

RACIAL CAPITALISM AND CLIMATE CHANGE: COLONIALISM AND CLIMATE LAW AND POLICY IN THE COMMONWEALTH

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ABSTRACT

This Article provides a snapshot of current climate policy and litigation experiences in a select group of Commonwealth countries: the United Kingdom, Canada, India, Pakistan, Kiribati, and The Bahamas. It traces current domestic climate policies and litigation experiences back to the colonial histories of these countries. These Commonwealth countries enjoy a shared common law tradition, but in the context of climate change, levels of climate vulnerabilities, resilience, and historic and current responsibilities for emissions vary tremendously. Levels of climate vulnerability, and climate responsibility, often reflect the colonial histories of these countries. These colonial histories are reflective of racial capitalist trajectories that impact current day emissions, consumptive habits, and climate vulnerabilities. Political and economic blockages to progressive climate action persist in some Global North countries. Many current carbon major emitting companies are also located in several Global North countries in the Commonwealth, and many of these companies also have colonial histories and climate responsibilities. Additionally, policy and financial constraints in tackling the climate crisis persist in Global South countries. Policy constraints and blockages are not uniform, and they at times cross over the North-South divide, as do emerging legal relationships. Vulnerable populations and sacrifice zones exist within the Global North. Elites in the Global South also replicate racial capitalistic tendencies of oppression and exclusion towards more vulnerable subpopulations. Despite these hurdles, significant opportunities have emerged in many jurisdictions, largely as a result of innovative climate litigation suits, particularly in the Global South. This Article argues that litigants across the Commonwealth can share strategies and best practices in order to move climate policy forward in their jurisdictions, and reduce climate vulnerabilities.

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INTRODUCTION

This Article provides a brief overview of existing climate policy and litigation efforts in a select group of Commonwealth countries: the United Kingdom, Canada, India, Pakistan, Kiribati, and The Bahamas. The climate policymaking and litigation landscape has changed dramatically since the Paris Agreement came into force in 2016. This overview captures very recent developments in climate law and policy in a select group of Global North and Global South Commonwealth countries, and it provides a timely reminder that efforts at climate policymaking vary significantly in different national jurisdictions across the Global North and Global South.

Levels of climate vulnerability, and climate responsibility, often reflect the colonial histories of these countries. These colonial histories are reflective of racial capitalist trajectories, which impact current day emissions, consumption habits, and climate vulnerabilities. While history can be determinative, this Article also illustrates that the climate policy landscape can shift quickly and dramatically. Within this group of countries, the past few years have seen innovative legislation and litigation efforts, although the outcomes of these efforts have been uneven. Climate extremes have also pushed countries towards maladaptation and even discriminatory housing and immigration policies, illustrating that

exclusionary policies and circumstances can compound existing climate vulnerabilities. Significant variations exist even between countries in the Global North and Global South. Commonwealth countries share histories and common law traditions, but the Commonwealth itself has been slow to respond to the needs of vulnerable countries, as the institution itself contains and replicates racially divisive policies and economies.

While Global North countries have seen the bulk of climate litigation to date, their climate policy approaches differ dramatically. In the United Kingdom, the 2008 Climate Change Act ushered institutional structures such as the Climate Change Committee, which paved the way for a national target of achieving net-zero emissions by 2050 enshrined in legislation.¹ Recent political changes threaten to derail legislative progress in the United Kingdom, and economic and political blockages persist despite legislative advances.² Canada has also taken progressive climate policy approaches, with mixed levels of climate litigation.³ Both the United Kingdom and Canada are home to some of the largest carbon major companies in the world,⁴ which themselves have colonial roots and legacies.

In contrast, several countries in the Global South, which are and will continue to experience the worst impacts of climate change, have been uniformly innovative and ambitious given existing capacity constraints. India and Pakistan's progressive judiciary provide a picture of legal innovation that could disseminate throughout the Global South, particularly in the context of climate adaptation and human rights. Extreme events, such as Hurricanes Irma and Dorian in The Bahamas, illustrate the perils of the absence of robust climate policy and how climate-exposed subpopulations within a vulnerable country can be targeted. Kiribati has been innovative in its climate policymaking, establishing the Migration with Dignity policy.⁵ This policy resists the narrative of the I-Kiribati as victims of climate change and provides a reconceptualization of migration as a tool to sustain

¹ Climate Change Act 2008, c. 27 (UK).

² See INST. FOR GOV'T, NET ZERO: HOW GOVERNMENT CAN MEET ITS CLIMATE CHANGE TARGET (2020), <https://www.instituteforgovernment.org.uk/sites/default/files/publications/net-zero-government-climate-change-target.pdf> [https://perma.cc/LRW7-6E5P].

³ See Canada's Climate Plans and Targets, GOV'T OF CAN., <https://www.canada.ca/en/services/environment/weather/climatechange/climate-plan/climate-plan-overview.html> [https://perma.cc/V8HR-GW5H].

⁴ See Richard Heede, *Tracing Anthropogenic Carbon Dioxide and Methane Emissions to Fossil Fuel and Cement Producers, 1854-2010*, 122 CLIMATIC CHANGE 229, 237 (2014) (listing the individual contributions of these companies).

⁵ GOV'T OF KIRIBATI, KIRIBATI NAT'L LABOUR MIGRATION POL'Y (2015), <https://www.unescap.org/sites/default/files/Kiribati%20National%20Labour%20Migration%20Policy.pdf> [https://perma.cc/5S9R-TLNH].

livelihoods.⁶ This Article argues that as the impacts of climate change escalate, more climate policymaking and litigation will occur within and throughout the Commonwealth, and the sharing of best practices (by legislatures, litigants, and the courts) is both useful and necessary.

I. THE COMMONWEALTH OF NATIONS

The Commonwealth of Nations formed in 1949 as colonialism was dissipating (either voluntarily or by force).⁷ The seeds of the Commonwealth developed much earlier, however, in the interwar period.⁸ A 1926 report presented to the Imperial Conference offered a definition, which endures today, of the relationship between Britain and the “Dominions,” describing them as autonomous communities within the British Empire.⁹ At that time, the “Dominions” included primarily Global North countries such as Canada, Australia, New Zealand, South Africa, and Ireland.¹⁰ More Global South countries, such as India, Pakistan, and Sri Lanka, joined the Commonwealth in the 1940s.¹¹ As Philip Murphy, Director of History and Policy at the Institute for Historical Research writes: as the Commonwealth evolved, the United Kingdom wished to avoid a perception of the institution as driven by Western, white, or neocolonial interests in an effort to entice larger Global South nations to join and remain within it to prop up the British power status.¹²

British enthusiasm for the Commonwealth, in terms of economic ties, waxed and waned over the years. Interest increased as a result of President de Gaulle’s decision in 1963 to veto Britain’s first application for membership to the EEC.¹³ In an interesting parallel, during the Brexit vote, then Prime Minister Johnson floated the racially charged concept of

⁶ *Id.* at 8.

⁷ For an overview of the Commonwealth, see *Our History*, THE COMMONWEALTH, <https://thecommonwealth.org/history> [<https://perma.cc/6TK8-35JP>].

⁸ *Id.*

⁹ See INTER-IMPERIAL RELS. COMM. IMPERIAL CONFERENCE, 1926 (1926), https://www.founding-docs.gov.au/resources/transcripts/cth11_doc_1926.pdf [<https://perma.cc/QT8B-DMG9>].

¹⁰ PHILLIP MURPHY, *THE EMPIRE’S NEW CLOTHES: THE MYTH OF THE COMMONWEALTH* 22 (1st ed. 2018).

¹¹ *Id.* at 23–24.

¹² *Id.* at 24.

¹³ *The EEC and Single European Act*, UK PARLIAMENT (Apr. 2013), <https://www.parliament.uk/about/living-heritage/evolutionofparliament/legislativescrutiny/parliament-and-europe/overview/britain-and-eeec-to-single-european-act> [<https://perma.cc/2MJS-AKE2>].

“Empire 2.0” as a strategy to mitigate the inevitable economic damage exiting the European Union would cause Britain.¹⁴

The Commonwealth today is a voluntary association of fifty-six autonomous nations, many of which used to be under British colonial rule (although membership is now open to any country).¹⁵ Member countries span Africa, Asia, the Americas, the Pacific, and Europe, with approximately 2.5 billion people living in the Commonwealth—making up approximately one-third of the world’s population.¹⁶ The Commonwealth secretary-general manages the Commonwealth Secretariat, based in London, and is the public face of the institution.¹⁷ The heads of government of the Commonwealth, who meet biennially at the Commonwealth Heads of Government Meeting (CHOGM), elect the secretary-general.¹⁸ The values and principles of the Commonwealth are contained in the Commonwealth Charter, and the Secretariat supports member countries in meeting the Charter’s aims.¹⁹ The Commonwealth Foundation (which supports democracy and development) and the Commonwealth of Learning (which supports open learning and distance education) also support the institution.²⁰ The head of the Commonwealth is His Majesty King Charles III.²¹ The Commonwealth was formed under the rule of his mother, Her Majesty Queen Elizabeth II, as she was the ruling monarch when former colonies transitioned to independent state status. Queen Elizabeth II was a staunch supporter of the Commonwealth.

The Commonwealth includes some thirty-three small island developing states, and the aims of the Commonwealth Secretariat include

¹⁴ Henry Ridgwell, *British Hope to Build Post-Brexit ‘Empire 2.0’ Hits 21st Century Reality*, VOICE AM. (May 3, 2017), <https://www.voanews.com/a/britain-africa-trade/3834549.html> [<https://perma.cc/7RE7-AV9W>].

¹⁵ For more details on the countries and aims of the Commonwealth, see *Our History*, *supra* note 7.

¹⁶ For details on the member countries of the Commonwealth, see *Our Member Countries*, THE COMMONWEALTH, <https://thecommonwealth.org/our-member-countries> [<https://perma.cc/Y6AF-NDML>].

¹⁷ *About Us*, THE COMMONWEALTH, <https://thecommonwealth.org/about-us> [<https://perma.cc/PTT8-P73S>].

¹⁸ For the latest CHOGM meeting held in Rwanda in 2022, see *Commonwealth Heads of Government Meeting (CHOGM)*, THE COMMONWEALTH, <https://thecommonwealth.org/chogm> [<https://perma.cc/WD5M-K7T3>].

¹⁹ For details on the Commonwealth Charter, see *Commonwealth Charter*, THE COMMONWEALTH, <https://thecommonwealth.org/charter> [<https://perma.cc/EE2P-K9F7>].

²⁰ For information on the foundation, see *Commonwealth Foundation*, THE COMMONWEALTH, <https://thecommonwealth.org/about/commonwealth-foundation> [<https://perma.cc/57KC-25MQ>]; For information on the learning network, see *Commonwealth of Learning*, THE COMMONWEALTH, <https://thecommonwealth.org/about/commonwealth-of-learning> [<https://perma.cc/UU78-DH76>].

²¹ *About Us*, *supra* note 17.

acting as a voice for small, vulnerable states; promoting justice and human rights; and addressing threats like climate change, debt, and inequality.²² The secretary-general attended COP28 in December 2023, leading a team of international policy experts and climate specialists from the Commonwealth Secretariat.²³ The secretary-general and her team engaged in advocacy for urgent global climate action, attempted to amplify the voice of small states and vulnerable countries of the Commonwealth, strengthen networks and partnerships, and exchange knowledge and best practices to support climate change adaptation and mitigation in member countries.²⁴ Despite these lofty goals, the Commonwealth contains major fossil fuel-emitting countries, including the United Kingdom, Canada, and India. These countries, particularly the United Kingdom and Canada, are also home to major fossil fuel corporations, otherwise known as carbon major corporations,²⁵ which have deep historical climate responsibilities and questionable colonial roots. Perhaps as a result, the Commonwealth has generally been slow to act on behalf of small island developing states, and it has failed to be a strong advocate for climate justice.

