

The Social and Political Life of Climate Change Litigation

Mobilizing the Law to Address the Climate Crisis

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2.1 INTRODUCTION

The chapters in this volume vividly illustrate the recent growth in the number and range of climate change cases globally. They also showcase the inherent complexity and contingencies of these types of cases in terms of their potential legal and political impacts. Some lawsuits – like the *Urgenda* case in the Netherlands – have achieved landmark judicial decisions, shaped government policy, received extensive coverage in the media, and inspired litigants in other countries. Other cases, for example, the *Juliana v. United States* case brought by youth plaintiffs, show the limits of some courts' willingness to assign legal responsibility to governments for the harms caused by greenhouse gases. Some of these lawsuits are examples of strategic climate litigation, as discussed in the chapter by Ben Batros and Tessa Khan in this volume.¹ Others would fall into what Catalina Vallejo and Siri Gloppen refer to in their chapter as 'low-profile climate litigation' or what Kim Bouwer refers to as 'unsexy' climate litigation.² Paralleling this emergence and expansion of different varieties of climate litigation is a burgeoning interest among scholars and practitioners in learning lessons from these cases.³

In this chapter, I contribute to this evaluative endeavour by turning from the legal to the socio-legal to offer a different lens through which to consider the phenomenon of climate change litigation. By drawing on theoretical

¹ See the chapter written by Ben Batros and Tessa Khan in this volume (Chapter 3).

² See Catalina Vallejo and Siri Gloppen's chapter in this volume (Chapter 4); Kim Bouwer, 'The Unsexy Future of Climate Change Litigation' (2018) 30 *Journal of Environmental Law* 483.

³ There has been a huge growth in scholarly interest in climate change litigation. See Joana Setzer and Lisa C. Vanhala, 'Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance' (2019) 10 *WIREs Climate Change* e580.

approaches in the study of legal mobilization, this chapter sheds light on some of the social and political dynamics of climate change litigation that can often be overlooked in existing analyses. I suggest that situating climate change litigation in its social and political context is useful in gaining a more holistic understanding of what is at stake when individuals and groups turn to the courts as part of their efforts to address the climate crisis. Drawing on the contributions to this volume, this chapter (1) shows how legal mobilization theory can be helpful to practitioners and scholars interested in understanding, explaining, and assessing climate change litigation in practice and (2) highlights some of the ways in which studying climate change litigation can shape our conceptual and empirical understandings of the processes of legal mobilization more generally.

2.2 BRINGING A LEGAL MOBILIZATION LENS TO CLIMATE CHANGE LITIGATION

Scholars interested in legal mobilization seek to understand litigation in its social and political context. Frances Zemans offered one of the most succinct definitions of the term in noting that ‘the law is . . . mobilized when a desire or a want is translated into a demand as an assertion of rights’.⁴ This view of litigation tends to understand the process of mobilizing the law as an act of participation in political and governance systems. It also shifts attention away from the purely legal to the actors engaging with the law (including non-official legal actors).⁵ A legal mobilization perspective also problematizes how we understand ‘success’ when it comes to litigation: it takes as its starting point a broad conceptualization of what success might entail. Another advantage of bringing a legal mobilization lens to the subject of climate change litigation is that it tends to overcome the selection bias that is often inherent when lawyers and legal scholars discuss and analyse climate change litigation. This selection bias manifests in two ways: first, as a disproportionate focus on landmark and/or successful cases and a tendency to overlook cases that are unsuccessful. Cases may fail to result in groundbreaking legal outcomes and/or may entrench a counterproductive policy or set of practices and/or can catalyse a backlash from judges, political institutions, or the public. A second way in which this selection bias manifests is that cases that are settled out of court or

⁴ Frances Zemans, ‘Legal Mobilization: The Neglected Role of the Law in the Political System’ (1983) 77 *American Political Science Review* 690.

