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AVENUES FOR PRIVATE CLIMATE CHANGE LITIGATION: THE ADVANCEMENT OF A SOUTH AFRICAN CONSTITUTIONAL RIGHTS APPROACH

Pia Rebelo and Xavier Rebelo

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Pia Rebelo and Xavier Rebelo
The City Law School

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AVENUES FOR PRIVATE CLIMATE CHANGE LITIGATION: THE ADVANCEMENT OF A SOUTH AFRICAN CONSTITUTIONAL RIGHTS APPROACH

Forthcoming in Climate Litigation in Africa Conference Proceedings

Pia Rebelo* and Xavier Rebelo†

Abstract

A second wave of climate litigation targeting private defendants has gained momentum due to advances in attribution science and the legal discourse surrounding the responsibility of ‘carbon majors’ who knowingly pollute. At the same time, rights-based arguments are seeing increasing success in public litigation targeting governments who fail to take appropriate action to prevent climate change. This Paper explores the potential for rights-based arguments in the private context, specifically on the African continent. It argues that the horizontal application of an environmental right, both directly and indirectly, enjoys firm judicial recognition in certain African jurisdictions. As a result, Africa is ripe for substantive engagement with environmental rights and their application to private entities despite having few cases of climate litigation. More narrowly, this Paper investigates the constitutional milieu of the South African right to a healthy environment and argues for a substantive engagement with the transformative nature of such a right as opposed to relying solely on procedural approaches to obtaining environmental justice.

Keywords: [Climate; Litigation; South Africa; Rights-based; Environmental]

Introduction

Whilst the majority of strategic climate litigation cases (around 80%) have targeted governments, an increasing number of private actors are cited as defendants, in particular fossil fuel companies known as the ‘carbon majors’.¹ Although initial attempts at suing private

* PhD Candidate, The City Law School, City, University of London.

† PhD Candidate, Departments of Law and Environment Sciences, University of Cape Town.

¹ Joana Setzer and Rebecca Byrnes, *Global trends in climate change litigation: 2019 snapshot* (2019 policy report) London: Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science.

entities for climate change harm were largely unsuccessful, scientific advancements in quantifying the carbon contributions of polluters has enabled a second wave of private climate litigation which is creatively engaging with corporate governance, responsible investing, and reporting and disclosure requirements.² These successes have also been supported by the growing popularity of rights-based approaches in climate litigation more generally. An evolving constitutional context, which elevates environmental protection to a core element of democracy and human welfare, is enabling a normative framework for the governance of both public and private legal relationships. Perhaps, even more useful in empowering a new era of private climate litigation is an increasing judicial acceptance of the horizontal application of environmental rights. Given the enshrinement of environmental and associated rights in many African constitutions, Africa has contributed significantly to the jurisprudence on horizontality despite having few climate change cases. This has been supported by other emerging trends in the Global South which are highlighting the overwhelming vulnerability of certain populations and the monumental rights infringements stemming from present and future climate disasters. This Paper presents the untapped potential of Africa's environmental rights jurisprudence as a successful litigation strategy for targeting private entities partly responsible for climate change. Many African constitutions permit substantive engagement with socio-economic and environmental rights, which places Africa at a unique advantage in respect of private environmental disputes. South Africa, having a particularly developed environmental law framework, is also considerably apt for climate change disputes of this kind despite not yet enacting its Climate Change Bill.

The Scope of this Paper does not extend to an evaluation of the effectiveness of private climate litigation as a tool for combatting greater climate injustice; nor does it promote the targeting of 'carbon majors' or propose litigation for an instrumental purpose, namely forcing private entities to stop emitting greenhouse gases and to pay for the harm caused by their irresponsible environmental behaviour. This Paper is confined to an analysis of *one strategy* of private climate litigation – *rights-based private climate litigation*, and its promising prospects within an African context. Accordingly, this Paper first addresses developments in private climate litigation and highlights significant trends. It briefly outlines the failings of the first wave of private climate change litigation and illustrates the new approaches which characterise the more successful second wave. Second, this Paper discusses how a rights-based approach (ordinarily applicable to government-targeted litigation) has immense potential for application to private disputes – this is particularly true in an African context where environmental rights enjoy constitutional inclusion. Third, this Paper recounts how a horizontal application of

² Geetanjali Ganguly, Joana Setzer, and Veerle Heyvaert, 'If at First you don't Succeed: Suing Corporations for Climate Change' (2018) 38 *Oxford Journal of Legal Studies* 841.

environmental and associated rights has enjoyed firm judicial recognition on the continent of Africa. Finally, this Paper narrows its lens to the South African context and observes that a transformative constitutional ambience and horizontally-enforceable environmental right positions the country at the precipice of contributing meaningfully to the global private climate litigation discourse.

1. Private Climate Change Litigation: Where we Stand Now

The potential for a *rights-based private climate litigation* approach requires some conceptualisation before evaluating its potential within an African and, more specifically, South African context. At the outset, the focus of this article is on *private* climate litigation, however, the burgeoning successes of this type of litigation cannot be viewed in isolation from the developments occurring in wider *public* climate litigation efforts. Private climate litigation refers to the litigious strategy of holding private entities responsible for their contributions to climate change and the resultant harm caused to human beings – the harm element often manifesting itself as rights violations. Longer term goals include remoulding corporate behaviour through presenting significant legal and, ultimately, financial risks to companies who fail to uphold a set of environmental standards – this is similar to its counterpart, *strategic public climate litigation*, which aims to exert influence over public policy or attain injunctive relief in respect of public projects.³ In understanding the current milieu of private climate litigation efforts, it is important to briefly acknowledge its evolution to pinpoint the major developments which underpin recent successes.

Private climate litigation has evolved in two waves with contrasting success rates. The first wave of private climate litigation, primarily based on public nuisance claims in the USA, commenced in the early 2000s and was mainly targeted at oil, gas and electric companies.⁴ Two major hurdles compromised the success of this string of cases; namely, locus standi and causation.⁵ In the USA, defendants were able to rely on arguments of standing jurisprudence involving political question doctrines, as the US Constitution permits a federal court jurisdiction only where: (i) the plaintiff has suffered an injury in fact; (ii) that is ‘fairly traceable’ to the defendant’s misconduct (causation); and (iii) is capable of being redressed by the court.⁶ On an arguably incorrect application of Article III of the US Constitution, what was initially created to limit lawsuits against federal agencies somehow became a barrier for private citizens in

³ Geetanjali Ganguly et al op cit note 2 at 843.

⁴ Characterised by *Kivalina v ExxonMobil Corporation et al* 696 F.3d 849, 2012 WL 4215921 (9th Cir 2012) and *Comer v Murphy Oil USA Inc* 607 F.3d 1049 (5th Cir 2010).

⁵ Geetanjali Ganguly et al op cit note 2 at 847.

⁶ Mary Kathryn Nagle, ‘Tracing the Origins of Fairly Traceable: The Black Hole of Private Climate Change Litigation’ (2010) 85 *Tulse Law Review* 477.

vindicating their rights.⁷ The ‘fairly traceable’ prong of standing jurisprudence also required that, ‘there must be a causal connection between the injury and the conduct complained of - the injury has to be “fairly... trace[able] to the challenged action of the defendant, and not ...th[e] result [of] the independent action of some third party not before the court.”’⁸

Progress was made in respect of this requirement in *Massachusetts v Environmental Protection Agency (EPA)*⁹ where ‘mere contribution’ was enough for the Supreme Court to conclude that fairly traceable had been satisfied in a climate change context. However, the ‘special solitude’ granted to states in the *Massachusetts* case was not extended to private plaintiffs, thereby denying private persons from suing government agencies and emission contributors.¹⁰ The doctrine of political question also excluded federal courts from considering matters considered exclusive to the executive branch. Causation was also factually challenging to prove as seen in the case of *Kivalina v ExxonMobil Corporation*, where the federal court found that the plaintiffs were unable to show even a ‘substantial likelihood’ that ExxonMobil had caused the harm, nor was the harm ‘fairly traceable’ to ExxonMobil’s activities.¹¹

However, the discouraging precedents that lie in the wake of the first wave of private climate litigation did little to diminish fervour for the cause. This is evidenced by a second wave of private climate litigation that has garnered significant momentum. Although the second wave is still in its nascent stages, it is underpinned by a more diverse repertoire of arguments and litigation strategies than the first wave. The second wave of private climate litigation is also washing over shores of a rapidly evolving scientific, discursive and constitutional context. It has been argued that this developing context spawns new opportunities for judicial officers to re-evaluate legal and evidentiary thresholds in a way that will elevate the accountability of private carbon emitters.¹² This holds promise that the second wave of private climate litigation is not fated to follow the trajectory of its predecessor.

