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OS DIREITOS FUNDAMENTAIS À VIDA E SAÚDE NA LITIGÂNCIA CLIMÁTICA: PERCEÇÕES DA AMÉRICA LATINA

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Summary: 1. Introduction. 2. The Fundamental Rights to Life and Health: Normative Interactions and Complementarities. 3. Methodology. 4. Insights from Colombia and Ecuador. 5. Discussion and Concluding Remarks.

Abstract: This paper scrutinizes the use and significance of the fundamental rights to life and health within constitutional climate lawsuits filed in Latin American jurisdictions. The study takes the normative synergies between both rights as points of departure to doctrinally and comparatively analyze how they overlap with climate change law in establishing state responsibility and corresponding remedies for acts and omissions threatening people's lives and health. By doing so in the light of Latin America's transformative constitutionalism, it contributes to expanding our current understanding of climate litigation as a strategic endeavor to limit the global temperature from warming beyond 1.5°C, while situating this against the region's broader socioeconomic challenges that mediate people's vulnerability to climate change. This analysis concludes that even when the indivisibility between the fundamental rights to life and health gives rise to principles and obligations to address both the environmental and social dimensions of climate vulnerability, such a normative potential has not yet been harnessed evenly nor to its fullest extent.

Resumo: Este artigo examina o uso e o significado dos direitos fundamentais à vida e à saúde em processos constitucionais climáticos em jurisdições latino-americanas. O estudo toma as sinergias normativas entre ambos os direitos como ponto de partida para analisar doutrinária e comparativamente como eles se sobrepõem à lei da mudança climática ao estabelecer a responsabilidade do Estado, e as correspondentes correções

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para atos e omissões que ameaçam a vida e a saúde das pessoas. Ao fazê-lo, contribui para expandir a nossa compreensão atual sobre litigância climática como um esforço estratégico para limitar a subida global da temperatura além de 1,5°C e situa isto relativamente aos desafios socioeconómicos mais vastos da América Latina, que por sua vez medeiam a vulnerabilidade das pessoas às mudanças climáticas; uma análise que é especialmente relevante para a região devido ao seu *constitucionalismo transformador*. Esta análise conclui que, mesmo quando a indivisibilidade entre os direitos fundamentais à vida e à saúde dá origem a princípios e obrigações de abordar tanto as dimensões ambiental quanto social da vulnerabilidade climática, este potencial normativo ainda não foi aproveitado de maneira uniforme e em toda a sua extensão.

Keywords: climate litigation, Latin America, new Latin American constitutionalism, right to life, right to health, vulnerability.

Palavras-chave: litigância climática, América Latina, novo constitucionalismo latino-americano, direito à vida, direito à saúde, vulnerabilidade.

1. Introduction

The “rights turn” that climate litigation has experienced in several jurisdictions around the world mirrors increasing strategic efforts by litigants and courts to advance the protection of the climate system by deploying bolder legal argumentation (Rodríguez-Garavito C, 2022; Savaresi A, Auz J, 2019; Peel J, Osofsky HM, 2018). Particularly, in countries characterized by steep poverty, mainly those of the so-called “Global South,”² human rights arguments in climate lawsuits epitomize the inextricable nexus between climate change and persisting development challenges (Setzer J, Benjamin L, 2020). In so doing, they serve as a tool for flagging — and thus tackling — both the environmental and social dimensions of climate vulnerability (Ohdedar B, 2022).³

Academic research on climate litigation has focused mainly on cases in the Global North (Lin J, Peel J, 2022; Peel J, Lin J, 2019). And while scholarship concerned with the potential of rights-based litigation in the Global South has proliferated over the recent years (Rodríguez-Garavito C, 2022; Setzer J, Vanhala LC, 2019), few efforts have been undertaken to systematically ascertain what specific rights are invoked therein. Consequently, it is little understood the types of obligations — and their inherent remedies and courses of action — that states are (or ought to be) demanded to fulfill and follow (Savaresi A, Setzer J, 2022: 19). The precious few works that focus on the significance of particular rights pay most attention to the right to a healthy environment (de Vilchez Moragues P, Savaresi A, 2021; Varvastian S, 2019).⁴ Moreover, a few other analyses concentrate on how courts consider health in climate litigation — yet they do so by studying high-income countries (McCormick S et al, 2018) or by deploying a public health lens as opposed to the human rights legal framework (Toolan N et al, 2022).

We are thus before a notable knowledge gap, especially when considering two important aspects concerning the rights to life and health to which recent systematic assessments of climate change litigation based on human rights law have pointed (Varvastian S, 2021; Peel J, Osofsky HM, 2018). First,

2. While the North-South divide has underlain the creation and evolution of international law (Islam MR, 2015), this spatial demarcation has been called into question for typifying a colonial understanding of the world (Eckl J, Weber R, 2007) and failing to capture new trajectories of inequality (Horner R and Hulme D, 2019; Islam MR, 2015). With such caution in mind, the present paper borrows this spatial differentiation since it constitutes a contact point with climate change litigation scholarship (Auz J, 2022a; Rodríguez-Garavito C, 2020; Setzer J, Benjamin L, 2020; Peel J, Lin J, 2019).

3. The concept of climate vulnerability has been used generically by climate law scholarship (Ohdedar B, 2022: 138). However, academic literature from development studies provides a sharper understanding of it—mainly by contributing to the knowledge of how poverty and climate change are bound (Mearns R, Norton A, 2010). These non-legal works see climate vulnerability as a function of both biophysical and social factors: the former concern climate change as an environmental threat, while the latter focus on the broader socio-political conditions and resources that determine how people respond to climate impacts (Chávez-Rodríguez L, Klepp S, 2021: 160; Ribot J, 2010: 50).

4. The works of Samvel Varvastian (2021) and Pau de Vilchez Moragues (2022) are notable exceptions. While not drawing on a systemic analysis of domestic climate lawsuits, they explore the use and significance of several human rights in key climate litigation cases worldwide.

the right to life is the most common right invoked by plaintiffs in rights-based climate litigation (Varvastian S, 2021: 383). Furthermore, several adjudicative and supervisory bodies have recently recognized that climate change threatens the enjoyment of this right and the right to health in interrelated ways (Varvastian S, 2021: 383; Wu CF, 2021). Due to such an overlap, some case-law cover aspects of the right to health by only addressing the right to life (Wu CF, 2021: 126). For example, in *Leghari v. Federation of Pakistan* (2015), the Lahore Appellate Court granted the plaintiff's claims that the government had violated their fundamental rights to life and dignity (articles 9 and 14.1 of the 1973 Pakistani Constitution)⁵ by failing to meet the goals of the National Climate Policy of 2012 – which encompassed actions to address issues in various sectors including health (Lahore High Court, 2015: § 4).⁶ This court consequently mandated establishing a committee to enforce such a regulatory framework and monitor its progress.

Latin America flags the need to better understand the use of the rights to life and health in rights-based climate litigation as a strategic endeavor and its significance against broader socioeconomic challenges. This is so for three main reasons. First, this world region is where most rights-based climate cases have been brought – after Europe and North America (Setzer J, Higham C, 2021: 32); over half of such lawsuits invoke the right to health in their complaints or judgments (Viveros-Uehara T, forthcoming).⁷ At the same time, the mobilization of groups affected by environmental justice concerns is vibrant throughout the region, which appears to be increasingly shaped by climate change motivations (MacLennan M, Perch L, 2012: 284).

Second, Latin America's socioeconomic challenges strongly mediate people's vulnerability to climate change (Parry L et al, 2019). Concerningly, the lives and health of the region's inhabitants have already been compromised by changing climatic patterns – and disproportionately so for the 32.1% of the population who live in poverty and therefore exhibit higher vulnerability to climate change (ECLAC, 2022: 14).⁸ An abundance of scientific evidence has laid bare how climate change exacerbates disease and pest transmission processes while increasing morbidity, mortality, and disabilities due to extreme weather events in this region (Magrin G et al, 2014: 1535). Changing climatic patterns are facilitating the spread of the chikungunya virus, dengue, and Zika as significant public health challenges in some countries (Cissé G et al, 2022: 28). Also, as extremely long dry spells

5. Article 9 of the Constitution of the Islamic Republic of Pakistan provides that “[n]o person shall be deprived of life or liberty save in accordance with law”; article 14.1 sets that “[t]he dignity of man and, subject to law, the privacy of home, shall be inviolable.”

