to prevent the melting of Arctic glaciers, on the basis that it is affecting their health, property, way of life, and livelihood.[98] In addition, Chile and Colombia requested in 2023 an Advisory Opinion from the IACtHR on climate change and human rights with the purpose of "clarify[ing] the scope of the States' obligations … to respond to the climate emergency within the framework of international human rights law."[99] They argue "there is a close link between the climate emergency and the impact on human rights, which requires inter-American standards to accelerate the response to the climate emergency."[100] They claim that the advisory opinion will "guide both the requesting countries as well as the other countries in the region, regarding the development of policies and programs at the local, national and international level."[101]

The UN Human Rights Committee already decided on two climate claims. In *Teitiota v. New Zealand* (2020), in which the claimant challenged his deportation to Kiribati which is suffering from the rise of sea level, the HRC highlighted "the continuing responsibility of [New Zealand] to take into account in future deportation cases the situation at the time in [Kiribati] and new and updated data on the effects of climate change and rising sea-levels thereupon."[102] Then, in *Billy v. Australia* (2022), the HRC concluded that Australia is in breach of the ICCPR as the information indicates Australia's failure "to discharge its positive obligation to implement adequate *adaptation* measures to protect the authors' home, private life and family" and "to adopt timely adequate adaptation measures to protect the

98. Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations of the Rights of Arctic Athabaskan Peoples Resulting from Rapid Arctic Warming and Melting Caused by Emissions of Black Carbon, Climate Change Litigation Databases (2021), http://climatecasechart.com/non-us-case/petition-inter-american-commission-human-rights-seeking-relief-violations-rights-arctic-athabaskan-peoples-resulting-rapid-arctic-warming-melting-caused-emissions/.

99. Solicitud de Opinión Consultiva sobre Emergencia Climática y Derechos Humanos a la Corte Interamericana de Derechos Humanos de la República de Colombia y la República de Chile (Jan. 9, 2023), https://www.corteidh.or.cr/docs/opiniones/soc_1_2023_es.pdf.

100. *Id.*

101. *Id.*

102. *Teitiota, supra* note 6, at 9.14.

authors' collective ability to maintain their traditional way of life."[103]

The International Court of Justice is also seized of climate proceedings. On 29 March 2023, the UNGA requested an advisory opinion from the ICJ on climate change.[104] The resolution asks the Court what are the legal duties of states and the legal consequences of climate change under different international regimes including the UNFCCC, Paris Agreement, and human rights law.[105] All these proceedings before domestic, regional, and international courts suggest a rise in climate change litigation generally and through the "right-based" technique specifically. The aforementioned successful decisions—mostly by domestic courts and the UN HRC—already judicialized climate change by deciding on questions that previously failed to be settled in policy rooms. Importantly, these successful decisions already influenced governmental action in a manner that is *demos*-enhancing rather than *demos*-substituting.[106] The next question is how these courts judicialized climate change and what is the interpretive technique used for that purpose.

C. *Judicialization Technique*

This part unpacks how "rights-based" judicialization is and can be effective *vis-à-vis* a politically and scientifically complex problem like climate change. In brief, the essence behind the success of courts so far in judicializing climate change is the pursuance of an interpretive strategy that seeks to (first) *humanize* the interpretation process and (second) *integrate* the provisions of the Paris Agreement into this process as follows.

1. *Humanization*

The Paris Agreement suffers from deliberate ambiguities and is state-centric.[107] These features naturally lead any court

103. *Billy*, *supra* note 6, at 8.12–8.14.

104. G.A. Res. 77/276 (Mar. 29, 2023), at 3.

105. *Id.*

106. Dressel & Meitzner, *supra* note 54.

107. Ralph Bodle & Sebastian Oberthür, *Form of the Paris Agreement and Nature of Its Obligations*, *in* The Paris Agreement on Climate Change: Analysis and Commentary 91–103 (Daniel Klein et al. eds., 2017).

mandated with applying the Paris Agreement to be more inclined to interpret its deliberate ambiguities in favor of the state and its wide discretion in formulating its NDC. As one government recently revealed before the ECtHR, "if the Court considered that it should take some international instruments on climate change into account, all these instruments were the result of negotiations between sovereign States and provided for a collective objective and individual obligations, leaving various aspects of the matter to the *discretion of the States*. This was, in particular, the case for the UNFCCC and the Paris Agreement."[108]

That is why human rights are a necessary foundation for the effective judicialization of climate change. Human rights are broad enough to potentially cover *any* subject matter and carry a moral weight that can persuasively overcome policy considerations like those in climate negotiations. Human rights can alter the overarching interpretational approach of the Paris Agreement from a state-centric to a human-centric process. As Jeffrey Dunoff put it, the human rights "narrative" and "thinking" change our conceptualization of the climate regime by supplementing it with a set of internationally agreed values around which bold judicial responses can be triggered.[109]

When combatting climate change is *framed* as an inter-state question, the Paris Agreement (with its gaps and ambiguous provisions) becomes the primary legal basis under which state action will be assessed, and hence ambiguities will more likely be interpreted in favor of the state or the government. However, when combatting climate change is *framed* as a human rights question, human rights (with its more robust legal standards) become the primary legal basis under which state action will be judged. Consequently, human protection becomes the primary objective of the interpretation process.[110]

---

108. *Verein KlimaSeniorinnen Schweiz II*, App. No. 53600/20, at ¶ 353.

109. Jeffrey Dunoff, *A New Approach to Regime Interaction, in* Regime Interaction in Int'l L. 171–172 (Margaret A. Young ed., 2012).

110. *See generally* Margaretha Wewerinke-Singh, Climate Change and Human Rights Under International Law (2018) (offering comprehensive analysis of the legal issues related to for the accountability issue of human rights impact of climate change); César Rodríguez-Garavito, *Litigating the Climate Emergency: The Global Rise of Human Rights–Based Litigation for Climate Action*, in Litigating the Climate Emergency: How Human Rights, Courts, and Legal Mobilization can Bolster Climate Action (César Rodríguez-Garavito ed., 2022) (outlining the use of human rights norm in climate actions); Annalisa

As a result, so far, the reasoning of the South African High Court in the 2017 *Earth life vs Minister of Environmental Affairs* case was primarily founded on the human right to a clean environment;[111] the reasoning of the Dutch Supreme Court in *Urgenda* was primarily founded on ECHR Articles 2 (right to life) and 8 (right to respect for private and family life);[112] the reasoning of the German Constitutional Court *Neubauer* was primarily founded on "fundamental rights" under the German Constitution;[113] the reasoning of the ECtHR in *KlimaSeniorinnen v. Switzerland* was primarily based on ECHR Article 8 (right to respect for private and family life), and the reasoning of the UN HRC in *Teitiota* was primarily founded on ICCPR Article 6 (right to life),[114] and in *Billy* on ICCPR Articles 17 (right to private and family life) and 27 (collective right to maintain a traditional way of life) respectively.[115] As will be elaborated further in Part IV below, this indicates that courts that are *by default* mandated with human protection (i.e. constitutional and human rights courts and bodies) are more equipped and inclined to judicialize climate change than other courts. Besides, courts which operate in legal systems in which human rights rest at the *top* of the normative hierarchy *vis-à-vis* other norms and regimes (i.e. constitutional courts) are more able to judicialize climate change than other courts.