Despite the Commonwealth's long history, Britain's colonial rule and legacy of slavery is catching up with it, particularly in the Commonwealth Caribbean. Britain's relationship with its former Caribbean colonies has become strained. Barbados, once dubbed "Little England" by other Caribbean states, removed the queen as head of state in November 2021 and declared itself a republic.²⁶ The country was one of England's first slave colonies and was a hub for the transatlantic slave trade.²⁷ In 2022, the Duke and Duchess of Cambridge embarked on an eight-day tour of the Caribbean to both celebrate the queen's Platinum Jubilee and to persuade other Caribbean countries to not follow Barbados.²⁸ Their visit was met with protests and demands for reparations from slavery, with one poster in Jamaica declaring: "#SehYuhSorry and make

²² *Id.*

²³ *The Commonwealth at COP28*, THE COMMONWEALTH, <https://thecommonwealth.org/cop28> [<https://perma.cc/4GCC-AY6W>].

²⁴ *Id.*

²⁵ See Heede, *supra* note 4, at 231.

²⁶ *Barbados Becomes a Republic and Parts Ways with the Queen*, BBC (Nov. 30, 2021), <https://www.bbc.com/news/world-latin-america-59470843> [<https://perma.cc/G6UU-6FWZ>].

²⁷ Sir Hilary Beckles, *On Barbados, the First Black Slave Society*, AFR. AM. INTELL. HIST. SOC'Y.: BLACK PERSPS. (Apr. 8, 2017), <https://www.aaihs.org/on-barbados-the-first-black-slave-society/> [<https://perma.cc/48PU-8SXH>]. Barbados will remain a member of the Commonwealth.

²⁸ Rachel Hall & Amelia Gentlemen, *Perfect Storm: Royals Misjudged Caribbean Tour, Critics Say*, THE GUARDIAN (Mar. 25, 2022, 13:14), <https://www.theguardian.com/uk-news/2022/mar/25/william-and-kate-caribbean-tour-slavery-reparations-royals> [<https://perma.cc/578S-84WH>].

REPARATIONS.”²⁹ One hundred Jamaican academics and organizations signed an open letter to the duke and duchess prior to their visit, calling for the royal family and the British government to apologize and pay reparations for subjecting the island to colonial rule and slavery.³⁰ The letter recounts the monarchy’s failure to address the legacy of slavery during the colonial period, as well as the British government’s continued insensitivity to the calls for reparations.³¹ The letter includes the following paragraph:

During her 70 years on the throne, your grandmother has done nothing to redress and atone for the suffering of our ancestors that took place during her reign and/or during the entire period of British trafficking of Africans, enslavement, indentureship and colonialization. In fact, on September 30, 2015, your former Prime Minister (PM) David Cameron addressed a joint sitting of both houses of the Jamaican Parliament, and told us to “move on from this painful legacy,” merely acknowledging the “horrors of slavery” and asserting British leadership in the abolition of slavery. Many of us were outraged and demanded an apology.³²

During their Caribbean tour, the duke and duchess also had to cancel a planned trip to a cocoa plantation in Belize amid ongoing protests.³³ Indigenous communities involved in the protest are in a land dispute with the conservation charity, Flora and Fauna International (FFI).³⁴ Indigenous communities allege that FFI controls their communal ancestral lands, lost in the colonial era, as “private property.”³⁵ Protest signs included slogans like: “Prince William leave our land” and “Colonial legacy of theft continues with Prince and FFI.”³⁶ Britain’s history of

²⁹ Eloise Barry, *Prince William and Kate’s Tour Was Meant to Secure the Monarchy in the Caribbean. Instead, It’s Raising New Questions About Its Future*, TIME (Mar. 24, 2022, 2:09 PM), <https://time.com/6160376/prince-william-kate-royal-tour-controversy-caribbean/> [https://perma.cc/F3RS-2GDZ].

³⁰ *100 Jamaican Individuals and Organizations Sign Open Letter to William and Kate Prior to their Visit*, PETCHARY’S BLOG (Mar. 21, 2022), <https://petchary.wordpress.com/2022/03/21/100-jamaican-individuals-and-organizations-sign-open-letter-to-william-and-kate-ahead-of-their-visit> [https://perma.cc/BBB6-P22R].

³¹ *Id.*

³² *Id.*

³³ Jose Sanchez, *Start of British Royals’ Caribbean Tour Marred by Belize Protest*, REUTERS (Mar. 18, 2022, 12:25 AM), <https://www.reuters.com/world/start-british-royals-caribbean-tour-marred-by-belize-protest-2022-03-19/> [https://perma.cc/PR3B-63PF]. Prince William is a patron and supporter of FFI.

³⁴ *Id.*

³⁵ Barry, *supra* note 29.

³⁶ *Id.*

racial capitalism continues to breed inequality, and resentment, in the Commonwealth.

During their tour, Prince William stopped short of apologizing for slavery but expressed profound sorrow for slavery in an address to the Jamaican Prime Minister.³⁷ Similarly, in his first trip to a Commonwealth country as monarch, King Charles III failed to issue an apology for slavery during his visit to Kenya, but, again, he expressed profound sorrow for the painful legacy of slavery.³⁸ The monarch's resistance to issuing an apology is a direct result of the British government's refusal to consider calls for reparations from its former colonies. Echoing former Prime Minister Cameron's sentiments in 2015, current Prime Minister Rishi Sunak, when confronted with a request for an apology, stated, "Trying to unpick our history . . . is not the right way forward."³⁹

The movement for reparations spans the Commonwealth. It began in the early 1990s with conferences held in Nigeria to explore the possibility of seeking reparations from former colonial powers.⁴⁰ The African Reparations Movement was established in London in 1993.⁴¹ In 2013, the Caribbean Community (CARICOM) formed a separate commission, chaired by Sir Hilary Beckles, to prepare the case for reparations.⁴² In 2014, CARICOM issued a ten-point plan for reparatory justice—including reparations—from European governments.⁴³ The plan includes a full, formal apology, debt

³⁷ Associated Press, *Prince Williams Expresses 'Profound Sorrow' for Slavery in Jamaica Visit, But Offers No Apology*, CBC NEWS (Mar. 24, 2022), <https://www.cbc.ca/news/world/prince-william-jamaica-slavery-sorrow-1.6395828#:~:text=In%20a%20speech%20to%20Jamaicans,that%20were%20once%20British%20colonies> [https://perma.cc/6SHU-KQ5G].

³⁸ Rael Ombuor & Karla Adam, *King Charles in Kenya Says 'No Excuses' But Gives No Apology for Colonial Violence*, WASH. POST (Oct. 31, 2023), <https://www.washingtonpost.com/world/2023/10/31/king-charles-colonialism-apology-kenya> [https://perma.cc/E4ML-C4JW].

³⁹ Keith Magee, *Opinion: What's Stopping King Charles From Saying Sorry' for Slavery?*, CNN (Nov. 8, 2023, 4:51 PM), <https://www.cnn.com/2023/11/08/opinions/king-charles-kenya-africa-asia-colonialism-apology-magee/index.html> [https://perma.cc/3QS7-9QVT].

⁴⁰ MURPHY, *supra* note 10, at 114.

⁴¹ *African Reparations Movement (UK)*, ARCHIVES HUB, [https://archiveshub.jisc.ac.uk/search/archives/e592d7bc-9dd7-3c28-8a1049f56aadecab#:~:text=The%20Africa%20Reparations%20Movement%20\(ARM,enslavement%2C%20colonisation%2C%20and%20racism](https://archiveshub.jisc.ac.uk/search/archives/e592d7bc-9dd7-3c28-8a1049f56aadecab#:~:text=The%20Africa%20Reparations%20Movement%20(ARM,enslavement%2C%20colonisation%2C%20and%20racism) [https://perma.cc/GZ9J-VT9R].

⁴² For more information on the CARICOM slavery reparations plan, see Don Rojas, *Message From the Caricom Reparations Commission*, CARICOM REPARATIONS COMM. (Feb. 18, 2021), <https://docs.house.gov/meetings/JU/JU10/20210217/111198/HHRG-117-JU10-20210217-SD004.pdf> [https://perma.cc/YX8Y-ZQJZ].

⁴³ *CARICOM Ten Point Plan for Reparatory Justice*, CARICOM (Dec. 17, 2020), <https://caricom.org/caricom-ten-point-plan-for-reparatory-justice/> [https://perma.cc/K5FF-AC3J].

cancellation, repatriation, indigenous development programs, technology transfer, and alleviation of the public health crisis.⁴⁴ University College London established a searchable database of government compensation extended to British slave owners when slavery was abolished.⁴⁵ On the list is one of Cameron's ancestors.⁴⁶

In 2017, Dr. Shashi Tharoor, former Indian government minister, published his book, *Inglorious Empire: What the British Did to India*, allocating responsibility for the deaths of around thirty-five million Indians to the British colonial administration and making the case for reparations to India for the economic damage inflicted.⁴⁷

The call for reparatory justice across the Commonwealth recognizes the history of racial capitalism that is deeply implicated in Britain's colonial history. The call for reparations also recognizes the ongoing economic impacts and disparities that persist between Britain and other Commonwealth countries, particularly those in the Global South. Britain profited economically from the exploitation it imposed on its former colonies. Racial capitalism also intersects closely with colonial corporate entities formed to extract wealth and resources from these countries. Racial capitalism is connected to the fossil fuel economy, which is imposing vast economic and cultural costs on Global South countries, including those within the Commonwealth.

II. RACIAL CAPITALISM, COLONIALISM, CORPORATIONS, AND CLIMATE CHANGE

A. RACIAL CAPITALISM AND COLONIALISM

Unpicking the myth of empire involves the recognition of the racially charged system of colonialism that was inflicted on Black and Brown people in the former colonies. While some members of the Commonwealth are settler-colonial countries, such as Australia,

⁴⁴ *Id.*

⁴⁵ See Centre for the Studies of the Legacies of British Slavery, *Details*, UCL DEPT. HIST. (2024), <https://www.ucl.ac.uk/lbs/project/details> [<https://perma.cc/ND7F-8VNN>].

⁴⁶ PTI, *David Cameron's Ancestors Had Owned Slaves: Report*, INDIAN EXPRESS (Feb. 28, 2013, 09:47), <https://indianexpress.com/article/news-archive/print/david-camerons-ancestors-had-owned-slaves-report/> [<https://perma.cc/8WXC-76T2>].

⁴⁷ SHASHI THAROOR, *INGLORIOUS EMPIRE: WHAT THE BRITISH DID TO INDIA* 151 (Hurst ed., 1st ed. 2017).

New Zealand, and Canada, they have always been considered to be “the inner Commonwealth,” hinting at racial solidarity with the UK.⁴⁸ The criticisms of the British Empire concern the patterns of racial and economic oppression and subjugation it perpetrated. These tactics, including the “divide-and-rule” strategy, were designed to sow division between existing tribal and ethnic communities, strategically withhold investment in basic transport infrastructure and education, exploit and extract mineral resources to benefit foreign capitals in Europe, impose repressive policing and administration, and dislocate people and inflict trauma upon them through the slave trade.⁴⁹ The patterns and legacies of economic and racial discrimination continue today throughout the Commonwealth.

