

D I A L O G U E

# GLOBAL PERSPECTIVE ON CLIMATE AND ENERGY JUSTICE

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## SUMMARY

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The first biennial symposium of the Institute for Global Understanding at Monmouth University was held March 25-27, 2021.\* The symposium assembled experts from the government, nonprofit, academic, community, and private sectors to examine topics at the intersection of human rights and the environment and to propose solutions for the future. One session hosted panelists for a round table discussion on climate and energy justice. Below, we present a transcript of that discussion, which has been edited for style, clarity, and space considerations.

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**Randall S. Abate** (moderator) is the Rechnitz Family and Urban Coast Institute Endowed Chair in Marine and Environmental Law and Policy and Director of the Institute for Global Understanding at Monmouth University in New Jersey.

**Patrícia Galvão Ferreira** is an Assistant Professor at the University of Windsor Faculty of Law in Windsor, Ontario.

**Jae-Hyup Lee** is a Professor at Seoul National University School of Law in South Korea.

**Esmeralda Colombo** is a Visiting Professor and Research Fellow at the Center for Climate and Energy Transformation at the University of Bergen, Norway.

**Damilola S. Olawuyi**, SAN, is an Associate Professor of Energy and Environmental Law at Hamad Bin Khalifa College of Law in Doha, Qatar.

**Randall Abate:** This morning's session is unique in a couple of ways. First, we have distinguished speakers representing four countries on this panel. Second, this is in round table format. Each presenter will speak for 15 minutes. Following that, I will pose questions directly to the speakers to take a deeper dive into the issues raised in their remarks.

It is my pleasure to introduce our distinguished speakers, each of whom is a globally recognized scholar in the fields of climate and/or energy justice. We will first hear from Patrícia Galvão Ferreira, an assistant professor at the University of Windsor Faculty of Law in Windsor, Ontario. Next, we will hear from Dr. Jae-Hyup Lee, a professor at Seoul National University School of Law in South Korea. Our third speaker will be Esmeralda Colombo, a visiting professor and research fellow at the Center for Climate and Energy Transformation at the University of Bergen, Norway. Lastly, we will hear from Damilola Olawuyi, a professor of energy and environmental law at Hamad Bin Khalifa College of Law in Doha, Qatar.

To give you a sense of the interrelationship, our first presenter will focus primarily on climate justice issues. The second and third presentations sit at the intersection of climate justice and energy justice. The final presentation will focus exclusively on energy justice.

### **Litigating the Right to Be Cold: Obstacles for Climate Justice in Canadian Courts**

**Patrícia Galvão Ferreira:** I speak to you from Windsor, Ontario, which sits in the territory of the Three Fires Confederacy—the Ojibwe, the Odawa, and the Potawatomi. It is a great pleasure to be part of this panel and this conference and to reflect with you today on access to climate justice in Canadian courts.

As hope has ebbed and flowed over the past three decades that States would be willing and able to effectively create laws and policies to avoid, or to at least minimize, dangerous climate change impacts, we have witnessed several waves of climate litigation in national courts. These lawsuits have increasingly called on judges to play a more critical role in pushing governments or corporations to address the climate crisis.

In fact, we are now in the middle of another big wave of climate litigation, in the wake of the 2015 Paris Agreement. A 2020 report on the state of climate litigation by the United Nations Environment Programme shows that in the past three years the number of climate lawsuits around the world has nearly doubled.<sup>1</sup> Rights-based litigation accounts for a significant share of this new tide of climate lawsuits, in the wake of emblematic victories in some pioneering rights-based cases that I am sure many of you

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\* IGU 2021 Biennial Symposium web page, <https://www.monmouth.edu/igu/symposium>.

1. UNITED NATIONS ENVIRONMENT PROGRAMME, GLOBAL CLIMATE LITIGATION REPORT: 2020 STATUS REVIEW (2020), <https://www.unep.org/resources/report/global-climate-litigation-report-2020-status-review>.

are familiar with, cases like *Urgenda*<sup>2</sup> in the Netherlands, and also anchored in a growing list of authoritative reports that emphasize the intersection between a stable climate and human rights.

Canada offers a perfect illustration of this new trend. In the past three years alone, four different rights-based climate lawsuits were filed in Canadian courts. Much like other rights-based climate lawsuits around the world, Canadian plaintiffs are asking courts to declare that Canada's climate laws and policies are inadequate in light of climate science and international climate law, and that this failure to adopt adequate legal and policy protections constitutes violations of §7, the right to life, and §15, the right to equal protection, of the Canadian Charter of Rights and Freedoms.<sup>3</sup>

Yet, my presentation is based on research projects to examine not only the similarities, but also the unique characteristics of rights-based litigation in Canada. In particular, to shed some light as to why access to climate justice in Canadian courts has thus far proved exceptionally challenging. Three of these four lawsuits have been rejected by the Canadian courts in preliminary phases. Only one lawsuit has moved forward thus far, the *Mathur* case against Ontario.<sup>4</sup>

Coincidentally or not, the decision that this case would move to trial was issued yesterday. On the previous day, the Canadian Supreme Court had confirmed the constitutionality of the country's federal carbon pricing law. So in fact, this has been a very eventful week for climate advocates in Canadian courts. And I'm glad to be here reflecting on these breakthroughs.

I will structure the balance of my presentation around three main points: first, who the Canadian plaintiffs are and why they resorted to Canadian courts now; second, the main obstacles hampering their efforts to have their cases fully heard by courts; and third, to emphasize the importance of these Canadian lawsuits, highlighting some of the potential implications internationally and nationally of a victory in at least one of these rights-based lawsuits.

First, who are the Canadian plaintiffs? The first aspect of the Canadian rights-based lawsuits to keep in mind is that they also reflect the growing leadership role that youth groups are embracing in climate action worldwide, including climate litigation. Yet there is a twist in the Canadian context.

The first rights-based lawsuit in Canada was a November 2018 application by a youth organization called ENvironnement JEunesse, or ENJEU, filed before a federal court in Quebec to bring a class action lawsuit against the government of Canada on behalf of Quebec's citizens

2. Supreme Court Dec. 20, 2019, ECLI:NL:HR:2019:2007 (*Urgenda*/Netherlands) (Neth.), available at <http://climatecasechart.com/climate-change-litigation/non-us-case/urgenda-foundation-v-kingdom-of-the-netherlands/>.
3. Canadian Charter of Rights and Freedoms, Part II of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c 11 (U.K.).
4. *Mathur v. Her Majesty the Queen in Right of Ontario* (filed Nov. 25, 2019) (Can.), available at <http://climatecasechart.com/non-us-case/mathur-et-al-v-her-majesty-the-queen-in-right-of-ontario/>.

aged 35 and under.<sup>5</sup> This claim alleged that Canada has not taken sufficient action to reduce greenhouse gas emissions in the face of the climate challenge, therefore failing to protect the fundamental rights of Quebec youth. They took into account the Canadian Charter of Rights and Freedoms, but also the Quebec Charter of Human Rights and Freedoms.

This is very much like earlier youth-led cases in other countries, including the *Juliana*<sup>6</sup> case in the United States. They inspired this lawsuit. But the two cases that followed, *La Rose v. Her Majesty the Queen* and *Mathur v. Her Majesty the Queen in Right of Ontario*, also had youth as main plaintiffs.<sup>7</sup> Yet one particularity that often goes unnoticed is the fact that these two Canadian lawsuits have intentionally included indigenous youth. This makes *La Rose* and *Mathur* stand out from other youth-led climate lawsuits in other countries.

The *La Rose* case against the government of Canada was filed by 15 plaintiffs. Seven of them are indigenous youth. This case was framed in a way that is very similar to the *Juliana* case. They are challenging the constellation of government decisions that together lead to high greenhouse gas emissions and are inconsistent with the estimated Canadian carbon budget if we are to meet the Paris Climate Agreement temperature goals of 1.5°C and 2°C.

In the *Mathur* case, three of the seven plaintiffs are indigenous youth. The plaintiffs in this case are specifically challenging the Cap and Trade Cancellation Act,<sup>8</sup> passed in 2018 by the government of Ontario, instead of a broader set of climate laws and policies. They argue that by setting a lower emissions reduction target than the previous legislation, this Act is in fact allowing more greenhouse gas emissions from the province that are significantly contributing to dangerous climate change-related impacts, including heat waves, floods, and fires. Therefore, Ontario is violating the Canadian Charter of Rights and Freedoms by abdicating the responsibility to do its part to address the climate change crisis.