The second wave largely consists of lawsuits filed against fossil fuel companies, known as the ‘Carbon Majors’. This new wave of private climate litigation was inspired by scholarly analysis

⁷ Ibid; Andrew E Hessick, ‘Standing, Injury in Fact, and Private Rights (2008) 93 *Cornell Law Review* 275 at 299.

⁸ Justice Scalia in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992), quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976).

⁹ 549 US 497 (2007), hereafter *Massachusetts*.

¹⁰ Ibid at 520; ‘special solitude’ is a doctrine affording federal states the privilege of special consideration by the US Supreme Court.

¹¹ *Kivalina* op cit note 4.

¹² Geetanjali Ganguly et al op cit note 2.

that ascribes responsibility for climate change to major carbon emitters as determined by progressive scientific work in the field of attribution.¹³ This work constitutes the substantive basis of the petition currently being investigated by the Human Rights Commission of the Philippines¹⁴ and appears to be encouraging a renewed appetite for major private climate cases against significant emitters.¹⁵ Indeed, there are at least 40 ongoing climate cases globally against Carbon Majors.¹⁶ These cases have been filed on a diverse assortment of grounds, ranging from liability suits which seek to reclaim damages resulting from climate change, allegations that corporations have defrauded shareholders and failed to report accurately on the effects of climate change risks on their business, ‘greenwashing’ claims, and claims concerning the infringement of human rights. A significant challenge that continues to dog private climate litigation is that there is ‘no worn path to victory’.¹⁷ However, this has culminated in the emergence of creative private litigation strategies, each of which has only served to broaden the range of legitimate and science-backed arguments to enhance environmental responsibility. Although potentially disappointing for climate activists seeking a seismic moment in global accountability, various approaches which do not pursue ‘one road to Eldorado’, are equally necessary in achieving the incorporation of climate justice factors into all areas of public and private spheres.

The most striking second-wave cases are largely premised on the idea that Carbon Majors, although fully cognisant of the implications of burning fossil fuels, continued to contribute significantly to greenhouse gas emissions that instigate climate change and should thus, accrue liability for the resulting damage.¹⁸ Examples of such liability cases against Carbon Majors include *Liuuya v. RWE AG*¹⁹, which is explored in further detail in the following section, and *Pacific Coast Federation of Fishermen’s Associations, Inc. v Chevron Corp & Ors (Chevron)*²⁰, in which an industry-representative body filed a claim in tort against a conglomeration of energy companies for their contribution to climate change. In the latter case, the Pacific Coast Federation of Fishermen’s Association alleged that it had suffered losses as

¹³ Richard Heede, ‘Tracing Anthropogenic Carbon Dioxide and Methane Emissions to Fossil Fuel and Cement Producers, 1854–2010’ (2014) 122 *Climate Change* 229; Brenda Ekwurzel, James Boneham and Richard Heede, ‘The Rise in Global Atmospheric CO₂, Surface Temperature, and Sea Level from Emissions Traced to Major Carbon Producers’ (2017) 144 *Climate Change* at 579.

¹⁴ The text of the petition is available at, <http://www.greenpeace.org/seasia/ph/PageFiles/735291/Petitioners- and-Annexes/CC-HR-Petition.pdf>, accessed 30 May 2018.

¹⁵ Michael Burger and Justin Gundlach, ‘The Status of Climate Change Litigation: A Global Review’ (UN Environment Program and Sabin Center for Climate Change Law 2017).

¹⁶ Joana Setzer and Rebecca Byrnes op cit note 1.

¹⁷ Kim Bouwer, ‘The Unsexy Future of Climate Change Litigation’ (2018) 30 *Journal of Environmental Law* 483.

¹⁸ Vic Sher, ‘Forum Versus Substance: Should Climate Damages Cases Be Heard in State or Federal Court?’ (2020 Synopsium - Lawyering in the Age of Climate Change) 32 *Stanford Law Review*.

¹⁹ Case No. 2 O 285/15 Essen Regional Court.

²⁰ CGC-18-571285 California Superior Court.

a result of the defendants' contributions to climate change and its associated negative impacts on commercial crab fisheries. This generates a sense of déjà vu, recalling the handful of failed tort claims that composed the first wave. However, these cases are underwritten by substantial advancements in climate attribution science, which may be pivotal in the acquisition of a successful outcome.

The second wave of private climate litigation can be characterised by more than the mere fetishization of the impacts of past emissions, as litigants are also pursuing avenues to alter current and future corporate behaviour.²¹ In fact, more cases of climate litigation were filed against the financial sector last year than in any preceding year.²² Some of these cases were filed in relation to continued financial investment in carbon-intensive industries²³, while others were brought by NGO's and shareholders against pension funds and banks for a failure to consider climate-related risk in corporate decision-making and for the insufficient disclosure of climate risk.²⁴ Particularly, litigants are more frequently alleging that corporations have breached the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises to compel these institutions to reconsider their business and investment models, as well as improve climate reporting in the context of altered risk.²⁵ A handful of cases in the second wave have also alleged that corporations are misleading investors in relation to the material climate risks to their business.²⁶ Similarly, 'greenwashing' has also come to the forefront of lawsuit allegations filed against Carbon Majors for inconsistencies between discourse and action. 'Greenwashing' refers to advertising campaigns which misrepresent the overall environmental performance of a company or the benefits of its products or services.²⁷

In respect of corporate governance, directors have also been targeted for their inaction in

²¹ Joana Setzer and Rebecca Byrnes op cit note 1.

²² Javier Solana, 'Climate Litigation in Financial Markets: A Typology' (2020) 9 *Transnational Environmental Law* at 103-135.

²³ *Harvard Climate Justice Coalition & Others vs. President and Fellows of Harvard College & Others* 90 Mass. App. Ct. 444.

²⁴ See *Mark McVeigh v. Retail Employees Superannuation Pty Ltd* [2019] FCA 14 (17 January 2019).

²⁵ On 8 May 2017 Oxfam Novib, Greenpeace, BankTrack and Friends of the Earth Netherlands (Milieudefensie) submitted a specific instance to the Dutch National Contact Point (NCP) alleging a violation of the OECD Guidelines for Multinational Enterprises by ING Bank, Initial and Final Assessments available at, <http://mneguidelines.oecd.org/database/instances/nl0029.htm>, accessed 25 July 2020.

²⁶ See *City of New York v. Exxon Mobil Corp.*, 739 F. Supp. 2d 576 (S.D.N.Y. 2010).

