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## Legal Mobilization and Climate Change: The Role of Law in Wicked Problems

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### Abstract

Climate change is a wicked problem, a framework not often used in sociolegal studies. The problem is complex, not readily named, and not limited to one jurisdiction. Therefore, the places of law are multiple: human rights instruments, supranational tribunals, regional courts, and local governments and NGOS. Litigation concerning responsibility for greenhouse gas emissions has largely not resulted in favorable judgments, and the papers in this collection turn to other ways of conceptualizing law and courts in responding to climate change. Relevant legal strategies include environmental legal enforcement, but also changes in investment, and response to the many disasters that are related to climate change. The papers in this collection travel across jurisdictions, actors and problems to assess legal strategies concerning climate change.

### Key words

Climate change; legal mobilization; adaptation; sub-national courts; environmental law; human rights; agriculture

### Resumen

El cambio climático es un problema perverso, un marco poco usado en los estudios sociojurídicos. El problema es complejo, de difícil denominación, y no está limitado a una sola jurisdicción. Por lo tanto, el derecho tiene muchos espacios: instrumentos de derechos humanos, tribunales supranacionales, juzgados regionales y gobiernos y ONG locales. Los litigios sobre responsabilidades por emisiones de gases de efecto invernadero no han sido capaces de acabar con veredictos favorables, y los artículos de esta colección miran hacia otras formas de conceptualizar el derecho y los tribunales como respuesta al cambio climático. Estrategias legales importantes incluyen la aplicación del derecho, pero también cambios en inversiones y respuestas a los múltiples desastres relacionados con el cambio climático. Los artículos de este número navegan

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por varias jurisdicciones, agentes y problemas para valorar las estrategias jurídicas sobre cambio climático.

**Palabras clave**

Cambio climático; movilización jurídica; adaptación; tribunales subnacionales; derecho ambiental; derechos humanos; agricultura

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## 1. Introduction

Climate change is the very essence of a “wicked problem” (Termeer *et al.* 2013). Because of their complexity, wicked problems are not easily categorized, so they cannot be readily “named” in existing scientific communities or policy circles. In the absence of simple formulations, wicked problems have no simple solutions. Any proposed solution must draw on a range of different forms of knowledge and expertise, which often place conflicting demands on a society. Moreover, both the causes and impacts of climate change are playing out on a global stage, not confined to a single jurisdiction or nation-state. Finally, wicked problems present long-term challenges because the underlying conditions causing the problems are constantly changing (Termeer *et al.* 2013). In the face of a shifting landscape of environmental problems and social and political arrangements, it is hardly surprising that an effective policy response to climate change has been elusive.

Plaintiffs have pursued claims concerning climate change in court, from local courts to supranational arenas (Gloppen and St. Clair 2012, Setzer and Byrnes 2019). Turning to litigation and the wide range of actors who participate in deploying the law in climate changes makes it clear that climate change politics is not only multiscalar; it is “multifaceted, contentious, and nuanced” (Vanhala and Hilson 2013, 141, Ley 2018, Setzer and Vanhala 2019). Litigation can mark a “governance gap”, or a failure in other institutions to address a problem (Vanhala 2013). Court cases also require resources to bring the law to bear, including favorable rules and organizations with the wherewithal to litigate. Understanding courts in governance relying on the first approach often focuses on the judges and how they decide. Their outcomes can be instrumentally more or less effective, but they also contribute to building a community around climate change claims. The community includes scholars, who amplify decisions (Fisher 2013). When judges name climate change as the problem in regulating greenhouse gases, scholars have taken it up, and scored a victory. The second approach to understanding litigation focuses on the actors who organize cases and how they make law meaningful in everyday life. In this volume, authors draw on both approaches: describing policy actors who mobilize the law to address climate change, through litigation, application in local settings, and community-building (Bouwer 2018, Setzer and Vanhala 2019).

Policy-makers and advocates tackling climate change have devised a wide range of strategies for addressing climate change – international treaties, human rights agreements (Atapattu 2015), and policy instruments like carbon markets that require changes to tax codes and administrative regulations (Peel and Osofsky 2015). In dealing with localized consequences associated with climate change, communities have pursued development projects to strengthen their capacity to protect housing and economic activity.

Studying climate change through the lens of legal mobilization illustrates just how wicked a problem it is. As the papers in this volume demonstrate, the scope of climate change is not easily confined to existing legal categories; policy actors are searching for suitable formulations for legal claims that will address the damage and assign responsibility. Time and space do not make legal formulations any easier. Many of the injuries associated with climate change have been caused by conduct that occurred long ago by actors far away, and still, the most serious damage has not yet materialized. And finally, judicial outcomes will always be, at best, partial solutions, an emergent part of the policy process.

