

Litigating Climate Justice: The Right to Health and Vulnerable Populations in Latin America

By *Thalia Viveros-Uehara**

Abstract: As the climate crisis disproportionately imperils the health of populations living in poverty and social exclusion in Latin America, realizing the most vulnerable population's right to health as a crucial component for achieving climate justice becomes increasingly urgent. While the region's new constitutionalism has made progress toward protecting this right, a transformative approach is just beginning to take hold in the field of climate change law, as evidenced by the growing number of rights-based climate litigation cases. This paper employs systematic content analysis (SCA) to qualitatively examine the *corpus* of domestic rights-based climate change lawsuits filed across Latin American jurisdictions through mid-2022 and places a sharper focus on the adjudicated cases. The goal is to scrutinize the relationship between the use of the right to health and climate justice within this body of litigation. Particularly, the study delves into the interplay of the social and ecological factors that compound climate vulnerability. It achieves this by identifying and classifying data based on the motives of the litigants, the objectives of the litigants and courts and their arguments, and the legal bases of their respective complaints and judgments as they relate to the existing and emerging health concerns of vulnerable populations. The findings reveal a constellation of ways in which litigants and courts use the right to health in relation to the socio-ecological spectrum of health vulnerability. This paper proposes a typology of cases (climate justice gradient) to conceptualize this phenomenon as a first step in expanding the strategic and interpretative horizons of the current climate litigation toward a more comprehensive approach to climate justice.

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A. Introduction

Rights-based climate litigation is proliferating in Latin America. Since 2015, the number of these lawsuits has increased tenfold: from 8 to 81 in 2022.¹ As the human rights framework holds great influence over civil society actors and national courts in this region, it has been instrumental in “opening the door” to climate litigation.² Consequently, most human rights-based climate cases have been filed here, after Europe and North America.³ The affected individuals and groups are turning to courts and arguing on human rights grounds to hold governments accountable for failing to implement and enforce existing policies for climate mitigation and adaptation.⁴

The few academic works that have thus far studied climate litigation in the so-called “Global South,” where Latin America has been ascribed,⁵ shed light on how this region’s pressing socioeconomic challenges distinctively pervade and influence the outcome of climate-related lawsuits.⁶ This literature points to how, unlike the motivations behind lawsuits in the Global North jurisdictions, the poverty and disadvantages that increase the populations’ vulnerability to global warming project onto the motivations behind rights-based climate litigation in the Global South.⁷ By showing climate change as not only an ecological issue but also a broader problem of social justice that disproportionately affects

- 1 LSE Grantham Research Institute on Climate Change and the Environment, Litigation Cases, https://climate-laws.org/litigation_cases?region%5B%5D=Latin%20America%20%26%20Caribbean&case_started_from=2010&case_started_to=2022 (last accessed on 22 February 2023).
- 2 César Rodríguez-Garavito, Human Rights: The Global South’s Route to Climate Litigation, *American Journal of International Law* 114 (2020), p. 41.
- 3 Joana Setzer / Catherine Higham, *Global Trends in Climate Change Litigation: 2021 Snapshot*, London 2021, p. 32.
- 4 Jacqueline Peel / Jolene Lin, Transnational Climate Litigation: The Contribution of the Global South, *American Journal of International Law* 113 (2019), p. 685.
- 5 The North-South conceptualization has played a significant role in shaping international law. However, this geographical division has been criticized for promoting a colonial view of the world and failing to account for new forms of inequality. Despite such concerns, this paper uses the ‘Global North-South’ notion as a reference point for analyzing climate change litigation to build on existing scholarship in the field. For a comprehensive historical recount of the North-South concept within international law, see M. Rafiqul Islam, *History of the North–South Divide in International Law: Colonial Discourses, Sovereignty, and Self-Determination*, in: Shawkat Alam / Sumudu Atapattu / Carmen G. Gonzalez / Jona Razzaque, (eds.), *International Environmental Law and the Global South*, Cambridge 2015, p. 23.
- 6 For scholarship focusing on climate litigation in the Global South, please see Joana Setzer / Lisa Benjamin, *Climate Litigation in the Global South: Constraints and Innovations*, *Transnational Environmental Law* 9 (2020), p. 77–101; Juan Auz, *Human Rights-Based Climate Litigation: A Latin American Cartography*, *Journal of Human Rights and the Environment* 13 (2022), p. 114–36; Peel / Lin, note 4; Rodríguez-Garavito, note 2.
- 7 Setzer / Benjamin, note 6, p. 79.

the least-advantaged populations,⁸ climate litigation has arguably become a platform for climate justice contestations.

The concept of climate justice highlights the multifaceted inequalities that contribute to people's vulnerability to the impacts of climate change, resulting in certain populations disproportionately experiencing the most severe damages despite having contributed the least to global warming.⁹ Its praxis has been articulated around several human rights, including the right to a healthy and safe environment and social rights like the right to health.¹⁰ While the former right has been central to the Global South's rights-based climate litigation,¹¹ major climate lawsuits in Latin America have also relied on the latter to frame climate challenges as health concerns, such as the *Future Generations v Ministry of the Environment and Others* and *Greenpeace Mexico v Ministry of Energy and Others* cases.¹² Yet, the use and significance of the right to health have been understudied. Thus far, the literature has not specifically concentrated on the implications of any human right in climate litigation other than those connected with the right to a clean and healthy environment.¹³

Leaving the right to health within Latin America's climate litigation unexplored has significant consequences for the region's pursuit of climate justice. On the one hand, health is one of the challenges that make the multifaceted inequalities behind climate vulnerability most evident.¹⁴ While the region has contributed with 11% of the historical cumulative net anthropogenic CO₂ emissions—as opposed to North America's 23% and Europe's 16%¹⁵—it, for example, possesses higher susceptibility to the transmission of vector-borne dis-

8 *Birsha Ohdedar*, Climate adaptation, vulnerability and rights-based litigation: broadening the scope of climate litigation using political ecology, *Journal of Human Rights and the Environment* 13 (2022), p. 139; *Carmen Gonzalez*, Racial Capitalism, Climate Justice, and Climate Displacement, *Oñati Socio-Legal Series* 11 (2021), p. 113; *Farhana Sultana*, Critical Climate Justice, *The Geographical Journal* 188 (2022), p. 118; *Susana Borràs*, Movimientos para la justicia climática global: replanteando el escenario internacional del cambio climático, *Relaciones Internacionales* 33 (2016), p. 99.

9 *Sultana*, note 8, p. 119.

10 *Gonzalez*, note 8, p. 113.

11 *Pau de Vilchez Moragues / Annalisa Savaresi*, The Right to a Healthy Environment and Climate Litigation: A Mutually Supportive Relation? *SSRN Electronic Journal* (2021), p. 4.

12 *Thalia Viveros Uehara*, The Right to Health in Climate Change Litigation: A Transformative Pathway for Addressing Latin America's Health Crises?, *Völkerrechtsblog* (22 March 2022).

13 *Sabrina McCormick et al.*, The Role of Health in Climate Litigation, *American Journal of Public Health* 108 (2018), p. 104–8; *Sam Varvastian*, The Human Right to a Clean and Healthy Environment in Climate Change Litigation, *MPIL Research Paper Series 2019–09* (2019); *de Vilchez Moragues / Savaresi*, note 11.

14 *Marisol Yglesias-González et al.*, Code Red for Health Response in Latin America and the Caribbean: Enhancing Peoples' Health through Climate Action, *The Lancet Regional Health – Americas* 11 (2022), p. 2.

15 IPCC, Summary for Policymakers, in: P.R. Shukla et al. (eds.), *Climate Change 2022: Mitigation of Climate Change. Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, Cambridge, UK and New York 2022, p. 10.

eases.¹⁶ To make matters worse, Latin America's high levels of social and health inequality between and within the countries exacerbate health vulnerability to climate change,¹⁷ especially among populations experiencing poverty and social exclusion.¹⁸ On the other hand, Latin America's constitutional tradition, known as the new constitutionalism (NLAC),¹⁹ furnishes the right to health with the potential to address both the environmental and social dimensions of vulnerability, thereby paving strong connections with climate justice concerns.

Hence, this paper traces how the right to health has been invoked within Latin America's climate litigation and its significance against climate justice concerns. More specifically, it applies systematic content analysis (SCA) to the *corpus* of domestic climate lawsuits filed as of mid-June 2022 across all Latin American countries that aimed to advance climate action (positive litigation),²⁰ were grounded in human rights (rights-based litigation), and used the right to health as a legal basis. The study analyzes the complaints and resolutions to identify the data on the litigants' motives, the objectives and arguments of the litigants and courts, and the legal bases of their respective complaints and judgments as they relate to the existing and emergent health concerns of vulnerable populations. Then, the paper focuses more sharply on seven cases from this body of litigation that meet the following criteria: (1) they have been adjudicated, (2) their resolution favored the claimants, and (3) their case documentation is publicly available.

