Syrett, Keith. "Righting Climate Change Wrongs? The Human Right to Health as Accountability Mechanism for the Health Impacts of Climate Change." *Global Health and International Community: Ethical, Political and Regulatory Challenges*. By John Coggon and Swati Gola. London: Bloomsbury Academic, 2013. 101–118. *Bloomsbury Collections*. Web. 25 Apr. 2023. <<http://dx.doi.org/10.5040/9781472544582.ch-006>>.

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Righting Climate Change Wrongs? The Human Right to Health as Accountability Mechanism for the Health Impacts of Climate Change

Keith Syrett

Introduction

If the premise that health constitutes a global public good, which ‘affect[s] all countries and regions, which may have intergenerational impacts, which all may share and from which none may be excluded’ is accepted,¹ it becomes imperative for the international community to take steps to address the consequences of climate change. While the consequences for human health have, in the past, tended to be somewhat overlooked by comparison with the widely known (albeit, often not fully understood) environmental impacts,² there is an evolving consensus that climate change represents a significant challenge for the health of all populations. Indeed, one influential account has contended that ‘climate change is the biggest global health threat of the 21st century’.³ Furthermore, since the effects of climate change tend to amplify existing risks to health,⁴ poor and disadvantaged populations in the global South bear a burden of disease which is grossly disproportionate to the extent of their contribution to the problem.⁵ Climate change therefore exacerbates existing health inequalities

- 1 Graham Lister, ‘Interdependence’ in Marshall Marinker (ed.), *Constructive Conversations about Health: Policy and Values* (Abingdon: Radcliffe Publishing, 2006) 142.
- 2 See for example Edward Maibach, Matthew Nisbet, Paula Baldwin, Karen Akerlof and Guoqing Diao, ‘Reframing Climate Change as a Public Health Issue: An Exploratory Study of Public Reactions’ *BMC Public Health*, 2010, 10: 299, reporting survey results which indicate that ‘the human health consequences of climate change are seriously underestimated and/or poorly understood, if grasped at all’.
- 3 Anthony Costello, Mustafa Abbas, Adriana Allen, Sarah Ball, Sarah Bell, Richard Bellamy, et al., ‘Managing the Health Effects of Climate Change’, *Lancet*, 2009, 373: 1693.
- 4 Ibid., 1712. See also Sharon Friel, Michael Marmot, Anthony McMichael, Tord Kjellstrom and Denny Vågerö, ‘Global Health Equity and Climate Stabilisation: A Common Agenda’, *Lancet*, 2008, 372: 1677.
- 5 See for example Jonathan Patz, Holly Gibbs, Jonathan Foley, Jamesine Rogers and Kirk Smith, ‘Climate Change and Global Health: Quantifying a Growing Ethical Crisis’, *EcoHealth*, 2007, 4: 397.

between developed and developing nations, and between rich and poor. As such, it raises profound and difficult problems of justice.

The goal of this chapter is to explore the potential for the human right to health to play a role as a space within which accountability for the injustices caused by climate change may be critically interrogated and, potentially, secured. The focus is upon accountability through judicial or quasi-judicial human rights mechanisms. Of course, various other modes of accountability exist in this context: Potts additionally enumerates administrative, political and social means through which answerability for acts and omissions in respect of the right to health may be realized,⁶ and these may well be germane to the climate change context. However, a concentration upon judicial/quasi-judicial forms may be justified on a number of bases.

First, while a human right carries hugely significant normative and political weight, and functions discursively as a particular means of ‘framing’ an issue within political and civil society,⁷ an argument for legal enforcement lies at the core of a rights claim. Indeed, it is, in part, the obstacles to legal enforcement which have led some to contend that human rights are inapplicable to health and/or health care.⁸ Following from this, and secondly, judicial (and to a somewhat lesser extent, quasi-judicial) mechanisms constitute interesting subjects of study *precisely because* accountability through such means is problematic. In this respect, the central objective of the subsequent analysis is to explore readings of accountability which might render judicial and non-judicial mechanisms more helpful in the context of the health impacts of climate change than has sometimes been supposed. Thirdly, and most specifically, the notion that legal modes form the primary means through which the human right to health can be articulated, and accountability for the health impacts of climate change thereby realized, appears to have currency with the Office of the High Commissioner for Human Rights (OHCHR) at the United Nations. The report upon the linkages between human rights and climate change which was issued by the OHCHR in 2009 forms the foundation of the critical analysis offered in this chapter.⁹ While its conclusions cannot be regarded as determinative of the

6 Helen Potts, *Accountability and the Right to the Highest Attainable Standard of Health* (Colchester: University of Essex Human Rights Centre, 2008), 17.

7 The value of ‘framing’ is explored at length in Karen O’Brien, Asunción Lera St Clair and Berit Kristoffersen, ‘The Framing of Climate Change: Why It Matters’, in Karen O’Brien, Asunción Lera St Clair and Berit Kristoffersen (eds), *Climate Change, Ethics and Human Security* (Cambridge: Cambridge University Press, 2010).

