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Climate Change Litigation: Recent Trends, the Global South, Human Rights and Rights of Nature

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Climate Change Litigation: Recent Trends, the Global South, Human Rights and Rights of Nature

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Introduction: Climate change litigation at the ASIL Virtual Meeting

During the first virtual Annual Meeting of the American Society of International Law, Francesco Sindico facilitated a session on “Climate Change Litigation and the Future of the Climate Change Legal Regime”, which featured distinguished panellists, including Hari Osofsky, Dean of Penn State Law and the Penn State School of International Affairs; Jolene Lin, Director of the Asia-Pacific Centre for Environmental Law at the

¹ Both authors would like to thank Amelia Burnette for her comments and feedback on this short paper. Amelia has been awarded a Fulbright fellowship and will start her PhD at SCELG where she will be focusing on climate litigation and human rights. Currently Amelia is an attorney with a non-profit environmental law firm in the United State advocating for a healthy environment.

National University of Singapore; Daniel Mawgaw, former Director of the International Environmental Law Office at the U.S. EPA and President Emeritus of the Center for International Environmental Law; and Laura Shay Lynes, President at The Resilience Institute (TRI) in Canada.

The discussion was framed in the context of three important overriding themes: political and legal consequences of declaring a global climate emergency, questions about the future legitimacy of the Paris Agreement as a meaningful driver of global climate action, and whether countries will include climate action in post Covid-19 economic recovery actions.

At the outset of the discussion, Francesco Sindico asked the panellists to consider the impact different legal systems have on the outcomes of climate litigation and to elaborate on the conditions needed for climate litigation to serve as an effective tool in strengthening climate governance and provide pathways to positive climate action. What follows is a brief overview of the key points presented by each panellist at the ASIL Virtual Meeting session on climate change litigation.

The growth and regulatory impact of climate change litigation

Hari Osofsky began by making a statement of support for Black Lives Matter. Her presentation then focused on the evolution and regulatory impact of climate change litigation around the world, examining its role within the broader context of multi-level climate change governance and as a form of strategic litigation.²

² Jacqueline Peel and Hari M Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (Cambridge University Press 2015); Jacqueline Peel and Hari Osofsky, ‘Litigation as a Climate Regulatory Tool’ in Christina Voigt (ed), *International Judicial Practice on the Environment: Questions of Legitimacy* (Cambridge University Press 2019).

Hari Osofsky then turned to an overview of climate change cases around the world, highlighting the massive growth in litigation, key trends and their direct and indirect impacts. She explained that while most litigation has involved – and continues to involve – statutory pathways, especially in the USA, there are emerging human rights, constitutional, corporate and financial law pathways. While mitigation has been the primary focus, adaptation cases also have begun to emerge, particularly in Australia. There is also increasing interest in suits against corporate actors. Finally, although much of the litigation is pro-regulatory, anti-regulatory suits have been brought in reaction to government action addressing climate change.³

After describing recent developments in a number of jurisdictions, Hari Osofsky concluded by providing some key lessons learned from her collaborative work with Jacqueline Peel. She highlighted that, although corporate and rights-based cases are often very high profile, most climate litigation remains statutory. She explained high profile individual cases and lower-profile cumulative cases together have potential to produce transformative change, and that indirect effects are often even more powerful than direct effects, although drawing causal links is complex. Finally, litigation functions best as part of a broader effort.

The emergence of climate litigation in the Global South

Climate litigation in the Global South tends to be couched in rights-based claims including the right to life and a clean and healthy environment. Jolene Lin explained that this is in part due to the fact that many jurisdictions in the Global South

have embedded environmental rights in their constitutions and, in some cases, courts have interpreted the right to life to include the right to a clean and healthy environment.⁴

In addition to the human rights dimension, Jolene Lin clarified another trend when it comes to climate litigation in the Global South. Plaintiffs try to address what they perceive to be the most fundamental drivers of climate change, not necessarily by pushing for new climate laws or policy, but rather by focusing on enforcement of existing environmental laws and relying on tried and tested legal precedents to ground their pleadings. This increases the chances of favourable outcomes, which is of particular importance to litigators who are working with fewer resources. This “stealthy nature”, as Jolene Lin puts it, of attaching climate change issues to claims of existing environmental enforcement allows litigators to advance climate change policy in a more quiet and cautious manner without pushing the limits of judicial restraint.

Overall, cases continue to emerge in the Global South, but there is wide underreporting of these cases due to factors such as language barriers and challenges accessing legal materials in some jurisdictions. The growing understanding of the climate litigation landscape in the Global South will contribute to a richer and more developed picture of climate litigation and its impacts on global climate governance.

³ Peel and Osofsky (n 2); Jacqueline Peel and Hari M Osofsky, ‘Climate Change Litigation’ (2020) Annual Review of Law and Social Science <<https://www.annualreviews.org/doi/10.1146/annurev-lawsocsci-022420-122936>> accessed 2 June 2020; 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; Joana Setzer and Rebecca Byrnes, ‘Global Trends in Climate Change Litigation: 2019 Snapshot’ (Grantham Research Institute

on Climate Change and the Environment) <<http://www.lse.ac.uk/granthaminstitute/publication/global-trends-in-climate-change-litigation-2019-snapshot/>> accessed 26 June 2020.