⁵ See Michael McCann, ‘Litigation and Legal Mobilization’, in Keith E. Whittington et al. (eds.), *The Oxford Handbook of Law and Politics* (Oxford: Oxford University Press, 2008).

the legal cases that ‘fail to launch’ (for a variety of different reasons) are also often ignored in existing analyses of climate change litigation. And yet, these cases (or ‘non-cases’) matter when we want to draw broader lessons about whether litigation is an effective, efficient, and legitimate way of addressing the climate crisis. Bringing a legal mobilization perspective shows that existing research on climate change litigation tends to overlook important questions: who is mobilizing the law to address the climate crisis, why, and with what consequences? Who is not turning to the courts, and what drives this quiescence?

2.3 WHAT EXPLAINS THE TURN TO THE COURTS?

Broadly conceived, there are three main strands of theoretical arguments accounting for the turn to the courts in the legal mobilization literature: (1) arguments that focus on institutional and structural incentives and disincentives to mobilize the law; (2) accounts of how group dynamics shape collective mobilization efforts; and (3) approaches that focus on the micro-politics of disputing behaviour and the turn to law.⁶ These are considered here in light of the phenomenon of climate change litigation and the contributions to this volume.

The first group of theories focus on incentives and constraints to the mobilization of law within the legal and political landscape. One of the oldest theoretical approaches within this intellectual camp focuses on the idea that those who are politically disadvantaged – that is, cannot achieve their aims through the political process – are more likely to turn to the courts. This approach was developed to account for the turn to litigation by the civil rights movement in the twentieth century when disenfranchised African Americans were unable to achieve progress in their quest for equality through political channels.

Approaches that focus on the way in which legal opportunities are structured by legal systems have been useful in complementing these arguments that tended to focus on political dynamics but overlooked the systems that shape access to justice. The growing literature on what has come to be known as ‘legal opportunity structures’ has explored how they shape the emergence and nature of mobilization on some issues and in some jurisdictions (and also how they have been shaped by mobilization efforts).⁷ Ellen Ann Andersen, in

⁶ See *ibid.*

⁷ See, e.g., Chris Hilson, ‘New Social Movements: The Role of Legal Opportunity’ (2002) 9 *Journal of European Public Policy* 238; see also Lisa Vanhala, ‘Legal Opportunity Structures

her book on gay rights litigation, argues that legal opportunity structures include the legal stock (that is, the body of law that can be drawn upon by potential litigants); procedural regulations, such as rules on standing and costs; and the presence of receptive judges. She persuasively shows how opportunity structures influence the origins, progress, and outcomes of litigation.⁸

This literature raises interesting ways of thinking about the potential to effectively use law to address the climate crisis across different jurisdictions. In terms of climate change litigation, early research on the phenomenon largely debunked the idea that there is a straightforward relationship between a legislative gap in climate change governance and a gap-filling role played by courts.⁹ However, there is growing evidence to suggest that understanding legal opportunity structures can be useful for those working on and studying climate change litigation. Understanding the contextual conditions under which litigation happens (or doesn't) can help to account for patterns of climate change litigation. In turn, studying climate change litigation can help advance the literature on legal opportunity structures by highlighting factors that are less relevant in other substantive areas of law. Several of the contributions to this volume illustrate the potential for these multidirectional insights. For example, Julia Mello Neiva and Gabriel Antonio Silveira Mantelli consider the wider institutional and political context within which Brazilian climate litigation unfolds. They find that, despite the weakening of the institutional environmental protection framework, delays in the judicial system, and threats to human rights defenders, climate litigation is becoming increasingly important in Brazil. They suggest that the judiciary is now playing a role in climate governance along with the executive and legislative branches.¹⁰ The chapter by Arpitha Kodiveri on climate change litigation in India explores the specific strains of environmentalism that the courts in India have engaged

and the Paradox of Legal Mobilization by the Environmental Movement in the UK' (2012) 46 *Law & Society Review* 523; see also Lisa Vanhala, 'Is Legal Mobilization for the Birds? Legal Opportunity Structures and Environmental Nongovernmental Organizations in the United Kingdom, France, Finland, and Italy' (2018) 51 *Comparative Political Studies* 380; see also Lisa Vanhala, 'Shaping the Structure of Legal Opportunities: Environmental NGOs Bringing International Environmental Procedural Rights Back Home' (2018) 40 *Law & Policy* 110; see also Bruce M. Wilson and Juan Carlos Rodríguez Cordero, 'Legal Opportunity Structures and Social Movements: The Effects of Institutional Change on Costa Rican Politics' (2006) 39 *Comparative Political Studies* 325.