Formulating a legal claim is the first challenge for those who seek to mobilize the law to address climate change. By their nature, legal claims require conflict between an injured party whose damages are remediable and who can trace those damages in a relatively uncomplicated way to defendants who are clearly responsible for the harm. However, the damage done by climate change does not map neatly onto this model of conflict. Thus, the actors who seek to mobilize the law must be creative in how

they formulate their legal claims, and the full range of this creativity is reflected in the papers in this symposium.

Mitigating greenhouse gas emissions has garnered the majority share of scholarly attention. The first principle when one is stuck in a hole is to stop digging, and that principle guides the importance of finding ways to regulate greenhouse gas emissions. Some of the litigation concerning emissions has worked on drawing a causal link between fossil fuels and damage now; those lawsuits so far have largely been instrumentally ineffective though they garner public attention (Bouwer 2018, Ganguly *et al.* 2018). Lawyers transform recent improvements in the science of attributing disasters to climate change to something that advocates hope would be effective in drawing causal links in court (Marjanac *et al.* 2017, Ganguly *et al.* 2018). The indirect effects of litigation reshape regulation of greenhouse gases (Peel and Osofsky 2015), whatever the success of drawing causal links.

Throughout, the reach of law exceeds its purported jurisdiction and limits. Around the world, strategies for advocates have been multiple, and often focus on regulatory levers as much as enforcement. In this collection, Peel, Osofsky, and Foerster (2018) turn to exploring the promise and limits of the legal strategies to have institutions divest from fossil fuels. By integrating regulatory strategies with the outcomes of litigation, they broaden the reach of law and sociolegal studies, and implicitly question a model of legal mobilization that relies on courts giving orders. They also describe the range of environmental litigation in Australia seeking to enforce administrative environmental law in that country. Since Australia has tried to take on climate change, the importance of litigation there points away from a “governance” gap and toward the importance of resources in mobilizing the law (Vanhala 2013, Setzer and Vanhala 2019). On occasion the many sources of law provides actors with opportunities to set political authorities against one another. For example, Muñoz and Moya (2018) argue that non-governmental organizations deploy European Union environmental laws in Spanish courts. They argue that the European Union’s laws allow regional courts to gain leverage on climate change when the national government is reluctant.

Formulating legal claims is particularly complicated because the effects of climate change are not neatly confined in conceptions of time and space required in legal arenas. One of the thorniest issues associated with all of climate change governance is the global scale of nations and economic actors responsible for harming people who live far away from the activities causing the changes. Jurisdiction, then, limit the remedies that are available, and the global diffusion of greenhouse gases over more than one hundred years gives courts a reason not to attribute responsibility for loss of land and villages to fossil fuel companies (Bronen and Chapin 2013). Climate change threatens the very existence of some societies, including people living in polar regions or on island nations. In the absence of successful claims against fossil fuel companies, human rights claims ground the arguments for global responsibility. In this collection, Derman (2019) analyzes human rights claims made in international tribunals by the Maldives and the Inuit Circumpolar Council, two groups threatened with obliteration due to climate change. Moreover, as Hilson (2018) notes in his contribution to this volume, narrow legal conceptions of time do not always overlap with scientific and environmental timelines, where damage stretches far into a future that courts cannot always see.

Effects of climate change are here now. The myriad effects of climate change include the need for agriculture to adapt (Arbuckle, Morton, and Hobbs 2012, Arbuckle *et al.* 2013), the significance of species’ changing habitats and migration patterns (Camacho 2010), and disasters. How different countries respond to disasters is part of regulating climate change as well. In the absence of systematic, well-implemented national plans, adaptation to climate change and response to disaster is often local and *ad hoc*. How communities have responded to large scale disaster in the recent past illuminates the problems the world faces in a changing climate. Recent disasters

have not solely been attributable to climate change. Given that the built environment can exacerbate climate change problems, no one problem ever will be. Land use planning laws, insurance systems, and mortgage practices all will contribute to inequality and how communities rebuild after disaster (Sawada and Yoshido 2017). Therefore, Roberts's work in this collection concerning communities and rebuilding in New Orleans after Hurricane Katrina raises concern about what countries will do as the effects of climate change make many places increasingly difficult to inhabit. Environmental laws are simply not the only source of legal authority deployed by policy actors. Sterett (2018), for example, demonstrates that climate change exacerbates existing problems in everyday life – like housing – already governed by existing legal practices, and inequality (see also Sterett 2009, 2012, 2015). Large-scale natural disasters strains existing rules and traditional bureaucratic processes.

