

When the kids put climate change on trial: youth-focused rights-based climate litigation around the world

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Young people are increasingly taking governments to court for their failure to meaningfully abate climate change. They argue that states have a responsibility under domestic and international law to protect, respect and fulfil the rights of children against worsening climate change. Such cases form a unique subset of rights-based climate change litigation due to their emphasis on intergenerational equity. Young people are disproportionately affected by the climate crisis and face distinct age-related vulnerabilities and adverse discrimination linked to the impacts of climate change. The unequal burden that young people bear in this context is also shaped by the social, legal, political and economic structures that marginalize their interests and voices in societies around the world. To reclaim their agency in the face of the crisis, young people are increasingly mobilizing against policies and actions that perpetuate the status quo. They do so through participation in activist efforts, and as we discuss in this paper, litigation cases. As of May 2021, the Sabin Centre for Climate Change Law's database of climate litigation included 32 youth-focused cases in 14 countries. Our article takes stock of this wave of climate litigation and offers both a typology for and analysis of the types of claims in this jurisprudence. We identify three types of youth-focused cases, including those focused on: (1) insufficient efforts to reduce carbon emissions and meet climate commitments; (2) insufficient efforts to implement mitigation and adaptation measures; and (3) specific regulatory approvals that are expected to have dramatic climate impacts. We also identify a worrisome trend in which youth-focused cases are dismissed due to a lack of justiciability or standing at a procedural stage. We suggest that courts' refusal to deal with the merits of these claims undermines not just the agency of young people, but also constitutes a denial of their rights to redress for human rights infringements resulting from worsening climate change.

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Keywords: *climate litigation, human rights, climate change, youth, children, disruptive dissent, activism*

1 INTRODUCTION

It has been said that when it comes to climate change, ‘[young people today] have less to lose than any other generation, and everything to gain’.¹ Children and youth are set to bear the brunt of the consequences of the climate crisis, as they face long-term threats to their lives, health, access to food and water, shelter, education and livelihoods in the future.² Indeed, as the Office of the United Nations High Commissioner for Human Rights highlighted in 2015, there is no greater threat facing the world’s children and future generations than that of climate change.³

Unsurprisingly, today’s young people⁴ make up one of the most vocal and active segments of the climate justice movement.⁵ Around the world, children and youth have increasingly mobilized against policies and actions that they deem insufficient to confront the climate crisis, through participation in activist efforts such as the ‘school strike for climate’ campaign that millions of youth joined in 216 countries;⁶ the large-scale public protests organized in September of 2019 across 125 countries;⁷ and, as we explore in this article, climate litigation cases in 14 countries.

The perspectives advanced by young climate activists highlight the stark intergenerational inequities that underlie the climate crisis. It is well established that children living today experience disproportionate physical, psychological and educational vulnerability

1. S Adler-Bell, ‘The Story Behind the Green New Deal’s Meteoric Rise’, *The New Republic* (6 Feb 2019), quoting an activist with the Sunrise Movement.

2. See Intergovernmental Panel on Climate Change (IPCC), *Climate Change 2007: Impacts, Adaptation and Vulnerability* (IPCC Working Group II, 2007). See also IPCC, *Climate Change – The IPCC Scientific Assessment* (IPCC Working Group I 1990).

3. See OHCHR, *Analytical Study on the Relationship between Climate Change and the Full and Effective Enjoyment of the Rights of the Child*, 35 sess, UN Report, A/HRC/35/13 at 3, citing UNICEF, *Unless We Act Now: The Impact of Climate Change on Children* (New York, 2015) at 6.

4. We define young people loosely as encompassing both children (aged under 18) as well as youth (aged 15–35), given that the cases surveyed in this paper often involve plaintiffs in a wide range of age groups. See UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, art 1 (for the definition of children in international law). See also H Thew, L Middlemiss and J Paavola, ‘“Youth is Not a Political Position”: Exploring Justice Claims-Making in the UN Climate Change Negotiations’ (2020) 61:102036 *Global Environmental Change* at 5 (which states that YOUNGO, the UN youth constituency lacks formal lower and upper age limits). Please note that the claim in the Canada *ENJEU* case sets an upper age limit of 35.

5. E Marris, ‘Why Young Climate Activists have Captured the World’s Attention’ (2019) 573 *Nature* 471.

6. See ‘Strike Statistics’ (updated 9 November 2021), online: *Fridays for Future* <<https://fridaysforfuture.org/what-we-do/strike-statistics/>> accessed 9 November 2021. See also, ‘Who We Are’ (2020), online: *Fridays for Future* <<https://fridaysforfuture.org/what-we-do/who-we-are/>> accessed 9 November 2021.

7. D Fisher, ‘The Broader Importance of #FridaysForFuture’ (2019) 9 *Nature Climate Change* 430.

associated with climate change due to their unique sensitivity to climate risks and their limited adaptive capacity to respond to them.⁸

Yet, despite being most affected by climate change, young people, as a demographic, are not only the least responsible for the current state of global emissions, but they are also the least able to influence policy efforts that could avert its worst impacts. Due to the latency of climate change, the climate impacts experienced today are the result of decisions made or not made by governments several decades ago.⁹ In other words, the harms that young people are currently experiencing (and can expect to experience in the future) stem from decisions made before they were born. Their lack of policy influence is compounded by their exclusion from climate-related decision-making – whether at the annual international negotiations convened by the United Nations Framework Convention on Climate Change (UNFCCC), or in domestic policy discussions.¹⁰ As a result, young people report feeling unable to shape the political decisions around climate change that affect them the most. It has been observed that young people of all ages are largely ignored in social and environmental policymaking environments due to social and legal norms that define them as lacking agency and maturity.¹¹ This marginalization creates palpable frustration among children and youth today,¹² which has led growing numbers of them to engage in climate activism of various types around the world.¹³

As part of their mobilization to prevent catastrophic climate change, children and youth have initiated (or participated in) rights-based lawsuits against various levels of government to stop diverse polluting activities or to demand stronger policy responses to climate change. As of May 2021, the Sabin Centre for Climate Change Law's database of climate litigation includes 32 climate cases led by or involving children or youth.¹⁴ Climate cases invoking the rights of children and youth have been launched at an increasing pace and across a growing range of jurisdictions during the past six years, including before the domestic courts of Australia, Brazil, Canada, Colombia, Germany, India, Pakistan, Mexico, Norway, Peru, South Korea, Sweden, Uganda

8. I Weissbecker and others, 'Psychological and Physiological Correlates of Stress in Children Exposed to Disaster: Current Research and Recommendations for Intervention' (2008) 18 *Children, Youth and Environments* 30.

9. See generally Le Treut et al., 'Historical Overview of Climate Change Science' in *Climate Change 2007: The Physical Science Basis. Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (2007).

10. ED Gibbons, 'Climate Change, Children's Rights, and the Pursuit of Intergenerational Climate Justice' (2014) 16 *Health & Hum Rts J* 19, 34 [Gibbons].

11. See A Lio and I Literat, "'We Need You to Listen to Us": Youth Activist Perspectives on Intergenerational Dynamics and Adult Solidarity in Youth Movements' (2020) 14 *International Journal of Communication* 21 [Lio and Literat]. See also 'Our House is Falling Apart, and We Are Rapidly Running out of Time', Speech to EU Parliament, Strasbourg, Germany, 16 April 2019.

12. See K Nairn, 'Learning from Young People Engaged in Climate Activism: The Potential of Collectivizing Despair and Hope' (2019) 27:5 *Young* 435, 443 [Nairn] (describing 'the tug between frustration, despair, and hope' among youth climate activists).

13. See K O'Brien, E Selboe and BM Hayward, 'Exploring Youth Activism on Climate Change: Dutiful, Disruptive, and Dangerous Dissent' (2018) 23 *Ecology and Society* 44 [O'Brien, Selboe and Hayward]. See also 'Our House is Falling Apart, and We Are Rapidly Running out of Time,' Speech to EU Parliament, Strasbourg, Germany, 16 April 2019.

14. Sabin Centre for Climate Change Law, *Climate Litigation Databases* <<http://climatecase-chart.com/>> accessed 9 November 2021. Note that we have omitted cases that were not explicitly children focused.

and the USA, as well as international and regional bodies, such as the Committee on the Rights of the Child and the European Court of Human Rights.¹⁵

This body of climate litigation forms a unique subset of cases within the recognized ‘rights turn’ in climate change litigation,¹⁶ due to its emphasis on intergenerational equity. Intergenerational equity has long been recognized as a key principle of international environmental law,¹⁷ including in the context of the UNFCCC, which provides that: ‘Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities’.¹⁸ For the most part, states have failed to satisfy this principle and have instead created (and sustained) the conditions for the current climate crisis. Under the doctrine of intergenerational equity, youth plaintiffs across the world have launched a multitude of cases alleging that their governments’ insufficient efforts to abate greenhouse gas (GHG) emissions infringe their rights to life, water, food and health disproportionately compared to other generations.¹⁹ In doing so, youth rights-based climate cases also invoke distinctive equality rights arguments²⁰ which aim to address environmental vulnerabilities facing children and young people as well as age-related adverse effect discrimination.²¹ Youth-focused climate litigation thus aims to provide redress to the youth already experiencing the effects of climate change, as well as to protect future generations from climate-related harms.

