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Introduction to Special Section on Climate Change Litigation

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INTRODUCTION

Introduction

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Abstract

Acknowledging the exponential growth and global dimension of climate litigation, this introductory piece to this Special Section starts by situating this phenomenon in the context of the scholarly debate on polycentric and multi-level climate governance. It highlights both the strategic use of climate litigation as a tool to establish responsibilities and push for a more ambitious mitigation and adaptation agenda, but also as an opportunity to better understand the role of courts in public policy governance. The second part of the article then proceeds to discuss the main findings arising from the various contributions grouped in this section, and concludes by arguing that further research is needed in order to properly understand the role and contribution of climate change litigation to transnational climate governance.

Keywords: Climate change; climate litigation; strategic litigation; climate governance; polycentric governance

Given the unwillingness, inability, or slowness of the executive and legislative branches responding to climate change, litigation has been moving the needle. During the last decade, climate litigation has grown exponentially in both scope and significance, gradually becoming an integral element of current climate governance. Starting initially in a more systematic fashion in the common law jurisdictions of North America and Australia,¹ this phenomenon has more recently accrued a further exponential growth and a more prominent global dimension, with cases in the global south and in European jurisdictions.

It is therefore not surprising that this phenomenon has been eliciting a considerable and growing amount of scholarly attention.² There is an extensive and burgeoning academic literature on climate change litigation, from different disciplines and perspectives, complemented by a number of international projects³ and online databases.⁴ With respect to legal scholars, interest in climate

¹See Jacqueline Peel & Hari M. Osofsky, *Climate Change Litigation's Regulatory Pathways: A Comparative Analysis of the United States and Australia*, 35 L. & POL'Y 3, 150 (2013).

²See, among several others publications, William C.G. Burns & Hari M. Osofsky (eds), *ADJUDICATING CLIMATE CHANGE* (Cambridge Univ. Press 2009); Richard Lord QC, et al. (eds), *CLIMATE CHANGE LIABILITY: TRANSNATIONAL LAW AND PRACTICE* (Cambridge Univ. Press 2011); Lisa Vanhala & Chris Hilson, *Climate Change Litigation: Symposium Introduction*, 35 L. & POL'Y 141 (2013); Elizabeth Fisher & Eloise Scotford, *Climate Change Adjudication: The Need to Foster Legal Capacity: An Editorial Comment*, 28 J. ENV'TL LAW 1 (2016); A. Savaresi & J. Auz, *Climate Change Litigation and Human Rights: Pushing the Boundaries*, 9 CLIMATE CHANGE LAW 244 (2019).

³See, for example, the UNITED NATIONS ENVIRONMENT PROGRAMME, *Global Climate Change Litigation Report – Status Review* (2017) and (2020), which provides an overview of the current state of climate change litigation around the world.

⁴Of particular relevance is the online database managed by the Sabine Centre for Climate Change Law. SABINE CENTER FOR CLIMATE CHANGE LAW, <http://climatecasechart.com/climate-change-litigation/>.

litigation has been at times regarded as an almost ‘obsessive’ attraction for this topic driven by the new and valuable intellectual challenges that it stimulates.⁵ There have also been various attempts to systematize the field, by drawing classifications or typologies of the different climate lawsuits on the basis of the defendants (whether states or private actors), the legal arguments (whether is tort law, administrative law, or constitutional law) and the area of law involved, with scholars distinguishing an increasingly prominent role for human rights claims in this context.

From a broader environmental governance perspective, climate litigation represents a further indication of the role that citizens, individuals and groups can have in the pursuit, enhancement and even implementation of environmental objectives. This is all the more important when dealing with an issue of such a global dimension and complexity, where, while governments retain a primary role in taking action, addressing these pressing and severe challenges requires a more holistic and comprehensive approach. In that sense, the growing in climate cases brought by private litigants and NGOs, at different scales and in different jurisdictions, may be regarded as responding to calls for a ‘polycentric approach’ to climate policy and governance,⁶ that is an approach characterized by the participation of multiple levels and multiple centers of decision-making which are formally independent from each other.⁷

