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Special Issue on Law in a Changing Climate

Introduction: law in a changing climate

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Abstract

As societies grapple with mitigating or adapting to climate change, law plays a prominent role in the social relations that constitute a response. In this essay, we briefly review of the many different perspectives on law and climate change offered by the authors in this special issue of Law and Society Review. From transnational human rights activism to constitutional litigation to local practices and all around the globe, both the powerful and the marginalized draw on legal institutions and actors in multiple arenas and at multiple scales to address the consequences of climate change. Together, these articles show that law is not confined to courtrooms or judicial systems or regulations; rather, law offers both limitations and opportunities in the ongoing struggle over climate change.

Keywords: Climate change; legal mobilization; legal pluralism; human rights; transnational advocacy

Introduction: law in a changing climate

Climate threads through legal and political systems, ranging from the level of transnational human rights-based litigation to community mobilization to mitigate air pollution, or the harm from rising seas. Throughout, actors mobilize the law (Vanhala 2022). Not all the law relevant to climate names climate change as the problem. Seeing climate change as a complex whole, one that crosses legal fields, links wicked problems where improvement in one element runs headlong into another, related problem (Marshall and Sterett 2019). International reports warn of increased risk of global pandemics. Agricultural practices lead to habitat loss and deforestation, folded into a changing climate marked by increasingly interconnected governance challenges happening together in the Brazilian Amazon (Delaroche, Dias, & Massoca 2023). In the United States, building housing in places at great risk of a rising sea brings conflicts over how to price flood insurance in an increasingly risky setting. People facing dramatically increasing insurance costs have little reason to welcome transnational understandings of the pervasiveness of a changing climate (Elliott 2021; Pralle 2019).

Law and legal professionals have organized the multiple problems now summed up as a changing climate. Property rights have allowed deforestation and the mining and consumption of fossil fuels, and property regimes contributing to overfishing (Hurst 1984; McEvoy 1986). Following how legal professionals organized resources use was a foundational theme in sociolegal studies (Hurst 1984). In the United States, key environmental laws have organized litigation about managing pollution (Melnick 1983). In recent years, these particular problems have become subsumed as a governance and legal issue as climate change, a global problem. Global governance has relied on legal forms to work out compensation across national boundaries (Vanhala 2022).

In recent years, climate writers have taken this more comprehensive approach, naming an environmental reckoning (Jackson & Chapple 2018), and the denial of its comprehensive reach "the great derangement" (Ghosh 2016). The philosopher Timothy Morton names something so that reaches into every part of life, across time and space, a "hyperobject" (Morton 2013). As industrial capitalism has changed the earth system leading to today's climate crisis, climate politics has become "existential politics" (Colgan et al. 2021). Since so much of governance is conducted through legal forms, sociolegal scholars are critical at each level. Sea level rise overlaps with decisions about how to build in coastal areas, or how to farm. The articles in this special issue engage law in a changing climate at different scales. They include local property claims and transnational lawyering. When read together, they contribute to framing law as a pervasive force shaping the problems and their names, now in a changing climate.

In her article in this special issue, Raychel Gadson writes about some effects of mobilizing against health-related problems worsened by coal dust in the United States. As Gadson discusses, lawyers and activists have engaged in oppositional mobilization tactics for better health and environmental governance. These deliberations help stakeholders name and approach human rights as matters of climate and environmental justice, whether in legal or political forums or both. Ana Maria Vargas details how social actors build "environmental legal consciousness" by resisting state power in exclusionary climate adaptation policies in Colombia. In Chile, Lopez Moreno documents how local activists have ably found ways to include and address climate change in the efforts to reform the Chilean constitution. In intersecting global and local issues, Sébastien Jodoin and Margaretha Wewerinke-Singh document the local ramifications of learning forms of rights-based advocacy at the global level of legal mobilization. Therefore, the effects of legal mobilization include an important learning process of combining rights-based litigation with political negotiation gained through mobilizing the law, which Dias et al (2021) have also found in Brazil, even in lawsuits against the state in which citizens do not win.