²⁷ See *Beyond Pesticides v. Exxon Mobil Corporation* (1:20-cv-01815) District Court, District of Columbia (Last known filing July 10, 2020); also in December 2019, ClientEarth lawyers lodged a complaint against BP, alleging that BP's global 'Keep Advancing' and 'Possibilities Everywhere' ad campaigns were misleading in their focus on BP's low carbon energy products when more than 96% of BP's annual spend is on oil and gas, available at, <https://www.clientearth.org/bp-greenwashing-complaint-sets-precedent-for-action-on-misleading-ad-campaigns/>, accessed 25 July 2020.

responding to climate risk. In 2016, prominent Australian barristers, Noel Hutley and Sebastian Hartford-Davis, released an opinion relating to the extent to which Australian law permits company directors to respond to climate risk. The report, ‘Climate Change and Directors’ Liability’, finds that it is conceivable that directors who neglect to duly consider pertinent climate change risks may attract liability for breaching their duty of care and diligence.²⁸ Subsequently, the Centre for Policy Development in Australia augmented the 2016 opinion by emphasising five material developments since 2016 that have further elevated the need for directors to engage in board-level governance and duly consider climate risks. Ultimately, there is a growing understating that the ‘exposure of individual directors to “climate change litigation” is increasing, probably exponentially, with time’.²⁹

Ganguly et al attributes this uptick in private climate litigation to three major factors: 1) the *scientific context*, including development in attribution science to overcome causation hurdles; 2) *legal discourse*, a growing understanding of responsible climate change behaviour and the precedential contribution of tobacco and asbestos litigation; and finally, 3) the *constitutional context* developments in which certain jurisdictions have constitutionalised environmental protection and extended judicial capacity to deal with climate change matters.³⁰

Scientific advancements are relevant on a global scale in achieving climate justice, as well as the growing pervasiveness of normative values such as ‘the polluter pays’ and the ‘atmospheric trust’ concept (an expansion of the public trust doctrine). At the same time, transnational frameworks such as the Oslo Principles and Principles on Climate Obligations for Enterprises have identified a series of climate change obligations which can be applied to companies.³¹ Similar to tobacco litigation of the past, Carbon Majors have undeniably developed an understanding of their contributions to climate change yet have taken little action to amend their behaviours and have often taken steps to mislead the public.³² Certainly, big oil companies have followed in the footsteps of their tobacco counterparts as similar trends of ‘discovery, investigation, concealment, obfuscation—often spanning decades, has been extensively documented across an array of public health and environmental issues’.³³ The

²⁸Noel Hutley SC and Sebastian Hartford Davis, ‘Climate Change and Directors’ Duties’ (2019) *Supplementary Memorandum of Opinion* available at, <https://cpd.org.au/2019/03/directors-duties-2019/>, accessed 25 July 2020.

²⁹ *Ibid* at 3.

³⁰ Geetanjali Ganguly et al op cit note 2 at 850.

³¹ Expert Group on Global Climate Obligations, *Oslo Principles on Global Climate Change* (2015 Eleven International Publishing).

³² Center for International Environmental Law (CIEL), ‘Smoke and Fumes’ (November 2017) at 25 available at, www.ciel.org/wp-content/uploads/2017/11/Smoke-Fumes-FINAL.pdf, accessed 24 July 2020

³³ *Ibid*.

legacy of tobacco litigation also indicates that *knowing* one's activities are causing catastrophic climate change outcomes, is significant in respect of defrauding shareholders. Such an approach has been instituted against Exxon Mobil under the USA's Martin Act, which grants the New York state attorney general the authority to pursue investigations and actions against those it suspects of securities fraud.³⁴ This is one of the first cases to be heard where climate change disclosure has taken centre-stage for an allegation of securities fraud.

Of particular relevance to the continent of Africa is the evolution of the constitutional context, a phenomenon within the Global South that is enhancing climate litigation attempts more broadly. The emergence of modern Constitutions in a post-liberation era have seen human-rights-related arguments emerge as a dominant litigation strategy. This 'human rights turn'³⁵ in climate litigation is notably more prevalent in the developing world where, arguably, the spirit of human rights claims is more desperate due to their populations' high vulnerability to the risks associated with climate change.³⁶ In respect of a rights-centred approach to climate litigation, and in particular the development of private climate litigation, Africa has an immense contribution to make. This is because a number of African jurisdictions have recognised the right to a healthy environment and the role of governments in enforcing this right against private bodies.³⁷ Africa is undeniably ripe for realising the full potential for a horizontal application of environmental rights in a climate context to hold private entities legally responsible and to afford the victims of rights violations adequate recourse.

2. The Influence of a Rights-Based Approach on Private Climate Change Litigation

Litigation directed at holding private parties responsible for their climate change contributions is being supported by a 'rights-turn' in climate change litigation more generally.³⁸ The rights approach has emerged from a public litigation context against government authorities, based on a vertical application of human rights and their interconnectedness with surrounding environmental conditions.³⁹ This marks a redirection from the traditional approach in public

³⁴ The Martin Act, N.Y. General Business Law Article 23-A, §§ 352 et seq. (Act), is New York's broad 'blue sky law.'

³⁵ Jacqueline Peel and Hari M. Osofsky, 'A Rights Turn in Climate Change Litigation?' (2018) 7 *Transnational Environmental Law*, 37.

³⁶ Louis Kotzé, 'Human Rights, the Environment and the Global South', in S. Alam et al. (eds), *International Environmental Law and the Global South* (2015) 178–9.

³⁷ Keely Boom, Julie-Anne Richards and Stephen Leonard, 'Climate Justice: The International Momentum towards Climate Litigation' (2016) available at, <https://www.boell.de/sites/default/files/report-climate-justice-2016.pdf>, accessed 23 June 2020.

³⁸ Jacqueline Peel and Hari M. Osofsky op cit note 35.

³⁹ For example, *Juliana v. United States*, 339 F. Supp. 3d 1062 (D. Or. 2018).

climate change disputes whereby governments are challenged for failing to properly consider environmental risks in their decision-making processes⁴⁰ – although this approach is not always mutually exclusive from a rights-based one. This progression to rights-based arguments has been catalysed by the incorporation of specific environmental rights in various Human Rights Instruments and Constitutions with proven correlations to stronger environmental management and an increase in environmental challenges brought before the courts.⁴¹ This Section acknowledges the broad success of rights-based climate change litigation and comments on how this approach can easily translate to obligations imposed on private parties through a horizontal application of environmental and associated rights.

Two cases are noteworthy in illustrating a recent receptiveness to an emerging rights-based jurisprudence - these are the *Leghari* and *Urgenda* cases, based in Pakistan and the Netherlands respectively. Prior to these judgments, the traditional rights-based approach struggled with the obstacle of attributing human rights violations to greenhouse gas emissions, especially where such harm is merely *predicted* or whether rights protections need to be applied *extraterritorially*.⁴² The issue of attribution is also prevalent within the first wave of private climate litigation, with similar scientific and political developments now able to overcome such a hurdle by establishing a causal connection between climate disaster and the infliction of harm to humans. New rights-based arguments gained significant attention in 2015, when a Dutch environmental group call the Urgenda Foundation and 900 Dutch citizens sued the Dutch government for a failure to adequately address climate change.⁴³ The Hague District Court ordered the government to more carefully consider international scientific recommendations in taking more prudent measures to tackle greenhouse gas emissions. Although the initial finding of the Hague District court was historical in substantiating a State's duty of care towards its citizens, the real human rights discourse came later in 2018 when the Dutch government appealed the matter.⁴⁴ Whereas the Hague District Court did not find that the government had violated the human rights of the petitioners, the Court of Appeal built its reasoning almost entirely on the right to life and the right to private and family life under Articles 2 and 8 of the European Convention on Human Rights. The Court of Appeal summarized the position on State duties as follows:

⁴⁰ For example, *Massachusetts* supra note 9 generally considered a landmark lawsuit, considered and interpreted the Clean Air Act and whether the US EPA had wrongfully decided to not regulate greenhouse gas emissions.

⁴¹ Chris Jeffords and Joshua C. Gellers, 'Constitutionalizing Environmental Rights: A Practical Guide' (2017) 9 *Journal of Human Rights Practice*, 136.

⁴² Jacqueline Peel and Hari M. Osofsky op cit note 35 at 46.