2. *Evolution*

Traditional interpretative techniques fail to bring a relatively new phenomenon like climate change within the ambit of human rights. In interpretation, *textualism* is premised on the supremacy of the text and *intentionalism* is guided by the intention of its drafters. Climate change, however, is a new phenomenon that neither appears in the text of human rights provisions nor was it within the intention of their drafters. Consequently, neither *textualism* nor *intentionalism* in interpreting human rights

---

Savaresi & Juan Auz, *Climate Change Litigation and Human Rights: Pushing the Boundaries*, CLIMATE L. (2019) (discussing the use of human right laws as a gap-filler to provide remedies when other laws cannot).

111. *Earthlife,* 2 All SA 519, at ¶ 70.

112. *Urgenda,* HR 20, at ¶ 8.3.4.

113. *Neubauer,* 1 BvR 2656/18, at 266.

114. *Teitiota, supra* note 6, at 10.

115. *Billy, supra* note 6, at 9.

can help bring climate change within the ambit of these rights. Hence, courts, in judicializing climate change, tend to interpret these rights in an "evolutive" or "dynamic" manner. As will be elaborated further in Section IV, "evolutive" or "dynamic" interpretation is an interpretational approach known both in constitutional and human rights interpretation by which the meaning of a norm is determined as it stands today and not as it was understood when it was created. That explains how domestic courts in the Netherlands, Germany, and South Africa, the ECtHR, and the HRC in the communications against New Zealand and Australia succeeded in bringing the relatively new climate risks within the purview of the aforementioned human rights norms. As will be elaborated further in Part IV below, "evolutive interpretation" is an interpretational technique most familiar before constitutional and human rights courts and bodies.

3. *Integration*

While the human rights regime is necessary as an overarching source of authority and gap-filling, climate change is a global and multi-thematic problem deciding upon which requires more than the mere application of abstract human rights provisions. The latter on their own fail to provide *specific* normative standards for combatting climate change and against which government compliance can be assessed. As a result, *integrating* the norms of the Paris Agreement in the application of human rights norms is a necessity.[116] While human rights serve to *strategically* transform the interpretational process from a state-centric to a human-centric one with a gap-filling potential, climate change instruments serve to provide the *specific* standard of protection which cannot be derived solely from *within* the abstract norms of human rights law. That is why, so far, the aforementioned successful climate awards by domestic courts, the ECtHR, and the HRC, besides relying on human rights as a foundational basis, relied on specific provisions of the UNFCC, Paris Agreement, in addition to findings in the IPCC reports. Otherwise, an abstract human right could not by itself guide towards a specific protection standard according to which a government's climate program can be assessed.

116. Wewerinke-Singh, *supra* note 110, at 33; Rodríguez-Garavito, *supra* note 110, at 33.

In other words, each of the human rights regime and climate change regime has its strengths and deficiencies. As a result, courts are inclined to make use of the strengths and avoid the deficiency of each. From one side, the human protection regime is relied on to transform the interpretation of the Paris Agreement from a state-centric into a human-centric process, benefit the Paris Agreement with its authority, effective interpretations, and enforcement mechanisms, and hence consolidate the shaky "bindingness" of its provisions.[117] That was a main concern expressed by many governments recently before the ECtHR, arguing that "the principles of the harmonious and evolutive interpretation of the Convention should not be used to interpret the Convention as a mechanism of international judicial enforcement in the field of climate change and to transform the rights enshrined in the Convention into rights to combat climate change." The Court, however, decided otherwise as will be elaborated below.[118]

On the other side, the norms of the Paris Agreement (in combination with the IPCC reports) are engaged to provide the specific protection standard.[119] Hence, in such a process, the human rights and climate change regimes are complementing each other with legitimacy and efficiency, resulting in a sort of a hybrid regime with a wider potential.[120] By relying on both regimes, courts can navigate the high waves of politics and science in the ocean of climate change. As will be elaborated further in Section IV, domestic courts are by default mandated to apply and integrate all norms relevant to climate change. Meanwhile, human rights courts and bodies, and other international courts (i.e. ICJ), may integrate norms by the interpretive technique of "systemic integration" provided in VCLT Article 31(3)(c).[121]

---

117. Wewerinke-Singh, *supra* note 110, at 33; Savaresi & Auz, *supra* note 110, at 244.

118. *Verein KlimaSeniorinnen Schweiz II*, App. No. 53600/20, at ¶ 453.

119. *See generally* Rodríguez-Garavito, *supra* note 110 (discussing the practice of domestic courts in applying the Paris Agreement and the IPCC reports in order to determine a state's 'fair share' of emission cuts).

120. *See* Martti Koskenniemi, *Hegemonic Regimes*, *in* Regime Interaction in Int'l L.: Facing Fragmentation 305, (Margaret A. Young, ed.) (discussing the concept of 'hybrid regimes').

121. Vienna Convention on the Law of Treaties (1969), art. 31(3)(c): "There shall be taken into account, together with the context … any relevant rules of international law applicable in the relations between the parties."

4. *Progression*

When the interpretation process is *humanized* and the standards of the Paris Agreement are *integrated* into this process, the result is that courts may not necessarily limit themselves to applying these standards as they are exactly written in the Paris Agreement, but they may also *interpret* or *strengthen* such standards especially when appears necessary for human protection. For instance, while the Paris Agreement does not *per se* impose more than a joint (and not individual) obligation on all states regarding the GHG reduction target, the Dutch Supreme Court in *Urgenda* boldly decided based on the ECHR that the government must do "its part" and thus ordered the Netherlands to achieve an emission reduction by at least 25% in 2020.[122] Similarly, the Hague District Court acknowledged in *Shell* that the company cannot be absolved "of its individual partial responsibility to do *its part* regarding the emissions of the Shell group" and hence ordered it to reduce its CO_2 emissions by a net rate of 45% at the end of 2030.[123] Also, the German Constitutional Court in *Neubauer* found that Germany "cannot evade its responsibility by pointing to greenhouse gas emissions in other states" but there is a "constitutional necessity to actually implement one's own climate action measures at the national level and not to create incentives for other states to undermine the required cooperation" and hence required Germany to increase its 2030 emissions reduction target.[124] Also, the ECtHR in *KlimaSeniorinnen Schweiz* decided that a state "should not evade its responsibility by pointing to the responsibility of other States, whether Contracting Parties to the Convention or not."[125] These conclusions were reached despite the fact that the Paris Agreement does not provide for such specific individual obligations. As a result, these courts are progressively developing the standards of the Paris Agreement by the power of their human protection mandates.