Finally, studying climate change through legal mobilization offers a perspective on the complexity of governance in the case of wicked problems. Legal solutions are simply one tool in the toolkit – the papers in this symposium invoke all manner of other governance mechanisms alongside of litigation. Through disaster management services (Sterett 2018), community organizing (Roberts 2018), interest group engagement in legislative and administrative politics (Muñoz and Moya 2018), and NGO activity (Derman 2018), a wide range of actors leverages what institutional and political power they have to push the relevant authorities to make the changes necessary to arrest and adapt to climate change.

We hope that the papers in this volume open a wide-ranging discussion about the role of legal mobilization in the broader regulatory and legislative policy-making efforts surrounding climate change. We are confident that this new approach will provide not just fruitful avenues of scholarly research, but also promising solutions to climate change, the most wicked of wicked problems.

## References

- Arbuckle, J., *et al.*, 2013. Climate Change Beliefs, Concerns, and Attitudes toward Adaptation and Mitigation among Farmers in the Midwestern United States. *Climatic Change* [online], 117(4), 943–50. Available from: <https://doi.org/0.1007/s10584-013-0707-6> [Accessed 24 July 2019].
- Arbuckle Jr., J.G., Morton, L.W, and Hobbs, J., 2013. Farmer Beliefs and Concerns about Climate Change and Attitudes toward Adaptation and Mitigation: Evidence from Iowa. *Climatic Change* [online], 118, 1–13. Available from: <https://doi.org/10.1007/s10584-013-0700-0> [Accessed 24 July 2019].
- Atapattu, S., 2015. *Human Rights Approaches to Climate Change*. New York: Routledge.
- Bouwer, K., 2018. The unsexy future of climate change litigation. *Journal of Environmental Law* [online], 30(3), 483–506. Available from: <https://doi.org/10.1093/jel/eqy017> [Accessed 24 July 2019].
- Bronen, R., and Chapin, F.S., 2013. Adaptive governance and institutional strategies for climate-induced community relocations in Alaska. *Proceedings of the National Academy of Sciences* [online], 110 (23-4 June), 9320-5. Available from: <https://doi.org/10.1073/pnas.1210508110> [Accessed 6 November 2018].
- Camacho, A., 2010. Assisted migration: Redefining nature and natural resource law under climate change. *Yale Journal on Law and Regulation* [online], 27(2), 171. Available from: <http://digitalcommons.law.yale.edu/yjreg/vol27/iss2/2> [Accessed 6 November 2018].
- Derman, B.B., 2019. Revisiting limits to legal mobilization for global climate justice: Complexity, territoriality, and responsibility. *Oñati Socio-legal Series* [online],

