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Hypothesis

An Attack on the Separation of Powers? Strategic Climate Litigation in the Eyes of U.S. Judges

Jasmina Nedevska

Department of Philosophy, Uppsala University, 752 38 Uppsala, Sweden; jasmina.nedevska@statsvet.uu.se

Abstract: Climate change litigation has emerged as a powerful tool as societies steer towards sustainable development. Although the litigation mainly takes place in domestic courts, the implications can be seen as global as specific climate rulings influence courts across national borders. However, while the phenomenon of judicialization is well-known in the social sciences, relatively few have studied issues of legitimacy that arise as climate politics move into courts. A comparatively large part of climate cases have appeared in the United States. This article presents a research plan for a study of judges' opinions and dissents in the United States, regarding the justiciability of strategic climate cases. The purpose is to empirically study how judges navigate a perceived normative conflict—between the litigation and an overarching ideal of separation of powers—in a system marked by checks and balances.

Keywords: climate; litigation; separation of powers; governance; legitimacy

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1. Introduction

Pointing to climate-change-related injury, citizens and environmental groups are increasingly turning to courts in order to take legal action against their governments. These cases belong to a category that can be referred to as strategic climate cases. Some of these, such as Massachusetts v EPA (2007) and Juliana v United States (ongoing) in the United States or State of the Netherlands v Urgenda (2015) in the Netherlands, have been the focus of extensive institutional debate [1]. In the Urgenda case, the Supreme Court of the Netherlands established in 2019 that the State's inaction on climate change had violated its citizens' rights to life and privacy [2] (aa. 2; 8). In what has been described as the "strongest" climate ruling so far, the State was ordered to cut its greenhouse gas emissions by at least 25% by 2020, compared to levels in 1990.

Given this development, climate change litigation appears as a potentially powerful tool as societies steer towards sustainable development. Yet, it raises the issue whether, and to what extent, a court may legitimately exercise power over a state's chosen climate policy. To the extent that the aim is to apply specific climate laws, that issue could seem less problematic, albeit not inexistent. Here, however, I aim to treat climate litigation that purports to change government policy, e.g., by reference to fundamental rights–so-called "strategic" climate litigation. Views critical of such litigation are often based on the ideal of separation of powers in constitutional democracies. In a system based on the idea of checks and balances, the separation ideal may allow the judiciary to review legislation, in order to ensure the effectiveness of certain moral constraints. However, the ideal also requires that the judiciary is restrictive in exercising this power.

The United States is a developed system of checks and balances that has seen a comparatively large amount of climate lawsuits. Separation-of-powers principles have also played an important role in U.S. climate change litigation [3] (p. 30). This project uses the United States as a case to investigate a perceived normative conflict between climate change litigation and the ideal of separation of powers. Three studies are suggested in this proposal. Each study comprises a content analysis of opinions and dissents by judges in American climate lawsuits. The particular aims of these are to demonstrate how the

conflict (1) is expressed, (2) is avoided by individual judges and (3) is jointly avoided across ideological dividing lines, respectively. While the objects of study are normative views, the particular aims of the studies remain purely descriptive. Nonetheless, the project's findings may be of use for policy-makers and an interested public, including environmental organizations, business representatives, diplomats and lawyers.

2. The Research Problem

From a political science perspective, strategic climate litigation can be seen as a relatively new, overlooked form of climate governance [4,5]. That implies that courts are used to steer entire social systems towards (or away from) sustainable climate policies [6] (p. 385). This would follow a general trend during the late 20th and early 21st century—referred to as the judicialization of politics—to rely on courts to resolve contentious moral matters and public policy issues [7]. Specific climate rulings may, in addition, influence legal considerations in other jurisdictions [8]. Implications of climate change litigation are to this extent "global"—even if it mainly takes place in national courts (for an empirical and normative critique of this view, see [9]).