Also, while the Paris Agreement is silent on these questions, the HRC found in *Teitiota* that the state must take into account in *deportation* cases updated data on the effects of climate change

122. *Urgenda,* HR 20, at ¶¶ 5.2.1–8.3.5.
123. *Shell,* C/09/571932, at ¶¶ 4.4.49, 5.3.
124. *Neubauer,* 1 BvR 2656/18, at 203.
125. *Verein KlimaSeniorinnen Schweiz II,* App. No. 53600/20, at ¶¶ 442, 453.

and rising sea levels thereupon at the receiving country,[126] and in *Billy* required the state to adopt timely adequate *adaptation* measures to protect the *indigenous* people's collective ability to maintain their traditional way of life.[127] Therefore, while the Paris Agreement does not provide for such specific obligations, in this particular context of applying human rights to climate change, the standards of the Paris Agreement are being progressively developed. This interpretive strategy *subtly* leads to the judicialization of climate change and the progressive development of its regime.

Hence, this part showed the interpretive process by which domestic courts and, the ECtHR, the HRC have judicialized climate change. As there are still right-based climate proceedings pending before the ECtHR and IACtHR, and potentially before the ICJ, the next section examines whether these regional and international courts can also undertake the aforementioned interpretive process—i.e. *humanization* and *integration* of the Paris Agreements norms—and hence judicialize climate change and reveals the challenges and limits of that process.

IV. Climate Judicialization: its Proliferation, Challenges, and Limits

As Anne-Marie Slaughter says, courts are talking to one another all over the world.[128] They communicate and influence each other. Hence, climate judicialization is proliferating among domestic, regional, and international courts, albeit with different forms and degrees. Courts tend to cite other courts' decisions to reinforce their own.[129] The more domestic courts judicialize climate change, the more regional human rights courts will be inclined to do the same, and vice versa. This process generates a jurisprudential "impulse" that influences other climate change proceedings before domestic courts in Europe and Latin America and potentially other proceedings before UN treaty bodies. Additionally, the ICJ—by virtue of its prime position in the international legal system—can put in motion a

126. *Teitiota, supra* note 6, at 9.14.

127. *Billy, supra* note 6, at 8.14, 11.

128. Anne-Marie Slaughter, *A Typology of Transjudicial Communities*, 29 Univ. Rich. L. Rev. 99–134, 99 (1994).

129. *Id.*

global jurisprudential trend. As Marcelo Kohen observes, "c'est l'ambiguïté fréquente dans l'existence et le contenu des règles de droit combinée au fait que la première constatation par la Cour suffit à bien des égards à rendre une règle indiscutablement existante ou à considérer l'interprétation suivie comme ayant la valeur de «bonne» interprétation."[130]

Hence, the judicialization of climate change issues has real potential. Yet, it also has its challenges. There are deep structural features in each of the domestic, regional, and international systems that either promote or lessen the *ability* of a court to judicialize climate change and its *extent*. Accordingly, this part shows how domestic courts, regional human rights courts, and the ICJ possess different "abilities" to *humanize* and *integrate* the norms of the Paris Agreement and the different "degrees" of judicialization each can reach as influenced by its deep structural features. Besides, the judicialization of climate change has its limits. Right-based climate litigation is not happening in all countries. It is also more able to rise among democratic legal systems than others. Also, judicialization is not the ultimate solution for climate change. It is rather a part of a wider socio-legal process in which courts influence policy, which in turn makes law.[131] Accordingly, this part examines the proliferation of climate judicialization among different systems and the challenges and limits of that proliferation.

A. *Domestic Systems: Constitutionalism*

If there is a "judicial revolution" in climate change underway, such revolution is primarily coming from "below" (domestic courts). Over 1200 climate-related cases were filed just in the last ten years,[132] the majority of which are before domestic courts. Several domestic courts, including Dutch, German,

130. Marcelo G. Kohen, L'utilisation du précédent devant la CIJ: les immunités pénales des détenteurs de fonctions officielles à la lumière des affaires Yerodia et Djibouti c. France, in Le Precedent en Droit International 115 (2016), p. 261. English translation: "this is the frequent fact of ambiguity in the existence and content of the rules and the fact that the first observation by the Court is sufficient in many respects to make the rule indisputably existing or to consider the interpretation followed as having the value of 'good' interpretation."

131. Koh, *supra* note 12, at 8.

132. Setzer and Higham, *supra* note 7, at 1.

and South African courts, already rendered successful awards in rights-based climate cases. There are several reasons why this "judicial revolution" is primarily coming from below. Generally, domestic courts are more established and empowered than international courts. As Phillipe Sands says about international courts, "some are stronger, some are weaker, but they are all, in a sense, *delicate* and *fragile* creatures. *Any comparison with national courts would be misplaced, since these have often had centuries to mature.*"[133]

Judicialization of politics is a form of judicial empowerment. Hence, a key foundational basis that enables some constitutional courts to judicialize climate change is the robust constitutional legal structure in which they operate. Domestic legal systems provide hierarchical relationships among legal regimes and courts. They ensure the supremacy of constitutional rights and freedoms over other regimes, and of constitutional courts over lower courts. This particular hierarchical conception of law and procedures is the origin and habitat for the judicialization of political questions. For example, as Tate and Vallinder found, since the adoption of the Canadian Charter of Rights in 1982, the Canadian Supreme Court has become a key player in the policies of provincial and cultural autonomy and the future of the Canadian Confederation (e.g. *Quebec Secession Reference* 1998).[134]

This relative strength of domestic courts renders them more capable of *humanizing* and *integrating* the norms of the Paris Agreement and consequently *progressively developing* its standards. By default, domestic courts apply constitutional rights and are more used to invoking the "core values" of their constitutions to develop the law or fill its gaps and hence encroach upon the "political domain" when necessary. Besides, unlike international courts, supreme courts neither have normative nor jurisdictional limitations that hinder them from applying a group of norms that belong to different regimes (e.g. human rights and climate change regimes).