6. Lahore High Court Ruling of 14/09/2015. Delivered in Case No. 25501/2015, available at http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2015/20150414_2015-W.P.-No.-25501201_decision.pdf

7. Sixty-one of the 77 domestic climate lawsuits filed as of June 2022 are rights-based cases. Thirty-two of these (52%) invoked the right to health in their complaints or judgments (Viveros-Uehara T, forthcoming).

8. The UN Economic Commission for Latin America and the Caribbean estimates that in 2021 the extreme poverty and poverty rates in this world region reached 13.8% and 32.1%, respectively. Compared to 2020, the number of people living in extreme poverty increased from 81 to 86 million, while the total number of people living in poverty declined slightly from 204 to 201 million (ECLAC, 2022: 14).

become more frequent and increase the number of fires, the incidence of respiratory and cardiovascular diseases has aggravated (Castellanos EJ et al, 2022: 33).

As persons living in poverty and members of minority groups lack the means to prevent, treat, cure, and rehabilitate climate-related health conditions, they are less likely to withstand climate change. This is because the climate crisis finds them already having health needs that often go undiagnosed or untreated (GBD, 2016; Manderson L et al, 2009) and itself creates further health problems that are often not explicitly identified as being linked to climatic causes and thus requiring redress in ongoing climate litigation (Wu CF, 2021).

A third reason is the new Latin American constitutionalism's (NLAC)⁹ openness towards and compatibility with the international human rights framework, which has paved the way for constitutional courts to play a key role in delivering social transformations (von Bogdandy A, 2017: 33; Couso JA, 2006: 68). More specifically, the region's "transformative constitutionalism" — adopted during the 1990s in the constitutional projects that followed a period of authoritarian regimes — opened the domestic legal order to international law as well as pertinent national and international case-law (von Bogdandy A et al, 2016: 2).

By connecting international human rights with constitutional rights, national constitutions of Latin American countries embolden domestic judges as they must determine the meaning of such rights and principles (von Bogdandy A et al, 2016: 17). Particularly, through constitutional adjudication of social rights, the NLAC seeks to confront the structural deficiencies and exclusion that characterize the region. Hence, over the past decades, constitutional courts have gained increasing preponderance in holding governments accountable for their human rights obligations — including through the judicialization of the rights to life and health (Hoffmann F, Bentes F, 2008: 101; Bergallo P, 2011: 1624; Motta Ferraz OL, 2009: 33; Parra-Vera O, 2016: 147). Such a trajectory has arguably paved a fertile ground for rights-based climate litigation to sprout in the region (Lin J, Peel J, 2022: 192; Rodríguez-Garavito C, 2020: 40; Peel J, Lin J, 2019: 707).

In view of that, to expand our current understanding of the use and significance of the rights to life and health in Latin America's climate litigation, this paper analyzes three constitutional climate lawsuits that invoke both rights and that have already been adjudicated. It takes the normative synergies between the rights to life and health as points of departure to shed light on how they overlap with climate change law to provide the basis for establishing state responsibility and corresponding remedies for acts and omissions that threaten people's lives and health. In so doing, the paper examines climate litigation as a strategic endeavor to limit the global temperature from warming beyond 1.5°C while situating it

9. This article's notion of NLAC refers to "Latin America's progressive neo-constitutionalism," which Javier Couso (2022: 356) associates with the "Latin American *ius Commune's* movement" — a doctrinal effort aimed at diffusing human rights standards and promoting empowering dynamics among social actors to overcome the exclusion and inequalities that characterize the region (von Bogdandy A et al, 2016).

against Latin America's broader socioeconomic challenges. Further, given the region's socio-legal scenario where international and constitutional human rights closely converge, for the purposes of this paper the terms "fundamental rights" or "rights" will be used to describe both (Borowski M, 2002). Nevertheless, it refers to "national fundamental rights," and "international fundamental rights" whenever an indication of their national or international sources, respectively, is necessary.

Hence, the next section presents the interactions and complementarities that have arisen through the interpretative work of international human rights bodies and national courts. Then, section three clarifies the rationale underpinning the selection of cases and the methodology on which their analysis is drawn, while section four presents the substance of such analysis. Finally, section five discusses the cases and offers some concluding remarks.

2. The Fundamental Rights to Life and Health: Normative Interactions and Complementarities

The close interaction between the rights to life and health materialized in the legal realm since the 1948 Universal Declaration of Human Rights enshrined both rights in article 25. By asserting that "[e]veryone has the right to a standard of living adequate for the health and wellbeing of himself and his family, including food, clothing, housing, and medical care and necessary social services [...]", this milestone document recognized a mutually supportive relationship between both rights. While not expressly recognizing the right to life, it defined that the right to a standard of *living* is given by how it allows the realization of (the highest attainable standard) health. Later, the recognition of these rights followed different instruments. The International Covenant on Civil and Political Rights (ICCPR) sets the right to life in article 6, while the International Covenant on Economic, Social and Cultural Rights (ICESCR) does so with the right to health in article 12.¹⁰

Both rights are recognized in regional instruments, yet also separately. Particularly relevant to the Latin American region is the American Convention on Human Rights, where the right to life is enshrined (article 4).¹¹ The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) sets the right to health in article 10.¹² However, the Inter-American Human Rights

10. Article 6.1 of the ICCPR states that "[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." The ICCPR was adopted in December 1966 and entered into force in March 1976 (UN Treaty Collection, 2022). Article 12.1 of the ICESCR states that "[t]he States Parties to the present Convention recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." The ICESCR was adopted in December 1966 and entered into force in January 1976 (UN Treaty Collection, 2022).

11. The American Convention on Human Rights, also known as the "Pact of San José," was adopted in November 1969 and entered into force in July 1978. Its article 4.1 indicates sets out that "[e]very person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life" (UN Treaty Collection, 2022).

12. The Protocol of San Salvador was adopted in November 1988 and entered into force in November 1999; its article 10.1 indicates that "[e]veryone shall have the right

System (IAHRS) has developed an extensive body of case-law that emphasizes how inextricably intertwined the rights to life and health are (Cenedesi Bom Costa Rodrigues R, 2005: 107). The Inter-American Court of Human Rights (IACtHR) first paved the way for acknowledging such interrelationship in its judgment of the case “*Street Children*” (*Villagran-Morales et al.*) v. *Guatemala* (1999). Here, the court reasoned that the fundamental right to life entailed a broad scope by including “not only the right of every human being not to be deprived of his life arbitrarily, but also the right that he will not to be prevented from having access to the conditions that guarantee a dignified existence” (IACtHR, 1999: § 144). The rights’ explicit interconnectedness was further reiterated in the decisions of the cases *Gonzales Lluy et al. v. Ecuador* (2015), *Chinchilla Sandoval et al. v. Guatemala* (2016), *Poblete Vilches et al. v. Chile* (2018), *Cuscul Piraval et al. v. Guatemala* (2018), and *Vera Rojas et al. v. Chile* (2021) (Corte Interamericana de Derechos Humanos, 2021).

International fundamental rights and, by extension, constitutional rights have been described as interrelated, interdependent, and indivisible.¹³ Given that these three concepts carry distinct meanings, it is relevant in the context of the present analysis to situate where the relationship between the rights to life and health stands. Considering that interrelatedness describes the broadest connections among rights; interdependence connotes their synergistic function, and indivisibility describes the rights’ *integral* nature — thereby constituting a much stronger claim (Daly E, May JR, 2019: 174) — the relationship between the fundamental rights to life and health falls within the latter concept. Adjudicative and supervisory bodies at the international and national levels have established that both rights are indivisible as their relationship is profound and inextricable.¹⁴ Noticeably, in Latin American countries, the criterion of connectedness between these rights has been used to circumvent rules that do not allow for the direct protection of social rights (Yamin AE, 2022: 766; Parra-Vera O, 2016: 151).¹⁵

In climate change law, the rights to life and health have also come to interact, albeit until recently. The Paris Agreement was the first core instrument of the climate change international regime that recognized state parties’

to health, understood to mean the enjoyment of the highest level of physical, mental and social wellbeing” (UN Treaty Collection, 2022).