⁴³ *Urgenda Foundation v. State of the Netherlands* [2015] HAZA C/09/00456689.

⁴⁴ *The State of the Netherlands v Urgenda Foundation*, The Hague Court of Appeal (9 October 2018), case 200.178.245/01 (English translation).

'the State has a positive obligation to protect the lives of citizens within its jurisdiction under Article 2 ECHR, while Article 8 ECHR creates the obligation to protect the right to home and private life. This obligation applies to all activities, public and non-public, which could endanger the rights protected in these articles, and certainly in the face of industrial activities which by their very nature are dangerous. If the government knows that there is a real and imminent threat, the State must take precautionary measures to prevent infringement as far as possible'.⁴⁵

The Appeal Court found that climate change poses a real and imminent threat to human rights, whilst the District Court took a more interpretive approach in using rights to inform an understanding of the State's duty of care - a breach of which is an unlawful act under Dutch tort law.⁴⁶ Consequent emission targets set by the Dutch government and the introduction of a Climate Bill⁴⁷ in the Netherlands, means that future *Urgenda*-like arguments in the Netherlands are unlikely.⁴⁸ However, the proposition of 'future rights violations' remains relevant and will serve to strengthen similar arguments in regions where environmental and climate change frameworks are limited in imposing duties on governments to take protectionist action. On December 20, 2019, the Dutch government failed in a second appeal to the Supreme Court of the Netherlands, which upheld the decision of the Court of Appeal under Articles 2 and 8 of the ECHR.⁴⁹ Unfortunately, *Urgenda* stopped short of applying the principle of 'pro-rata responsibility' to private entities, as the idea of pro-rata liability is connected only insofar as 'joint and individual responsibility' is apportioned to signatories to the UNFCCC, being States.⁵⁰ Therefore private emitters can only be apportioned any sort of liability vicariously through the State.

Similarly, the Lahore High Court in Pakistan did not make any clear annunciation on the liability of private entities in the *Leghari* case; however, it perhaps went further than the *Urgenda* case to acknowledge the normative concept of 'climate justice' as a construct which must transform its predecessor, 'environmental justice'. In its ground-breaking decision holding the Federal

⁴⁵ Ibid para 43.

⁴⁶ Suryapratim Roy and Edwin Woerdman, 'Situating *Urgenda v the Netherlands* within Comparative Climate Change Litigation' (2016) 34 *Journal of Energy & Natural Resources Law* at 172.

⁴⁷ Bill on a framework for policy development aimed at reducing Dutch emissions of greenhouse gasses in order to limit global warming of the Earth (Climate Act), Parliamentary Doc. 2017–2018, 34 534, No 10.

⁴⁸ Jonathan Verschuuren, '*The State of the Netherlands v Urgenda Foundation: The Hague Court of Appeal upholds Judgment requiring the Netherlands to further reduce its greenhouse gas emissions*' (2019) 28 *Review of European, Comparative & International Environmental Law* 94.

⁴⁹ Supreme Court of the Netherlands ECLI:NL:HR:2019:2007.

⁵⁰ Ibid para 5.6.4.

Government of Pakistan and Regional Government of Punjab accountable for their inaction and delay in implementing the Government's National Climate Change Policy 2012 and the Framework for Implementation of Climate Change Policy (2014-2030);⁵¹ the court stated the following:

*'Climate Justice links human rights and development to achieve a human-centered approach, safeguarding the rights of the most vulnerable people and sharing the burdens and benefits of climate change and its impacts equitably and fairly. [...] Who is to be penalised and who is to be restrained?'*⁵²

The *Urgenda* and *Leghari* cases heralded a turn in public climate change litigation, one specifically based on the promotion of human rights, which led to the emergence of similar cases being brought in various other jurisdictions.⁵³ These State-directed challenges also contributed to a global impetus to hold *all* contributors to climate change responsible. The growing success of rights-based approaches to climate change litigation are based largely on two factors: 1) access to justice in conjunction with climate or environmental rights; and 2) judicial opportunism.⁵⁴ These factors are equally relevant to the development of private climate litigation against corporate entities. The enshrinement of environmental rights in various Constitutions is serving to 'set them above the vicissitudes of everyday politics and this is also effectively to raise them above the possibility of routine democratic revision'.⁵⁵ The rise of environmental rights has been identified as a significant contributor to the shift from viewing climate change as a political issue to one of individual concern and ultimately individual rights.⁵⁶ This has been coupled with a number of helpful factors, including the rise of transnational human rights frameworks and judicial networks.⁵⁷

In a private context, this momentum has already extended to efforts against the Carbon Majors. In another striking example of 'judicial opportunism', the Commission on Human Rights of the Philippines (CHR) announced at the end of 2019 that 47 investor-owned

⁵¹ *Ashgar Leghari v. Federation of Pakistan* (W.P. No. 25501/2015), Lahore High Court Green Bench, Orders of 4 Sept. and 14 Sept. 2015, available at https://elaw.org/pk_Leghari (Leghari).

⁵² *Ibid* para 21.

⁵³ For example: *Juliana v. United States* *supra* note 39; *Third Runway at Vienna International Airport* case, Case No. W109 2000179-1/291E, Federal Administrative Court, Austria, 2 Feb. 2017; and *Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others* [2017] ZAGPPHC 58, Judgment of High Court of South Africa, Gauteng Division, Pretoria (South Africa), 8 Mar. 2017.

⁵⁴ Joana Setzer and Lisa Benjamin, 'Climate Litigation in the Global South: Constraints and Innovations' (2020) 9 *Transnational Environmental Law* at 80.

⁵⁵ Tim Hayward, *Constitutional Environmental Rights* (2005) 129.

⁵⁶ Geetanjali Ganguly et al *op cit* note 2.

⁵⁷ *Ibid*.

corporations, including ExxonMobil, Chevron, Shell, BP, Total, Sasol and Repsol, can be found to be both legally and morally liable for a number of human rights violations against the Filipinos resulting from climate-related disasters. Although the approach of the Commission was *dialogical*, rather than adversarial, the Commission recognised that the results of the Inquiry could be relied upon by rights-holders as a foundation for filing claims for punitive damages at a later stage.⁵⁸ Panel Chairman Commissioner Roberto Cadiz, stated that National Human Rights Institutions have a role to play in testing boundaries and creating new paths - 'to be bold and creative, instead of timid and docile; to be more idealistic, and less pragmatic; to promote soft laws into becoming hard laws; to be able to see beyond legal technicalities and establish guiding principles that can later become binding treaties'.⁵⁹

This Inquiry will undoubtedly have far-reaching consequences for the private sector, with the intention to help clarify the standards for corporate reporting in respect of their greenhouse gas emissions and the consequent impacts of their activities on climate change. Following the Philippines Inquiry, Island nations in the Pacific including Vanuatu, Kiribati, Tuvalu, Fiji and Solomon Islands also declared their intent to bring legal action against big polluters.⁶⁰ Similarly, the case of *Luciano Lliuya v. RWE AG* was brought in Germany by a Peruvian farmer for a declaratory judgment and an award of damages against RWE, Germany's largest electricity producer.⁶¹ The German court dismissed the claim on the basis that no linear causal chain could be established between Luciano Lliuya's account of the melting of mountain glaciers near his home town of Huaraz and the greenhouse gas contributions of the German electricity supplier. However, this matter is currently on appeal as the appeals court found Luciano's complaint to be well-pled and admissible. The case will move into an evidentiary phase and hear expert testimony on whether:⁶²

- a) There is a serious threat to the defendant's property due to the increase in volume of the lake in which the glacier is melting into;
- b) The defendant's power plants are contributing to global greenhouse gas emissions, resulting in co-causation of the glacier melting.