That is why the South African High Court in the 2017 *Earth life* case relied on the constitutional right to a clean environment in *combination* with the climate regime,[135] and progressively

133. Philippe Sands, Climate Change and the Rule of Law: Adjudicating the Future in International Law, 28 J. ENV'T L. 19, 23 (2016).

134. Tate & Vallinder, *supra* note 15, at 517.

135. *Earthlife,* 2 All SA 519, at ¶ 88.

developed the latter by finding that climate change has to be considered as part of an EIA before deciding on the authorization of a coal-fired power plant.[136] Also, the Dutch Supreme Court in the 2019 *Urgenda* case relied on the ECHR in *combination* with climate change instruments (UNFCCC, Paris Agreement, and IPCC reports),[137] and progressively *developed* the latter by finding that the Netherlands has to do "its part" and achieve an emission reduction by at least 25% in 2020.[138] Additionally, the German Constitutional Court in the 2021 *Neubauer* case relied on "fundamental rights" in *combination* with the climate change regime (Federal Climate Change Act, Paris Agreement, and IPCC reports),[139] and progressively *developed* the latter by finding that Germany has to do "its part" and striking down its climate targets and annual emission amounts until 2030.[140] Similarly, The Hague District Court in the 2021 *Shell* case relied on the (technically non-binding) UN Guiding Principles on Business and Human Rights in *combination* with the climate change regime, and progressively *developed* the latter by finding that Shell has to do "its part" and reduce its CO_2 emissions by a net rate of 45% at the end of 2030.[141]

Accordingly, given their constitutional systems, domestic courts possess more *ability* to judicialize compared to international courts. Yet, as mentioned in Section II.C, courts are not likely to judicialize *proprio motu*. Judicialization triggers must exist, such as counsels providing judges with the interpretive strategy and elements by which a court can persuasively judicialize. Otherwise, the options for judicializing decline before domestic courts. For example, in *Heathrow Airport Ltd,* the applicant argued that the development of a third runway at Heathrow Airport is unlawful as it does not take into account the UK's climate change commitments under the Paris Agreement.[142] However, the UK Supreme Court ultimately did not find a violation of the Paris Agreement.[143] In that case, the

136. *Id.* at 91.

137. *Urgenda*, HR 20, at ¶¶ 5.6.1-5.8, 6.1-7.3.6, 7.4.1-7.5.3.

138. *Id.* at 5.8, 7.5.1.

139. *Neubauer,* 1 BvR 265, at 7-11, 16, 159.

140. *Id.* at 203, 266.

141. *Shell*, C/09/571932, at ¶¶ 4.4.49, 5.3.

142. R (on the application of Friends of the Earth Ltd and others) (Respondents) v. Heathrow Airport Ltd (Appellant) UKSC (2020).

143. *Id.* at 165–67; *Supreme Court Overturns Block on Heathrow's Expansion*, White & Case (Jan. 25, 2021), https://www.whitecase.com/publications/

counsels did not opt for a rights-based strategy that *humanizes* the interpretation process. Instead, they based their arguments on climate change norms alone (state-centric strategy).[144] So, it is unsurprising that the court in such a situation proceeded to interpret ambiguities in climate provisions in favor of the state. Now, the applicants intend to take the case to the ECtHR, which is a step that attempts to fill the missing gaps in the Paris Agreement and strengthen its standards by way of evolutive interpretation of human rights. There are many other cases still pending before domestic courts either triggering climate norms only or in *integration* with human rights norms which generate higher chances.

Therefore, given the robust constitutional systems they draw on, domestic courts possess a relatively greater ability to judicialize climate change in comparison to international courts. The purpose is not to generalize the judgments rendered to all domestic courts, but rather to expose the structural features that render domestic courts possessing relatively more ability to judicialize climate change in comparison to international courts.

B. *Regional Systems: Quasi-Constitutionalism*

This "judicial revolution" may reach regional human rights courts like the ECtHR and IACtHR. Whether measured in terms of its caseload or influence on domestic and international legal systems, the work of the ECtHR has had a profound impact, leading some to hail the ECHR regime as the "most effective human rights regime in the world."[145] As a result, much of the hope for climate action hinges on the ECtHR and the IACtHR which have been seized of climate change cases.[146] The successful climate awards rendered by

---

alert/supreme-court-overturns-block-heathrows-expansion (last visited May 20, 2023).

144. *See* R (on the application of Friends of the Earth Ltd. and others) v. Heathrow Airport Ltd. [2020] UKSC 52, 76–77. On appeal from: R (on the application of Plan B Earth) v. Sec'y of State for Transp. [2020] EWCA (Civ) 214 (featuring arguments by counsel on targets set by Paris Agreement).

145. Daniel Peat, *The Tyranny of Choice and the Interpretation of Standards: Why the European Court of Human Rights Uses Consensus*, 53 N.Y.U. J. INT'L L. & POL. 381, 399 (2021).

146. *See supra* Section III.B.

the Dutch and German courts led many human rights and environmental law specialists to expect similar progressive outcomes from the ECtHR and IACtHR, especially considering the latter's recognition of the right to a healthy environment as a human right.[147] Due to its limited scope, this paper will put more emphasis on the ECtHR system, with some references to the IACtHR.

A key structural basis that strengthens the above hopes is the *quasi*-constitutional feature of these regional human rights courts which may impose challenges to the judicialization process as both the ECtHR and IACtHR, unlike domestic courts, operate on a *regional* stage that is situated between domestic legal systems (with their constitutional features) and the international legal system (with its fragmented feature). Meanwhile, the same *quasi*-constitutional feature of these courts provides them with few tools that could be used to judicialize a politically loaded question like climate change.

1. *Challenges to Judicialization in Quasi-Constitutionalism*

The ECtHR and IACtHR do not operate in an entirely constitutional manner like domestic courts. As one government argued recently before the ECtHR, "a '*judicialisation*' of the matter [of climate change] at the international level would only create tension from the perspective of the principle of subsidiarity and the separation of powers. In any event, the Court could not act as a *supreme court* for the environment, given, in particular, the evidentiary and scientific complexity of the matter."[148] Both the ECtHR and IACtHR are established by states through an international treaty.[149] In enforcing their decisions, both courts rely on the cooperation of their member states. The member states of the ECtHR may even correct their

147. The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity: Interpretation and Scope of Articles 4(1) and 5(1) in Relation to Articles 1(1) and 2 of the American Convention on Human Rights), Advisory Opinion OC-23/17, Inter-Am. Ct. H.R. (ser. A) No. 23, ¶ 1 (Nov. 15, 2017).