The promise of youth-focused climate litigation is thus a hopeful one. It lies in its potential to protect young people from the worsening effects of climate change, while also holding them accountable to their domestic and international climate change and human-rights-related commitments. Indeed, all such cases are grounded in the simple

15. In addition to the rights-based climate cases discussed in this article, youth have also been involved in other types of climate litigation. See eg, *Sharma and others v Minister for the Environment* [2021] FCA 560 (in which the federal Court of Australia recognized that the government had a duty of care to avoid causing personal harm to children when approving a project to extend a coal mine due to the impacts of climate change).

16. See J Peel and HM Osofsky, ‘A Rights Turn in Climate Change Litigation?’ (2018) 7:1 *Transnational Environmental Law* 37, which identifies an increase in rights-based climate litigation over the last decade.

17. According to Edith Brown Weiss, the basic premise of intergenerational equity is that ‘all generations are partners caring for and using the Earth. Every generation needs to pass the Earth and our natural and cultural resources on in at least as good condition as we received them.’ See EB Weiss, ‘Climate Change, Intergenerational Equity, and International Law’ (2008) 9:3 *Vt J Env'tl L* 615.

18. *United Nations Framework Convention on Climate Change*, 9 May 1992, 31 I.L.M. 849, art 3(1) [hereinafter *Climate Change Convention*].

19. See generally BJ Preston, ‘The Evolving Role of Environmental Rights in Climate Change Litigation’ (2018) 2:2 *Chinese Journal of Environmental Law* 131; L Slobodian, ‘Defending the Future: Intergenerational Equity in Climate Litigation’ (2019) 32 *Geo Env'tl L Rev* 569. See also ‘Children’s Right to a Healthy Environment’ (2019) online (pdf): *Human Rights Watch* <<https://www.hrw.org/news/2019/10/08/childrens-right-healthy-environment>> accessed 9 November 2021.

20. See N Chalifour, J Earle and L Macintyre, ‘Coming of Age in a Warming World: The Charter’s Section 15 Equality Guarantee and Youth-Led Climate Litigation’ (2021) 17:1 *Journal of Law & Equality*.

21. R Kaya, ‘Environmental Vulnerability, Age and the Promises of Anti-Age Discrimination Law’ (2019) 28:2 *Review of European, Comparative & International Environmental Law* 162.

fact that states are obliged under domestic and international law to protect, respect and fulfil the rights of children.²²

This article takes stock of youth-focused rights-based climate litigation. We concentrate specifically on the types of claims that have emerged and how courts, across jurisdictions, have responded to them. Given that there is no comprehensive overview of this particular corpus of cases and decisions to date,²³ our article provides a typology for, and analysis of, all youth-focused cases that were launched globally as of May 2021 – a total of 32 cases in 14 countries. Our assessment of this jurisprudence is anchored in broader literature on the agency of young people in climate governance and on different forms of youth dissent in the field of climate change.²⁴

The remainder of this article is structured as follows. In Section 2, we explore how we understand the agency of children and youth in the context of climate justice. In Section 3, we identify and distinguish between the different types of youth-focused climate lawsuits that have arisen across the globe. In Section 4, we discuss how courts have responded to these cases and comment on the key victories and setbacks that children and youth have experienced in climate litigation. In particular, we identify a worrisome trend in which an increasing majority of cases are dismissed due to a lack of justiciability and standing. In Section 5, we reflect on how courts' refusal to deal with the merits of youth-focused climate cases may undermine the agency of children and youth, as well as constitute a denial of their right to redress for violations of their substantive rights and intergenerational equity.

2 RECLAIMING AGENCY IN THE CONTEXT OF CLIMATE JUSTICE

Our understanding of climate change as a fundamental problem of intergenerational justice rests not only on its disproportionate and long-term impacts for youth, but

22. See Human Rights Council, *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, 37th sess, UN Doc A/HRC/37/58, which indicates that states must do more to respect, protect and fulfil the rights of children in relation to environmental harm. Such harm interferes with the full enjoyment of a vast range of the rights of the child. See also Committee on Economic, Social and Cultural Rights, General Comment No. 14 (2000) on the right to the highest attainable standard of health, para 4; Committee on the Rights of the Child, General Comment No. 7 (2005) on implementing child rights in early childhood, para 10; General Comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health, para 2. Additionally, the Convention on the Rights of the Child specifically requires state parties to take the dangers and risks of environmental pollution into consideration in order to meet their commitments under the Convention. See UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, 3, art 24 (2)(c).

23. The literature to date has mostly focused on youth climate activism more broadly (see eg Han, Heejin and S Wuk Ahn, 'Youth Mobilization to Stop Global Climate Change: Narratives and Impact' (2020) 12:10 Sustainability 1), on a select few, high-profile youth-focused climate cases (see eg MC Blumm and MC Wood, "'No Ordinary Lawsuit': Climate Change, Due Process, and the Public Trust Doctrine' (2017) 67 Am U L Rev 1), or on litigation trends within particular jurisdictions (see eg NJ Chalifour, J Earle and L Macintyre (n 20)). See also the survey in Nicole Rogers, *Law, Fiction and Activism in a Time of Climate Change* (Routledge 2019).

24. O'Brien, Selboe and Hayward (n 13).

also on its inextricable connection to the recognition or denial of their agency. The unequal burden that young people bear in the context of the climate crisis can be understood not simply as resulting from their underlying vulnerability to climate impacts, but also from the social, legal, political and economic structures that have marginalized their rights, interests and voices in societies around the world. Young people are systematically excluded from key decision-making processes relating to climate change, and are often unable or unwilling to vote in elections.²⁵ Even when they are invited to participate in policy processes, youth participation can be tokenistic and often does not result in a meaningful consideration of their perspectives.²⁶ As Thew et al. argue, the substantive contributions of youth to climate governance tend to be underestimated because they are perceived as ‘human becomings’ rather than as human beings and are framed as ‘apathetic, deficient, underdeveloped and ... in need of support’.²⁷ These assumptions about young people’s lack of agency can lead to feelings of frustration and exclusion from decision-making for children and youth and to their eventual disengagement from formal climate politics.²⁸

In response, today’s youth increasingly turn to activism and litigation to reclaim their agency.²⁹ A rising number of young people around the world are engaging in acts of civil disobedience, such as school strikes, and have initiated lawsuits to stop various polluting activities or to demand stronger policy responses to the climate crisis. Through these efforts, youth have emerged as ‘agents of change ... aimed at stopping the global climate crisis at an unprecedented scale’.³⁰

While this article centres on youth-focused court cases, we see activism and litigation as convergent strategies. They both represent creative channels for youth to exercise their rights to contest government policies and practices that underlie the climate crisis. When thinking about litigation as part of the toolbox for reclaiming youth agency in the face of climate change, it is therefore useful to consider how litigation might fit within the diverse forms of youth-related dissent on climate change.

According to the typology put forward by O’Brien, Selboe and Hayward, the different ways in which youth activists engage with political power in order to transform climate policy can be categorized into three overlapping types of dissent: dutiful dissent, dangerous dissent and disruptive dissent.³¹ On one side of the spectrum, dutiful

25. See JA Ødegaard Borge and IC Mochmann, ‘A Voice, but Not a Vote: A Youth Generation at Risk?’ (2019) 33:3 *Children & Society* 286. See generally J Sloam, ‘New Voice, Less Equal: The Civic and Political Engagement of Young People in the United States and Europe’ (2014) 47:5 *Comparative Political Studies* 663 (for an account of the marginalization of youth participation in conventional politics).

26. See R Trajber et al., ‘Promoting Climate Change Transformation *with* Young People in Brazil: Participatory Action Research Through a Looping Approach’ (2019) 17:1 *Action Research* 87 at 89–90.

27. Thew, Middlemiss and Paavola (n 4) 3.

28. See O’Brien, Selboe and Hayward (n 13). See also Lio and Literat (n 11); Nairn (n 12).

29. See N Rogers, ‘Victim, Litigant, Activist, Messiah: The Child in Time of Climate Change’ (2020) 11 *Journal of Human Rights and the Environment* 103; M Warren, ‘Thousands of Scientists are Backing the Kids Striking for Climate Change’ (2019) 567(7748) *Nature* 291–293; H Han and S Wuk Ahn, ‘Youth Mobilization to Stop Global Climate Change: Narratives and Impact’ (2020) 12:10 *Sustainability* 4127; S Nissen, JHK Wong and S Carlton, ‘Children and Young People’s Climate Crisis Activism – a Perspective on Long-Term Effects’ (2020) *Children’s Geographies* 1.

