

Climate Change Litigation, Liability and Global Climate Governance – Can Judicial Policy-making Become a Game-changer?

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Abstract

Climate change litigation, which is often perceived as an attempt to fill the regulatory gap left by the traditional decision-making legislative and executive branches, has grown intensively in recent years, becoming an important feature of climate governance in the US and a growing trend in some other jurisdictions. However, climate cases often involve a range of complex legal and non-legal issues, such as separation of powers, scientific uncertainty, causation and liability. How effective is the judiciary in climate policy-making and what impact will it have on global climate governance? The paper attempts to answer this question by discussing the role of the judiciary in contemporary climate governance and the specifics of regulatory approaches adopted by courts in dealing with climate cases.

1. Introduction

Climate change is commonly considered a global problem, which taken at its worst, could significantly and irreversibly change the life on the planet, bringing down many ecosystems and human communities alike.¹ As the awareness of the human impact on the climate grew over the last few decades, the international community agreed to tackle this problem by gradually curbing the global greenhouse gas (GHG) emissions.² However, it soon proved to be a much more difficult task than anticipated, as the global climate governance was undermined by squabbling over the reduction commitments and their implementation, fueled by immediate economic trade-offs.³

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1 See, in general, IPCC, 2014: Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change [Core Writing Team, R.K. Pachauri and L.A. Meyer (eds.)]. IPCC, Geneva, Switzerland, 151 pp.

2 See United Nations Framework Convention on Climate Change. New York, 9 May 1992; in force 21 March 1994.

3 Lazarus, Richard J. "Super wicked problems and climate change: Restraining the present to liberate the future" *Cornell Law Review* 94 (2009): 1153-1233.

Despite the fact that there may be certain difficulties in defining climate change litigation,⁴ the latter is widely considered to be an attempt to fill the regulatory gap in the existing climate regime.⁵ The first cases explicitly concerning the emissions of GHG and their impact on climate date back to the early 1990s; however, it took more than a decade for climate lawsuits to experience a dramatic increase in popularity, coinciding with the history-making 2007 decision of the US Supreme Court in case *Massachusetts v. Environmental Protection Agency* (EPA).⁶ And although the US remains the main arena for climate change litigation, similar cases have already made their way into other jurisdictions, most notably pertaining to the common law legal system.⁷

2. Climate Change Litigation: A Growing Trend

Over the years, the body of climate change litigation has been subject to significant transformation and evolution – not only in terms of size, as the number of lawsuits has grown exponentially – but with regard to regulatory pathways that the litigants pursued. So far, the existing legal scholarship has distinguished several climate change lawsuits' typologies based on the type of action, focus of the claim, regulatory effect, etc.⁸ Some types of lawsuits – for example, challenges to agency permits and rules – have been traditionally used to a much broader extent and with more success than others – for example, common law claims based on public nuisance or public trust doctrine.⁹ Furthermore, certain types of lawsuits, including the above-mentioned claims under public trust doctrine, are only making their way onto the judicial stage.¹⁰ In addition, the difference between legal as well as political systems dictates the specifics of lawsuits and their potential for impacting the existing national policy.¹¹

Whatever the typologies of climate change litigation may be and however such cases may affect different jurisdictions, the fact remains that courts are bound to face a growing number of lawsuits, as the consequences of climate change become more palpable and the

4 See, for example, Markell, David, and J. B. Ruhl. "An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual?" *Florida Law Review* 64 (2012): 15-86; Peel, Jacqueline, and Hari M. Osofsky. "Climate Change Litigation's Regulatory Pathways: A Comparative Analysis of the United States and Australia" *Law & Policy* 35.3 (2013): 150-183.

5 Preston, Brian J. "Climate Change Litigation (Part 1)" *Carbon & Climate Law Review* (2011): 3-14; Lin, Jolene. "Climate change and the courts" *Legal Studies* 32.1 (2012): 35-57; Gerrard, Michael B., and Joseph A. MacDougald. "An Introduction to Climate Change Liability Litigation and a View to the Future" *Connecticut Insurance Law Journal* 20 (2013): 153-164. Peel and Osofsky, supra note 4; van Asselt, Harro, Michael Mehling, and Clarisse Kehler Siebert. "The changing architecture of international climate change law" in *Research handbook on climate change mitigation law*, edited by Geert Van Calster, Wim Vandenberghe and Leonie Reins. Cheltenham, UK: Edward Elgar Publishing (2015): 1-30.