148. *Verein KlimaSeniorinnen Schweiz II*, App. No. 53600/20, at ¶ 338.

149. European Convention of Human Rights art. 19, Nov. 4, 1950, 213 U.N.T.S. 221; American Convention of Human Rights art. 33, 22 Nov. 1969, 1144 U.N.T.S. 123.

court by interpretative declarations. Consequently, two structural challenges in this *quasi*-constitutional system may potentially impact the Court's ability to *humanize* climate change and *integrate* the Paris Agreement norms and hence judicialize climate change, as follows.

Challenge I: Sensitivity towards Domestic Political Choices. To maintain its credibility, the ECtHR sometimes refrains from interfering with the "margin of appreciation" granted to state parties and from imposing its will in areas relating to complex state interests and policies.[150] This doctrine is of tremendous importance as the Convention's effectiveness is based on the states' cooperation in implementing the necessary changes in domestic law following a Court ruling.[151] Consequently, this concept may challenge the ability of the ECtHR to intervene in a major politically divisive problem like climate change.[152] However, this challenge is not decisive as the "margin of appreciation" is an elusive concept whose contours are difficult to precisely define.[153] The ECtHR has applied it with great flexibility and in an unpredictable manner.[154] Hence, the political climate and other triggers of judicialization may potentially influence the Court's approach towards the judicialization of climate change as elaborated in Section II.C.

Challenge II: Selectivity in Interacting with External Regimes. International law is composed of compartmentalized regimes. Under international law, the ECHR and Paris Agreement belong to *separate* regimes, unlike in domestic systems.[155] While generally, constitutional courts are empowered to settle disputes by applying any relevant rules under the constitution or any legislation, international courts generally have limitations regarding their subject matter jurisdiction and applicable laws. Article 32(1) ECHR states that the jurisdiction of the Court "shall extend to all matters concerning the interpretation and application of the Convention and the Protocols

150. Magdalena Forowicz, The Reception of International Law in the European Court of Human Rights 3–4 (2010).

151. *Id.* at 363.

152. *Id.* at 363–364.

153. *Id.* at 7.

154. *Id.* at 8.

155. *See* Bruno Simma and Dirk Pulkowski, *Of Planets and the Universe: Self-Contained Regimes in International Law*, 17 Eur. J. of Int'l L. 483, 484–5 (2006) (describing "self-contained regimes").

thereto."[156] Consequently, the ECtHR's reliance on external instrument like the Paris Agreement can be viewed by states as a nonmandated use of its jurisdiction.[157] As one government argued recently in relation to climate change, "[t]he Court does not have the authority to ensure compliance with international treaties or obligations other than the Convention."[158] Further, less than one-third of the ECtHR's judges have experience and/or training in international law, leading more than two-thirds of the ECtHR bench less predisposed to consider regimes or instruments other than the ECHR.[159] As a result, references to other regimes by the ECtHR have been "cherry-picked."[160] Consequently, this feature may weaken the judicialization of climate change, particularly when it comes to *integrating* the Paris Agreement norms in the interpretation process. But this weakness is not decisive as the political climate and other triggers of judicialization can influence the Court's approach in prompting references to other instruments like the Paris Agreement, especially when such reference is properly justified as will be shown below.[161] Now, after presenting the challenges, it is the time to reveal the keys that are available for the judicialization of climate change.

2. *Keys of Judicialization in Quasi-Constitutionalism*

The ECtHR is similar to constitutional courts in the sense that the ECHR is akin to "a constitutional instrument of European public order (*ordre public*)".[162] So, the ECtHR operates in a quasi-constitutional system where there is an hierarchy under development between regimes and courts, by which the ECHR and fundamental freedoms of the European communities are gradually operating as quasi-hierarchical to other regimes, and the ECtHR is operating as superior to domestic

156. European Convention of Human Rights art. 32(1), Nov. 4, 1950, 213 U.N.T.S. 221.

157. Forowicz, *supra* note 150, at 8.

158. *Verein KlimaSeniorinnen Schweiz II*, App. No. 53600/20, at ¶ 454.

159. *Id.* at 368–369.

160. *Id.* at 383.

161. *Id.* at 364.

162. Loizidou v. Turkey (Preliminary Objections), App. No. 15318/89, ¶ 75 (Mar. 23, 1995), https://seafarersrights.org/wp-content/uploads/2018/03/EUROPE_CASE_LOIZIDOU-V-TURKEY_1995_ENG.pdf.

and other courts. Accordingly, counsels may utilize such features and pursue the judicialization technique before the ECtHR as follows.

Humanization. The fact that the ECtHR is by *default* mandated to apply human rights makes it capable to *humanize* climate change. Fortunately, the Court has a strong path in interpreting the Convention's norms in an evolutive and dynamic manner. This latter interpretational technique is necessary to stretch the ECHR rights to encompass climate change. The ECtHR has repeatedly stressed that the Convention is a "living instrument" that must be interpreted "in the light of present-day conditions."[163] Hence, in several cases, the Court addressed issues that were not explicitly regulated by the ECHR and decided to fill gaps. The case law suggests that the Court adopts evolutive interpretation when (a) there is an objective value; (b) evolution is important only because and so far as it gets this value right; and (c) it is not necessary to establish a concrete consensus among the member states.[164] As these criteria arguably apply to climate change, evolutive interpretation can be employed to evolve the ECtHR rights to encompass this relatively new threat.

Integration. The ECtHR and human rights bodies rely on VCLT Article 31(3)(c) which provides that it shall be taken into account in the interpretation "any relevant rules of international law applicable in the relations between the parties."[165] This interpretational element opens the gate for integrating the Paris Agreement norms in the interpretation process. Systemic integration was sometimes limited to the application of the secondary rules of international law (i.e. law of treaties and state responsibility). Yet, systemic integration was also used to apply rules of other special regimes, which led some to argue that VCLT Article 31(3)(c) has been operating as a "master key" to access other special regimes in the house of international law.[166] Additionally, the ECtHR relies on external instruments

163. Matthews v. United Kingdom, App. No. 24833/94, ¶ 39 (Feb. 18, 1999), https://hudoc.echr.coe.int/tur#{%22itemid%22:[%22001-58910%22]}; George Letsas, A Theory of Interpretation of the European Convention on Human Rights 58-59 (2007).

164. *Id.* at 79.

165. Vienna Convention on the Law of Treaties (1969), Article 31(3)(c): "There shall be taken into account, together with the context … any relevant rules of international law applicable in the relations between the parties."