The fourth and final case in this wave of rights-based litigation in Canadian courts, *Lho'imggin v. Her Majesty the Queen*, was filed by two Wet'suwet'en house indigenous hereditary chiefs.<sup>9</sup> The hereditary chiefs are representing all Wet'suwet'en indigenous peoples against the government of Canada. This lawsuit is very similar to the other cases, in the sense that it is challenging the inad-

5. *ENVironment JEunesse v. Canada* (filed Nov. 26, 2018) (Can.), available at <http://climatecasechart.com/climate-change-litigation/non-us-case/environnement-jeunesse-v-canadian-government/>.
6. *Juliana v. United States*, No. 6:15-cv-1517, 48 ELR 20083 (D. Or. May 25, 2018).
7. *La Rose v. Her Majesty the Queen* (filed Oct. 25, 2019) (Can.), available at <http://climatecasechart.com/climate-change-litigation/non-us-case/la-rose-v-her-majesty-the-queen/>; *Mathur v. Her Majesty the Queen in Right of Ontario* (filed Nov. 25, 2019) (Can.), available at <http://climatecasechart.com/non-us-case/mathur-et-al-v-her-majesty-the-queen-in-right-of-ontario/>.
8. Cap and Trade Cancellation Act, S.O. 2018, c 13 (Can.), available at <https://www.ontario.ca/laws/statute/18c13>.
9. *Lho'imggin v. Her Majesty the Queen* (filed Feb. 10, 2020) (Can.), available at <http://climatecasechart.com/climate-change-litigation/non-us-case/gagnon-et-al-v-her-majesty-the-queen/>.

equacy of a set of Canadian climate laws and policies in light of climate science and international commitments. The *Lho'imggin* case stands out by challenging the systematic decisions to approve new carbon-intensive fossil fuel projects on indigenous lands, and by highlighting the disproportionate vulnerability of Canadian indigenous peoples to climate impacts.<sup>10</sup>

Why are indigenous peoples at the forefront of these cases in Canada? Why are they taking this leadership role in rights-based litigation in the country? At first glance, Canada is not considered particularly vulnerable to climate change impacts, with some even arguing that the benefits from warmer average temperatures may outweigh costs in some parts of Canada, provided that adaptation is taken seriously. But of course that interpretation has a very clear environmental racism undertone.

In fact, official studies in Canada have documented that the country is particularly vulnerable when compared to other countries, as it is warming at twice the global average, with the Arctic warming three times faster than global numbers.<sup>11</sup> And studies have also documented how indigenous peoples are feeling the brunt of impacts from this disproportionate warming. In a landmark decision on the constitutionality of the federal carbon pricing law,<sup>12</sup> issued two days ago, the Supreme Court of Canada has for the first time recognized this reality, emphasizing that climate impacts are threatening indigenous peoples' ability to sustain themselves and to maintain their traditional ways of life.

The fact that the Canadian Supreme Court, based on official studies by the Canadian government, has now recognized the disproportionate vulnerability of indigenous peoples is an important first step forward in climate justice. As indigenous peoples in Canada continue to push the country to face the enduring legacy of colonialism that still pervades Canadian laws and institutions, in a complex process of national reconciliation, it is natural that they are at the forefront of rights-based climate litigation initiatives as well. Not only are they the ones under existential threat due to climate impacts and risks, but indigenous peoples in Canada have also been responsible for a broader movement toward greater environmental protection in the country, in opposition to mainstream laws and policies that tend to favor short- and medium-term economic growth and development over long-term ecosystem protection.

Now that I have clarified the reason behind this indigenous leadership role in rights-based climate litigation in Canada, I would like to discuss the strong headwinds that youth and indigenous plaintiffs in Canada are facing to even have their cases fully heard in Canadian courts. This record shows how difficult it has been for plaintiffs to get a

measure of climate justice in the Canadian judicial system. From the four rights-based lawsuits, only one, *Mathur*, has been allowed to proceed to trial after surviving two motions to strike. In fact, the decision on the second motion to strike in the *Mathur* case was issued yesterday, so this is really fresh. As each of the decisions to dismiss the cases is in fact quite complex, my intention here is to give you a taste of the main issues.

Both the *La Rose* case and the *Lho'imggin* case have been dismissed in motions to strike for lack of justiciability. If plaintiffs lose the appeals against these decisions, they would not have the merits of their cases heard in Canadian courts. The main argument that the courts have used to dismiss these two cases has been that plaintiffs were basing the allegations of violations of their rights not on any specific climate law or policy, or even an identifiable network of laws and policies, but rather on a diffuse constellation of climate laws and policies.

Such a diffuse constellation of laws and policies, which requires weighing conflicting environmental, social, and economic interests, should remain in the realm of parliament and executive deliberations, according to the two decisions by Canadian courts. This position, which is similar in many ways to the latest decision by American courts in the *Juliana* case, illustrates how some Canadian courts are still having a difficult time adapting existing legal doctrines to the complex, unprecedented, and asymmetric nature of the rights violations against certain social groups caused by climate change.

The ENVJEU case is a different beast, as it was shaped as a class action on behalf of all youth in Quebec (therefore it did not highlight the disproportionate effects in indigenous youth). This case was dismissed due to a technicality, as the court decided that defining the class as those 35 years and younger was not sufficiently justified. The Quebec court in this case, in fact, decided that it had the power to review the constitutionality of a constellation of climate laws and policies that together allegedly violated the rights to life and equal protection under the Charter of Rights and Freedoms. The Quebec court has therefore taken a very different position in terms of justiciability of the rights-based lawsuit.

The Ontario court also affirmed the justiciability of the case in the *Mathur* lawsuit; however, in this case, the plaintiffs are challenging one specific law, which is the law that the Ontario government has issued to cancel the previous cap-and-trade system, and also to lower the Ontario provincial emissions reduction target. We are expecting the trial date for the *Mathur* case to be set for later this year. Plaintiffs appealed the dismissals in the three other cases.

We still hope to see Canadian courts examine the merits of the cases. If not, we expect new cases to be filed to address the question of justiciability by focusing on a narrower network of climate laws and policies, so that the merits of the cases can be heard and the rights affirmed. We also hope that some well-recognized obstacles to climate litigation that have been playing out in other countries—such as causation and the *de minimis* defense—do not prevent courts from affirming Canada's duty to protect the rights

10. *Id.*

11. GOVERNMENT OF CANADA, CANADA'S CHANGING CLIMATE REPORT (Elizabeth Bush & Donald S. Lemmen eds., 2019), [https://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/energy/Climate-change/pdf/CCCR\\_FULLREPORT-EN-FINAL.pdf](https://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/energy/Climate-change/pdf/CCCR_FULLREPORT-EN-FINAL.pdf).

12. References re Greenhouse Gas Pollution Pricing Act, 2021 SCC 11 (Can.), available at <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/18781/index.do>.

of its most vulnerable social groups, by contributing its fair share to global climate efforts. The emblematic decisions by foreign courts rejecting these defenses of lack of causation or de minimis contributions (e.g., *Urgenda*) can help inform decisions by Canadian courts.

But I would like to flag two additional obstacles that are expected in these lawsuits in the merits phase, which are unique to the Canadian context. The first obstacle is that Canada is behind many other countries in the recognition of substantive environmental rights. There is currently no legislation in Canada explicitly recognizing a right to a healthy environment, despite many attempts to create an environmental bill of rights or even to get this recognition through reform of existing statutory law—for example, the Canadian Environmental Protection Act.<sup>13</sup> Canadian courts have also yet to recognize that the right to life and equal protection encompasses the right to a healthy environment.

This lack of recognition of environmental rights represents an obstacle to access to justice in Canadian courts in all environmental cases, not only in the climate context. The rights-based climate lawsuits are only making more visible the problems created by the lack of legislative and judicial recognition of environmental rights. The urgency of the climate crisis and the scale of the threats it represents to human rights also highlight the extent of the need to advance in environmental rights recognition in Canada. Canadian courts will have to jump from the stance of not recognizing that the right to life or equal protection includes an environmental scope to recognizing that the right to a stable climate is within the scope of protection under §7 or §15.