- 16 The Lancet, 1.3.1 Climate suitability for infectious disease transmission, <https://www.lancetcountdown.org/data-platform/climate-change-impacts-exposures-and-vulnerability/1-3-climate-sensitive-infectious-diseases/1-3-1-climate-suitability-for-infectious-disease-transmission> (last accessed on 15 June 2022).
- 17 PAHO and WHO, *Health in the Americas. Summary: Regional Outlook and Country Profiles*, Washington 2017, p. 26.
- 18 *Luke Parry / Claudia Radel / Susana B. Adam / Nigel Clark / Miriam Counterman / Nadia Flores-Yeffal / Diego Pons / Paty Romero-Lankao / Jason Vargo*, *The (in)Visible Health Risks of Climate Change*, *Social Science and Medicine* 241 (2019), p. 112448.
- 19 *Armin von Bogdandy*, *Ius Constitutionale Commune en América Latina: Observations on Transformative Constitutionalism*, in: *Armin von Bogdandy et al. (eds.), Transformative Constitutionalism in Latin America. The Emergence of a New Ius Commune*, Oxford 2017, p. 33; *Javier A. Couso*, *The Changing Role of Law and Courts in Latin America: From an Obstacle to Social Change to a Tool of Social Equity*, in: *Roberto Gargarella et al. (eds.), Courts and Social Transformation in New Democracies*, Hampshire 2006, pp. 61–79.
- 20 Climate litigation scholarship distinguishes between “positive” and “negative” types of litigation based on the direction toward which lawsuits seek to move climate policy. The former strives to reduce greenhouse gas emissions, preserve the environment, and increase adaptive capacity (usually initiated by NGOs or community members), while the latter attempts to avoid these shifts by challenging mitigation or adaptation measures (usually brought by corporations). Early categorizations along these lines were suggested by *David Markell* and *J. B. Ruhl*, *An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual Climate Change Special Issue*, *Florida Law Review* 64 (2012), p. 65–66; *Navraj Singh Ghaleigh*, ‘Six Honest Serving-Men’: Climate Change Litigation as Legal Mobilization and the Utility of Typologies, *Climate Law* 1 (2010), p. 43.

This study constitutes the first systematic inquiry into the right to health in climate litigation conducted in Latin America; only a few studies have analyzed this and mostly in high-income countries or through a public health lens.²¹ As a humble early step, the study employs a descriptive approach to the phenomenon by examining the “how” question, rather than delving into why the right is used in different ways. Therefore, the analyzed cases are not directly comparable, but they provide valuable initial insights into the implications of climate litigation on health vulnerability. This leads to the proposal of a typology of rights-based cases (climate justice gradient) built on their potential to address climate-related health concerns more directly, which contributes to expanding strategic and interpretive horizons and turning them into more comprehensive approaches to climate justice through the judicial pathway.

An important conceptual note pertains to the significant diversity among the countries of Latin America. While this paper employs the term “Latin America” to underscore the commonalities of these nations regarding their constitutional paradigms and development trajectories, this reference is not intended to diminish the unique circumstances of the individual countries. Given that Latin America is often referred to as a region of countries that share a history of colonization and ongoing socio-economic inequalities,²² this paper expands on this background to trace how the urgency of the climate crisis disproportionately affects the health of the most vulnerable populations in this region.

The following section presents the theoretical framework guiding this examination. It begins with an overview of the intersections between climate justice and Latin America’s health vulnerability, then outlines how they overlap with the normative content of the right to health. Section B provides a brief note on the paper’s methodology, and section C delves into the findings. The final sections, D and E, introduce the climate justice gradient and contain some concluding remarks.

B. Intersecting Pathways: A Theoretical Framework of Health and Justice in Climate Litigation

1. Climate justice and vulnerable populations in the courts

Climate litigation in Latin America is arguably at the forefront of climate justice quandaries. This is because, unlike the climate lawsuits in the Global North, the climate vulnerability exacerbated by this region’s pressing socioeconomic challenges manifests itself in its cases. Although academic research on climate litigation in the Global South is scant, such efforts shed light on how the broader social dimensions of climate change determine people’s vulnerability and project onto the motivations of rights-based climate litigation.

21 Narayan Toolan / Hannah Marcus / Elizabeth G. Hanna / Chadia Wannous. Legal Implications of the Climate-Health Crisis: A Case Study Analysis of the Role of Public Health in Climate Litigation, *PLoS ONE* 17, (June 15, 2022), p. 1-31; *McCormick et al.*, note 13.

22 *Armin von Bogdandy*, note 19, p. 30.

According to Joana Setzer and Lisa Benjamin, in climate litigation in these regions, including Latin American jurisdictions, “the character of human rights claims is arguably more desperate because of the high vulnerability of their populations to climate-induced risks and loss and damage, as well as their limited access to life-sustaining resources.”²³ Similarly, Jacqueline Peel and Jolene Lin observe that the saliency of social challenges may interconnect climate change matters with other issues, such as public health, in climate litigation.²⁴

This embeddedness of vulnerability in Latin America’s climate litigation is strongly associated with the multi-scale patterns of inequality that climate justice calls to attention.²⁵ Several studies have made it difficult to deny that the populations most vulnerable to the impacts of climate change are often those who have contributed the least to global warming.²⁶ Who is susceptible to, unable to avoid, or cope with climate change’s adverse effects is a function of not only the exposure to climate hazards—due to growing CO₂ emissions—but also the lack of social assets, such as health systems, which decrease the population’s ability to withstand such impacts.²⁷ In other words, because climate vulnerability is a function of ecological conditions (exposure to climate hazards) and social infrastructure determining the sensitivity and adaptive capacity to climate change,²⁸ populations living in poverty, whose historical CO₂ emissions are neglectable, bear the greatest risks.²⁹ These inequalities that drive vulnerability differentials across populations and along the ecological and social dimensions are the foundational concerns of climate justice, thereby making this aspect bound to climate litigation in Latin America.

Particularly, in this region, health challenges mirror the interplay between global and local inequalities and vulnerability’s socio-ecological dimensions.³⁰ From a global perspec-

23 Setzer / Benjamin, note 6, p. 79.

24 Peel / Lin, note 4, p. 694.

25 Michael MacLennan / Leisa Perch, *Environmental Justice in Latin America and the Caribbean: Legal Empowerment of the Poor in the Context of Climate Change*, *Climate Law* 3 (2012), p. 287.

26 IPCC, *Climate Change 2022: Impacts, Adaptation, and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, in: Hans Otto Pörtner / Debra Roberts / Melinda Tignor / Elvira S. Poloczanska / Katja Mintenbeck / Andrés Alegría / Marlies Craig, Stefanie Langsdorf / Sina Löschke / Vincent Möller / Andrew Okem / Bardhyl Rama (eds.), Cambridge and New York 2022, p. 1193.

27 Caroline Moser / Andrew Norton / Alfredo Stein / Sophia Georgieva, *Pro-Poor Adaptation to Climate Change in Urban Centers: Case Studies of Vulnerability and Resilience in Kenya and Nicaragua*, Washington D.C. 2010, p. 2.

28 John Agard et al., Annex II: Glossary, in: CB Field et al. (eds.), *Climate Change 2014: Impacts, Adaptation, and Vulnerability. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change*, Cambridge 2014, p. 1775.

29 IPCC, note 26, p. 1204; *Ohdedar*, note 8, p. 140.

30 Barry S. Levy / Jonathan A. Patz, *Climate Change, Human Rights, and Social Justice*, *Annals of Global Health* 81 (2015), p. 311; *Luke Parry* et al., note 18, p. 112448; *Marisol Yglesias-González* et al., note 14.

tive, Latin America's historical share of CO₂ emissions (11%) is half of North America's (24%) and less than Europe's (16%),³¹ yet, for example, it showcases higher susceptibility for the transmission of vector-borne diseases,³² among other conditions that lead to increased morbidity, mortality, and disabilities.³³ This pattern is also traceable at the local level: while the highest decile of the region's population has a higher carbon footprint than the bottom 50%,³⁴ it is the people in the lower deciles whose health is disproportionately affected by climate change.³⁵

Similar to the ecological dimension of vulnerability, the social dimension also shows strong associations with multi-scalar inequalities. For Latin America's 151 million people living in poverty (23.7% of the region's population), access to quality healthcare services, an instrumental asset for withstanding climate-related health conditions, is severely restricted.³⁶ Although healthcare coverage has expanded during the past few decades, barriers to accessing these essential services persist within these countries, which primarily affect the most disadvantaged people.³⁷ Moreover, overall growth in coverage has not resulted in more resilient health systems capable of supporting populations in withstanding climate change.³⁸

Latin America's pressing socio-ecological inequalities make the climate crisis a health crisis. As human rights provide a legal language for flagging climate change-entrenched vulnerabilities within litigation in this region, they articulate climate-justice concerns.³⁹ In particular, the right to health may offer a starting point for the judiciaries to acknowledge the health vulnerability of their populations to climate change.⁴⁰ Consequently, climate litigation performs a crucial role, highlighting the need for climate justice to the judiciary,

31 IPCC, note 15, p 10.

32 The Lancet, note 16.

33 Graciela Magrin / José A. Marengo / Jean-Phillipe Boulanger / Marcos S. Buckeridge / Edwin Castellanos / Germán Poveda / Fabio R. Scarano / Sebastián Vicuña, Central and South America. Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part B: Regional Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change, Cambridge and New York 2014, p. 1535.

34 Benedikt Bruckner / Klaus Hubacek / Yuli Shan / Honglin Zhong / Kuishuang Feng, Impacts of Poverty Alleviation on National and Global Carbon Emissions, *Nature Sustainability* 5 (2022), p. 3.

35 Magrin et al., note 33, p. 1537.

36 PAHO and WHO, note 17, p. 7; R. Andres Castaneda Aguilar / Aleksander Eilertsen / Tony Fujs / Christoph Lakner / Daniel Gerszon Mahler / Minh Cong Nguyen / Marta Schoch / Samuel Kofi Tetteh Baah / Martha Viveros / Haoyu Wu, April 2022 global poverty update from the World Bank, <https://blogs.worldbank.org/opendata/april-2022-global-poverty-update-world-bank> (last accessed on 24 February 2023).

37 PAHO and WHO, note 17, p. 15; OECD, Primary Health Care for Resilient Health Systems in Latin America, Paris 2022, p. 21.

38 Yglesias-González et al., note 14, p. 2.

39 Gonzalez, note 8, p. 113.

40 Setzer / Benjamin, note 6, p. 98.

especially for vulnerable populations susceptible to health risks due to changes in climatic patterns.