166. International Law Commission, Report of the Study Group on Fragmentation of International Law, Difficulties Arising from the Diversification

for the sake of evolutive interpretation, to identify the existence of commonly accepted standards.[167] This is especially the case when the instrument shows a "continuous evolution" in the law and there is a "common ground in modern societies" on this new evolution.[168] The almost universal membership of the Paris Agreement coupled with the scientific findings in the IPCC reports arguably meet such requirements.

It follows that ECtHR litigants may rely on the "evolutive interpretation" and "systemic integration" keys to *humanize* the interpretation of the Paris Agreement and *progressively* develop its provisions by the authority of human rights. These keys could be used to persuade the Court and its clientele to judicialize climate change. By using these keys, counsels would be seeking to achieve their objectives through interpretative techniques with which the court is familiar. This process may be less problematic before the IACtHR which, unlike the ECtHR, already recognized the right to a clean environment as a human right.[169] Therefore, with climate change cases, the quasi-constitutional system of the ECtHR would be critically tested in a way that may impact its entire future and global outlook. The Court may have to decide whether to judicialize climate change by employing its "evolutive interpretation" and "systemic integration" keys,

---

and Expansion of International Law, ¶ 420, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006).

167. *See* Marckx v. Belgium, App. No. 6833/74, ¶ 41 (Jun. 13, 1979), https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22marckx%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-57534%22]} (referring to the Brussels Convention on the Establishment of Maternal Affiliation of Natural Children and the European Convention on the Legal Status of Children Born out of Wedlock); FOROWICZ, *supra* note 150, at 355. On the employment of the 'common ground' doctrine in the context of climate change, see Rodríguez-Garavito, *supra* note 110, at 25-27.

168. Demir and Baykara v. Turkey, App. No. 34503/97, ¶ 86 (Nov. 12, 2008), https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-89558%22]}; Birgit Schlütter, *Aspects of Human Rights Interpretation by the UN Treaty Bodies, in* UN HUMAN RIGHTS TREATY BODIES: LAW AND LEGITIMACY 261, 299 (Helen Keller & Geir Ulfstein eds., 2012).

169. *See* The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity: Interpretation and Scope of Articles 4(1) and 5(1) in Relation to Articles 1(1) and 2 of the American Convention on Human Rights), Advisory Opinion OC-23/17, Inter-Am. Ct. H.R. (ser. A) No. 23, ¶ 56 (Nov. 15, 2017) (noting the existence of a right to a healthy environment under Article 11 of the Protocol of San Salvador).

or not and simply respect the "margin of appreciation" of states and not stretch the Court's limited jurisdiction over external instruments like the Paris Agreement. The Court would either affirm itself as a European constitutional court or a mere subsidiary international court in the field of human rights.

In *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland,* the Court chose the former. In its first judgment on climate change rendered on April 9, 2024, the Court, first, interpreted the Convention in an "evolutive" manner (*humanization*). It stressed that it "cannot ignore the pressing scientific evidence and the growing international consensus regarding the critical effects of climate change on the enjoyment of human rights" and that "the interpretation and application of the rights provided for under the Convention can and must be influenced both by factual issues and developments affecting the enjoyment of the rights in question."[170] Second, the Court "integrated" relevant provisions from climate change instruments while interpreting the Convention (*integration*). It explained that "it cannot ignore … the consensus flowing from the international-law mechanisms to which the member States voluntarily acceded and the related requirements and commitments which they undertook to respect … such as those under the Paris Agreement. The Court must bear these considerations in mind when conducting its assessment under the Convention."[171]

Through this interpretative process, the Court was able to decide that a respondent state "should not evade its responsibility by pointing to the responsibility of other States, whether Contracting Parties to the Convention or not."[172] Accordingly, the ECtHR, for the first time, ruled that Switzerland had breached, *inter alia*, Article 8 due to a "critical lacunae in the Swiss authorities' process of putting in place the relevant domestic regulatory framework, including a failure by them to quantify … emissions limitations" and to meet their own emission targets (*progression*).[173] Nevertheless, the ECtHR did not go to the extent of setting a particular emission reduction target like what the Dutch Supreme Court did in *Urgenda.*[174] That is

170. *Verein KlimaSeniorinnen Schweiz II*, App. No. 53600/20, at ¶¶ 455-456.
171. *Id.* at ¶ 456.
172. *Id.* at ¶ 442.
173. *Verein KlimaSeniorinnen Schweiz II*, App. No. 53600/20.
174. *Urgenda*, HR 20, at ¶¶ 5.8, 7.5.1.

because the ECtHR at the end operates in a *quasi*-constitutional system with its associated challenges mentioned above.

C. *The International System: State-Centrism*

On 29 March 2023, the UNGA requested an advisory opinion from the ICJ on climate change.[175] The resolution asks the Court what the legal duties of states and the legal consequences of climate change are under different international regimes including the UNFCCC, Paris Agreement, and international human rights law.[176] There are numerous climate proceedings before other international courts and tribunals. Given its limited scope, this paper focuses on the proceedings before the ICJ, given its prime position in the international legal system and that the Court has been explicitly requested to assess climate change under human rights law. As the UN principal judicial organ of the United Nations, these proceedings will be historical. Despite that the advisory opinions are not technically binding, they are highly influential and authoritative on the global level. However, unlike constitutional and human rights courts, the ICJ operates in a state-centric environment that presents challenges to the judicialization of climate change by way of evolutive interpretation of human rights.

1. *Challenges to Judicialization in State-Centrism*

Challenge I: State-Centrism. The ICJ is neither a global constitutional nor a human rights court. Instead, it is the guardian of "inter-state" general international law.[177] Hence, it shows a distinct respect for the sovereignty of its users.[178] As a result, unlike constitutional and human rights courts, the ICJ is more hesitant to impose social policies by way of interpretation, especially when Article 38 of its Statute provides that judicial decisions are only "subsidiary" means for the determination of international

175. G.A. Res. 77/276 (Mar. 29, 2023).

176. *Id.*

177. Bruno Simma, *Human Rights Before the International Court of Justice: Community Interest Coming to Life?*, in THE DEVELOPMENT OF INTERNATIONAL LAW BY THE ICJ 302, 323-324 (Christian J. Tams & James Sloan eds., 2013).

