

SYMPOSIUM FOREWORD

Symposium on ‘Climate Change Litigation: Trends, Policy Implications and the Way Forward’ held at the INTRALaw Research Center, Department of Law, Aarhus University, Aarhus (Denmark), 14–15 June 2018

Climate Change Litigation: Trends, Policy Implications and the Way Forward

Katerina Mitkidis*  and Theodora N. Valkanou**

Climate change has evolved from being a controversial issue to a widely recognized global threat over time. The inclusion of climate action as one of the 17 United Nations (UN) Sustainable Development Goals,¹ the conclusion of the 2015 Paris Agreement,² and the publication in 2018 of the Intergovernmental Panel on Climate Change (IPCC) Special Report on Global Warming of 1.5°C³ have forged an agreement among the international community on the causes and risks of climate change. At the national level, a surge of laws codifying national and international responses to climate change has given rise to a growing number of lawsuits around the world on climate change-related matters.⁴ The topic of climate litigation has attracted the attention of scholars from across social sciences fields, including most prominently the legal discipline and political science.⁵ Legal scholarship on climate litigation covers a broad scope

* INTRALaw Center, Department of Law, Aarhus University (Denmark).
Email: katpe@law.au.dk.

** Centre for International Law, Conflict and Crisis, Faculty of Law, University of Copenhagen (Denmark).
Email: theodora.valkanou@jur.ku.dk.

¹ UN General Assembly, ‘Transforming Our World: The 2030 Agenda for Sustainable Development’ (25 Sept. 2015), UN Doc. A/RES/70/1, available at: https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_70_1_E.pdf.

² Paris (France), 12 Dec. 2015, in force 4 Nov. 2016, available at: https://unfccc.int/sites/default/files/english_paris_agreement.pdf.

³ IPCC, *Global Warming of 1.5°C: An IPCC Special Report on the Impacts of Global Warming of 1.5°C above Pre-industrial Levels and Related Global Greenhouse Gas Emission Pathways, in the Context of Strengthening the Global Response to the Threat of Climate Change, Sustainable Development, and Efforts to Eradicate Poverty*, Oct. 2018, available at: <https://www.ipcc.ch/sr15>.

⁴ UN Environment Programme (UNEP) & Sabin Center for Climate Change Law, Columbia University, *The Status of Climate Change Litigation: A Global Review* (UNEP, 2017), available at: <https://wedocs.unep.org/handle/20.500.11822/20767>; M. Nachmany & J. Setzer, ‘Global Trends in Climate Change Legislation and Litigation: 2018 Snapshot’, LSE Policy Brief, 30 Apr. 2018, p. 2, available at: <http://www.lse.ac.uk/GranthamInstitute/publication/global-trends-in-climate-change-legislation-and-litigation-2018-snapshot>; J. Setzer & R. Byrnes, ‘Global Trends in Climate Change Litigation: 2019 Snapshot’, Policy Report, Grantham Research Institute, 4 July 2019, available at: <http://www.lse.ac.uk/GranthamInstitute/publication/global-trends-in-climate-change-litigation-2019-snapshot>.

⁵ J. Setzer & L.C. Vanhala, ‘Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance’ (2019) 10(3) *Wiley Interdisciplinary Reviews: Climate Change* e580 (mapping the social science scholarship on climate change litigation between 2000 and 2018).

of issues, ranging from perspectives on a single case analysis⁶ to regulatory aspects of climate litigation,⁷ and covering one⁸ or multiple⁹ jurisdictions.