Underlining the strategic nature of some climate change cases, some scholars have also examined climate litigation as part of a multilevel and multi-layered approach to climate change, involving different levels of regulation and governance and different actions and strategies by state and non-state actors at different scales.⁸ Moreover, beyond their strictly legal dimension, climate litigation and the relevant court rulings represent a further crucial tool for civil society “to inform social perceptions”,⁹ highlight the potentially significant harm of “certain conduct by public and private actors”, and eventually ‘push governments to take more substantial action to address’ the current most severe threat for our planet.¹⁰

Finally, and importantly, climate change litigation offers interesting and useful insights “not only for how climate change policy is likely to evolve, and for who is likely to shape it, but more generally for the role of the courts in public policy governance.”¹¹ Significant rulings, like the ones delivered by the Dutch courts in *Urgenda* and in the *Mileudefensie v Shell* cases or the German constitutional court’s decision in *Neubauer*, to name just a few, demonstrate that courts are in some cases prepared to take bold steps and, when vested with adjudicating strategic climate cases, they can become important actors in the multi-layered climate change governance. Given the global and multidimensional nature of climate change and the multilevel dimension of climate

⁵E. Fisher, *Climate Change Litigation, Obsession and Expertise: Reflecting on the Scholarly Response to Massachusetts v. EPA*, 35 LAW & POL’Y 3 (2019).

⁶Eleanor Ostrom, *A Polycentric Approach for Coping with Climate Change*, POL’Y RESEARCH WORKING PAPER 5095 (2009). *But see*, J. Setzer & L.C. Vanhala, *Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance*, 10 WIREs Climate Change 3 (2019) <https://wires.onlinelibrary.wiley.com/doi/10.1002/wcc.580> (remarking that further research is needed to thoroughly explore to what extent “the multiple scales represented by the actors, jurisdictions, and legislation involved in these cases constitute a form of polycentric governance”).

⁷Initially introduced by V. Ostrom, C.M. Tiebout & R. Warren in their analysis of the management and provision of public services and subsequently applied to problems concerning the governance of common pool natural resources, the idea of polycentrism has recently been explored in relation to climate governance, see among others. V. Ostrom, C.M. Tiebout & R. Warren, *The Organization of Government in Metropolitan Areas: A Theoretical Inquiry* 55 AM. POL. SCI. REV. 4, 831 (1961); E. OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION (1990); A. Jordan, D. Huitema & H. van Asselt (eds), GOVERNING CLIMATE CHANGE: POLYCENTRICITY IN ACTION? (Cambridge Univ. Press 2018).

⁸Jacqueline Peel, Lee Godden, R.J. Keenan, *Climate Change in an Era of Multi-level Governance* 1 TRANSNT’L ENV’T L. 2, 245, 268–72 (2021).

⁹F. Sindico, M. Moise Nbenue & K. McKenzie, *Climate Change Litigation and the Individual: An Overview*, in COMPARATIVE CLIMATE LITIGATION: BEYOND THE USUAL SUSPECTS (Springer, 2021).

¹⁰*Id.*

¹¹D. Markell & J.B. Ruhl, *An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual?*, 64 FL. L. REV. 1, 19 (2012). *See also*, more recently, J. Setzer & L. Vanhala, *supra* note 6.

regulation and governance, these rulings often stress the linkages between the local and the global, the domestic and the international. Scholars have further noted how rulings issued by courts “across various jurisdictions and at different territorial levels of governance . . . can be seen to play an important role in articulating forms of ‘transnational climate change regulation.’”¹² Yet, at the same time, and more problematically, some of these ‘bold’ rulings have also raised contentious issues concerning the role and scope of judicial intervention.¹³

Against this background, and in the light of a number of recent high profile climate cases decided by domestic courts, the aim of this special section of the German Law Journal is to bring together perspectives on the role of climate litigation and the role of the judiciary in that context from scholars from different jurisdictions. In this perspective, the articles in this special section not only offer commentaries on recent high-profile rulings, but they also bring insights into the evolving features, trends and dynamics in climate litigation.

