

CLIMATE CHANGE LITIGATION IN GLOBAL PERSPECTIVES

LITIGÂNCIA SOBRE MUDANÇAS CLIMÁTICAS EM PERSPECTIVAS GLOBAIS

Pin Huang¹

ABSTRACT

Following the signing of the United Nations Framework Convention on Climate Change in 1992, an international response to climate change has developed, and there is an urgent desire to mitigate and adapt to climate change in order to avoid the damage caused by it. To urge governments, businesses and others to actively address climate change, justice is becoming an important tool for countries to respond to climate change. Climate change litigation first originated in the United States and is now practiced to varying degrees around the world. The 2016 Paris Agreement laid the empirical logical foundation for climate change litigation. Climate change litigation, as a special type of justice dealing with climate interests, has a rich manifestation. The legal basis for climate change litigation and the type of litigation varies from region to region due to different levels of economic development and litigation philosophies. This paper is based on a global perspective and analyses the development path and existing problems of climate change litigation from a regional and international climate perspective. In doing so, it provides a macro-level understanding of climate change litigation.

Keywords: Climate Change, Litigation, Global Perspectives, United Nations Framework Convention on Climate Change

Resumo

Após a assinatura da Convenção-Quadro das Nações Unidas sobre Mudanças Climáticas em 1992, uma resposta internacional às mudanças climáticas foi desenvolvida e há um desejo urgente de mitigar e adaptar-se às mudanças climáticas para evitar os danos causados por ela. Para incentivar governos, empresas e outros a abordarem ativamente as mudanças climáticas, a justiça está se tornando uma ferramenta importante para que os países respondam às mudanças climáticas. A litigância sobre mudanças climáticas teve origem nos

¹ Master's degree at Lanzhou University, majoring in law. Assistant, Italian Studies Centre, Lanzhou University. Bachelor's degree at China University of Political Science and Law in 2022.

Estados Unidos e agora é praticada em graus variados ao redor do mundo. O Acordo de Paris de 2016 estabeleceu a base empírica e lógica para a litigância sobre mudanças climáticas. A litigância sobre mudanças climáticas, como um tipo especial de justiça que trata dos interesses climáticos, tem uma rica manifestação. A base legal para a litigância sobre mudanças climáticas e o tipo de litigância variam de região para região devido a diferentes níveis de desenvolvimento econômico e filosofias de litigância. Este artigo é baseado em uma perspectiva global e analisa o caminho de desenvolvimento e os problemas existentes da litigância sobre mudanças climáticas a partir de uma perspectiva climática regional e internacional. Ao fazer isso, fornece uma compreensão em nível macro da litigância sobre mudanças climáticas.

Palavras-chave: Mudanças Climáticas, Litigância, Perspectivas Globais, Convenção-Quadro das Nações Unidas sobre Mudanças Climáticas

1. INTRODUCTION

Climate change is the long-term alteration of temperature and typical weather patterns in a place. Climate change has evolved from being a controversial issue to a widely recognized global threat over time. And it has been characterized as the 'defining issue of our time' by the last two United Nations Secretaries-General.²

With climate change receiving widespread attention around the world, justice has become an important way for countries to address climate change. Climate change litigation originated in the United States. There are some typical climate litigation decisions, such as the US Supreme Court judgment in *Massachusetts v. Environmental Protection Agency (EPA)* (2007) and the Hague District Court's decision in *Urgenda Foundation v State of the Netherlands* (2015). Both cases are regarded as important markers in climate change litigation's development and growing significance.³ The Massachusetts

² B Ki-moon, 'Opening Remarks' (2014 Climate Summit, New York, 23 September 2014); A Guterres, 'Remarks on Climate Change' (United Nations Headquarters, New York, 10 September 2018).

