EDITORIAL

Comparative Climate Litigation in North-South Perspective

By *Maxim Bönnemann,** *Meike Krakau*** and *Anna-Julia Saiger****

"We are dealing with core, indeed, high policy-making",[1] stated Justice Allsop of the Australian Federal Court in overturning the ground-breaking Sharma decision[2] in spring 2022. The decision has been perceived not only in Australia, but also worldwide, as a setback for climate litigation – and as an example of the institutional limits of court decisions in the Global North[3] on the climate crisis. Sharma concerned a finding by a single Federal Court judge that the Federal Minister for the Environment owed children a duty of care when

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1 Minister for the Environment v Sharma [2022] FCAFC 35, at [246].

2 Sharma v Minister for the Environment [2021] FCA 560.

3 Australia is a good example of how a country in the Southern Hemisphere can nevertheless be assigned to the Global North if the notions of "Global North" and "Global South" are not used as geographical markers but as a political category. Often, but not always, this distinction is based on the member states of the OECD, with the Global South referring to non-OECD countries (for an overview of how the term is used in various social science disciplines and in comparative law, see *Philipp Dann / Michael Riegner / Maxim Bönnemann*, The Southern Turn in Comparative Constitutional Law: An Introduction, in: Philipp Dann / Michael Riegner / Maxim Bönnemann (eds.), The Global South and Comparative Constitutional Law, Oxford 2020, p. 5 ff.; for the area of climate litigation see Joana Setzer and Catherine Higham, Global trends in climate change litigation: 2023 snapshot, Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science, 2023, p. 14 f.) In climate law, we consider the heuristic value of these categories to be particularly high, as they capture both the highly unequal responsibility of climate change and the unequal conditions (state capacities) in dealing with the consequences.

considering whether to approve a mining project.[4] On appeal, the three justices of the Full Court found that such a duty did not exist: Justice Allsop in particular emphasised that "the natural places for the development of such policy and the making of decisions as to the implementation of such policy is the Executive branch of government, and Parliament".[5] This article of faith was nonetheless expressed reluctantly, with Allsop leaving no doubt that at stake in these decisions is "the risk of catastrophe for the world and humanity".[6]

At first sight, such a delineation between law and politics seems unremarkable. It is not for courts to decide on issues where there is scope for political disagreement but for the democratically elected legislature or the executive. And yet the appeal decision left many with a certain unease. If the catastrophe we face is one "for the world and humanity", isn't it time to rethink some of our core beliefs regarding institutional roles and the role of the judiciary? If current institutional arrangements fail when addressing the global climate catastrophe, aren't we in dire need of alternative approaches when thinking about the role of law and courts?

These questions are fundamental and complex. But regardless of how one answers them, thinking about them can only be done comparatively.[7] In this respect, we argue in this Symposium, the Global South has a key role to play. For not only are the countries most exposed to the climate crisis those of the Global South. It is also in the Global South where courts have been dealing with structural and profound crises or with institutional failure for a long time – and in this way have produced ideas, concepts and doctrines that are highly relevant for the Global North.

It is only recently that comparative law has begun to pluralise its epistemic foundations and reflect on its eurocentric heritage. For much of its history, comparative law has neglected or marginalised the Global South.[8] While neighbouring disciplines have long established that there are areas in which "theory from the South"[9] provides privileged insights into global problems and their solutions, comparative law is only slowly acknowledging the highly innovative contributions of Southern courts and scholarship. More recently, scholarship has interrogated a distinct "Constitutionalism of the Global South"[10] and argued for a

4 *Jacqueline Peel / Rebekkah Markey-Towler*, A Duty to Care: The Case of Sharma v Minister for the Environment, Journal of Environmental Law 33 (2021), pp. 727–736.

5 Minister for the Environment v Sharma [2022] FCAFC 35, at [250].

6 Minister for the Environment v Sharma [2022] FCAFC 35, at [248].

7 *Anna-Julia Saiger*, Domestic Courts and the Paris Agreement's Climate Goals: The Need for a Comparative Approach, Transnational Environmental Law 9/1 (2020), p. 37 – 54.

8 For a recent account see *Daniel Bonilla Maldonado*, Legal Barbarians: Identity, Modern Comparative Law and the Global South, Cambridge 2021.

9 *Jean Comaroff / John L. Comaroff*, Theory from the South: Or, How Euro-America is Evolving Toward Africa, New York 2012.

10 *Daniel Bonilla Maldonado*, Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia, Cambridge 2013.

"Southern Turn"[11] in comparative law. Classic areas for pioneering judgments by Southern courts are, for instance, socio-economic rights, rights of nature, or access to justice.[12]

This has also been recognised in the field of climate litigation[13] (and climate constitutionalism more broadly[14]). However, as has been observed in the pioneering work by Joana Setzer and Lisa Benjamin, while climate litigation cases in the Global South are growing, they still receive too little scholarly attention.[15] This is all the more lamentable as industrialised countries from the Global North bear the main responsibility for historic and present greenhouse gas emissions, while many countries from the Global South are especially vulnerable to the adverse effects of climate change.

The debate gathered in this Symposium assesses and compares specific tools, constraints, and topics that relate to climate litigation – both in South-South and South-North comparison. What is more, it interrogates which specific features of climate litigation in the Global South might move the global debate on climate litigation further.

At the same time, this Symposium is the result of a collaboration between World Comparative Law, the Verfassungsblog and the Völkerrechtsblog. In what was an entirely new format for all participants, the Verfassungsblog and the Völkerrechtsblog hosted a blog symposium[16] in the spring of last year and then offered authors the opportunity to expand their blog posts into comprehensive peer-reviewed journal articles.