As Dr. Kehinde Andrews—British academic and author—writes, it is impossible to separate industry and the Industrial Revolution from colonial violence and genocide.⁵⁰ Charting the purposeful extermination of Indigenous people across the Americas and the Caribbean, Andrews connects genocide as a precondition for slavery, which was designed to provide labor to build wealth for colonizing countries, including Britain.⁵¹ Enrichment from slavery permeated British industry. The UCL project demonstrates that many directors of the Bank of England were slave owners.⁵² The practice of banks using enslaved people as security for loans was widespread. The insurance industry, including Lloyds of London, underwrote slave ships and plantations; the first five presidents of Royal Sun Alliance were slave owners.⁵³ Two of the largest accounting firms in the world, Deloitte and PricewaterhouseCoopers, were founded by families enriched by the slave trade.⁵⁴ But it was not just the financial industry that benefited from the slave trade. Colonialism itself was perpetrated through corporate entities.

The Dutch traded enslaved people primarily through the Dutch West India Company, and the model was so economically successful that the Dutch West India Company collaborated with the

⁴⁸ MURPHY, *supra* note 10, at 61–62.

⁴⁹ *Id.* at 129.

⁵⁰ KEHINDE ANDREWS, *THE NEW AGE OF EMPIRE: HOW RACISM & COLONIALISM STILL RULE THE WORLD 164–170* (2021).

⁵¹ *Id.*

⁵² See Centre for the Studies of the Legacies of British Slavery, *The Database: Context*, UCL DEPT. HIST. (2024), <https://www.ucl.ac.uk/lbs/project/context> [<https://perma.cc/5AY6-PZR9>].

⁵³ ANDREWS, *supra* note 50, at 55–75.

⁵⁴ See *id.* at 55–75.

British and French to sell enslaved people to those colonizers.⁵⁵ The East India Company colonized India directly, with an army of 260,000 troops and the company receiving loans and financial support from the British government.⁵⁶ Between 1765 and 1815, Indian subjects paid over £18 million a year in taxes to the company.⁵⁷ The use of trading corporations avoided the tricky question of sovereignty over colonial territories,⁵⁸ and so it was a very popular vehicle used to execute colonialism, extraction, and exploitation. The Royal Niger Company, the Imperial British East Africa Company, and the British South Africa Company were all deeply involved in the colonial project, including the racial and economic exploitation that was part and parcel of colonialism. The interlocking and relational nature of colonial power persists today, through its legacies of dispossession, exploitation, and genocide.⁵⁹

Andrews notes that the domination of private business interests over the state in Western economies in fact begins during the Atlantic slave trade (2021). Western corporations grew wealthy by exploiting colonies' resources, including their people. That pattern of racial capitalism continues today. Grietje Baars argues that international law was developed pragmatically in service of global capitalism, as international law, capitalism, and colonialism all emerged around the same time in history.⁶⁰ Trading companies, such as the East India Company, became increasingly important actors in the colonial space. At the same time, corporate statutes—such as the Joint Stock Companies Act of 1844, which allowed for asset partitioning and limited liability for investors in those companies—were passed in the United Kingdom.⁶¹ UK companies grew out of the guild system, where royal charters for monopolies were granted by the crown. These guilds established monopolies over certain trading routes and commodities, including slave-trading routes. In 1600, Royal Charter granted the British East India Company a monopoly

⁵⁵ *Id.* at 88–92.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ GRIETJE BAARS, *From the Dutch East India Company to the Corporate Bill of Rights: Corporations and International Law*, in RESEARCH HANDBOOK ON POLITICAL ECONOMY AND LAW 260 (Ugo Mattei. & John D. Haskell eds., 2015).

⁵⁹ See Christopher Balcom, *Review Essay Colonial Pasts, Racial Capitalism and Coloniality*, 22 CONTEMP. POL. THEORY S87–88 (2023).

⁶⁰ BAARS, *supra* note 58 at 262.

⁶¹ See *id.* at 265; Joint Stock Companies Act 1844, 7 & 8 Vict. c. 110 (UK).

of trade with India.⁶² Corporate law responded to trading companies' desire to raise capital for risky ventures by implementing corporate principles such as limited liability and separate legal personality.⁶³

B. CORPORATIONS AND CLIMATE CHANGE

Extractive industries such as oil and gas, copper, and aluminum were major players in advancing corporate imperialism.⁶⁴ The oil and gas industry—in particular, through the Standard Oil group of companies—took advantage of corporate principles of limited liability and separate legal personality to build powerful multinational groups.⁶⁵ The Standard Oil group of companies was dismantled in the early twentieth century, but its direct descendants include many carbon major companies, such as Chevron, ExxonMobil, and BP, that continue to operate today, including in the Global South.⁶⁶ The long histories of many of these resulting companies mean they were actively involved in and took advantage of the racial and colonial histories of subjugation in the Global South, and they also bear significant historic responsibilities for decades of greenhouse gas emissions. The British East India Company was a state-sponsored corporate vehicle that oversaw the political and economic oppression of countries in south and east Asia.⁶⁷ Anglo-American was one of the primary extractive companies operating in South Africa in the twentieth century.⁶⁸ The Hudson's Bay Company in Canada was similarly involved in the colonial project.⁶⁹ With operations all over the world, where natural resources were

⁶² Dave Roos, *How the East India Company Became the World's Most Powerful Monopoly*, HIST. (June 23, 2023), <https://www.history.com/news/east-india-company-england-trade> [<https://perma.cc/3BD5-YZM6>].

⁶³ BAARS, *supra* note 58, at 266.

⁶⁴ NORMAN GIRVAN, *CORPORATE IMPERIALISM: CONFLICT AND EXPROPRIATION* 12 (M.E. Sharpe, Inc. ed., 1st ed. 1976).

⁶⁵ Phillip Blumberg, *The Transformation of Modern Corporate Law: The Law of Corporate Groups*, 37 CONN. L. REV. 605, 607 (2005).

⁶⁶ Jeff Desjardin, *Chart: The Evolution of Standard Oil's Energy*, VISUAL CAPITALIST (Nov. 24, 2017), <https://www.visualcapitalist.com/chart-evolution-standard-oil> [<https://perma.cc/L6BT-ZFHJ>].

⁶⁷ Erin Blakemore, *How the East India Company Became the World's Most Powerful Business*, NAT'L GEOGRAPHIC (Sept. 6, 2019), <http://www.nationalgeographic.com/culture/topics/reference/british-east-india-trading-company-most-powerful-business> [<https://perma.cc/4894-85V8>].

⁶⁸ Seeraj Mohamed, *Anglo-American Corporation and Corporate Restructuring in Post-Apartheid South Africa*, 34 INT'L REV. APPLIED ECON. 439, 439 (2020).

⁶⁹ Melissa Gismondi, *The Untold Story of the Hudson Bay Company*, CAN. GEOGRAPHIC (May 2, 2020), <https://www.canadiangeographic.ca/article/untold-story-hudsons-bay-company> [<https://perma.cc/TR9F-WMB5>].

available, the group structure was a convenient trading mechanism for these entities. Companies, and company law, therefore played an active role in the colonial project.⁷⁰

The 1970s saw a meteoric rise of transnational corporations (TNCs) operating in the Global South, with rising concerns regarding the social impacts of their operations.⁷¹ This mirrored the rise of capitalist city centers in the Global North, which required natural resources from the Global South to fuel their economic prosperity.⁷² Norman Girvan, a renowned Caribbean scholar, identified this phenomena as “corporate imperialism,” wherein global owners and managers of capital hold power, and use it to exploit governments, workers, and peasants, and to extract more resources to accumulate further capital.⁷³ This power dynamic was institutionalized through the corporate form, and in particular through TNCs.

Due in part to the significant resources accumulated through extraction, TNCs became key actors in regulatory systems.⁷⁴ Some of the largest transnational companies, such as oil and gas and other extractive companies in the mining and minerals industries, have become influential economic and political players on both domestic and international fronts.⁷⁵ This influence has allowed them to shape the rules, and, in particular, to prevent the establishment of corporate liability rules, in relation to international human rights and environmental impacts.⁷⁶ As a result, corporate law has provided TNCs with significant flexibility, and it rarely imposes liability for environmental or climate damage on these entities. TNCs hide socially irresponsible actions behind complex corporate structures in multiple jurisdictions, and they use jurisdictional arbitrage to avoid accounting for human rights and environmental abuses.⁷⁷ Many countries in the Global South have not reaped the benefit of racial capitalism, and they are befallen with what has been dubbed the “resource curse,”

⁷⁰ Lisa Benjamin, *Group Companies and Climate Justice*, 74 CURRENT LEGAL PROBS. 235, 11 (2021).

⁷¹ Giovanni Mantilla, *Emerging International Human Rights Norms for Transnational Corporations*, 15 GLOB. GOVERNANCE 279, 279 (2009).

⁷² GIRVAN, *supra* note 64, at 3, 11.

⁷³ *Id.* at 11–12.

⁷⁴ Subhabrata Bobby Banerjee, *Transnational Power and Transnational Governance: The Politics of Corporate Responsibility*, 71 HUM. RELS. 796, 804 (2018).

⁷⁵ Harri Kalimo & Tim Staal, *Softness in International Instruments: The Case of Transnational Corporations*, 42 SYRACUSE J. INT'L L. & COM. 363, 370 (2015).

⁷⁶ Janet Dine, *Corporate Regulation, Climate Change and Corporate Law: Challenges and Balance in an International and Global World*, 26 EUR. BUS. L. REV. 173, 196 (2015).

⁷⁷ Janet Dine, *Stopping Jurisdictional Arbitrage by Multinational Companies: A National Solution?* 11 EUR. CO. L. 77, 77 (2014).

since the benefits of foreign direct investment (often conducted via TNCs) rarely reach those most in need.⁷⁸

Corporations and colonialism were, and are, deeply intertwined. As a result, capitalism has been persistently entangled with racial oppression.⁷⁹ Racial capitalism as a concept grew out of the Black radical tradition of writers, such as Eric Williams, Franz Fanon, and Cedric Robinson, who wrote about the racial aspects of colonialism and enslavement. Robinson described the symbiotic relationship between racism and capitalism.⁸⁰ Racial capitalism describes the fabrication and manipulation of racial hierarchies by colonizing countries to maintain control over populations and extract labor, wealth, and resources.⁸¹ This pattern continued in settler-colonial states such as Canada and Australia, where Indigenous nations and land were eliminated and expropriated.⁸² Racial capitalism involves a process of deriving social and economic value from the racial identity of another person.⁸³ As Nancy Leong notes, racial capitalism commodifies nonwhiteness.⁸⁴ We see the roots of colonialism and the legacy of racial capitalism in the policy problem of climate change.

Climate change has been described as a “super wicked” policy problem.⁸⁵ Climate science is complex, and the impacts of climate change are systemic, pervasive, and at a crisis point. It is highly polycentric, dynamic, uncertain, and sociopolitically sensitive, and so poses challenges to legal orders that seek certainty and stability.⁸⁶ Countries in the Global North are responsible for the majority of historic global emissions, and they benefited financially from industrial activities that led to those

⁷⁸ Jeffrey D. Sachs & Andrew M. Warner, *Natural Resource Abundance and Economic Growth* 1–2 (Nat'l Bureau of Econ. Rsch., Working Paper No. 5398, 1995), https://www.nber.org/system/files/working_papers/w5398/w5398.pdf [<https://perma.cc/P5NK-F2EF>].

⁷⁹ Nancy Fraser, *From Exploitation to Expropriation: Historic Geographies of Racialized Capitalism*, 94 *ECON. GEOGRAPHY* 1, 3 (2018).

