

The Pros and Cons of Litigation as Change Policy: As Practiced in Climate Change and International Territories

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Introduction

This paper examines litigation as a change policy in its broader contexts and, more specifically, as it is used within the climate change arena and in international lawsuits that target Sovereign States. Additionally, this paper will further discuss the pros and cons of change policy litigation and its impact on leaders in jurisprudence, governance, business, and policy legislation. The body of the paper will include an explanation of litigation through change policy, a brief history, current applications, and its future. The summary section will examine the literature sources for research regarding litigation as a change policy. It will conclude on the generally perceived benefits and hazards of its continued use within various fields. It further explains why litigation is used as opposed to other available forms of legislation.

Litigation used as policy change is not a new phenomenon but has been increasingly relied upon by activists and corporations in a broader expansion for potentially unethical purposes. This includes the practice within the domestic United States and in international applications.

Body

Change Policy Litigation takes many forms; however, this paper will focus on its application within the domestic U.S. borders where it is engaged in climate change, and outside in international applications that involve the Sovereign States. This paper examines two areas of change policy litigation which include 1) climate change mitigation and 2) international lawsuits

by sovereign states and multinationals to promote faster and often profitable changes to public and private outcomes. The term 'climate change litigation' includes proceedings directly involved with climate change issues. This form of litigation is directed "at public and private companies, federal governments, city administrations and insurance companies" (Clarke & Hussain, 2018). The use of litigation as change policy is being used more frequently as a mechanism to take swifter action rather than relying on the slower legislation process.

Climate Control

The use of change policy litigation in the United States has become popular in fighting for climate change policies that may have taken much longer to implement through legislation. Activist organizations use litigation frequently to halt impending progress on pipelines, oil rigs, and fracking, or fight the consequences of pollution caused by fossil fuel acquisition and use. The latter usage comes under human rights litigation which is also becoming more successful as a tool for litigation.

The phenomenon of 'climate change litigation' has come to the fore in recent years as campaigners and activists have become increasingly frustrated at a perceived lack of action on the part of the international community and individual states in terms of getting to grips with the climate change problem. Existing legal mechanisms available to private parties and other bodies, such as non-governmental organizations (NGOs), have been used as a means of endeavoring to hold governments and polluters to account for the effects of climate change" (Wilde, 2021).

In short, folding Human Rights issues inside the litigation accelerates the outcome. "Scott Walker argues that the urgent threat posed by climate change demands a more ambitious policy

response and that shifting to a human-rights focused approach could provide a better framework than ad hoc litigation" (Corr, 2022).

Activists et al. use litigation when their hoped-for reforms fail in the legislature due to a lack of support from an elected majority of representatives. The cost to taxpayers for litigation instead of legislation is high. When activists or government officials attempt to enact significant reforms without going through the legislature but through litigation, the cost of government spending and regulation increases. In multiple states, judges are being pushed, not just by activists but also by powerful government officials, to enact sweeping reforms, many of which have already been proposed in the legislature and failed to receive support from a majority of elected representatives (Gleason, 2022).

When the Environmental Protection Agency's moved to regulate greenhouse gasses, "its ultimate effect on public policy depended in large part on cooperation from the political branches of government, particularly the executive branch" (Goldford, 2021). Additionally, lawsuits are now being waged against damage yet to occur, such as impending hurricanes, fires, snow storms, and floods which are believed to be the result of climate change. "It seems that the courts are close to accepting that it is conceptually and theoretically possible to establish a link between an extreme weather event, and consequent damage, with the contribution of a specific polluter to climate change" (Wilde, 2021).

The results inspire activists and open the floodgates to more lawsuits (Goldford, 2021):
But environmental lawyers and activists in liberal democracies with functioning elected institutions might want to think twice before investing considerable human and financial resources in litigation. They might succeed more if they focus their efforts on the political branches through lobbying, voting, and persuasion of their fellow citizens. After all, if a

case hinges on statutory interpretation and the legislative branch finds the court's decision to be undesirable, it can simply amend the statute at issue.

