

Climate Litigation

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PluriCourts

Climate Litigation

- Introduction
 - Today's plan
 - Definition of Climate Litigation
 - Challenges
 - Recent Case Law

Climate Litigation

- Brain storming
- Related concepts:
 - Courts?
 - Climate rights?
 - Damage?

Climate Litigation

- Related concepts:
 - 1) Courts?
 - Climate Change concerns in judicial decisions?
 - » PCA Arbitration: Indus Waters Kishenganga Arbitration (Pakistan v. India), Para 117 Final award: - “ changing conditions-**including climate change**-lead to reconsidering over years the amount of water to divert.”

Climate Litigation

- Related concepts
 - 2) Climate rights?
 - Right to prevent climate change?
 - Right to the protection from the impacts of climate change?

Climate Litigation

- Related concepts
 - 3) Climate Damage
 - Ecological/environmental damage
 - » Loss of biodiversity
 - » Loss of land and property
 - Climate refugees
 - **Climate Change 2014: Synthesis Report** <http://ar5-syr.ipcc.ch/>

Climate Litigation

- Kivalina in Alaska
 - Likely to disappear.
 - Who pays? Where will people go?



<http://www.rd.com/true-stories/inspiring/kivalina-alaska-a-disappearing-town/>

Climate Litigation

- Definition (IBA)

“ To ensure communities, individuals and governments have substantive legal and procedural rights relating to the enjoying of a safe, clean, healthy and sustainable environment and the means to take or cause measures to be taken within their national, legislative and judicial systems and, where necessary, at regional and international levels, to mitigate sources of climate change and provide for adaptation to its effects in a manner that respects human rights”

Climate Litigation

- Litigation as strategy
 - Legislation
 - Implementation
 - Enforcement

Climate Litigation: Challenges

- Locus standing
 - Claimants?
 - Individuals
 - NGOs
 - States
 - Plaintiffs?
 - States
 - Corporations

Climate Litigation: Challenges

- Climate rights?
 - Right to prevent climate change?
 - Human rights protection of environment?
- Causation v. Accumulation

Sabin Center Climate Litigation Chart

- <http://web.law.columbia.edu/climate-change/non-us-climate-change-litigation-chart>

Emerging Trends in Climate Change Litigation

- State Responsibility
- Corporate Responsibility
- “Greening” of human rights

Climate Litigation

- What current provisions/ legal regimes may be utilised to advance climate change litigation?

Climate Litigation

- Public International Law Tools
 - Draft Article on State Responsibility for International Wrongfulness Acts
 - SC Resolution?
 - Advisory Opinion (Palau)
 - Inuit Petition (Inter-American Commission On Human Rights)
- Private Law suits
 - Urgenda Case
 - Belgium case
 - Washington
 - Pakistan Case

Public International Law

- Draft Articles on Responsibility of States for Internationally Wrongful Acts
 - Art.2 [...] action or omission:
 - a) attributable to the States under international law;
 - b) a breach of an international obligation of the State

Public International Law Suit

- Duty to prevent climate change damage?
- Treaty Law: UNFCCC
 - Preamble
 - Art. 2 UNFCCC, Art. 4 (2) UNFCCC
 - Art. 2 (1) (a) Paris Agreement
 - All Parties
 - Art. 18 VCLT

Public International Law Suit

- Customary Law
 - No- harm rule principle (prohibition of trans boundary harm)
 - Trail Smelter arbitration
 - Principle 2 Rio Declaration
 - What is prohibited: harmful activities or harm as such?
 - Qualification: significant

Public International Law Suit

- **Attributability to State**
 - Act of state organs? Art. 4-11 DASR
 - Failing to act with due diligence: state's duty of control/standards of care determined by a state's means and capacities.
 - Opportunity to act
 - Foreseeability of harm
 - Proportional and preventive measures

Public International Law Suit

- Causation
 - General
 - Specific (Attributability of emissions of a state to a certain damage) Art.39 DASR

Public International Law Suit

- Legal Consequences Art. 28-32 DASR
 - Cessation
 - Performance
 - Reparation (compensation)
 - Ecological damage
 - Moral damage
 - Apportion of responsibility/allocation of costs.

Public International Law Suit

- Paris Agreement
 - Decision, Para 58
 - *Agrees* that Article 8[Loss and Damage] of the Agreement does not involve or provide a basis for any liability or compensation

Public International Law Tools

- SC resolutions?
 - Climate Change as threat to international peace and security
 - Ex: feasible conflicts over control of energy sources, natural resources (water scarcity)
 - Art.24 (1) & Art.39 UN Charter
 - maintenance of international peace and security
 - Art. 55 (3)
 - promotion of universal respect for human rights and fundamental freedoms.