13. The Vienna Declaration and Programme of Action, adopted in 1993 by the World Conference on Human Rights, states in paragraph 5 that “[a]ll human rights are universal, indivisible and interdependent and interrelated.”

14. For example, the UN Human Rights Committee provides, in its General Comment 36, that the duty to protect the fundamental right to life implies ensuring essential health care (2019: § 26). Reciprocally, in its General Comment 14, the UN Committee on Economic, Social, and Cultural Rights has interpreted that the right to life encompasses integral components of the right to health (2000: § 3).

15. For instance, in a paradigmatic case concerning an 11-year-old girl with Type 1 Gaucher’s Disease — to whom the Costa Rican Office of Social Security denied treatment — the Fourth Chamber of the Supreme Court of Costa Rica (the Constitutional Chamber) ordered the government to provide the treatment for the claimant. It did so by arguing that “if the right to life is especially protected in all modern legal states and, therefore, so is the right to health, any economic criteria that negatively affect the exercise of such rights must be put aside because... without the right to life all other rights are useless” (Parra-Vera O, 2016: 152).

obligations on human rights (Phelan AL, 2020: 422).¹⁶ Even though it did so by explicitly referencing the right to health only, climate lawsuits commonly invoke the right to life (Varvastian S, 2021: 383) — thereby heralding the inroads both rights are currently making in the context of climate change as well. However, as mentioned, there is a knowledge gap on the use and effects of the specific rights invoked within climate litigation. Hence, while it is clear that the rights to life and health interact in climate-related legal cases, it is vague how such overlaps — and their inherent implications — are occurring.

The absence of a robust body of international jurisprudence dealing with climate change and human rights is what Wewerinke-Singh (2019: 9) points out as “perhaps the greatest methodological challenge” in integrating both fields of law. Except for two decisions issued by the UN Human Rights Committee (HRC),¹⁷ no international or regional tribunal has adjudicated a climate change-related lawsuit.¹⁸ Further, because climate litigation is still a novel issue — particularly in Global South jurisdictions — such a jurisprudential gap also holds at the national levels (Peel J, Lin J, 2019: 684). This lack of precedents confronts judicial decision-making with the open question of how to interpret international and national fundamental rights in the context of climate change. Existing human rights case-law relative to environmental issues have provided an alternative ground for legal scholars to deal with the gap challenge (Wewerinke-Singh M, 2019). Also, the interpretative work of human rights treaty bodies offers a stepping stone for determining the scope of human rights obligations in light of climate change law (de Vilchez Moragues P, 2022).

Therefore, to provide meaning to the use and significance of the rights to life and health in Latin America’s climate litigation, it is important to first unpack how the overlap between such fundamental rights has already been interpreted by existing international and domestic human rights case-law on climate and environmental issues and human rights treaty bodies. By recounting such precedents, this section sheds light on two key aspects where the rights to life and health are strongly articulated in the context of climate change, namely, (i) the prevention, precautionary, and progressivity principles, and (ii) substantive and procedural obligations.

16. In its Preamble, the Paris Agreement acknowledges that “climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity.” The Agreement was adopted in December 2015 and entered into force in November 2016 (UN Treaty Collection, 2022).

17. See HRC Communication No. 2728/2016 of 24/10/2019, *Teitiota v. New Zealand*, available at <https://www.ohchr.org/en/press-releases/2020/01/historic-un-human-rights-case-opens-door-climate-change-asylum-claims>; and HRC Communication No. 3624/2019 of 21/07/2022, *Residents of the Torres Strait region v. Australia*, available at <https://www.ohchr.org/en/press-releases/2022/09/australia-violated-torres-strait-islanders-rights-enjoy-culture-and-family>

18. For an analysis of the climate cases currently under the European Court of Human Rights consideration, see Heri C (2022); for those filed before the Inter-American Human Rights System, see Auz J (2022).

The Prevention, Precautionary, and Progressivity Principles

The IACtHR (2017) addresses in its Advisory Opinion OC-23/17 the obligations to respect and ensure the right to life in the context of environmental law (including the obligations relative to addressing climate change). Crucially, it reasons that in order to comply with them – which the court acknowledges as essential for the enjoyment of the right to health – states bear the responsibility to prevent environmental damage and fulfill the precautionary principle.¹⁹ Regarding the former duty, the court draws on the International Court of Justice’s consideration that the obligation of prevention arises when there is a risk of “significant damage.”²⁰ In line with this, the IACtHR further deliberates that any harm to the environment that may involve a violation of the rights to life and personal integrity must be considered significant harm.²¹

On the obligation to observe the precautionary principle, the IACtHR understands that states must act according to this principle to protect the rights to life and personal integrity.²² This principle calls for adopting measures where there is no scientific certainty about the impact that an activity could have on the environment.²³ In the same vein, the HRC (2019) considers climate change to constitute a serious threat to the ability of present and future generations to enjoy the right to life.²⁴ Therefore, in its General Comment 36, it establishes that the obligation to respect and ensure the right to life in the context of climate change entails state parties “pay due regard to the precautionary approach.”²⁵

Progressivity is another principle that stands at the normative junction between the rights to life and health. It entails the obligation for states to mobilize and allocate the maximum available resources for the gradual realization of the right to health and, therefore, the advancement of the right to life.²⁶ In this respect, the Office of the UN High Commissioner for Human Rights (OHCHR) (2016) calls on states to fulfill such a duty by mitigating climate change and ensuring that all persons, particularly the most marginalized groups, have adequate capacity to adapt to changing climatic conditions.²⁷ While climate mitigation entails the phase-out of greenhouse

19. IACtHR Advisory Opinion OC-23/18 of 15/11/2017. The Environment and Human Rights, § 125, available at https://www.corteidh.or.cr/docs/opiniones/seriea_23_ing.pdf.

20. *Idem*, § 135.

21. *Idem*, § 140.

22. *Idem*, § 180.

23. *Idem*, § 175.

24. General Comment No. 36 on Article 6: right to life, published on 3rd of September 2019; United Nations Human Rights Committee, § 62, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/261/15/PDF/G1926115.pdf?OpenElement>.

25. *Idem*, § 62.

26. General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), adopted on 11 of August 2000; United Nations Committee on Economic, Social and Cultural Rights, § 31, available at <https://digitallibrary.un.org/record/425041>; OHCHR Report of 06/05/2016. Analytical study on the relationship between climate change and the human right of everyone to the enjoyment of the highest attainable standard of physical and mental health, § 34, available at <https://digitallibrary.un.org/record/841798/?ln=en>.

27. OHCHR (see note 25), § 54.

gas (GHG) emissions, adaptation concerns the progressive development of sustainable and resilient health systems and infrastructure.²⁸ Because this latter aspect is essential for overcoming the socioeconomic challenges that strongly determine people's vulnerability to climate change, the progressivity principle is relevant for addressing the climate-related health concerns that arise in contexts characterized by poverty and exclusion.

Climate (and environmental) litigation has borrowed on these principles when invoking the interconnectedness between the rights to life and health. This is illustrated in the *Residents of the Torres Strait region v. Australia* case before the HRC (2022), the first internationally adjudicated climate-related legal action that favored the claimants. Here, the claimants argued that the state party had violated their right to life by failing to devote the maximum available resources to reduce GHG emissions.²⁹ While the Human Rights Committee did not find Australia to have violated claimants' right to life,³⁰ it should be noted that the right to life was a central argument in the Committee's reasoning of the case, as the individual opinion of Committee Member Duncan Laki Muhumuza shows. He argued a violation of article 6 of the ICCPR based on Australia's failure to take precautionary measures to prevent the imminent danger to the claimants' rights.³¹

At the regional level, the case-law of the European Court of Human Rights (ECtHR) on the right to life in the context of environmental concerns underscores the relevance of the precautionary principle (Wewerinke-Singh, 2019: 109). For example, in the case *Tatar and Tatar v. Romania* (2007), this court stressed that even in the absence of scientific probability regarding the causal link between the harm caused to the applicants and the state's conduct, the state should adopt measures to protect their private and family life. Hence, by failing to fulfill such a duty, the ECtHR found Romania to have violated the applicants' right to private and family life.³²

On the progressivity principle, the IACtHR recently indicated that addressing critical situations of lack of services, which are essential for the health and life of claimants, is a component of the state's responsibility to fulfill rights that are closely interconnected with the right to health.³³ In the *Lhaka Honhat Association v. Argentina* (2020) case — the first judgment in which the court declared the responsibility of the state for violating the rights to a healthy environment, adequate food and water based on article 26 of the American Convention (progressive development) — this tribunal mandated Argentina to formulate and implement an action plan to provide adequate goods and services, namely drinking water and food, necessary for the

28. *Idem*, § 57.