Whilst the court is yet to weigh up all evidence, this is already a significant legal development

⁵⁸ CHR Philippines, *CHR concluded landmark inquiry on the effects of climate change to human rights; expects to set the precedent in seeking climate justice* (Press Release Dec. 13, 2018) available at, <http://chr.gov.ph/chr-concluded-landmark-inquiry-on-the-effects-of-climate-change-to-human-rights-expects-to-set-the-precedent-in-seeking-climate-justice/>, accessed 15 July 2020.

⁵⁹ *Ibid.*

⁶⁰ People's Declaration for Climate (8 June 2015, Justice Port Vila, Vanuatu).

⁶¹ *Lliuya* supra note 19.

⁶² Order to parties to submit evidence (unofficial English translation) 1-5 U 15/17 2 0 285/15 Landgericht Essen.

in holding corporate entities liable for climate change damages and suggests that the causal links between rights violations and emitting greenhouse gases is more widely accepted by judiciaries. Public rights-based arguments against States have undeniably addressed some of the inadequacies surrounding the establishment of such a causal connection and have laid the groundwork for advancing arguments of contributory harm and pro-rata responsibility. *Luciano Lliuya v. RWE AG* thus reflects a culmination of the progress made in trans-jurisdictional matters, particularly insofar as these developments can be applied to private entities. *Luciano Lliuya v. RWE AG* also illustrates how civil law regimes are being infiltrated by a climate change agenda. Here, the claim was based on nuisance under German law as informed by property rights under the German Civil Code; however, an increasing pervasiveness of environmental principles such as the 'polluter pays' is apparent.

The rights-based approach has made significant leaps which are relevant to both streams of climate change litigation: State-targeted and private. This is fundamentally attributed to progressive procedural requirements, the adoption of environmental rights and environmental legislation which permits access to justice by those who have had their rights infringed. If these are supporting factors, then a closer look at the African context and its elevation of environmental rights places the continent at a significant advantage for these types of claims directed towards private parties. The recognition of constitutional environmental rights also provides strong avenues for horizontal application; whereby private parties may fall under a direct or indirect application of a set of environmental standards. The next section explores how the African continent has already made progressive inroads in applying environmental rights horizontally and how climate considerations are increasingly explored in a rights context against private entities.

3. Africa's Horizontal Application of Environmental Rights

Despite Africa's particular vulnerability and lack of resilience in respect of climate change, coupled with environmental rights enshrined in many post-liberation constitutions, the continent has not yet contributed significantly to the growing global body of climate change disputes.⁶³ To date, there have been only 6 cases bringing the issue of climate change before African courts and all of these have been actions against government bodies for primarily failing to consider climate change in respect of administrative procedures. **South Africa**, having the most developed environmental management framework, holds the majority of 4

⁶³ Louis Kotze and Anél du Plessis, 'Putting Africa on the Stand: A Bird's Eye View of Climate Change Litigation on the Continent' (2019) *University of Oregon's Journal of Environmental Law and Litigation* ISSN 1049-0280.

cases, the most recognised of which is the *Earthlife v Thabametsi* case.⁶⁴ All of these have involved challenges to environmental authorisations granted under the National Environmental Management Act 107 of 1998 (“NEMA”), for reasons including, *inter alia*, failing to adequately consider climate change factors in environmental impact authorisation (EIA) procedures.⁶⁵ Similarly, in **Kenya**, the EIA process was challenged in granting a licence to Amu Power Company to proceed with a coal-fired power plant project in the County of Lamu in the *Save Lamu v Amu Power Co Ltd* case. The National Environmental Tribunal found that the Respondents’ EIA had failed to, *inter alia*, fully consider the project’s contribution to climate change and accepted arguments that this was inconsistent with Kenya’s low carbon development commitments. South Africa and Kenya both enjoy a constitutionally-enshrined right to a healthy environment,⁶⁶ which is protected by national laws through their respective EIA procedures and legislative frameworks, with Kenya also boasting a Climate Change Act.⁶⁷ The South African and Kenyan judgments therefore have powerful resonating effects insofar as affirming that EIA procedures must consider climate change risks in order to give effect to environmental rights. However, these cases do not provide much in the way of developing an understanding of the enforcement of environmental rights against private parties.

In **Nigeria**, the climate change case of *Gbemre v Shell Petroleum*⁶⁸ has gone further in terms of substantive engagement with rights, even though the arguments of the complainant were not based on an existing and specific environmental right – but rather the incorporation of environmental factors into other rights. In a stark horizontal application of rights to private entities, a Federal High Court in Nigeria held that the practice of gas flaring in the Niger Delta is unconstitutional and violates the fundamental rights of life and dignity as provided for in the Constitution of Federal Republic of Nigeria and the African Charter on Human and Peoples Rights. The plaintiffs also argued that the practice of gas flaring leads to the emitting of greenhouse gases which contributes to climate change and could lead to further rights violations. The court did not make any specific declaration on this point, but its declaration on direct rights violations by the Defendant is significant in signalling a very early judicial

⁶⁴ *Earthlife* supra note 53.

⁶⁵ The other three include: *Philippi Horticultural Area Food & Farming Campaign and Another v MEC for Local Government, Environmental Affairs and Development Planning: Western Cape and Others* (16779/17) [2020] ZAWCHC 8; 2020 (3) SA 486 (WCC) (17 February 2020); *Trustees for the Time Being of the GroundWork Trust v. Minister of Environmental Affairs, KiPower (Pty) Ltd, and Others* (filing date 2017) case no. 54087/17 (still pending); *GroundWork v the Minister of Environmental Affairs and the President* (filing date 2019) case no. 24571/19 (still pending).

⁶⁶ Section 24 of the Constitution of the Republic of South Africa, Act 108 of 1996; and Articles 42 and 70 of the Constitution of Kenya, 2010.

⁶⁷ Climate Change Act 11 of 2016.

⁶⁸ *Gbemre v. Shell Petroleum Development Co.*, Suit No. FHC/CS/B/153/2005 (hereinafter *Gbemre*).

receptiveness to tackling climate change with a robust rights-based agenda.⁶⁹ The *Gbemre* case was heard in 2005, which was undeniably revolutionary for its time.

Although not considered a climate change case, Kenya easily accepted a horizontal application of constitutional environmental rights as early as 2010, in the case of *Abdalla Rhova Hiribae and Others v. Attorney General and Others*.⁷⁰ This is indicative of its new post-2010 constitutional era, which does not consider rights as exclusively concerned with the relationship between the State and individuals.⁷¹ The petitioners in this case alleged that the respondents failed to develop a comprehensive land use master plan for guiding land use, development, livelihood and biodiversity/ecological protection, and in failing to do so, they had violated the petitioners' rights to life and a healthy environment.⁷² The National Environmental Management Authority opposed the matter on the ground that joinder of all respondents was inappropriate as 'only the state can guarantee fundamental rights' and therefore the court has no jurisdiction to entertain the petition.⁷³ It argued that 'there is only vertical application of human rights, no horizontal', thus the petition is devoid of merit.⁷⁴ The court explained that the new constitutional dispensation in the general and the Bill of Rights in particular:

*'applies to and binds all persons represents a radical departure from the position under the former Constitution where only the state could be held liable for violation or infringement of constitutional rights. In my view, where the facts so demonstrate, an individual or corporate person . . . can be held to have violated another person's constitutional rights, and appropriate orders or declarations issued.'*⁷⁵

This is aligned with an understanding of Article 20(2) of the Kenyan Constitution which supports a case-by-case approach in determining whether constitutional rights apply horizontally. Article 20 states that the 'Bill of Rights applies to all law and binds all state organs and all persons' and that '[e]very person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom'.⁷⁶

⁶⁹ Unfortunately, this ruling faced various issues of implementation: Hari M Osofsky, 'Climate Change and Environmental Justice: Reflections on Litigation over Oil Extraction and Rights Violations in Nigeria' (2010) 1 *Journal of Human Rights and the Environment* 189.