30. Han and Wuk Ahn (n 29).

31. O’Brien, Selboe and Hayward (n 13) 40–41.

dissent characterizes non-confrontational efforts, such as work in non-profit organizations or policymaking environments. Such dissent is often expressed through ‘joining’ activities that support existing and emerging institutions and social norms to promote incremental changes. Typically, this form of dissent does not challenge the status quo. According to the authors, membership in mainstream environmental and political organizations is the most common expression of dutiful dissent.³² On the other side of the spectrum, dangerous dissent characterizes political activism that is confrontational and defies business as usual by advocating for and initiating large-scale transformations to the economy and status quo, outside of the dominant capitalist paradigm. This includes a wide spectrum of ideas, discourses and practices, particularly focused on anti-consumerist philosophy and wealth redistribution. Examples include the degrowth and just transition movements.³³

Finally, disruptive dissent is a type of dissent that fits somewhere in the middle. It characterizes youth efforts that seek to *transform* norms, rules, regulations and institutions *within* existing political and economic structures. This typically involves activism that calls for more ambitious climate targets, opposes polluting projects, and often demands more transparency in climate policies to achieve such targets. Unlike dangerous dissent, disruptive dissent seeks to amplify ambition or halt polluting activities within today’s dominant liberal paradigm. O’Brien, Selboe and Hayward also identify disruptive dissent as questioning the ‘script’ of hegemonic powers and institutions, as well as the actors who perpetuate them in their own interest.³⁴ As such, we conceive of youth climate litigation as a form of disruptive dissent.

Of course, it might appear strange to refer to litigation as a form of dissent because it is often understood as a fundamentally conservative process that favours the status quo and the wealthy.³⁵ Children and youth face numerous barriers when they engage with the legal system, due to a lack of knowledge, capacity and resources,³⁶ or due to the reluctance of courts and lawyers to value their contributions to judicial proceedings.³⁷ It is quite possible that many youth climate cases may be thwarted by the very same barriers and inequities that have excluded young people from the political and economic processes that have supported carbon-intensive economic activities and hampered efforts to transition to a low-carbon world.

At the same time, it has been argued that climate change is an inherently disruptive problem that requires significant changes in how existing legal doctrines and frameworks are interpreted and applied.³⁸ Several scholars view climate litigation, especially when it relies on human rights, as having the potential to serve as a vehicle for challenging the legal, social and political norms that have engendered the climate

32. *ibid* 41.

33. *ibid* 42.

34. *ibid* 41.

35. M Galanter, ‘Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change’ (1974) 9 *Law & Society Review* 95; G Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (University of Chicago Press 1991); A-M Marshall, ‘Environmental Justice and Grassroots Legal Action’ (2010) 3 *Environmental Justice* 147.

36. S Sanz-Caballero, ‘Children’s Rights in a Changing Climate: A Perspective from the United Nations Convention on the Rights of the Child’ (2013) 13 *Ethics Sci Environ Polit* 9.

37. See generally, J King, J Wattam and C Blackstock, ‘Reconciliation: The Kids Are Here! Child Participation and the Canadian Human Rights Tribunal on First Nations Child Welfare’ (2016) 3 *Canadian Journal of Children’s Rights* 31.

38. E Fisher, E Scotford and E Barritt, ‘The Legally Disruptive Nature of Climate Change’ (2017) 80 *Modern Law Review* 173.

crisis and for transforming how we understand and address climate change.³⁹ By articulating new legal doctrines and principles for tackling the ways in which governments address the climate crisis, youth-focused climate litigation has the potential to yield transformative legal, social, economic and environmental change. To be sure, as we discuss below, some cases advance more legally disruptive arguments than others. Nonetheless, the broader transformative potential of youth-focused climate litigation should not be underestimated, even in cases that engage with, rather than seek to completely displace, prevailing constitutional and international legal norms. In a context where states have failed to respect their obligations and abide by their own laws, we contend that litigation seeking to enforce existing laws can nonetheless be considered disruptive, if not to the legal system, then to the political economy underlying climate inaction and carbon intensive economies.

3 YOUTH-FOCUSED CLIMATE LITIGATION AS A VEHICLE FOR DISRUPTIVE DISSENT

Young people have been at the heart of some of the most visible rights-based climate cases across the world. As summarized in Table 1, the plaintiffs in these cases have alleged that the failure of governments to combat climate change has violated their rights to life, security, liberty, privacy, a healthy environment, equality, and to freedom from discrimination under domestic and international law. Although these cases are all founded on the notion that the constitutional or human rights of youth and children are threatened by climate change, they differ in terms of their focus, the legal arguments that they advance and the types of remedies sought.

Our review of these cases revealed three overarching categories of youth-focused rights-based cases against government actors. These are cases that challenge: (1) insufficient efforts to reduce carbon emissions and meet climate commitments; (2) insufficient efforts to implement mitigation and adaptation measures; and (3) specific regulatory approvals that are expected to have dramatic climate impacts. We elaborate on each of these categories below.

3.1 Cases on insufficient efforts to reduce carbon emissions and meet climate commitments

A first category of cases argues that insufficient efforts to reduce carbon emissions constitute a violation of the fundamental rights of children and youth. Two subsets of claims emerge in this category. The first invokes the public trust doctrine and advances a transformative claim to a stable climate as a critical component of the fundamental rights and freedoms of young people.⁴⁰ As Blumm and Wood posit, ‘the public trust doctrine presents a fundamental-rights framework for articulating climate

39. G Nosek, ‘Climate Change Litigation and Narrative: How to Use Litigation to Tell Compelling Climate Stories’ (2018) 42 William & Mary Environmental Law and Policy Review 3; J Setzer and L Benjamin, ‘Climate Litigation in the Global South: Constraints and Innovations’ (2019) Transnational Environmental Law; A Savaresi and J Auz, ‘Climate Change Litigation and Human Rights: Pushing the Boundaries’ (2019) 9 Climate Law 244.

40. Such cases include *Rabab Ali v Federation of Pakistan*; *Juliana v United States*; *Nisi Mbabazi et al. v AG*; *Ridhima Pandey v Union of India & Ors*; *CRC Communication Sacchi et al. v Argentina et al.*; and *Sinnok v Alaska*.

Table 1 List of youth-focused climate litigation cases and the types of rights invoked

| Domestic Cases | Jurisdiction | Year of Filing | Rights Invoked |
|--------------------------------|---------------------|-----------------------|---|
| <i>Chermaik v Brown</i> | United States | 2011 | Constitutional rights to life, liberty and property; stable climate; personal security, bodily integrity, autonomy. Public trust doctrine. |
| <i>Alec L. v McCarthy</i> | United States | 2011 | Constitutional rights to life, liberty and property; stable climate; personal security, bodily integrity, autonomy. Public trust doctrine. |
| <i>Kanuk v Alaska</i> | United States | 2011 | Constitutional rights to life, liberty and property; stable climate; personal security, bodily integrity, autonomy. Public trust doctrine. |
| <i>Sanders-Reed v Martinez</i> | United States | 2011 | Constitutional rights to life, liberty and property; stable climate; personal security, bodily integrity, autonomy. Public trust doctrine. |
| <i>Barhaugh v Montana</i> | United States | 2011 | Constitutional rights to life, liberty and property; stable climate; personal security, bodily integrity, autonomy. Public trust doctrine. |
| <i>Blades v California</i> | United States | 2011 | Constitutional rights to life, liberty and property; stable climate; personal security, bodily integrity, autonomy. Public trust doctrine. |
| <i>Aronow v Minnesota</i> | United States | 2011 | Constitutional rights to life, liberty and property; stable climate; personal security, bodily integrity, autonomy. Public trust doctrine. |
| <i>Svitak v Washington</i> | United States | 2011 | Constitutional rights to life, liberty and property; stable climate; personal security, bodily integrity, autonomy. Public trust doctrine. |
| <i>Farb v Kansas</i> | United States | 2012 | Constitutional rights to life, liberty and property; stable climate; personal security, bodily integrity, autonomy. Public trust doctrine. |

(continued)

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|--|---------------|------|---|
| <i>Nisi Mbabazi et al. v AG</i> | Uganda | 2012 | Constitutional right to a clean, healthy environment. Public trust doctrine. |
| <i>Juliana v United States</i> | United States | 2015 | Constitutional rights to life, liberty and property; rights to equality. Public trust doctrine. |
| <i>Rabab Ali v Federation of Pakistan</i> | Pakistan | 2016 | Constitutional rights to life, security, information, property, equality, inviolability of dignity. |
| <i>PUSH Sverige, Fältbiologerna och andra v Sverige regering</i> | Sweden | 2016 | Rights to life, health, respect for private and family life under the <i>European Convention on Human Rights</i> . |
| <i>Greenpeace Nordic Ass'n and Nature and Youth v Ministry of Petroleum and Energy</i> | Norway | 2016 | Constitutional right to an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained. |
| <i>Ridhima Pandey v Union of India & Ors</i> | India | 2017 | Constitutional right to life. |
| <i>Clean Air Council v United States</i> | United States | 2017 | Constitutional rights to life, liberty and property; stable climate; personal security, bodily integrity, autonomy. |
| <i>Sinnok v Alaska</i> | United States | 2017 | Constitutional rights to life, liberty and property; stable climate; personal security, bodily integrity, autonomy. Public trust doctrine. |
| <i>Demanda Generaciones Futuras v Minambiente</i> | Colombia | 2018 | Constitutional rights to a healthy environment, life, health, food, water. |
| <i>ENvironnement JEUnesse v Procureur General du Canada</i> | Canada | 2018 | Constitutional rights to life, liberty, security and equality; as well as the province of Quebec's right to a healthy environment. |
| <i>Reynolds v Florida</i> | United States | 2018 | Constitutional rights to life, liberty and property. Public trust doctrine. |
| <i>Aji P. v State of Washington</i> | United States | 2018 | Constitutional rights to life, liberty and property. Public trust doctrine. |
| <i>CRC Communication Sacchi et al. v Argentina et al.</i> | UNCRC | 2019 | Rights to life, health, and the prioritization of the child's best interest, as well as the cultural rights of petitioners from indigenous communities. |
| <i>La Rose v Her Majesty the Queen</i> | Canada | 2019 | Constitutional rights to life, liberty and security, as well as equality. Public trust doctrine. |
| <i>Mathur et al. v Her Majesty the Queen in Right of Ontario</i> | Canada | 2019 | Constitutional rights to life, liberty and security, as well as equality. |