⁸ See Ellen Ann Andersen, *Out of the Closets and into the Courts: Legal Opportunity Structure and Gay Rights Litigation* (Ann Arbor: University of Michigan Press, 2009).

⁹ See Lisa Vanhala, 'The Comparative Politics of Courts and Climate Change' (2013) 22 *Environmental Politics* 447.

¹⁰ See Julia Mello Neiva and Gabriel Antonio Silveira Mantelli's chapter in this volume (Chapter 19).

with and the chapter by Waqqas Ahmad Mir explores the role of different pieces of legislation in Pakistan in shaping climate change litigation there.¹¹ Pooven Moodley explores similar issues in his chapter on climate change litigation in Africa.¹² Jolene Lin and Jacqueline Peel's chapter also engages with the notion that legal stock shapes the mode of litigation that is pursued. They suggest, building on recent research, that the high percentage of rights-based climate cases in the Global South is due at least in part to the fact that many of the national constitutions of Global South jurisdictions contain environmental rights and/or the right to life has been interpreted to include the right to live in a healthy and clean environment.¹³ Juan Auz's chapter implicitly draws attention to an understudied facet of legal opportunity structures: the nature of potential remedies and the transnational political dynamics associated with specific remedies. He highlights the political and legal complexities around the question of remedies in Global South states given the tensions between what is demanded by global climate justice norms (i.e., the idea that those who contributed least to global greenhouse gas emissions should not bear the costs and harms of climate change), on one hand, and practical solutions to promote effective mitigation and adaptation efforts at the domestic level in Global South states, on the other.

The contributions to this volume also show that we cannot limit a legal opportunity structure analysis to one level of governance: increasingly, regional courts and international bodies are being targeted in efforts to mobilize the law. For example, Jolene Lin and Jacqueline Peel (Chapter 9) highlight the potentially complementary role of regional courts in their discussion of the 2017 Advisory Opinion of the Inter-American Court of Human Rights on Human Rights and the Environment, emphasizing the linkages between human rights and environmental protection. The chapter by Ashfaq Khalfan (Chapter 8) engages with the practice of the UN Committee on Economic, Social and Cultural Rights to begin to address the question of how much an individual state has to do to reduce emissions within its jurisdiction. The chapter by Sophie Marjanac and Sam Hunter Jones (Chapter 7) also illustrates how international compliance bodies complement domestic legal opportunity structures by shifting attention to a legal advocacy effort in an

¹¹ See Arpitha Kodiveri's chapter in this volume (Chapter 20); see also Waqqas Ahmad Mir's chapter in this volume (Chapter 22).

¹² See Pooven Moodley's chapter in this volume (Chapter 21).

¹³ See Jacqueline Peel and Jolene Lin, 'Transnational Climate Litigation: The Contribution of the Global South' (2019) 113 *American Journal of International Law* 679; see also Joana Setzer and Lisa Benjamin, 'Climate Litigation in the Global South: Constraints and Innovations' (2020) 9 *Transnational Environmental Law* 77.

international human rights forum. They take an in-depth look at the communication by a group of Torres Strait Islanders to the United Nations Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights. In their chapter which brings lessons from strategic human rights litigation to the issue of climate litigation, Ben Batros and Tessa Khan (Chapter 3) bring many of the ideas associated with opportunity structure approaches into a more practical form. The authors develop a useful set of questions that can support practitioners in analyzing the social, political, and legal contexts within which cases are being considered to identify the role that litigation can and should play in broader theories of change.