II. *The right to health as a tool for climate justice*

Currently, 13 countries of the Latin American region recognize the right to health in their national constitutions. Moreover, nearly all of them have done so by ratifying the International Covenant on Economic, Social and Cultural Rights (ICESCR), whose Article 12 enshrines the right to the highest attainable standard of health.⁴¹ The conventions on the Rights of the Child,⁴² Elimination of All Forms of Discrimination against Women,⁴³ and Rights of Persons with Disabilities,⁴⁴ which also protect the right to health albeit *ratione personae*, have equally been ratified by most, if not all, Latin American countries. Furthermore, pertaining to the regional human rights system, 16 of these countries are parties in the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador).⁴⁵ Nine out of these sixteen countries have thus far ratified the Inter-American Convention on Protecting the Human Rights of Older Persons, one of the most recently-adopted Inter-American

41 Lawyers Collective and O'Neill Institute for National and Global Health Law, Global Health and Human Rights database – Americas, <https://www.globalhealthrights.org/constitutions/constitution-region/c-americas/> (last accessed on 15 June 2022); UN High Commissioner for Human Rights, Status of Ratification – International Covenant on Economic, Social and Cultural Rights, <https://indicators.ohchr.org/> (last accessed on 15 June 2022).

42 This convention recognizes the right to health in Article 24; it was adopted on 20 November 1989 and entered into force on 2 September 1990. UN Treaty Collection, Status of the Convention on the Rights of the Child, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=_en (last accessed on 28 February 2023).

43 This convention recognizes the right to health in Article 12; it was adopted on 18 December 1979 and entered into force on 3 September 1981. UN Treaty Collection, Status of the Convention on the Elimination of All Forms of Discrimination against Women, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&clang=_en (last accessed on 28 February 2023).

44 Article 25 enshrines the right to health. This convention was adopted on 13 December 2006 and entered into force on 3 May 2008. UN Treaty Collection, Status of the Convention on the Rights of Persons with Disabilities, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en (last accessed on 28 February 2023).

45 The right to health is recognized in Article 10. It was adopted on 17 November 1988 and entered into force on 16 November 1999. The Danish Institute for Human Rights, Signatories for Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador), <https://sdg.humanrights.dk/en/instrument/signees/2475> (last accessed on 15 June 2022).

treaties and the first international instrument that fully regulates older people's human rights, whose Article 19 protects this population's right to physical and mental health.⁴⁶

Crucially, the constitutional reforms that several Latin American countries have undergone since the 1990s, known as the NLAC, have opened the possibility for judiciaries to bring this international and regional human rights corpus into the domestic legal order.⁴⁷ This has emboldened national courts to protect the right to health of the most vulnerable populations.⁴⁸ Consequently, in some Latin American countries, domestic courts have intervened to address health-related challenges, resulting in a number of their rulings having structural effects.⁴⁹ For example, Colombia's Constitutional Court has issued resolutions related to the right to health, and these resolutions have had wide-reaching effects on health policymaking; for example, Decision T-760/08 led to the reform of Colombia's national health system.⁵⁰ On the other hand, all Latin American countries are parties to the United Nations Framework Convention on Climate Change (UNFCCC) and have also ratified the 2015 Paris Agreement.⁵¹

The potential of the human rights framework anchored in the NLAC, including the right to health, is mutually supportive of the climate change law.⁵² Although case law is still

- 46 This convention was adopted on 15 June 2015 and entered into force on 11 January 2017. OAS Department of International Law, Signatories and Ratifications of the Inter-American Convention on Protecting the Human Rights of Older Persons, https://www.oas.org/en/sla/dil/inter_american_treaties_A-70_human_rights_older_persons_signatories.asp (last accessed on 28 February 2023).
- 47 *von Bogdandy*, note 19, p. 17; *Couso*, note 19, p. 61.
- 48 *Mark Tushnet*, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law*, Princeton 2009, p. 227; *Pedro A. Villarreal*, *El derecho a la salud en lo individual y en lo colectivo: la calidad en los servicios de salud a partir de Poblete Vilches vs. Chile*, in: Mariela Morales Antoniazzi / Laura Clérico (eds.), *Interamericanización del derecho a la salud. Perspectivas a la luz del caso Poblete de la Corte IDH, Querétaro 2019*, p. 281.
- 49 Alicia Ely Yamin / Siri Gloppen (eds.), *Litigating Health Rights: Can Courts Bring More Justice to Health?* -Cambridge USA 2011, p. 19; *Alicia Ely Yamin*, *The Right to Health. The Potential and Limits of Catalysing Systemic Change through the Courts*, in: Conrado Hübner Mendes / Roberto Gargarella / Sebastián Guidi (eds.), *The Oxford Handbook of Constitutional Law in Latin America*, Oxford 2022, p. 758.
- 50 *Óscar Parra-Vera*, *The Protection of Social Rights*, in: Juan F. Gonzalez-Bertomeu / Roberto Gargarella (eds.), *The Latin American Casebook. Courts, Constitutions, and Rights*, Oxon 2016, pp. 161–63.
- 51 United Nations Treaty Collection, Paris Agreement – Status of Ratifications, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=_en (last accessed on 6 July 2022).
- 52 *Annalisa Savaresi*, *Climate Change and Human Rights. Fragmentation, Interplay, and Institutional Linkages*, in: Sébastien Duyck et al. (eds.), *Routledge Handbook of Human Rights and Climate Governance*, New York 2018, pp. 31–42; *Margaretha Wewerinke-Singh*, *State Responsibility for Human Rights Violations Associated with Climate Change*, in: Sébastien Duyck et al. (eds.), *Routledge Handbook of Human Rights and Climate Governance*, New York 2018, pp. 75–89; *Margaretha Wewerinke-Singh*, *Remedies for Human Rights Violations Caused by Climate Change*, *Climate Law* 9 (2019), pp. 224–43.

in its infancy in this regard, several bodies of the universal and Inter-American Human Rights Systems have extensively clarified the conceptual and normative spaces where they overlap.⁵³ Drawing on such interpretative sites, several complementarities can be identified between the right to health and the concept of climate justice. More specifically, the normative content of the right to health relates to the three components of climate justice—distributive, procedural, and corrective—which the UNFCCC regime sets forth.⁵⁴

The distributive aspect of climate justice refers to the allocation of climate change's different burdens and resources among countries and populations to cope with them.⁵⁵ Procedural justice concerns who decides and participates in decision-making, and corrective justice entails the redressal for adverse climate impacts, including the recognition of diverse cultures and perspectives.⁵⁶ The Paris Agreement comprises these three aspects by calling on its parties to implement climate responses on the basis of the principles of equity and common but differentiated responsibilities, respective capabilities,⁵⁷ international cooperation,⁵⁸ and public participation⁵⁹ and foster climate resilience and low greenhouse gas emissions.⁶⁰ Crucially, the synergies that arise due to the overlap of the right to health with each of these components of climate justice protect the socio-ecological dimensions of vulnerability, as summarized in Table 1; the full realization of the right to health constitutes a pathway to climate justice as both entail mitigating the occurrence of (and consequent exposure to) climate impacts and also accessing the health systems that enable the most vulnerable to withstand such effects.

Pertaining to the corrective component of climate justice, the right to health entails state duties aimed at redressing the ecological and social dimensions of vulnerability. For the former dimension, the CESCR clarifies that the right to health embraces a wide range of factors that determine people's opportunities to lead a healthy life, which encompass "the improvement of all aspects of environmental [...] hygiene," including the climate system.⁶¹

53 UN Human Rights Council, Analytical Study on the Relationship between Climate Change and the Human Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health. A/HRC/32/23, New York 2016; Comisión Interamericana de Derechos Humanos, Emergencia climática: Alcance y obligaciones interamericanas de derechos humanos, Washington D.C. 2021.

54 Borràs, note 8, p. 101; Gonzalez, note 8, p. 113; IPCC, note 26, p. 124. For an analysis of the complementarity of human rights law and social justice, please see *Lawrence O. Gostin / Matiangai V.S. Sirleaf / Eric A. Friedman*, *Global Health Law: Legal Foundations for Social Justice in Public Health*, in: Lawrence O. Gostin / Benjamin Mason Meier (eds.), *Foundations of Global Health & Human Rights*, New York 2020, p. 49.

55 Borràs, note 8, p. 101; Gonzalez, note 8, p. 113; IPCC, note 26, p. 124.

56 Borràs, note 8, p. 101; Gonzalez, note 8, p. 113; IPCC, note 26, p. 124.

57 Article 1.2 of the Paris Agreement.

58 Articles 6.1, 7.6, 7.7, and 8.4 of the Paris Agreement.

59 Articles 6.8 and 12 of the Paris Agreement.

60 Article 2.1 of the Paris Agreement.

61 UN CESCR, General Comment No. 14. E/C.12/2000/4, Geneva 2000, para. 15.

Thus, this right obliges states to prevent dangerous anthropogenic interference with the environment, a duty to not only require the states to reduce greenhouse gas emissions (climate mitigation)⁶² but also dedicate the maximum available resources to progressively realize such mitigative measures.⁶³ Regarding vulnerability's social dimension, Article 12.2 of the ICESCR and CESCR's General Comment 14 states that besides promoting a healthy environment, the right to health also includes the right to a system of health protection, namely, access to a variety of medical facilities, goods, and services necessary to ensure attention in the event of sickness. Therefore, states must take measures to develop sustainable and resilient health systems and infrastructure to fulfill their minimum core obligations concerning the right to health, which is instrumental for climate adaptation.⁶⁴ Crucially, this ought to be done by paying particular attention to the specific needs of vulnerable or marginalized groups of society.⁶⁵

The right to health and climate justice also synergize with the distributive component of the latter concept. Drawing on CESCR's General Comment No. 2 and the 1978 Declaration of Alma-Ata—which recognizes the “gross inequality in the health status of people, particularly between [the so-called] developed and developing countries”⁶⁶—the right to health grounds states' obligations on global patterns of inequality by calling on the governments to comply with their international obligation to “facilitate access to essential health facilities, goods, and services in other countries,” among other tasks.⁶⁷ In this way, in line with the principles of equity and common but differentiated responsibilities of climate justice, the right to health obliges states that have contributed the most to climate change (high-income countries) to assist the most vulnerable nations (low- and middle-income countries) in addressing their climate-related health crises.⁶⁸ Furthermore, to address more localized forms of inequality, the right to health proscribes any discrimination on the

62 UN General Assembly, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment. UN Doc. No. A/76/161, New York 2019, para. 43.