In the midst of the ever-increasing interest of legal scholars in the phenomenon of climate change, fuelled by the decision of the court of first instance in the *Urgenda* case in the Netherlands and awaiting the decision of the Hague Court of Appeal,¹⁰ the International and Transnational Tendencies in Law Center (INTRALaw) at Aarhus University (Denmark) convened a workshop entitled ‘Climate Change Litigation: Trends, Policy Implications and the Way Forward’. The workshop took place at the Aarhus University Department of Law on 14 and 15 June 2018. It gathered participants representing both academics and practitioners from around the world to reflect on the current state of climate litigation, its implications and future prospects. The participants of the workshop first discussed recent advancements in the area of climate litigation, such as the engagement of national courts with the Paris Agreement, the implications of climate litigation for business, and the emerging ‘human rights turn’.¹¹ The discussion subsequently addressed the intersections of law and policy not only within the environmental field but also in a broader context, such as that of international investment law. The workshop concluded with the prospects for future climate litigation, exploring possible new legal bases for future cases, such as financial regulation, international criminal law, and the law of restitution. The articles in this Symposium Collection were inspired by the various discussions at the workshop.

The Symposium Collection opens with two articles that engage with the interaction (and potential cross-fertilization) between international and domestic climate change law. The authors, however, take different points of departure. Lennart Wegener, in his article ‘Can the Paris Agreement Help Climate Change Litigation and Vice Versa?’, hypothesizes that the ‘dynamic interaction between domestic litigation and

⁶ E.g., K.J. de Graaf & J.H. Jans, ‘The Urgenda Decision: Netherlands Liable for Role in Causing Dangerous Global Climate Change’ (2015) 27(3) *Journal of Environmental Law*, pp. 517–27.

⁷ E.g., J. Peel & H.M. Osofsky, ‘Climate Change Litigation’s Regulatory Pathways: A Comparative Analysis of the United States and Australia’ (2013) 35(3) *Law & Policy*, pp. 150–83.

⁸ E.g., B. Hollaus, ‘Austrian Constitutional Court: Considering Climate Change as a Public Interest Is Arbitrary: Refusal of Third Runway Permit Annulled’ (2017) 11(3) *Vienna Journal on International Constitutional Law*, pp. 467–77.

⁹ E.g., P. de Vilchez Moragues, ‘Broadening the Scope: The Urgenda Case, the Oslo Principles and the Role of National Courts in Advancing Environmental Protection Concerning Climate Change’ (2016) 20 *The Spanish Yearbook of International Law*, pp. 71–92.

¹⁰ *Stichting Urgenda v. Government of the Netherlands (Ministry of Infrastructure and the Environment)*, ECLI:NL:RBDHA:2015:7145, Rechtbank Den Haag [District Court of The Hague], C/09/456689/HA ZA 13-1396, available at: <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2015:7196>; and *Stichting Urgenda v. Government of the Netherlands (Ministry of Infrastructure and the Environment)*, ECLI:NL:GHDHA:2018:2591, Gerechtshof Den Haag [The Hague Court of Appeal], C/09/456689/HA ZA 13-1396, available at: <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2018:2610>. See J. van Zeben, ‘Establishing a Governmental Duty of Care for Climate Change Mitigation: Will *Urgenda* Turn the Tide?’ (2015) 4(2) *Transnational Environmental Law*, pp. 339–57; and B. Mayer, ‘*The State of the Netherlands v. Urgenda Foundation*: Ruling of the Court of Appeal of The Hague (9 October 2018)’ (2019) 8(1) *Transnational Environmental Law*, pp. 167–92.

¹¹ J. Peel & H.M. Osofsky, ‘A Rights Turn in Climate Change Litigation?’ (2018) 7(1) *Transnational Environmental Law*, pp. 37–67.

the Paris Agreement may improve the overall efficacy of both regimes'.¹² He unfolds the argument that the rather soft nature of the provisions of the Paris Agreement and its bottom-up architecture, on the one hand, and litigation before domestic courts, on the other hand, are mutually reinforcing. Domestic litigation may trigger internalization processes with regard to the norms and goals of the Paris Agreement and subsequently activate national action. In turn, the review of nationally set climate change policies as expressed in nationally determined contributions (NDCs) through domestic litigation may lead to effectuating the international regime by giving soft goals in NDCs a hard law edge. The author warns that the legal value of the Paris Agreement might be overshadowed by national law, namely constitutional and procedural law, which has a more direct impact on the outcomes of domestic litigation. Yet, Wegener underscores the significant and meaningful role of the Paris Agreement in coordinating global efforts to combat climate change and calls for closer attention to be paid to the 'normative and functional interlinkages and interactions' between the international and domestic level of climate change regulation.