Public International Law Tools

- Advisory Opinion Art.65 ICJ Statute
 - Who can request the ICJ to give an Advisory Opinion? [Art.95 Charter UN]
 - GA, SC, organs and specialized agencies
 - Palau, 2011
<http://www.un.org/apps/news/story.asp?NewsID=39710&Cr=pacific+island&Cr1=#.VuEKbf72bIU>

Private Law Suit

- Urgenda Foundation v. kingdom of the Netherlands
 - District Court of the Hague [2015] HAZA C/09/00456689
 - Claimants: The Urgenda Foundation + 900 Dutch citizens
 - Plaintiff: Dutch Ministry of the Environment

Urgenda Case

- PETITUM (from latin peto= to ask for)
 - Declaratory judgement
 - i) unlawful conduct by State
 - ii) compel state to limit GHGs emissions
 - no compensation (3:269 Dutch Civil Code)

Urgenda Case

- Book 6 The law of obligations , Tort Law
 - Article 6:162 Definition of a ‘**tortious act**’
 - 1. A person who commits a tortious act (unlawful act) against another person that can be attributed to him, must repair the damage that this other person has suffered as a result thereof.
 - 2. As a tortious act is regarded a violation of someone else’s right (entitlement) and an act or omission in **violation of a duty** imposed by law or of what according to unwritten law has to be regarded as proper social conduct, always as far as there was no justification for this behaviour.
 - 3. A tortious act can be attributed to the tortfeasor [the person committing the tortious act] if it results from his fault or from a cause for which he is accountable by virtue of law or generally accepted principles (common opinion).

Urgenda Case

- Violation of duty of care to help prevent dangerous climate change.
 - Requirements (Dutch Supreme Court Jurisprudence)
 - Foresight of harm
 - Proximity
 - Preventive measures
- Tort of negligence

Urgenda Case

- Art.21 Dutch Constitution
 - Protection and improvement of its living environment
- No-harm rule
 - customary international law
- Art. 2 And Art. 8 ECHR
 - Right to life, health and private life

Urgenda Case

- Facts
 - 1. scientific evidence (IPCC)
 - on the correlation between GHGs emissions & global warming
 - + 2° C= adverse effects for all societies
 - UNFCCC, Paris Agreement
 - Acknowledgement by states

Urgenda Case

- Dutch Climate Policy
 - -17 % emissions compared to 1990
 - subsidies to fossil fuel
- What ought to NL do?
 - 25%-40% emission reductions by 2020

Urgenda Case

- Open Questions
 - Does this ruling amount to a political decision?
 - Separation of power
 - Environmental competence of judges?

Washington Case

- Our Children's Trust v. Washington Department of Ecology
 - King County Court
 - Claimants: 8 young petitioners
 - Petition: carbon emission rule that protect the atmosphere for present and future generations.

Washington Case

- “ State has to protect what it holds in trust [...] and it has a constitutional obligation to protect the public ‘s interest in natural resource held in trust for the common benefit of the people”
- “ State has a mandatory duty to preserve, protect and enhance the air quality for the current and future generations”

Washington Case

- Public Trust Approach @Brunnée *et al.*
 - Natural resources as trust property
 - State as trustee
 - Citizens as beneficiaries

Pakistan Case

- Ashgar Leghari v. Federation of Pakistan
 - Lahore High Court Green Bench [2015] W.P. No. 22501/2015
 - Claimant: A. Leghari
 - Serious threat to watery security and food security
 - Failure to carry out National Climate Policy (NCCP)
 - Plaintiff: Ministry of environment

Pakistan Case

- Violation of fundamental rights of citizens
 - IEL principles
 - sustainable development, precautionary principle and intergenerational equity
 - Public Interest Litigation

Pakistan Case

- Order:
 - Climate Change Focal Point
 - Climate Change Commission:
 - Ministries, NGOs and experts.

Climate Litigation

- Summary
 - Right to Prevent Climate Change
 - » State Responsibility for climate change
 - new emerging concepts
 - » State Due Diligence
 - » Duty of Prevent
 - » Duty of Care

Conclusion

- “ The legal profession has a critical role to play in strengthening and creating laws...and policies needed to ensure an effective and equitable response to climate change. We cannot solve the climate crisis without you, the lawyers of the world”- Ari S. Gargow, Gen Counsel to US Env Protection Agency, March 2015.