63 For a comprehensive commentary on the right to health's principle of progressive realization as interpreted in 2021 by the Committee on the Rights of the Child, see *Benjamin Mason Meier / Flavia Bustreo / Lawrence O. Gostin*, Climate Change, Public Health and Human Rights, *International Journal of Environmental Research and Public Health* 19 (2022), p. 7.

64 UN Human Rights Council, note 53, para. 57.

65 UN CESCR, note 61, para. 34-37.

66 International Conference on Primary Health Care, Declaration of Alma-Ata, USSR 1978, para II.

67 UN CESCR, note 61, para. 38-42.

68 For an analysis of the duty to cooperate in light of the climate justice tenets within climate litigation, please refer to *Juan Auz*, Two Reputed Allies: Reconciling Climate Justice and Litigation in the Global South, in: César Rodríguez-Garavito (ed.), *Litigating the Climate Emergency: How Human Rights, Courts, and Legal Mobilization Can Bolster Climate Action*, Cambridge NY 2022, p. 145-156.

grounds of race, sex, disability, and social or other status, which nullifies the realization of the right to health.⁶⁹

The right to health encompasses the procedural component of climate justice, as it also extends to access to health-related education and information and the participation of all populations in health-related decision-making at the community level.⁷⁰ In a parallel and mutually supportive vein, the concept of climate justice lends urgency to advancing inclusive and democratic climate actions for which the involvement of local individuals and groups is essential.⁷¹

Table 1. Complementarities between the right to health and climate justice in their relation to the environmental and social dimensions of vulnerability.

Vulnerability dimensions	Right to health	Climate justice
Ecological	Distributive: Establishes the duty to take steps through international assistance and cooperation to respect, protect, and fulfill the right to health, prevent discrimination, and ensure equality (by providing special protection to the most vulnerable populations).	Distributive: Acknowledges that countries that contribute the most to climate change bear the most responsibility for mitigating such a phenomenon (the principles of equity and common but differentiated responsibilities and respective capabilities).
	Procedural: Mandates states to provide access to health-related information and the participation of individuals and groups in decision-making processes, which may affect their development.	Procedural: Calls for the empowerment and participation of local individuals and groups directly affected by climate change.
	Corrective: Mandates the state to take necessary steps to make the most of their available resources to improve the environment as an underlying determinant of health by preventing dangerous anthropogenic interference with the climate system (climate mitigation).	Corrective: Calls for reducing greenhouse gas emissions to avoid catastrophic warming (climate mitigation).

69 UN CESCR, note 61, para. 18.

70 UN CESCR, note 61, para. 11.

71 *Brian Tokar, On the Evolution and Continuing Development of the Climate Justice Movement*, in: Tahseen Jafry (ed.), *Routledge Handbook of Climate Justice*, Oxon 2019, p. 20-21.

Vulnerability dimensions	Right to health	Climate justice
	Distributive: Establishes the duty to take steps through international assistance and cooperation to respect, protect, and fulfill the right to health; prevent discrimination; and ensure equality (by providing special protection to the most vulnerable populations).	Distributive: Acknowledges that countries that contribute the most to climate change bear the most responsibility for helping adapt to such a phenomenon.
Social	Procedural: Mandates states to provide access to health-related information and the participation of individuals and groups in decision-making processes, which may affect their development.	Procedural: Calls for the empowerment and participation of local individuals and groups directly affected by climate change.
	Corrective: Obliges states to take necessary steps to make the most of their available resources to develop sustainable and resilient healthcare services and ensure their availability, accessibility, acceptability, and quality (climate adaptation).	Corrective: Calls for fostering climate resilience and low greenhouse gas emissions (climate adaptation) as efforts to eradicate poverty.

C. Methodology

This paper conducts a SCA on all domestic rights-based climate lawsuits filed as of mid-2022 across Latin American countries that (1) have recognized the right to health—in their national constitutions or by abiding by international human rights instruments—and (2) have a civil legal system in place.⁷² Here, the reference to climate litigation encompasses the cases generally brought before judicial bodies in which the climate change law, policy, or science are material issues of law or fact.⁷³ These cases constitute the so-called “positive litigation,” which strives to advance climate action by reducing CO₂ emissions, preserving the environment, and/or increasing adaptive capacity (unlike “negative litigation,” in which corporations challenge mitigation or adaptation measures).⁷⁴ Furthermore,

72 For further insights on the implications of SCA for legal research, please refer to *Mark A. Hall and Ronald F. Wright*, Systematic Content Analysis of Judicial Opinions, *California Law Review* 96 (2008), pp. 63–122; *Maryam Salehijam*, The Value of Systematic Content Analysis in Legal Research, *Tilburg Law Review* 23 (2018), pp. 1–9.

73 The Sabin Center for Climate Change Law at Columbia Law School, US Climate Change Litigation database, <http://climatecasechart.com/climate-change-litigation/about/> (last accessed on 24 March 2022).

74 *David Markell / J. B. Ruhl*, An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual Climate Change Special Issue, *Florida Law Review* 64 (2012), pp. 65-66; *Ghaleigh*, note 20, p. 43; *Setzer / Higham*, note 3, p. 27.

the “rights-based” attribution to the concept of climate litigation concerns the use of human rights as the legal basis of the claimants’ arguments and judicial decisions whose linkages with climate change are emphasized.⁷⁵

Although climate litigation may materialize in different ways, depending on each legal field and national setting, it encompasses common stages whose identification enables the systemic comparative study of litigation across sectors and jurisdictions.⁷⁶ In this vein, Siri Gløppen distinguishes four distinct but interrelated stages of the litigation process: (1) claims formation, (2) adjudication, (3) implementation, and (4) social outcome stages (Figure 1).⁷⁷ The logic of Gløppen’s analytical framework helps trace the implications of discourses and rights in litigation. Hence, this research uses that template as its analytical foundation for exploring the litigation process. However, it focuses only on the claims formation and adjudication stages, given that the novelty of climate litigation in Latin America constrains the availability of the data for the implementation and the social outcome stages.

Based on this analytical template, this study places a sharper focus on the cases that have used the right to health as their legal basis and meet the following criteria: (1) they have been adjudicated, (2) their resolution favored the claimants, and (3) their case documentation is publicly available. Particularly, this study classifies the data based on the litigants’ motives, the objectives of the litigants and courts, their arguments, and the legal bases of their respective complaints and judgments, as they relate to existing and emergent health concerns of vulnerable populations. To that aim, the study uses a rubric of questions to guide the analysis along the complementarities between the right to health and climate justice (see Table 2). Moreover, the analyzed lawsuits are drawn from the most comprehensive and up-to-date databases of climate-change cases filed in Latin American jurisdictions, including the Interamerican Association for Environmental Defense’s (AIDA) climate litigation platform, the Grantham Research Institute on Climate Change and the Environment, and the Sabin Center for Climate Change Litigation.⁷⁸

As one of the first attempts to examine how the right to health is employed in Latin America’s climate litigation, this study intentionally uses a broad selection criterion to enable a comprehensive analysis. Consequently, the cases are not classified by legal fields, meaning that torts and constitutional, administrative, and criminal cases are all included for analysis, resulting in a non-comparability among them. Nevertheless, they collectively

75 *de Vilchez Moragues / Savaresi*, note 11.

76 *Siri Gløppen*, *Litigation as a Strategy to Hold Governments Accountable for Implementing the Right to Health*, *Health and Human Rights* 10 (2008), p. 21.

77 *Gløppen*, note 76, p. 26.

78 Asociación Interamericana para la Defensa del Ambiente, *Plataforma de Litigio Climático para América Latina y el Caribe*, <https://litigioclimatico.com/es/sobre-la-plataforma> (last accessed on 15 June 2022); Grantham Research Institute on Climate Change and the Environment, *Litigation Cases*, https://climate-laws.org/litigation_cases (last accessed on 15 June 2022); The Sabin Center for Climate Change Law at Columbia Law School, *U.S. Climate Change Litigation database*, note 73.

provide a useful foundation for further in-depth explorations of the implications of climate litigation for health vulnerability.