Naming a problem as global, as UN negotiations and transnational litigation do, invites normative claims about what law can be. In the world of transnational negotiations and litigation, a changing climate is all-encompassing. Transnational rights-based climate litigation are the sociolegal partner to naming an environmental reckoning. A changing climate in litigation reaches well beyond greenhouse gas emissions and extreme floods to severe drought. Sébastien Jodoin and Margaretha Wewerinke-Singh follow the world of transnational climate-based rights litigators. They argue in their article in this special issue that transnational climate rights cases resemble each other not least because people in transnational networks of non-profits share

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information. Jodoin and Wewerinke-Singh find that environmental litigators participating in rights-based climate litigation rely on networks to collaborate, learn, dispute, and tell stories. The rights named in the cases they describe are broad: they claim the future, or a right to a clean environment. They promise to force change against recalcitrant government officials.

The scholar Kim Bouwer (2018) has named these "holy grail" cases concerning climate. They promise to solve a broad swathe of problems with one inspiring, principled court decision. That promise is the world of transnational litigators. That meaning does not resolve what rights mean to people whose homes flood. Following how the cases are produced and what they mean to participants, as Jodoin and Wewerinke-Singh do, is critical to climate litigation politics today. These cases are at the heart of environmental advocates' legal mobilization (Vanhala 2022). Advocates aspire to match the global name for multiple problems, global governance, and transnational litigation, by proposing an "earth system law" to govern natural resources at a planetary scale (Kotzé & Kim, 2019). Jodoin and Wewerinke-Singh's project invites more reflection on the project of creating a global regime of rights, and what it means where trees are cut down, buildings built, and coal burned. Jodoin and Wewerinke-Singh note that they cannot know whether or how the language of transnational rights based climate litigation means anything to people responsible for changing practices to mitigate harm.

Litigating against dominant power structures – the systems that brought us here – has long been understood as potentially offering two kinds of changes. First, it may gain some headway toward the effects people intend. A victory may contribute to a government regulating to mitigate greenhouse gas emissions, or broadly consider climate in its decisions. Even without a clear instrumental effect, it could contribute to sharing information with a broad public, or inspiring people, or offering hope. Those more diffuse effects could be what litigants intend, or they might be a beneficial side effect (Marshall 2006; 2009; Nolette 2015; Sarat and Scheingold 2006; Setzer, Silbert & Vanhala, 2024).

Legal mobilization as sharing information or mobilizing publics may not have intended effects. For many years in both Europe and the United States, litigators have relied on the law in their countries, or, in Europe, on rights in the European Convention on Human Rights, to press cases for immigrants and for asylum seekers (Coutin 2000; Hamlin 2014; Kawar 2015; Sterett 1997). They pressed both for principled interpretations of human rights, and for governments to follow their own laws, winning cases within what are often tight doctrinal constraints (Kawar 2015). Though many had hoped that victories could lead to broader acceptance of immigrants, electoral politics in recent years in all countries has ridden on ongoing waves of anti-immigrant preferences by voters. Perhaps, anti-immigrant policies would have been even more exclusionary without victories, and certainly parties to cases would not have won. But surely experiences across multiple countries with immigration should teach some caution about what a victory will mean. For example, in the United States, immigrants represented by big law firms are more likely to win in appellate courts than those assisted by smaller specialized immigration firms (Krishnan et al. 2024). Cases have to be embedded in relationships among legal actors, which are marked by power asymmetry (Dias 2023).

Sociolegal scholars have pointed out that law does not come from outside the systems it regulates (Moore 1978). Therefore, understanding what law does requires

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describing power. Power infuses decisions about where people can live, with what resources, and what fuels people will rely upon, often with law. Transnational rights and their meaning depend on how they circulate among people who build homes or farm, far from transnational litigation.