⁷⁰ HCC No. 14 of 2010.

⁷¹ Brian Sang, 'Horizontal Application of Constitutional Rights in Kenya: A Comparative Critique Of The Emerging Jurisprudence' (2018) 26 *African Journal of International and Comparative Law* 1.

⁷² *Abdalla Rhova Hiribae* supra note 70 para 3.

⁷³ *Ibid* para 20.

⁷⁴ *Ibid*.

⁷⁵ *Ibid* paras 46 – 7.

⁷⁶ Article 20(1) and 20(2) of the Constitution of Kenya, 2010.

Similarly, South African constitutional jurisprudence, coupled with the environmental right framed in Section 24 of the Constitution, places South Africa in an ideal position for the horizontal application of environmental rights – a monumental advantage in litigating climate change disputes against private entities. However, the horizontal application of those rights enshrined in the Bill of Rights has not always been a straightforward matter. Section 8(2) of the Constitution declares that the Bill of Rights is binding for natural and juristic persons, ‘if and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right’. The interpretation afforded by the *Du Plessis* judgment⁷⁷ of the Interim Constitution’s correlating section 7(1) is that the chapter (i.e. Bill of Rights), ‘shall bind all legislative and executive organs of state at all levels of government’, and therefore constitutional rights merely enjoy indirect effect in private relationships between private entities.⁷⁸ However, this view is no longer valid and given the wording of the Section 24 right to an ‘environment that is not harmful to their health or well-being’; a private entity can easily violate such rights and are oftentimes greater contributors than state-entities to gross human rights violations, as seen in the *Gbemre* case. If there is any lingering doubt pertaining to the horizontality of South Africa’s environmental right, Judge Dennis Davis clarifies the application of the Bill of Rights to private parties in *McCarthy v Constantia Property Owners Association and Others*.⁷⁹ Judge Davis was generous in granting locus standi to those who ‘have come to court to protect the environmental fabric of their suburb’.⁸⁰ He also clarified that Section 8(2) provides that the Bill of Rights binds juristic persons and,

*‘is not only designed to introduce the culture of justification in respect of public law but intended to ensure that the exercise of private power should similarly be justified. Accordingly the carefully constructed but artificial divide between public and private law which might have dominated our law prior to the constitutional enterprise can no longer be sustained in an uncritical fashion and hence unquestioned application’.*⁸¹

Section 24 is thus seemingly predestined for horizontal application with the environmental right being enforceable between private parties even where no legislative or common law rule

⁷⁷ *Du Plessis v. De Klerk* 1996 (5) BCLR 658 (CC), 1996 SACLR LEXIS 1 (May 15, 1996).

⁷⁸ *Ibid* para 41: the Court based its reasoning on German constitutional law doctrine.

⁷⁹ 1999 (4) SA 847 (C).

⁸⁰ *Ibid* at 855F.

⁸¹ *Ibid* at 855C-E; see also Michael Kidd, ‘Suburban aesthetics and the environment right. *McCarthy and others v Constantia Property Owners Association and others* 1999 (4) SA 847 (C)’ (1999) 6 *South African Journal of Environmental Law and Policy* 257.

provides for such a claim.⁸² If no rule exists, then Section 8(3) mandates the courts to develop such a rule. In essence this means that where a private actor pollutes a natural resource, such as water, a violation of the environmental right under section 24(a) can be alleged.⁸³ Furthermore, the horizontal application of the South African environmental right is beginning to emerge more blatantly in South African judicial proceedings, with related rights such as access to information also having horizontal application in respect of environmental disclosure and reporting. The forthcoming section explores South Africa's potential for applying its environmental right horizontally in achieving successful climate change litigation against private entities. Of particular relevance is the *Company Secretary of Arcelormittal South Africa v Vaal Environmental Justice Alliance* case,⁸⁴ whereby the Courts reaffirmed that under South Africa's constitutional dispensation, 'there is no room for secrecy and that constitutional values will be enforced' against juristic persons.⁸⁵

4. A Horizontal Perspective of South Africa's Right to a Healthy Environment and Interrelated Rights

The South African Constitution enshrines a comprehensive and widely-celebrated substantive environmental right, which is capable of both vertical and horizontal application.⁸⁶ Despite the existence of a fully-fledged environmental right, environmental constitutionalism in South Africa is generally exercised through the utilisation of procedural rights in the narrow sense.⁸⁷ As such, the substantive environmental right is 'underutilised' in litigation that seeks to protect the environment.⁸⁸ As noted by Feris, 'when one examines South African jurisprudence, there seems to be a marked dearth of cases where the environmental right has been fully utilised and clearly interpreted'.⁸⁹ The *Arcelormittal* case marks a decisive break from this pattern and exhibits a wholesome understanding of the interdependency of rights and, in line with thick

⁸² Carola Glinski, 'Environmental Justice in South African Law and Policy' (2003) 36 *Verfassung und Recht in Übersee / Law and Politics in Africa, Asia and Latin America* at 59.

⁸³ *Hichange investments (Pty) Ltd v Cape Produce Co (Pty) Ltd t/a Pelts Products and Others* 2004 JDR 0040 (E).

⁸⁴ *Company Secretary of Arcelormittal South Africa and Another v Vaal Environmental Justice Alliance* (69/2014) [2014] ZASCA 184; 2015 (1) SA 515 (SCA); [2015] 1 All SA 261 (SCA) (26 November 2014) hereinafter *Arcelormittal*.

⁸⁵ *Ibid* para 82.

⁸⁶ Anél du Plessis, 'South Africa's Constitutional Environmental Right and the Pursuit of a Country where "Well-being" Thrives' (2017) in UN Environment, *New Frontiers in Environmental Constitutionalism* at 249; Loretta Feris, 'The Public Trust Doctrine and Liability for Historic Water Pollution in South Africa' (2012) 8 *Law Environment and Development Journal* at 17.

⁸⁷ Melanie Murcott, 'The Procedural Right of Access to Information as a Means of Implementing Environmental Constitutionalism in South Africa' in Erin Daly and James May (eds) *Implementing Environmental Constitutionalism: Current Global Challenges* (2018) 196.

⁸⁸ Loretta Feris, 'Constitutional Environmental Rights: An Under-Utilised Resource' (2008) 24 *South African Journal on Human Rights* at 29; see also Michael Kidd, 'Greening the Judiciary' (2006) 9 *Potchefstroom Electronic Review* 72.

⁸⁹ Loretta Feris *ibid* at 29.

environmental constitutionalism, affirmed and extended the horizontal application of the environmental right. Although not considered a climate case in the strict sense, *Arcelormittal* may have important and far reaching implications for future private climate litigation in South Africa.

Arcelormittal concerns litigation based on the right to access of information instituted by a nongovernmental environmental advocacy organisation, the Vaal Environmental Justice Alliance (VEJA), against South Africa's largest steel producer, Arcelormittal South Africa Ltd.⁹⁰ In 2011, VEJA initiated a campaign to access environmental information from Arcelormittal, specifically the company's Environmental Master Plan pertaining to the rehabilitation of the Vanderbijlpark site.⁹¹ The information sought by VEJA would reflect whether or not Arcelormittal had complied with its own environmental strategy as well as with the requirements of the licences issued by various governmental departments under environmental legislation. VEJA asserted that it had a right to access Arcelormittal's records in terms of the Promotion of Access to Information Act⁹² (PAIA). The PAIA allows for the horizontal enforcement of the right to information in cases 'where information is required for the protection of any rights'.⁹³ In its request, VEJA claimed that the requested records were necessary for the protection of the environmental right, which is also a horizontally enforceable right.⁹⁴

Arcelormittal adopted an obstructive stance and disputed that VEJA required the requested records for the protection of the environmental right.⁹⁵ Additionally, Arcelormittal claimed that, through requesting the records, VEJA was usurping the state's role in enforcing the regulatory provisions of environmental legislation.⁹⁶ Navsa ADP, writing for the Supreme Court of Appeal (SCA), rejected Arcelormittal's arguments through the application of thick environmental constitutionalism and a rights-based approach to environmental litigation. The Supreme Court of Appeal (SCA) upheld the order of the High Court and directed Arcelormittal to deliver the requested records to VEJA within 14 days. Although the order of the court was limited to simply granting access to information, the approach taken by the court offers valuable insights into the horizontal application of the environmental right in South Africa and illustrates the immense potential for a rights-based approach to private climate litigation in the future.