⁸⁰ See generally CEDRIC J. ROBINSON, *ON RACIAL CAPITALISM, BLACK INTERNATIONALISM, AND CULTURES OF RESISTANCE* (H. L. T. Quan ed., 2019).

⁸¹ Carmen G. Gonzalez, *Migration as Reparation: Climate Change and the Disruption of Borders*, 66 *LOY. L. REV.* 401, 404–05 (2020).

⁸² *Id.* at 405–06.

⁸³ Nancy Leong, *Racial Capitalism*, 126 *HARV. L. REV.* 2152, 2152 (2013).

⁸⁴ *Id.*

⁸⁵ Richard Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 *CORNELL L. REV.* 1153, 1160 (2009).

⁸⁶ Elizabeth Fisher et al., *The Legally Disruptive Nature of Climate Change*, 80 *MOD. L. REV.* 173, 173–201 (2017).

historic emissions. These financial benefits find their roots in colonialism. High consumptive patterns in the Global North were fueled and subsidized by resources extracted from the Global South. High levels of consumption are one of the major causes of the climate crisis, and they are, even today, racially uneven. Per capita emissions of Global North countries still far exceed the per capita emissions of people in the Global South.

The Global North still profits economically from the fossil fuel economy, with many major private oil and gas companies being registered or headquartered in the Global North, but with operating subsidiaries extracting oil and gas resources from the Global South. In 2013, Richard Heede, cofounder and director of the Climate Accountability Institute, published a groundbreaking quantitative analysis of historic fossil fuel and cement production records of ninety leading investor-owned, state-owned, and nation-state producers of oil, natural gas, coal, and cement.⁸⁷ His study concluded that these ninety carbon major entities were responsible for 63 percent of cumulative worldwide industrial emissions of carbon dioxide and methane from 1854–2010.⁸⁸ Investor-owned entities contributed the majority—315 gigatonnes—of these emissions, followed closely by nation-states and state-owned fossil fuel and cement-producing entities.⁸⁹ The twenty largest investor- and state-owned energy corporations were responsible for 29.5 percent of all global industrial emissions, and the ten largest investor-owned corporations alone were responsible for 15.8 percent of global industrial emissions through 2010.⁹⁰ Therefore, corporations are responsible for the majority of historic emissions, but they have failed to be held accountable—through the courts or legislatures—for the damage their emissions have caused, particularly in the Global South.

The impacts of climate change will be felt predominantly in Global South countries, and they will affect the more vulnerable constituents within those countries.⁹¹ Under international climate treaties, Global North countries have the responsibility to take the lead in reducing emissions and to provide climate finance to the Global South, but they have largely failed to do so. Countries in the Global South are highly vulnerable

⁸⁷ See Heede, *supra* note 4, at 229.

⁸⁸ *Id.* at 234.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ V. Masson-Delmotte et al., *Summary for Policymakers*, IPCC 9 (2018), <https://www.ipcc.ch/sr15/> [<https://perma.cc/5HYF-8LTS>]; see generally *Special Report on Climate Change and Land*, IPCC (Oct. 6, 2018), <https://www.ipcc.ch/srcc1/> [<https://perma.cc/AJ4J-DBZU>].

and are experiencing some of the worst impacts of climate change.⁹² Issues of climate justice are therefore highly racialized and mirror colonial histories of injustice, as many countries in the Global South continue to occupy climate sacrifice zones, which are the legacy of racialized capitalism.⁹³

III. CLIMATE LEGAL INTERVENTIONS ACROSS A SELECT GROUP OF COMMONWEALTH COUNTRIES

In 2015, 197 countries signed the Paris Agreement, which provides for nationally determined contributions to be submitted by each party.⁹⁴ The parties also agreed to keep increases in global mean temperatures “well below 2°C,” with an aspirational goal to limit the increase to 1.5°C, above preindustrial averages.⁹⁵ While each party’s ambition level is nationally determined, the Paris Agreement has been a significant driver of national policymaking on climate change, and of climate litigation efforts. In addition, domestic climate litigation is playing a key role in advancing the implementation of the Paris Agreement itself.⁹⁶ This Article focuses primarily on what some authors have described as “direct legal intersections in climate policy making”—laws and regulations with the primary purpose of achieving climate policy objectives or which take into account climate change issues or impacts explicitly.⁹⁷ These direct policy interventions on climate change mainly appear in the Global North. In the Global South, more indirect policy interventions are assessed, and litigation in these countries often aims to enforce existing legislation, with climate cobenefits.⁹⁸

While there is no set definition of climate litigation, this Article will focus on recent cases in the six selected jurisdictions. Australia and the United States have seen the most climate litigation to date,⁹⁹ but levels

⁹² V. Masson-Delmotte et al., *supra* note 91, at 9; Gonzalez, *supra* note 81.

⁹³ *Id.*

⁹⁴ For more details on the Paris Agreement see *The Paris Agreement*, UNITED NATIONS, <https://www.un.org/en/climatechange/paris-agreement> [<https://perma.cc/E2LA-4HKV>].

⁹⁵ Paris Agreement to the United Nations Framework Convention on Climate Change art. 2(1)(a), Dec. 12, 2015, T.I.A.S. No. 16-1104.

⁹⁶ Jacqueline Peel & Jolene Lin, *Transnational Climate Litigation: The Contribution of the Global South*, 113 AM. J. INT’L L. 679, 681 (2019).

⁹⁷ Eloise Scotford et al., *Climate Change and National Laws Across Commonwealth Countries*, 43 COMMONWEALTH L. BULL. 318, 320 (2017).

⁹⁸ Joana Setzer & Lisa Benjamin, *Climate Litigation in the Global South: Constraints and Innovations*, 9 TRANSNAT’L ENV’T L. 77, 79, 86 (2019).

⁹⁹ Jacqueline Peel & Hari Osofsky, *A Rights Turn in Climate Litigation?*, 7 TRANSNAT’L ENV’T L. 37, 39 (2018).

of climate litigation are generally increasing all over the world, including in the Global South.¹⁰⁰ Climate litigation cases can be divided into two main categories. The first is strategic cases that take a visionary approach designed to influence public and private climate accountability. These are usually high-profile cases.¹⁰¹ Cases such as the suit brought by Ashgar Leghari (filed in Pakistan)¹⁰² or the complaint filed by Ioane Teitiota (filed in Kiribati),¹⁰³ would fall into this first category. The second are more routine cases, which are less visible and often involve planning applications.¹⁰⁴ These cases usually involve judicial review of applications for coal-fired power plants, or the Heathrow airport extension case in the United Kingdom.¹⁰⁵ While labeled “routine,” these cases can have a great influence over national climate policies.

A. THE UNITED KINGDOM

The United Kingdom was a global climate leader with the passage of the Climate Change Act in 2008.¹⁰⁶ The act was innovative, as it was the first direct climate change legislation to be passed in the world.¹⁰⁷ It established the Climate Change Committee (CCC), an expert-based and independent committee with a statutory role in advising the government on periodic national climate targets.¹⁰⁸ After its passage, the country experienced a decline in climate consensus and global leadership on the issue, primarily due to the financial crisis in 2008.¹⁰⁹ While the United Kingdom formed part of the European Union’s negotiating bloc in the Paris

¹⁰⁰ *Id.* at 83–84.

¹⁰¹ See JOANA SETZER & REBECCA BYRNES, GLOBAL TRENDS IN CLIMATE CHANGE LITIGATION: 2019 SNAPSHOT (2019), https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2019/07/GRI_Global-trends-in-climate-change-litigation-2019-snapshot-2.pdf [<https://perma.cc/AT2Z-X8KD>].

¹⁰² See *Leghari v. Pakistan*, (2015) 25501/201 WP (Punjab) (2018) (Pak.).

¹⁰³ See *Ioane Teitiota v. New Zealand* [2015] NZSC 107 (Kiribati); see also Hum. Rts. Comm., Int’l Covenant on Civ. & Pol. Rts., Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2728/2016, U.N. Doc. CCPR/C/127/D/2728/2016 (Sept. 23, 2020).

¹⁰⁴ SETZER & BYRNES, *supra* note 101, at 2.

¹⁰⁵ *R v. Heathrow Airport* [2020] UKSC 52 (appeal taken from Eng.).

¹⁰⁶ See Climate Change Act 2008, c. 27 (UK).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Ross Gillard, *Unravelling the United Kingdom’s Climate Policy Consensus: The Power of Ideas, Discourse and Institutions*, 40 GLOB. ENV’T CHANGE 26, 33 (2016).

Agreement negotiations, Brexit¹¹⁰ required a reassessment of its national positions. In 2019, the then prime minister, Theresa May, announced a goal to achieve national net-zero emissions by 2050, making the United Kingdom the first country in the world to establish such a target, preceding the European Union's similar climate commitment.¹¹¹ The CCC's advice to the government laid the pathway to the establishment of the net-zero target. Its scientific assessment was couched in the commitments of the Paris Agreement as well as the Intergovernmental Panel on Climate Change's Special Report on 1.5°C.¹¹² The Paris Agreement has informed both climate policymaking as well as climate litigation cases in the United Kingdom.

However, the United Kingdom has recently backtracked on its climate commitments. In 2020, then Prime Minister Johnson appointed ex-prime minister of Australia and coal champion, Tony Abbott, to be a trade advisor to the UK Board of Trade, amid criticism.¹¹³ Johnson had very mixed views on climate change. In 2000, he claimed, "There is no evidence that the planet is suffering from the extreme weather patterns associated with climate change."¹¹⁴ Johnson changed his views when the United Kingdom hosted COP26 in Glasgow, becoming a more progressive sounding climate leader. But in 2023, under Prime Minister Sunak, the government approved a huge and controversial new oil and gas field in the North Sea.¹¹⁵ The approval by the North Sea Transition Authority would put the United Kingdom's net-zero commitment in jeopardy. Sunak has committed to maxing out the country's oil and gas fields in the North

¹¹⁰ Brexit combines two words, Britain and exit, and refers to the UK's withdrawal from the European Union, which took place on January 31st, 2020.

¹¹¹ Peter Walker et al., *Theresa May Commits to Net Zero UK Carbon Emission by 2050*, GUARDIAN (June 11, 2019, 17:30), <https://www.theguardian.com/environment/2019/jun/11/theresa-may-commits-to-net-zero-uk-carbon-emissions-by-2050> [https://perma.cc/4MSU-2FMK].

¹¹² V. Masson-Delmotte et al., *supra* note 91, at 9.

¹¹³ Peter Walker & Kevin Rawlinson, *Former Australian PM Tony Abbott Confirmed as UK Trade Advisor*, GUARDIAN (Sept. 4, 2020, 12:31), <https://www.theguardian.com/politics/2020/sep/04/former-australian-pm-tony-abbott-confirmed-as-uk-trade-adviser> [https://perma.cc/7NMM-X8UN].

¹¹⁴ Dave Keating, *Four Years Ago Boris Johnson Said Climate Concern Was Without Foundation*, FORBES (Feb. 5, 2020, 08:55), <https://www.forbes.com/sites/davekeating/2020/02/05/four-years-ago-boris-johnson-said-climate-concern-was-without-foundation/?sh=5594b5436954> [https://perma.cc/4VG5-KZYC].

¹¹⁵ Laura Pattison, *Britain Approves Huge, Controversial Oil and Gas Field in the North Sea*, CNN (Sept. 27, 2023, 5:15 AM), <https://www.cnn.com/2023/09/27/energy/rosebank-oil-gas-field-britain-climate-intl/index.html> [https://perma.cc/5M4T-ZRCW].

Sea.¹¹⁶ This climate policy backsliding is indicative of a Global North country committed to exploiting its own energy resources, regardless of the impacts this may have on the Global South.