³ Osofsky, H. M. . "The continuing importance of climate change litigation." *Social Science Electronic Publishing* 1.1(2010):3-29.

v. EPA judgment paved the way for extensive federal regulation of greenhouse gas emissions from industrial sources and motor vehicles under the Obama Administration.⁴ The 2015 Urgenda decision found the Dutch government's emission reduction targets to be inadequate to safeguard Dutch citizens from the impacts of climate change, a ruling that has since been upheld by the Dutch Court of Appeal and then on December 20, 2019, by the Dutch Supreme Court.

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As an important governance tool for climate change, climate change litigation influences policymaking as well as corporate behavior and is a catalyst for enhanced climate action. The number of global climate change lawsuits has increased significantly since the signing of the Paris Agreement in 2015. It has created a global momentum whereby the courts are identified as fundamental actors for exerting pressure 'on the executive and legislative branches of government to act on the climate change issues'.⁶

In terms of practical results,

With prominent court cases like *Lliuya v RWE* in Germany and, in particular, the decisions of the German Constitutional Court in *Neubauer et al. v Germany*, and the Hague District Court (the Netherlands) in *Milieudefensie et al. v Royal Dutch Shell* repeatedly making headlines in 2021, climate litigation has successfully gained a role as an important component of achieving ambitious climate goals. Some cases seeking more ambitious emission reductions have been successful whereas, to date, those seeking compensation or restitution for losses or damages have not.⁷

The question of how climate change litigation should be defined is still actively debated among scholars and practitioners. However, according to the practice, climate change litigation refers to litigation where climate change or greenhouse gases are an explicit subject of the case, though not necessarily

⁴ "Climate Change Litigation, Obsession and Expertise: Reflecting on the Scholarly Response to Massachusetts V. EPA." Social Science Electronic Publishing.

⁵ Zeven, Van, and Josephine. "Establishing a Governmental Duty of Care for Climate Change Mitigation: Will Urgenda Turn the Tide?" *Transnational Environmental Law* 4.2(2015):339-357.

⁶ Lin, Jolene. "Climate Change and the Courts." *Legal Studies* 32.1(2012):35-57.

⁷ Otto, Friederike E. L., et al. "Causality and the Fate of Climate Litigation: The Role of the Social Superstructure Narrative." *Global Policy*, vol. 13, no. 5, 2022, pp. 736-750.

the only subject. There is no clear classification of climate change litigation in the academic community. Setzer and Byrnes mention two main categories: on the one hand, 'strategic cases, with a visionary approach, that aim to influence public and private climate accountability,' and on the other hand, 'routine cases, less visible cases, dealing with, for example, planning applications or allocation of emissions allowances under schemes like the EU emissions trading system.' Various types of litigation exist within these broad categories, pursuing different aims. But the common thread in climate change litigation is the claim of fundamental rights based on constitutional rights or human rights. In strategic or pro-active cases, claimants are typically individuals and civil society organizations, and the defendants are mostly governments.

The case analysis and comparative methods are this paper's main research methods. Based on the above definition of climate change mitigation, this paper selected typical climate change litigation cases for analysis. Through the overall analysis of the case and the study of specific cases, the problems are discovered. For example, compared and analyzed the controversial issues of climate change litigation in different regions, sorted out existing cases, compared the differences in the development of climate change litigation in different regions, and the differences in applicable law. The regional dimension refers to the European courts and to the African and Inter-American human rights systems. On the international front, the author compares intergenerational climate change litigation, inter-state climate change litigation, climate change litigation before the International Court of Justice, and litigation under the United Nations Convention on the Law of the Sea.

2. CLIMATE CHANGE LITIGATION: REGIONAL PERSPECTIVES

This paper focuses on regional and international perspectives of climate change litigation. The regional dimension refers to the European courts and to the African and Inter-American human rights systems.