29. HRC Communication No. 3624/2019 of 21/07/2022 (see note 16), § 3.4.

30. *Idem*, § 8.8.

31. *Idem*, § 14 & 17.

32. ECtHR Decision of 05/07/2007. Delivered on Application No. 67021/01 Tatar and Tatar v. Romania, available at https://www.stradalex.com/nl/sl_src_publ_jur_int/document/echr_67021-01_001-83052.

33. IACtHR Judgment of 06/02/2020. Delivered in Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina, § 222 & 332, available at https://www.corteidh.or.cr/docs/casos/articulos/seriec_400_ing.pdf.

health of the affected groups.³⁴ This, in addition to “[ensuring] reasonable conservation and improvement of the environmental resources.”³⁵

Domestic climate lawsuits have also drawn on the prevention, precautionary, and progressivity principles when arguing on the grounds of the rights to life and health (de Vilchez Moragues P, 2022). In the *Urgenda Foundation v. State of the Netherlands* case (2019), for instance, the Supreme Court of The Netherlands acknowledged that the warming of the planet — to which the emission of greenhouse gases (GHG) leads — “will result in, among other things, the significant erosion of ecosystems, which will [...] endanger health and cost human lives.”³⁶ Hence, this tribunal considered climate change a risk that may affect individuals’ rights to life and respect for private and family life enshrined in articles 2 and 8 of the European Convention on Human Rights, respectively.³⁷ It consequently upheld that, consistent with the precautionary principle, the protection afforded by these two rights — whose obligations largely overlap³⁸ — encompassed the state’s duty to take preventive measures to counter the danger, even if the materialization of that danger is uncertain.³⁹

Substantive and Procedural Obligations

The rights to life and health entail a distinct — yet intertwined — normative content from which substantive and procedural obligations arise. In clarifying the scope of the right to life, the HRC provides that it entails the duty to take positive measures, including establishing adequate legal frameworks and institutions, under a due diligence obligation to protect the life of individuals against foreseeable threats.⁴⁰ These measures, the Committee further clarifies, should ensure special protection for persons in vulnerable situations⁴¹ and address the “general conditions in society” that may prevent the enjoyment of the right to life by, among others, ensuring access to health care.⁴² The right to life also encompasses procedural guarantees such as access to effective measures to vindicate rights and the state’s duties to investigate, prosecute, punish, and remedy violations.⁴³

Concerning the normative content of the right to health, the UN Committee on Economic, Social and Cultural Rights (CESCR), in its General Comment 14, interprets this right as extending beyond timely and appropriate health care. It considers this right also to entail the underlying determinants of health, such as healthy environmental conditions⁴⁴ — which falls under the “general conditions in society” that the right to life protects. Particularly, the

34. *Idem*, § 333.

35. *Idem*.

36. Supreme Court of The Netherlands Judgment of 20/12/2019. Delivered in Case *Urgenda Foundation v. State of the Netherlands*, § 4.2, available at http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2020/20200113_2015-HAZA-C0900456689_judgment.pdf.

37. *Idem*, § 5.2.2. and 5.2.3.

38. *Idem*, § 5.2.4.

39. *Idem*, para 5.3.2.

40. General Comment No. 36 (see note 23), § 19, 20, & 21.

41. *Idem*, § 23.

42. *Idem*, § 26.

43. *Idem*, § 27, 28 & 67.

44. General Comment No. 14 (see note 25), § 11.

Committee sets out three obligations that such a right encompasses. First, the obligation to respect requires states to refrain from limiting equal access to health services and unlawfully polluting the air, water, and soil.⁴⁵ The obligation to protect calls on states to adopt measures to ensure that third parties do not interfere with the realization of the right to health.⁴⁶ And the obligation to fulfill mandates for the provision of health care and equal access for all to the underlying determinants of health, including by formulating policies to reduce and eliminate pollution.⁴⁷ The right to health also implies the obligation for states to assist other countries in advancing such a right.⁴⁸ Crucially, it entails the procedural duties to secure participation, access to information⁴⁹ and effective judicial or other types of remedy.⁵⁰

The rights to life and health intertwine through the aforementioned obligations. In its Resolution 3/2021, the Inter-American Commission on Human Rights (IACHR) (2021) clarifies what the relationship between both rights implies for the state duties in the context of climate change drawing on the interdependence and indivisibility between both rights and other human rights.⁵¹ Specifically, it provides that states bear a “reinforced” obligation to protect the most vulnerable individuals and groups.⁵² It further declares that the fulfillment of substantive obligations, including taking positive measures, should be undertaken under the due diligence principle.⁵³ In this regard, states — and companies under their jurisdictions — should reduce GHG emissions.⁵⁴ They should also ensure access to health care⁵⁵ — an obligation that the OHCHR (2016) interprets in more depth when calling on states to “develop sustainable and resilient health systems and infrastructures [...] including by promoting universal health coverage and social protection floors.”⁵⁶

In addition, the commission emphasizes the effective implementation of the rights of access to information, public participation, and access to justice as procedural conditions for the fulfillment of substantial obligations.⁵⁷ Another procedural obligation to which both the IACHR and the OHCHR call attention is the states’ duty to make full reparations to the victims, which consists of the restoration of the environment.⁵⁸

In interpreting such substantive and procedural obligations, regional human rights case-law on environmental issues has laid useful parameters that help

45. *Idem*, § 34.

46. *Idem*, § 35.

47. *Idem*, § 36.

48. *Idem*, §§ 38 & 42.

49. *Idem*, § 11.

50. *Idem*, § 59.

51. IACHR Resolution 3/21 of 31/12/2021. Climate emergency: Scope of inter-American human rights obligations, §§ 8 & 9, available at https://www.oas.org/en/iachr/decisions/pdf/2021/resolucion_3-21_ENG.pdf.

52. *Idem*, § 16.

53. *Idem*, § 10.

54. *Idem*, § 43.

55. *Idem*, § 50.

56. OHCHR (see note 25), § 57.

57. *Idem*, § 32.

58. *Idem*, § 14; OHCHR (see note 25), § 62.

define the extent of the duties' scope. While the focus of these precedents in the IACtHR has been mostly given to property rights of Indigenous and tribal communities — as opposed to the ECtHR's attention on the right to life (de Vilchez Moragues P, 2022: 233) — the inter-American judicial practice has substantiated the interconnection between the rights to life and health. It, therefore, still offers valuable guidance on the duties arising from such an overlap. This is particularly visible in the case of the *Yakye Axa Indigenous Community v. Paraguay* (2005), in which the IACtHR found that the state violated the right to life — embodied in article 4(1) of the American Convention on Human Rights — by failing to take positive, concrete measures toward generating minimum living conditions compatible with the dignity of the human person specially in the case of persons who are vulnerable and at risk.⁵⁹ This special protection, the court argued, entailed the duty of progressive development outlined in article 10 of the Protocol of San Salvador where the right to health is enshrined.⁶⁰ In view of such obligations, this regional tribunal ordered the state to grant the affected Yakye Axa community "regular medical care and appropriate medicine to protect the health of all persons, especially children, the elderly and pregnant women, including medicine and adequate treatment for worming of all members of the Community."⁶¹ Pertaining to procedural obligations, the court deemed it necessary for the state to create effective mechanisms for Indigenous people to vindicate their ancestral lands.⁶²

In sum, amidst the jurisprudential gap on climate change, existing precedents from rights-based cases on environmental issues and the ample interpretative work of human rights treaty bodies offer useful guidance for determining the scope of human rights obligations in light of climate change law. Particularly, they recognize that the inextricable relationship between the rights to life and health articulates mainly when the prevention, precautionary, and progressivity principles and several substantive and procedural obligations are involved. Crucially, as this section's review has pointed out, such an overlap encompasses both the environmental and social dimensions that determine people's vulnerability to climate change as it calls for reducing GHG emissions *and* ensuring access to health systems and infrastructure.