8 For discussion, see for example Brigit Toebes, ‘Towards an Improved Understanding of the International Human Right to Health’, *Human Rights Quarterly*, 1999, 21: 661; Imre Loefer, ‘“Health Care is a Human Right” Is a Meaningless and Devastating Manifesto’, *British Medical Journal*, 1999, 318: 1766; Philip Barlow, ‘Health Care Is Not a Human Right’, *British Medical Journal*, 1999, 319: 321; Theodore Dalrymple, ‘Is There a “Right” to Health Care?’, *Wall Street Journal*, 28 July 2009.

9 Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights (A/HRC/10/61) (15 January 2009).

position in international human rights law, they are nonetheless likely to prove highly influential – especially within the United Nations human rights system – as they amount to the first statement made by an international human rights body on the relationship between climate change and human rights.¹⁰

The subsequent discussion is structured as follows. First, the implications of climate change for population health are briefly outlined. The analysis then turns to consider the prospects for securing accountability for the consequences of climate change by means of invocation of the human right to health in judicial and quasi-judicial fora, with particular reference to the views expressed by the OHCHR on this matter. Next, an argument is advanced for an expanded conception of the meaning of accountability. It is contended that this may render human rights adjudication a more useful vehicle through which the health impacts of climate change, and the means selected to address them, may be articulated, debated and scrutinized. The final section of the chapter explores the manner in which the human right to health is best construed if concerns as to the suitability and scope of judicial and quasi-judicial activity at the climate change/health interface are – at least to some extent – to be allayed.

The human health impacts of climate change

The impacts of climate change on human health have usefully been classified as being either direct or indirect in character.¹¹ Direct effects include those which arise from thermal stress at either end of the temperature scale (heatwaves and winter cold), other extreme weather events (floods, storms, droughts) and increases in certain air pollutants and aeroallergens (spores and moulds). In certain countries, there may be beneficial aspects to these developments (e.g. milder winters in temperate countries may reduce mortality), but the expectation is that the impacts will be predominantly negative. Importantly, however, ‘the extent of change in the frequency, intensity and location of extreme weather events due to climate change remains uncertain’.¹²

Effects which manifest themselves in more indirect ways include those upon the transmission of infectious diseases, such as those borne in water (e.g. cholera), vector organisms (e.g. dengue fever and malaria) or food (e.g. salmonella), and on regional food productivity (particularly cereal grains, which account

10 See John Knox, ‘Linking Human Rights and Climate Change at the United Nations’, *Harvard Environmental Law Review*, 2009, 33: 477.

11 See A. McMichael, ‘Global Climate Change and Health: An Old Story Writ Large’, in A. McMichael, D. Campbell-Lendrum, C. Corvalán, K. Ebi, A. Githeko, J. Scheraga and A. Woodward (eds), *Climate Change and Human Health: Risks and Responses* (Geneva: World Health Organization, 2003), 11.

12 *Ibid.*

for some two-thirds of global food energy).¹³ In addition, climate change is likely to impact upon a range of social, economic and political structures, with deleterious consequences for human health. For example, decreases in food productivity or geographical distribution of fish stocks may trigger malnutrition, migration (often to already overcrowded urban areas) and conflict, leading in turn to increased pressure on health-care resources and other social services, and to mental health problems.

Given uncertainties in modelling, quantification of the precise extent of these impacts is problematic.¹⁴ Campbell-Lendrum et al. estimate that 5.5 million disability-adjusted life years were lost in 2000 as a consequence of climate change, a figure which is expected to increase progressively over time (in contrast to some other threats to health, such as tobacco use, which – while contributing more to the overall global burden of disease – are decreasing in incidence).¹⁵ There is, however, general agreement that the effects will exacerbate existing inequalities in health between developing and developed nations.¹⁶ For example, it has been estimated that poor African populations will suffer 500 times greater loss of healthy life years than their European counterparts as a consequence of global environmental change, including climate change.¹⁷ A number of factors explain such variation, including differing rates of incidence, existing underlying vulnerabilities (both health-related and social, economic and political) and adaptive capacity. As Smith has graphically stated, the consequence is that ‘the rich will find their world to be more expensive, inconvenient, uncomfortable, disrupted, and colourless – in general, more unpleasant and unpredictable, perhaps greatly so. The poor will die’.¹⁸

The (f)utility of human rights? The OHCHR report

In his report to the United Nations General Assembly of August 2007, the Special Rapporteur on the right of everyone to the enjoyment of the highest

13 Ibid.

14 See Anthony McMichael, Rosalie Woodruff and Simon Hales, ‘Climate Change and Human Health: Present and Future Risks’, *Lancet*, 2006, 367:859, 864.

15 D. Campbell-Lendrum, C. Corvalán and A. Prüss-Ustün, ‘How Much Disease Could Climate Change Cause?’, in McMichael, Campbell-Lendrum, Corvalán, Ebi, Githeko, Scheraga and Woodward (eds), *Climate Change and Human Health*.