Constitutional politics have also been a place for contesting responsibilities and trying to embed principles to manage a changing climate. In this special issue, Rodolfo Lopez Moreno explores a constitutional change process in Chile that brought together popular climate change language with less popular constitutional changes. The whole package went down to defeat. Moreno gathers invaluable reflections from participants. The process itself was complicated, and not often enough in use to be familiar to climate activists. The radiating effects of naming climate, critical to both a litigation campaign and constitutional politics, could depend on both process and outcome.

From a politics of legal principles to local practices

To understand what such broad principles could mean to farmers or people whose homes flood requires broadening the actors considered and power. The world of human rights necessarily changes when people who may be far from the world of transnational lawyering or negotiations make it meaningful where they live (Merry 2006). Before climate, actors in other movements collaborated across national boundaries. Activists borrowed from each other to inform rights (Heyer 2015), just as the lawyers Jodoin and Wewerinke-Singh study do. Collaborations can build shared understandings even when doctrines and national legal histories differ. As Dias argues (2023), a key task in understanding the role of the law, lawyers, and disputants in a changing climate is to "unpack[] how climate action and dispute resolution are embedded in social relations." Bouwer (2018) also highlights this point when noting that climate change directly and indirectly affects all conflicts and how they are resolved in society. One set of social relations is among transnational litigators and the people who work with them handling disputes, as Jodoin and Wewerinke-Singh explore in their work. Another, though, is the messy relationships, sometimes transnational and sometimes specific to a country, region or locality, among legal officials and the people in their communities. Officials include the many people embedded in state bureaucracies. They are responsible for interpreting the law if not for litigating.

Turning to a broader array of legal processes and officials both turns away from the big story of an environmental reckoning and thereby can connect more to how people live with a changing climate. Chile's constitutional politics concerning climate came amidst an historic drought, now usually interpreted as climate change related. Farming in the Amazon, or flooding, or a drought, are all much more immediate for people than the world of transnational litigation. People engage state policies in climate-related disaster in both the Global North and South. (Dias et al. 2021; Sterett and Mateczun 2020, 2022; Peel & Osofsky 2020). For those who own homes in flood and fire zones, a climate problem is the increasing cost of insurance, and inequality in expense or ability to contest it. (Elliott 2021; Lea and Pralle 2022; Pralle 2019).

Sociolegal scholars have long pointed out that litigation is but the smallest part of how people work with law. As Susan Silbey and Ayn Cavicchi argue, the trial is the popular image of law – and high profile claims for fundamental rights for the young in a changing climate may gain press – but "the trial is merely the tip of the iceberg

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of matters that come to legal agencies for reconstruction and containment" (Silbey and Cavicchi 2005: 556). When we turn away from the tip of the iceberg, we find legal officials in administrative agencies, and the people who engage them.

In this special issue, Raychel Gadson turns to legal mobilization in state bureaucracies to argue that activists sometimes use legalized processes to adapt to how best to persuade state bureaucrats. She writes about coal dust in Baltimore. Baltimore is the second largest port for shipping coal in the United States. The coal is shipped around the world, most of it to India. People living in Baltimore experience the grime, the asthma, and the December 2021 explosion from coal shipping and storage. People in India experience the greenhouse gas emissions from burning the coal. Situating the problem in one place, as one problem, as Gadson does, makes it much more comprehensible than a broad description of the threat of a changing climate.

Legal pluralism (Merry 1988) contributes to filling in the conceptual blank space of interpreting what principled commitments to mitigating a changing climate would mean to people living outside the world of transnational litigation. Anna Maria Vargas explores informal settlements in flood zones in Cartagena, Colombia. She argues that people stake claims to a place to live by staking poles, evoking a folk interpretation of law that differs from state law. One can claim a right to space by staking a claim, and working to make the space useful (see also Silbey and Cavicchi 2005: 561–563). That claim, respected by neighbors who have also staked a claim, does not align with state law excluding people from flood zones. People who claim space by staking poles have nowhere else to live. She concludes by arguing that state law reinforces vulnerability. The affluent can build sea walls and others have nowhere safe to go.