A second important obstacle is that Canadian courts have yet to recognize that the scope of the right to life includes positive obligations that States must fulfill. The rights-based climate lawsuits are rooted in Canada's failure to create adequate legal and policy frameworks that will allow the country to meet the international commitments that are considered its minimum fair share in global climate efforts. In order to establish that there was a violation of the right to life in these cases, courts would need to recognize that governments have an obligation to take positive steps to protect a right to a stable climate, rather than merely refraining from actions that directly violate such a right (negative obligations). In other words, the questions the rights-based climate lawsuits are presenting are still novel to Canadian courts. Canadian courts will need to jump from the backward position they are in at present, in not yet recognizing environmental rights, to recognize climate rights.

That leads me to my final point, which is the potential implications of success in one of those cases. I would like to highlight both national and international implications of a successful decision in at least one of these Canadian rights-based climate lawsuits. At the domestic level, a successful outcome in those cases can have a significant

impact as it will, at long last, lead to the judicial recognition of environmental rights in Canada, improving access to environmental justice in the country. In particular, a decision on one of the lawsuits where indigenous peoples or youth are plaintiffs would also be a major step forward in ensuring access to environmental justice to indigenous peoples, in a moment where Canada goes through a process of national reconciliation.

At the international level, a successful Canadian lawsuit decision would add to a number of important precedents of courts affirming climate rights that started with *Urgenda* in the Netherlands back in 2015, but now includes decisions by Colombian courts, French courts, and others.<sup>14</sup> This growing body of case law in national courts is cementing the concept that a stable climate is a human right.

Another international implication relates to the fact that Canada, which often flies under the radar when it comes to main contributors to climate change, is in fact one of the 10 largest global emitters of greenhouse gases in absolute numbers.<sup>15</sup> A successful rights-based climate lawsuit will improve the chances that Canada will cut emissions significantly, in a moment when we need all largest global emitters to play their role if we are to reach the Paris climate goals. This is also extremely important from an international equity perspective, as Canada, a developed country, remains at the very top in per capita emissions. For all these reasons, it is no surprise that so many are closely following the fate of these Canadian rights-based climate lawsuits.

### Green New Deal Policy of South Korea: Policy Innovation for a Sustainable Transition

**Jae-Hyup Lee:** I am going to talk about the Green New Deal policy of South Korea.<sup>16</sup> The Korean Green New Deal was originally proposed as a post-COVID-19 stimulus plan, but it is regarded as a sustainability-centered strategy for building a low-carbon, climate-neutral economy. The COVID-19 challenge provides an opportunity for reevaluating the impacts of the threats of environmental and health problems, while formulating public policy responses toward a sustainable future.

I will discuss the Korean Green New Deal as a national climate and energy strategy for the post-COVID era, illustrating its necessity and some challenges ahead. Hopefully, this Korean case will enlighten global efforts to recover from the economic downturn and promote enhanced climate action at the same time.

First, let me provide some background on South Korea in terms of climate change and energy. South Korea currently leaves large footprints in the global climate change

13. Canadian Environmental Protection Act, S.C. 1999, c 33 (Can.).

14. UNITED NATIONS ENVIRONMENT PROGRAMME, GLOBAL CLIMATE LITIGATION REPORT: 2020 STATUS REVIEW (2020), <https://wedocs.unep.org/bitstream/handle/20.500.11822/34818/GCLR.pdf>.  
 15. Johannes Friedrich et al., *This Interactive Chart Shows Changes in the World's Top 10 Emitters*, WORLD RESOURCES INST., Dec. 10, 2020, <https://www.wri.org/insights/interactive-chart-shows-changes-worlds-top-10-emitters>.  
 16. GOVERNMENT OF THE REPUBLIC OF KOREA, NATIONAL STRATEGY FOR A GREAT TRANSFORMATION—KOREAN NEW DEAL 3-17 (2020), available at [english.moef.go.kr/co/fixFileDown.do?orgNm=Korean\\_New\\_Deal.pdf](http://english.moef.go.kr/co/fixFileDown.do?orgNm=Korean_New_Deal.pdf).

landscape. It is the seventh-largest national carbon dioxide emitter next to Japan, Germany, and Iran.<sup>17</sup> And it is one of the Organisation for Economic Co-operation and Development (OECD) countries with the fastest growing greenhouse gas emissions, together with countries like Turkey and Mexico.<sup>18</sup>

South Korea's nationally determined contribution under the Paris Agreement proposes an economywide target to reduce greenhouse gas emissions by 37% below business-as-usual by 2030.<sup>19</sup> Although many environmental activists argue that Korea's proposal is insufficient, it is a tough target to achieve for countries like Korea.

Korea imports 95% of its energy needs from overseas.<sup>20</sup> Its energy consumption is still very much dependent on fossil fuels. Many Korean industries are energy-intensive like steel, shipbuilding, and semiconductor fabrication. Electricity is generated by coal, natural gas, and nuclear plants. Renewable sources account for less than 10% now.<sup>21</sup>

South Korea has introduced the first national mandatory emissions trading system in the East Asian region.<sup>22</sup> Indeed, the national policy strategy for achieving net-zero emissions through the Green New Deal is the first commitment of its kind in East Asia. South Korea regards itself as a bridge nation between developed and developing nations, and has been active in international environmental diplomacy. A number of prominent international organizations related to climate change and sustainability are headquartered in Korea, including the Green Climate Fund and Global Green Growth Institute.

The Green New Deal is very popular, and there are similar concepts that are interchangeably used in the international community. The ultimate overarching goal of international environmental policy is sustainable development. All other concepts, like a green economy or green growth, are regarded as a pathway toward sustainable development. Although the Green New Deal idea started around 2007, most recently the European Union (EU) and the United States have both presented a Green New Deal as a viable policy. The EU, for instance, proclaimed its goal of net-zero emissions, with a transition to a circular economy, and a just transition mechanism in its Green Deal program.<sup>23</sup>

The U.S. Congress outlined climate crisis, job creation, and equity concerns in the Green New Deal resolution.<sup>24</sup> This Green New Deal resolution has also been taken up by the new Joseph Biden Administration. In Korea, President Moon Jae-in announced the Korean New Deal last year. It is a massive government-led program to offset the impacts of the COVID-19 pandemic even though Korea responded to the pandemic relatively well, and to lay the foundation for future economic growth.

The Korean New Deal is composed of the Digital New Deal and Green New Deal with a stronger economic safety net. The Green New Deal has three major tasks with eight specific project areas. The first task is the green transition of infrastructure. The three specific projects include net-zero buildings, restoration of territorial and marine and urban ecosystems, and enhancing the management system for clean and safe water.

The second task is a low-carbon and decentralized energy supply, a smart grid, promotion of renewable energy use and support of a just transition, and an expansion of the supply of electric and hydrogen vehicles.

The third task is the innovation of green industry and the promotion of research and development. If we compare the EU, U.S., and Korean Green New Deals, we see each Green New Deal scheme has strengths and weaknesses. But there are also many commonalities, like a focus on nature adaptation, resiliency, electricity, transportation, and buildings. We can find some convergence of policy initiatives.

Critics of the Korean Green New Deal have pointed out that it has relatively less focus on equity and a just transition and does not present ambitious climate change measures.

Looking back at the history of Korean environmental and energy policy, there was a precursor to the Green New Deal. The Green Growth Strategy of 2009 and the subsequent enactment of the Low Carbon Green Growth Act of 2010 is still good law and policy.<sup>25</sup> The main tasks and specific focus areas of Green Growth—which are mitigation of climate change, energy independence, creation of new engines for economic growth, improvement in quality of life, and enhancement of international cooperation—look very similar to the current Green New Deal.

Many view the Green New Deal as an upgraded version of Green Growth. So, a question arises: is a transition from Green Growth to the Green New Deal necessary? I believe so. But there are preconditions to be met as well. The Green New Deal has three components—green, new, and deal. The Green New Deal policy is justified when all three components are meaningfully integrated. First, why “green” and how much is green? Is the definition of “green” in the Green New Deal different from that of Green Growth?

The green turn of government policy was already included in Green Growth. However, there were disagree-

17. Union of Concerned Scientists, *Each Country's Share of CO<sub>2</sub> Emissions*, <https://www.ucsusa.org/resources/each-countrys-share-co2-emissions> (last updated Aug. 12, 2020).