(continued)

Table 1 List of youth-focused climate litigation cases and the types of rights invoked (Continued)

| Domestic Cases | Jurisdiction | Year of Filing | Rights Invoked |
|--|---------------|----------------|---|
| <i>Álvarez et al. v Peru</i> | Peru | 2019 | Constitutional rights to life and to enjoy a healthy environment; rights to health and water. |
| <i>Kim Yujin et al. v South Korea</i> | South Korea | 2020 | Constitutional rights to life, equality and to live in a healthy and pleasant environment. |
| <i>Neubauer et al. v Germany</i> | Germany | 2020 | Constitutional rights to human dignity, life, physical integrity and property; right to the free choice and practice of an occupation or profession. |
| <i>Held v State</i> | United States | 2020 | Right to a clean and healthful environment and to a stable climate system; right to seek safety, health and happiness; and rights to individual dignity and equal protection. |
| <i>Duarte Agostinho and Others v Portugal and 32 Other States (Youth for Climate Justice v Austria et al.)</i> | ECHR | 2020 | Public trust doctrine. Rights to life, privacy and to not experience discrimination. |
| <i>Youth v Government of Mexico</i> | Mexico | 2020 | Constitutional rights to a healthy environment and compliance with the General Law on Climate Change. |
| <i>Youth Verdict v Waratah Coal</i> | Australia | 2020 | Right to life, culture and the protection of children under the <i>Queenstand Human Rights Act</i> . |
| <i>Six Youths v Minister of Environment and Others</i> | Brazil | 2021 | Constitutional right to an ecologically balanced environment. |

obligations that transcend jurisdictions across the planet'.⁴¹ This long-standing doctrine holds that certain natural resources are part of a trust owned by and available to all citizens equally. Governments, as trustees, owe fiduciary duties to present and future generations, including the obligation to preserve and restore common resources.⁴² Claimants today seek to extend and apply the concept of public trust to the atmosphere because of its importance to the stability of every natural system.⁴³

Juliana v United States is perhaps the best-known case in this wave of 'atmospheric trust litigation'.⁴⁴ The 21 youth plaintiffs in *Juliana* asserted that the government's fossil fuel policies infringed on their due process rights to life, liberty and property, and were contrary to the government's fiduciary duties under the public trust doctrine.⁴⁵ As a remedy, the plaintiffs requested an injunction enjoining the government to cease permitting and subsidising fossil fuel and sought the articulation of a plan to drastically reduce emissions. Similar cases have been launched in India, Pakistan and Uganda.⁴⁶ In *Mbabazi and Others v The Attorney General and National Environmental Management Authority* for instance, the plaintiffs invoke Article 237 of the Ugandan Constitution, which states that 'the government or a local government as determined by Parliament by law shall hold in trust for the people and protect natural lakes, rivers, wetlands, forest reserves, game reserves, national parks and any land to be reserved for ecological and touristic purposes for the common good of all citizens'.⁴⁷ Pointing to multiple instances of damage caused by extreme weather events, including some that have led to the loss of children's lives, the plaintiffs claim that the government has violated its public trust duty to preserve natural resources. They seek relief in the form of a declaration that the government is violating its constitutional obligations, and several injunctions, including an order compelling the development of a comprehensive emissions mitigation plan.⁴⁸ Moreover, they seek an order directing the Minister responsible 'to take measures to protect the plaintiffs and the children of Uganda from effects of climate change and specifically extreme climatic conditions such as floods'.⁴⁹

Another set of cases challenges insufficient action to address climate change as a violation of fundamental human rights. In Germany, a group of teenagers and young adults initiated a legal challenge in 2019 that argued that the target included in

41. M Blumm and MC Wood, "'No Ordinary Lawsuit': Climate Change, Due Process, and the Public Trust Doctrine' (2017) 67:1 Am Univ Law Rev 1, 22.

42. VP Nanda and W Ris Jr, 'The Public Trust Doctrine: A Viable Approach to International Environmental Protection' (1975) 5 Ecology LQ 5 291.

43. See eg, *La Rose v Her Majesty the Queen*, 2020 FC 1008 at para 12(d); *Juliana v United States*, 217 F Supp 3d 1224 (D Or 2016).

44. See generally MC Wood and CW Woodward IV, 'Atmospheric Trust Litigation and the Constitutional Right to a Healthy Climate System: Judicial Recognition at Last' (2010) 6 Wash J Env't L & Pol'y 634; MC Wood, 'Atmospheric Trust Litigation Across the World' in K Coghill, C Sampford and T Smith (eds), *Fiduciary Duty and the Atmospheric Trust* (Routledge 2016) 109.

45. *Juliana v United States*, 947 F 3d 1159, 32 (9th Cir 2020) 2.

46. See *Pandey v India*, No 187/2017, Decision rendered by the Green Tribunal Principal Bench, New Delhi (15.01.2019); *Ali v Federation of Pakistan*, filed in January 2016 at the Supreme Court of Pakistan; *Mbabazi and Others v The Attorney General and National Environmental Management Authority*, Civil Suit No. 283 of 2012.

47. Constitution of the Republic of Uganda, 1995, art 237.

48. See *Mbabazi* (n 46).

49. *ibid*.

Germany's Federal Climate Change Act⁵⁰ was insufficient to ensure that global average increases in temperature would remain well below 2°C and, if possible, 1.5°C. The claimants alleged that the climate impacts associated with Germany's inadequate climate targets would violate the principle of human dignity enshrined in Article 1 of the German Constitution ('Grundgesetz' or 'Basic Law'), the right to life and physical integrity protected in Article 2, and the responsibility to protect the natural foundations of life for future generations. As a remedy, the claimants sought a declaration that the legislature was required to issue new emissions reductions targets and a prohibition on the transfer of emissions allocations between Germany and other EU countries in the new regulatory regime.⁵¹ In Canada, ENvironnement JEUnesse (ENJEU) initiated a class action lawsuit in 2019 before the Superior Court of Quebec on behalf of all Quebec citizens aged 35 and under against the Government of Canada for its failure to combat climate change. ENJEU argued that the Canadian government's decision to adopt climate targets that are likely to lead to global warming exceeding the two-degree threshold, and its repeated failures to meet these targets, are 'grossly inadequate, irresponsible, negligent and wrongful'.⁵² By failing to put in place the necessary measures to limit global warming, ENJEU alleged that Canada had breached the fundamental rights of Québécois youth, including their rights to life and security under section 7 of the Canadian Charter of Rights and Freedoms and section 1 of the Quebec Charter of Rights and Freedoms; their right to live in a healthful environment in which biodiversity is preserved under section 46.1 of the Quebec Charter; and their right to equality under section 15 of the Canadian Charter and section 10 of the Quebec Charter.⁵³ Similar cases have been launched in Canada,⁵⁴ South Korea,⁵⁵ Peru⁵⁶ and Brazil.⁵⁷

Claims of this type have also been made at the international level. In *Youth for Climate Justice v Austria et al.*, six Portuguese youth filed a complaint with the European Court of Human Rights against 33 Council of Europe Contracting States for failing to take sufficient action on climate change.⁵⁸ Similarly, in *Sacchi et al. v Argentina et al.* (2019), a complaint filed under the Convention on the Rights of the Child (CRC), 16 petitioners claimed that climate change had led to violations of their rights to life and health, as well as asserting the need for the prioritization of the child's best interest

50. Federal Climate Change Act of 12 December 2019 (Federal Law Gazette I, p. 2513), as last amended by Article 1 of the Act of 18 August 2021 (Federal Law Gazette I, p. 3905) [Federal Climate Change Act].

51. *Neubauer et al. v Germany*, Federal Constitutional Court, 2021.

52. *ENvironnement JEUnesse v Procureur général du Canada*, 2019 QCCS 2885, rev'd 2021 QCCA 1871, para 13 [translation produced by the authors].

53. *ibid.*

54. *La Rose* (n 43).

55. *Do-Hyun Kim et al. v South Korea*, filed March 13, 2020 in the Constitutional Court of the Republic of Korea [English translation of complaint], alleging that the nation's climate change law violates the plaintiffs' fundamental rights, including the right to live and a clean environment.

56. See *Álvarez et al. v Peru*, filed in December 2019, alleging that the government has taken insufficient action to address climate change because it failed to adequately halt deforestation in the Amazon rainforest.

57. *Six Youths v Minister of Environment and Others*, filed before the 14e Vara Cível Federal de São Paulo, Brazil, April 2021.