2.1 Climate Change Litigation in European Regional Courts

In 2015, nearly 200 parties reached the Paris Agreement at the Paris Climate Change Conference. This is the second legally binding climate agreement after the Kyoto Protocol, setting the stage for global action on climate change after 2020. The number of global climate change lawsuits has increased significantly since the signing of the Paris Agreement in 2015. However, while European governments appear to understand the threat posed by climate change, there are widespread differences in the policies they are adopting to achieve the goals set out in the Paris Agreement. A number of climate change cases have been brought before the Court of Justice and the General Court of the EU, the majority of which have focused on such matters as the allocation of allowances under the EU's Emissions Trading Scheme. Here are two typical cases of litigation: *Carvalho and Others v. EU Parliament and Council* and *Sabo and Others v. The EU Parliament and Council*. The General Court's decisions in *Carvalho* and *Sabo* demonstrate just how difficult it is for individuals and civil society organizations to use the Article 263 annulment procedure to challenge the validity of EU legislation directly before the EU Courts.⁸

In the Dutch *Urgenda* case, the European Convention on Human Rights played a considerable role,

In this case, the Dutch Supreme Court ordered the State to reduce greenhouse gas emissions by at least 25 per cent by the end of 2020 compared to 1990. It relied, among others, on Articles 2 (the right to life) and 8 (the right to respect for private life and home) of the European Convention on Human Rights (ECHR). It referred extensively to the case law of the European Court of Human Rights (ECtHR) that interpreted these provisions as obliging States to take appropriate

⁸ Pouikli K . "Editorial: a short history of the climate change litigation boom across Europe". ERA Forum, 22.4(2021):569-586.

measures when the State is aware that there is a 'real and immediate' risk to the life or well-being of persons.⁹

The European Court of Human Rights has jurisdiction over climate change litigation based on the European Convention on Human Rights. The European Convention for the Protection of Human Rights and Fundamental Freedoms was opened for signature in Rome in 1950 for the Council of Europe Member States to sign. The Convention came into force in September 1953, and the European Court of Human Rights (ECtHR) was established in 1959 to ensure that Member States comply with the Convention. Article 34 of the Convention provides that the European Court of Human Rights may receive applications from "any individual, non-governmental organization or group of individuals" alleging that a member state has violated one or more of their rights protected under the Convention. Applicants are only eligible if they are actual, potential, or indirect victims of the alleged violation. Article 35 of the Convention provides that the European Committee on Trade Rights can only deal with complaints after all domestic remedies have been exhausted in order to provide the State with the opportunity to comply with the requirements of the Convention.¹⁰ Moreover, given its remit, the ECtHR could be a crucial supranational tribunal for those seeking to hold governments accountable for their ineffective response to climate change.

The ECHR also figured prominently in civil proceedings initiated by the interest groups Milieudefensie and Stichting Adem. In addition to this, the ECHR has been used, albeit generally unsuccessfully, to deal with a number of challenges by neighboring residents against holders of environmental permits for livestock farming.

There is real scope for significant progress to be made in the fight against dangerous climate change by litigation in the European regional courts.

⁹ Krommendijk, Jasper. "Beyond Urgenda: The Role of the ECHR and Judgments of the ECtHR in Dutch Environmental and Climate Litigation." *Review of European, Comparative & International Environmental Law*, vol. 31, no. 1, 2022, pp. 60-74.

¹⁰ Vermeulen, Bernardus. "Theory and Practice of the European Convention on Human Rights: Third Edition." (1998).

2.2 Climate Change Litigation in the Americas

This section discusses climate change as a human rights issue, relying on the Inter-American human rights system and the UN Human Rights Committee to litigate climate change. Traditionally, environmental law and human rights law are two separate substantive laws. With the increasing severity of environmental problems, people are gradually realizing that human rights and environmental protection are essentially interdependent. The Human Rights Council and The Intergovernmental Panel on Climate Change acknowledged climate change as a human rights issue. The critical link between human survival and the environment was recognized early on in the Inter-American Commission on Human Rights work. Although the first climate change case to reach an international human rights body was instead simply dismissed by that body, good developments in jurisprudence have occurred throughout the system. For example, environmental issues are justifiable under the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights.¹¹