Although Professor Lazarus' book might leave some with the impression that the courts are the go-to place for those that seek public policy change, it is essential to remember that this is not necessarily the case in the United States, Canada, and elsewhere (Goldford, 2021). Professor Lazarus is a Harvard law professor. While litigation may empower public consciousness, which can lead to policy change, the public pays a steep price for that convenience.

As a result of the litigation change policy, the process of gathering important data to support lawsuits has begun. Organizations have realized that to win climate or health suits related to pollution; the prosecutors will need statistical data in the sciences and human health fields. Thus the process for gathering this information must occur well in advance of these lawsuits. While this is neither a negative nor positive outcome, it is a concerning phenomenon as it can "stack the deck" in favor of the outcomes (Patterson et al., 2022):

Sound scientific evidence is as critical to successful litigation as effective public health policies. Increasingly, public health practitioners are asked to testify in court about the known health impacts of environmental harm. Collecting this evidence requires foresight, meticulous record keeping, peer support, and the courage to withstand questioning of professional capacity.

Another example of this is in California, where (Mazmanian et al., 2020):

Its world-class technocrats conduct research and design policy proposals addressing environmental and climate change issues (CEC, 2019). These premier institutions include Lawrence Berkeley Labs, the Jet Propulsion Laboratory, UC Berkeley's Energy and Climate Institute, California Institute of Technology's Linde Center for Global

Environmental Science, the University of California Los Angeles's Center for Climate Science, the Scripps Institute of Oceanography at the University of California at San Diego, University of Southern California's Earth Science program, and the Stanford University's Precourt Institute for Energy.

By constantly monitoring these organizations, California can stay on the cutting edge of the knowledge curve and offer its data to those organizations, multinationals, and countries for a premium. These organizations (Mazmanian et al., 2020):

Systematically measure, monitor, enforce, and publicly report program and policy results and provide transparency and a scientific and legally defensible data basis for fending off legal challenges and supporting subsequent upward revisions in goals. Examples are as follows: California's extensive electronic reporting system on air, water, toxics, and energy policy progress.

As a result, California, which has become a leader in the implementation of renewables worldwide, can understand what is needed to maintain "effective environmental regulation based on sound physical science and public policy principles" (Mazmanian et al., 2020).

Positive litigation outcomes for leaders to be aware of include 1) litigation can move climate issues more deeply into the domain of the public consciousness, 2) litigation can force offending companies to respond and make changes that are in the public's best interest, and 3) courts can issue injunctions intended to halt any ongoing harm and demand reparations where harm has occurred. Adverse outcomes from litigation change policy for leaders to be aware of include 1) the increasing cost to organizations, 2) limiting the diversity of voices, 3) lack of public awareness involvement and buy-in, 4) bypassing the democratic process of legislation, and 4) the destabilization of sovereign countries.

Many legal scholars such as Professor Michael McCann "have found that litigation can nevertheless have an empowering effect on the public's legal consciousness that can lead to public policy change down the road even if not right away" (Goldford, 2021). Among the negatives of litigation is that it limits the diversity of voices that can be heard. At the same time, legislative institutions can bring in a variety of voices to sort through the issues at hand.

Multinationals vs. Sovereign States

Within the last fifteen years, multinationals have expanded their asset class allocations to include assets within the Sovereign States. Within the international law realm, attorneys provide services to defend sovereign states from multinational corporations.

In some cases, these suits revolve around natural resources within a specific state, such as water, minerals, coal, and oil. The crux of each suit is argued inside institutions such as the International Centre for the Settlement of Investment Disputes (ICSID) or similar, located in major cities worldwide. Outside investors seek "compensation for alleged expropriation of land and factories, but also over a huge range of government measures, including environmental and social regulations, which they say infringe on their rights" (Provost & Kennard, 2015).