Because rights-based climate litigation is proliferating in Latin America (Setzer J, Higham C 2021: 32), such normative synergies are worth examining in this world region. By providing a fertile ground to explore how the rights to life and health interact in the context of climate change, a focus on Latin America's body of climate lawsuits could help better understand the horizons of the jurisprudential gap — and thus eventually contribute to overcoming it. This endeavor cannot be timelier as climate change increasingly and disproportionately disrupts the wellbeing and health of the

59 IACtHR Judgment of 17/06/2005. Delivered in Case of the Yakye Axa Indigenous Community v. Paraguay, § 162, available at https://www.corteidh.or.cr/docs/casos/articulos/seriec_125_ing.pdf

60. *Idem*, § 163.

61. *Idem*, § 221.

62. *Idem*, § 225.

significant number of people who live in poverty in the region (Castellanos EJ et al, 2022: 33; Cissé G et al, 2022: 28; Magrin G et al, 2014: 1535).

The NLAC adds another compelling reason to explore Latin America's climate litigation. This concept, which connotes the reconfiguration of the countries' constitutions during the late decades of the twentieth century (Couso JA, 2006; 2022: 355), sheds attention on the instrumentality of the human rights legal framework for propelling social transformation in the region (von Bogdandy A, 2017: 33). In particular, the incorporation of several social rights into national constitutions and the harmonization of constitutional law with international human rights law (Couso JA, 2006: 68; Piovesan F, 2017) have emboldened constitutional courts to determine the meaning of such fundamental rights thereby confronting pressing social ailments. This is illustrated by the structural impacts that the judicialization of health-related challenges through constitutional adjudication has had in some countries and cases (Yamin AE, 2022; Parra-Vera O, 2016).⁶³

Lastly, it is important to bear in mind that almost all countries of the region recognize the rights to life and health in their constitutions (Lawyers Collective and O'Neill Institute, 2022) and are Parties to the ICCPR, ICESCR, the American Convention on Human Rights, and the Protocol of San Salvador (UN Treaty Collection, 2022). Further, they are all Parties to the United Nations Framework Convention on Climate Change (UNFCCC), and the majority has already ratified the Paris Agreement (UN Treaty Collection, 2022).

3. Methodology

This inquiry applies comparative doctrinal analysis to three constitutional cases, one adjudicated by Colombia's Supreme Court (2018), another by the Constitutional Court of Colombia (2016), and the third one by the Court of the Francisco de Orellana Canton in Ecuador (2021). Because this method studies the substance of judicial reasoning *vis-à-vis* the existing corpus of international and regional treaties, national constitutions, and case-law (Egan S, 2018; Hutchinson T, 2018), the analysis illuminates the formal and material intersections between the rights to life and health and climate change law. Crucially, by doing so against the precedents outlined in section two, it draws attention to the normative spaces in which both rights overlap in the context of climate change and, thus, to their use and significance within current climate litigation.

The three cases were selected from the database that the author elaborated. This database compiles judicial cases from the databases of (1) the Interamerican Association for Environmental Defense's (AIDA) climate litigation platform, (2) the Grantham Research Institute on Climate Change and the Environment, and (3) the Sabin Center for Climate Change Litigation – as they currently contain the most comprehensive and updated record of

63. Decision T-760/08 issued in 2008 by the Constitutional Court of Colombia is an example of structural judicial intervention since it mandated several general provisions aimed at reforming the country's health care system (Parra-Vera O, 2016: 161).

climate change cases filed in most Latin American jurisdictions.⁶⁴ The author's database further systematizes all such cases according to (1) the type of motivation, whether they (2) are "rights-based," (3) the rights invoked in their complaints and judgments (laying particular emphasis on the rights to life and health), (4) the type of legal action, and (5) the status of the litigation process (pending or adjudicated).

A critical clarification here concerns the reference to "climate litigation." For the purposes of elaborating the author's database, this concept encompasses cases generally brought before judicial bodies in which climate change law, policy, or science are material issues of law or fact (The Sabin Center, 2022). Further, because climate litigation has been motivated by a broad spectrum of interests and actors, scholars have identified various litigation "types" (Gloppen S, Vallejo C, 2020; 2013; Markell D, Ruhl GB, 2012: 15; Ghaleigh NS, 2010). An overarching analytical thread across these typologies based on actors' motivation has been the direction toward which they seek to move climate policy. "Pro" or "positive" litigation strives to reduce GHG emissions, preserve the environment, and increase adaptive capacity — usually initiated by NGOs or community members. "Anti" or "negative" litigation attempts to avoid these shifts by challenging mitigation or adaptation measures — these are usually cases brought by corporations (Setzer J, Higham C, 2021: 27; Markell D, Ruhl GB, 2012: 65; Ghaleigh NS, 2010: 43). While the author's database distinguishes between these two types, this inquiry concentrates on cases concerned with tackling the adverse climate impacts on life and health, which belong to the former type of litigation. Hence, unless otherwise explicitly stated, references to "climate litigation" henceforth refer to the "positive" type.

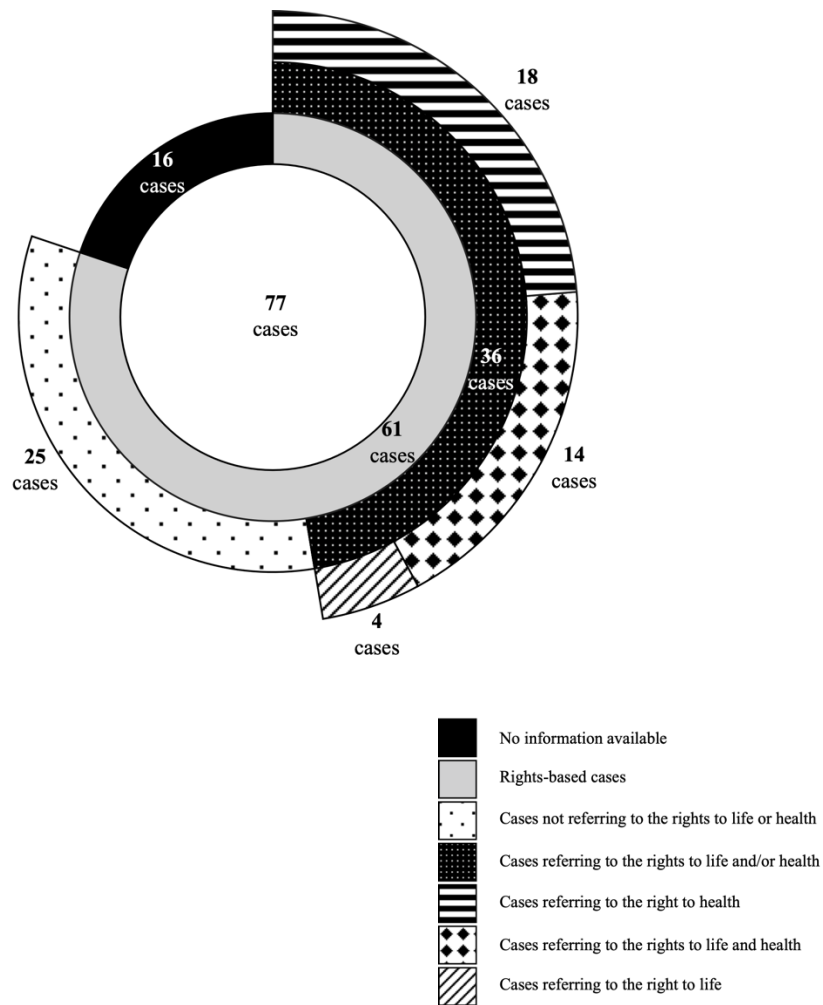
The "rights-based" attribution to the concept of climate litigation refers to cases that invoke international or national fundamental rights as the legal basis of plaintiffs' claims and/or judicial decisions and whose linkages with climate change are emphasized (de Vilchez Moragues P, Savaresi A, 2021). Moreover, by distinguishing the type of action, the author's database identifies whether cases are filed on administrative, civil, criminal, or constitutional grounds.