18. OECD, *Korea Needs to Put Green Growth Vision Into Action*, <https://www.oecd.org/korea/korea-needs-to-put-green-growth-vision-into-action.htm> (last visited Apr. 20, 2021).

19. Climate Action Tracker, *South Korea: Pledges and Targets*, <https://climateactiontracker.org/countries/south-korea/pledges-and-targets/> (last visited Apr. 20, 2021).

20. U.S. Energy Information Administration, *South Korea: Overview*, <https://www.eia.gov/international/analysis/country/KOR> (last updated Nov. 6, 2020).

21. *Id.*

22. INTERNATIONAL CARBON ACTION PARTNERSHIP, *KOREA EMISSIONS TRADING SCHEME* (2020), [https://icapcarbonaction.com/en/?option=com\\_etsm\\_ap&task=export&format=pdf&layout=list&systems%5B%5D=47](https://icapcarbonaction.com/en/?option=com_etsm_ap&task=export&format=pdf&layout=list&systems%5B%5D=47).

23. European Commission, *A European Green Deal*, [https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal\\_en](https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en) (last visited Apr. 20, 2021).

24. H. Res. 109, 116th Cong. (2019).

25. Framework Act on Low Carbon, Green Growth, Act No. 9931, Jan. 13, 2010 (S. Kor.), available at [https://elaw.klri.re.kr/kor\\_service/lawView.do?hseq=49999&lang=ENG](https://elaw.klri.re.kr/kor_service/lawView.do?hseq=49999&lang=ENG).

ments and controversies over what it means to be green; for instance, regarding the nuclear industry and the large infrastructure construction project that the government promoted. The Four Rivers Restoration Project, a signature project of the Green Growth of Korea, has been criticized by many as greenwashing because it will inversely damage the nearby environment and its inhabitants. The Green New Deal should not roll back or relax any low-carbon or climate-resilient policies. It should not support sectors that exacerbate the climate crisis. In other words, mainstreaming decarbonization and energy transmission should be key in determining what is green.

Second, why “new” and how is this novelty justified? The main justification of being new is the urgency of climate action. The situation has changed significantly in the past 10 years since the Green Growth Strategy was designed. Low-carbon is not enough. We need to transition to net-zero carbon and start designing a post-carbon economy. This requires a fundamental change in the way we produce and consume energy and goods.

Third, why “deal” and how can a deal be achieved? A deal is no deal when the stakeholders are not fully included. The Green New Deal should also be formulated bottom-up and inclusively. The equity element has become much more important in the current context because the impacts of climate change have begun affecting the most vulnerable members of our society. We have seen this from floods, heat waves, wildfires, and above all COVID-19. The Green New Deal concept should incorporate more protection for the have-nots compared to Green Growth.

In November of last year, the ruling Democratic Party of Korea introduced a framework bill to transition to a decarbonized society to respond to the climate crisis in order to implement the Green New Deal policy.<sup>26</sup> The bill somewhat clarified and complemented the earlier Green New Deal policy. All the green growth, green technology, and green industry has changed to decarbonized technology and decarbonized industry. Climate crisis and decarbonization have become the key terminologies.

National vision and interim targets must be specified under the provision. The bill actually incorporated that. It is incorporating a progression of principles under the Paris Agreement—establishing net-zero emissions by 2050, with a review of its progress every five years, and establishing 2030 emission targets, with a review of its progress every year.

Additionally, in order to mainstream the climate change and decarbonization aspects into the policy, the climate crisis impact assessment scheme has been introduced.<sup>27</sup> Article 40 states that national and local governments shall analyze their policies’ impacts on the climate crisis and assess impacts arising from the expected climate crisis. The results of the climate crisis impact assessment must be incorporated into policy development and implementa-

tion. More importantly, the bill clearly spells out equity and fairness concerns, including balanced regional development, the low-income and socially vulnerable class, a just transition among industries, and protecting laborers and alleviating inequality.

Will a Green New Deal be realized as originally planned in Korea? There are many challenges ahead. Although there have been multiple attempts to move forward, with momentum from local governments to the National Assembly and the current administration, the heavily divided political landscape makes it very difficult to reach political consensus. The bill was supposed to be passed during the February term of the National Assembly, but it is still pending.

Mainstreaming decarbonization into a national policy is not going to be easy. Korea’s giant conglomerates are predominantly energy-intensive, and the renewable energy sector is still in its infancy. Some even suggest the Green New Deal provides opportunities for specific enterprises such as hydrogen vehicles mostly manufactured by Hyundai/Kia Group in the midst of a climate crisis. However, despite these challenges, Korea’s Green New Deal can be a useful steering concept capturing the momentum of COVID-19 recovery. It can transform into an effective climate response policy and can ensure a just transition for the most vulnerable members of the community.

### ***People v. Arctic Oil* and Its Discontents: The Norwegian Paradox in Global Climate and Energy Justice**

**Esmeralda Colombo:** I am excited to be talking about the one and only Norwegian climate change case, *People v. Arctic Oil*.<sup>28</sup> My presentation is connected to what Patricia presented: global climate justice. It also intersects with Jae’s presentation on policy changes and what can happen when it comes to energy transitions and incentives. In fact, I will not delve into the nooks and crannies of the case. Rather, I would like to set it within the broader context of global climate and energy justice, comparing it with similar litigation worldwide, specifically *Urgenda*, which was referenced in the case.

I will then turn to the sociolegal conditions that affected the decision in the case, especially by the Supreme Court of Norway. We will consider the “Norwegian paradox,” as it is called, as one of the reasons why the decision was not climate-protective in the end. The third topic will be the decision’s repercussions with respect to intergenerational equity.

Let me start with the definitions of “climate justice” and “energy justice.” It is not easy to find one, but here Professor Abate has been helpful. He has emphasized how climate justice can address the disproportionate burden of climate change impacts on poor and marginalized com-

26. Framework Act on Implementing a Decarbonized Society for Response to the Climate Crisis, Bill No. 2105226, Nov. 11, 2020 (S. Kor.), available at <https://www.lawmaking.go.kr/mob/nsmLmSts/out/2105226/detailR>.

27. *Id.* art. 40.

28. *People v. Arctic Oil*, 16-166674TVI-OTIR/06 (Oslo District Court, Norway, Jan. 4, 2018); *People v. Arctic Oil*, 18-060499ASD-BORG/03 (Oslo Court of Appeals, Norway, Jan. 23, 2020); *People v. Arctic Oil*, HR-2020-2472-P (Norway Supreme Court, Dec. 22, 2020).

munities. And we have addressed that theme in various sessions of this symposium.

In general, energy justice is connected to climate justice, but also has a core definition in the sense that it aims to achieve equity in both social and economic participation in the energy system, remediating health burdens especially on marginalized communities. This is a common trait. This definition has been put forward by the Biden Administration's Deputy Director for Energy Justice, Shalanda Baker, along with Subin DeVar, Director of the Initiative for Energy Justice, and Shiva Prakash, Global Regulatory Counsel at Lime.<sup>29</sup>

Starting with this background, how does *People v. Arctic Oil* compare to similar litigation worldwide? The case is known as the Norwegian climate lawsuit in Norway, while the international name is *People v. Arctic Oil*. The different formulation is likely due to the less adversarial character of Norwegian legal culture as compared to other legal cultures, notably U.S. legal culture. Traditionally, climate and energy justice issues have been addressed in public debate, executive bodies, or the Norwegian parliament, rather than in courts of law. Resorting to courts is often construed as a last resort to secure justice in Norway, a resort to be complemented with regulation.

Accordingly, the main inspiration for the Norwegian climate lawsuit case was to challenge Norway's petroleum policy for present and future generations, not in a fully adversarial way, but rather to promote more climate-protective and environment-protective legislation. This major lawsuit has challenged the expansion to the north of the petroleum industry in Norway, particularly in the south and southeast Barents Sea in the Arctic. The southeast Barents Sea was especially controversial because it was an area that had not been opened up, while the south Barents Sea had been explored since the 1980s.

In October 2016, the lawsuit was brought by two organizations, the Natur og Ungdom and Greenpeace Nordic. The first organization represents present and future generations, while Greenpeace Nordic is affiliated with Greenpeace International. An intervenor, Grandparents for Climate Action, was important for some developments of the case in the past two days, which I will address later.