The special issue opens with three contributions examining from different angles the landmark decision of the German Federal Constitutional court on the German Climate Change Act.¹⁴ In that historic ruling the court declared some of the provisions of the Federal Climate Change Act determining the national climate targets and the annual emissions amount allowed until 2030 as incompatible with the claimants’ fundamental rights. According to the court, the challenged provisions, by transferring major emission reduction burdens to the period after 2030 would create a risk that the claimants’ fundamental rights and freedoms would be severely curtailed due to the drastic and urgent mitigation measures that will have to be taken.

The first contribution, by Andreas Buser,¹⁵ discusses how the Court has “innovatively combined positive and negative duties” deriving from German constitutional law to address the intertemporal and intergenerational dimension of climate change. While the analysis illustrates in particular how the intertemporal and intergenerational dimension of the climate change problem features in the Court’s legal assessment of the constitutionality of the German climate change act, the article also touches on other important questions emerging from the Court’s decision, such as the progressive approach to standing for the environmental claimant, the connection between domestic policies and international commitments, as well as crucially, the legitimate role and scope of power of the judiciary vis-à-vis the discretion of the legislator.

While this first piece deals with intergenerational justice, the second, by Rike Krämer-Hoppe,¹⁶ comments on the analysis of the Federal Climate Change Act’s insufficiency to respond to Germany’s international obligations and needs by the Court and mourns the lost opportunity by the German court of engaging with intrajurisdictional equity. The Karlsruhe court introduced a new dimension of human rights, the intertemporal guarantee of freedom, and recognized the fight against climate change as an international task, which could not be solved by Germany alone. While the court argued for international cooperation, it did not give the principle of common but differentiated responsibility the central place it deserves in this discussion. Krämer-Hoppe argues that this principle, included in the Paris Agreement, goes beyond a call for international cooperation by bringing together the efforts of developed as well as developing countries to combat climate change.

The third article by Louis J. Kotzé further develops this international dimension of the German decision.¹⁷ Kotzé, through the lenses of the Anthropocene (a human dominated geological epoch), analyses to what extent the Court, while mentioning the international dimensions of the pressing

¹²Jacqueline Peel, Lee Godden, R.J. Keenan, *supra* note 7, at 269–70.

¹³See among others, L. Burgers, *Should Judges Make Climate Change Law?*, 9 *TRANSNAT’L ENV’T L. L.* 1, 55 (2020).

¹⁴See, e.g., Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Order of the First Senate of Mar. 24, 2021, 1 BvR 2656/18, [hereinafter Order of Mar. 24, 2021], http://www.bverfg.de/e/rs20210324_1bvr265618en.html.

¹⁵Andreas Buser, *Of Carbon Budgets, Factual Uncertainties and Intergenerational Equity— The German Constitutional Court’s Climate Decision*, in this Special Issue.

¹⁶Rike Krämer-Hoppe, *The Climate Protection Order of the Federal Constitutional Court of Germany and the North-South Divide*, in this Special Issue.

¹⁷Louis J. Kotzé, *Neubauer et al. versus Germany: Planetary Climate Litigation for the Anthropocene?*, in this Special Issue.

climate problem, embraces a holistic planetary view of climate science, climate change impacts, planetary justice, planetary stewardship, earth system vulnerability, and global climate law. The German Constitutional Court did show signs of understanding the global dimensions of science and of the earth systems, but it could have gone further. In future cases, courts across the globe will have to increasingly follow a planetary perspective that is grounded in the context of the Anthropocene when adjudicating matters related to global disruptors such as climate change. This decision offers a first, and important, example of a promising new paradigm that Kotzé's labels planetary climate litigation.