6 Peel, Jacqueline, and Hari M. Osofsky. *Climate Change Litigation: Regulatory Pathways to Cleaner Energy*. Cambridge University Press, 2015, p. 19; Wilensky, Meredith. "Climate Change in the Courts: An Assessment of Non-US Climate Litigation" *Duke Environmental Law & Policy Forum* 26 (2015): 131-179.

7 See Wilensky, supra note 6.

8 See supra notes 4-6.

9 Markell and Ruhl, supra note 4.

10 Peel and Osofsky, supra note 4.

11 Ibid.

awareness of climate change-induced risks increases. Accordingly, certain types of lawsuits – for example on adaptation – will most likely become more common¹² and take their place alongside the established categories of cases. Furthermore, with the persisting practice of states’ “lagging” in mitigation efforts, a number of climate lawsuits are likely to directly target state policy with regard to GHG emissions reduction and invoke state liability in the absence of concrete steps to adhere to the reduction commitments. Some of these cases have already made their way into courtrooms in the US and beyond;¹³ however, both procedural and substantive hurdles loom over them, as many relevant issues, including the causation and justiciability, may come under fierce debate when dealing with such cases.¹⁴

3. Climate Governance: The Role of the Judiciary

Like other spheres of public governance, the governance of climate change has been traditionally within the realm of legislative and executive branches. The global climate governance, including UNFCCC and the subsequent action under its platform, is the result of intergovernmental cooperation; similarly, national climate policies are the result of political dialogue within the national jurisdiction of single states. Understandably, the global climate governance was, and remains, strongly influenced by national policies of different states¹⁵ – particularly major contributors of global GHG emissions like the US, China, India, etc. – usually driven not by scientific, but political approach to the issue of climate change.¹⁶

As the power of the judiciary is commonly limited to judicial review under existing legislation, the role of courts in national climate governance is naturally restricted, and the dominating types of lawsuits usually revolve around the interpretation and compliance with the existing statutes on air quality and environmental impact assessment.¹⁷ This type of litigation has indeed a rich history. For example, in the US it includes a wide range of cases, brought under the Clean Air Act (CAA) and the National Environmental Policy Act

12 See Peel, Jacqueline, and Hari M. Osofsky. "Sue To Adapt?" *Minnesota Law Review* 99.6 (2015): 2177-2250.

13 See, for example, *Friends of the Earth v. Canada*, FC 1183 (2008) (Federal Court, Canada); *Kanuk v. Alaska*, S-141776 (2014) (Supreme Court of Alaska, US); *Urgenda Foundation v. The State of the Netherlands*, C/09/456689 / HA ZA 13-1396 (2015) (Hague District Court, the Netherlands) (available in English at <http://www.urgenda.nl/documents/VerdictDistrictCourt-UrgendavStaat-24.06.2015.pdf>); *Ashgar Leghari v. Federation of Pakistan*, W.P. No. 25501/2015 (2015) (Lahore High Court, Pakistan); *Juliana v. United States*, 6:15-cv-01517 (2016) (District Court for the District of Oregon, US).

14 See Bergkamp, Lucas, and Jaap C. Hanekamp. "Climate Change Litigation against States: The Perils of Court-made Climate Policies" *European Energy and Environmental Law Review* 24.5 (2015): 102-114.

15 Moncel, Remi, and Harro van Asselt. "All hands on deck! Mobilizing climate change action beyond the UNFCCC" *Review of European Community & International Environmental Law* 21.3 (2012): 163-176.

16 See, for example: Peel, Jacqueline, Lee Godden, and Rodney J. Keenan. "Climate change law in an era of multi-level governance" *Transnational Environmental Law* 1.2 (2012): 245-280; Belis, David, et al. "China, the United States and the European Union: Multiple Bilateralism and Prospects for a New Climate Change Diplomacy" *Carbon & Climate Law Review* 9.3 (2015): 203-218; Wirth, David A. "The International and Domestic Law of Climate Change: A Binding International Agreement Without the Senate or Congress?" *Harvard Environmental Law Review* 39.2 (2015): 515-566.