16 See for example Costello, Abbas, Allen, Ball, Bell, Bellamy, et al., ‘Managing the Health Effects’; Friel, Marmot, McMichael, Kjellstrom and Vägerö, ‘Global Health Equity’; Patz, Gibbs, Foley, Rogers and Smith, ‘Climate Change and Global Health’; Report of the Office of the United Nations High Commissioner for Human Rights, 32–3.

17 A. McMichael, S. Friel, A. Nyong and C. Corvalán, ‘Global Environmental Change and Health: Impacts, Inequalities and the Health Sector’, 336 *British Medical Journal*, 2008, 336: 191.

18 Kirk Smith, ‘Introduction: Mitigating, Adapting and Suffering: How Much of Each?’, *Annual Review of Public Health*, 2008, 29: 11, 11.

attainable standard of physical and mental health, Paul Hunt, issued some brief observations on the relationship between climate change and health in the context of a discussion of water, sanitation and the human right to health. Referring to the 'disturbing trends' of increased frequencies of droughts and floods and the consequent impact upon vector-borne diseases, diseases arising from polluted water supplies, drowning and malnutrition arising from flooding, the Special Rapporteur claimed that 'the international community has not yet confronted the health threats posed by global warming. The failure of the international community to take the health impact of global warming seriously will endanger the lives of millions of people across the world'.¹⁹ Accordingly, he called upon the Human Rights Council to 'urgently study the impact of climate change on human rights generally and the right to the highest attainable standard of health in particular'.²⁰ In response, the Council passed a Resolution which expressed concern that climate change posed 'an immediate and far-reaching threat to people and communities around the world and [that it] has implications for the full enjoyment of human rights' and called upon the Office of the High Commissioner for Human Rights (OHCHR) to conduct a detailed analytical study of the relationship between climate change and human rights.²¹

The resulting report was published on 15 January 2009. The OHCHR observed that global warming, which it regarded as synonymous with climate change, might potentially carry implications for the full range of human rights,²² but it identified six which were likely to be most severely affected, including the right to health.²³ Describing the health impacts of climate change, the report observed that individuals and communities with low adaptive capacity – particularly those already suffering from poor health or malnutrition – were most vulnerable, and noted that 'comprehensive measures', including education, health care and public health initiatives, would be necessary to address such vulnerability.²⁴

The OHCHR reached the perhaps unsurprising conclusion that climate change 'has generally negative effects on the realisation of human rights',²⁵ including the right to health. More striking and contentious was its argument that 'it is less obvious whether, and to what extent, such effects can be qualified

19 Report of the United Nations Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (A/62/214) (8 August 2007), 102.

20 Ibid., 107.

21 United Nations Human Rights Council, Resolution 7/23, 'Human Rights and Climate Change' (28 March 2008).

22 Report of the Office of the United Nations High Commissioner for Human Rights, 20.

23 The other rights listed were the right to life, the right to adequate food, the right to water, the right to adequate housing and the right to self-determination.

24 Ibid., 33–34.

25 Ibid., 69.

as human rights violations in a strict legal sense',²⁶ and – still more bluntly – that 'the physical impacts of global warming cannot easily be classified as human rights violations'.²⁷ Despite this conclusion, the OHCHR was at considerable pains to indicate that 'legal protection remains relevant as a safeguard against climate-change-related risks and infringements of human rights resulting from policies and measures taken at the national level to address climate change'.²⁸ Its reasoning here appears to have rested upon the familiar tripartite typology of obligations which exist, *inter alia* under the International Covenant on Economic, Social and Cultural Rights, to respect, protect and fulfil human rights.²⁹ On the basis of this classification, it can be seen that the OHCHR was of the opinion that enforceability of the obligation to *respect* those human rights which might be affected by climate change could not be achieved through legal means ('it is doubtful . . . that an individual would be able to hold a particular State responsible for harm caused by climate change'),³⁰ but that some degree of accountability through judicial and quasi-judicial mechanisms could be achieved through enforcement of the obligation to *protect* against an individual's 'home' state ('in such cases, it would appear that the matter of the case would rest on whether the State through its acts or omissions had failed to protect an individual against a harm affecting the enjoyment of human rights').³¹

The OHCHR identified a number of obstacles to legal enforcement of the obligation to respect human rights in the climate change context.³² First, there is a problem of attribution of responsibility. Given that all countries have – albeit to varying extents – contributed to global warming through the emission of greenhouse gases, it is impossible to connect a particular impact upon human rights to the actions of a given state. Secondly, there are problems of causation. The direct cause (in so far as it occupies the same spatiotemporal field) of the impaired right may be a heatwave, flood or vector-borne disease, etc.; that

26 Ibid., 70.

27 Ibid., 96.

28 Ibid.

29 See Report of the Special Rapporteur on the right to adequate food of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, *The Right to Adequate Food as a Human Right* (E/CN.4/Sub.2/1987/23) (7 July 1987). The Committee on Economic, Social and Cultural Rights has endorsed this typology in the context of the right to health: see General Comment No.14, *The Right to the Highest Attainable Standard of Health* (E/C.12/2000/4) (11 August 2000), 33. For a discussion of the evolution of this typology, see Magdalena Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (Antwerp: Intersentia, 2003), 157–64.