The author's database unveiled 77 domestic climate lawsuits filed as of mid-June 2022 across 7 Latin American countries (Argentina, Brazil, Chile, Colombia, Ecuador, Mexico, and Peru). Sixty-one are rights-based cases belonging to the positive type of litigation. Thirty-two (52%) of these rights-based lawsuits invoked the right to health either in their complaints or judgments, while eighteen (29%) did so with the right to life (**Figure 1**). Fourteen (23%) of the 61 rights-based cases were grounded on both rights, eleven of which were brought on constitutional grounds. Relevant to this inquiry is noticing that just five out of the fourteen rights-based cases that

64. Asociación Interamericana para la Defensa del Ambiente, Plataforma de Litigio Climático para América Latina y el Caribe, available at <https://litigioclimatico.com/es/sobre-la-plataforma>; Grantham Research Institute on Climate Change and the Environment, Litigation Cases available at, https://climate-laws.org/litigation_cases; The Sabin Center for Climate Change Law at Columbia Law School, U.S. Climate Change Litigation database, available at <http://climatecasechart.com/>.

jointly invoked the rights to life and health have already been decided. Within this sub-group, constitutional actions are equally predominant, as they constitute four cases while only one pertains to an administrative action.

Figure 1. Rights-based climate litigation cases filed in Latin American countries (as of June 2022) that invoked the rights to life and health.



Following the most similar system design (MSSD) as a logic of comparative inquiry — which suggests the comparison of cases that are similar in as many features as possible, assuming that this provides the optimal sample for comparison (Andreassen BA, 2017: 244) — this analysis opted for the constitutional cases that pursued a “pro” or “positive” motivation.

Furthermore, given that the doctrinal method relies on case records (Hutchinson T, 2018; Egan S, 2018), the enquiry selected cases that were already adjudicated and whose documents are publicly available — or whenever their complaint documents are not, their resolutions contain a thorough description of the claimants' arguments. According to the author's database, three of the four constitutional cases that relied on the rights to life and health fulfill these criteria, namely the *Future Generations v. Ministry of the Environment and Others* (Colombia), the *Atrato River* (Colombia) and the *Baihua Caiga et al. v. PetroOriental S.A.* (Ecuador) cases.

4. Insights from Colombia and Ecuador

While a substantive body of literature has analyzed the *Future Generations* case (Auz J, 2022: 129; de Vilchez Moragues P, Savaresi A 2021; Gloppen J, Vallejo S, 2020: 395; Setzer J, Benjamin L, 2020: 79), few works have laid a sharper focus on how the normative synergies between the rights to life and health interplay with climate change law — and thus examined the use and significance of such rights specifically within this climate lawsuit.⁶⁵ Filed in 2018 by a group of children and youth before the Superior Tribunal of the Bogotá Judicial District (STB), it is arguably “the first attempt to dovetail climate change and human rights arguments in a Latin American court” (Auz J, 2022: 129), an effort that is visible in the claimants' and the court's arguments. In its complaint, the claimants relied on the 1991 Colombian National Constitution to request the judicial protection of several rights, including the rights to life and health enshrined in articles 11 and 49.⁶⁶ They argued that the detrimental impacts on these rights were consequential of the threats that the deforestation of the Amazon posed to their right to a healthy environment — for which the Colombian government was responsible due to its failure to halt such loss in forest cover.⁶⁷

Drawing on case-law of the country's Constitutional Court (CCC) (ruling T-1096 of 2004),⁶⁸ claimants emphasized that the fundamental right to life

65. For an analysis of the *Future Generations v. Ministry of the Environment and Others* case from the lens of the right to health, see Viveros-Uehara (2022).

66. Article 11 of the Colombian National Constitution provides that “[t]he right to life is inviolable. There will be no death penalty.” Article 49 states that “[h]ealth care and environmental hygiene are public services provided by the state. Everyone is guaranteed access to health promotion, protection, and recovery services.” Complaint of 29/01/2018. *Future Generations v. Ministry of the Environment and Others*, p. 2, available at http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2018/20180129_11001-22-03-000-2018-00319-00_complaint.pdf.

67. *Idem*.

68. Ruling T-1096 of 2004 derived from a tutela action filed by a person deprived of liberty against the National Prison Institute. The claimant considered that by refusing to transfer them to a prison establishment where health services were duly provided and where they were not subjected to sexual harassment and abuse, such an institute violated their rights to life, health, physical and moral integrity, and sexual freedom. In line with international case-law, the CCC ruled that the fundamental rights to life and health of persons deprived of liberty must not be restricted. Thus, the National Prison Institute must adopt measures to prevent cruel, inhuman, and degrading treatment against such populations. CCC Ruling T-1096 of 04/11/2004. Delivered in Case No. T-950466, available at [https://www.corteconstitucional.gov.co/relatoria/2004/t-1096-04.htm#:~:text=3%2C%20CNP\),El%20CNP%20advierde%20de%20manera%20categ%](https://www.corteconstitucional.gov.co/relatoria/2004/t-1096-04.htm#:~:text=3%2C%20CNP),El%20CNP%20advierde%20de%20manera%20categ%)

entailed a life of dignity, the possibility of designing a life plan and of “living as one wants” (*vivir como se quiera*), the existence of both material (*vivir bien*) and intangible conditions, and physical and moral integrity (*vivir sin humillaciones*).⁶⁹ In this respect, one of the plaintiffs testified that they could not live as they wanted given that they no longer had the possibility of practicing sports outdoors due to the increasing temperatures in their residence.⁷⁰ They asserted that such a detrimental situation also imperils their health, as this closely relates to the opportunity to do regular physical activity.⁷¹

Regarding the right to health, claimants drew on article 49 of the National Constitution, case-law of the CCC (rulings T-060 of 2007, T-148 of 2007, T-760 of 2008, and T-1077 of 2012)⁷² and General Comment 14 of the CESCR to elaborate on the duties to ensure access to quality healthcare and other determinants of health and to grant special protection to vulnerable populations.⁷³ They further emphasized that such obligation entailed the duty to protect the environment as this constitutes a determinant of health.⁷⁴ Based on the potential threats that claimants argued to their rights to life and health, they called on the STB to consider the precautionary principle and the importance of securing public participation.⁷⁵ Moreover, they requested the court to order the state to take positive measures, such as elaborating a plan and an intergenerational pact to reduce the Amazon’s deforestation rate.⁷⁶ Claimants also demanded that the state investigate the illegal activities that led to the alleged environmental degradation.⁷⁷

In February 2018, the STB dismissed the petition given that it considered that the *tutela* action was not the “appropriate mechanism to issue the orders requested by the claimants [...] which concern the protection of the collective right to a healthy environment and other fundamental rights.”⁷⁸

C3%B3rica%20el%20respeto%20a%20la,los%20derechos%20humanos%20universalm ente%20reconocidos.

69. Complaint of 29/01/2018 (see note 65), p. 94.

70. *Idem*, p. 95.

71. *Idem*.

72. Rulings T-60 and T-148 of 2007 and T-760 of 2008 refer to the Colombian healthcare system. Drawing on the obligations arising from the country’s National Constitution (articles 48 and 48) and international human rights instruments (article 12 of the ICESCR), the CCC considered that the fundamental character of the right to health was given by its connection with the right to life — which also entails providing special protection to vulnerable individuals. On this basis, in these three rulings, the Constitutional Court considered that whenever the denial of access to medicines and treatments by insurance companies (EPS) imperiled claimants’ lives, the EPS are obliged to provide such treatments regardless of whether they are included in the claimants’ health benefits packages. Rulings T-1077 of 2012 and T-672 of 2014 were derived from cases concerning the health impacts of environmental pollution. The CCC reasoned that the state obligation to protect the rights to life and health against environmental pollution implied observance of the precautionary principle and reinforced protection for vulnerable populations.

73. Complaint of 29/01/2018 (see note 65), p. 102.

74. *Idem*, p. 103.

75. *Idem*, p. 117.

76. *Idem*.

77. *Idem*.

78. STB Ruling of 12/02/2018. Delivered in Case No. 110012203 000 2018 00319 00, p. 17, available at http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2018/20180212_11001-22-03-000-2018-00319-00_decision.pdf.