The following article by Marta Torres-Schaub takes recent developments in climate litigation in France as a standpoint to discuss the dynamic interplay between law, policy making and judicial proceedings in this context and the extent to which legal action brought by civil society can contribute to promote and advance a legislative and policy framework better equipped to address the climate emergency. The article discusses in particular two cases—the *Grande Synthe* and the *Affaire du Siecle*—in which French courts were confronted with the task of assessing the adequacy State's action and of the existing legislative and administrative framework in the light of climate protection concerns and the state's commitments undertaken under the Paris Agreement. While the article focuses primarily on developments in the French legal system, it situates these developments in the context of other climate justice proceedings in other jurisdictions. Indeed, like the two French rulings examined in this article, several climate cases against governments shows how courts can represent a forum to not only enforce the implementation of the international commitments, but also to hold the governments accountable for failure to take appropriate and adequate action to avert the climate catastrophe. Furthermore, in a similar vein as in the legal reasoning of the German court's decision, there is a greater attention paid by the French courts to not only the wording of the law, reflected in the international climate regime and in the national commitments undertaken in implementation to it, but also to the seriousness of the threat posed by climate change and the urgency to act. At the same time, and interestingly, the legislative and policy developments taking place in Germany¹⁸ and in France, respectively, in response to these court proceedings demonstrate the positive impact of these legal action—or threat of legal action—in triggering policy and regulatory developments.

The two next contributions take us to the Global South. Eeshan Chaturvedi¹⁹ and Alessandra Lehmen²⁰ review the climate litigation trends in India and Brazil, respectively. The focus of Chaturvedi's piece is the role of judicial activism in climate litigation trends and how it may shape the cases to come. India's judiciary has, in the past, taken steps, some would say bold ones, that suggest that climate litigation has an auspicious future in one of the largest emitters of greenhouse gases. The two main auspicious developments in environmental court cases have been the use of international environmental law and the expansion of the access to justice. Despite these two developments, there have been some roadblocks in the path to successful climate lawsuits. India does not have comprehensive legislation addressing climate change. It does have, however, non-enforceable plans guiding the response to this problem. Courts have, thus, been constrained in what they could do. Chaturvedi reviews cases where courts have tackled climate change related issues by resorting to pre-existing classical environmental regulations. Courts are not always able to overcome the causation or calculation of an action carbon-footprint. However, both facial and applied challenges to the National Action Plan on Climate Change (NAPCC) or more general climate change claims nor grounded in a pre-existing statute, lead to unclear, unenforceable court mandates. A youth-led climate case was dismissed by the Green Tribunal, a specialized court which stands as one of the most important environmental innovation, on the basis that while

¹⁸Two weeks after the Constitutional Court published its decision, the German government adopted a draft amendment to the Climate Protection Act which contains tighter emission reduction targets.

¹⁹Eeshan Chaturvedi, *Climate Change Litigation: Indian Perspective*, in this Special Issue.

²⁰Alessandra Lehmen, *Advancing Strategic Climate Litigation in Brazil*, in this Special Issue.

the NAPCC did not contained timeframes and assessable goals, there was no reason to assume that it did not align with the obligations the Paris Agreement established. Nonetheless, the future may be brighter given the international precedent and the innovative approaches to other environmental matters, the Indian judiciary may open new doors in new cases.

While Chaturvedi's piece focuses on judges' and courts' role, Lehmen's article turns our attention to the plaintiffs and the concept of strategic litigation and its potential role in driving change in Brazil as the sixth largest greenhouse gas emitter. Building on avenues used in environmental litigation at large, this piece, first, offers a framework to avoid the pitfalls arising from the political question doctrine. Second, it explores possibilities of bringing claims against private entities grounded in ESG frameworks. Finally, Lehmen discusses the role of lawyers in bridging theoretical and practical gaps, namely those between Environmental Law and Climate Law, between scientific experts and courts, and between international and domestic climate change regimes.

The last two contributions move the focus from the analysis of specific jurisdictions and of specific rulings to take a more transversal approach to the question of climate litigation. In this sense, Jaqueline Peel and Rebekkah Markey-Towler undertake a comparative analysis of three recent significant climate cases—namely the case of Sharma in Australia, the Neubauer decision in Germany and the Shell decision in the Netherlands—in order to identify the key 'ingredients' for successful strategic climate litigation.²¹ Through this analysis, the contribution also offers interesting insights on the very concept of strategic litigation and what 'success' would mean in this context.