30 Report of the Office of the United Nations High Commissioner for Human Rights, 72. Note also Knox's view that the conclusion reached by the OHCHR was influenced by political factors; that is, that assigning liability to powerful states (such as the US) for violations of human rights as a consequence of greenhouse gas emissions would render future negotiations towards a climate agreement considerably more awkward: 'Linking Human Rights and Climate Change', 489–90.

31 Ibid., 73.

32 Ibid., 70.

event *may* have been caused by climate change, but achieving the standard of legal proof of causality necessary to establish this is likely to be impracticable. Thirdly, the OHCHR refers to the problem of future harm, noting that the Human Rights Committee has indicated that, for an act or omission to be characterized as a violation of rights, it is necessary that the adverse impact should already have taken place or be imminent.³³ Demonstrating this will frequently prove problematic in the climate change context, as is the case with many other forms of environmental harm.

In addition to the impediments acknowledged by the OHCHR, other factors militate against securing accountability for the impacts of climate change upon health through imposition of a legal obligation to respect human rights. First, there is the difficulty that international law does not normally permit litigants to bring actions alleging that a state has interfered with the enjoyment of human rights beyond its own national boundaries. This precludes citizens of, for example, the United States from seeking legal redress for harms caused to (say) populations living in sub-Saharan Africa as a consequence of the former state's greenhouse gas emissions. This is problematic because those who are most likely to activate judicial and quasi-judicial mechanisms tend to reside in those countries which are least affected by climate change. Secondly, even if the subject-matter of a legal challenge is harm done within the aspiring litigant's own jurisdiction, there may well be problems of *locus standi*. That is, an individual (or, where the applicable legal framework permits this, a representative organization) may find it difficult to show that he/she is sufficiently and directly harmed by climate change to a degree greater than other residents of that state (as frameworks for the protection of human rights generally require), given that many of its effects – including those upon human health – tend to be geographically and temporally highly diffuse in character. Finally, there are familiar arguments relating to the non-justiciability of the right to health. These centre upon its lack of definitional clarity; the collective nature of at least some of the actions which may need to be taken to give it effect; the fact that it frequently gives rise to positive obligations on the part of states to expend resources; and the fact that, as a right which is subject to an obligation of progressive realization on the part of the state, it may be said to possess a 'programmatic' character. These last two arguments, in particular, speak to concerns as to possible violation of the separation of powers and the democratic legitimacy of judges which may be said to render questions of the right to health more suitable for enforcement and accountability through political mechanisms than legal.³⁴

33 See *Aalbersberg v The Netherlands*, No. 1440/2005.

34 For a critical analysis of these latter two objections to justiciability, see Roberto Gargarella, 'Dialogic Justice in the Enforcement of Social Rights: Some Initial Arguments,' in Alicia Yamin and Siri Gloppen (eds), *Litigating Health Rights* (Cambridge, MA: Harvard University Press, 2011), 232.

As the OHCHR suggests, certain of these obstacles can be overcome if one construes the legal obligation which is placed upon the state in the climate change context as being one of protecting individuals against threats arising from climate change which may interfere with the enjoyment of human rights. In particular, the problems of attribution and causation do not arise, because the claim which is made is not that the state bears responsibility for causing or contributing to climate change (i.e. that its emissions of greenhouse gases trigger events which impact upon human health), but rather that it has *failed to take steps to ensure that individuals are secure from the harm which climate change may bring about*. In such circumstances, also, there is no risk of impermissible transboundary litigation, since the legal action turns upon the measures which the state has taken (or, more frequently, failed to take) to address harms which may eventuate to those residing within its borders – albeit that, as noted above, this is likely to afford little protection to those populations who must suffer the worst consequences of climate change at a global level. Furthermore, the temporal reach of the litigation is likely to be reduced since a legal obligation upon the state will only arise in respect of those harms which are foreseeable.

However, the requirement to demonstrate the foreseeability of events which threaten to harm human rights may itself prove problematic. This is because (as previously discussed) there is uncertainty as to the *degree* to which climate change will increase the frequency of events such as heatwaves, floods or the incidence of infectious diseases, with the consequence that it is unclear how far the state's legal obligations to take adaptive measures to protect the right to health can be said to extend. When set alongside continued difficulties relating to *locus standi* (it being difficult for an individual to demonstrate that he/she is more adversely affected than the rest of the population by the state's failure to take steps to protect against the impacts of climate change) and ambivalence regarding justiciability, it becomes apparent that there remain limited prospects of securing accountability in judicial and/or quasi-judicial mechanisms for the health impacts of climate change through invocation of an obligation to protect the human right to health, notwithstanding the views of the OHCHR.