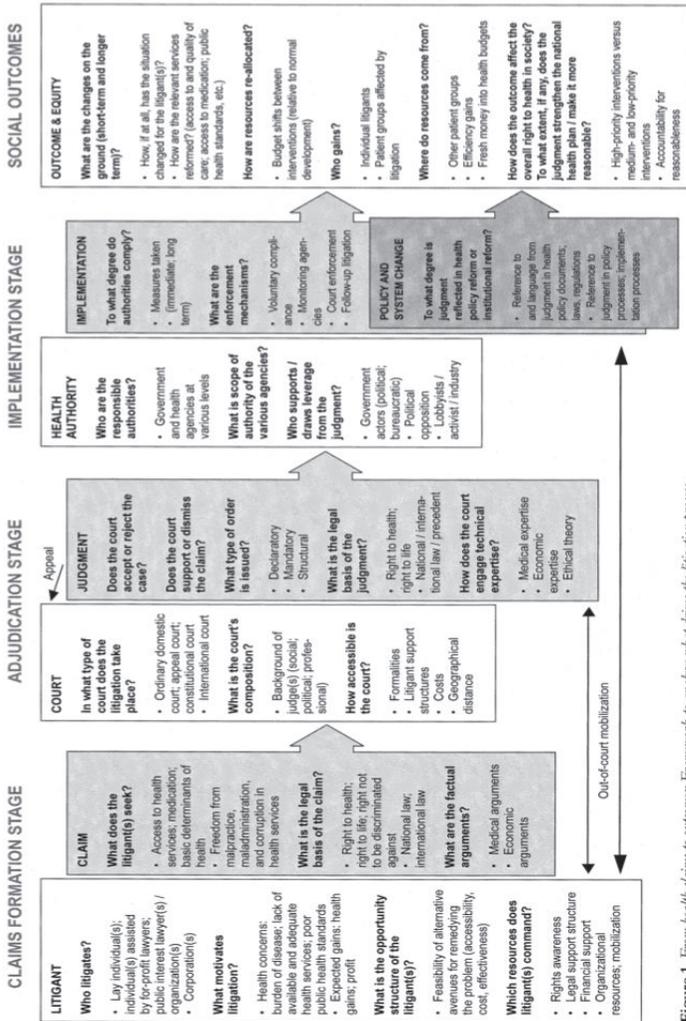


Figure 1. From health claims to outcomes: Framework to analyze what drives the litigation process

Figure 1. Siri Gløppen’s framework to analyze what drives the litigation process.⁷⁹

⁷⁹ Gløppen, note 76, p. 26.

Table 2. Rubric of questions to guide the analysis of the complementarities between the right to health and climate justice.

Unit of analysis	Variable	Questions
Com-plaints	1. Claimant profiles	1.1 What is the demographic profile of the claimants? 1.2 Do they belong to socially excluded populations (from an intersectional perspective)? 1.3 Are they assisted or represented by for-profit lawyers, Global North, or Global South nonprofit organizations?
	2. Motives	a. Are the claimants motivated by climate-related health concerns? b. Are they motivated by the distributive, procedural, and/or corrective aspects of such concerns? How?
	3. Objectives	3.1 Do the claimants seek access to healthy environmental conditions? How? 3.2 Do they seek access to quality and resilient healthcare services? How?
	4. Arguments	4.1 How do the claimants frame the health–climate change nexus? 4.2 How do they understand such a nexus in relation to poverty, social exclusion, and vulnerability? 4.3 Do they situate it within the existing global and local patterns of inequality? How?
	5. Legal bases	5.1 Do the claimants invoke the right to health? Where and how do they ground these claims? 5.2 Do they invoke climate change law? Where and how do they ground these claims? 5.3 How do they juxtapose such legal bases?
Resolutions	6. Objectives	6.1 Do the judges address climate-related health concerns? How? 6.2 Do they tackle distributive, procedural, and/or corrective aspects of such concerns? How?
	7. Arguments	7.1 How do the judges frame the health–climate change nexus? 7.2 How do they understand it in relation to poverty, social exclusion, and vulnerability? 7.3 Do they situate it within the existing global and local patterns of inequality? How?
	8. Legal bases	8.1 Do the judges draw on the right to health? Where and how do they ground these claims? 8.2 Do they invoke climate change law? Where and how do they ground these claims? 8.3 How do the right to health and climate change law overlap in judicial reasoning?

D. The Right to Health in Climate Litigation: Mapping a Constellation

A search through the three databases that this paper draws on unveiled a total of 77 domestic climate lawsuits filed as of mid-2022 across seven Latin American countries (Argentina, Brazil, Chile, Colombia, Ecuador, Mexico, and Peru). Of these, 61 are rights-based cases, most of which have been filed since 2015. Brazil showed the highest number of rights-based complaints (16), followed by Argentina (12), Mexico (12), and Colombia (9), as Figure 2 illustrates.

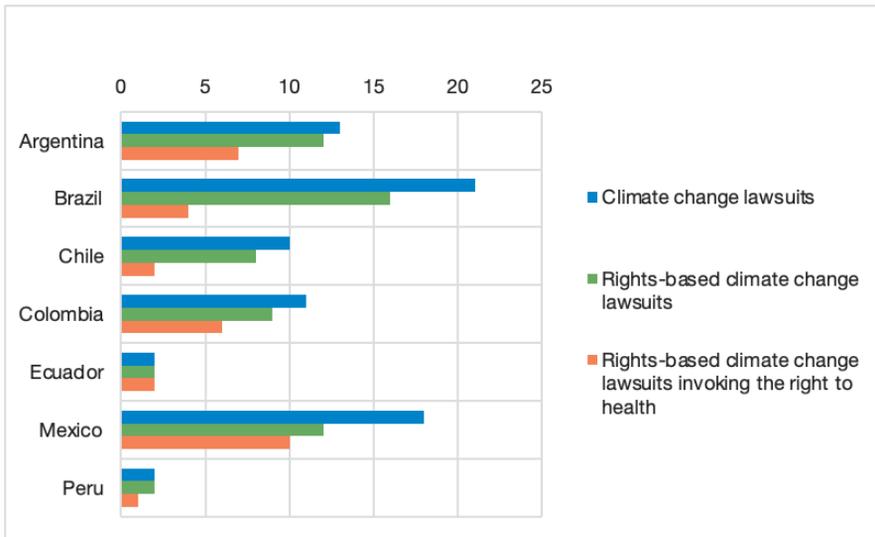


Figure 2. Total number of climate-change lawsuits, rights-based climate-change lawsuits, and rights-based climate-change lawsuits invoking the right to health, filed per country.

In total, 32 (52%) of the rights-based lawsuits invoked the right to health in their complaints or judgments. Of them, 19 were pending resolution, while 13 had already been adjudicated. This paper's analysis focuses on 7 of the 13 rights-based climate lawsuits that invoked the right to health. This is so because (1) their resolution favored the claimants and (2) the publicly available case documentation permits their scrutiny under this paper's methodology—either because their complaint and judgment documents were at hand or, whenever their complaints were not, their resolutions contained a thorough description of the claimants' arguments. Five of the sampled cases were situated within the constitutional field of law, and two followed the administrative law track. Table 3 lists these seven cases, their jurisdiction, relevant dates, type of action, the area of law in which they are anchored, and a summary of their substance.

1. The claims formation stage: Who litigates and how?

Synergies exist between the affected individuals and nonprofit organizations to bring these cases before the judiciary branches as claimants prevail across most of the analyzed cases. Notably, the affected individuals belong to population groups historically associated with the region's structural sociopolitical imbalances based on gender, ethnicity, race, and age. In cases such as *Future Generations v Ministry of the Environment and Others* (Colombia) and *Herrera Carrion and Others v Ministry of the Environment and Others* (Ecuador), national NGOs provided strong support to children and the group of girls who acted as claimants, respectively. Indigenous, Afro-descendent, and Campesino communities were the claimants in the *Center for Social Justice v Ministry of the Environment and Others* (Colombia) and *Indigenous Communities v Ministry of the Environment and Others* (Colombia) cases. Only one case was filed by the government and another by an international (high-income country) NGO as the sole claimant.

Table 3. Summary and relevant aspects of the analyzed cases.

Coun-try	Case	Summary (and relevant dates)	Adjudicat-ing court	Type of action	Area of law
Chile	<i>Private Corporation for the Development of Aysen and Others v Environmental Evaluation Service of Chile</i>	In September 2016, the claimants challenged the Environmental Assessment Service of Chile's approval of the proposed hydroelectric project <i>Central Hidroeléctrica Cuervo</i> in the southern region of Aysén. In January 2018, the court ruled in favor of the claimants and annulled the approval of the project.	Third Environmental Tribunal	<i>Reclamación</i> action	Administrative
Colombia	<i>Future Generations v Ministry of the Environment and Others</i>	In January 2018, a group of children and youth sued several government agencies for their failure to reduce deforestation in the Colombian Amazon. A lower court ruled against the youth claimants. However, in April 2018, the Supreme Court reversed the lower court's decision and ordered the government to formulate and implement action plans to address deforestation in the Amazon.	Supreme Court of Justice	<i>Tutela</i> action	Constitutional
Colombia	<i>Municipality of Ibagué v Ministry of the Environment and Others</i>	In September 2011, the Municipal Authority of Ibagué filed a popular action against the Ministry of Environment, the Mining Agency, two mining companies, and three individuals to challenge mining permits in the Combeima and Cocora rivers. In September 2020, the Council of State denied the defendants' appeal and reaffirmed the lower court's decision, which favored the claimants' petition.	Council of State	Popular action	Administrative

Country	Case	Summary (and relevant dates)	Adjudicating court	Type of action	Area of law
Colombia	<i>Center for Social Justice v Ministry of the Environment and Others</i>	In January 2015, Indigenous and Afro-descendant communities sued governmental authorities for failing to prevent the pollution of the Atrato river. In October 2015, the Constitutional Court reversed the lower court's decision, which denied the claimants' petition. The higher court recognized the Atrato river as a subject of rights and ordered the government to decontaminate the river and eradicate illegal mining.	Constitutional Court	<i>Tutela</i> action	Constitutional
Colombia	<i>Indigenous Communities v Ministry of the Environment and Others</i>	In December 2015, Indigenous communities filed a lawsuit against Colombian authorities and private companies for the diversion of the Bruno River to conduct mining activities. In November 2011, the Constitutional Court acknowledged the risks posed by the mining activities in a region vulnerable to climate change and ordered the defendants to assess the social and environmental impacts of the diversion of the river, among other measures.	Constitutional Court	<i>Tutela</i> action	Constitutional
Ecuador	<i>Herrera Carrion and Others v Ministry of the Environment and Others</i>	In February 2020, a group of girls filed a constitutional injunction against the government of Ecuador for authorizing gas flaring, which causes serious impacts on the environment and people's health. In July 2021, the Court of Justice of the Sucumbios Province reversed the court's dismissal of the case at first instance and mandated the government to update the plan for the gradual and progressive elimination of the gas flares.	Court Justice of the Sucumbios Province	<i>Protección</i> action	Constitutional
Mexico	<i>Greenpeace Mexico v Ministry of Energy and Others</i>	In May 2020, Greenpeace Mexico filed a lawsuit against the Mexican government, challenging the constitutionality of two electricity-sector policies that would limit renewable energies. In November 2020, the court ruled in favor of the claimants.	Second District Court	<i>Amparo</i>	Constitutional

While an in-depth assessment of the claimants' identities and related vulnerabilities is not feasible, it is apparent that the way they invoked their right to health, framed their climate-related health concerns, and pursued legal action is associated with interlocking inequalities that drive their socio-ecological vulnerability to climate change. From this perspective, the analyzed cases can be grouped into two categories: (1) cases in which claimants emphasized the social dimension of vulnerability and (2) cases in which they focused solely on ecological vulnerability. These categories have varying implications, particularly for the distributive and corrective aspects of climate justice.