178. *Id.*

law.[179] As Bruno Simma observes, the policy-oriented development of the law by way of interpretation might go too far for the clientele of the ICJ and its mainstream circles.[180] So far, human rights were litigated before the ICJ in more traditional inter-state ways of pleadings,[181] and the ICJ dealt with human rights violations as matters of state responsibility which is "law by states for states."[182] The *Congo v. Uganda* case and the *Wall* opinion reveal that the Court is prepared to deal with human rights arguments, particularly when they are in line with traditional modes of international law reasoning.[183]

As a result, sometimes frictions arise between the ICJ and human rights bodies, like when the ICJ diverged from the CERD Committee in *Qatar v. UAE*.[184] The Court referred to its judgment in *Diallo* in which it affirmed that it is "in no way obliged, in the exercise of its judicial functions, to model its interpretation of the [ICCPR] on that of the [Human Rights] Committee."[185] This indicates that the ICJ may not necessarily follow the HRC's approach in *Teitiota* and *Billy*. Further, divisions may also be apparent between the ICJ and human rights judges. An apt illustration of this is Sir Gerald Fitzmaurice's judicial conduct as a judge of the ECtHR coming from the bench of the ICJ. Influenced by the ICJ's approach, Fitzmaurice had to produce a long series of dissenting opinions and eventually resign before the end of his term, after frequently failing to secure adherence to his view at the ECtHR.[186] As Bianchi reveals, this is quite telling of the sharp contrast that divided Fitzmaurice's approach to human rights from that of

179. U.N. Charter, Statute of the International Court of Justice, art. 38(1)(d) ("subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law").

180. Simma, *supra* note 177, at 302.

181. *Id.* at 321.

182. *Id.* at 319.

183. *Id.* at 322; Armed Activities on the Territory of the Congo (DRC v. Uganda), Judgment, 2005 I.C.J. Rep (December 19); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. (July 9).

184. Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Preliminary Objections, 2021 I.C.J. Rep. ¶ 101 (April 2019).

185. Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, 2010 I.C.J. Rep. at 664, ¶ 66 (November 30).

186. Bianchi, *supra* note 11, at 38–9.

his fellow judges at the ECtHR.[187] While the latter looked at the text of the ECHR as a "living instrument", Fitzmaurice saw the Convention as an international treaty to protect human rights, rather than an instrument to promote social policies by way of interpretation.[188]

Hence, in the advisory proceedings on climate change, the ICJ's application of human rights will depend on how it "frames" the relationship between climate change and human rights regimes. A human-centric framing would provide that fighting climate change *is* a human right and would consequently *subjugate* the climate change regime to the human rights one. In contrast, a state-centric framing would provide that the climate change regime is regulated by *lex specialis* instruments (i.e. Paris Agreement) and human rights are no more than an *element* that should be taken into account to the extent that it confirms (without modifying) what is already written in the Paris Agreement. So far, the ICJ's human rights practice suggests the latter state-centric framing.

Challenge II: Fragmentation. Different from domestic and human rights courts, the ICJ operates in a fragmented normative environment in which human rights and climate change are normatively and institutionally separate and independent regimes. As the ICTY once affirmed, "[i]n international law, every tribunal is a self-contained system. . ."[189] Thus, the human rights regime is not hierarchical to other (inter-state) regimes as in (quasi) constitutional systems. Consequently, unlike domestic and human rights courts, the ICJ does not apply human rights by default. Hence, this significant difference in the ICJ's legal environment reduces the Court's ability to fill gaps in the Paris Agreement and strengthen its standards through the evolutive interpretation of human rights. As a result, while the ICJ will indeed contribute to the clarification of the Paris Agreement's provisions by several interpretive techniques, the World Court is particularly less predisposed, compared to constitutional and human rights courts, to fill gaps in the Paris Agreement by way of evolutive interpretation of human rights. Hence, it would be a quantum leap if the World Court decided to *humanize* the

187. *Id.*

188. *Id.*

189. Prosecutor v Tadić, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 11 (Int'l. Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

interpretation of the Paris Agreement, interpret its deliberate ambiguities in favor of human protection, and ultimately filled the missing gaps in the primitive climate regime.

2. *Keys of Judicialization in a State-Centric Environment*

Despite the previously mentioned limitations, the magnitude and imminence of climate change may potentially push the ICJ to take advantage and develop its human rights approach particularly in this historical advisory opinion. As Georges Abi-Saab says, "la Cour doit se l'approprier (pour ne pas dire le conquérir) en démontrant aux autres organes, par ses positions et son action, qu'elle mérite leur reconnaissance comme primus inter pares, suivie non par obligation, mais par déférence, eu égard à son autorité intrinsèque et à la qualité de son raisonnement et de ses jugements."[190] This puts the ICJ under an immense pressure to not be seen as lagging behind in comparison to other international courts, especially when it concerns the most existential crisis of our time. Accordingly, counsels may utilize this and pursue the judicialization technique before the ICJ as follows.

Humanization. Previously, the ICJ conducted an evolution of the law (i.e. evolutive interpretation of the law),[191] albeit not in a human rights context. For example, the ICJ stated in *South West Africa* that "an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing *at the time* of the interpretation."[192] Also, in *Navigational Rights*, the Court mentioned that the intention of the parties may have been "to give the terms used [. . .] a meaning or

190. Marcelo Kohen, "'Considerations about What is Common': the I.C.J. and Specialised Bodies", in d'Argent P. & Combacau, J. (eds), Considérations sur ce qui est privé : essais sur les limites du droit international / Reflections on what remains private : essays on the limits of international law. Liber amicorum Joe Verhoeven, Bruylant, 2014, 473-85, 482. English translation: "The Court must appropriate it (not to say conquer it) by demonstrating to the other organs, through its positions and its action, that it deserves their recognition as primus inter pares, followed not by obligation, but by deference, having regard to its intrinsic authority and the quality of its reasoning and judgments".

191. Sondre Torp Helmersen, Evolutive Treaty Interpretation: Legality, Semantics and Distinctions, 6 Eur. J. of Legal Stud. 127, 132 (2013).

192. Legal Consequences for States of the Continued Presence of South Africa in Namibia (Southwest Africa) notwithstanding Security Council Resolution 276, Advisory Opinion, 1971 I.C.J. Rep. 16, at 31.

content capable of evolving' and that such an intention does not have to be explicit and 'may be presumed."[193] Hence, the potential advisory proceedings on climate change could be an opportunity for the Court to decide for the first time on the evolutive interpretation of human rights, for example by recognizing that the right to life or self-determination provide protection against climate threats, especially for small island States.

Integration. Previously, the ICJ conducted integration of the law (i.e. systemic integration or integrated interpretation), albeit not in a human rights context. VCLT Article 31(3)(c) provides that it shall be taken into account in the interpretation "any relevant rules of international law applicable in the relations between the parties." It provides that international obligations shall be interpreted by reference to their normative environment.[194] The contours of "systemic integration" are not exactly determined yet.[195] In applying provisions of the 1955 Treaty of Amity in *Oil Platforms,* the Court used "systemic integration" to import, interpret, and apply standards from the regime of use of force.[196] Thus, in the potential advisory proceedings on climate change, counsels may employ this key to *integrate* the Paris Agreement norms in defining the standards for protecting the right to life, the right of people to self-determination, and their right to not be deprived of their means of subsistence. The same key can also be used to interpret the Paris Agreement in harmony with environmental norms (e.g. no harm) and general principles of international law (e.g. due diligence, good faith, cooperation).