While litigation attempting to force an increase in climate ambition in the country failed,¹¹⁷ a judicial review of the secretary of state's approval of a third runway at Heathrow Airport was successful at the Court of Appeal. In *R v. Secretary of State for Transport and Others*,¹¹⁸ the question the court considered was whether an approval by the secretary of state to expand Heathrow International Airport was illegal due to inadequate consideration of climate change commitments under the Paris Agreement. The court held that the decision was illegal, as the United Kingdom's commitments under the Paris Agreement formed part of government policy at the time the decision was taken, and the secretary of state failed to consider these commitments in the Airports National Policy Statement.

More recently, a UK court held that Client Earth failed to allege a prima facie case against Shell Oil. According to Heede's 2013 study, the Royal Dutch Shell group is responsible for over 2 percent of all global, historic emissions.¹¹⁹ Royal Dutch Shell also acquired a descendant of the Standard Oil group of companies (South Penn Oil). Client Earth brought a shareholder derivative suit, claiming the directors of Shell failed to achieve appropriate climate targets, and that it should not have left the Dutch jurisdiction to avoid climate liability from another suit brought by Milledefensie. The high court dismissed these claims, finding there is no universally accepted methodology as to how Shell might be able to achieve its reductions targets, and that the balancing of competing business priorities was a matter for directorial discretion.¹²⁰ The case is a significant defeat, illustrating that any attempt to impose liability for climate harms onto carbon major companies such as Shell is still extremely difficult.

However, the United Kingdom will likely continue experiencing a variety of climate litigation attempts, focusing on the country's commitments under the Paris Agreement. This litigation risk escalates with recent national decisions, such as the decision to continue to drill in the North

¹¹⁶ Severin Carrell, Peter Walker & Helena Horton, *Dismay as Rishi Sunak Vows to 'Max Out' UK Fossil Fuel Reserves*, GUARDIAN (July 31, 2023, 5:35 PM), <https://www.theguardian.com/environment/2023/jul/31/dismay-as-rishi-sunak-vows-to-max-out-uk-fossil-fuel-reserves> [<https://perma.cc/2SDV-UE32>].

¹¹⁷ See generally *Plan B & 11 Citizens v. UK 2050 Carbon Target*, [2018] EWHC (QB) 1892 (UK).

¹¹⁸ *R (on application Plan B Earth) v. Sec'y State for Transp. & Others* [2020] EWCA (Civ) 214, [¶ 2, 12] (UK).

¹¹⁹ Heede, *supra* note 4, at 231.

¹²⁰ *Client Earth v. Shell's Board Dir.'s* [2023] EWHC (Ch) 1897 (UK).

Sea,¹²¹ which jeopardize existing national climate commitments. Climate litigation has had mixed results to date, however, and it is unclear whether—despite its significant contributions to historic emissions, including through carbon major companies registered in the United Kingdom—the United Kingdom will be able to maintain its existing climate policy and legal commitments in the future.

B. CANADA

Like the United Kingdom, and despite existing vulnerabilities to climate change in the country,¹²² there has been uneven policy implementation in Canada on climate change, primarily due to a lack of political consensus on the issue. The barriers to domestic climate action are tied to the strong economic interests and political clout of the tar sands industry in provinces like Alberta and Saskatchewan. Canada is the fourth largest producer and exporter of oil in the world, and 98 percent of Canada's proven oil reserves are found in the tar sands.¹²³ If fully exploited, it has been alleged that the oil sands would exhaust 16 percent of the global budget to stay within 1.5°C.¹²⁴ Many actors in the Canadian oil sands are or were multinational companies. Until 2017, companies such as ConocoPhillips, ExxonMobil, Royal Dutch Shell, and BP owned significant stakes in the area.¹²⁵ ExxonMobil, BP, and Royal Dutch Shell are all descendants of the Standard Oil group of companies (either directly or by acquisition). The Standard Oil group of companies were intimately involved in the colonial project.¹²⁶ Since 2017, a number of these multinational enterprises (MNEs) have sold their stakes to domestic companies, leaving over 70 percent of activity in the oil sands in the hands of Canadian companies such as Canadian Natural Resources, Cenovus, Suncor Energy,

¹²¹ Pattison, *supra* note 115.

¹²² *See Is Canada Finally Inching Toward a Political Consensus on Climate Change?*, CBC (Apr. 16, 2021), <https://www.cbc.ca/news/politics/erin-otoole-climate-carbon-trudeau-1.5989619> [https://perma.cc/4JY6-REPT]; *see, e.g.,* Adam Scott & Greg Muttitt, *Climate on the Line: Why New Tar Sands Pipelines are Incompatible with Paris Goals*, OIL CHANGE INT'L (Jan. 2017), http://priceofoil.org/content/uploads/2017/01/climate_on_the_line_FINAL-OCI.pdf [https://perma.cc/H5XD-JTCP].

¹²³ *Oil Supply And Demand*, NAT. RES. CAN. (Dec. 2019), <https://www.nrcan.gc.ca/energy/oil-sands/18086> [https://perma.cc/VXM6-96DF].

¹²⁴ Scott & Muttitt, *supra* note 122.

¹²⁵ *List Of Tar Sands Companies' Reserves As At End Of 2016*, RAINFOREST ACTION NETWORK (2017), <https://www.ran.org/list-tar-sands-companies> [https://perma.cc/ZR5V-466S].

¹²⁶ *See generally* Gilbert Montague, *The Rise and Supremacy of the Standard Oil Company*, 16 Q. J. ECON. 265 (1902).

and Imperial Oil.¹²⁷ Within Richard Heede's top twenty emitters' list are several MNEs who have or had a stake in the Canadian oil sands. Canadian companies appear within Heede's study in the list of ninety carbon majors, including Encana at number sixty-two, Suncor at number sixty-seven, Canadian Natural Resources at seventy-six, and Talisman at number seventy-nine.¹²⁸ This uneven political and economic landscape has led to a patchwork of legislation at both the federal and provincial levels.¹²⁹

After the Paris Agreement, Canada took several steps to enact direct policy interventions on climate change at the federal level. In 2016, the Pan-Canadian Framework on Clean Growth and Climate Change was passed.¹³⁰ The Framework is an overarching national plan to meet emissions reduction targets, grow the economy, and build resilience to a changing climate. It aims to achieve these goals through four pillars: (1) pricing carbon pollution, (2) taking action in each sector of the economy, (3) adapting to climate change, and (4) supporting clean technologies, innovation, and job creation. Building on the Framework, in 2018, the government passed the Greenhouse Gas Pollution Pricing Act (GGPPA),¹³¹ which operates through two main channels. Part one of the legislation applies a charge on a broad range of greenhouse gas-emitting fuels at scheduled (and increasing) rates,¹³² and part two establishes an output-based performance system for regulated industrial facilities.¹³³ In 2019, the government adopted the Federal Impact Assessment Act, which for the first time expressly mentions climate change as a factor to be considered in an assessment of a project that will have environmental impacts. The act requires that a project's assessment take into account the extent to which the effects of the designated project hinder or contribute to Canada's ability to

¹²⁷ Chris Varcoe, *Foreign Sell-off of Oilsands Shouldn't Spark Anxiety*, CALGARY HERALD (Apr. 10, 2017), <https://calgaryherald.com/business/energy/varcoe-foreign-sell-off-of-oilsands-shouldnt-spark-alberta-anxiety> [https://perma.cc/X78Z-3ZSV].

¹²⁸ Heede, *supra* note 4.

¹²⁹ Natalie J. Chalifour, *Jurisdictional Wrangling over Climate Policy in the Canadian Federation: Key Issues in the Provincial Constitutional Challenges to Parliament's GHG Pollution Pricing Act*, 50 OTTAWA L. REV. 197, 207 (2019).

¹³⁰ Environment & Climate Change Canada, *Pan-Canadian Framework on Clean Growth and Climate Change* (2016), <https://www.canada.ca/en/services/environment/weather/climatechange/pan-canadian-framework.html> [https://perma.cc/Q8FZ-9YKN].

¹³¹ Greenhouse Gas Pollution Pricing Act S.C. 2018, c. 12, s. 186, [hereinafter, GGPPA].

¹³² *See id.*, Part I.

¹³³ *See id.*, Part II.

meet its environmental obligations and its commitments in respect to climate change.¹³⁴

This suite of legislation attracted controversy from several provinces, with Saskatchewan refusing to even sign the Pan-Canadian Framework, and with Ontario, Saskatchewan, and Alberta challenging the constitutionality of the legislation.¹³⁵ At issue in the case was the balance of power between provinces, which retain jurisdiction over issues of property and civil rights, and the federal national concern doctrine.¹³⁶ This federal doctrine is found in Section 91 of the Constitution, and it grants federal jurisdiction over matters not expressly assigned to the provinces. The section grants power to the federal government “to make Laws for the Peace, Order, and good Government of Canada.”¹³⁷ Ruling that both parts one and two of the GGPPA were unconstitutional, the court described the act as introducing a wide range of discretionary federal power that would intrude on provincial jurisdiction. While citing the Paris Agreement, the court found it had fewer compulsory guidelines compared with the previous compulsory targets of the Kyoto Protocol, and so it would not excuse the unconstitutionality of the GGPPA.¹³⁸ Other provinces, such as Ontario and Saskatchewan, determined that the GGPPA was not ultra vires the Constitution, but these decisions have been appealed to the Supreme Court. Chalifour notes that decisions such as the one in the Alberta Court of Appeal will leave “gaping holes” in Canada’s jurisdictional ability to meet both national and international climate commitments.¹³⁹

In 2021, the government passed the Net-Zero Emissions Accountability Act.¹⁴⁰ The legislation enshrined the country’s commitment to

¹³⁴ Impact Assessment Act, S.C. 2019, c. 28, s. 1; see also Meinhard Doelle, *Integrating Climate Change Mitigation into the Impact Assessment Act*, in *THE NEXT GENERATION OF IMPACT ASSESSMENT: A CRITICAL REVIEW OF THE CANADIAN IMPACT ASSESSMENT ACT 277, 279* (Meinhard Doelle & A. John Sinclair eds., 2021).

¹³⁵ Environment & Climate Change Canada, *supra* note 130; see also Reference re Greenhouse Gas Pollution Act, 2019 CanLII 40 (Can. Ont. C.A.); Reference re Greenhouse Gas Pollution Act, 2019 CanLII 40 (Can. Sask. C.A.).

¹³⁶ Chalifour, *supra* note 129, at 224.

¹³⁷ Constitution Act, 1867, 30 & 31 Vict., c 3 (U.K.), reprinted in R.S.C. 1985, app II, no 5, s 91 (Can.). This Constitutional provision is often referred to as the POGG power, authorizing the Government to “make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces.” *Id.*

¹³⁸ See Reference Greenhouse Gas Pollution Pricing Act, S.C. 2018, c 12 (Can.).

¹³⁹ Chalifour, *supra* note 129, at 2.

¹⁴⁰ See *Net-zero Emissions by 2050*, GOV’T CAN. (date modified Feb. 2, 2024), <https://www.canada.ca/en/services/environment/weather/climatechange/climate-plan/net-zero-emissions-2050.html> [<https://perma.cc/VN94-ETMW>].

achieve net-zero emissions by 2050.¹⁴¹ In 2022, the government published the 2030 Emissions Reduction Plan, which includes a target of 40–45 percent emissions reductions by 2030.¹⁴² Similar to the UK structure, the 2021 legislation establishes a Net Zero Advisory Body, which provides independent advice to the minister of environment and climate change to support the net-zero national goal. Despite these legislative advances, similar to the United Kingdom, Canada approved a \$12 billion offshore oil and gas drilling project in Bay du Nord.¹⁴³ This would be Canada's first deep-water offshore remote drilling project, and it would drill an estimated resource of three hundred million barrels of light crude oil in the Atlantic Ocean.¹⁴⁴ This approval illustrates the tension between the country's legislative aims and its domestic policymaking on oil and gas.