The analyzed cases reveal that, on the one hand, claimants belonging to populations directly affected by current or imminent environmental damage impacting their health and who also live in areas characterized by poverty emphasize the social dimension of climate

vulnerability. They draw attention to the importance of ensuring a healthy environment and a safe climate, as well as improving local infrastructure, including health and sanitation services. This is illustrated by the three cases in Colombia (two brought by ethnic communities and one by a local authority) and the one in Ecuador (filed by a group of girls exposed to climate change-inducing pollution).

In *Center for Social Justice v Ministry of the Environment and Others*, the claimants requested the Constitutional Court to protect several human rights, including their right to health, by ordering measures to address the “health, socio-environmental, ecological, and humanitarian crisis” experienced in the basin of the Atrato River.⁸⁰ They raised concerns over the death of Indigenous and Afro-descendant children in the Chocó Department because of the pollution of the river and cited reports of Colombia's National Human Rights Institution, which documented the death of 3 minors and the intoxication of 64 from the Indigenous communities of Quiparadó and Juinduur (located in the lower Atrato subregion) due to drinking contaminated water.⁸¹ The claimants also argued that because of the mining activities and illegal deforestation polluting the Atrato River, diarrhea, dengue, and malaria had proliferated.⁸² They denounced that the affected region lacked an adequate health system to treat and cure such detrimental health conditions.⁸³

In Ecuador's *Herrera Carrion and Others v Ministry of the Environment and Others* case, the claimants were a group of girls who lived near gas flare stacks and who, as a consequence of such proximity, had experienced and witnessed first-hand detrimental impacts on their personal and community health. They argued that, by emitting toxic pollutants, gas flaring in the provinces of Sucumbios and Orellana (in the Ecuadorian Amazon) contributed to climate change and caused detrimental health conditions such as cancer in the local inhabitants.⁸⁴ The claimants further denounced that the lack of medical facilities in the region to treat such a disease made matters worse.⁸⁵

On the other hand, the claimants for whom climate change impacts had not yet materialized or who did not raise the issue of poverty as a challenge directly affecting them focused on the ecological dimension of climate change by seeking mitigation measures. The cases in Chile and Mexico (brought forth by domestic and international nonprofit

80 *Center for Social Justice v Ministry of the Environment and Others* [2016] T-622/16 2.10 (Constitutional Court of Colombia), <https://www.corteconstitucional.gov.co/relatoria/2016/t-622-16.htm> (last accessed on 5 March 2023).

81 *Center for Social Justice v Ministry of the Environment and Others*, note 80, 2.4.

82 *Center for Social Justice v Ministry of the Environment and Others*, note 80, 2.4.

83 *Center for Social Justice v Ministry of the Environment and Others*, note 80, 2.4.

84 *Herrera Carrion and Others v Ministry of the Environment and Others* [2021] Appeal Judgment 6.1.5 (Court Justice of the Sucumbios Province), http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2021/20210729_16152_ruling.pdf (last accessed on 5 March 2023).

85 *Herrera Carrion and Others v Ministry of the Environment and Others*, note 84, 6.1.6.

organizations) and Colombia's *Future Generations v Ministry of the Environment and Others* illustrate this point.

In the *Future Generations v Ministry of the Environment and Others* case, children and youth requested the protection of their right to health as they alleged both potential and current climate-related health impacts.⁸⁶ They argued that the government's failure to protect the Colombian Amazon had resulted in an increase in greenhouse gas emissions, which contributed to climate change.⁸⁷ This led to a growing risk of diseases and could also hinder riverside communities' access to healthcare services, given the projected change in rain patterns and the availability of water resources.⁸⁸ Additionally, some claimants who had experienced atopic dermatitis claimed that this health condition was currently and tangibly exacerbated by the increase in the temperature in their region.⁸⁹ However, these claimants did not raise the socioeconomic conditions of the area for which they requested protection as an issue affecting them directly, thus not framing it as a motive for their complaint.

In arguing how their right to health is being, or would be, violated in the context of climate change, the claimants of the seven analyzed lawsuits grounded their claims on international human rights instruments, national constitutions, and jurisprudence where such a right is enshrined. Specifically, the claimants resorted to Article 12 of the ICESCR, General Observation 14 of the CESCR, Article 10 of the Protocol of San Salvador, Article 49 of Colombia's Constitution, Article 45 of Ecuador's Constitution, and Article 4 of Mexico's Constitution. Regarding national jurisprudence on the right to health, the claimants of the *Future Generations v Ministry of the Environment and Others* case pointed to Decisions T-060/2007, T-148/2007, and T-760/2008, through which the Constitutional Court recognized the fundamental character of the right to health.⁹⁰

Correspondingly, the claimants legally substantiated their requests for stopping climate change-inducing (thus health-detrimental) activities on international and national climate-change and environmental laws and policies. This observation stems solely from the three cases in which the claimants focused on the ecological dimension of vulnerability—as no complete detail was available on this matter for the cases in which the claimants exposed vulnerability's social dimension. In the Chile case, the claimants turned to the Ramsar Con-

86 *Future Generations v Ministry of the Environment and Others* [2018] Complaint p. 3 (Superior Tribunal of Bogota), http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2018/20180129_11001-22-03-000-2018-00319-00_complaint.pdf (last accessed on 5 March 2023).

87 *Future Generations v Ministry of the Environment and Others*, note 86, p. 3.

88 *Future Generations v Ministry of the Environment and Others*, note 86, p. 104.

89 *Future Generations v Ministry of the Environment and Others*, note 86, p. 107.

90 *Future Generations v Ministry of the Environment and Others*, note 86, p. 102.

vention, in which the country has been a state party since November 1981⁹¹, to emphasize the government's obligation to protect wetlands whose role as carbon sinks is essential for climate mitigation.⁹² They also referred to the National Strategy for Climate Change and Forest Resources, which reflects the country's international commitments to address climate change.⁹³

Notably, the claimants' legal arguments on the right to health and climate change followed separate, yet parallel paths. In other words, except for the *Future Generations* case, in which the claimants alluded to the Paris Agreements' human rights preambular clause⁹⁴, neither in *Private Corporation for the Development of Aysen and Others* nor in *Greenpeace Mexico* cases did the claimants juxtapose the obligations that the states bear to realize the right to health with their commitments to mitigate and adapt to climate change. Instead, they grounded their request to protect the right to health solely on human rights law and, conversely, to advance climate mitigation on climate change law, thereby mirroring the fragmentation between human rights and climate change law.

II. The adjudication stage: Assessing courts' decisions

While all the courts acknowledged the violations of the right to health in their decisions (except for the *Municipality of Ibaigué* case), they varied in the extent to which they redressed climate-related health concerns. A closer examination of the judgments of the seven cases allowed the identification of a connecting line between the redressal measures that the courts mandated and their understanding of the claimants' vulnerability. Although the type of legal action also determined the scope of the rulings, the courts' understanding of vulnerability seemed to play a role, particularly in the distributive and corrective dimensions of climate litigation. This perspective divides the analyzed cases into two broad categories: (1) the cases in which the courts addressed the social dimension of vulnerability and (2) the cases in which they focused solely on ecological vulnerability. Specifically, the decisions that ordered reparation measures encompassing the social dimension of vulnerability were based on the arguments that considered how poverty and social exclusion played a role in the context of climate change. On the other hand, the decisions solely concerned with

91 The Ramsar Convention Secretariat, Partes Contratantes en la Convención Ramsar, https://www.ramsar.org/sites/default/files/documents/library/annotated_contracting_parties_list_s.pdf (last accessed on 15 June 2022).

92 *Private Corporation for the Development of Aysen and Others v Environmental Evaluation Service of Chile* [2018] Judgment p. 33825 (Third Environmental Tribunal), http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2018/20180104_R-42-2017_judgment.pdf (last accessed on 5 March 2023).

93 *Private Corporation for the Development of Aysen and Others v Environmental Evaluation Service of Chile*, note 92, p. 33826.

94 *Future Generations v Ministry of the Environment and Others*, note 86, p. 9.

ceasing climate change-inducing activities or measures were based mainly on the ecological dimension of vulnerability.