Towards a re-reading of 'accountability'

If the preceding analysis is accepted, a plausible response would be for those who would seek to secure accountability for the health impacts of climate change to abandon any attempt to utilize judicial and quasi-judicial human rights mechanisms for the purpose. It is submitted that this would be a regrettable course of action. Such mechanisms have value, particularly in so far as the authority which attaches to a statement of the legal position is likely

to be highly influential in shaping future debate (whether at state level, or in the international arena) about the consequences of climate change and the most appropriate means to address these. Furthermore, the existence of legal precedent, even in situations in which – as is the case with many international legal frameworks – there is an absence of effective sanction for violation, may serve to set parameters as to the actions which, at least as a matter of politics, are regarded as acceptable in this context. Thus, as Osofsky notes in a study of the value of climate litigation in both domestic (United States) and international law, ‘these cases help to bring attention to the regulatory options and debates, and push policymakers to address more nuances of the problem in the process’.³⁵

The argument which is advanced here is that it is not necessary to jettison this mode of accountability, even assuming that it may be possible to sever it from other mechanisms.³⁶ Rather, what is required is the adoption of a broader perspective as to the meaning and function of accountability than that which is taken in the OHCHR report discussed in the preceding section. This, in turn, can inform a more nuanced approach on the part of judicial and quasi-judicial institutions albeit that – as will subsequently be discussed – this may prove no easy task.

It was not inevitable that the OHCHR should have read the notion of accountability as being predominantly legal in character, focused upon the attribution of responsibility for violations of rights. This much is apparent from the work of Paul Hunt, which – as noted previously – was highly instrumental in prompting the United Nations to consider the relationship between climate change and human rights. In his first interim report to the General Assembly in 2004, the then Special Rapporteur sought to build awareness of the existence of a wider range of institutional mechanisms for the realization of accountability for the right to health, on the basis that ‘in relation to a human right as complex as the right to health, a range of accountability mechanisms is required and the form and mix of devices will vary from one State to another’.³⁷ However, of more significance for the present analysis, he also called for a broader understanding of the meaning of the concept, contending that ‘all too often, “accountability” is used to mean blame and punishment. But this narrow understanding of the term is much too limited. A right to health accountability

35 Hari Osofsky, ‘The Continuing Importance of Climate Change Litigation’, *Climate Law*, 2010, 1: 3, 29.

36 Potts, *Accountability*, 27 argues that ‘while it is principally the judicial accountability mechanism that provides the final platform for government accountability (for the right to health), this is a mechanism that rarely operates in isolation from other mechanisms. Frequently, recourse to judicial mechanisms arises from and feeds back into other accountability mechanisms’.

37 Report of the United Nations Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (A/59/422) (8 October 2004), 38.

mechanism establishes which health policies and institutions are working and which are not, and why, with the objective of improving the realization of the right to health for all'.³⁸ Elsewhere, reiterating his rejection of an approach rooted purely in the assignment of blame and attendant sanctions, Hunt has stated that accountability 'is a process that helps to identify what works, so it can be repeated, and what does not, so it can be revised. It is a way of checking that reasonable balances are fairly struck'.³⁹

On this approach, accountability is not profitably viewed as a one-off win or lose scenario in which the successful 'victor' assigns blame to the 'loser' for deficiencies in their performance (in this case, those which amount to violations of the right to health). Rather, it is a continuous,⁴⁰ educative process which contributes to the enhancement of institutional performance and future decision-making. As Diane Longley has argued in the context of the accountability of health services, legal mechanisms (such as courts) will play a role in such an exercise, in so far as there will be a need for some form of guidance and structuring to ensure that the objectives of the process are realized:

Accountability is an ongoing evaluative process which should provide a vehicle for improvement and change. Such a focus might preclude the provision of any easy answers, but it should frame the questions that could lead to a better understanding of contending issues. Accountability is thus fundamental to an organisation's learning. For this to become a possibility some external direction is required . . . The techniques and processes of law can assist in providing that external direction.⁴¹

In order for this form of accountability to exist, it is necessary for there to be 'open discussion of priorities and objectives before decisions reach a stage in which there is no real choice'.⁴² Longley therefore characterizes the components of accountability as follows:

The central prerequisite for genuine accountability is clearly openness, a transparency which needs to embrace all decision-making from policy-setting, through implementation to monitoring. A commitment to openness is of prime importance in order to counteract any tendency to control or distort information which might in turn prevent issues being the subject of proper debate and reduce capacity for reasoned choices to be made . . . The same commitment also implies an obligation on the part of decision-makers to give explanations and justifications for their activities.⁴³

38 Ibid., 37.

39 Paul Hunt and Gunilla Backman, 'Health Systems and the Right to the Highest Attainable Standard of Health', *Health and Human Rights*, 2008, 10: 81, 89.