17 Markell and Ruhl, supra note 4.

(NEPA).¹⁸ Apart from cases heard before lower courts, the former came into focus in all three climate cases to reach the US Supreme Court – *Massachusetts v. EPA*,¹⁹ where the litigants managed to persuade the Court that the CAA authorized EPA to regulate tailpipe GHG emissions from new motor vehicles, *American Electric Power v. Connecticut*,²⁰ establishing that the CAA and EPA's action under it displaced federal common law public nuisance claims and *Utility Air Regulatory Group v. EPA*,²¹ holding that the same CAA did not authorize EPA to require specific permitting for stationary sources based on their GHG emissions. For its part, NEPA was the platform under which the first climate change lawsuits were brought in the US in the early 1990s and many subsequent lawsuits in the years following.²² Similarly, litigation under national environmental impact assessment legislation has been much prolific outside the US, particularly in those jurisdictions with established climate change litigation traditions.²³

In general, however, the above-mentioned litigation – both US and non-US – did not require the courts to rule on the policy itself, but rather on the related administrative procedures and competences.²⁴ In other words, for the most part climate change litigation focused on “courts deciding whether and how administrative agencies must take climate change into account in decision-making under existing statutes.”²⁵ Even so, the justiciability of such lawsuits, never mind claims directly aiming at national climate change mitigation efforts or climate-affected human rights,²⁶ has been a subject of debate within the courts themselves. Thus, in the US it has been a common practice to invoke the principle of separation of powers,²⁷ by stating, for example, that climate-related policy should be dealt with by the legislature and executive, which are far better equipped to handle it.²⁸ Nonetheless, as it may be observed from both the US and non-US litigation, the separation of powers issue does not present an insuperable challenge; moreover, courts in some jurisdictions, for example Australia, are much more lenient with regard to it, which substantially facilitate the hearing of cases on their merits.²⁹

Overall, it has to be acknowledged that the role of the judiciary in the shaping of climate governance is still in the process of development. Though it is true that courts face and will continue to face a growing number of climate cases, so far there have only been a few of them, which could be accounted as successful, while the vast majority of lawsuits are

18 Ibid.

19 *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497 (2007).

20 *American Electric Power v. Connecticut*, 131 S. Ct. 2527 (2011).

21 *Utility Air Regulatory Group v. Environmental Protection Agency*, 134 S. Ct. 2427 (2014).

22 Markell and Ruhl, supra note 4.

23 Wilensky, supra note 6.

24 See, for example, Markell and Ruhl, supra note 4; Bogojević, Sanja. "EU Climate Change Litigation, the Role of the European Courts, and the Importance of Legal Culture" *Law & Policy* 35.3 (2013): 184-207; Wilensky, supra note 6.

25 Markell and Ruhl, supra note 4.

26 Supra note 13.

27 The separation of powers emerged in all three Supreme Court cases mentioned above and in many other climate cases before lower courts, for example *Native Village of Kivalina v. ExxonMobil Corporation*, C 08-1138 SBA (2009) (District Court for the Northern District of California); *Comer v. Murphy Oil USA*, 12-60291 (2013) (United States Court of Appeals for the Fifth Circuit), etc.

28 *AEP v. Connecticut*.

29 Peel and Osofsky, supra note 6, 270-278.

dismissed on procedural or substantive grounds. At the same time, it is also true that even in case of success, the litigation may not necessarily have an actual impact on the policy, particularly if a successful case is just an isolated episode.³⁰ On the other hand, a successful case in a highly litigious environment, such as *Massachusetts v. EPA* in the US, has a much higher potential to become a factor shaping the national climate policy in the respective jurisdiction. Furthermore, the very fact that courts have been willing to accept the science of climate change and stress its importance in considering the routine activities and projects of governing bodies and companies, shows a growing potential of such cases.³¹

The question therefore remains whether successful court decisions could affect global climate governance as well. In a sense, any climate change case has some potential to affect *global climate* itself, since the latter is driven by GHG emissions universally, thus any action/inaction with regard to the levels of emissions in one state actually impacts the global situation.³² This, however, does not necessarily presume that *global governance* would be affected by the decisions of national courts. Nevertheless, a successful legal precedent in one jurisdiction might become an impetus for climate action – and ultimately, litigation – elsewhere, which could then lead to a certain trend, influencing the global dialogue on climate.³³ Furthermore, some legal scholars have been keen on emphasizing the indirect effect the judiciary has on climate policy as a whole – by drawing additional public and governmental attention to the problem of climate change and facilitating public participation in climate governance not only in their respective states, but also at the international level.³⁴