Over half a million suits have been filed - with new ones being added weekly. Investment funds have taken a keen interest in these suits due to enormous award settlements. Even a pre-litigated claim is viewed as an asset class that can be manipulated as an investment vehicle or as security against multimillion-dollar loans. Additionally, multinationals can use the mere threat of an ICSID lawsuit as pressure to change cultural, social, and financial protocols in their favor. As Luis Parada, an attorney for sovereign states in Washington DC states that the "state arbitration system was created with good intentions, but in practice, it has gone completely rogue" (Provost & Kennard, 2015). Unfortunately, the system can exert enough power so that "foreign investors

can force a government to change its laws to please the investor as opposed to the investor complying with the laws they find in the country." It is entirely within the realm of reason that this system can and is occurring within the United States by outside investors from foreign countries such as China, Russia, and the Saudis who buy up water and agricultural resources and establish technology companies. The Fufeng Group, a China-based company, recently purchased 300 acres of farmland only 20 minutes from Grand Forks Air Force Base in North Dakota. The Air Force Base is home to sophisticated military drone technology. (Zilber, 2022)

Summary

The summary section examines the literature sources chosen for research regarding litigation as change policy, which include peer-reviewed articles, book reviews, magazine articles, and websites. Robert Corr's article *Climate litigation: Would human rights be a better lens than negligence?* (2022) examines the inclusion of climate change litigation as an essential part of the climate action change movement. By making climate change a human rights issue, activists engage a more significant part of the population (something change policy litigation generally fails to do) and operate as an accelerant on the data at hand.

Nothing will gain more public notice when human rights are violated than a fierce public outcry. Patrick Gleason's article *State & federal officials increasingly seek policy change through litigation instead of legislation* (2022) examines the increasing use of litigation as change policy and acknowledge that while effective as a blunt instrument, it has many downsides, including bypassing the legislative process. Zachary Goldford's article *Legal mobilization, litigation, and policy change - a review of the rule of five: Making climate history at the Supreme Court* (2022) is a book review of the book *The Rule of Five* by Richard J. Lazarus. This review notes in more detail the pros and cons of using litigation as change policy

and appears to approve of legislation over litigation. Daniel Mazmanian et al.'s article *State leadership in U.S. climate change and energy policy* shows how California has become a leader in renewable energy and has established a network of monitoring systems for global climate data analysis, which positions them as the go-to state for large multinationals and activists who can afford to pay for this data. The data is used for current analysis and shows how natural disasters are a product of direct pollution from primary global polluters such as the U.S., India, and China. As an aside, this is also a way for those with political agendas, such as George Soros's open borders agenda, to transfer wealth from developed to under-developed countries. The political ramifications are daunting. David Patterson's article *Post COP26: Legal action now part of public health's environment and climate change toolbox* illustrates how an individual's health can be affected by climate change. Data is compiled and stored in the same manner as California's climate data acquisition but to support arguments related to human rights and public health. Claire Provost and Matt Kennard's article *The obscure legal system that lets corporations sue countries* demonstrates how change policy litigation works in the international legal system between multinationals, the investor class, and sovereign states.

Pending lawsuits can be used as investment opportunities, much like fixed assets which can be borrowed against millions of dollars. Mark Wilde's article *Causation and climate change litigation: 'Bridge too far?'* illustrates another example of how 'causation', proven through data and science, can boost or create impetus for change policy litigation.

Conclusion

This paper concludes that change policy litigation is highly effective but can be detrimental to the integrity of the Democratic process within the U.S. and to the safety and stability of foreign countries. Its ability to change the balance of power within these structures

makes it a dangerous tool that could be used for nefarious purposes. Suppose countries can be destabilized and controlled through lawsuits. In that case, militaries then become agencies that ensure those outcomes are honored rather than organizations that work defensively to maintain the public's safety. Thus the use of litigation as change policy should be observed so that abuses do not occur and remediation and policies can be implemented that effectively nullify bad actors. The summary section will examine the literature sources for research regarding litigation as a change policy. It will conclude on the generally perceived benefits and hazards of its continued use within various fields. It further explains why litigation is used as opposed to other available forms of legislation.

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