The first climate change case brought to the Inter-American System was *Sheila Watt- Cloutier et al. v. United States*. The case was dismissed even before consideration of its admissibility. The dismissal of the Inuit case was a missed opportunity for the Inter-American system to consider the link between climate change and human rights. However, the case marked a turning point in recognizing the need to address existential threats such as climate change. Suppose the Inter-American system was slow to get off the ground with Inuit case. In that case, the Court's Advisory Opinion 23 is certainly a leap forward for the Inter-American system and international human rights law with respect to the justiciability of environmental claims, including possible climate change

¹¹ VDLR Jaimes†. "Climate Change and Human Rights Litigation in Europe and the Americas." (2015).

claims under human rights treaties. The advisory opinion could have ripple effects far beyond the Americas. The Inter-American Court of Human Rights has effectively made environmental law part of the inter-American human rights law system through the development and systematic interpretation of the American Convention.

2.2 Climate Change Litigation in Africa

Climate breakdown has led to a rapid increase in climate change litigation around the world, but there have been few cases specifically related to global heating in Africa. This is surprising in light of the continent's vulnerability to climatic harm due to relatively low levels of development, resilience, and adaptive capacities.¹² In Africa, development has generally taken precedence over environmental concerns, even though it is clear that climate breakdown leads to underdevelopment and impoverishment. Climate change litigation in many southern countries focuses on addressing development-related environmental threats rather than directly upon global warming. As a result, litigation is more likely to address local environmental issues with climate-related elements than to address climate change itself. Influenced by the legacy of colonialism, many sub-Saharan African countries have relatively underdeveloped legal systems with weak legislative frameworks and civil society organizations.

Domestic courts are the obvious place for litigations to seek relief for climatic harm. In Africa, In addition to problems such as imperfect legislation, litigants also face obstacles such as lack of funds and lack of expertise. At the regional level, the main instrument on which climate change litigation is based is the African Charter of Human and Peoples' Rights, adopted in 1981. This paved the way for the establishment of the African Commission on Human and

¹² Berhanu, M. , and A. O. Wolde . "Review on Climate Change Impacts and its Adaptation strategies on Food Security in Sub-Saharan Africa." *Agricultural Social Economic Journal* 19.3(2019):145-154.

Peoples' Rights in 1987. The African Court on Human and Peoples' Rights was established in 2004. Unlike THE ACHPR, the Court has the power to issue binding decisions that are positive for climate change litigation, and NGOs have the right to file lawsuits against them. The African Commission or other African intergovernmental organizations may apply to the Court for proceedings. Under the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, future parties to climate change litigation in Africa may include individuals or communities displaced by climate change. The African Convention on the Conservation of Nature and Natural Resources and the African Charter on the Welfare of the Child might also provide a basis for litigation.

In conclusion, climate change litigation in Africa is limited by capacity constraints. Constitutional rights provisions, regional instruments such as the African Charter, and international human rights and climate law facilitate litigation, but domestic climate change legislation offers the most immediate basis for climate change litigation.

3. CLIMATE CHANGE LITIGATION: INTERNATIONAL PERSPECTIVES

3.1 Intergenerational Climate Change Litigation

3.1.1 Child Rights and climate change linkages

On the day of the UN Climate Action Summit 2019, the first climate change-related Communication was filed on behalf of 16 children under the United Nations Convention on the Rights of the Child. The Petition argues that the actions of the five G20 respondent countries have created and perpetuated climate hazards and undermined the human rights that need to be protected. Children are among the most vulnerable to the effects of climate change. Environmental hazards can affect many of the rights of children, such as the

rights to life, health and development, food, housing, and water. Protecting children's rights is a requirement for intergenerational justice.¹³ The UNCRC lays out strong children's rights protections relating to the environment. The Declaration on Children's Rights and the Environment will inspire further action to set and implement relevant standards at the international and national levels.