4. Liability for Climate Change

The science-related problem of whether any entity could be held liable for climate change has been a vital issue in many climate cases. One of the main reasons for that, is that it has often affected standing, which has traditionally been one of the major obstacles in the way of claimants.³⁵ Thus, for example, in the US climate change litigation the federal courts assess standing in accordance with Article III of the US Constitution by requiring a

30 Wilensky, supra note 6. See, for example, *Gbemre v. Shell Petroleum* (2005) (Federal Court of Nigeria).

31 Peel and Osofsky, supra note 6, 286-287; Wilensky, supra note 6. For litigation see for example, *Gray v. Minister for Planning*, 152 LGERA 258 (2006) (Land and Environment Court of New South Wales, Australia); *Massachusetts v. Environmental Protection Agency*; *Utility Air Regulatory Group v. Environmental Protection Agency*.

32 This position is in fact highlighted by courts themselves – see, for example, *Massachusetts v. EPA*, *Urgenda Foundation v. The State of the Netherlands*.

33 See, for example, van Zeven, Josephine. "Establishing a Governmental Duty of Care for Climate Change Mitigation: Will Urgenda Turn the Tide?" *Transnational Environmental Law* 4.2 (2015): 339-357; Cox, Roger. "A climate change litigation precedent: Urgenda Foundation v The State of the Netherlands" *Journal of Energy & Natural Resources Law* 34.2 (2016): 1-20.

34 Peel and Osofsky, supra note 4, Lin, supra note 5. Thus, for example, the very few attempts to bring forward any climate-related concerns into the international forums – for example the Inuit petition to Inter-American Commission on Human Rights – so far have sought merely an attraction of international attention to the problems posed by climate change, rather than actual problem-solving.

35 The constraints related to standing, however, may also be attributable to the separation of powers. See Peel and Osofsky, supra note 6, 270-271.

plaintiff to show “(1) injury in fact; (2) causation; and (3) likelihood that the injury will be redressed by a favorable decision.”³⁶ It is true that courts accept the fact that states enjoy relaxed standing, as in *Massachusetts v. EPA*, where their sovereign regulatory interests were injured due to the lack of regulatory power; the situation though is different for private claimants, including NGOs, suing the industry, or states and federal government.³⁷ Since the US Supreme Court has been reluctant to resolve the issue of private person standing in climate cases, lower courts have often been split over it.³⁸

As a result, in order to have standing, the private claimants in US climate cases first of all have to undergo the pains of proving that they have suffered personal injury from industry or state action/inaction with regard to greenhouse gas emissions and the resulting climate change.³⁹ However, in a number of cases the plaintiffs have been denied standing, because the courts considered the alleged harm to their interests was too generalized or even not identifiable at all to establish standing.⁴⁰ Such difficulties have been most obvious in cases, where claimants referred to complex and widespread injuries, allegedly attributed to climate change.⁴¹ In contrast, courts – whether federal or state – have been more willing to accept that the claimants suffered an injury when the claim specified the personal harm brought by climate change to a concrete claimant.⁴² In some of these cases, for example, the courts held that denying standing would actually bar judicial redress for the most widespread and dangerous injuries, solely because they might affect a large number of people.⁴³

Another related and particularly notorious universal challenge to liability and, accordingly, plaintiffs' standing, is the necessity to prove that a concrete injury has actually been *caused* by industry's or state's action/inaction with regard to greenhouse gas emissions and the

36 The three-element “irreducible constitutional minimum of standing”, established by the US Supreme Court in case *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). See, for example, *Native Village of Kivalina v. ExxonMobil Corporation, Amigos Bravos v. U.S. Bureau of Land Management*, 6:09-cv-00037-RB-LFG (2011) (United States District Court for the District of New Mexico); *Washington Environmental Council v. Bellon*, 12-35323 (2013) (United States Court Of Appeals for the Ninth Circuit); *Communities for a Better Environment v. Environmental Protection Agency*, 11-1423 (2014) (United States Court of Appeals for the District of Columbia Circuit).

37 Bradford, Gregory. “Simplifying State Standing: The Role of Sovereign Interests in Future Climate Litigation” *Boston College Law Review* 52 (2011): 1065-1103.