Shifting away from the structural level, a second group of theories pays attention to variables at the group level to account for the turn to the courts. Much high-profile climate litigation is brought or supported by organized groups such as civil society organizations or NGOs. The chapter by Jolene Lin and Jacqueline Peel suggests that this is as true for the emerging climate change litigation docket in the Global South as it is in the Global North.¹⁴ The literature on legal mobilization suggests that the characteristics of these groups can shape the trajectory of litigation and its wider impacts. Scholars have emphasized different features. For example, those working from a resource mobilization perspective tend to focus on the range of resources groups bring to bear in legal cases. An influential essay by Marc Galanter argues that in litigation ‘the haves come out ahead’ and suggests that a lack of resources and an inability to be a ‘repeat player’ in the courts can limit the possibilities of achieving change through law.¹⁵ Charles Epp’s groundbreaking book also underscores the importance of what he calls ‘support structures’ – that is, organizations, lawyers, and funding – in underpinning the expansion of rights and use of the courts.¹⁶ Recent research on the role of lawyers as ‘strategy entrepreneurs’ in the environmental movement also broadens our understanding of the role of resources beyond just the financial in shaping organizational decisions to turn to the courts.¹⁷

Questions about the role and types of resources required for successful climate litigation are plentiful. There are interesting, unexplored questions on the role funders play in climate change litigation, including those

¹⁴ See Jolene Lin and Jacqueline Peel’s chapter in this volume (Chapter 9).

¹⁵ Marc Galanter, ‘Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change’ (1974) 9 *Law & Society Review* 95.

¹⁶ See Charles R. Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (Chicago: University of Chicago Press, 1998).

¹⁷ See Vanhala, ‘Is legal mobilization for the birds?’.

advocating for action on greenhouse gas emissions or pushing for adaptation measures as well as those advocating against. For example, researchers have found that legal strategies have emerged as one part of a coordinated set of strategies to thwart large-scale misinformation campaigns on climate change.¹⁸ Jolene Lin and Jacqueline Peel, in their chapter highlighting the different modes of climate litigation in the Global South (Chapter 9), identify where and how foundation funding can matter in shaping climate litigation. But there is room for further research on the sources and implications of different models of funding for climate change litigation.

Studying climate change litigation also broadens how we conceptualize ‘resources’ in a way that can productively inform legal mobilization theory. For example, recent research has shown how climate science can shape the emergence, trajectory, and/or outcomes of climate litigation.¹⁹ Insights from Science and Technology Studies, led by the work of Sheila Jasanoff, suggest that the types and degree of certainty provided by scientific evidence, the scientific knowledge and capacity of the judiciary, and the standards of evidence required to form convincing causal, legal arguments can all matter in climate change litigation.²⁰ Science can play an important role as a spark for the transformation of disputes through growing scientific certainty or as part of a commitment to embedding the precautionary principle in governance processes, including judicial governance. Scientific ideas can also become relevant through the incorporation of experts into climate cases and through the involvement of science-based organizations as part of the ‘support structure’ for climate change litigation. In their chapter, Michael Burger, Jessica Wentz, and Daniel Metzger show how the various branches of climate change attribution science are being drawn upon in human rights cases to frame government obligations to mitigate and adapt to climate change.²¹ Richard Heede’s chapter also highlights the science-litigation connection by exploring how the science of attributing source emissions has contributed to efforts to hold major carbon producers to account through climate lawsuits

¹⁸ See Justin Farrell et al., ‘Evidence-based strategies to combat scientific misinformation’ (2019) 9 *Nature Climate Change* 191–195.

¹⁹ See Lisa Vanhala, ‘Coproducing the Endangered Polar Bear: Science, Climate Change, and Legal Mobilization’ (2020) 42 *Law & Policy* 105.

²⁰ See Sheila Jasanoff, *Science at the Bar: Law, Science and Technology in America* (Cambridge, MA: Harvard University Press, 1997); see also Sheila Jasanoff, ‘The Idiom of Co-production’, in Sheila Jasanoff (ed.), *States of Knowledge: The Co-Production of Science and Social Order* (London: Routledge, 2004), pp. 1–18; see also Sheila Jasanoff, ‘A New Climate for Society?’ (2010) 27 *Theory, Culture and Society* 233.