40 See further Potts, *Accountability*, 13.

41 Diane Longley, *Public Law and Health Service Accountability* (Buckingham: Open University Press, 1993), 104–5.

42 Ibid., 104.

43 Ibid., 7–8.

When viewed from this angle, accountability takes on a quite different character from that envisaged in the OHCHR report. It entails the presentation of reasoned arguments, evidence and explanation for activities and decisions with a view not to the attribution of blame, but rather to the development of public understanding and social and institutional learning. The process therefore attains a deliberative or dialogic character which has been well captured by Schedler:

The norm of accountability continues the Enlightenment's project of subjecting power not only to the rule of law but also to the rule of reason. Power should be bound by legal constraints but also by the logic of public reasoning. Accountability is antithetical to monologic power. It establishes a dialogic relationship between accountable and accounting actors.⁴⁴

Rights adjudication and accountability

How might human rights adjudication fit within this expanded notion of accountability? Guidance in this regard may be found in contemporary analyses of judicial approaches to socioeconomic rights, including the right to access healthcare services, with a particular emphasis being given to those rights which are protected by the Constitution of South Africa.⁴⁵ It has been argued that cases such as *Government of the Republic of South Africa v Grootboom*⁴⁶ and *Minister of Health v Treatment Action Campaign (No. 2)*⁴⁷ illustrate a willingness on the part of the Constitutional Court of South Africa to adopt a *deliberative* or *dialogic* conceptualization of the function of rights litigation. In these cases, judicial evaluation of the lawfulness of state action against a standard of 'reasonableness' functions as a means of requiring 'that the State explain and justify to the court, and therefore to the litigants and the public more generally, the grounds of its decisions and the reasons for the selection of particular means'.⁴⁸ Although the court's judgment is determinative of the issue in front of it, it does not foreclose further deliberation within the political branches and civil society in general, that is 'the decision remains part of a process of continuing revisability, whether through Parliament, case law or public discourse'.⁴⁹ Indeed, the publicity attendant upon a judicial

44 Andreas Schedler, 'Conceptualising Accountability' in Andreas Schedler, Larry Diamond and Marc Plattner (eds), *The Self-Restraining State* (Boulder: Lynne Rienner, 1999), 15.

45 For discussion, see Sandra Fredman, *Human Rights Transformed* (Oxford: Oxford University Press, 2008); Keith Syrett, *Law, Legitimacy and the Rationing of Health Care* (Cambridge: Cambridge University Press, 2007), especially Chapter 8.

46 (2001) (1) SA 46.

47 (2002) (5) SA 721.

48 Fredman, *Human Rights*, 108.

49 *Ibid.*, 109.

pronouncement, especially one issued by a supreme or constitutional court, serves as a *catalyst* for further public dialogue on the issue which forms the subject-matter of the litigation. Understood in this manner,

Rights should not be regarded as simply overriding the will of the democratic majority or trumping policy considerations. Rights are not fixed immutable boundaries, but are standards of justification, the content and meaning of which alter with shifts in the social context . . . Rights cannot be considered brightline boundaries between the spheres of individual freedom and legitimate state power, but rather constitute a social practice and an occasion for deliberation on vital social issues.⁵⁰

While the constitutional entrenchment of socioeconomic rights (as exists in South Africa) undoubtedly serves to facilitate judicial adoption of this deliberative approach, the key to rereading the nature of accountability lies in the adoption of a conception, which runs as a thread through this jurisprudence, of ‘law as justification’.⁵¹ On this understanding, litigation functions as a means by which decision-makers are obliged to explain and rationalize their choices using arguments which can be accepted – or, at least, comprehended – by all. It therefore serves to build public understanding and to provide the foundation for a broad societal debate upon problems and their purported solutions. This function is not exclusively performed in instances where justiciable socioeconomic rights are in play. Rather, it is an inherent (albeit, not always clearly articulated) feature of the judicial role in all cases in which the exercise of state power is at issue. As Dyzenhaus argues, ‘what justifies all public power is the ability of its incumbents to offer adequate reasons for the decisions which affect those subject to them . . . The courts’ special role is as an ultimate enforcement mechanism for such justification’.⁵²

Interestingly, both the narrow and broader conceptions of accountability discussed here can be discerned at play in one well-known instance of climate change litigation. In 2005, the Inuit Circumpolar Conference lodged a petition at the Inter-American Commission on Human Rights in which it alleged that the acts and omissions of the government of the United States had contributed to climate change which, in turn had affected the enjoyment by the Inuit peoples of various human rights, including the right to health.⁵³ The quasi-judicial Commission, adopting an approach similar to that of the OHCHR discussed

50 Johan van der Walt and Henk Botha, ‘Democracy and Rights in South Africa: Beyond a Constitutional Culture of Justification’, *Constellations*, 2000, 7: 341, 343–4.

51 Ibid., 344 commenting on Etienne Mureinik, ‘A Bridge to Where? Introducing the Interim Bill of Rights’, *South African Journal of Human Rights*, 1994, 10: 31.

52 David Dyzenhaus, ‘The Politics of Deference: Judicial Review and Democracy’, in Michael Taggart (ed.), *The Province of Administrative Law* (Oxford: Hart, 1997), 305.