38 Peel and Osofsky, supra note 6, 77.

39 See, for example, *Amigos Bravos v. U.S. Bureau of Land Management; Californians for Renewable Energy v. Department of Energy*, 11-2128(JEB) (2012) (United States District Court for the District of Columbia); *WildEarth Guardians v. Jewell*, 12-5300 (2013) (United States Court of Appeals for the District of Columbia Circuit); *Washington Environmental Council v. Bellon*.

40 See, for example, *Californians for Renewable Energy v. Department of Energy; Conservation Law Foundation v. U.S. Environmental Protection Agency*, 10-11455-MLW (2013) (United States District Court for the District of Massachusetts).

41 Bradford, supra note 37. See, for example, *Amigos Bravos v. U.S. Bureau of Land Management*.

42 See, for example, *WildEarth Guardians v. Jewell; Washington Environmental Council v. Bellon; High Country Conservation Advocates v. United States Forest Service*, 13-cv-01723-RBJ (2014) (United States District Court for the District of Colorado); *WildEarth Guardians v. Bureau of Land Management*, 1:11-cv-01481-RJL (2014) (United States District Court for the District of Columbia); *Kanuk v. Alaska; Southern Utah Wilderness Alliance v. United States Department of the Interior*, No. 13-cv-01060 (2015) (United States District Court for the District of Utah); *Juliana v. United States*.

43 *Kanuk v. Alaska; Juliana v. United States*.

resulting climate change.⁴⁴ In practical terms, this signifies that plaintiffs must effectively rely on scientific evidence; however, as there is still a degree of uncertainty in the science of climate change, a tangible causal chain between the defendant's action/inaction, global problem of climate change as it is and the concrete harm to the plaintiff may be quite obscure.⁴⁵

Besides, despite the seemingly universal consensus that human activity is impacting the climate, it has been a common practice to deny any individual responsibility for it. Thus, industries and in some cases, states or agencies, claimed that their contribution was too negligible to affect the climate or, alternatively, that it was but a fraction of the global problem, hence it would be unjustified to impose on them liability for climate change, majorly caused by the GHG emissions of others.⁴⁶ In some cases the courts have been persuaded by such an argument;⁴⁷ in others, however, it has been ruled that the fact that many parties contribute to climate change should not presume the absence of individual contribution, hence, responsibility, since the global situation is affected by each and everyone's action/inaction with regard to this common problem.⁴⁸

In conclusion, as may be perceived, although the above-mentioned hurdles have not been specific to US climate change litigation only and plaintiffs in other jurisdictions are often challenged in likewise manner, some courts have already ruled positive on the issue of climate responsibility, including such obligations imposed on a national government.⁴⁹ This means that proving causation should not be deemed impossible in any future litigation as well.

5. Concluding Remarks

Some concerns are expressed that the developing climate change litigation trend may not be an overall positive to the way climate governance functions and may even cause backlash.⁵⁰ Indeed the industry has already fired back with anti-regulatory lawsuits⁵¹ in response to the pro-regulatory claims, brought by private persons, environmental groups and in some cases even public authorities. At the same time, it must be made clear that the obstinate denial of responsibility and clinging to the short-term economic benefit by states and the industry will only continue to fuel litigious activism, particularly in the light of a

44 Faure, Michael G., and Andre Nollkaemper. "International liability as an instrument to prevent and compensate for climate change" *Stanford Environmental Law Journal* 26.1 (2007): 123-179.

45 See *Native Village of Kivalina; Amigos Bravos v. U.S. Bureau of Land Management; Washington Environmental Council v. Bellon; Communities for a Better Environment v. Environmental Protection Agency*.

46 See, for example, *Massachusetts v. Environmental Protection Agency; Urgenda Foundation v. The State of the Netherlands*.

47 See, for example, *Amigos Bravos v. U.S. Bureau of Land Management; Hapner v. Tidwell*, 09-35896 (2010) (United States Court of Appeals for the Ninth Circuit).

48 *Massachusetts v. EPA; Urgenda Foundation v. The State of the Netherlands*.

49 *Urgenda Foundation v. The State of the Netherlands*.

50 Bergkamp and Hanekamp, supra note 14.

51 Peel and Osofsky, supra note 6, 283-308.

few successful precedents in various jurisdictions. With that in mind, the role of courts in climate governance could be considered vital as the judiciary may be by far the most authoritative instance for public participation when the legislature and executive fail to secure the adequate policy.