²¹ See Michael Burger, Jessica Wentz, and Daniel Metzger’s chapter in this volume (Chapter 11).

and human rights investigations.²² Joana Setzer and Michelle Jonker-Argueta's chapters explore lawsuits against the carbon majors in different ways: Setzer presents an empirical picture of the volume and impacts of these cases whereas Jonker-Argueta's chapter explores the process of a 'supply-side case' through a detailed examination of the *People v. Arctic Oil* case in Norway.²³ Reinhold Gallmetzer persuasively argues in his chapter that there is unexploited potential for NGOs and private citizens to generate, access, verify, and disseminate information that can bring more and stronger cases before judicial authorities.²⁴ Kelly Matheson's chapter on the case for climate visuals in the courtroom exemplifies this by demonstrating how and why visual evidence of climate change impacts can be effective in climate change litigation.²⁵

Legal mobilization research has shown how dimensions other than resources and legal opportunities also matter in shaping when and how a group might turn to litigation. My previous research exploring the disability rights movement's turn to litigation over time underscored the important role that ideas and identities can play in pushing a group to court. I found that there is a relationship between the notion of becoming a 'rights-holder' and the likelihood of seeing the courts as an appropriate venue within which to pursue social change objectives.²⁶ This work also found that divisions of labour among organizations regarding the use of specific tactics began to shape the organizational field within a broader movement. Identities have also become an important facet of some climate change cases but have generally not been a focus of analysis. Think, for example, of the importance of having youth plaintiffs in *Juliana* and the *Amazon Future Generations* case in Colombia and the inter-generational justice frames that were at the forefront of these cases. In 2016, a group of women senior citizens, known as the KlimaSeniorinnen, filed suit against the Swiss government, alleging that the government had failed to uphold its obligations under the Swiss Constitution and the European Convention on Human Rights by not steering Switzerland onto an emissions reduction trajectory consistent with the goal of keeping global temperatures below two degrees Celsius above pre-industrial levels. The women's petition noted that their demographic is especially vulnerable to the heat waves expected to result from climate change. The case was

²² See Richard Heede's chapter in this volume (Chapter 12).

²³ See Setzer's chapter in this volume (Chapter 10); see also Jonker-Argueta's chapter in this volume (Chapter 17).

²⁴ See Reinhold Gallmetzer's chapter in this volume (Chapter 13).

²⁵ See Kelly Matheson's chapter in this volume (Chapter 14).

²⁶ See Lisa Vanhala, *Making Rights a Reality?: Disability Rights Activists and Legal Mobilization* (New York: Cambridge University Press, 2010).

ultimately dismissed and denied appeal in the national courts and (at the time of writing) the group has pursued the case in the European Court of Human Rights. The affirmation or denial of identities through court cases and litigation-linked advocacy activity can have profound impacts on whether litigation is a tool of empowerment or oppression for litigants and associated grassroots communities. James Goldston's chapter explores the interconnections between climate litigation and equality and outlines how an equality lens can shape climate litigation decision-making at a number of levels and stages. Taking note of the disproportionate impacts of climate change on the marginalized and disadvantaged can help inform where and why climate litigation should be supported and why it is important for litigation efforts to be rooted within the communities on whose behalf litigation is brought.²⁷

Finally, approaches accounting for the turn to courts concerned with the individual level have tended to focus on both the pre-litigation stage of the mobilization of law, with attention being paid to the conditions under which grievances are articulated in legal terms, as well as on legal disputing behaviour. This builds on a long history in the sociology of law and draws on the legacy of Felstiner et al.'s 'naming, blaming and claiming' framework, which demonstrated that a great deal of the process of mobilizing the law concerns dynamics distant from the courtroom.²⁸ Their framework expresses the ways in which harmful experiences are – or are not – perceived (naming), do or do not become grievances (blaming), and ultimately transform into disputes or not (claiming).

This framework can be useful in understanding a number of different facets of climate change litigation. It can show how the problem of climate change becomes recognized by certain individuals and communities (and not others) and how this is then translated into legal grievances.²⁹ The chapter by Laura Gyte, Violeta Barrera, and Lucy Singer on the role of narratives and framing in litigation and beyond and the degree of investment required to undertake this narrative work in a co-productive way also suggests there is an important role for NGOs and funders to play in translating the key messages of climate cases.³⁰ This perspective is also useful in understanding how and why the climate change problem is increasingly linked with other issues, particularly human rights and equality concerns, in litigation efforts. Finally, this

²⁷ See James A. Goldston's chapter in this volume (Chapter 5).