⁴ Jacqueline Peel and Jolene Lin, ‘Transnational Climate Litigation: The Contribution of the Global South’ (2019) 113 American Journal of International Law 679.

From the Inuit petition to the Teitiota case: human rights and success in climate litigation

Daniel Magraw emphasised the human rights turn in climate litigation.⁵ There is a well-established relationship between human rights and the environment, and it is now generally acknowledged that a healthy environment is necessary for the enjoyment of a vast array of human rights. Importantly, environmental harm – including climate change – interferes with human rights.

Human rights can be a potent component of climate change claims at both the domestic and the international level and will continue to develop. An early example of human rights claims being brought in the context of climate change was the 2005 Inuit Petition brought to the Inter-American Commission on Human Rights. More recent international cases include the Committee on Human Rights *Teitiota*⁶ case and the pending *Torres Strait Islanders* case.

Daniel Magraw reminded us of the wide impact of litigation, even when it would appear, if considered superficially, as unsuccessful. In 2005, the Inter-American Commission on Human Rights declined to consider the Inuit Petition without explanation, which some might consider a failure of the case. However, the Commission ultimately held a hearing on the connection between human rights and climate change impacts. Considering the subsequent actions by States, NGOs and international organizations to solidify this now well-acknowledged link, the Petition thus, while itself unsuccessful, had wide-reaching effects. In this context, Daniel Magraw pointed out that strategic litigation can be effective if it is part of a broader campaign for change.

Another case that has not technically “succeeded” is the well-publicised *Juliana*⁷ (or *Our Children’s Trust*) case in the USA, which was dismissed for lack of standing by an appellate court, but had the indirect effect of raising awareness of climate change impacts on the rights of children and future generations.

A key point stemming from Daniel Magraw’s presentation was that the impacts of litigation are not only what was originally intended by the plaintiff but can include indirect impacts such as an influence on social and government behaviours.

Rights of Nature and legal personhood to bison in Canada

Laura Shay Lynes’ presentation focused on the Rights of Nature and the extent to which it could be used in climate change litigation.⁸ One prominent example is the grant of legal personhood to the Whanganui River in New Zealand.

Climate change brings challenges to Indigenous peoples’ rights on a scale never before seen. Indigenous Peoples have survived environmental change for thousands of years, but the magnitude and speed of change that is the result of climate change is unprecedented. A prominent example of the potential of the Rights of Nature to contribute to climate change litigation is the hypothetical case of bison personhood presented by Laura Shay Lynes. Before being hunted to near-extinction during colonization, bison freely roamed the vast plains of Canada, and played a significant role in the cultural traditions, ceremonies and discourse of First Nations Peoples. Additionally, bison have tremendous ecological value and, as the largest terrestrial animal in the plains, are considered an ecologi-

⁵ Jacqueline Peel and Hari M Osofsky, ‘A Rights Turn in Climate Change Litigation?’ (2018) 7 *Transnational Environmental Law* 37; Annalisa Savaresi and Juan Auz, ‘Climate Change Litigation and Human Rights: Pushing the Boundaries’ (2019) 9 *Climate Law* 244.

⁶ *Ioane Teitiota vs New Zealand* [2020] Human Rights Committee, UN International Covenant on Civil and Political Rights CCPR/C/127/D/2728/2016.

⁷ *Juliana vs United States of America* [2020] United States Court of Appeals for the Ninth District D.C. No. 6:15-cv-01517-AA.

⁸ Laura S Lynes, ‘The Rights of Nature and the Duty to Consult in Canada’ (2019) 37 *Journal of Energy & Natural Resources Law* 353.

cal keystone species, playing a crucial role in climate change adaptation and sustaining Indigenous ways of life.

While there are no current cases regarding this issue, reintroducing bison with legal personhood onto Indigenous lands (and with Indigenous governance) would serve to fast-track climate change adaptation and would advance commitments under the climate change regime, along with State obligations under other treaties such as the UN Declaration of the Rights of Indigenous Peoples.

The example of a hypothetical bison personhood case demonstrates the possibility of highlighting the interconnectedness of humans and the natural world to draw attention to the climate emergency as a continued strategy of climate change litigation, and as a tool to solve some of the very complex issues faced by climate governance.

Conclusion: The World is Open and the Climate Change Litigation Initiative (C2LI)

In his closing remarks Francesco Sindico said: ‘the world is open now’. Climate change related court decisions come in many languages from many jurisdictions and this is an opportunity – a richness – that we should all embrace as we come together to advance climate change litigation and continue to move the levers of the complex global system of climate change govern-

ance. SCELG, in collaboration with the University of Geneva Faculty of Law and the National University of Singapore Asia-Pacific Centre for Environmental Law, is ready to play its part through the Climate Change Litigation Initiative (C2LI). C2LI will be a policy relevant portal providing insights into how individuals have advanced (or could advance) climate litigation before domestic courts in 30 countries using a scenario based methodology. C2LI will be launched at COP 26 in Glasgow and builds on a book edited by Francesco Sindico and Makane Moïse Mbengue titled “Comparative Climate Change Litigation: Beyond the Usual Suspects” published by Springer in 2020.⁹

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⁹ Francesco Sindico and Makane Moïse Mbengue (eds), *Comparative Climate Change Litigation: Beyond the Usual Suspects* (Springer International Publishing 2020)

<<http://www.springer.com/gp/book/9783030468811>>
accessed 2 July 2020.



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