58. *Youth for Climate Justice v Austria et al.*, Application no 39371/20/. See also the article by Hartmann and Willers in this special issue.

and the cultural rights of Indigenous communities. The claim is against Argentina, Brazil, France, Germany and Turkey for not taking sufficient action to curb emissions.⁵⁹ Remedies sought include a declaration that climate change is a children's rights crisis and that each of the respondent nations is 'recklessly perpetuating life-threatening climate change', as well as a recommendation that respondents should cooperate internationally to establish 'binding and enforceable measures to mitigate the climate crisis, prevent further harm to the petitioners and other children, and secure their inalienable rights'. In addition, the petitioners seek a recommendation that pursuant to Article 12 of the CRC, the respondent States 'shall ensure the child's right to be heard and to express their views freely, in all international, national, and subnational efforts to mitigate or adapt to the climate crisis and in all efforts taken in response to this Communication'.⁶⁰

3.2 Cases on insufficient efforts to implement mitigation and adaptation policies

A second category of youth-focused climate litigation cases, identified as the most common type of case in the Global South, relates to efforts by individuals and NGOs to compel their governments to implement and enforce existing policies for mitigation and adaptation.⁶¹ For example, the plaintiffs in *Demanda Generaciones Futuras v Minambiente* brought an *acción de tutela*⁶² against the Colombian state to force compliance with the Paris Agreement and Colombia's domestic commitment to reduce the deforestation rate to zero in the Colombian Amazon by 2020.⁶³ Plaintiffs argued that continued deforestation threatened, among other things, the plaintiffs' constitutionally protected right to enjoy a healthy environment and their rights to life and health. Seven young plaintiffs have taken a similar approach in *Álvarez et al. v Peru*. This complaint alleges that the Peruvian government's failure to curb deforestation compromises the young plaintiffs' rights to enjoy a healthy environment, as well as their rights to life, health and water.⁶⁴ Relief sought includes an order to incorporate concrete objectives for the reduction of deforestation in national policies and the elaboration of action plans for the reduction of deforestation, alongside the allocation of sufficient human, logistical and financial resources to implement these plans at the regional level.⁶⁵ Finally, in a case brought in Mexico, youth plaintiffs seek to compel their government to taking stronger climate action through the judicial review of the General Law on Climate Change, which sets the country's

59. *Sacchi et al. v Argentina et al.*, filed under the *Convention on the Rights of the Child* (23 September 2019).

60. *ibid* paras 325–31.

61. J Peel and J Lin, 'Transnational Climate Litigation: The Contribution of the Global South' (2019) 113(4) *Am J Int Law* 679, 685.

62. It is a special summary procedure codified under Article 86 of the Colombian Constitution to protect fundamental rights. This action can only be used 'as a temporary device to avoid irreversible harm' (S Lalian, 'Classifying Systems of Constitutional Review: A Context-Specific Analysis' (2020) 5 *Indiana J Constitutional Design* 1, 14–15. See also the article by Auz in this special issue).

63. *Demanda Generaciones Futuras v Minambiente*, STC4360-2018 (Corte Suprema de Justicia, Colombia) 2.

64. *Álvarez et al. v Peru* (n 56).

65. *ibid* paras 5(a) and (b).

reductions targets.⁶⁶ Although the law was passed in 2012, no regulations have been passed to allow for its implementation.⁶⁷

3.3 Cases on the judicial review of regulatory approvals

A third category of cases entails the judicial review of specific regulatory approvals of carbon-intensive activities or exploration activities that are likely to lead to such activities further down the line. In *Greenpeace Nordic Ass'n and Nature and Youth v Ministry of Petroleum and Energy*, the plaintiffs challenged the constitutionality of the Norwegian government's decision to issue a number of exploration licences for oil drilling in the Barents Sea. They alleged that this decision violated the government's international commitments under the Paris Agreement and Article 112 of the Norwegian Constitution, which codifies the right to a healthy, productive and diverse environment for the benefit of both present and future generations.⁶⁸ Similarly, the plaintiffs in *PUSH Sverige, Fältbiologerna och andra v Sverige regering* challenged the Swedish government's approval of the sale of a state-owned company's lignite operations to a Czech energy company expected to expand unsustainable mining and burning activities.⁶⁹ They alleged that the sale breached the government's duty of care to protect its citizens from the harmful effects of climate change, based on Sweden's Constitution, the European Convention on Human Rights and other international commitments.⁷⁰ Another noteworthy example of such claims is the recent complaint filed by Australian youth plaintiffs in *Youth Verdict v Waratah Coal*, which opposes the government's approval of a coal mining project.⁷¹ Remedies sought in these cases tend to focus on preventing or reversing the approval of the carbon intensive activities.

3.4 Lessons learned

We argue that all three types of youth-focused cases can be seen as examples of disruptive dissent, through which young people aim to transform the prevailing norms and structures that have generated the climate crisis.⁷² While the cases on insufficient efforts to reduce carbon emissions challenge the fundamental norms governing decisions relating to the climate, the second set of cases on the insufficient implementation

66. In 2012, the country adopted the General Law on Climate Change, and a decree in 2018 brought its domestic emission reduction targets in line with the Paris Agreement on climate change.

67. See *Youth v Government of Mexico*, filed in September 2020 at the District Court in Administrative Matters.

68. *Greenpeace Nordic Association and Nature and Youth v The Government of Norway*, 23 January 2020 (Borgarting Court of Appeal, Norway).

69. *PUSH Sverige, Fältbiologerna och andra v Sverige regering*, complaint filed 15 December 2016, para 73.

70. *ibid*, paras 87–110.

71. H Asten and A Crockett, 'Queensland Case to Focus on the Human Rights Implications of Climate Change' Herbert Smith Freehills (19 May 2020) <<https://hsfnotes.com/environment-australia/2020/05/19/queensland-case-to-focus-on-the-human-rights-implications-of-climate-change/#more-665>> accessed 9 November 2021.

72. N Levy, 'Juliana and the Political Generativity of Climate Litigation' (2019) 43 *Harvard Environmental Law Review* 479.

of adaptation and mitigation policies seeks to hold governments accountable to the laws they have passed. Similarly, the judicial review of the governmental approval of carbon intensive economic activities challenges the status quo, especially in countries with highly carbonized political and economic systems, and ultimately aims to contribute to their decarbonization.⁷³

More broadly, to the extent that climate litigation is initiated and led in a participatory manner,⁷⁴ we argue that youth-focused climate cases have the potential – inside and outside the courtroom – to address the lack of agency of young people in climate policymaking. For one thing, these cases position the voices and rights of youth as being central to climate governance, thus reflecting the notion that ‘children’s lives are already fully human lives and not merely lives-in-waiting for adulthood’.⁷⁵ The inclusion of the child’s right to be heard and to express their views freely in connection with climate mitigation and adaptation measures amongst the remedies sought by the child plaintiffs in *Sacchi et al. v Argentina et al.* demonstrates, for example, how litigation can be utilized directly to address this lack of agency by leveraging the formal court process.

These youth-focused climate cases have thus produced a shared narrative of intergenerational equity that has the potential to affect the broader social and political order. These cases highlight the need for legal norms to be adjusted to match the reality of the climate crisis by including future generations and future climate harm within the scope of fundamental rights.⁷⁶ Indeed, many climate cases involving children and youth have invoked constitutional rights protection in combination with the principles of intergenerational equity. This was most explicit in *Demanda Generaciones Futuras v Minambiente*, where the plaintiffs requested as a remedy that the Colombian Supreme Court should order the crafting of an intergenerational pact to halt deforestation in the Amazon.⁷⁷ Similarly, in *Neubauer et al. v Germany*, the plaintiffs specifically argued that the climate crisis and insufficient efforts to combat it imposed a disproportionate burden on future generations.⁷⁸ These cases demonstrate that the rights of future generations are intrinsically linked to today’s youth because youth understand more than any group that decisions today shape the well-being of generations tomorrow. In turn, the publicity generated by these lawsuits and by judgments in successful cases can raise awareness of the impacts and urgency of climate change in the communities in which they are filed and beyond.

Powerfully, several youth-focused climate cases have relied on storytelling to connect climate science to personalized injuries. One of those cases is *Juliana*, with the complaint detailing the experiences of each youth plaintiff in order to show the impacts of climate change on their daily lives. The story of plaintiff Sahara, for instance, is documented in the complaint as follows:

73. GC Unruh, ‘Understanding Carbon Lock-In’ (2000) 28 *Energy Policy* 817; S Bernstein and M Hoffmann, ‘The Politics of Decarbonization and the Catalytic Impact of Subnational Climate Experiments’ (2018) *Policy Sciences*.

74. A-M Marshall, ‘Social Movement Strategies and the Participatory Potential of Litigation’ in A Sarat and SA Scheingold (eds), *Cause Lawyers and Social Movements* (Stanford Law and Politics 2006).

75. MC Benwell and P Hopkins, *Children, Young People and Critical Geopolitics* (1st edn, Routledge 2016) 2.

76. P Paiement, ‘Urgenda Agenda: How Climate Litigation Builds Transnational Narratives’ (2020) 11 *Transnational Legal Theory* 121, 140–41.

77. Slobodian (n 19) 578–9.

78. *Neubauer et al. v Germany* (n 51).