In conclusion, the state-centric and fragmented environment of the ICJ poses a challenge to its attempt to judicialize climate change through the "right-based" technique. Yet, this potential advisory opinion on climate change may be seized as a turning point in the Court's human rights jurisprudence. Counsels may use the "systemic integration" and "evolutive interpretation" keys to bring the human rights regime into

193. Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, 2006 I.C.J. Rep. 213, at 242.

194. Report on the Fragmentation of International Law, *supra* note 166, at 413.

195. Case concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia), separate opinion of Judge Weeramantry, 1997 I.C.J. Rep. 88, at 114.

196. Oil Platforms case (Iran v. United States of America), Merits, 2003 I.C.J. Rep. 161, ¶ 41.

interaction with the climate change regime for the first time before the ICJ. Indeed, it will be a unique moment at which inter-state international law and human rights will be mutually impacting upon one another. All international lawyers and beyond will be impatiently waiting to see whether the climate change regime will *mainstream* human rights, or whether the latter will rather *progressively* develop the climate change regime.

D. *Limits of Judicialization of Climate Change*

As shown, the judicialization of climate change is proliferating among domestic, regional, and international courts, albeit with different forms and to different degrees. The previous part of this paper exposed the deep structural features in each of the domestic, regional, and international systems that may promote or challenge the ability of a court to judicialize climate change and the extent of that judicialization.

Judicialization of climate change also has limits. First, right-based litigation is more able to rise among democratic systems than others. In addition, despite its proliferation, the right-based litigation of climate change is not happening in all countries but is lacking in many countries, especially in Africa, the Middle East, and Asia, including countries of significant contribution to global GHG emissions (e.g. United States, China, Russia, Iran, Saudi Arabia, etc.).[197] In addition, right-based litigation of climate change has been more addressing climate mitigation, while being almost dearth on climate adaptation which is the most pressing for the Global South.[198]

Second, judicialization is not the ultimate solution for climate change. It is rather a part of a wider socio-legal process in which courts influence policy, which in turn makes law.[199] The proliferation of such human-oriented jurisprudence on climate change promotes climate change negotiations. The jurisprudence of domestic and international courts should set normative baselines for the fight against climate change and hence narrow down the political controversy. Otherwise, excessive judicial intervention may risk evolving into a "juristocracy"

197. Rodríguez-Garavito, *supra* note 110, at 34; Setzer & Higham, *supra* note 7, at 10.

198. Rodríguez-Garavito, *supra* note 110, at 34–35.

199. Koh, *supra* note 12, at 8.

that fails to comprehend the specifics of climate policies and triggers political backlash.[200] In contrast, the goal of the ongoing judicialization of climate change is to *strengthen* the legal standards of the Paris Agreement to make it capable of achieving its agreed objectives. As the Dutch Supreme Court stressed in *Urgenda*, "[i]ndeed, this order does not amount to an order to take specific legislative measures but leaves the State *free* to choose the measures to be taken in order to achieve a 25% reduction in greenhouse gas emissions by 2020 […] After all, it remains for the State to determine what measures will be taken and what legislation will be enacted to achieve that reduction."[201] Also, as the ECtHR explained in *KlimaSeniorinnen Schweiz*:

> Judicial intervention, including by this Court, cannot replace or provide any substitute for the action which must be taken by the legislative and executive branches of government. However, democracy cannot be reduced to the will of the majority of the electorate and elected representatives, in disregard of the requirements of the rule of law. The remit of domestic courts and the Court is therefore complementary to those democratic processes.[202]

Accordingly, after judicialization, the climate dossier will ultimately go back to political processes to (re)formulate specific climate measures, albeit this time according to judicially strengthened standards and with less untenable political arguments. Then, in case of non-compliance, the question will go back to courtrooms and so on. So, in this process, climate change will be twirling between judicial and political venues.

In conclusion, it is significant to conceptualize the proliferation of right-based climate change litigation before different kinds of courts to assess the potential of this significant phenomenon. It is also equally important to be aware of its limits as it helps us in assessing its exact potential and hence best employing it with neither underestimation nor exaggeration in the fight for our planet and for the rights of our coming generations.

---

200. Botero, *supra* note 13, at 5–6; Petrov, *supra* note 13, at 9.
201. Urgenda, HR 20, at ¶ 8.2.7.
202. *Verein KlimaSeniorinnen Schweiz II*, App. No. 53600/20, at ¶ 412.

V. Conclusion

Climate litigation is proliferating before different types of domestic, regional, and international courts. This unprecedented and complex phenomenon has not yet been fully understood. While these proceedings are mostly examined in isolation, this paper seeks to encourage different types of lawyers (international/domestic, generalists/specialists, practitioners/theorists, etc.) to speak with and complement each other through common frameworks under which such complex phenomena could be addressed. The concept of "judicialization" captures the proliferation of right-based climate litigation and helps us understand this significant phenomenon and its domestic, regional, and international reflections.

Right-based judicialization is of high potential as it could be juris-generative and law-creating. In this socio-legal process, courts set social policies and fill normative gaps by way of interpretation. This kind of judicialization transforms the interpretation of a state-centric instrument like the Paris Agreement into a human-centric process that consolidates the shaky bindingness of several provisions in this Agreement and gears the interpretation of its deliberate ambiguities towards human protection. So far, right-based judicialization has proved to be an efficient and successful tool when it is *demos*-enhancing rather than *demos*-substituting.[203] Besides, its unique human rights foundation gives judicial decision-making considerable weight and persuasion.[204]

However, the judicialization of climate change also has its challenges and limits. There are deep structural features in each of the domestic, regional, and international systems that either promote or weaken the *ability* of the court to judicialize climate change and the *extent* of that judicialization. Besides, right-based litigation is not happening in all countries and is not the ultimate solution for climate change. It is rather a part of a wider socio-legal process in which courts influence policy, which in turn makes law.[205] Its goal is to set normative baselines to exclude untenable positions and narrow down the political controversy. Being aware of these challenges and limits helps us assess the exact potential of this phenomenon and best employ it for the benefit of our planet.

---

203. Dressel & Meitzner, *supra* note 54.
204. Law, *supra* note 53.
205. Koh, *supra* note 12, at 8.