⁹⁰ *Arcelormittal* supra note 84 at para 2.

⁹¹ *Ibid* para 8.

⁹² The Promotion of Access to Information Act 2 of 2000.

⁹³ See s 50(1)(a) of the PAIA.

⁹⁴ *Arcelormittal* supra note 84 paras 8-9.

⁹⁵ *Ibid* paras 11–15 and 83

⁹⁶ *Ibid* para 12.

Despite the applicant's reliance on the procedural right of access to information, as enshrined in the PAIA, the *Arcelormittal* judgement provided a vivid illustration of environmental constitutionalism as the environmental harms of polluting industries occupied centre stage throughout the litigation.⁹⁷ Navsa ADP highlighted Arcelormittal's 'acknowledged history of operational impact on the environment'⁹⁸ and wrote the judgement from the need to 'reset our environmental sensitivity barometer' in the face of climate change.⁹⁹ This is a welcome change from many narrowly cast cases where requests for access to information are disconnected from, or treat as peripheral, the environmental harms in relation to which the information is sought and the everyday struggles of those affected by such harms.¹⁰⁰

Through a solid grounding of the procedural issues in the context of a rights-based approach, the court was able to engage with the substantive rights that underlie VEJA's request for information in an expansive and integrated manner. In line with the principle of 'interdependency' that has been endorsed by various human rights instruments¹⁰¹, the court exhibited an acute awareness of the direct correlation that substantive rights have on one another by recognising the effect of environmental degradation on the South African population.¹⁰² Environmental ruin can have tremendous implications for the attainment of social justice, equality and dignity as 'the environment and nature...create the conditions for social justice.'¹⁰³

Not only did the judgement recognise the symbiosis between substantive rights, it also recognised the mutually-reinforcing nature of procedural and substantive rights. The court reasoned that the procedural right to information was fundamental to the full expression of the environmental right and thus, too, pivotal in ensuring the full enjoyment of various interconnected socio-economic rights. In so doing, the court traversed various provisions in South Africa's environmental legislative framework that pursue social justice and link issues of transparency and participation to environmental protection.¹⁰⁴

⁹⁷ Melanie Murcott op cit note 87 at 201.

⁹⁸ *Arcelormittal* supra note 84 para 52.

⁹⁹ *Ibid* para 84.

¹⁰⁰ Melanie Murcott op cit note 87 at 200.

¹⁰¹ See for example the Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights, June 1993, UN Doc A/Conf 157/23, Part I, para 5.

¹⁰² *Arcelormittal* supra note 84 para 52, where the court linked environmental degradation, such as the negative effects on air and water quality, to the rights of individuals and communities.

¹⁰³ David Schlosberg, 'Theorising Environmental Justice: The Expanding Sphere of a Discourse' (2013) 22 *Environmental Politics* at 38.

¹⁰⁴ *Arcelormittal* supra note 84 paras 62–70.

Through an application of transformative environmental constitutionalism, the court extended the application of environmental principles to the private actors responsible for environmental degradation. This extension takes cognisance of the fact that in certain instances, private abuses of human rights may be as noxious as those committed by the State.¹⁰⁵ Of particular relevance, the court affirmed the potential for the horizontal application of s 2(4)(k) of NEMA, which mandates that environmental decisions ‘must be taken in an open and transparent manner, and access to information must be provided in accordance with the law.’¹⁰⁶ This symbolises a pioneering judicial development as although it is uncontroversial that the provisions of PAIA may apply to corporations, the horizontal application of the principles of NEMA, prior to the *Arcelormittal* judgement, was debatable.¹⁰⁷ This development is consistent with the emerging acceptance that corporations must respect human rights, particularly those related to the environment.¹⁰⁸ In reinforcing *Arcelormittal*’s environmental corporate accountability, Navsa ADP rejected *Arcelormittal*’s refusal to disclose the documents requested by VEJA.

Although *Arcelormittal* is not considered a climate case in the strict sense, as Kim Bouwer notes, a preoccupation with the ‘holy grail’ cases of climate litigation may result in other cases being overlooked.¹⁰⁹ This necessitates the consideration of cases which pursue private law pathways and where issues of climate change are less ‘visible’ and the connection to domestic climate policy is generated ‘inadvertently’.¹¹⁰ In order to illuminate these cases it is necessary to analyse ‘litigation “in the context of” climate change, as well as litigation “about” climate change’.¹¹¹ Indeed, there are important takeaways from the *Arcelormittal* judgment that indicate the advantage of having a horizontally enforceable environmental right in the context of private climate litigation.

First, the judgment in *Arcelormittal* provides a vivid depiction of the strength of an integrated rights-based approach to pursue private environmental litigation in South Africa. The judgement is testament to the fact that litigation based on procedural rights can be enriched and strengthened by linking the procedural right with the relevant substantive right. Augmenting procedural rights with substantive rights serves to position litigation within the

¹⁰⁵ Iain Currie & Johan de Waal *The Bill of Rights Handbook* (2000) 41.

¹⁰⁶ *Arcelormittal* supra note 84 para 66.

¹⁰⁷ See s 2(1) of the NEMA, which reads: ‘The principles set out in this section apply throughout the Republic to the actions of all organs of state that may significantly affect the environment... (emphasis added)’.

¹⁰⁸ Justine Nolan, ‘With Power Comes Responsibility: Human Rights and Corporate Accountability’ (2004) 28 *University of New South Wales Law Journal* at 581.

¹⁰⁹ Kim Bouwer op cit note 17 at 484.

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

context of the environmental harms suffered and the social injustices they produce.¹¹² This was demonstrated in *Arcelormittal* as the court did not limit the scope of its analysis to the procedural right of access to information, but also focussed on the protection of the environment and the issues of equality and human dignity linked to it. This is particularly salient in the African context, and in the Global South more broadly, where climate cases evince a ‘stealthy’ strategy.¹¹³ Applicants often rely on procedural rights to tackle climate related issues, which tends to result in cases of ‘incidental climate litigation’.¹¹⁴ Given the prevailing lacuna in jurisprudence pertaining to the content of the environmental right in South Africa, it is unlikely that it will be invoked directly in climate litigation. Rather, litigants are likely to continue to place a heavy reliance on procedural rights. However, *Arcelormittal* reveals that augmenting procedural rights with the substantive environmental right creates the opportunity for the judiciary to engage with the substantive issues in the case.

Such engagement is significant in light of the judiciary’s goal of transformative constitutionalism. It must be borne in mind that the South African Constitution is symbolic of the country’s ideological and *de iure* fracture from the oppressive apartheid regime and its fresh commitment to transformation.¹¹⁵ Although not contributing significantly to our understanding of the content of the environmental right, the court in *Arcelormittal* hinted towards the judicial recognition that a sound environment constitutes the foundation upon which constitutional values can be realized, enhanced and protected.¹¹⁶ As John Knox proclaimed: ‘human rights are grounded in respect for fundamental human attributes such as dignity, equality and liberty. The realization of these attributes depends on an environment that allows them to flourish’.¹¹⁷

Climate change presents a ‘wicked’ problem in that it manifests as more than a mere

¹¹² Melanie Murcott op cit note 87 at 200.