The second article, 'Domestic Courts and the Paris Agreement's Climate Goals: The Need for a Comparative Approach' by Anna-Julia Saiger,¹³ brings into focus the methodological challenges of studying the relationship between international and domestic climate change law. Saiger adopts a critical attitude towards legal scholarship on climate change litigation for rarely engaging in a methodological discussion. She highlights the need for a more traditional, yet nuanced, legal approach to the examination of the role of domestic courts in the creation and enforcement of international law. The author proposes a context-sensitive comparative approach as a possible avenue that is sensitive to national peculiarities and circumstances while permitting the comparison of cases from diverse jurisdictions. Such an approach allows for considering courts' motivations and self-conception when delivering judgments on climate change-related issues in national contexts as well as taking into account the national institutional setting and power balance among various state powers and organs.¹⁴ Saiger aspires to bring (and succeeds in bringing) attention back to the underlying legal analysis of the manoeuvring space of domestic courts in relation to international climate change law. Providing as an example the international obligations of conduct under the Paris Agreement, on the one hand, and the nationally set obligations of result, on the other hand, the author contends that the role of domestic courts in international law creation and enforcement is determined by their ability to link these two types of obligation. Saiger concludes that 'climate change litigation may become an opportunity to (re)discuss the role of domestic courts in the international legal architecture'.¹⁵

¹² L. Wegener, 'Can the Paris Agreement Help Climate Change Litigation and Vice Versa?' (2020) 9(1) *Transnational Environmental Law*, pp. 17–36.

¹³ A.-J. Saiger, 'Domestic Courts and the Paris Agreement's Climate Goals: The Need for a Comparative Approach?' (2020) 9(1) *Transnational Environmental Law*, pp. 37–54.

¹⁴ *Ibid.*, p. 53.

¹⁵ *Ibid.*, p. 54.

In her article, ‘Should Judges Make Climate Change Law?’¹⁶ Laura Burgers shifts the discussion from the interaction between international and national climate change law to the interplay between law and politics. She addresses the doctrine of the separation of powers in light of the growing trend of climate litigation. The question sought to be answered is whether the judiciary has the competence to adjudicate matters of high political sensitivity – in the case of climate change – or whether it acts *ultra vires* by doing so. Burgers thereby tackles the tension between law and politics as demonstrated in climate litigation. With a view to identifying the confines of legitimate judicial lawmaking in a constitutional democracy, she draws inspiration from the political theory on deliberative democracy of the German philosopher and sociologist Jürgen Habermas.¹⁷ Based on this theory, Burgers argues that the law derives legitimacy from the societal discursive process among citizens in the public sphere on how law should be formulated (which is ultimately echoed by the democratically elected parliament and government). When adjudicating, courts in turn should follow suit and reflect in their judgments society’s established beliefs.¹⁸ The judiciary may make a decision that opposes democratic majorities only if such a deviation is founded on the protection of fundamental rights. As argued by Burgers, a legal transition most notably marked by the constitutionalization of the environment in various jurisdictions has been identified. Not only does such legal transition affirm that climate change has entered the legal (and constitutional) domain (as opposed to its perceived existence as a political matter alone), but it also constitutes one of the state’s foundations.¹⁹ Burgers concludes that climate change litigation reflects a ‘growing consensus’ that the environment is of constitutional value and, in turn, a prerequisite for democracy – and such qualification is the basis of the democratic legitimacy of judicial lawmaking on climate change.