The claimants thus filed an appeal before the country's Supreme Court (SCC). In April of that same year, this latter tribunal reversed the lower court's decision and ruled in favor of the plaintiffs. Specifically, it ordered several agencies of the Colombian government (the defendants) to formulate, along with the affected communities and interested actors, a short-, medium-, and long-term plan and an "intergenerational pact for the life of the Colombian Amazon" to counter the deforestation rate in the Amazon.⁷⁹

In the reasoning that preceded this mandate, the SCC considered the rights to life and health in two fundamental and synergistic ways. First and crucially, the claimants' legal standing was recognized on both rights' grounds, thereby contradicting the lower court reasoning by conceding that the *tutela* action was indeed the appropriate means for them to request judicial protection.⁸⁰ Second, grounding its reasoning on the ICESCR (article 12), the Paris Agreement, the National Constitution, and national jurisprudence, this court provided that the realization of the fundamental rights to life and health is substantially determined by the natural environment.⁸¹ Hence, it recognized that the state's failure to cease the degradation of the Amazon forest contravened its responsibility to protect such rights.⁸² Given that such a failure affected mainly the rights of future generations and also considering the irreversibility of the environmental damage, the court drew on the precautionary principle to mandate the state to take preventive and corrective measures geared at climate adaptation.⁸³

The *Atrato* case also concerned a *tutela* action. This was filed in January 2015 before the Administrative Tribunal of Cundinamarca by a group of Indigenous and Afro-descendent communities living near the Atrato River against several ministries of the Colombian government.⁸⁴ The claimants invoked the rights to life and health, among others, to claim the state's responsibility for failing to prevent and counter the mining activities and illegal deforestation that caused the pollution of the said river.⁸⁵ They argued that because they depended on the Atrato river for agricultural purposes and domestic use, its pollution threatened their lives and health. Drawing on reports from the country's Ombudsman Office, they indicated: "In the Indigenous communities of Quiparadó and Juinduur, which are located in the subregion of the lower Atrato (Riosucio), the death of 3 minors and poisoning of 64 more for drinking contaminated during the year 2013 water was attested. Similarly, the Indigenous Embera-Katío peoples, located in the

79. SCC Ruling of 04/04/2018. Delivered in Case No. 11001-22-03-000-2018-00319-01, p. 48, available at http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2018/20180405_11001-22-03-000-2018-00319-00_decision-2.pdf

80. *Idem*, pp. 13 & 30.

81. *Idem*, p. 22.

82. *Idem*, p. 39.

83. *Idem*, pp. 36 & 46.

84. Ministry of the Environment and Sustainable Development; the Ministry of Housing, City and Territory; Ministry of Agriculture and Rural Development; Ministry of Mining and Energy; Ministry of Health and Social Protection; and the Mayor of Carmen de Atrato.

85. CCC Ruling T-622/16 of 10/11/2016. Delivered in Case T-5.016.242, p. 15, available at http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2016/20161110_T-62216_judgment-1.pdf.

Andágueda river basin — a tributary of the Atrato — reported the deaths of 34 children in 2014 for similar reasons.”⁸⁶

In February of that same year, the tribunal found the *tutela* inadmissible, arguing that claimants intended the protection of collective and not of fundamental rights. The claimants appealed such a decision, which was further upheld by the Council of State two months later, in April 2015, for considering that the plaintiffs did not demonstrate irreparable harm.⁸⁷ Given the scope and seriousness of the Atrato River’s reported situation, the CCC stepped in to review the case.

In its ruling, the Constitutional Court regarded the rights to life and health in two instrumental ways pertaining, on the one hand, to the case admissibility and, on the other, to the state’s responsibility. First, it drew on articles 1 and 44 of the National Constitution⁸⁸ and rulings T-060 of 2007, T-148 of 2007, and T-760 of 2008⁸⁹ to recognize the intertwined character of both rights.⁹⁰ This court further argued that their realization depends on the opportunity to enjoy a healthy environment.⁹¹ Crucially, to strengthen such an argument, the court relied on the IACtHR’s conceptualization of the right to life in relation to the right to health as outlined in the case *Yakye Axa Indigenous Community v. Paraguay*.⁹² Specifically, Colombia’s Constitutional Court recalled: “[in the *Yakye Axa Indigenous Community v. Paraguay* case] the Inter-American Court, after recognizing that the right to life “includes not only the right of every human being not to be arbitrarily deprived of his life, but also the right that conditions that impede or obstruct access to a decent existence should not be generated,” it indicated that the inability to access water affects the right of the ethnic community to decent existence and other rights such as education and cultural identity. In this sense, [the IACtHR] specified that: ‘special detriment to the right to health, and closely tied to this, detriment to the right to food and access to clean water, have a major impact on the right to a decent existence and basic conditions to exercise other human rights [...]’”⁹³

The Constitutional Court also recognized that both rights entailed the obligation to ensure special protection for persons in vulnerable situations.⁹⁴ Hence, because claimants — ethnic and Campesino communities — had their fundamental rights to life and health threatened and belonged to vulnerable

⁸⁶ *Idem*, p. 13.

⁸⁷ *Idem*, p. 21.

⁸⁸ Article 1 of the Colombian National Constitution provides that “Colombia is a social State organized in a decentralized Republic, with autonomous territorial entities, democratic, participatory, and pluralistic, founded on respect for human dignity, on the work and solidarity of the people that integrate it and on the prevalence of the general interest.” Article 44 establishes that “children’s fundamental rights are the rights to life, physical integrity, health and social security, a balanced diet, name and nationality, having a family and not being separated from it, care and love, education and culture, recreation and free expression of their opinions.”

⁸⁹ For a summary of CCC Rulings T-060 of 2007, T-148 of 2007, and T-760 of 2008, see note 71.

⁹⁰ CCC Ruling T-622/16 of 10/11/2016 (see note 84), p. 27.

⁹¹ *Idem*, p. 27 & 46.

⁹² *Idem*, p. 67.

⁹³ *Idem*, p. 67.

⁹⁴ *Idem*, p. 27.

populations, the court considered the *tutela* action admissible.⁹⁵ Furthermore, the Constitutional Court elaborated on the significance of the precautionary principle for the protection of the right to health (based on rulings T-1077 of 2012 and T-672 of 2014)⁹⁶ while also calling on the progressivity principle to argue that the state should take strict measures against illegal mining⁹⁷ – and its detrimental effects on the environment and communities' wellbeing and health.

After assessing several testimonies and evidence on the Atrato River's situation and that of its neighboring communities, the court found that the defendants (several agencies of the Colombian government) had violated the claimants' rights to life, health, and to a healthy environment by failing to fulfill their constitutional duties to prevent the pollution of the said river, its tributaries, and surrounding territories.⁹⁸ Consequently, it mandated the defendants to adopt seven measures which included elaborating and implementing a plan to decontaminate the water sources of the Atrato Basin and prevent further environmental damage.⁹⁹ It also instructed them to undertake toxicological and epidemiological studies to evaluate and identify the impacts of the Atrato River's pollution on the health of surrounding populations.¹⁰⁰

Ecuador's case (*Baihua Caiga et al. v. PetroOriental S.A.*) concerns a constitutional proceeding (*acción de protección*) filed in 2020 before the Court of the Francisco de Orellana Canton by three members of the Waorani Nation and three civil society organizations against PetroOriental S.A. The claimants argued that this company's gas flaring damages the environment and contributes to climate change, thereby threatening several fundamental rights, including their rights to nature, life, and health. They asserted violations of article 32 of the country's 2008 National Constitution (right to health)¹⁰¹ given that, by polluting the environment, the challenged activities hinder claimants' access to food and traditional medicines. Interrelatedly, plaintiffs alleged violations of article 66 (right to life)¹⁰² arguing that they lacked the minimum living conditions to undertake their life projects.¹⁰³ To establish such a connection, claimants also relied on the IACtHR's judgment

95. *Idem*, p. 28.

96. For a summary of CCC Rulings T-1077 of 2012 and T-672, see note 71.

97. CCC Ruling T-622/16 of 10/11/2016 (see note 84), pp. 109 & 110.

98. *Idem*, p. 144.

99. *Idem*, p. 163.

100. *Idem*, p. 164.