The organizations brought this lawsuit against the Norwegian Ministry of Petroleum and Energy to challenge licenses issued to the petroleum industry in June 2016, just 10 days before Norway ratified the Paris Agreement. So, the timing is interesting and the majority reached in the parliament for approving these licenses is also interesting. In fact, the parliament *unanimously* provided the legal basis for the licenses. Still, the legal challenge was directed to the governmental decision based on a parliamentary decision. In fact, in Norway, it is not possible to challenge parliamentary decisions that are policy decisions, and this was construed as a policy decision made unanimously by the

parliament. The Sámi population was also supportive of this case, not in courts, but rather in demonstrations and in the media.<sup>30</sup>

Similar to *Urgenda*, the legal theories in the Norwegian climate lawsuit are based on a breach of the Constitution and national law. The article in the Norwegian Constitution that was addressed for the first time in court is Article 112 on the right to a healthy environment.<sup>31</sup> Also, as with *Urgenda*, are provisions within the international climate regime, notably the precautionary principle, and within the European Convention on Human Rights (ECHR), notably Articles 2 and 8.

Domestic law provisions were not tort law provisions as for, notably, *Urgenda*, but provisions on environmental impact assessments and the petroleum statutes in Norway that mandate a standard of profitability in governmental petroleum policies. So the petroleum industry will be profitable not just for present, but also for future generations. The remedy sought was the annulment of the decision as based on unlawfulness, procedural errors, or both.

There are three decisions in the case. I would like to highlight two aspects of the decisions. First, standing was never a problem. It was based on Norway's Dispute Act because the case is set in civil courts, and there are no administrative courts in Norway. Second, Article 112 was the core of this case because it was tried for the first time since the amendments to the Constitution in 2014. This was in principle considered to be one of the most ambitious provisions on the right to a healthy environment in the world, because it integrates sustainable development with the rights of future generations. But as we will see, the courts have not interpreted this article in such an ambitious way.

Here, we come to the first decision in the case, the district court's decision.<sup>32</sup> Rendered in 2018, the district court's decision is important because it recognized the justiciability of Article 112 of the Constitution. Article 112 was construed as a rights provision, as plaintiffs had claimed, but the court set a very high threshold for scrutinizing the government's decision in petroleum policy matters.<sup>33</sup> This lets the government have broad discretion in how it pursues petroleum policy in Norway.

The extraterritoriality of emissions resulting from the use of oil and gas exported abroad, known as Scope 3 emissions, was not considered. It was presented as irrelevant where no procedural errors were found. When it comes to access to justice, plaintiffs also had to bear the expenses of the State, which is quite detrimental for access to justice because of very high legal costs in Norway.

29. SHALANDA BAKER ET AL., *THE ENERGY JUSTICE WORKBOOK 5* (2019), <https://iejusa.org/wp-content/uploads/2019/12/The-Energy-Justice-Workbook-2019-web.pdf>.

30. See *Klimasøksmål Arktis, The Climate Lawsuit*, <https://www.klimasøksmål.no/2017/11/03/klimasøksmalet/> (last visited May 10, 2021).

31. The Constitution of the Kingdom of Norway, available at <https://lovdata.no/dokument/NLE/lov/1814-05-17>.

32. *People v. Arctic Oil*, 16-166674TVI-OTIR/06 (Oslo District Court, Norway, Jan. 4, 2018).

33. *Id.*

In the second decision,<sup>34</sup> the Court of Appeals also maintained the justiciability of Article 112 and the very high threshold for considering government policy, but three modifications were put in place. First, exported emissions were covered by Article 112 mainly through the principle of solidarity within the Constitution and the no harm principle within international law. The problem is that the court did not indicate how Scope 3 emissions should have been accounted for in the resolution of the case. Therefore, the consideration of exported emissions was merely a declaration of principle.

Second, the appeals court maintained the responsibility of each party for their own expenses due to the novelty and importance of the case. Conversely, in most matters adjudicated by Norwegian courts, the unsuccessful party bears part of the legal costs of the successful party. Third, the appeals court referred to *Urgenda* as being a landmark case, but it is not a relevant decision because it does not deal with future emissions and it is not about a specific emission. Rather, it involves a policy decision, whereas the Norwegian case is about specific emissions by a specific sector. That was enough to distinguish the Norwegian case from *Urgenda*.

The Supreme Court's decision was a step back from the first two decisions, in the sense that Article 112 was found not to be fully justiciable because the right to a healthy environment is not a fully fledged civil and political right according to the Supreme Court. And when it comes to the threshold for scrutinizing governmental action, the court maintains that judicial review is not allowed if the parliament has taken a position on a particular matter. If the parliament has not taken a position, then it is possible to scrutinize governmental action.

This statement finds one exception, in the sense that Article 112 can still be applied in exceptional situations. In fact, judicial environmental review can be carried out when the parliament has grossly abdicated its duty. But the Supreme Court did not say how and when the parliament can grossly abdicate its duties. Then, *Urgenda* was referenced and was still considered not applicable, because it is not about future and specific emissions and no procedural errors were found. When it comes to access to justice, the State did not ask to have its expenses covered. So, there was no detrimental effect on the plaintiffs when it comes to that.

There was a dissenting opinion.<sup>35</sup> Four judges dissented, finding that the environmental impact assessment was faulty because it did not consider Scope 3 emissions and it was not a full environmental impact assessment. A breach of Norwegian law was found along with a breach of EU law. But this was the only ground of difference with the majority.

A second argument by plaintiffs was not considered, namely whether the government had carried out correct

economic analyses on the profitability of the licenses for Norwegian society. Some economists found it difficult to establish that the petroleum activity ensuing from the 2016 licenses in the southeast Barents Sea would be profitable in the future. Further, this matter was entwined with a scandal unearthed just days before the case.<sup>36</sup> It emerged that Norway's Ministry of Oil and Energy had silenced the reports of Norway's Petroleum Directorate to the parliament on the possible lack of profitability of petroleum activities in the southeast Barents Sea. The dissenting judges were skeptical of the governmental analysis, but they were not considering that portion of the plaintiffs' arguments because they did not have enough information to do so.

The decision was disappointing—and this is an understatement. It is interesting that the courts did not really say how they could distinguish the case from *Urgenda* when it comes to the application of the ECHR. In fact, plaintiffs in both cases had invoked Articles 2 and 8 of the ECHR.

There are sociolegal conditions factored into the Supreme Court's final decision. The right to a healthy environment was construed as a third-generation right by reference to a Norwegian article from 2002.<sup>37</sup> There is a knowledge gap between what the Supreme Court is aware of and recent doctrinal and practical evolutions on the right to a healthy environment.

Also, environmental matters were found to be inherently political. I call it the political question doctrine, Norwegian style. In the first round of the case, climate change matters were found to be inherently political by the Oslo District Court, but the Supreme Court maintained that all environmental matters are inherently political.

Article 112 of the Constitution was not read in light of international law sources. This has made it into a paper tiger in the sense that it is one of the most ambitious constitutional articles on environmental protection. The article could have been interpreted in a different way, especially with reference to the Paris Agreement, but this has not been the case.

A reason for these three different directions and constructions of the right to a healthy environment in the Norwegian paradox is that Norway has been very ambitious in its climate change policies internationally with development aid, and support also for the Paris Agreement and its implementation. But when it comes to its climate change record at home, Norway is still the seventh-largest exporter of emissions worldwide.<sup>38</sup> So the support for energy transitions at home has been lacking. Prof. David Boyd, the United Nations special rapporteur on human rights and

34. *People v. Arctic Oil*, 18-060499ASD-BORG/03 (Oslo Court of Appeals, Norway, Jan. 23, 2020).

35. *People v. Arctic Oil*, HR-2020-2472-P, paras. 253ff (Norway Supreme Court, Dec. 22, 2020) (Justices Webster, Bull, Falch, Østensen Berglund).

36. Esmeralda Colombo, *A Legal and Reputation Scandal Looming Days Ahead of Norway's Climate Case*, HARVEST MAG., Oct. 22, 2020, <https://www.harvestmagazine.no/pan/a-legal-and-reputation-scandal-looming-days-ahead-of-norways-climate-case-start-before-the-supreme-court>.

37. *People v. Arctic Oil*, HR-2020-2472-P, para. 92 (Norway Supreme Court, Dec. 22, 2020); Erik Møse, *Menneskerettigheter* 90 (Cappelen Damm, 2002).