Sahara has asthma, and the increased frequency of forest fires in Oregon, due to hotter and drier conditions, has triggered severe asthma attacks for Sahara. The smoke inhibits her ability to breathe, causes her throat to close up, and necessitates the use of her inhaler. As a result of the Defendants' actions in causing climate change, Sahara has become more susceptible to grass allergies, further aggravating her asthma. These health effects will worsen as climate change becomes more severe. Warmer winters and the lack of snow in Oregon have prevented Sahara's enjoyment of winter activities and will negatively impact her water supply in the future. Sahara wants to stay in Oregon, yet she fears her children and grandchildren will be unable to experience and enjoy Oregon's natural resources and wildlife.⁷⁹

This ability to attach such intimate meaning to the climate debate is an important contribution from children and youth. There is an increased emphasis on the stories of the injuries that today's young people are already experiencing (and are set to face) in the context of climate change. Such developments humanize the consequences of climate change and can allow claimants to leverage youth experiences to bring the problem closer to individuals in the eyes of the courts and of policymakers. Tessa Khan, former co-director of the Climate Litigation Network, which aims to support legal efforts as a tool to increase national emission reductions across the world, states that '[l]itigation that is driven by those most affected has personalized abstract injustices, put facts on the public record, and exposed misinformation and political spin'.⁸⁰ This personalization is important because the technical and scientific aspects of climate change and the 'global' framings of environment 'detach knowledge from meaning'. This detachment is said to create 'a sense of public alienation'.⁸¹

4 THE JUDICIAL OUTCOMES ASSOCIATED WITH YOUTH-FOCUSED CLIMATE LITIGATION

In this section, we review judicial responses to youth-focused rights-based cases. Our analysis revealed that the majority of cases were dismissed at a procedural stage before they were heard on the merits. Indeed, of the 23 cases where a first instance decision was rendered, 20 were dismissed at a preliminary stage, although appeals of these decisions are ongoing in some jurisdictions (see Table 2).⁸²

There are two key cases that stand out as apparent victories for youth-led climate justice at this stage. In *Demanda Generaciones*, youth plaintiffs alleged that the government's failure to reduce deforestation and ensure compliance with a target for zero-net deforestation in the Colombian Amazon by the year 2020, as agreed under the Paris Agreement and the National Development Plan 2014–2018, threatens their constitutional rights. The Court recognized that 'fundamental rights of life, health, and human dignity are substantially linked and determined by the environment and the ecosystem'.⁸³ Additionally, the Colombian Supreme Court sided with the plaintiffs and declared the Amazon to be a 'subject of rights' and its conservation to be a

79. See *Juliana* complaint, filed 15 August 2015, para 46.

80. Paiement (n 76) 121–2.

81. Trajber et al. (n 26) 89.

82. This number includes all of the US cases, except for *Held v State* which is ongoing (political questions doctrine and lack of redressability), *PUSH Sverige* (no valid injury), *La Rose* (no cause of action, too political), *Ridhima Pandey* (no cause of action) and *Greenpeace Nordic Ass'n* (no cause of action).

83. *Demanda Generaciones Futuras v Minambiente* (n 63) 13.

Table 2 The outcomes associated with youth-focused rights-based climate litigation

| | |
|---|---|
| Cases with positive outcomes on the merits (2) | <i>Demanda Generaciones Futuras v Minambiente Neubauer et al. v Germany</i> |
| Cases with negative outcomes on the merits (1) | <i>Greenpeace Nordic Association and Nature and Youth v The Government of Norway</i> |
| Cases dismissed for lack of justiciability and/or standing (20) | <i>Chernaik v Brown</i> <i>Alec L. v McCarthy</i> <i>Kanuk v Alaska</i> <i>Sanders-Reed v Martinez</i> <i>Barhaugh v Montana</i> <i>Blades v California</i> <i>Aronow v Minnesota</i> <i>Svitak v Washington</i> <i>Farb v Kansas</i> <i>Juliana v United States</i> <i>PUSH Sverige, Fältbiologerna och andra v Sverige regering</i> <i>Ridhima Pandey v Union of India & Ors</i> <i>Clean Air Council v United States</i> <i>Sinnok v Alaska</i> <i>Reynolds v Florida</i> <i>Aji P. v State of Washington</i> <i>La Rose v Her Majesty the Queen</i> <i>CRC Communication Sacchi et al. v Argentina et al.</i> <i>ENvironnement JEUnesse v Procureur General du Canada</i> <i>Six Youths v Minister of Environment and Others</i> |
| Cases that have not been dismissed for a lack of justiciability and are expected to proceed on the merits (8) | <i>Rabab Ali v Federation of Pakistan</i> <i>Mathur et al. v Her Majesty the Queen in Right of Ontario</i> <i>Álvarez et al. v Peru</i> <i>Kim Yujin et al. v South Korea</i> <i>Held v State</i> <i>Youth for Climate Justice v Austria et al.</i> <i>Youth v Government of Mexico</i> <i>Youth Verdict v Waratah Coal</i> |
| Cases that were settled out of court (1) | <i>Nisi Mbabazi et al. v AG</i> |

national and global obligation.⁸⁴ However, the success of this case is somewhat tainted by the Colombian government's failure to execute the Court's orders promptly and effectively. The non-profit organization *Dejusticia* denounces this inaction and the continued increase of the deforestation rate in Colombia.⁸⁵ A more recent positive

84. *ibid* paras 32, 45.

85. See SA Sierra, 'The Colombian Government has Failed to Fulfill the Supreme Court's Landmark Order to PROTECT the Amazon' (5 April 2019), online: *Dejusticia* <<https://www.dejusticia.org/en/the-colombian-government-has-failed-to-fulfill-the-supreme-courts-landmark-order-to-protect-the-amazon/>> accessed 9 November 2021.

outcome is *Neubauer et al. v Germany*. In this case, the Court struck down parts of the German Federal Climate Change Act as incompatible with the young plaintiffs' constitutional rights and argued that its targets unfairly offloaded significant emission reduction burdens onto future generations.⁸⁶ The Court ordered the legislature to set clear provisions for reduction targets from 2031 onwards by the end of 2022. Shortly after the decision, it was reported that the German government had announced that it would move quickly to adjust its climate law in response to the decision.⁸⁷

Apart from these two cases, the only other case heard on the merits is the youth-led constitutional challenge to Norway's grant of exploration and development licences for oil drilling in the Barents Sea. Based on a restrictive interpretation of Article 112 of Norway's Constitution,⁸⁸ the Norwegian Supreme Court recently upheld the constitutional validity of the government's decision. The Court ruled that the article did not grant individual actionable rights but constituted a 'guideline' for legislative work and prescribed certain governmental duties to protect and preserve the environment. It held that the threshold for finding a breach of the government's duties is high, since courts should generally defer to popularly elected bodies to make complex policy decisions respecting fundamental environmental issues.⁸⁹ The Court thus reasoned that the government would only violate its constitutional obligations if it grossly disregarded its duties to preserve the environment and manage natural resources.⁹⁰

The rest of the cases that have had a first instance decision rendered have been dismissed at a preliminary stage due to a lack of justiciability and standing, though it should be noted that several of these dismissals have been appealed. A number of the dismissals acknowledge claims made by youth plaintiffs. For example, in a pre-trial order in *Juliana*, the District Court of Oregon held that the plaintiffs' public trust claim was receivable and that 'the right to a climate system capable of sustaining human life is fundamental to a free and ordered society'.⁹¹ These findings were not overturned by the Court of Appeals' subsequent decision to dismiss the case for lack of standing.⁹²

4.1 Justiciability of rights-based climate litigation

While the precise requirements and terms that govern the admissibility of public interest litigation differ across jurisdictions, a primary obstacle facing youth-focused

86. See Federal Climate Change Act (n 50); see also Bundesverfassungsgericht, 'Constitutional Complaints against the Federal Climate Change Act Partially Successful' (2021) <<https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2021/bvg21-031.html>> accessed 18 May 2021.

87. See eg, 'Germany Pledges to Adjust Climate Law after Court Verdict', AP News (30 April 2021).

88. Article 112 of the Norwegian Constitution states: 'Every person has the right to an environment that is conducive to health and to a natural environment whereby productivity and diversity are maintained. Natural resources shall be managed on the basis of comprehensive long-term considerations, which will safeguard this right for future generations as well. ... The authorities of the state shall take measures for the implementation of these principles.'

89. *Greenpeace Nordic Association and Nature and Youth v The Government of Norway*, HR-2020-2472-P, 22 December 2020 (Supreme Court of Norway), paras 141–5.

90. *Greenpeace Nordic Association and Nature and Youth v The Government of Norway* (n 89) paras 138–45.

91. *Juliana et al. v United States*, US District Court Oregon, 2016, para 32.

92. *Juliana v United States*, 947 F 3d 1159, 32 (9th Cir 2020).

climate cases is that of justiciability. We understand justiciability broadly as ‘a set of judge-made rules, norms and principles delineating the scope of judicial intervention in social, political and economic life’.⁹³ Although the concept of justiciability differs across jurisdictions, there are two broad reasons given for finding climate litigation claims non-justiciable: first, that there is no valid cause of action; and second, that it is *not legitimate* for courts to intrude into the sphere of social and economic policy because they *lack the capacity* to properly adjudicate and enforce social and economic rights.⁹⁴ We explore both of these reasons in more detail below.