The *Center for Social Justice* and *Herrera Carrion* cases fell into the first category, wherein, besides ordering the cease of the environmentally harmful (climate change-inducing and health detrimental) activities challenged by the claimants, the courts mandated measures for the protection of health systems. These measures included conducting assessments of the impacts of such activities on the health of surrounding populations⁹⁵ and, in the Ecuador case, even the potential provision of oncology units for the diagnosis and treatment of cancer.⁹⁶

In all these cases, the deployment of contextual analysis permitted judicial reasoning to identify a linkage between climate change and the affected populations' precarious social contexts, a connection upon which the courts framed the health vulnerability of communities. For example, in *Herrera Carrion* and *Others*, the Court of Justice of the Sucumbios Province recognized that gas flaring contributed to climate change and affected human health.⁹⁷ It situated the case within the high poverty rates affecting the provinces of Sucumbios and Orellana (where the claimants lived) and drew from Articles 50, 358, and 363 of Ecuador's Constitutions to argue that the protection of vulnerable groups entailed access to universal and free healthcare.⁹⁸

Similarly, the judicial reasoning in the *Indigenous Communities* case reflects a broad understanding of the claimants' vulnerability, although Colombia's Constitutional Court did not direct any measures to directly tackle its social dimension. More specifically, this tribunal acknowledged that poverty rates in the Cerrejón department—where the challenged mining activities took place—were higher than the country's average.⁹⁹ It also considered the adverse impacts that this region had experienced from El Niño-Southern Oscillation while also highlighting that one of such department's municipalities (Albania) had not issued a climate change plan to address such effects.¹⁰⁰ However, the Constitutional Court instructed the inter-institutional working group (comprising the Ministry of the Interior, the National Mining Agency, and Carbones de Cerrejón Limited, among others) to undertake a technical study on the mining project's environmental and social risks, which did not specify any consideration for or measures against ongoing climate-related health concerns.¹⁰¹

Furthermore, the procedural aspect of climate justice surfaced throughout these three cases, as the courts ordered the involvement of local communities as a means of countering

95 *Center for Social Justice v Ministry of the Environment and Others*, note 80, 10.2.5.

96 *Herrera Carrion and Others v Ministry of the Environment and Others*, note 84, 9.9.VII.5.

97 *Herrera Carrion and Others v Ministry of the Environment and Others*, note 84, 9.9.II and 9.9.III.

98 *Herrera Carrion and Others v Ministry of the Environment and Others*, note 84, 8.6.

99 *Indigenous Communities v Ministry of the Environment and Others* [2017] SU-698/17 5.7.2 (Constitutional Court of Colombia), http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2017/20171128_SU-69817_judgment.pdf (last accessed on 5 March 2023).

100 *Indigenous Communities v Ministry of the Environment and Others*, note 99, 1.1.6 and 5.1.3.

101 *Indigenous Communities v Ministry of the Environment and Others*, note 99, III.3.

existing inequalities. Crucially, Colombia's Constitutional Court and Ecuador's Court of Justice of the Sucumbios Province mandated the participation of affected communities and vulnerable populations in the implementation of their decisions (*Center for Social Justice, Indigenous Communities* and *Herrera Carrion cases*).¹⁰²

Unlike the cases discussed earlier, the *Private Corporation for the Development of Aysen and Others* and the *Greenpeace Mexico* cases fall into the second category, where the decisions were solely focused on the ecological aspect of vulnerability. Specifically, the courts in these cases directed the cessation of activities or measures that contributed to climate change.¹⁰³ However, while the courts recognized in both cases that climate change-inducing emissions could lead to health concerns, they did not consider the social contexts that make certain population groups more vulnerable to these health challenges.

In the *Future Generations* case, the Supreme Court of the Justice of Colombia ordered the country's Presidency, the Ministry of Environment and Sustainable Development, and the Ministry of Agriculture and Rural Development to issue an "intergenerational pact for Colombian Amazon."¹⁰⁴ The court stated that this pact should adopt measures to reduce deforestation and greenhouse gas emissions, including national, regional, and local strategies to adapt to climate change.¹⁰⁵ While this ruling appears to have opened up an avenue in which the social dimension of vulnerability could play a central role through its reference to climate adaptation, the preceding judicial reasoning did not give attention to the contexts of inequality of populations inhabiting the Colombian Amazon. Instead, by framing the connection between the loss of forest cover, its contribution to climate change, and its impacts on human health, the court's arguments emphasized the ecological dimension of vulnerability.

Moreover, the overlap between human rights and climate change law was not evident even in the judgments that grounded their arguments in instruments from both fields of law. Similar to the findings on the lawsuits' claims, although the rulings in the *Future Generations*, *Municipality of Ibagué*, *Center of Social Justice*, *Herrera Carrion and Others*, and *Greenpeace Mexico* cases acknowledged the obligations that the states bear toward the right to health on the one hand and the countries' commitments to reduce greenhouse

102 *Center for Social Justice v Ministry of the Environment and Others*, note 80, 10.2; *Herrera Carrion and Others v Ministry of the Environment and Others*, note 84, 9.9.VII; *Indigenous Communities v Ministry of the Environment and Others*, note 99, III.4.

103 *Greenpeace Mexico v Ministry of Energy and Others* [2020] Judgment p. 199 (Second District Court), http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2020/20201117_Amparo-No.-1042020_judgment.pdf (last accessed on 5 March 2023); *Private Corporation for the Development of Aysen and Others v Environmental Evaluation Service of Chile*, note 92, p. 33844.

104 *Future Generations v Ministry of the Environment and Others* [2018] Appeal Judgment p. 49 (Supreme Court of Colombia), http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2018/20180405_11001-22-03-000-2018-00319-00_decision-2.pdf (last accessed on 5 March 2023).

105 *Future Generations v Ministry of the Environment and Others*, note 104, p. 49.

gas emissions on the other, none of these decisions interpreted the duties associated with the right to health in the light of the responsibilities to mitigate and adapt to climate change. For instance, in the *Municipality of Ibagué* case, the Council of State of Colombia identified the realization of the right to health as an end of the state, based on Article 49 of the country's Constitution, but did not link health issues to the commitments that the Paris Agreement entailed for Colombia.¹⁰⁶

E. From Vulnerability to Justice: Climate Litigation through a Climate Justice Gradient

The examination of Latin America's rights-based climate lawsuits from the perspective of the right to health reveals a constellation of ways in which litigants and courts invoke and substantiate this right, with varying degrees of emphasis on the socio-ecological spectrum of health vulnerability. To aid in the discussion of the implications of this for climate justice in litigation, Figure 3 proposes a “climate justice gradient.” It categorizes how these actors framed and responded to climate-related health issues in climate litigation, based on their positions along the socio-ecological spectrum of vulnerability.

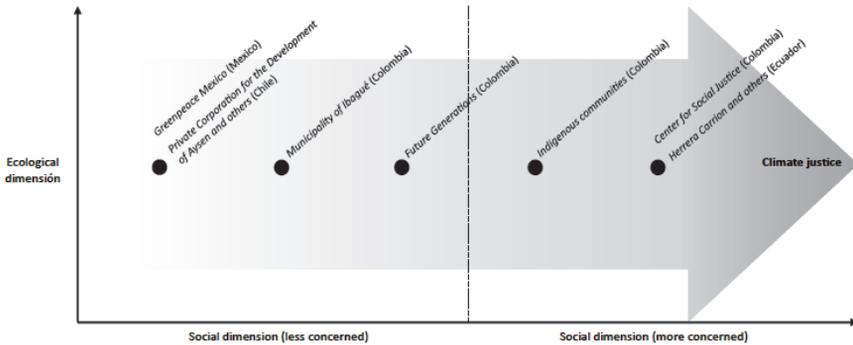


Figure 3. Climate justice gradient relative to the climate lawsuits’ use of the right to health and their corresponding positions along the socio-ecological spectrum of vulnerability.

The extreme right side of the gradient (the darkest shade) represents the hypothetical closest alignment between the use of the right to health in climate litigation and climate justice. Following this paper’s theoretical framework, this area assumes that the full realization of the right to health serves as a pathway to climate justice when it includes mitigating

106 *Municipality of Ibagué v Ministry of the Environment and Others* [2020] Appeal Judgment p. 204 (Council of State), http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2020/20200914_73001-2331-000-2011-00611-03_judgment.pdf (last accessed on 5 March 2023).

the occurrence of climate impacts and ensuring that the most vulnerable populations have access to the health systems necessary to cope with such adverse effects. Therefore, the further to the right side of the gradient a case is, the greater its implications are in terms of the distributive, procedural, and corrective dimensions of climate justice.