The four contributions cover a wide range of geographical regions (from Southeast Asia to South Africa and Latin America) and address different facets of climate change litigation and climate justice issues. They range from the right to health, to youth-led climate change

11 *Philipp Dann / Michael Riegner / Maxim Bönnemann*, The Southern Turn in Comparative Constitutional Law: An Introduction, in: Philipp Dann / Michael Riegner / Maxim Bönnemann (eds.), The Global South and Comparative Constitutional Law, Oxford 2020, pp. 1 – 38.

12 From the rich literature on legal innovation from the Global South see only Oscar Vilhena Vieira / Upendra Baxi / Frans Viljoen (eds.), Transformative constitutionalism, Pretoria 2013; Armin von Bogdandy / Eduardo Ferrer Mac-Gregor / Mariela Morales Antoniazzi / Flavia Piovesan / Ximena Soley (eds.), Transformative constitutionalism in Latin America, Oxford 2017; *Martha Gayoye*, Gendered Constitutionalism in the Global South, VRÜ/WCL 56 (2023), pp. 115 – 126. With regard to environmental constitutionalism: *Melanie Murcott*, Transformative Environmental Constitutionalism, Leiden 2022.

13 *Anna-Julia Saiger*, Nationale Gerichte im Klimaschutzvölkerrecht. Eine rechtsvergleichende Untersuchung zum Pariser Übereinkommen, 2022.

14 *Navraj Singh Ghaleigh / Joana Setzer / Asanga Welikala*, The Complexities of Comparative Climate Constitutionalism, Journal of Environmental Law 34 (2022), pp. 517 – 528.

15 *Joana Setzer / Lisa Benjamin*, Climate Litigation in the Global South: Constraints and Innovations, Transnational Environmental Law 9 (2020), pp. 77 – 101.

16 See Verfassungsblog, Comparative Climate Litigation in North-South Perspective, https://verfassungsblog.de/category/debates/comparative-climate-litigation-in-north-south-perspective-debates/ and Völkerrechtsblog, Comparative Climate Litigation in North-South Perspective, https://voelkerrechtsblog.org/de/symposium/comparative-climate-litigation-in-north-south-perspective/ (last accessed on 19 June 2023).

litigation, to the question of what the European Court of Human Rights could learn from courts in the Global South.

In the first article of this Special Issue, *Lorenzo Gradoni* and *Martina Mantovani* provide a critical overview of youth-led climate change litigation in light of its political context and its distinctive and innovative features, both at the substantive, as well as at the procedural level. Their article sheds light on the susceptibility of children and young people to the impacts of climate change and the challenges they encounter in securing their rights. The authors further reveal the 'radicality' of youth-led litigation, which is fundamentally based on innovative claims under the public trust doctrine, the rights of nature and human rights law. At the procedural level, the authors critically reflect on the growing use of intergenerational class actions, direct multi-state complaints to international adjudicating bodies, and transnational claims. Finally, the authors share their insights on the prospects of youth-led climate change litigation.

Against this backdrop, the following contributions demonstrate the influence of comparative thinking on various jurisdictions and legal systems. In the second article, *Melanie Murcott*, *Maria Antonia Tigre*, and *Nesa Zimmermann* provide transnational insights for climate litigation at the European Court of Human Rights. As courts play a crucial role in advancing climate justice, their contribution aims to conceptualize climate (in)justice and its significance in climate adjudication. In addressing issues of standing and transboundary harm, they extend their analysis beyond the European Convention on Human Rights to the Global South and highlight the valuable insights the Global South could offer to the ECtHR's adjudication of climate cases. Ultimately, by highlighting the transnationalisation of climate jurisprudence that can improve decision-making, they argue for a South-North perspective to advance climate justice.

Shifting the focus from Europe to Latin America, *Thalia Viveros-Uehara* in the third contribution examines the right to health and its impact on vulnerable populations in light of the region's new constitutionalism. By analyzing the interplay of social and environmental factors that exacerbate climate vulnerability, the author explores the relationship between the use of the right to health and climate justice. In doing so, she draws on both the fundamental motivation and objective of the litigants, as well as the underlying legal basis. Her findings reveal the various ways in which litigants and courts use the right to health in relation to the socio-ecological spectrum of health vulnerability. Finally, *Viveros-Uehara* proposes a typology of cases (climate justice gradient) to broaden the strategic and interpretive perspectives of current climate litigation towards a more comprehensive approach to climate justice.

Agung Wardana, ultimately, offers a critical perspective on climate change litigation, with a specific emphasis on examining the legal and political-economic facets of such litigation in Indonesia. The author aims to counter the overly optimistic outlook on climate change litigation, by shedding light on the under-researched nature of this field. Focusing on three precedent-setting climate litigation cases in Indonesia, *Wardana* argues that in a country where the government is pursuing an economic growth model that is heavily reliant

on high carbon emissions, climate litigation can pose a significant challenge as it questions the existing political and economic model which has contributed to the climate crisis in the first place. Additionally, the author suggests that the courts, being the final line of defence for the environment, may also be influenced by this structural condition and have arguably taken on the role of guardians of the respective economic model.

The Global South, as this Symposium shows, is also proving to be an engine of legal innovation in the field of climate litigation. Whether in the right to health (Viverous-Uehara), standing requirements (Murcott/Tigre/Zimmermann) or in numerous other areas – the contributions in this issue demonstrate the necessity of a North-South perspective. But they also show something else: without an understanding of political-economic contexts (Wardana) or the dynamics of political movements (Gradoni/Mantovani), the significance of courts in the climate crisis cannot be understood. This Symposium hopes to have made a small contribution to understanding the interplay of climate litigation and its contexts.