It seems, furthermore, that the questions raised about the power of courts can be understood through the lens of legitimacy in governance. Authority is said to have normative legitimacy if its claim to power is "well-founded–whether it is justified in some objective sense" [10] (p. 601). Such claims can be made in favour of climate change litigation. Representation of climate plaintiffs in court could be said to contribute to a form of procedural legitimacy: it promotes inclusion in the decision-making process of concerned entities who are excluded from the "demos", i.e., are not eligible voters, such as children, future generations, animals or nature itself [11]. Enforcement by courts, in turn, could be said to contribute to substantial legitimacy: it promotes effectiveness that is lacking due to a relatively unconcerned demos [12,13] and [14] (p. 188). Both goals could be said to promote the effectiveness of climate politics, indirectly or directly. They would thereby be in line with Goal 13 in UN's 2030 Agenda for Sustainable Development: to globally limit climate impact.

However, some will say, the normative legitimacy of climate change litigation does not only rest on its climate-related benefits. Arguably, it should also abide by overarching ideals of constitutional democracies (at least as far as self-proclaimed such states are concerned). To remain with Agenda 2030, it outlines three mutually reinforcing dimensions of sustainable development—an environmental, social and economic dimension, respectively. Goal 16 has a social emphasis and requires responsible, democratic institutions. Less tended to—in the literature on climate change litigation—is the related, institutional ideal of separation of powers (but see [15,16]).

According to this ideal, the power of the different branches of government should be exercised according to the rule of law—a predetermined set of restrictions—in order to reflect the will of the people [17] (pp. 10–13). Judges, defendants and other stakeholders in climate litigation put forth the ideal of separation of powers as a reason to deny strategic climate plaintiffs access to court. For example, the defence in Juliana v United States claimed in the Court of Appeals that such access would be a "direct attack on the separation of powers". (See 18-36082 Kelsey Rose Juliana v. USA-YouTube, at 10:49. Retrieved from the official channel of the United States Court of Appeals for the Ninth Circuit on 27 April 2021.) Part of the expression is included in the title of this project. These critics argue that it is the specified task of elected politicians—not judges far from public control—to steer public climate policy. Here, the legitimacy concern would (again) be procedural, while the specific value is accountability [14] (p. 188). The lack of accountability makes strategic climate litigation seem like a less legitimate form of climate governance.

Nonetheless, very little research has been done on climate litigation in respect of the ideal of separation. It is well known that depending on the constitutional system, the ideal of separation can have radically different implications [17]. In a constitutional system based on the idea of popular sovereignty (such as Sweden, where the present author is

from), the separation ideal typically favours the procedural value of accountability through elections, while courts "merely apply the law". Prima facie, that seems to entail that environmentalists should rather seek redress in the parliamentary process. In a system characterized by checks and balances (as in the United States), however, the separation ideal could more plausibly favour the value of effectiveness of some fundamental moral constraints. The judiciary would then be ultimately responsible for keeping the legislator within those constraints, in accordance with a constitution or other basic legal document.

At the same time, judicial constraints on the legislator are to be applied restrictively, in respect of doctrinal criteria. Existing scholarship on rights, in particular, implies that climate plaintiffs may not fulfil such criteria (see, inter alia, [18,19]). Arguably, climate change litigation has left room for individual interpretation among judges. In addition, it is known that judges are influenced by factors external to the law, such as ideological preferences—the law literature refers to the latter as "judicial attitudes". We can expect these to play out more where there is more room for interpretation, as well as in more contentious matters, such as climate policy [20].

It is not clear how judges navigate a percieved normative conflict–between strategic climate litigation and an overarching ideal of separation of powers–in systems of checks and balances. In the project description further below, under the subheading "Material and Methods", I suggest an empirical case study of the United States to investigate this matter.

3. Previous Research

Climate cases have appeared on local, regional, state and federal levels and in a growing number of jurisdictions across the world (including the EU). According to Setzer & Vanhala (2019), research on climate change litigation has proliferated in relation to rulings in high-profile cases such as Massachusetts v EPA (2007) and Urgenda (2015) [5]. In these cases, highest court judges have ruled against defendants (governments) and in favour of strategic plaintiffs on the substantive merits of the case. Yet, very little research has been done on climate change litigation in respect of the overarching ideal of separation of powers. This matter seems understudied both in environmental law and climate governance, which should be the most concerned fields in law and political science, respectively.