3.1.2 Youth Climate Activism in the Courts

In Colombia in 2018, the Supreme Court ruled in favor of 25 young people who had filed a lawsuit to protect their constitutional rights to life, food, water, and a healthy environment from the effects of deforestation and climate change. The momentum of the Youth Climate movement has created a powerful and intelligent wave of activism around the globe. In South Korea and India, youth-led cases have also had a broad positive impact. Because countries in South and Southeast Asia are moving to implement environmental legal frameworks to comply with their commitments in the 2015 Paris Agreement and address the climate threats they face. This youth activism is on a path to interrogate and attempt to hold accountable every backward country, diplomatic negotiation, and fossil fuel power by any means possible, using all appropriate judicial and quasi-judicial avenues and other public forums.

In fact, young people are also taking a practical approach to their lives to reduce carbon emissions and living pollution as much as possible:

Young people are also working at the community level to build awareness and facilitate climate change action, and acting with integrity in making individual lifestyle changes to reduce their own carbon footprints, however minor in comparison to the carbon emissions of governments and corporations. With these efforts, together with their focus on the rights of the most vulnerable beyond just themselves, young people currently play a key role in advancing an HRBA to climate change.¹⁴

¹³ <<https://www.un.org/zh/documents/treaty/A-RES-44-25>>accessed 23 November 2022.

¹⁴ GASPARRI, GIULIA, et al. "Children, Adolescents, and Youth Pioneering a Human Rights-Based Approach to Climate Change." *Health and Human Rights*, vol. 23, no. 2, 2021, pp. 95-108.

3.2 International Court of Justice Takes Up Climate Change Litigation

3.2.1 Bring Climate Change before the International Court of Justice

As climate change becomes more severe, there is increasing consideration of the role of national courts in addressing the climate crisis. The International Court of Justice (ICJ) is the principal judicial body of the United Nations, established by the UN Charter, and it is the primary tribunal for resolving legal disputes between states. In resolving disputes, international conventions, international customary law, general principles of law, and judicial precedents are applied. Given the common interest of States in climate change, the decision of the ICJ in a contentious case may not only bind the parties to the dispute, but the implications of its decision may extend far beyond the particular dispute.

All UN members automatically become parties to the ICJ Statute, but the ICJ will only consider a dispute at the request of one or more States. The countries most likely to make such a request are those that have the least impact on climate change but are most directly affected by its adverse effects. For example, island countries are at risk of being submerged by rising sea levels. As the world takes climate change seriously, the author believes that the number of countries filing climate change lawsuits with the ICJ will be on the rise.

3.2.2 Advisory Opinion on Climate Change

An advisory opinion is a legal advice provided to the UN or a specialized agency in accordance with Article 96 of the UN Charter.

- a. The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.

b. Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.¹⁵

Unlike judgments rendered by international courts, advisory opinions do not have a legally binding effect unless they are pre-determined to be binding. Despite having no binding force, the Court's advisory opinions nevertheless carry great legal weight and moral authority.¹⁶ Advisory opinions rendered by the ICJ are useful in raising "international public awareness" of climate change issues. The ICJ's advisory opinion also contributes to the clarification and development of international law.¹⁷ A resolution adopted by the UN General Assembly in March 2023 has been hailed as a victory for climate justice. The resolution means that the UN General Assembly will seek the opinion of the International Court of Justice on the obligations of states to address climate change. The ICJ will collect and consider relevant documents, hold one or more public hearings, and give advisory opinions on issues raised by the General Assembly of the United Nations.¹⁸ The ICJ advisory opinion may provide an impetus for countries to step up emissions reductions and other climate-related actions.

3.3 Inter-State Climate Change Litigation

Anti-international climate change litigation has long been commonplace, particularly in the area of investment law. In contrast, litigation in support of interstate climate change has been almost non-existent. Despite the lack of practice, interstate climate change litigation has been widely discussed in academic circles. In theory, interstate litigation is intended to resolve disputes,

¹⁵ UN Charter art 96.

¹⁶ 'Advisory Jurisdiction'(IJC)<<https://www.icj-cij.org/en/advisory-jurisdiction>> accessed 24 November 2022.