4.1.1 *Valid cause of action*

As explored in Section 3 of this article, climate litigation cases invoke a broad range of different causes of action. While some cases allege breaches of the public trust doctrine, others challenge specific actions or breaches of domestic and international laws on the part of governments. Others take a broader approach in challenging governments’ policy on climate change as a whole. All cases allege differing degrees of human rights violations due to inadequate or insufficient government action on climate change.

Some children’s rights cases have been dismissed for being overbroad. In *La Rose* the claim was found to be non-justiciable since it alleged ‘an overly broad and unquantifiable number of actions and inactions on the part of the Defendants’.⁹⁵ Ultimately, it was found that the claims did not involve a reasonable cause of action because they pointed to broad and diffuse government conduct and did not identify a particular law that burdens youth. Soon after, another case in Canada (*Mathur*) involved a similar claim, but on a much smaller scale. In that case, the Ontario Superior Court rejected the government’s motion to dismiss, holding that

93. See L Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada* (Thomson Reuters Canada Limited 2012) at 2. According to Sossin, ‘if a subject-matter is held to be suitable for judicial determination, it is said to be justiciable; if a subject-matter is held not to be suitable for judicial determination, it is said to be non-justiciable’. Historically, the justiciability doctrine has had the effect of impeding the adjudication of broad and systemic claims involving economic and social rights. Children’s rights cases are no different. Indeed, the debate about whether social and economic rights can or should be adjudicated and enforced by courts or other bodies has been ongoing since the 1960s, when the rights in the Universal Declaration of Human Rights were divided into two categories: ‘economic, social and cultural rights’ and ‘civil and political rights’. Though both sets of rights were affirmed to be indivisible and interdependent in the *Vienna Declaration* (12 July 1993, A/CONF.157/23), commentators have continued to distinguish them by asserting that economic, social and cultural rights are not justiciable. See A Nolan, B Porter and M Langford, ‘The Justiciability of Social and Economic Rights: An Updated Appraisal’ (2009) CHRGI Working Paper No. 15.

94. Nolan, Porter and Langford (n 93). See also A Sen, *Development as Freedom* (Knopf, New York 1999) 8. See also A Semple, ‘Justiciability, Doctrine and Deference: Political Questions Before the U.S. Supreme Court and Private Applicant Standing Before the European Court of Justice’ (2007) Public Procurement Analysis, which discusses justiciability in the United States and its political questions doctrine, as well as standing requirements under European jurisprudence. See also M Langford, ‘The Justiciability of Social Rights: From Practice to Theory’ (2008) 3 Social Rights Jurisprudence: Emerging Trends in International and Comparative Law 43.

95. *La Rose* (n 43) para 40.

the plaintiffs presented a reasonable cause of action at this stage.⁹⁶ The Court held that both the GHG reduction target and the repeal of a provincial climate change Act were reviewable by the court for their compliance with the *Canadian Charter*.⁹⁷

These different rulings suggest that more narrowly defined claims may be more successful in meeting justiciability requirements in some legal systems. However, an approach that scales down ambition in terms of both the substantive scope of the claim and of remedies sought may come at the price of reduced impact and/or inadequate redress for climate harm suffered.⁹⁸ On this issue, Chalifour has recently stated:

It is simply impractical and unjust for courts to require climate litigants to play ‘whack-a-mole’ in defending their constitutional rights, forcing them to challenge each major project approval or GHG-related decision separately. This approach risks grave injustices given the systemic nature of climate change, the considerable amount of time and resources required to mount a single challenge and the irreversibility of many of the harms at stake.⁹⁹

4.1.2 *Legitimacy and capacity*

Legitimacy and capacity are interrelated requirements for the justiciability of a claim.¹⁰⁰ Legitimacy concerns are intimately linked to the separation of powers and the general notion that certain matters are not justiciable due to their political nature. As Sossin writes, ‘[political questions] typically involve moral, strategic, ideological, historical or policy considerations that are not susceptible to resolution through adversarial presentation of evidence or the judicial process’.¹⁰¹ In such cases, it is conventionally argued that courts should be sensitive to their role as judicial arbiters and must avoid fashioning remedies that usurp the role of other branches of government.¹⁰²

These requirements have often thwarted the adjudication of climate litigation cases. In *La Rose* for example, as noted above, a Canadian Federal Court recently held that the youth plaintiffs’ claim was not justiciable because the court did not have the legitimacy or capacity to grant the remedies sought. The Court emphasized the need to take account of the separation of powers doctrine when determining remedies in climate change cases.¹⁰³ It went on to find that, based on this doctrine, it was unable to grant remedies that would effectively put an end to the alleged infringement of fundamental rights.¹⁰⁴

96. *Mathur v Ontario*, 2020 ONSC 6918, paras 140, 267.

97. *ibid.*

98. See also M Wewerinke-Singh, ‘Remedies for Human Rights Violations Caused by Climate Change’ (2019) 9 *Climate Law* 224.

99. N Chalifour, J Earle and L MacIntryre, ‘Detrimental Deference’, *The Canadian Bar Association* (18 Nov 2020).

100. Although the specific language of capacity and legitimacy is not used universally across all jurisdictions, the content of both concepts commonly fuels the doctrine across jurisdictions.

101. Sossin (n 93) 162.

102. *Doucet-Boudreau v Nova Scotia (Department of Education)* 2003 SCC 62 at paras 33–4, citing McLachlin J (as she then was) in *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 SCR 319, 389.

103. *La Rose* (n 43) para 54.

104. *ibid* para 52.

Similarly, in *Juliana* in the United States, the 9th Circuit Court focused heavily on the court's lack of capacity to adjudicate the claim and found that the claims brought by the plaintiffs were not amenable to judicial resolution. Although the plaintiffs argued that the requested relief would ameliorate their injuries to some extent, they conceded that their requested relief alone would not stop global climate change. Ultimately the Court ruled that 'it is beyond the power of ... [the] court to order, design, supervise, or implement the plaintiffs' requested remedial plan to decrease fossil fuel emissions and combat climate change. ... [N]ot every problem posing a threat – even a clear and present danger ... can be solved by federal judges'.¹⁰⁵

Scholars have criticized the imposition of rigid requirements around redressability. As Kassman points out, '[i]f this interpretation were the only one, then redressability would be a permanent hurdle to adjudicating climate change'.¹⁰⁶ To avoid this scenario, she advocates 'shifting away from literal redress, such as completely alleviating the plaintiff's injury, towards symbolic redress, such as requiring an agency to act in an appropriate way or follow its mandate' in order to overcome judicial reluctance to address climate change.¹⁰⁷

The majority in *Juliana* also held that ordering the Government to make a plan to 'phase out fossil fuel emissions and drag down excess atmospheric CO₂' was not within the Court's jurisdiction; in other words, it was not *legitimate* for the court to adjudicate. The majority held that such a decision should be made by 'the political branches or [by] the electorate at large, the latter of which can change the composition of the political branches through the ballot box'.¹⁰⁸ In a notable dissent however, Justice Staton criticized the majority's application of the political question doctrine, noting both the urgency associated with acting on climate change as well as the moral responsibility of states to curb emissions for which they are responsible:

The majority laments that it cannot step into the shoes of the political branches ... but appears ready to yield even if those branches walk the Nation over a cliff ... [P]ractical redressability is not measured by our ability to stop climate change in its tracks and immediately undo the injuries that plaintiffs suffer today – an admittedly tall order; it is instead measured by our ability to curb by some meaningful degree what the record shows to be an otherwise inevitable march to the point of no return.¹⁰⁹

The Quebec Superior Court made a similar finding in *ENvironnement JEUnesse*. Although the Court does not normally intervene in the exercise of executive power, it recognized that jurisdiction could not be declined on the basis of justiciability where a rights-based infringement is alleged.

While the Superior Court concluded that the questions raised by *ENvironnement JEUnesse* were justiciable at trial, the Quebec Court of Appeal recently overturned this decision.¹¹⁰ Despite this recent development, the debate around justiciability in Canada remains very much alive. As the plaintiffs in *Mathur et al.* pleaded, if all climate policy claims were non-justiciable, '[the government] could violate the Charter

105. *Juliana* (n 45).

106. E Kassman, 'How Local Courts Address Global Problems: The Case of Climate Change' (2013) 24 *Duke J Comp Int Law* 201, 232.

107. *ibid.*

108. *ibid* 32.

109. *Juliana* (n 45).

110. *ENvironnement JEUnesse* (n 52).

with impunity, provided that it repeals any specific legislation that may be constitutionally infirm and then (legislatively) bestows upon itself the power to act identically through policy'.¹¹¹

4.2 Standing

A handful of youth-focused climate cases have been dismissed for a lack of standing. Standing refers to the right of an individual or group of individuals to bring an action before a Court and to participate in the judicial proceeding. The requirements to establish it vary across jurisdictions.