53 Petition to the Inter-American Commission on Human Rights seeking relief from global warming caused by acts and omissions of the United States, 7 December 2005, available at <http://inuitcircumpolar.com/files/uploads/icc-files/FINALPetitionICC.pdf>.

previously, declined to entertain the case on the basis that it had insufficient information to determine whether the alleged facts would tend to characterize a violation of the rights protected by the American Declaration on the Rights and Duties of Man, although a subsequent hearing on the linkages between climate change and human rights did take place. However, the petitioner construed the function of the litigation in a much more deliberative manner than did the Commission, viewing it as a means of catalysing a debate on an issue which, for reasons of US domestic politics, had not proved possible in other, political, arenas. This is clearly apparent from the statement made by the Chair of the Conference, Sheila Watt-Cloutier:

A declaration from the Commission may not [be] enforceable, but it has great moral value. We intend the petition to educate and encourage the United States to join the community of nations in a global effort to combat climate change . . . This petition is our means of inviting the United States to talk with us and to put this global issue into a broader human and human rights context. Our intent is to encourage and inform.⁵⁴

As Osofsky observes, the dialogic character of the petition, which informs Watt-Cloutier's remarks, should give us cause to reconsider the traditional 'win-lose' model of litigation,⁵⁵ which – it is argued – underpins the OHCHR's conclusions as to the prospects of securing accountability for the impacts of climate change via human rights adjudication. On this broader, more deliberative reading of accountability, judicial and quasi-judicial mechanisms function to some extent independently of the outcome of the litigation. That is, they represent valuable means of catalysing a debate on climate change issues within civil society and the political branches of government (both domestically and internationally), even if the affected parties fail to demonstrate a violation in law of the obligation either to respect or protect human rights, such as the right to health.

Proceduralization of the right to health?

The preceding discussion has sought to outline the manner in which accountability might be reconceptualized in order that rights adjudication through judicial and quasi-judicial mechanisms might make a useful contribution to a wider process of democratic debate as to the nature of the

54 Sheila Watt-Cloutier, *Presentation to Eleventh Conference of Parties to the UN Framework Convention on Climate Change*, 7 December 2005, available at www.inuitcircumpolar.com/index.php?ID=318&Lang=En.

55 Hari Osofsky, 'The Inuit Petition as a Bridge? Beyond Dialectics of Climate Change and Indigenous Peoples' Rights', *American Indian Law Review*, 2007, 31: 675, 696.

impacts of climate change (including those on human health) and how best these should be managed. However, although it is suggested that realization of the broader form of accountability should be viewed as intrinsic to the judicial/quasi-judicial function when called upon to regulate exercises of state power, it does not follow that adoption of such a reading will necessarily prove to be a straightforward task.

The difficulty lies in the fact that judges and others who bear responsibility for operation of these institutions may themselves be rooted in the narrower conception, in which litigation amounts to a zero-sum game and accountability connotes blame and the attendant visitation of sanctions. The influential Dworkinian account of rights as ‘trumps’,⁵⁶ overriding other types of reasons for decisions, actions, policies or omissions which are advanced by the state, tends to reinforce this more limited perspective on the nature of legal accountability. And while the South African example demonstrates that such an understanding, while dominant, is not inevitable, the particular character of constitutional rights jurisprudence in that state, which connects closely to its recent history,⁵⁷ needs to be recognized. That is, the prospect of transplantation to other legal orders, whether domestic, regional or international, must be read in light of the socio-political context of the system within which this approach to accountability has evolved.⁵⁸

With regard to the subject-matter of this chapter, this problem is exacerbated by continuing ambivalence as to the justiciability of the right to health for the reasons previously identified. Persuasive arguments have been advanced within the academic literature ‘that judicial intervention in cases involving health rights in particular and social rights in general can be perfectly justifiable’.⁵⁹ Nonetheless, the inherent conservatism of the judiciary, especially that which operates within domestic legal systems with no tradition of entrenchment of socioeconomic rights, is likely to limit willingness to articulate the broader vision of accountability for the health impacts of climate change which is argued for here.

For these reasons, courts and cognate institutions may remain reluctant to entertain cases in which individuals or groups seek to argue that rights to

56 See for example Ronald Dworkin, ‘Rights as Trumps’, in Jeremy Waldron (ed.), *Theories of Rights* (Oxford: Oxford University Press, 2004).

57 Mureinik, ‘A Bridge to Where?’, 32 argues that the shift to a ‘culture of justification’ reflected a desire to build a political order based upon persuasion rather than the coercion which had characterized the apartheid regime.

58 Although note that the deliberative or dialogic reading of rights adjudication has not solely been identified as operating within the South African context; for example, Fredman refers extensively to the jurisprudence of the Indian Supreme Court: *Human Rights*, Chapter 5. See also Varun Gauri and Daniel Brinks (eds), *Courting Social Justice* (Cambridge: Cambridge University Press, 2008), analysing rights litigation in Brazil, Indonesia and Nigeria, in addition to South Africa and India.

59 Gargarella, ‘Dialogic Justice’, 243. See also Yamin and Gloppen (eds), *Litigating Health Rights*, generally; Syrett, *Law, Legitimacy*, especially Chapter 9.

health have been violated as a consequence of climate change. If this is so, then a possible way forward may be for judicial and quasi-judicial bodies to focus attention upon the *procedural* dimensions of the right to health, rather than being drawn into evaluation of whether the *substance* of the right has been violated or not. Such an approach would limit the scope of judicial encroachment on the territory of the political branches of government (since there would be no question of prescribing a particular substantive outcome and consequent allocation of resources). Yet it would still afford an opportunity for affected individuals and groups to articulate the health impacts of climate change in a public forum, with a view to contributing to a process of social learning about those impacts and catalysing a public debate about how they might best be addressed.