¹⁷ "International Advisory Proceedings on Climate Change." Social Science Electronic Publishing.

¹⁸ <<https://www.unep.org/news-and-stories/story/un-resolution-billed-turning-point-climate-justice>>accessed 15 April 2023.

but it may have other motivations due to political considerations. The underlying motivation for interstate climate change litigation is to require countries to strengthen their actions to address climate change and reduce carbon emissions, and to remedy or eliminate the harms associated with climate change. The following two issues have received more attention around interstate climate change litigation: disputes over breaches of international obligations concerning climate change; dispute over harm associated with climate change.

Three conditions need to be met for a breach of an international obligation on climate change: first, the state has an international obligation on climate change; second, the state has acted in breach of the obligation and the breach is attributable to the state; and third, one or more states have suffered damage as a result of said act.¹⁹ International law does not impose strict liability for transboundary damage arising out of activities falling within the scope of a State's exercise of sovereign rights within its jurisdiction. The applicant State must identify the due diligence obligations that have been breached by the respondent State, which places a heavy burden of proof on potential state litigants.

3.4 Litigation under the United Nations Convention on the law of the Sea

Although the United Nations Convention on the Law of the Sea (UNCLOS) does not explicitly mention global climate change, the link between the two has become increasingly strong. This is mainly manifested in the fact that issues such as sea level rise, ocean warming or acidification caused by global climate change have a profound impact on the application and interpretation of the UNCLOS. The main potential of the International Tribunal for the Law of the Sea as one of the future options for climate change litigation

¹⁹ Savaresi, A. . "Inter-state Climate Change Litigation: 'Neither a Chimera nor a Panacea'." (2020).

includes: its relatively strong regulation of substantive international law jurisdiction in the use and protection of marine resources and the marine environment; the accessibility of proceedings; institutional settings, such as specialized tribunals; environmental jurisprudence; and transparent procedures and decisions.

The International Tribunal for the Law of the Sea has jurisdiction over climate change litigation cases. If the parties have chosen the International Tribunal for the Law of the Sea as the international tribunal for the settlement of disputes concerning the interpretation or application of the Convention, the Tribunal may have jurisdiction over proceedings brought by the injured State in accordance with the provisions of Article 288(1) of the Convention.

A court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part.²⁰

Currently, the International Tribunal for the Law of the Sea is not yet seized the climate litigation activities of interested States under the compulsory dispute settlement procedure of Part 15 of the Convention. Despite the potential legitimacy of the International Tribunal for the Law of the Sea to govern global climate change litigation, there are still more potential legal obstacles to the actual interpretation or application of the Convention.

4. CONCLUSION

It is now widely accepted that climate change is one of the major challenges facing humanity and that all countries need to take action to address the risks. Law is a powerful weapon for human society to deal with adverse risks. This article examines the development of climate change litigation from both regional and international perspectives.

²⁰ UNCLOS art 288(1).

In a global climate change scenario, climate change litigation plays a dual role. First, it provides litigants with a means of redress against specific rights violations and climate harms. Second, it is a way to achieve climate justice through litigation cases, and justice is about human rights. The international climate change treaties - namely the 1992 United Nations Framework Convention on Climate Change (UNFCCC), the 1997 Kyoto Protocol, and the 2015 Paris Agreement - and the vast array of normative documents associated with them are an important part of the international legal order. Climate change litigation has opened up in the five years since the UN Paris Agreement was adopted. It has been largely ad hoc but has nonetheless followed the course of trying to get countries to meet their commitments and reach more ambitious goals. At the same time, in the context of climate change activism, international human rights law plays a crucial role in providing legal remedies currently unavailable in international environmental law.

Globally, many successful cases are essential drivers of climate action. The role of climate change litigation in climate action within countries varies. The strong demand for economic recovery in the post-epidemic era may influence mitigation actions in some countries, and climate change litigation is a reminder that crises like climate change play an essential role in achieving a higher-quality recovery.

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