Furthermore, few studies on climate change litigation seem to have looked into larger sets of cases, cases on lower levels or dismissed cases (but see [21–25]). This may be, in part, because the high-profile cases contain legal innovations or form precedents for future cases (to some extent, this perspective is kept in the present project). It might also be explained by the fact that climate litigation has been given less attention outside faculties of law.

Under "Material and Methods" below, I suggest a case study of the United States to better understand the complex relationship between strategic climate litigation and the ideal of separation of powers, as far as a system of checks and balances is concerned. The United States offers relatively large amounts of material within a unified legal system, which can be used to describe and explain patterns with regard to the separation ideal. I do so through analyses of judges' arguments [26] in three subordinate studies. In these analyses, I draw on democratic theory, rights theory and scholarship on judicial attitudes, respectively. Rather than provide normative guidelines, the study aims at purely empirical accounts of how a normative ideal (separation of powers) is applied in new legal terrain (strategic climate litigation).

The working hypotheses in the project description partly emerged during a pilot study and postdoctoral appointment at the Department of Politics at Princeton University, 2020. The pilot study involved the applicant and a research assistant under the author's supervision (the author wishes to thank research assistant Akhil Rajasekar).

4. Material and Methods

Against the background of previous research, then, I suggest a specific case study of the United States. The United States is a system of checks and balances with a developed "adversarial legal culture" [11] (p. 12). As such, the United States has seen a comparatively

large number of climate lawsuits. As of January 2020, 1143 out of the world's 1444 recorded climate cases had been filed in the U.S. [27]. The cases include, for example, claims based on the National Environmental Policy Act (NEPA), constitutional claims and public trust claims. These cases provide large amounts of material within a unified legal system and can be used to describe and explain patterns of principled argument.

The issue of separation of powers may arise in several ways before a United States court, and this study excludes some. Judges may, for example, refer to separation of powers when a claim is rejected on the merits because there is no relevant right to apply (such as the right to a clean environment) and little room for the judiciary to "invent" new rights [28] (pp. 51, 283–284). This study excludes separation arguments related to merits and focuses on the preceding matter of justiciability (which may include considerations of relevant rights). Justiciability concerns, generally, "a person's ability to claim a remedy before a judicial body when a violation of a right has either occurred or is likely to occur" [3] (p. 30), [29]. A case may be considered injusticiable by reference to a "political question doctrine" if one of the political branches has "a textually demonstrable constitutional" power to resolve the matter or if there are no "judicially discoverable" standards for doing so [30]. The ideal of separation of powers is also reflected in the doctrine of standing. According to this doctrine, plaintiffs need to fulfil established, procedural criteria (judicially discoverable standards) in order to bring their case before the court. Courts tend to invoke the doctrine in order to limit themselves to exercising judicial, rather than legislative or executive, power [3] (p. 30).

The relevant cases can be retrieved online from the Climate Change Litigation Databases at Columbia University's Sabin Center for Climate Change Law. A selection is made of cases brought by strategic climate plaintiffs within the federal legal system. In order to better establish patterns, the project considers the opinions and dissents on several levels for the same case. The project aims to answer the following delimited set of questions:

1. To what extent do U.S. judges express a normative conflict between the litigation and an overarching ideal of separation of powers?
2. How do individual judges navigate the expressed conflict?
3. Do judges' individual views on justiciability of strategic climate cases co-vary with attitudes along ideological lines?

Each question is treated in a study, with the purpose of producing a research article. The overarching method in common for these studies, which are descriptive, is content analysis. The project combines qualitative content analysis (Study 1 and 2) and quantitative content analysis (Study 3) in a manner further described below. Each analysis also draws on a main scholarly discourse—theories on democracy, rights and judicial attitudes, respectively—as described below.