101. Article 32 of Ecuador's National Constitution provides that "[h]ealth is a right guaranteed by the State, the realization of which is linked to the exercise of other rights, including the right to water, food, education, physical culture, work, social security, healthy environments and others that support the «*buen vivir*»".

102. "Article 66. [The following rights] are recognized: 1. The right to the inviolability of life. There will be no death penalty. 2. The right to a dignified life, which ensures health, food and nutrition, drinking water, housing, environmental hygiene, education, work, employment, rest and leisure, physical culture, clothing, social security and other necessary social services".

103. Petition of Baihua Caiga et al. v. PetroOriental S.A., p. 50, available at http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2020/20201210_16155_petition.pdf.

of the *Yakye Axa Indigenous Community v. Paraguay* case, the IACHR Advisory Opinion OC-23/17, and General Comment 14 of the CESCR.¹⁰⁴

Drawing on the duties that the state bears to fulfill the rights to life and health under the above-mentioned legal instruments, the claimants requested the court to declare the violation to such rights (among others) and to mandate (the government to command) PetroOriental S.A. to terminate the polluting activities and provide the victims with an effective remedy.¹⁰⁵ Regarding this latter measure, the plaintiffs demanded the defendant fund several projects to strengthen Indigenous knowledge and food sovereignty, including climate adaptation and traditional medicine, as these are two essential aspects for ensuring the rights to life and health.¹⁰⁶

In July 2021, the Francisco de Orellana Canton Court dismissed the case. It considered that there was no evidence of violations of the right to nature under article 71 of Ecuador's Constitution and consequently, of any other by-the-claimants-invoked fundamental rights derived therefrom. Noticeably, this court argued such dismissal by devoting attention solely to one of the several rights on which the claimants grounded their petition, namely the right to nature. It stated that the claimants failed to prove the causal connection between PetroOriental S.A.'s gas flaring, climate change, and the detrimental impacts they argue to be experiencing.¹⁰⁷ And even though the court welcomed the testimonies of Indigenous people — to supplement the lack of scientific studies on the subject matter — which reiterated how the defendant jeopardized their lives and health, the judgment paid no regard to such claims.

5. Discussion and Concluding Remarks

The three cases reflect how climate change impacts the lives and health of claimants. While they similarly drew on the fundamental rights to life and health to invoke the states' responsibility for their climate-related detrimental experiences, judicial reasoning varied in some ways and shared common ground in a few others. Three aspects are worth examining in further depth as climate litigation continues to proliferate in the region: two emerge out of convergence across the cases, and one out of divergence.

A first common aspect among the Colombian cases is the use of the rights to life and health to demonstrate claimants' standing in the *tutela* action. In both lawsuits, the lower courts declared the inadmissibility of the cases, considering that such a constitutional proceeding was not intended to request the protection of a collective right (the right to a healthy environment). To overcome such a barrier, in the appellate stage, claimants argued that by failing to deter climate change-inducing activities, the state violated their fundamental rights to life and health in connection with their

104. *Idem*, p. 51.

105. *Idem*, p. 57.

106. *Idem*, p. 58.

107. Court of the Francisco de Orellana Canton Ruling of 15/07/2021. Delivered in Case 22201202000469, p. 25 & 30, available at http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2021/20210715_16155_ruling.pdf.

right to a healthy environment. The Supreme and Constitutional Courts of Colombia also adopted such a position, thereby admitting the *tutela* actions and ultimately ruling in favor of the claimants. Even though Ecuador's case may appear to be the exception, it shares this commonality because it is a lower court that also dismisses the case (like in the *Future Generations* and *Atrato* cases). The *Baihua Caiga et al.* case adds to the body of lawsuits in the Global South, where procedural formalism seems to stand in the way of the judiciaries to process highly novel challenges such as climate change (Setzer J, Benjamin L, 2020: 95).

A second aspect that the three cases showcase is the type of general relief that claimants sought — and the judiciaries ordered — based on the obligations deriving from the rights to life and health concerning the right to a healthy environment. Particularly, in the three cases, claimants drew on the prevention and precautionary principles to request the cessation of activities harmful to the environment and the participation of affected individuals and groups. The judgments of the *Future Generations* and *Atrato* cases uphold most of such requests in the measures that courts mandated. Crucially, the courts' arguments heavily drew on the interpretative work of the IAHRs that emphasizes the indivisibility of the rights to life and health in the context of environmental and climate change challenges — such as the *Yakye Axa Indigenous Community v. Paraguay* case, the Advisory Opinion OC-23/17, and IACHR's Resolution 3/2021. Moreover, even when they reiterated national jurisprudence, they still brought the interpretative work of international and inter-American human rights bodies into their reasoning — albeit indirectly — given that the former precedents relied on the latter standards.¹⁰⁸ This openness toward the international human rights framework illustrates how the NLAC plays out in domestic climate litigation: courts integrate international fundamental rights into the domestic order to help guide their interpretation of the rights to life and health.

On the other hand, the analysis unveiled a divergence across the cases on the extent to which claimants invoked the particular scope of obligations and their inherent remedies. While petitioners in the three lawsuits centrally argued the broad scope of the right to life in connection with the right to health, only those of the *Atrato* and the *Baihua Caiga et al.* cases raised the duty of the states to progressively provide essential services for the realization of such rights. To be sure, the group of Indigenous and Afro-descendent communities and the members of the Waorani Nation argued that they lacked the minimum living conditions to enjoy a decent existence and thus demanded that the states address such situations. Consequently, the Constitutional Court of Colombia (in the *Atrato* case) tackled this particular concern — though not comprehensively — by mandating the government to undertake studies to identify detrimental health conditions among the population due to the pollution of the Atrato River. In contrast, neither the claimants nor Colombia's Supreme Court explicitly addressed such a social dimension in the remedies they sought and ordered in the

108. For example, CCC Ruling T-148 of 2007, cited by the claimants of the *Future Generations* case and the Constitutional Court in the *Atrato* case, drew on article 93 of Colombia's National Constitution to recognize that the normative content of the right to health as provided by the CESCR in its General Comment 14 applies to the national fundamental right to health.

Future Generations case. They instead laid a sharper focus on the environmental dimension of climate change by requesting and mandating the reduction of the GHG emissions resulting from the Amazon's deforestation.

In conclusion, the fundamental rights to life and health are quantitatively prominent in case argumentation in Latin America's climate litigation. Jointly, they are invoked in almost 60% of the region's rights-based lawsuits. To better understand this phenomenon, this study has first provided a recount of the normative synergies between such rights as per the existing human rights case-law relative to environmental issues and the interpretative work of human rights bodies. The inquiry has taken this recount as its point of departure to shed light on how the said fundamental rights and climate change law overlap in Latin America's climate cases. In so doing, it has unveiled how the quantitative prominence of the rights to life and health in this body of litigation is also *qualitative*. The normative synergies of both rights emerged within the three cases to demonstrate legal standing, thereby helping to overcome procedural barriers. Such synergies were also used to substantiate the states' responsibility to apply the prevention and precautionary principles and to ensure the participation of affected individuals and communities.

However, even when the indivisibility between the rights to life and health gives rise to principles and obligations towards the environmental and social dimensions that determine people's vulnerability to climate change, not all cases yielded such a normative potential evenly nor to its fullest extent. This analysis showed that when it comes to these rights' interpretation and vindication in connection with climate concerns, their environmental dimension (reducing GHG emissions and thus mitigating climate change) can prevail over the social dimension (ensuring access to health care systems necessary for reducing claimants' vulnerability to climate change) – a challenge that Daly and May (2019: 179) have identified in environmental cases. Whether claimants and judges use the rights' normative overlap in comprehensive ways will depend on how they thread climate concerns with their highly interconnected development challenges.

While this paper unveiled that the use of both rights within constitutional climate lawsuits in the region does not uniformly harness the rights' full normative scope, *why* this happens is still to be explored. Further research is needed to scrutinize how the non-legal socio-political realities of the region influence claimants' and courts' understanding of the dimensions that determine people's health vulnerability amidst our changing climate. As climate litigation continues to unfold alongside Latin America's socioeconomic challenges, the synergies between the fundamental rights to life and health in constitutional adjudication under the NLAC may offer a plausible pathway to better address the multi-dimensional complexity of climate change in the world's most unequal region.

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