Last but not least, the article by Josephine van Zeven²² offers a closer examination of the use of human rights claims in climate litigation by focusing on the use of two regional human rights instruments, namely the European Convention of Human Rights and the European Union's Charter of Fundamental Rights. In particular, through a careful analysis of climate litigation practice emerging under these two instruments, the article ultimately seeks to appraise, from a comparative perspective, the current and potential role of the Charter in climate litigation in the European Union.

Overall, the contributions in this special section have shown how climate litigation has expanded both the standing and the rights of citizens vis-à-vis governments, which must take actions to mitigate and to adapt to climate change. Increasingly those judicial decisions are aware of the global dimensions of both the problem from a scientific point of view and the response in this Anthropocene era. However, further steps to fully engage with the global implications are necessary, particularly relating to the North-South differences. Beyond the results of those innovative lawsuits, there is a strategic value in spurring this type of litigation as it raises awareness of the problem and, thus, may prompt executive and legislative actions down the line.

The cases addressed in this special section are some of the most salient, recent ones in climate litigation across the globe. But these are just the tip of the iceberg, as climate change is very present in day-to-day²³ environmental litigation issues, such as planning applications or awarding of permits for pollution-generating industrial activities. Those, while less grand, may also nudge the behavior and decisions of governments or private parties.²⁴ Moreover, while attention has recently gathered around state or government climate accountability, the future of climate litigation will likely increasingly include a diverse range of legal actions also against private parties, including cases against companies with the highest historical emissions (the so-called 'Carbon Majors') and other actions aimed at holding companies accountable for their ESG commitments.²⁵

²¹Jacqueline Peel & Rebekkah Markey-Towler, *Recipe for Success?: Lessons for Strategic Climate Litigation from the Sharma, Neubauer and Shell Cases*, in this Special Issue.

²²Josephine Van Zeven, *The Role of the EU Charter on Fundamental Rights in Climate Litigation*, in this Special Issue.

²³Setzer and Vanhala, *supra* note 6, at 3. See K. Bouwer, *The Unsexy Future of Climate Litigation*, 30 J. ENV'T'L L. 483 (2018).

²⁴*Id.*

²⁵See J. Setzer & C. Higham, *Climate Change Litigation is Growing and Targeting Companies in Different Sectors*, LONDON SCHOOL OF ECON BLOG, (Oct. 4, 2021), <https://blogs.lse.ac.uk/businessreview/2021/10/04/climate-change-litigation-is-growing-and-targeting-companies-in-different-sectors/>.

On the other hand, while climate litigation helps spur action at the legislative and executive level, the judicial branch intervention may risk creating inefficiencies when there is neither coordination, nor dialogue. Some have described the current system of differentiated, multi-layered climate governance as one dominated by “anarchic inefficiency”, “featuring a diverse set of players whose roles are largely uncoordinated between each other.”²⁶ Others have hailed climate change litigation as part of Ostrom-like polycentric governance, the likely path forward in climate governance.²⁷ At the moment, the global trend towards climate litigation appears still in early stages and future developments and further research may be needed to help us understand how it fits in the overall climate governance regime.

²⁶D. Held & A.F. Hervey, *Democracy, Climate Change and Global Governance: Democratic Agency and the Policy Menu Ahead*, in *THE GOVERNANCE OF CLIMATE CHANGE* 89 (Held, Hervey and Theros, eds., 2011).

²⁷Marcel J. Dorsch & Christian Flachslund, *A Polycentric Approach to Global Climate Governance*, 17 *GLOB. ENV'T'L POL.* 45 (2017). Polycentric governance moves away from traditional top-down governance regimes focused on nation-states. Instead, it embraces a multitude of actors involved in natural resource, environmental, and climate governance at different scales in a coordinated, not fragmented way. Dorsch & Flachslund organize the polycentric approach to climate governance around four key features for climate mitigation governance and their related mechanisms: An emphasis on *self-organization*, a recognition of *site-specific conditions*, the facilitation of *experimentation and learning*, and the building of *trust*.