Study 1: The Separation-of-Powers Argument in U.S. Climate Litigation

The first study of the project examines to what extent a theoretical conflict is expressed, in American climate change litigation, between the litigation and an overarching ideal of separation of powers.

Democratic theory is here used to enhance conceptual understanding of the ideal of separation of powers in different constitutional systems (see [17,31,32]) With regard to the U.S. case, a conflict may arise directly, between climate change litigation and the separation ideal, by reference to a political question doctrine, or indirectly, due to a doctrine of standing characteristic of a system of checks and balances. A function of this doctrine is (similarly) to make sure that the judiciary does not exceed its competence in relation to the legislator. In climate litigation, this doctrine may imply several problems, among them a "causality problem", as the plaintiff may not be able to show that injury has potentially been done to them. This study demonstrates the different ways in which strategic climate litigation conflicts with a separation ideal, according to U.S. judges.

Study 2: Three General Approaches U.S. Judges Take to the Causality Problem in Climate Change Litigation

The second study of the project examines how individual U.S. judges navigate an express conflict between strategic climate litigation and the ideal of separation of powers, but only in a further delimited manner. The study I suggest maps the different approaches judges take to one salient problem—the causality problem implied by a doctrine of standing.

Rights theory is here used to distinguish between different approaches to causality (see, inter alia, [5] (p. 10), [24] (p. 40)). A strict individualist approach implies that climate inaction does not cause injury and that plaintiffs are not granted standing, which the first study also shows. Yet, some judges seem to navigate around this by arguing for less established accounts of injury. What I refer to as a lax individualist approach implies that a judge argues for a less established account of individual injury. What I refer to as a non-individualist approach implies that a judge argues that there may be injury of a community (such as a state) or even an object, such as a river [18,19]. I thus hypothesize, with delimited regard to the causality problem, that a conflict persists, between the litigation and a separation of powers, when judges employ a strict individualist interpretation of injury, while judges seek to circumvent the conflict by either a lax individualist or non-individualist interpretation, respectively.

Study 3: Judges' Attitudes in U.S. Climate Change Litigation

The third study of the project explores to what extent judges' views on the justiciability of strategic climate cases co-vary with so-called judicial attitudes (see, inter alia, [25,33–35]).

Research has previously been done on whether judges appointed by Democratic and Republican presidents judge in equal measure in favour of the substantive claims of strategic plaintiffs [25]. Still, no studies of this kind seem to have focused on views on justiciability. However, focusing only on the inclination to hear cases may hide that, depending on attitude, judges' argument(s) for doing (or not doing) so differ. Recent research has also mapped how Republican and Democratic sympathizers in the American populace differ in why they support renewable energy [36]. Here, a similar perspective is used to study judges' views on the justiciability of strategic climate cases.

The issue is explored by using the information in opinions and dissents of individual judges' positions (available through the Sabin Center), together with available data on how each judge was appointed. The complementary data on appointments are available through the Federal Judicial Center's Biographical Directory of Article III Federal Judges [37].

5. Summary: Expected Results

In my first study, I explore the views of U.S. judges on how climate litigation conflicts with the ideal of separation of powers: directly, given a political question doctrine, and indirectly, given a doctrine of legal standing. The latter doctrine seems characteristic for the U.S. as a checks-and-balances system and would make sure that a relatively strong judiciary does not exceed its competence in relation to the legislator.

My second study is limited to a specific but salient problem implied by a doctrine of standing—a causality problem. I hypothesize that three approaches can be identified among judges: a strict, lax and non-individualist interpretation of injury, respectively. Among these, furthermore, I hypothesize that two circumvent the problem and imply that standing is granted: the lax individualist interpretation and the non-individualist interpretation.

In my third study, using additional data on appointments, I explore how views on justiciability co-vary with judges' attitudes along ideological lines. The results in this as well as the preceding studies will, of course, depend on the project's eventual findings.

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