In a rare contribution focusing on climate jurisprudence outside developed states, Joana Setzer and Lisa Benjamin map the initial trends of climate litigation in the Global South through a selection of cases.²⁰ Climate litigation in the Global South surprisingly has been overlooked by legal scholars notwithstanding its innovative and progressive features.²¹ This article provides a missing piece of the global climate litigation puzzle, which hopefully will stimulate further academic insights with a different geographical focus. Setzer and Benjamin distinguish the attributes of climate litigation in the Global South as opposed to climate litigation in the Global North. Whereas the latter calls directly for the legislature to enact laws which adequately accommodate climate change-related considerations, the former employs a different adjudicative tactic, namely targeting ‘poor’ enforcement of existing legislative tools and adopting a human

¹⁶ L. Burgers, ‘Should Judges Make Climate Change Law?’ (2020) 9(1) *Transnational Environmental Law*, pp. 55–75.

¹⁷ J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (William Reig tr, John Wiley & Sons, 2015).

¹⁸ Burgers, n. 16 above, pp. 62–3.

¹⁹ *Ibid.*, pp. 67–71.

²⁰ J. Setzer & L. Benjamin, ‘Climate Litigation in the Global South: Constraints and Innovations’ (2020) 9(1) *Transnational Environmental Law*, pp. 77–101.

²¹ Setzer & Vanhala, n. 5 above.

rights-based approach. The article puts forward that litigants in the Global South target existing legislation in their climate cases because arguably they are aware of the capacity constraints which the enactment of new climate change legislation might entail.²² In addition, the human rights-based approach employed is to be attributed to the widespread inclusion of human rights protection in the constitutions of states of the Global South, the specific socio-economic and political context as well as the vulnerability of local populations in the Global South to the adverse effects of climate change.²³ Drawing upon Legal Opportunity Structures approaches, Setzer and Benjamin further seek to unravel the emerging trend of (often successful) climate litigation in the Global South notwithstanding the hurdles faced by litigants. According to them, this trend is owed to progressive procedural requirements on standing contained in constitutional and environmental legislation which permit access to justice by individuals.²⁴ Furthermore, the existence of constitutional provisions on environmental protection and robust domestic climate change litigation, coupled with progressive approaches to climate change adopted by the judiciary, contribute to the regulatory outcomes of climate litigation in the Global South.²⁵

The final article in this Symposium Collection, 'Climate Litigation in Financial Markets: A Typology', by Javier Solana, provides a first-of-its-kind review of climate litigation cases in financial markets.²⁶ To date, the number of climate litigation cases concerning financial markets has been surprisingly low considering the important role of financial markets in the pursuit of global sustainable development. Yet, recently the number has started to rise significantly. As the author points out, in 2018 more of such climate litigation cases were brought before the courts than in any previous year.²⁷ Solana reviews all identified climate litigation cases in financial markets and presents an original typology based on the claim underpinning each case.²⁸ Upon reviewing 46 cases, he distinguishes eight categories of claim, namely, claims based on fundamental rights, authority or mandate, decision-making processes, disclosure, breach of contract, breach of fiduciary duties, negligence, and public nuisance. The typology aims to advance the understanding of the relation between climate change and financial risks. Solana considers possible implications of climate change litigation in financial markets as well as multiple avenues for future research.

Delving deeper into the already richly researched topic of climate change litigation, the authors of the articles in this Symposium Collection deliver novel perspectives on the phenomenon, unveiling new areas of interest, both intellectual and geographical. Collectively, they exhibit the span of legal analysis and its contribution to the study of climate change litigation. The Symposium Collection identifies gaps in existing

²² Setzer & Benjamin, n. 20, pp. 85–6.

²³ *Ibid.*, pp. 89–90.

²⁴ *Ibid.*, pp. 94–5.

²⁵ *Ibid.*, pp. 96–9.

²⁶ J. Solana, 'Climate Litigation in Financial Markets: A Typology' (2020) 9(1) *Transnational Environmental Law*, pp. 103–35.

²⁷ *Ibid.*, p. 105.

²⁸ For methodological considerations see *ibid.* pp. 106–7.

legal scholarship and underscores the need for further discussion of such key topics as the interplay between different levels of regulation, the doctrine of separation of powers, and social, environmental, and economic sustainability, including climate justice. We therefore invite further legal research into climate change litigation – a field which, as the contributors to this Symposium Collections demonstrate, is far from being fully comprehended and exhausted.