¹¹³ Jacqueline Peel and Jolene Lin, ‘Transnational Climate Litigation: The Contribution of the Global South’ (2019) 113 *American Journal of International Law* at 685.

¹¹⁴ Ibid. See also David Markell and J.B.Ruhl, ‘An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual’ (2012) 15 *Florida Law Review* 15; Jacqueline Peel, Hari Osofsky and Anita Foerster, ‘Shaping the “Next Generation” of Climate Change Litigation in Australia’ (2017) 41 *Melbourne University Law Review* 793.

¹¹⁵ Louis Kotze, ‘The Conceptual Contours of Environmental Constitutionalism’ (2015) *Widener Law Review* at 191.

¹¹⁶ *Arcelormittal* supra note 84 para 52.

¹¹⁷ John Knox, ‘United Nations General Assembly, Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment’ (2012) A/HR/C/22/43, Agenda Item 3 at 5, available at, http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/AHRC-22-43_en.pdf, accessed 2 August 2020.

environmental crisis, but has broader socio-economic consequences.¹¹⁸ It is well understood that the poorest in society suffer a disproportionate burden of the social, economic and health consequences that accompany environmental degradation.¹¹⁹ Given the enduring nature of socio-economic inequality in South Africa, addressing climate change is a human rights priority that cannot be delayed. Our courts have been tasked with implementing a process of transformative constitutionalism, which envisions the Constitution as vehicle for transforming South African society into one which is more democratic, participatory and egalitarian.¹²⁰ This transformative judicial milieu bodes well for prospective private climate litigation in South Africa and may possibly place applicants at a unique advantage in obtaining a favourable outcome. Second, although *Arcelormittal* involved the procedural right of access to information, the court affirmed that the substantive environmental right operates horizontally. In fact, the court went one step further in declaring that the environmental legislative provisions aimed at ensuring the full expression of the environmental right also operate horizontally.¹²¹ This development is of particular importance in light of emerging trends in the second wave of private litigation, which seek to hold corporations liable for failure to disclose climate related information.¹²² In South Africa, most large companies adhere to certain sustainability guidelines, indices and governance codes which promote good corporate sustainability practices and reporting. The Johannesburg Stock Exchange's Socially Responsible Investment (SRI) Index, the King Code on Corporate Governance for South Africa and the Global Reporting Initiative Guidelines all are premised on a company's own assessment of its environmental performance.¹²³ Consequently, many cases of environmental non-compliance go undisclosed or are reported as being of 'minor' relevance.¹²⁴ Notably, Eskom which is South Africa's electricity provider and biggest greenhouse gas emitter only discloses its direct emissions and has not yet set targets to reduce its future emissions.¹²⁵

The Constitution is premised on a clutch of aspirational values that should permeate all of

¹¹⁸ See Jim Perry, 'Climate Change Adaption in the World's Best Places: A Wicked Problem in Need of Immediate Attention' (2015) 133 *Landscape and Urban Planning* 1.

¹¹⁹ Barry Levy and Jonathan Patz, 'Climate Change, Human Rights, and Social Justice' (2015) 81 *Annals of Global Health* 318.

¹²⁰ Karl Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal on Human Rights* at 150.

¹²¹ *Arcelormittal* supra note 84 paras 61-66.

¹²² See discussion in section 2 above.

¹²³ The Centre for Environmental Rights, 'Full Disclosure: The Truth about Corporate Environmental Compliance in South Africa' (2015) at 6, available at, <https://fulldisclosure.cer.org.za/2015/download/CER-Full-Disclosure.pdf>, accessed 2 August 2020.

¹²⁴ *Ibid.*

¹²⁵ The Centre for Environmental Rights, 'Full Disclosure 5: The Truth about South African Banks' and Companies' Ability to Identify and Address Climate Risks', available at, <https://fulldisclosure.cer.org.za/2019/>, accessed 2 August 2020.

South African society.¹²⁶ The court in *Arcelormittal* recognised that the right to a healthy environment is inextricably linked to these aspirational values. Similarly, the procedural right of access to information is fundamental in ensuring the full expression of the substantive environmental right and thus, too, to the aforementioned values. As South African courts have already displayed a willingness to create new legislative goals by interpreting existing legislation to require additional climate related considerations¹²⁷, it would not be out of kilter for our judiciary to interpret existing corporate sustainability guidelines and indices as requiring adequate climate-change-related disclosures. This is palpable in light of the expansive and integrated approach taken by the court in *Arcelormittal*, which acknowledged the interdependency of the substantive environmental right and the procedural right of access to information.

In light of the potential for climate change to ossify and heighten inequality, it may be argued that the judicial interpretation of existing corporate reporting standards in South Africa as requiring sufficient climate disclosures is necessary in terms of the judiciary's commitment to transformative constitutionalism, a commitment that is significantly aided by the horizontal application of rights. This implies that in order for companies to act in accordance with the fundamental values of our Constitution, they should at the very least disclose the relevant information necessary for individuals to enforce and uphold the environmental right.¹²⁸ Ultimately, the failure to disclose relevant climate information may equate to a violation of the environmental right itself and the plethora of socio-economic rights and constitutional values that are inextricably linked to the integrity of the environment. The *Arcelormittal* judgement makes it explicitly clear that corporate disclosures of environmental information, which would include climate-related considerations, are necessary for fostering social justice, equality and dignity through empowering South Africans who are affected by environmental harm to protect the environment and pursue a just and equitable society that promotes their dignity.¹²⁹

5. Conclusion

Although rights-based arguments in the context of climate litigation are emerging as successful strategies in a public law context, their potential for private climate litigation is yet to be fully explored in evolving discourse. There are strong legal and moral obligations for

¹²⁶ See s 1(a)-(d) of the Constitution of the Republic of South Africa.

¹²⁷ See *Earthlife* supra note 53.

¹²⁸ Our courts have emphasised the important role that private parties play in enforcing the environmental right in *Arcelormittal* and *Biowatch Trust v Registrar Genetic Resources and Others* (CCT 80/08) [2009] ZACC 14; 2009 (6) SA 232 (CC) ; 2009 (10) BCLR 1014 (CC) (3 June 2009).

¹²⁹ Erin Daly and James R. May, 'Bridging Constitutional Dignity and Environmental Rights Jurisprudence' (2016) 7 *Journal of Human Rights and the Environment* at 3.

private polluters to be held directly responsible for their climate change contributions; however, the legal tools for doing so have only recently become available. This Paper has presented the strength of a constitutionally enshrined environmental right in achieving both climate justice and its less visible ally, environmental justice. The horizontal application of an environmental right lays the groundwork for pursuing multiple pathways to combat climate change through private law, which recognises the interconnectedness of a healthy environment and socio-economic rights. Given the recognition of an environmental right in many African constitutions, Africa still has much to contribute to the growing body of rights-based climate litigation – albeit, these might not present themselves as ‘silver bullet’ climate cases, but have the potential to expand upon various justifications for attributing rights violations to private parties.

In order to realise the full potential of the right to a healthy environment in a private context, it has been submitted that environmental rights be engaged with substantively in order to supplement the ‘tried and tested’ procedural approach, which can only go so far in advancing a set of rights-based arguments. Indeed, it is the mandate of South Africa’s commitment to transformative constitutionalism to contribute to an understanding of the environmental right which must necessarily address the climate injustices exacerbating inequality and impacting on the human dignity of its citizens. Ultimately, *Arcelormittal* confirms that all the dominos are aligned for South Africa to be engulfed by its own wave of private climate litigation. All that remains is for the first one to topple. And hopefully, in the right direction.

The City Law School
City, University of London
Northampton Square
London EC1V 0HB

T: +44(0)20 7040 3309
E: law@city.ac.uk



Email enquiries:
law@city.ac.uk



Telephone enquiries Find out more, visit
+44 (0) 44 02 7040 5787 www.city.ac.uk/law