In *PUSH Sweden*, for example, the claim was denied on this ground after the Stockholm District Court determined that the plaintiffs had not experienced an injury from the governmental decision to sell several coal-fired power plants to a company.¹¹² A series of cases led by Our Children's Trust in the United States have also been dismissed due to a lack of standing because courts found that they failed to allege specific, 'imminent or certain' harms. For example, the court in *Clean Air Council v United States* found that the injuries allegedly suffered by the youth plaintiffs could not be traced to the impugned regulatory rollbacks and that the injuries were not redressable by the court.¹¹³ *Ridhima Pandey v India* was dismissed on slightly different grounds amounting to lack of a valid cause of action: the National Green Tribunal of India reasoned that climate change concerns were considered in the impact assessments process under the Environment Protection Act, and that there was 'no reason to presume that the Paris Agreement and other international protocols are not reflected in the policies of the Government of India'.¹¹⁴ These dismissals are particularly concerning from the perspective of access to justice and intergenerational equity, since they put young people in the position of having to wait to be exposed to imminent climate harms, when it will likely be too late to do anything to prevent them.

Overall, the conservative approach that some courts have taken to the admissibility of rights-based climate claims can thwart the disruptive potential of these cases and of climate litigation more broadly.¹¹⁵ When courts rule that a claim is inadmissible, they are preventing a case from moving forward on the merits, where a full hearing could offer youth a formal platform for airing their grievances and proposing ways to address them. Dismissing cases at preliminary stages has the unfortunate effect of leaving young people in limbo, with little ability to influence policy decisions on climate change, and no ability to challenge these decisions through the court system. The refusal of courts to deal with the merits of youth-focused climate cases not only undermines the agency of children and young people, but also constitutes a denial of their right to redress for violations of their substantive rights. As explained in *Mathur et al.*, dismissing a climate case on the grounds of non-justiciability effectively shields the behaviour of governments in an important area of public policy from

111. *Mathur et al. v Her Majesty the Queen in Right of Ontario*, Reply to Motion to Strike, para 29.

112. See *PUSH Sverige* (n 69).

113. *Clean Air Council v United States*, 362 F Supp 3d 237.

114. *Pandey* (n 46).

115. *Fisher, Scotford and Barritt* (n 38).

judicial scrutiny.¹¹⁶ In *Greenpeace Nordic Ass'n v Ministry of Petroleum and Energy* the Court came to a similar conclusion, stating that the rule of law dictated that political issues were not exempt from judicial review, particularly if the government is the alleged wrongdoer. The Oslo District Court stated:

Judicial review in this area might juridify topics that are at the centre of the political debate. In this case, this consideration comes to the fore, in that Norway's most important industry from a socio-economic perspective – the petroleum activities – and what many will believe is the most important environmental challenge the world is facing – climate change – are arrayed against each other In that regard ... the environment is fundamental in the broadest sense for humans' living conditions, and when compared with other rights the courts have been assigned to protect, it does not seem unnatural to understand ... that in this area ... the courts must be able to set a limit on the Government's actions.¹¹⁷

The likely reasons for judicial caution in this area of law are closely related to the disruptive potential of youth-focused climate cases. Hsu points out that climate cases generally are 'potentially a means of regulation itself, as a finding of liability could have an enormous ripple effect and send greenhouse gas emitters scrambling to avoid the unwelcome spotlight'.¹¹⁸ However, such disruption is exactly what youth-led climate efforts aim to achieve. In a speech at the Global Climate Strike in Montreal, held on 27 September 2019, Greta Thunberg stated:

Because this is an emergency, and we will not be bystanders. Some would say we are wasting lesson time. We say we are changing the world. So that when we are older, we will be able to look our children in the eyes and say that we did everything we could back then. Because that is our moral duty, and we will never stop doing that We will do everything in our power to stop this crisis from getting worse.¹¹⁹

5 CONCLUSION

Youth plaintiffs all over the world have turned to courts to hold their governments accountable for the human rights violations caused by climate change. Domestic litigation has emerged as a key strategy available to children and youth to voice their demands for effective policies to combat the climate crisis. Indeed, an emerging corpus of legal norms and practices at the domestic and international levels substantiates the claims of youth and children that the adverse effects of climate change threaten their human rights. Several human rights bodies have thus confirmed that states have obligations to respect and protect the rights of children and youth in relation

116. *Mathur*, Reply to Motion to Strike (n 111), paras 125–40. See also *Greenpeace Nordic Association et al. v Norway Ministry of Petroleum and Energy* [2016] Oslo District Court, which discusses the importance of not ruling environmental cases as non-justiciable if the alleged wrongdoer is the government.

117. *Greenpeace Nordic Ass'n v Ministry of Petroleum and Energy*, Case no. 16-166674TVI-OTIR/06 (Oslo District Court) (4 January 2018).

118. S-L Hsu, 'A Realistic Evaluation of Climate Change Litigation through the Lens of a Hypothetical Lawsuit' (2008) 79(3) *Univ Color Law Rev* 701, 714.

119. JK Laframboise, "'We Will Not Be Bystanders": Greta Thunberg Tells Hundreds of Thousands at Montreal Climate March', *Global News* (27 September 2019).

to climate change.¹²⁰ In particular, a report from the Office of the High Commissioner for Human Rights concludes that states have affirmative obligations to take action to protect the rights and best interests of the child from the actual and foreseeable adverse effects of climate change.¹²¹ These include positive obligations to: take ambitious measures to minimize the future negative impacts of climate change on children by limiting global warming to no more than 1.5 degrees Celsius above pre-industrial levels; adopt adaptation measures to protect the children most vulnerable to the impacts of climate change; and ensure that climate mitigation and adaptation measures are the product of participatory, evidence-based decision-making processes that take into account the ideas and best interests of children as expressed by children themselves. According to the report, failure to take adequate steps to prevent children from suffering foreseeable climate-related human-rights harms breaches these obligations.¹²² Finally, states must allow rights holders, including youth and children, effective legal recourse to obtain reparations for any damages or injuries caused by climate change that they experience.¹²³

There is reason to be hopeful about the rise of youth-focused climate litigation. There is evidence that litigation provides youth and children with opportunities to share their stories about the ways in which they are impacted by climate change, as well as their vision for the future. As Levy points out, youth-focused climate lawsuits can trigger ‘constructive legal and political responses to climate change’ irrespective of their formal outcome, with novel cases raising public awareness and producing a domino effect by inspiring other cases.¹²⁴ Yet, the importance of judicial decision-making in these cases should not be downplayed either. If the chances of a court victory are slim due to, for example, an accumulation of unfavourable decisions within or across jurisdictions, youth-focused climate litigation may no longer be seen as a viable vehicle for the expression of disruptive dissent on the part of young people in relation to climate change. Besides reduced prospects for claiming actual redress, the extra-judicial impact of litigation is likely to diminish if it is perceived as being a purely symbolic endeavour.

Further, although the majority of youth-focused cases allege injuries to *current* generations of young people, a number of cases invoke the rights of future generations based on the principle of intergenerational equity. Indeed, youth plaintiffs in such cases argue that climate change will only get worse, affecting their children, grandchildren, and so forth. Yet, the delineation, scope or actionability of rights attributed to future generations remains unclear, as courts have generally avoided addressing them directly in youth-focused climate cases. For example, the Court in *Juliana* did not consider the issue of standing for future generations as separate from that of current children and youth. While no clear legal obligations stem from the rhetoric

120. OHCHR, *Mapping Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Focus Report on Human Rights and Climate Change* (2014). See also the analysis in A Savaresi, ‘Human Rights and Climate Change’, in Tuula Honkonen and Seita Romppanen (eds), *International Environmental Lawmaking and Diplomacy Review 2018 – Human Rights and the Environment* (Finland: University of Eastern Finland and UNEP 2019).

121. OHCHR (n 120) paras 28–40.

122. *ibid* para 54.

123. OHCHR, *Resolution adopted by the Human Rights Council on 12 July 2019, A/HRC/RES/41/21*.

124. Levy (n 72).

of intergenerational equity, its use in youth-focused cases is still beneficial, however, since it is 'widely recognized as a moral obligation, which can catalyze individual action'.¹²⁵ As Parker has written, 'The slow-onset nature of climate change, and the difficulties of establishing accountability from one generation to the next, make it necessary to develop and adopt new legal principles that articulate the rights and obligations underpinning intergenerational equity.'¹²⁶ It is thus likely that climate litigation focused on future generations will only continue to evolve and potentially create actionable legal obligations.

As the number of climate litigation cases rises, it is clear that courts will continue to be asked to adjudicate rights-based environmental harm. Although judges will surely not have all the answers, it is important that courts delineate the scope and limits of their power, rather than consistently refuse to consider climate litigation claims on the merits. Perhaps the simplest take away here is that judges should listen more. Given that it is undeniable that younger generations will experience human rights infringements disproportionately compared to others, youth-focused cases raise issues of public importance that should not be so easily struck as non-justiciable. Instead, courts should listen carefully to youth grievances – on the merits, with a full trial record before them. In listening more, it is our hope that judges will adapt to climate-related claims and adopt interpretations of legal doctrines that enhance rather than undermine access to climate justice for children and young people.

125. Slobodian (n 19) 589.

126. L Parker, 'Make a Healthy Climate a Legal Right that Extends to Future Generations', *The Economist* (17 Sept 2019).