38. HANNAH MCKINNON ET AL., *THE SKY'S LIMIT NORWAY: WHY NORWAY SHOULD LEAD THE WAY IN A MANAGED DECLINE OF OIL AND GAS EXTRACTION* (2017). Through its petroleum exports, Norway exports 10 times more emissions than it produces at home. *Id.*



the environment, embraces this view and has criticized the Norwegian paradox.<sup>39</sup>

One of the repercussions for climate and energy justice is that future litigation will probably be thwarted because of the high costs for accessing courts in Norway and because of the interpretation of Article 112 of the Constitution. Indeed, in the future, we do not know how the Supreme Court's decision will be interpreted, in particular whether the extraterritoriality of greenhouse gas emissions can be considered. It seems that the Supreme Court's dictum holds in this respect. The extraterritoriality of petroleum activities is relevant only when extraction and construction to carry out petroleum activities occur, not in the exploration phase, when it would be too early. To support this conclusion, the judges referenced only a governmental document from 1995-1996, whereas doctrine, in light of more recent legal sources, is contrary to this conclusion.<sup>40</sup>

So in the future, when oil and gas are found in the Arctic, it may be possible for the plaintiffs to take the case again to court, but only if it is proven that emissions abroad will also generate direct damages to Norway. This part of the Supreme Court's decision has been a bit vague and controversial, with Norwegian lawyers saying that it is not possible under Norwegian law to take away the licenses 10 years from now if oil and gas are found and if direct effects are proven for the emissions exported abroad to cause direct damages in Norway.

The idea of climate and energy justice is then parliamentary in the sense that there is not an idea of democracy as a constitutional democracy, but rather based on the parliament, and not including courts and not including youth. Climate change as a global natural phenomenon has not been translated into climate change as understood within legal categories as a global natural phenomenon. So far, it is still enclosed within a territorial understanding of emissions.

### The Search for Energy Justice and Sustainable Development in the Global South

**Damilola S. Olawuyi, SAN:** My presentation builds upon Esmeralda's presentation. She talked a lot about sociolegal conditions that may stifle energy justice, as well as climate justice. My talk will be looking at those conditions as they present themselves in the global South. As we know, the global South is home to more than 50% of the world's oil and gas resources.<sup>41</sup> The concern about energy transition has provided two very important dilemmas. One is, why is

it that a part of the world that is so rich in resources is still home to some of the energy-poorest people on earth? The other question is how will the transition impact the abilities of the global South to (1) transition and (2) be able to address energy poverty, which is really prevalent now?

I will discuss these issues, but first I will address some of the drivers of energy poverty in the global South, with a focus on Africa and the Middle East. I will then consider efforts aimed at addressing those concerns in terms of evaluating whether those efforts are making as much difference as we would like to see. Then, I will offer concluding thoughts on future directions.

As I mentioned and as Esmeralda mentioned, everyone is talking about addressing energy security and achieving energy justice. We think of energy security as the "three A's" of availability, affordability, and accessibility of energy resources, and the need to reduce the vulnerability of energy infrastructure to the impacts of climate change and other disasters.

The goal of achieving energy security is well conceptualized in the United Nations' Sustainable Development Goal (SDG) 7, which highlights a number of targets, especially ensuring universal access to modern energy services to the more than one billion people who currently lack access to electricity around the world. Another goal in advancing energy justice and energy security is doubling the global rate of improvement in energy efficiency and doubling the share of renewable energy in the global mix.

When considering progress made on the SDGs, we see that access to modern energy in the global North is already close to 100%.<sup>42</sup> Electrification rates, for example, in many of the countries in North America, Europe, and the Australia region, is very close to 100%.

But in the global South—especially in Africa, the Middle East, and Latin America—the average electrification rate remains about 24%,<sup>43</sup> meaning that 76% of the people living in that region still do not have access to electricity while an additional 20% even suffer from prolonged power outages and undersupply. This is the dilemma here. Almost one-third of the population in the global South still relies on noncommercial fuels for cooking, lighting, heating, and commercial activities.

1.3 billion people are living in the dark. Of those 1.3 billion people, more than 600 million are in sub-Saharan Africa. About 300 million are in India alone. In Asia alone, 622 million people do not have electricity. In sub-Saharan Africa, seven out of 10 people do not have access to electricity.<sup>44</sup>

Even within the global South, there is inequity in terms of distribution of electricity access and energy access. For example, in the Middle East, many of the Gulf countries such as Kuwait, Iran, Bahrain, and Qatar have close to

39. Press Release, United Nations Human Rights Office of the High Commissioner, Norway Must Resolve Climate Change and Human Rights Paradox, UN Expert Says (Sept. 23, 2019).

40. People v. Arctic Oil, HR-2020-2472-P, para. 186 (Norway Supreme Court, Dec. 22, 2020); Dagny Ås Hovind, *Krav Til Utredning av Klimavirkninger: Grunnlovens §112 Annet Ledd*, in MELLOM JUS OG POLITIKK: GRUNNLOVEN §112, 187 (Ole K. Fauchald & Eivind Smith eds., Fagbokforlaget 2019); Esmeralda Colombo, Det Norske Paradoxet i Klimasøksmål Arktis: Ein Rettsleg Analyse av Økonomiske Vurderingar, 2 RETTÆRD 47-70 (2020).

41. BP, BP STATISTICAL REVIEW OF WORLD ENERGY 12 (2018), <https://www.bp.com/content/dam/bp/business-sites/en/global/corporate/pdfs/energy-economics/statistical-review/bp-stats-review-2018-full-report.pdf>.

42. The World Bank, *Access to Electricity (% of Population)*, <https://data.worldbank.org/indicator/eg.elc.accs.zs> (last visited Apr. 27, 2021).

43. *Id.*; see also Todd Lindeman, *1.3 Billion Are Living in the Dark*, WASH. POST, Nov. 6, 2015, <https://www.washingtonpost.com/graphics/world/world-without-power/>.

44. Lindeman, *supra* note 43.

100% electrification rates. But within the same region, some of the poorer countries, like Syria and Yemen, have almost less than 50% electrification rates. For example, in Yemen, which is one of the poorest countries in the Middle East region, you find that 13.8 million of the country's 24.9 million people currently lack access to electricity and modern fuels.<sup>45</sup>

The Academic Advisory Group of the International Bar Association's Section on Energy, Environment, Natural Resources, and Infrastructure Law addressed some of these issues in our recent book on energy justice and energy law, in which we explained that the benefits and burdens of energy activities generally remain unequally distributed.<sup>46</sup> Despite the deep susceptibility to energy poverty in the global South, it still remains some of the least prepared as well in terms of legal institutions, technology resources, and capacity to address the problem.

These issues feed into a wider conversation about whether it is possible to achieve a just energy transition if energy distribution is still so lopsided. It varies in terms of those with access and those without. It will be very difficult to achieve energy transition without addressing this lopsidedness. It would even be more difficult to achieve a *just* energy transition, which some of the speakers have described, if we do not address some of the lopsidedness in the distribution of energy resources and access across the world.

What then are the main drivers and dimensions of the patterns of inequitable distribution of risk and benefits in global energy markets? First, energy injustice cannot be separated from other preexisting challenges, such as the impact of colonialism on land distribution, or conflict and political instability. I talked about Yemen and Syria, which are war-torn countries. They have been at war for many years. Even some of the countries in sub-Saharan Africa have not experienced political stability for many years, which limits progress on the development of energy access infrastructure.

Second, the impact of overpopulation, imbalance of power relations between the global North and South, and even problems of discrimination, which is still evident in many countries in the global South, are sociolegal conditions that make energy justice more difficult in the global South. Whether it be conflicts or war in those countries, these are conditions that, if they continue to prevail, will make achieving energy justice quite difficult in this part of the world.

Another problem is rapid population growth. For example, Qatar where I live, over the past few years, has grown from a country of just about 300,000 citizens to a country of about three million residents.<sup>47</sup> The population of the

citizens remains about 400,000 people, but about another 2.6 million people live and work in the country. People like me. The implication of that is the energy infrastructure available for 400,000 people is now serving about three million people. This population increase has resulted in the development of several energy infrastructure projects to serve the growing population. This development in Qatar is the same in many parts of the Gulf whereby, due to a boom in oil and gas resources and the associated industrial development, there has been a sharp increase in population over the past few years.