Like the UK landscape, climate litigation in Canada has yielded mixed results. A very recent challenge seeking judicial review of a decision to allow offshore oil and gas drilling was granted under the recent Impact Assessment Act.¹⁴⁵ The federal court determined that the committee's decision may have breached the Act's assessment requirements by failing to assess the risk and cumulative impacts of exploratory drilling in the context of climate change.¹⁴⁶ But in the context of human rights and climate change, there has been a rise of climate litigation in Canada.¹⁴⁷ Some cases rely on the Canadian Charter of Rights and Freedoms, and other cases invoke human rights to contest government action supporting fossil fuel consumption or expansion, or exercise their procedural environmental human rights.¹⁴⁸

A youth-led climate-related litigation, first initiated in 2018 by Quebec NGO ENvironment JEUnesse,¹⁴⁹ failed on procedural grounds (although it is being appealed). A second case, *La Rose v. Canada and the*

¹⁴¹ *Id.*

¹⁴² See 2030 Emissions Reduction Plan: Clean Air, Strong Economy, GOV'T CAN. (date modified Dec. 7, 2023), <https://www.canada.ca/en/services/environment/weather/climatechange/climate-plan/climate-plan-overview/emissions-reduction-2030.html> [<https://perma.cc/2FKV-NXMZ>].

¹⁴³ Nia Williams & Ismail Shakil, *Canada Approves \$12 bln Bay du Nord Offshore Oil Project*, REUTERS (Apr. 7, 2023), <https://www.reuters.com/business/energy/canada-approve-bay-du-nord-oil-project-wednesday-ctv-2022-04-06/> [<https://perma.cc/TG23-FNKK>].

¹⁴⁴ *Id.*

¹⁴⁵ See Reference Impact Assessment Act, S.C. 2019, c. 28, s. 1 (Can.).

¹⁴⁶ *Id.*

¹⁴⁷ Lisa Benjamin & Sara L. Seck, *Mapping Human Rights-Based Climate Litigation in Canada*, 13 J. HUM. RTS. & ENV'T 178, 178 (2021).

¹⁴⁸ *Id.* at 180.

¹⁴⁹ *Env't Jeunesse v. Att'y Gen. Canada*, 2021 CanLII 1871 (Can. Que. C.A.).

Attorney General of Canada,¹⁵⁰ initiated in British Columbia in 2019, was brought by fifteen child plaintiffs from across the country (both Indigenous and non-Indigenous). The plaintiffs again alleged violations of Charter rights as well as the violation of the public trust doctrine, but their claim was dismissed by the court, which adopted a deferential view of the court's role in adjudicating climate change. In another case led by Indigenous communities, *Dini Ze'(Lho'imggin)*, on behalf of two houses of the *Wet'suwet'en*,¹⁵¹ filed a legal challenge against Canada on February 10, 2020. *Lho'imggin* alleged that the Canadian government's targets for the reduction of greenhouse gas emissions by 2030 were insufficient, and that as a result, Canada had violated the communities' constitutional and human rights under sections 7 and 15(1) of the Charter. This claim was also unsuccessful; the court granted the government's motion to strike on the basis that section 91 of the Constitution Act of 1867 does not impose a duty on Canada to enact legislation, and requiring the government to do so would exceed the court's jurisdiction. In addition, the court deemed the claims made under sections 7 and 15 of the Charter too broad and therefore not justiciable. Human rights-based climate litigation has so far been unsuccessful in Canada, with judicial tepidness regarding courts' roles in adjudicating climate harms characterizing most of these judicial outcomes.

These series of cases illustrate that a patchwork of approaches at both the federal and provincial level may have a detrimental effect on Canada's climate policymaking ability. Even with more recent, ambitious federal climate legislation, the country's oil and gas industry exerts a tremendous influence on domestic policymaking in the climate change context, and climate litigation efforts to date have failed to make a dent in the influence of the oil and gas industry.

C. INDIA

As with other countries in the Global South, India is acutely vulnerable to the adverse impacts of climate change. A recent report illustrates the high level of vulnerability the country is facing. It states that as an emerging economy, India would experience some of the largest increases in potential impacts on workability and livability due to rising temperatures.¹⁵² By 2030, several hundred million people could experience a

¹⁵⁰ *La Rose v. Canada*, 2020 CanLII 1008 (Can. Ont. F.C.).

¹⁵¹ *Misdzi Yikhv v. Canada*, 2020 CanLII 1059 (Can. Ont. F.C.).

¹⁵² LOLA WOETZEL ET AL., MCKINSEY GLOB. INST., CLIMATE RISK AND RESPONSE: PHYSICAL HAZARDS AND SOCIOECONOMIC IMPACT 1–12 (2020).

lethal heatwave, and the country's heavy reliance on heat-exposed outdoor workers means its levels of productivity would be negatively affected,¹⁵³ as would lives and livelihoods. Yet, India is the world's second-largest producer and consumer of coal. The coal sector generates about 70 percent of the country's annual electricity and employs at least 2.9 million people.¹⁵⁴ While India has pledged to reduce its carbon emissions by 45 percent below 2005 levels by 2030, it has no plans to phase out coal.¹⁵⁵ Government-owned companies previously mined most coal domestically, but Prime Minister Narendra Modi has shifted some of this activity to private corporate entities, such as the Adani Group.¹⁵⁶

India does not have a climate change act per se, and so cases are brought based on different environmental laws and policies. A number of cases have focused on human rights, in particular Article 48A of the Indian Constitution, which deals with citizens' fundamental rights and duties.¹⁵⁷ It specifically directs the government to "endeavor to protect and improve the environment and to safeguard the forests and wild life of the country."¹⁵⁸ India has an aggressive renewable energy program under the Jawaharlal Nehru National Solar Mission, but, as illustrated above, it still heavily relies on coal and other fossil fuels, which may explain the reluctance to pass a comprehensive climate change act.¹⁵⁹ Recent proposals to build new coal power plants on ancient forest land by the Adani Group illustrate the policy complexity around climate change nationally.¹⁶⁰ This land is home to many Indigenous tribes, collectively

¹⁵³ *Id.*

¹⁵⁴ For statistics on the coal industry in India see *Production and Supplies*, MINISTRY OF COAL, <https://coal.gov.in/en/major-statistics/production-and-supplies> [<https://perma.cc/JM2H-BYBE>].

¹⁵⁵ Ankur Paliwal, "It was a set up, We were Fooled": The Coal Mine that Ate an Indian Village, *GUARDIAN* (Dec. 20, 2022), <https://www.theguardian.com/environment/2022/dec/20/india-adani-coal-mine-kete-hasdeo-arand-forest-displaced-villages> [<https://perma.cc/4KYC-BWWR>].

¹⁵⁶ *Id.*

¹⁵⁷ See, e.g., *Vellore Citizens Welfare Forum v. Union of India*, AIR 1996 SC 2715 (India); *Om Dutt Singh v. State of Uttar Pradesh*, (2015) No. 521 NGT (India); *Society for Protection of Environment & Biodiversity v. Union of India*, (2017) No. 677 NGT 6 (India); *Aditya Dubey v. Amazon Retail India* (2019) O.A. No. 997 NGT (India); *Indian Council for Enviro-Legal Action v. Union of India*, AIR 1996 SC 1446 (India); *Lafarge Umiam Mining Private Limited v. Union of India*, (2011) 7 SCC 338 (India).

¹⁵⁸ India Const. art. 48A.

¹⁵⁹ For more information on the Mission, see *Jawaharlal Nehru National Solar Mission*, VIKASPEDIA, <https://vikaspedia.in/energy/policy-support/renewable-energy-1/solar-energy/jawaharlal-nehru-national-solar-mission> [<https://perma.cc/2SN9-E8GB>].

¹⁶⁰ Carol Konyon, *India Plans to Build 40 New Coalfields on Ancient Forest Land*, *EARTH* (Aug. 13, 2020), <https://earth.org/india-plans-to-build-new-coal-on-ancient-forest-land/> [<https://perma.cc/BWH7-X6GE>].

called the Adivasi tribes, which have reported being subjected to a campaign of violence, intimidation, arbitrary arrest, judicial torture, and harassment by police and officials working for a bauxite mining company tasked with setting up mining activities.¹⁶¹ The poor and discriminatory treatment these tribes have received by the government illustrates perpetuating trajectories of racial capitalism, even within a Global South country.

However, India has a rich tradition of judicial enforcement of environmental constitutionalism, with courts relying on and actively enforcing environmental rights of public interest litigants. This decades-long tradition of progressive environmental constitutionalism, public interest litigation, and judicial activism combined have led to innovative judicial action, with judges regularly supplementing regulatory administrative capacity and filling implementation gaps.¹⁶²

India is unusual in that it has a specialist environmental court. In 2010, the National Green Tribunal was established to adjudicate environmental issues. In the *Sher Singh v. State of Hp* case (otherwise known as the *Rohtang Pass* case), the National Green Tribunal in India connected poorly implemented traffic regulations and unregulated tourism to climate change-related glacial retreat.¹⁶³ Relying on environmental provisions in the Indian Constitution, the judge ordered the immediate reforestation of the area.¹⁶⁴ He also ordered a number of regulatory actions, including less vehicular traffic, a ban on heavy vehicles or vehicles over fifteen years of age, and a green tax on vehicles.¹⁶⁵ These prolific orders derived from constitutional provisions but spread widely to transportation-related regulation and policymaking, illustrating judicial willingness to step into regulatory and administrative capacity gaps. In addition to constitutional cases, the Green Tribunal in India has reviewed some more routine cases dealing with permits for coal-fired projects and other energy projects, with mixed results. In 2017, eleven-year-old Ridhima Pandey brought a suit that falls under the strategic litigation category outlined above.¹⁶⁶ Her petition to the

¹⁶¹ Hannah Ellis-Petersen & Aakash Hassan, *We are Powerless: Indian Villagers Live in Fear of Torture in Fight Against Bauxite Mine*, GUARDIAN (Nov. 10, 2023), <https://www.theguardian.com/environment/2023/nov/10/indian-villagers-fear-torture-fight-bauxite-mine-adivasis> [https://perma.cc/GT43-L4JJ].

¹⁶² Joana Setzer & Lisa Benjamin, *Climate Change Litigation in the Global South: Filling in Gaps*, 113 AM. J. INT'L L. 56, 59 (2020).

¹⁶³ *Sher Singh v. State of Hp.*, (2013) No. 15 NGT (2016) (India).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *See Pandey v. Union of India* (2017) No. 187/2017 NGT (India).

Supreme Court was to appeal a final order from the Green Tribunal.¹⁶⁷ She based her claim against the Indian government on a variety of statutes and doctrines, including the Environment (Protection) Act, 1986,¹⁶⁸ the Forest (Conservation) Act, 1980;¹⁶⁹ the Air (Prevention and Control of Pollution) Act, 1981;¹⁷⁰ the Biological Diversity Act, 2002;¹⁷¹ and even the Paris Agreement, 2015.¹⁷² This claim has yet to be adjudicated, but its reliance on human rights is very similar to a case brought in Pakistan by Ashgar Leghari—discussed below.