- 9(3-this issue). Available from: <https://doi.org/10.35295/osls.iisl/0000-0000-0000-1062> [Accessed 24 July 2019].
- Fisher, E., 2013. Climate change litigation, obsession and expertise: Reflecting on the scholarly response to 'Massachusetts v. EPA'. *Law & Policy* [online], 35(3), 236-60. Available from: <https://doi.org/10.1111/lapo.12006> [Accessed 24 July 2019].
- Ganguly, G., Setzer, J., and Heyvaert, V., 2018. If at first you don't succeed: Suing corporations for climate change. *Oxford Journal of Legal Studies* [online], 38(4), 841-868. Available from: <https://doi.org/10.1093/ojls/ggy029> [Accessed 24 July 2019].
- Gloppen, S., and St. Clair, A.L., 2012. Climate change lawfare. *Social Research* [online], 79(4), 899-930. Available from: <https://www.jstor.org/stable/24385633> [Accessed 6 November 2018].
- Hilson, C., 2018. Framing Time in Climate Change Litigation. *Oñati Socio-legal Series* [online], 9(3-this issue). Available from: <https://doi.org/10.35295/osls.iisl/0000-0000-0000-1063> [Accessed 24 July 2019].
- Ley, A.J., 2018. Mobilizing doubt: The legal mobilization of climate denialist groups. *Law & Policy* [online], 40(3), 221-242. Available from: <https://doi.org/10.1111/lapo.12103> [Accessed 24 July 2019].
- Marjanac, S., Patton, L., and Thornton, J., 2017. Acts of God, human influence and litigation. *Nature Geoscience* [online], 10(9), 616-9. Available from: <https://doi.org/10.1038/ngeo3019> [Accessed 24 July 2019].
- Muñoz, L., and Moya, D., 2018. NGOs environmental legal mobilization and their access to the Spanish Supreme Court. *Oñati Socio-legal Series* [online], 9(3-this issue). Available from: <https://doi.org/10.35295/osls.iisl/0000-0000-0000-1061> [Accessed 24 July 2019].
- Peel, J., and Osofsky, H., 2015. *Climate Change Litigation: Regulatory Pathways to Cleaner Energy*. Cambridge University Press.
- Peel, J., Osofsky, H., and Foerster, A., 2018. A "Next Generation" of Climate Change Litigation?: an Australian Perspective. *Oñati Socio-legal Series* [online], 9(3-this issue). Available from: <https://doi.org/10.35295/osls.iisl/0000-0000-0000-1060> [Accessed 24 July 2019].
- Roberts, P.S., 2018. Social Capital and Disaster Resilience in the Ninth Ward. *Oñati Socio-legal Series* [online], 9(3-this issue). Available from: <https://doi.org/10.35295/osls.iisl/0000-0000-0000-1065> [Accessed 24 July 2019].
- Sawada, Y., and Takasaki, Y., 2017. Natural disaster, poverty and development: An intro. *World Development* [online], 94(C), 2-15. Available from: <https://doi.org/10.1016/j.worlddev.2016.12.035> [Accessed 24 July 2019].
- Setzer, J., and Byrnes, R., 2019. *Global trends in climate change litigation: 2019 snapshot* [online]. Policy report. London: Grantham Research Institute on Climate Change and the Environment / Centre for Climate Change Economics and Policy / London School of Economics and Political Science. Available from: [http://www.lse.ac.uk/GranthamInstitute/wp-content/uploads/2019/07/GRI\\_Global-trends-in-climate-change-litigation-2019-snapshot-2.pdf](http://www.lse.ac.uk/GranthamInstitute/wp-content/uploads/2019/07/GRI_Global-trends-in-climate-change-litigation-2019-snapshot-2.pdf) [Accessed 24 July 2019].
- Setzer, J., and Vanhala, L.C., 2019. Climate change litigation: a review of research on courts and litigants in climate governance. *WIREs Climate Change* [online],



- 10(3). Available from: <https://doi.org/10.1002/wcc.580> [Accessed 24 July 2019].
- Sterett, S.M., 2018. Climate Change Adaptation: Existential Threat, Welfare states and Legal Management. *Oñati Socio-legal Series* [online], 9(3-this issue). Available from: <https://doi.org/10.35295/osls.iisl/0000-0000-0000-1064> [Accessed 24 July 2019].
- Sterett, S.M., 2015. Disaster, Displacement, and Casework: Uncertainty and Assistance after Hurricane Katrina. *Law and Policy* [online], 37(1–2), 61–92. Available from: <https://doi.org/10.1111/lapo.12029> [Accessed 7 September 2018].
- Sterett, S.M., 2012. Need and citizenship after disaster. *Natural Hazards Review* [online], 13(3), 233–45. Available from: [https://doi.org/10.1061/\(ASCE\)NH.1527-6996.0000072](https://doi.org/10.1061/(ASCE)NH.1527-6996.0000072) [Accessed 24 July 2019].
- Sterett, S., 2009. New Orleans everywhere: Bureaucratic accountability and housing policy after Katrina. In: A. Sarat and J. Lezaun, eds., *Catastrophe: Law, Politics and the Humanitarian Impulse* [online]. Amherst / Boston: Massachussetts University Press, 83–115. Available from: <http://www.jstor.org/stable/j.ctt5vk7b4.7> [Accessed 24 July 2019].
- Termeer, C., Dewulf, A., and Breeman, G., 2013. Governance of Wicked Climate Adaptation Problems. In: J. Knieling and W.L. Filho, eds., *Climate Change Governance*. Berlin / Heidelberg: Springer, 27–39.
- Vanhala, L., 2013. The Comparative Politics of Courts and Climate Change. *Environmental Politics* [online], 22(3), 447–474. Available from: <https://doi.org/10.1080/09644016.2013.765686> [Accessed 6 November 2018].
- Vanhala, L., and Hilson, C., 2013. Climate change litigation: Symposium introduction. *Law & Policy* [online], 35 (3), 141–149. Available from: <https://doi.org/10.1111/lapo.12007> [Accessed 1 June 2018].