Another driver of energy poverty and energy injustice across the global South is the tendency of energy and environmental policies to disadvantage some of the global South countries. Everyone is talking about energy transition. But for many parts of the global South, energy transition actually means transition from using wood and biomass to now using modern electricity for day-to-day activities.

The language of energy transition does not actually capture some of the needs of the global South at all. The language of energy transition also does not capture the fact that some of the resources that the global South is now using to develop its economy will be significantly impacted by the transition, which means development will be further stunted in those parts of the world. So, there seems to be what I call a translation issue when conceptualizing energy transition.

For example, several studies have pointed to the role of natural gas as an environmentally preferable product. And the Intergovernmental Panel on Climate Change has also identified natural gas as a very important product for the transition.<sup>48</sup> Even the International Maritime Organization has embraced natural gas as an environmentally preferable product when it comes to shipping.<sup>49</sup> Yet natural gas markets, such as Qatar and Nigeria, are still finding it difficult to situate their product of natural gas within this narrative, because natural gas is still hit by Western narratives when talking about coal and the like despite the clear difference.

The susceptibility of energy markets in the global South to such Western narratives might disadvantage the global energy transition as a whole and might further disadvantage the global South countries because it simply means they will not be able to take advantage of natural gas in developing their economies and in developing a just transition. Speaking of a just transition, it must mean as well that the comparative advantage of countries in the global

fuel-growth-recent-population-increase-has-driven-both-infrastructure-investment-and? (last visited May 10, 2021).

45. *Id.*; see also LAURA EL-KATIRI & BASSAM FATTOUH, ENERGY POVERTY IN THE ARAB WORLD: THE CASE OF YEMEN 1-5 (2011).

46. See Damilola S. Olawuyi, *Energy Poverty in the Middle East and North African (MENA) Region: Divergent Tales and Future Prospects*, in ENERGY JUSTICE AND ENERGY LAW (Inigo del Guayo et al. eds., 2020).

47. *Id.*; see also Oxford Business Group, *Population Increase in Qatar Drives Infrastructure Investment*, <https://oxfordbusinessgroup.com/analysis/demographics->

48. Thomas Bruckner et al., *Energy Systems*, in CLIMATE CHANGE 2014: MITIGATION OF CLIMATE CHANGE (CONTRIBUTION GROUP III TO THE FIFTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE) (Ottmar Edenhofer et al. eds., 2014); see also Damilola S. Olawuyi, *Can MENA Extractive Industries Support the Global Energy Transition? Current Opportunities and Future Directions*, 8 EXTRACTIVES INDUS. & SOC'Y 100685 (2021).

49. INTERNATIONAL MARITIME ORGANIZATION, STUDIES ON THE FEASIBILITY AND USE OF LNG AS A FUEL FOR SHIPPING (2016); see also International Maritime Organization, Res. MEPC.320 (74), 2019 Guidelines for Consistent Implementation of the 0.50% Sulphur Limit Under MARPOL Annex VI (2020).

South should not be unduly stifled while speaking of the global energy transition.

There is also the question of technology gaps, despite many years of technology transfer to Africa. Africa and many parts of the Middle East still struggle with the technology required for clean energy and a low-carbon transition. This means the efforts to achieve energy transition will be highly dependent on how much technology is received from different parts of the world.

Also, a significant gap remains in the global South regarding the capacity to even the leverage of technologies. Unless this challenge is addressed, it will be very difficult for the world to make any substantive progress in the quest for energy transition.

Another issue is the susceptibility of critical energy infrastructure to climate and risk. Our panelists today have discussed the impacts of climate change. But in a country like Qatar, due to the excessive heat already even without climate change, climate change could bring even more problems when it comes to energy access because there is a risk of potential failure of facilities due to climate change. Many studies have confirmed that there is a real risk that energy access could be further stunted in this part of the world.<sup>50</sup> Currently, the normal average temperature across the Gulf is 43° Celsius. Climate change may cause the temperature to increase further, which poses a threat to energy infrastructure.

I would like to address some future directions. There is definitely a need for an energy justice approach in addressing this issue of energy transition. What I mean by an energy justice approach is effectively detecting, measuring, and reporting on the patterns of exclusions, energy poverty, and environmental risk that global South countries face. We cannot continue to speak of energy transition in a universal language. There is a need for a language that recognizes the circumstances of the global South and tries to address the circumstances in a narrative of global energy transition.

There is also a need for global South countries themselves to put in place structural and nonstructural measures to advance energy transition and achieve energy justice. When I talk about structural measures, I mean designing and constructing infrastructure that will address some of this demand for energy gaps that are yet to be met. In terms of nonstructural measures, I mean implementing laws, policies, and rules that will ensure that the investment climate will be suitable both for technology transfer and for infrastructure development.

There is a need for a clear and transparent legislative conceptualization of energy poverty, as well as adopting a comprehensive energy justice road map at national levels. There is also a need for clear and comprehensive legal frameworks on climate resilience to address some of those impacts of climate change on energy infrastructure.

Article 7.5 of the Paris Agreement already implores these countries to integrate climate adaptation into relevant socioeconomic planning. This is very important for many countries in the global South that may be significantly impacted by climate change going forward.

I talked about the need for a legal framework to enhance private participation. This is important in the context of the global South, because many of the current deficits that I have addressed cannot be resolved by government alone. A recent Brookings Institute study concluded that much of the funding needed to build energy infrastructure or to expand energy access will come from private investment.<sup>51</sup> I conducted a study of some of the global South countries, especially those in Africa and the Middle East.<sup>52</sup> The study shows a huge number without clear laws on public-private-sector partnerships, which makes it difficult to attract that additional financing needed to expand energy infrastructure and energy access.

Lastly, South-South cooperation will be extremely important. Many of the discussions on energy transition seem to underplay the narratives of the global South themselves. So, there is a need for global South countries to come together and think of cooperation in terms of technology transfer, financing, and even knowledge and information-sharing to better detect and address patterns of energy poverty.

One example is the EU Energy Poverty Observatory, which has been very useful in detecting, measuring, monitoring, and sharing knowledge on best practices on addressing patterns of energy poverty. I think global South countries will need to pool resources and achieve this sort of holistic database or training program on partnerships that would help them tackle the challenges they have, both in terms of energy transition and in terms of addressing or achieving energy justice.

### Question-and-Answer Session

**Randall Abate:** We are now going to have a round of follow-up dialogue. I will pose one question to each of the speakers and ask for a concise response.

I will start with a question for Patrícia. Does the recent decision from the Supreme Court of Canada affirming the constitutionality of the federal carbon pricing indicate that Canadian courts are ready to play a more active role in addressing the climate crisis?

**Patrícia Galvão Ferreira:** It certainly was a seminal decision, but it is a mixed bag in terms of what it offers for the rights-based cases. First, the Supreme Court of Canada explicitly stated that there is a global climate crisis. It used the expression “climate crisis.” It recognized very clearly and explicitly that the impacts will be felt disproportionately.

50. See Damilola Olawuyi, *Financing Low-Emission and Climate-Resilient Infrastructure in the Arab Region: Potentials and Limitations of Public-Private Partnership Contracts*, in Walter Leal Filho & Amr Abdel Meguid, CLIMATE CHANGE ADAPTATION IN THE ARAB REGION: CASE STUDIES AND BEST PRACTICE 533-47 (2017).

51. Joshua P. Meltzer, *Blending Climate Funds to Finance Low-Carbon, Climate-Resilient Infrastructure*, BROOKINGS INST., June 20, 2018, <https://www.brookings.edu/research/blending-climate-funds-to-finance-low-carbon-climate-resilient-infrastructure/>.

52. Olawuyi, *supra* note 50.

ately by some indigenous communities in some parts of Canada while not as much in others. So, those are very important points from a climate justice perspective.

The decision has an extremely important positive political effect for the federal government, which will now continue to move forward with the various climate policies, even in the face of certain provinces, especially the oil-rich provinces of Alberta and Saskatchewan, which are pushing back very strongly against attempts of the federal government to exercise its federal power to regulate greenhouse gases.

It is important to highlight, however, that this was a split decision, 6-3, and despite the majority affirming the constitutional right of the federal government to place a minimum national price on carbon, there were three important dissents. That shows that there is still divergence in the judiciary in Canada when it comes to the difficult question of the division of powers between the federal and provincial governments on climate regulation. In such cases, courts tend to defer to the legislative and executive branches when there is a lawsuit.