Upon categorizing the analyzed cases according to the climate justice gradient (as presented in Figure 3), two aspects become more evident. First, cases in which the claimants demonstrated higher vulnerability (because they belonged to populations whose health was directly affected by climate change-inducing activities or climate change itself while also residing in impoverished areas) used the right to health to seek protection for both the socio-ecological dimensions of climate vulnerability. These cases (right side of the gradient) led to judicial reasoning that involved contextual analysis of the claimants' precarious living conditions, resulting in the implementation of measures to assess health impacts or even provide healthcare infrastructure. On the other hand, the claimants for whom the ecological dimension of vulnerability was the sole concern witnessed resolutions aligned with a corresponding view on vulnerability (left side of the gradient). Environmental NGOs bringing forth cases that support this observation (*Private Corporation for the Development of Aysen and Others* and *Greenpeace Mexico*) may reflect how the unidimensional scope and agendas of such actors manifest in (and ultimately influence) the litigation process—a concern not unfamiliar to the literature on social movements in Latin America.¹⁰⁷

In the same vein, even for the *Future Generations* case, which was filed by a group of children and youth, this does not diverge from the latter observation when analyzed from an intersectional lens. More specifically, concerns based on the claimants' socioeconomic contexts were absent from their framing of vulnerability, which was based solely on their age. Moreover, although some of the claimants claimed personal, current, and tangible detrimental health effects, they used the right to health to request the protection of its ecological determinant (a safe climate)¹⁰⁸ and not against the lack of access to health infrastructure, nor the infrastructure's deficient preparedness for climate events, unlike the *Herrera Carrion and Others* case.¹⁰⁹ To be sure, the complaint's lack of attention to local inequalities may not be the only factor behind the Colombia Supreme Court's preclusion of the Amazon forest's pressing socioeconomic challenges from its reasoning, but this factor cannot be disregarded. The court mandated the participation of affected (non-claimant) communities in the implementation of its decision, but it did not go beyond instructing

107 Jean Foyer / David Dumoulin Kervran, ¿Ambientalismo de las ONG versus ambientalismo de los pobres?, in: Paul Almeida / Allen Cordero (eds.), *Movimientos sociales en América Latina: perspectivas, tendencias y casos*, Buenos Aires 2017, pp. 391–412; *Emilie Dupuits et al.*, Scaling up but Losing out? Water Commons' Dilemmas between Transnational Movements and Grassroots Struggles in Latin America, *Ecological Economics* 172 (2020), p. 106625; *Matt Baillie Smith / Katy Jenkins*, Disconnections and Exclusions: Professionalization, Cosmopolitanism and (Global?) Civil Society, *Global Networks* 11 (2011), pp. 160–79.

108 *Future Generations v Ministry of the Environment and Others*, note 86.

109 *Herrera Carrion and Others v Ministry of the Environment and Others*, note 84, 6.1.6.

broad measures on “adaptation”; in other words, health crises did not specifically come up in the judgment at all.¹¹⁰

The second aspect that became evident through the climate justice gradient is that none of the analyzed cases comprehensively addressed the ecological and social dimensions of climate vulnerability. Even the three cases at the right end of the gradient in Figure 3 are still some distance away from the climate justice pathway. This gap in addressing climate justice can be attributed to the failure of these cases to fully utilize the normative potential of the right to health in relation to climate justice, which is not an unreasonable consequence of the fragmentation between human rights and climate change law in the claims and judgments. Although the claimants’ social contexts played a significant role in their experience of adverse health effects due to climate change or climate change-inducing activities, the judgments in these cases invoked human rights and climate change frameworks independently. None of them explored the normative content of the right to health within the context of the states’ obligations to mitigate and adapt to climate change.

The climate justice gradient underscores the implications of differentiated vulnerabilities and legal fragmentation for climate justice. Although all the analyzed cases mandated the participation of affected individuals and groups in decision-making (procedural justice), they only partially fulfilled the distributive and corrective aspects of climate justice. Regarding these latter aspects, the lawsuits’ superficial attention to the social context of the claims (left side of the gradient) led to a failure in identifying the most vulnerable segments of society. As a result, focalized protection required by the right to health and climate change law was not provided—which, in turn, impeded direct redistribution efforts. Consequently, these cases promoted corrective measures aimed solely at restricting or ceasing activities harmful to the environment and health. While this is crucial for achieving climate justice, it left situated inequalities unaddressed. It is important to note that this does not mean these cases do not align with climate justice; they are simply not intended to either immediately or directly address the sharp differentials that render specific populations more vulnerable to climate change within countries.

One possible explanation for this is the influence of legal opportunity structures and socio-political factors beyond the litigation process that enable the realities of disadvantaged individuals or groups to reach the judicial pathway, as existing scholarship on rights litigation suggests.¹¹¹ Regarding the legal opportunity structures of these cases, it is worth noting that the lawsuits in Colombia and Ecuador, which involved directly affected populations as claimants, comprised *tutela* and *protección* actions, respectively. Both constitutional

110 *Future Generations v Ministry of the Environment and Others*, note 104.

111 *Auz*, note 6, p. 131; *Gloppen*, note 76, p. 25; *Siri Gloppen*, *Studying Courts in Context: The Role of Nonjudicial Institutional and Socio-Political Realities*, in: LaDawn Haglund and Robin Stryker (eds.), *Closing the Rights Gap: From Human Rights to Social Transformation*, California 2015, p. 291; *Setzer / Benjamin*, note 6, p. 80.

procedures are accessible and provide ample means to claim rights.¹¹² In contrast, the *Private Corporation for the Development of Aysen and Others* and *Greenpeace Mexico* cases comprised Chile's *reclamación* (administrative) action and Mexico's constitutional *amparo*, respectively.¹¹³ These procedures require more procedural and substantial formalities, thus requiring greater technical legal expertise, which NGOs possess.¹¹⁴ Nevertheless, exploring how socio-political factors contribute to the differing approaches taken by these cases in addressing socio-ecological vulnerability goes beyond the scope of this inquiry.

Moreover, the gradient's right-side cases only partially satisfied the corrective and distributive aspects of climate justice because they lacked an in-depth substantiation of the obligations to allocate the maximum available resources toward progressively realizing the right to health and providing international assistance and cooperation, respectively. Although the *Center for Social Justice* and *Herrera Carrion* cases mandated measures for the protection of health systems, they did not touch upon the crucial question of how states could allocate financial resources for implementing such measures. Examining this possibility could have further promoted the right to health in terms of the aforementioned aspects of climate justice, especially as reducing the inequitable distribution of health facilities, goods, and services have profound resource implications.

The principle of progressive realization could have provided an interpretative horizon for establishing the subsidiary responsibility of developed countries to take joint action toward fulfilling the right to health,¹¹⁵ thereby better aligning the corrective and distributive aspects of climate justice. The Colombia Constitutional Court came closer to this interpretative lens in the *Center for Social Justice* case, informing the remedies it issued by drawing on the "inter comunis" legal concept that requires third-party participation in the implementation of its decision.¹¹⁶ However, it is worth acknowledging that although the duty of international cooperation is a cornerstone of distributive, and thus corrective,

112 Political Constitution of Colombia 1991, Article 86; Political Constitution of Ecuador 2008, Article 88.

113 Ley 19300 of 1994, Article 20; Political Constitution of the Mexican United States 1917, Article 103.

114 *Francisca Pou Giménez*, *Judicial Review and Rights Protection in Mexico: The Limits of the 2011 Amparo Reform*, <https://ssrn.com/abstract=2210959> (last accessed on 15 June 2022).

115 *Wouter Vandenhole / Wolfgang Benedek†*, *Extraterritorial Human Rights Obligations and the North-South Divide*, in: Malcolm Langford / Martin Scheinin / Willem van Genugten / Wouter Vandenhole (eds.), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law*, Cambridge NY 2012, p. 337.

116 *Center for Social Justice v Ministry of the Environment and Others*, note 77, 10.1; *Chris Thornhill / Carina Rodrigues de Araújo Calabria*, *Global Constitutionalism and Democracy: The Case of Colombia*, *Jus Cogens* 2 (2020), p. 165.

justice amid the multi-scalar complexity of climate change, it has seldom been integrated into domestic climate litigation in the Global South.¹¹⁷

F. Conclusion

Latin America's burgeoning corpus of rights-based climate litigation is a heterogeneous assemblage. Even when a considerable number of lawsuits appeal to the right to health, a more profound investigation into their deployment vis-à-vis the social and ecological determinants of health vulnerability reveals a constellation of ways in which they intersect with the climate justice pathway. In this vein, the climate justice gradient that this paper has posited brings to light the implications of such intersections for the distributive, procedural, and corrective facets of climate justice. This typology does not insinuate that any of the scrutinized cases are misaligned with the objective of achieving climate justice. Instead, it signals how some of them have the potential to address more localized inequalities that render certain populations particularly susceptible to the effects of climate change.

The gradient exposes the multi-scalar disparities inextricably linked with Latin America's climate litigation. It suggests that the analyzed cases do not fully address the disparities, thereby underscoring the need to reflect on whether strategic and interpretative horizons can align more closely with the distributive and corrective dimensions of climate justice. Climate litigation might redress this quandary by ensuring that the predicaments of marginalized individuals and groups gain access to the judicial pathway. Filling out the normative content of the right to health, particularly the principle of progressive realization and the duty of international cooperation in the context of climate change law, also offers a way forward. Moreover, the complexities delineated by this paper compel us to converge the conventional conceptual lines between mitigation and adaptation that characterize climate litigation scholarship. Even cases typically associated with mitigation efforts, such as the *Herrera Carrion* (Ecuador) case, highlight the pressing need to consider adaptation, as precarious health systems significantly exacerbate the claimants' vulnerability to the already visible effects of climate change.

Nevertheless, while this paper is inclined to advocate a shift toward the right end of the climate-justice gradient, it proceeds with caution in taking a prescriptive stance. Methodological limitations impede it from addressing critical questions central to unpacking the legal and socio-political constraints and possibilities that the claimants and courts face in better aligning with climate justice. Overcoming this incomplete comprehension of Latin America's climate litigation is crucial in prescribing how climate litigation can confront the myriad complexities that arise from climate change's inextricable link with human health. However, as the first systematic inquiry into the right to health in the region's corpus of

117 *Auz*, note 68, p. 155. For an insightful analysis of how the duty of international cooperation interacts with domestic climate litigation in Global North jurisdictions, please refer to *Jannika Jahn*, *Domestic Courts as Guarantors of International Climate Cooperation: Insights from the German Constitutional Court's Climate Decision*, MPIL Research Paper Series 17 (2022).

litigation, this study provides useful insights into the prospects for more comprehensive approaches to climate justice via the judicial pathway.

As the climate crisis continues to disproportionately imperil the health of populations experiencing poverty and social exclusion, the extent to which climate litigation offers a pathway for climate justice will determine whether the involvement of the judiciaries can indeed effectuate a meaningful difference or replicate the executive and legislative branches' failures that it aims to tackle.



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