Legal/political regimes and power

Naming climate change has organized a field of legal practice, with databases (Sabin Center), environmental lawyers, journals, and research handbooks (Sindico et al. 2024). As Moreno demonstrates in his article in this special issue, it can frame constitutional reform. Studying how a field comes to be is not the concern of the lawyers writing, organizing databases, and litigating. Nor is it the concern of people in Colombia seeking to claim space in unstable land. It could be the concern of sociolegal scholars. How does an overarching description of legal responsibility get created? The question has bite because organizing a field is an answer to those who have, through law, long been producing the multiple harms many now describe as a changing climate. Naming a question, and a problem, is an exercise of power. Naming the problem and creating a field around it is all the more remarkable given how embedded existing systems of production and consumption are in the everyday, and in what we can imagine. The dominance of private actors, including via social media platforms, in producing what we know promises a common sense about law, or problems, that reflects back what people see (Silbey 2005), and perhaps immediate experience.

Others litigate climate-related cases and making climate-related decisions that law facilitates. They include the fossil fuel companies working to limit their liability and regulation, and insurance companies contesting responsibility in climate-related disasters (Sterett and Mateczun 2022). They may not name their work as climate litigation. But limiting studies of climate work to those who are intentionally claiming environmental harm cuts out at least half the actors. It cuts out powerful organized

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interests that dominate legal practices, including in adapting to climate (Vargas, this volume; Fritsvold 2009).

Not studying critical powerful actors limits understandings of how the world is produced, including through law. It also limits seeing how change could happen (Prasad 2018). It also cuts out multiple routes of adaptation (unequal or not) that may not involve intentionally environmental claims. Decisions by insurance companies about rates and whether to insure homes are shaping who can own, where, and how much they pay (Elliott 2021; Flavelle and Rojanaskul 2024).

Not studying critical powerful actors also misses the strength around the world of resurgent authoritarian governance. Many of the governments taking power after the pandemic have promised an end to immigration and asylum seeking, a resurgent nationalism, and a resurgent ideology of gender inequality. A changing climate is not a domestic priority for many recently elected governments. Governments promising to protect the nation often rely on legal strategies, including restrictions on courts, to enact priorities. If climate is a name for a comprehensive problem, one that sets a context for all of litigation (Bouwer 2018), mapping how or whether the legal tactics and strategies suppressing speech or restricting courts connects to the production of a changing climate is a task for sociolegal studies as well (Darian-Smith 2022).

Naming a comprehensive problem that requires a comprehensive legal approach contrasts with the neoliberalism that dominated Western governance from the 1980s forward. Regulation was widely portrayed as the problem. Markets would address problems, including a changing climate. Economists argued that it would be too costly to address a changing climate. Instead, technological innovation and market forces would correct the negative externalities of environmental destruction (Franta 2022). The role of law would be to facilitate internalizing externalities. If the world wanted to decrease the use of fossil fuels, the way to do it would be to price greenhouse gas emissions appropriately. The rise of law and economics in United States legal studies (Teles 2008) set the purpose of law as correctly lining up incentives in multiple domains. In climate, carbon credits track that framework (Prasad and Kuhl 2023). They are only occasionally implemented, and pricing and administration requires management, not an unfettered market. Credits in the auto industry in the United States have disproportionately benefitted one man, Elon Musk (Greenfield 2024), converting public purpose to private wealth. His political activity in turn endorses resurgent nationalism and authoritarian governance. He does claim the importance of addressing climate change, holding that carbon credits are enough.

Bringing together the "hyperobject" of climate change (Morton 2013) with sociolegal studies requires following the lawyers who bring cases in transnational courts. It also requires assessing where, and how, their work connects to the work of people worried about coal dust, or whether they have a home. We also need, though, to analyze the legal tactics that produce the common sense that becomes our governance.

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