A second aspect that made the decision not as progressive as climate advocates wanted was the limited way that the Supreme Court defined the scope of the federal jurisdictional power in cases where the matter is considered of national concern, like climate change. There were many possible ways the Supreme Court could have defined the scope of federal power to regulate greenhouse gas emissions in this case. It decided that the federal power was only limited to establishing minimal national standards for carbon price stringency. Therefore, the Supreme Court did not establish that when it is a matter of national concern the federal government has the power to create national regulations in other areas different from minimum carbon pricing.

The decision has many complex aspects to discuss. The critics are saying that there is not a lot of room, for example, for the federal government to legislate as forcefully in other areas without concern for pushback from provinces in courts again. But politically, it has been an extremely important decision. It was a huge step forward. We should not take that for granted. As Esmeralda said, a Supreme Court decision that sends that signal can have long-term implications. So we are extremely happy that this decision was issued in this way, even if there is dissent and it is a narrower approach.

**Randall Abate:** Thank you. On the topic of implications of climate justice litigation, I would like to pose the next question to Esmeralda and ask if you could tell us a bit more about how the Supreme Court's decision was received in Norway and internationally.

**Esmeralda Colombo:** Thank you for the question. Yes, the decision was received as a disappointment internationally, especially since the reasoning about extraterritoriality was not very coherent because in the second instance, extraterritoriality was recognized but not applied to the case. In the third instance before the Supreme Court, extraterritoriality

was recognized but in a very vague way and with implications for the future—the possibility of taking away licenses from the petroleum industry whenever findings are made of gas and oil and direct effects are proven onto Norway.

Nationally, in Norway, the response was more mixed. Some lawyers said it was good law in the sense that the Norwegian Supreme Court applied traditional law, as it was called in Norwegian, and was not stepping on the toes of the government and parliament, in a way respecting the boundaries of its own power. For other lawyers, especially the consideration of taking away licenses 10 years from now after companies have made huge investments for finding oil and gas, it would be contradictory and not in line with Norwegian law in the sense that it would amount to expropriation.

To touch again on the development of the case, in the past two days, the intervenor in the case, Grandparents for Climate Action, has filed an application before the European Court of Human Rights and has asked to join this case with the case brought by the six Portuguese youth versus Austria and 32 other countries.<sup>53</sup> It is interesting because the European Court of Human Rights has been expediting the only two climate cases so far filed before it—the case brought by the Portuguese youth and *Union of Swiss Senior Women for Climate Protection v. Swiss Federal Council*.<sup>54</sup> We will see whether the Grandparents for Climate Action in Norway will succeed in having this application first evaluated by the court and possibly joined with the other case.

**Randall Abate:** Thank you for that explanation. These are very exciting times in climate justice litigation. Globally there are some frustrating outcomes, but also a lot of hope in the retooling and strategizing that underlies the creative and persistent efforts in seeking climate justice in our court systems.

It is important to remember the relationship between the efforts in the courts and how that is propelling a climate justice movement and energy justice movement in its wake. And that point is relevant to our next two presenters' comments in terms of how legislatively some of these gains might be made given that the courts are not always issuing the judgments we would like to see.

A question for Jae then is regarding implementation of Green New Deal policies. There are countries that have adopted these Green New Deal policies that have also supported heavily affected industries during the pandemic in their stimulus funding. Some of these industries are fossil fuel-based. So, this type of application may contradict and undermine the essential purposes of the Green New Deal. Are there similar controversial examples that you can share, if any, in the Korean Green New Deal?

53. *Duarte Agostinho c Portugal*, App. No. 39371/20 (Eur. Ct. H.R. Sept. 7, 2020).

54. *Verein Klimaseniorinnen Schweiz c Schweiz*, App. No. 53600/20 (Eur. Ct. H.R. Nov. 26, 2020).

**Jae-Hyup Lee:** Yes. This has been really an eye-opening experience from hearing other presenters on climate litigation and global South energy justice problems.

As I mentioned, Korea has large conglomerates. It is actually largely fossil fuel-based. We are using a lot of fossil fuels in production. For instance, there is Doosan Heavy Industries, which is heavily involved in constructing industrial plants, coal plants, and the like. Our current presidential administration has halted the building of a new coal-powered plant and also halted any nuclear plants. These are some of the industries in which Korean companies are really competitive internationally. As you know, many of these industries rely on many workers, so they were heavily hit during the pandemic. The Korean government ended up subsidizing a large amount of money with the stimulus fund to support these coal-based industries.

Another example is Korea Electric Power Industry, which is a national state enterprise. The government has halted construction of another coal plant, but they have been engaged in exporting their technologies to other countries, like Vietnam, which actually has a spillover effect internationally. So, there have been controversies and contradictory stories, which is a big challenge.

We also saw what happened in the United States during the Barack Obama Administration. When President Obama was first elected, there was an ambitious plan for energy transition. But because the financial crisis hit in 2008, the priority became helping these companies survive. And then there are a lot of worries during this pandemic. So, the recovery plan must be really green.

The government should send a really big signal. The rules of the game have been changed. The climate crisis is really a crisis. It is an urgent matter. We need to use this momentum for the climate crisis and recovery in order to become more aggressive in our transition to more renewable-based energy.

**Randall Abate:** Thank you for those insights. It is encouraging to hear that the urgency of the climate and energy justice crises is starting to sink in around the world. This is true even in the United States—well past the time it should have acted—with the Biden Administration’s new efforts in moving forward on climate and energy justice challenges.<sup>55</sup> I think the first challenge we are starting to overcome in the United States is harnessing the political will to be very ambitious with Green New Deal-type policies. Then, as you alluded to, the second challenge is that the devil is in the details to implement these ambitious goals in a way that is going to be sustainable economically, socially, and politically.

Damilola, I want to follow up on the challenges regarding South-South cooperation and what challenges you see in promoting a just energy transition in the global South and how those challenges can be addressed.

**Damilola Olawuyi:** The challenge we see is that there is a need more than ever for global South countries to come together and address some of the challenges facing energy security, as well as transitioning to cleaner energy. But again, more than ever the global South seems to be divided. We have seen the situation in the Middle East in which for the past two or three years there has been a blockade of Qatar by a number of other Middle East countries, at a time when the countries should be coming together more to define strategic areas of cooperation.

There has been so much conflicting geopolitics going on in many parts of the Middle East and in Africa as well, which does not really foster that level of cooperation that we would like to see. There is also this issue of competition for markets, competition for technology, and competition for resources, which does not allow that common currency or common language to develop to address these problems.

There is no country in Africa or the Middle East that can address the problem of energy poverty alone. So, there is a need for countries to reduce these conflicted geopolitics that we are seeing escalating across the region and begin to work together toward harmonizing their positions. For example, how to access finance, how to access technology, and how to ensure that our products that give us a comparative advantage are not necessarily blacklisted in global markets.

These are serious issues that are not only related to energy poverty. They are actually related to the survival of many countries in Africa and the Middle East. I think there is a need to increase mechanisms for cooperation either through diplomatic avenues or through scientific cooperation. We like to focus on technology transfer from the North, but technology transfer within the global South itself can be very meaningful.

We need to reduce the conflicting geopolitics and focus on maximizing the benefits of interregional or regional technology development. Also, we need to create knowledge databases that can help countries come together and share ideas on how much progress has been made. These strategies can help foster South-South cooperation on energy justice.

**Randall Abate:** Thank you for those observations. I want to remind everybody that we have a valuable resources link<sup>56</sup> on our symposium web page that includes books and articles from our distinguished panelists from across the three-day event. These scholars have been devoted to these issues for many years and have outstanding publications that I highly recommend for further study of these issues.

55. See, e.g., Exec. Order No. 14008, 86 Fed. Reg. 7619 (Feb. 1, 2021); Exec. Order No. 13990, 86 Fed. Reg. 7037 (Jan. 25, 2021); *This Biden Appointment Is Bringing Justice to Green Energy*, SCI. FRIDAY (Feb. 5, 2021), <https://www.sciencefriday.com/segments/green-energy-justice/>.

56. Monmouth University Guggenheim Memorial Library, *The 2021 Institute for Global Understanding Biennial Symposium: Human Rights and the Environment*, <https://guides.monmouth.edu/IGU2021> (last visited May 10, 2021).