D. PAKISTAN

Pakistan is similarly vulnerable to the negative impacts of climate change, but it also has developed a rich, constitutionally based environmental jurisprudence. Pakistan experienced devastating floods in 2022, which covered almost one-third of the country. As the chair of the Group of 77 and China bloc at COP27, which represents most Global South countries in the climate negotiations, Pakistan forged a pathway to the establishment of a loss-and-damage fund in the climate negotiations—a historic decision.¹⁷³

In terms of climate litigation, in a groundbreaking case, Ashgar Leghari succeeded in his claim to force the Pakistani government to implement existing environmental laws and policies, including in the area of climate change adaptation.¹⁷⁴ Mr. Leghari was a law student and agriculturalist, and his family's farm had been suffering the negative impacts of climate change.¹⁷⁵ The extensive judgment by the Pakistani Supreme Court involved a series of rolling orders that ensured that institutional

¹⁶⁷ See *Pandey v. Union of India* (2017) No. 187/2017 NGT (India); see also Krithika Varagur, *Meet India's Teen Climate Advocate: Ridhima Pandey*, CHRISTIAN SCI. MONITOR (Sept. 30, 2019), <https://www.csmonitor.com/Environment/2019/0930/Meet-India-s-teen-climate-advocate-Ridhima-Pandey> [https://perma.cc/VMA4-GT6E].

¹⁶⁸ See Environment Protection Act, 1986 (India).

¹⁶⁹ See Forest Conservation Act, 1980 (India).

¹⁷⁰ See Air Prevention and Control of Pollution Act, 1981 (India).

¹⁷¹ See Biological Diversity Act, 2002 (India).

¹⁷² See Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104; see *Pandey v. Union of India* (2017) No. 187 NGT (India).

¹⁷³ Lisa Benjamin, *COP27 Produces a Historic Result for Vulnerable Countries: A Loss and Damage Fund*, JUST SEC. (Dec. 2, 2022), <https://www.justsecurity.org/84356/cop27-produces-a-historic-result-for-vulnerable-countries-a-loss-and-damage-fund/> [https://perma.cc/6RZG-29U9].

¹⁷⁴ *Ashgar Leghari v. Federation of Pakistan*, (2015) (HC Lahore) (Pak.).

¹⁷⁵ For an overview of the case, see *Leghari v. Pakistan*, CLX TOOLKIT, [https://clxtoolkit.com/case-book/leghari-v-pakistan/#:~:text=Leghari%20filed%20a%20public%20interest,implementation%20framework%20\(the%20Framework](https://clxtoolkit.com/case-book/leghari-v-pakistan/#:~:text=Leghari%20filed%20a%20public%20interest,implementation%20framework%20(the%20Framework)) [https://perma.cc/EY42-BTKE].

structures, such as the Climate Change Commission, were established pursuant to the existing National Climate Change Policy 2012, which had yet to be implemented.¹⁷⁶ The commission invited members from government ministries and departments, as well as civil society organizations, academia, and the scientific community, to convene, and they issued sixteen recommendations that were all accepted by the judge.¹⁷⁷ One recommendation was to establish a Climate Change Authority, which was later included in the Climate Change Act of 2017.¹⁷⁸ At the same time as the judicial orders (and possibly as a result of them), the government passed the Climate Change Act of 2017, illustrating a rare but important overlap between climate litigation and policymaking.¹⁷⁹ The case navigated the thin line between the separation of powers, but arguably, it is an appropriate judicial response, given the catastrophic impacts of climate change facing countries in the Global South.¹⁸⁰

Another example of the litigation/policy nexus may lie in the *Farooq v. Federation of Pakistan* case.¹⁸¹ The plaintiffs asked the court to order the government to enforce existing forestry legislation to plant, protect, manage, preserve, and conserve trees and forests in Punjab.¹⁸² Similar to the *Leghari* case, the high court granted the writ of mandamus and directed government departments and local authorities to take action.¹⁸³ That same year, Pakistan announced “Plant for Pakistan” or the “ten billion tree tsunami”—a five-year campaign to plant ten billion trees across Pakistan from 2018–2023.¹⁸⁴ Finally, in 2019, another suit was launched by Maria Khan and a number of women against the government for failing to develop renewable energy resources and transition Pakistan to a cleaner, low-carbon economy, citing provisions of the Paris Agreement and

¹⁷⁶ See MINISTRY OF CLIMATE CHANGE, GOV'T OF PAK., NATIONAL CLIMATE CHANGE POLICY (2012); Asghar Leghari, (2015) (Pak.).

¹⁷⁷ See Setzer & Benjamin, *supra* note 16, at 59.

¹⁷⁸ *Id.*

¹⁷⁹ *See id.*

¹⁸⁰ Emily Barritt & Sediti Boitumelo, *The Symbolic Value of Leghari v Federation of Pakistan: Climate Change Adjudication in the Global South*, 30 KING'S L.J. 203, 206 (2019).

¹⁸¹ Sheikh Asim Farooq v. Federation of Pakistan, (2018) (HC Lahore) (Pak.).

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ For an overview of the initiative, see Ministry of Climate Change and Environmental Coordination, *Ten Billion Trees Tsunami Programme – Phase-I Up-Scaling of Green Pakistan Programme (Revised)*, GOV'T PAK., <https://mocc.gov.pk/ProjectDetail/M2QzOW-JmMjUtZTU3MC00NmFkLWE4YmMtZDFhMmRlOGU2NGRh#:~:text=The%20overall%20objective%20of%20%E2%80%9CTen.job%20creation%20through%20the%20conservation> [<https://perma.cc/9DJC-W4BY>].

Pakistan's nationally determined contribution.¹⁸⁵ This case is ongoing but illustrates how innovative and active litigants in Pakistan have been in recent years, and how climate litigation could motivate domestic climate policymaking.

E. KIRIBATI

Kiribati is a small island developing state with approximately 110,000 inhabitants.¹⁸⁶ The country is extremely vulnerable to the impacts of climate change, and it has limited potable water and arable land. The country is already experiencing climate change's negative impacts, particularly sea level rise with salinization of soil and freshwater resources, leading to food and water security issues.¹⁸⁷ The country has a history of migration as a strategy for employment, education, and other activities.¹⁸⁸ Allgood and McNamara found that in a sampling of inhabitants, 75 percent were extremely concerned about the impacts of climate change and extreme events, and 39 percent were extremely concerned about loss of culture as a result.¹⁸⁹ The majority, 81 percent, would consider migration primarily due to environmental concerns.¹⁹⁰ Short-term migration to the capital, Tarawa, is already occurring.¹⁹¹

The country established an innovative Migration with Dignity policy.¹⁹² This policy resists the narrative of the I-Kiribati as victims of climate change and provides a reconceptualization of migration as a tool to sustain livelihoods.¹⁹³ It is important to point out that the topic of climate-induced displacement and migration is a sensitive one in small island developing states, and not all populations or countries have adopted a similar migration policy to Kiribati.¹⁹⁴ The long-term vision of the National

¹⁸⁵ *Maria Khan v. Federation of Pakistan*, (2019) (HC Lahore) (Pak.).

¹⁸⁶ GOV'T KIRIBATI, KIRIBATI JOINT IMPLEMENTATION PLAN FOR CLIMATE CHANGE AND DISASTER RISK MANAGEMENT 7 (2019), <https://unfccc.int/sites/default/files/resource/Kiribati-NAP.pdf> [<https://perma.cc/RZT9-J5TP>].

¹⁸⁷ *Id.* at 8.

¹⁸⁸ *Id.* at 26.

¹⁸⁹ Lacey Allgood & Karen McNamara, *Climate-Induced Migration: Explaining Local Perspectives in Kiribati*, 38 SING. J. TROPICAL GEOGRAPHY 370, 377 (2017).

¹⁹⁰ *Id.* at 379.

¹⁹¹ *Id.* at 373.

¹⁹² GOV'T KIRIBATI, *supra* note 5.

¹⁹³ Allgood & McNamara, *supra* note 189, at 375.

¹⁹⁴ See Adelle Thomas & Lisa Benjamin, *Policies and Mechanisms to Address Climate-induced Migration and Displacement in Pacific and Caribbean Small Island Developing States*, 10 INT'L J. CLIMATE CHANGE STRAT. & MGMT 86, 86 (2018).

Labour Migration policy is to provide the I-Kiribati with opportunities to migrate with dignity by accessing decent work opportunities abroad.¹⁹⁵ The policy is also designed to assist the transition from temporary to permanent migration.¹⁹⁶

The efficacy of this national policy on migration depends on the legal frameworks of receiving countries such as New Zealand. A Kiribati citizen, Ioane Teitiota, recently tested these legal relationships by claiming refugee status in New Zealand due to the impacts of climate change. After he lost a claim in the New Zealand Immigration & Protection Tribunal, Mr. Teitiota brought a complaint to the United Nations Human Rights Committee.¹⁹⁷ He claimed that New Zealand violated his right to life by rejecting his application for refugee status. Mr. Teitiota claimed that the effects of climate change, including sea level rise, forced him to migrate from the capital due to overcrowding resulting from land erosion, saltwater contamination of freshwater sources, and violent land disputes.¹⁹⁸ His claims were supported by expert testimony that conditions in the capital had become unlivable. Intense storms three to four times a month submerge parts of the island, sea walls are regularly breached, and a lack of waste management affects water supplies. Crops are difficult to grow, and freshwater is in short supply due to the contamination of wells.¹⁹⁹ This meant Mr. Teitiota's family, who relied on subsistence fishing and agriculture, could no longer sustain their livelihoods in the country.

The commission (with one dissenting opinion) declined to restrain New Zealand from removing Mr. Teitiota to Kiribati, agreeing with the New Zealand Tribunal's decision that there was no real risk of persecution.²⁰⁰ However, the commission made some important statements connecting refugee law and climate-induced migration. It stated that environmental degradation and climate change constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life, and therefore climate impacts can lead to violations of this human right.²⁰¹ While refugee law does not adequately cater to climate-induced migration and displacement, other suits from and in the

¹⁹⁵ GOV'T KIRIBATI, *supra* note 5.

¹⁹⁶ *Id.*

¹⁹⁷ Mari Galloway, Teitiota v New Zealand, *Climate Migration and Non-refoulement: A Case Study of Canada's Obligations under the Charter and the ICCPR*, 45 DALHOUSIE L.J. 387, 396 (2022).

¹⁹⁸ *Id.* at 393.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *See id.* at 397.

Global South have also led to judicial innovations connecting climate impacts to human rights violations—for example, the Ashgar Leghari suit in Pakistan. Kiribati’s extreme vulnerability, combined with innovative policymaking on migration, motivated Mr. Teitiota’s case.

F. THE BAHAMAS

The Bahamas is also a small island developing state, and it is also extremely vulnerable to the impacts of climate change. Approximately 80 percent of the country’s landmass is within five feet of mean sea level, and the majority of the population, and economic activity, is concentrated in coastal areas. The country has a National Adaptation Policy (2006)²⁰² and a Disaster Preparedness and Response Act, which was updated in 2022 to focus on disaster risk prevention.²⁰³ However, unlike Kiribati, the country does not have a formal migration plan.