²⁸ William L. F. Felstiner et al., 'The Emergence and Transformation of Disputes: Naming, Blaming, Claiming ...' (1980) 15 *Law and Society Review* 631.

²⁹ See Chris Hilson, 'Climate Change Litigation in the UK: An Explanatory Approach (or Bringing Grievance Back In)' (2010) *Climate Change: La Risposta del Diritto* 421.

³⁰ See Laura Gyte, Violeta Barrera and Lucy Singer's chapter in this volume (Chapter 15).

framework also shows why some litigants might want to pursue what Jolene Lin and Jacqueline Peel refer to as 'stealthy climate litigation'.³¹ That is, the desire to advance cautiously and under the radar 'by packaging climate change issues with less controversial claims' or with claims that might be perceived as an important policy issue in the jurisdiction.³² They point out that this tactic can be effective in diluting the political potency of climate change as an issue and evading the political question doctrine (or non-judiciability doctrine), arguments that are often raised in opposition in climate change cases.

2.4 CONCLUSION

The long-standing literature on legal mobilization can be instructive in helping to identify the factors that shape the levels and forms of climate change legal mobilization and to understand the broader socio-political implications of the way in which these cases emerge and progress (or not) and then ultimately have an impact (or not). Scholars going back to the 1950s have studied the groups that have mobilized the law and their successes and failures, from the civil rights movement to the campaign for marriage equality. Their theoretical approaches and findings can be instructive for those wanting to understand how, when, and where to intervene with the use of legal approaches to address the climate crisis. At the same time, learning from climate change litigation campaigns can help to inform the development of legal mobilization theory. What is clear is that a next stage in socio-legal research on climate change litigation involves subjecting claims about the impact of climate litigation to empirical scrutiny to identify the successes, unintended outcomes, and spillover effects of climate change legal cases (including those that are settled or fail to take off).³³

The answers to questions about who mobilizes the law to address the climate crisis, why, and with what effect matter for at least three important reasons. First, to understand and evaluate the effectiveness of climate change litigation, it is important to know the strategic imperatives driving a case and the way in which a legal case might fit into an organization's broader tactical repertoire and the broader political and legal context. The long-standing

³¹ See Jolene Lin and Jacqueline Peel's chapter in this volume (Chapter 9).

³² *Ibid.*

³³ An example of research in this vein at the vanguard is Sébastien Jodoin et al., 'Realizing the Right to Be Cold? Framing Processes and Outcomes Associated with the Inuit Petition on Human Rights and Global Warming' (2020) 54 *Law & Society Review* 168.

literature on legal mobilization has helped us to understand that even losses in court can be incredibly productive if a case raises awareness of an issue, changes the way the media covers a topic, and/or sparks or builds on other forms of mobilization such as campaigning, grassroots mobilization, and legislative change. Second, addressing these questions can help us understand why climate change and environmental legislation is enforced in some jurisdictions and not others and why it is used to address some types of problems and not others. Where enforcement of climate change statutes is largely left to third parties, these questions are all the more significant because judicial governance will be determined by the cases brought before the courts. Finally, it is also crucial to consider the democratic and social legitimacy of these cases: whose voices are heard in courts, and whose are excluded? How accountable are some of the collective actors bringing these cases and is this the best use of their resources in tackling the climate crisis? What implications does this form of mobilization have for democratic governance? Historically, critiques of legal mobilization come from both the right and the left. Those on the right decry the ‘anti-democratic’ nature of the phenomenon of ‘regulation through litigation’ and use the language of ‘activist judiciaries’. Critics on the left tend to focus on the ways in which the legal system can be seen as a ‘small-c’ conservative force that embeds and upholds structural and social inequalities and that meaningful justice – including climate justice – is not going to be achieved through the courts. These normative concerns are worth bearing in mind both for practitioners in the way they make decisions about whether, how, and where to litigate and for researchers in deciding how to empirically evaluate the difference that climate change litigation is making (or not) in broader campaigns for a sustainable transition.