A model for this type of procedural reading has evolved in recent years in the wider context of adjudication, especially by regional human rights institutions in Europe, of rights which are impacted by various forms of environmental harm and degradation. Of particular importance here has been the influence of the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (1998) which, as its title indicates, obliges state parties to guarantee certain procedural rights to the public in respect of environmental matters, including those which impact upon health and wellbeing. The Convention has informed the jurisprudence of the European Court of Human Rights on Article 2 (the right to life) and Article 8 (the right to respect for private life, family, home and correspondence) of the European Convention on Human Rights. The Court has ruled that failure of a state to provide information on the severity of an environmental threat,⁶⁰ or to provide opportunity for participation in a fair decision-making process on the issuing of authorization for activities which gave rise to environmental damage,⁶¹ constitute grounds for determination of cases in favour of applicants. Similarly, the quasi-judicial European Committee of Social Rights has concluded that the right to health (protected by Article 11 of the European Social Charter) entails provision of information, processes of consultation and education policies designed to involve local communities in environmental impact assessment and health policy debate regarding a particular industrial activity which had caused harm to the environment (in this case, lignite mining).⁶²

Although this line of jurisprudence does not specifically address the health impacts of climate change, there seems no reason why it could not, in principle, apply in that context. Of course, there remain certain limitations. In particular, the cases noted above are focused upon provision of information and

60 *Öneryildiz v Turkey*, 2004-XII 41 Eur. Ct. H.R. 20.

61 *Taskin v Turkey*, 2004-X 42 Eur. Ct. H.R. 50.

62 *Marangopoulos Foundation for Human Rights v Greece*, No.30/2005, 37, 103.

opportunities for participation in decision-making to those who are themselves directly affected by the harm. By contrast, in the case of the health consequences of climate change, the state in which the deficiencies in democratic procedure arise will, most probably, be one in which those impacts are minimal. Although the Aarhus Convention is applicable ‘without discrimination as to citizenship, nationality or domicile’,⁶³ populations in countries affected by climate change may lack the resources necessary to pursue human rights litigation, while those in defaulting nations may lack the necessary motivation or may face difficulties of *locus standi*, given the absence of impact upon *their* interests.

Conclusion

In light of these continuing hurdles, the modest assessment advanced by Paul Hunt (in a wider context), that ‘courts [and quasi-judicial mechanisms] are not a panacea . . . Nonetheless as one form of accountability, [they] have a significant role to play in the promotion and protection of health-related rights’,⁶⁴ would seem to be highly apposite to the climate change case.

The argument advanced here is that, in order to fulfil their potential to play such a role, courts and quasi-judicial mechanisms need to adopt a conception of accountability which moves beyond simple attribution of blame and which instead situates rights adjudication within a broader democratic, deliberative arena. This can enable litigation to act as an impetus for social and institutional learning about, and as a catalyst for public debate upon, the health impacts of climate change and the most appropriate means to address these. The most fruitful avenue by which this objective might be achieved would appear to be *via* articulation of procedural rights at the climate change/health interface, since this is likely to minimize judicial concerns as to intrusion on the territory of the political branches of government. Instead, the latter are left free to respond to the effects of climate change upon population health in whatever manner they see fit, provided that they have respected certain democratic procedural obligations when adopting the measures which they consider suitable.

Alan Boyle has contended that:

As the internationalization of the domestic environment becomes more extensive, through policies of sustainable development, protection of biodiversity, and mitigation of climate change, the role of human rights law in democratizing national decision-making processes and making them more rational, open and legitimate will become more and not less significant.⁶⁵

63 Article 3(9).

64 Report of the United Nations Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (A/HRC/4/28) (17 January 2007), 88.

The analysis presented in this chapter would tend to support such a view. If the global good of population health is to be upheld, as far as possible, in the face of the significant challenges presented by climate change, it may well be necessary to exert pressure upon recalcitrant states through means other than ‘traditional’ politics. Rights adjudication, if approached in the manner outlined here, presents an opportunity to circumvent political channels which may be blocked by unsympathetic governments.⁶⁶ It is not a substitute for inclusive and informed debate and decision-making, but it nonetheless possesses the capacity to function as a valuable input into, and stimulus for, such democratic activities.

65 Alan Boyle, ‘Human Rights or Environmental Rights: A Reassessment’, *Fordham Environmental Law Review*, 2007, 18: 471, 510.

66 For a discussion of this, and other forms of ‘blockage’, see Varun Gauri and Daniel Brinks, ‘Introduction: The Elements of Legalization and the Triangular Shape of Social and Economic Rights’, in Gauri and Brinks (eds), *Courting Social Justice*, especially 26–7.