As an archipelago of approximately four hundred thousand people, the country has experienced many extreme events over the past few decades, including flooding and hurricanes. Hurricane Dorian, which struck the country in 2019 as a Category 5 hurricane,²⁰⁴ was particularly devastating. Dorian was the most powerful hurricane to hit the country since modern records began.²⁰⁵ Catastrophic storm surge flooding occurred on the islands of Abaco and Grand Bahamas, reaching six to seven feet above ground level, and some eye witness accounts suggest water levels reached twenty feet above ground level in some areas.²⁰⁶ The Health Ministry estimated that more than two hundred people lost their lives, and approximately 75 percent of homes on the island of Abaco were damaged.²⁰⁷ The economic damage was estimated at USD\$3.4 billion.²⁰⁸

Haitian communities in The Bahamas, and on the island of Abaco in particular, suffered the majority of deaths and missing people and faced a series of distributional, procedural, and recognition injustices as a

²⁰² See generally NAT’L CLIMATE CHANGE COMM. & THE BAH. ENV’T, SCI. & TECH. COMM., COMMONWEALTH OF THE BAH., NATIONAL POLICY FOR THE ADAPTATION TO CLIMATE CHANGE (2006).

²⁰³ See generally INT’L FED’N RED CROSS, DISASTER RECOVERY IN THE BAHAMAS: A LEGAL AND POLICY SURVEY (2022).

²⁰⁴ LIXION A. AVILA ET AL., NAT’L HURRICANE CTR, HURRICANE DORIAN (2020).

²⁰⁵ *Id.* at 1.

²⁰⁶ *Id.* at 6.

²⁰⁷ *Id.* at 9.

²⁰⁸ *Id.*

result.²⁰⁹ This disproportional impact on an already vulnerable community illustrates that climate injustices take place not just on the international scale, but also within countries—even those that are considered unjustly affected by climate change at the international scale.²¹⁰ Due to structural disadvantages, certain communities within the Global South are more vulnerable than others—including women, children, the elderly, and rural populations—and this is true in the Caribbean.²¹¹ This includes migrants, including Haitian migrants in The Bahamas.

The Bahamas' 2010 census estimates that of the total 351,000 national population, 39,000 people were of Haitian descent.²¹² Many Haitian migrants are undocumented, and they experienced discrimination both before and after Hurricane Dorian hit in 2019. Many Haitians in The Bahamas work in menial jobs, live in poverty, and face social and economic discrimination.²¹³ Institutional structures such as the government, the legal system, civil society, and economic forces entrench vulnerability and stigmatization of Haitians.²¹⁴ These circumstances illustrate how racial capitalism can operate even within the Global South.

The legal and social stigmatization of Haitian migrants in The Bahamas has led to circumstances that promote and enhance environmental and climate injustices for these communities.²¹⁵ Lack of access to resources and uncertain immigration status has led to homes being built in undesirable areas that are highly exposed to flooding.²¹⁶ This was the case in the informal settlement, referred to as “Pigeon Peas,” “The Mud,” and “Sand Bank” in Abaco, which were devastated by Hurricane Dorian.²¹⁷ These informal communities largely consisted of makeshift housing structures that were densely packed together on undesirable flood-prone land

²⁰⁹ Adelle Thomas & Lisa Benjamin, *Climate Justice and Loss and Damage: Hurricane Dorian, Haitians, and Human Rights*, 189 GEOGRAPHIC J. 584 (2022).

²¹⁰ *See id.* at 589.

²¹¹ Lisa Benjamin & Adelle Thomas, *Gender and Climate Justice – Implications for Policy Formation in the Caribbean Region*, 66 LOY. L. REV. 329, 331 (2021).

²¹² *IOM Tracks Repatriations of Haitian Migrants from The Bahamas*, INT’L ORG. MIGRATION (NOV. 15, 2019), <https://www.iom.int/news/iom-tracks-repatriations-haitian-migrants-bahamas> [<https://perma.cc/KE65-XLKJ>].

²¹³ Kristy A. Belton, *Dry land drowning or rip current survival? Haitians without status in The Bahamas*, 34 ETHNIC & RACIAL STUD. 948, 949 (2011).

²¹⁴ *See id.*

²¹⁵ Thomas & Benjamin, *supra* note 209, at 587.

²¹⁶ Cristina Baussan, Leticia Duarte, Ottavia Spaggiari, & Sarah Stillman, *When Climate Change and Xenophobia Collide*, NEW YORKER (Feb. 16, 2021), <https://www.newyorker.com/news/dispatch/when-climate-change-and-xenophobia-collide> [<https://perma.cc/BJ84-7US9>].

²¹⁷ Thomas & Benjamin, *supra* note 209, at 587.

and were the locus of Haitian residents of Abaco before the storm.²¹⁸ After the storm, these communities were unrecognizable, with only heaps of rubble remaining.²¹⁹

Haitian residents who survived the storm told of seeing family members washed away in thirty-foot storm surges and seeing neighbors killed by flying debris.²²⁰ After the storm, many survivors were forcibly returned to Haiti, despite the government's promise to suspend deportations of people who were in the country illegally, including anyone that sought shelter as a result of Hurricane Dorian.²²¹ Anti-Haitian sentiment actually increased after the storm. On a visit to Abaco less than a month after the storm, then Prime Minister Minnis symbolically kicked down the door of one of the few Haitian shantytown homes that remained standing and stated his position that all migrants that were in the country illegally would be deported.²²² It is unclear whether Haitian migrants, who may have been in the country legally but lost their documents in the storm, were deported.²²³ What was left of these communities was then bulldozed by government-hired contractors, despite strong concerns that human remains were mixed in with the rubble of demolished homes.²²⁴

The lack of a formal migration and recovery plan, which would have covered circumstances like Hurricane Dorian, left vulnerable Haitian communities within The Bahamas even more vulnerable. Human rights legislation was unevenly, or questionably, applied to community members, and the circumstances for Haitian survivors of the storm became even worse as anti-Haitian sentiment flourished. This incident highlights the importance of instituting formal, protective policies for vulnerable communities within vulnerable countries. While The Bahamas is not primarily responsible for the impacts of climate change in its territory, it is clear that

²¹⁸ Rashad Rolle, *How the Mudd and Pigeon Peas were Lost*, TRIBUNE (Sept. 7, 2019), <http://www.tribune242.com/news/2019/sep/07/how-mudd-and-pigeon-peas-were-lost/> [<https://perma.cc/4DR5-EZ6Z>].

²¹⁹ Thomas & Benjamin, *supra* note 209, at 587.

²²⁰ Rolle, *supra* note 218.

²²¹ Rachel Knowles, *Haitian Migrants Devasted by Hurricane Dorian, Face Deportation from the Bahamas*, N.Y. TIMES (Oct. 10, 2019), <http://www.nytimes.com/2019/10/10/world/world/america-haiti-bahamas-dorian-deport/html> [<https://perma.cc/86CJ-BRSH>].

²²² Travis Cartwright-Carroll, *Tear it Down*, THE NASSAU GUARDIAN (Oct. 7, 2019), https://www.thenassauguardian.com/news/tear-it-down/article_4d066c5c-2cbb-5ed2-816e-a571e7f6ae8d.html [<https://perma.cc/FBJ9-2TVJ>].

²²³ See Knowles, *supra* note 221.

²²⁴ See Baussan et al., *supra* note 216.

subnational processes and judicial structures have resulted in significant injustices for those most vulnerable to climate impacts.²²⁵

IV. CONCLUSION

Despite escalating climate impacts, the policy landscape—even among a small selection of countries in the Commonwealth—remains mixed. Legal interventions through legislatures and the courts have escalated significantly in the past few years. Most policy progress appears to be made under direct climate change legislation, linked to independent and expert-based government advisory committees, particularly in the Global North. But climate change policymaking is complicated, and the results can be uneven. National industrial priorities, the influence of domestic oil and gas interests, as well as climate vulnerabilities, combined with political blockages, strongly influence both climate policymaking and climate litigation efforts. These conflicting interests can have a push-and-pull influence on climate policymaking and implementation. Governments must bring both the public and industry along with them in climate policymaking efforts or resist industrial pressure in order to implement strong climate action domestically, and many governments are unwilling, or unable, to do this. This policy backtracking is directly linked to the strong influence of domestic oil and gas industries, particularly in the United Kingdom, Canada, and India. Some of these companies have long and direct links to colonial-era oil and gas companies, such as Standard Oil. Consequently, they have directly benefited from racial capitalism and in many cases continue to perpetuate the extraction and exploitation of the Global South. Despite, or perhaps because of, these policy blockages, progressive judicial action has been undertaken by both courts and litigants, even in the absence of specific climate legislation, particularly in the Global South. In the Global North, courts have been reluctant to impose liability for climate harms on these corporations. Jurisdictional wrangling, as well as a lack of uniform political and social consensus on climate change, has hampered litigation efforts in Canada and the United Kingdom.

The picture in the Global South is more diverse, although policy circumstances still cater to national circumstances and imperatives. Litigation is still directed at the major climate vulnerabilities experienced in those countries, from deforestation in Pakistan, air pollution in India, and climate-induced migration in Kiribati. Geographic patterns of climate

²²⁵ See Thomas & Benjamin, *supra* note 209, at 586.

litigation can also be identified here; countries with significant emissions in the Global South, such as India and Pakistan, are experiencing some of the highest levels of climate litigation. Active judicial responses in these jurisdictions are justified given the dire circumstances facing citizens in the Global South. Courts in these countries are used to acting in conditions of entrenched poverty, government inactivity, and the long shadow of colonialist infrastructure—the circumstances in these countries are arguably more desperate and climate responses more urgent.²²⁶

While the sampling of countries assessed here have varying levels and types of governance arrangements, administrative capacities, economic development, societal cohesion, inequality, and climate vulnerabilities, they share a common law tradition. While most common law rules are settled, they may have “untidy” overlaps and often have moral underpinnings.²²⁷ Judicial understandings of these moral dimensions change over time. Climate litigation is likely to continue and even increase, and judicial interpretations of common law rules are likely to expand and progress as the impacts of climate change become more dire. Cases and litigants are relying on provisions of the Paris Agreement but also judicial outcomes from other Commonwealth countries. While this reliance tends to be Global North-North or South-South in alignment, learning networks that share best practices across the Global North and South have already formed, particularly amongst NGOs bringing climate litigation.²²⁸ South-South financing relationships are also emerging, with India dedicating a Commonwealth window in the India-UN development partnership fund. The characteristics of the climate legislation-litigation nexus are underresearched. For example, it is unclear whether and to what extent climate litigation may inspire climate legislation in countries, and while there is still little evidence on the impact of litigation on policymaking,²²⁹ there is clearly a connection, as illustrated in some of these countries. Litigation can, at times, spur legislative action, even in Global South countries where significant capacity constraints persist. Innovative judicial action is also implementing existing environmental legislation with beneficial climate outcomes.

²²⁶ See generally Setzer & Benjamin, *supra* note 162, at 57.

²²⁷ Jack Hodder, *Climate Change Litigation: Who's Afraid of Creative Judges?* 1, 3 (Climate Change Adaptation session of the Local Government New Zealand Rural and Provincial Sector Meeting, Wellington, Mar. 7, 2019), <https://d1pepq1a2249p5.cloudfront.net/media/documents/Climate-change-litigation-Whos-afraid-of-creative-judges.pdf> [<https://perma.cc/FWF3-DGKL>].

²²⁸ Peel & Lin, *supra* note 96.

²²⁹ SETZER & BYRNES, *supra* note 101.

Legal relationships and jurisdictional overlaps across the Global North and South are also emerging, illustrated by the New Zealand/Kiribati migration case, and these are also likely to increase in the future. Common law climate networks, such as the Commonwealth Climate and Law Initiatives (which focus on directors' duties), that are both South-South and North-South are important networks. But given the Commonwealth's historic legacy of slavery, colonialism, and racial capitalism, the Commonwealth Secretariat should do much more than it previously has done in the context of climate justice. In the absence of such activities, it will be up to climate litigants, legislatures, and policymakers to share best practices in climate policymaking, as well as climate adjudication, to ensure the Commonwealth continues to foster and build upon positive change.