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Policy brief

Global trends in climate change legislation and litigation: 2018 snapshot



THE LONDON SCHOOL
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Headline issues

- All 197 Paris Agreement signatories or ratifiers have at least one law or policy on climate change.
- There are more than 1,500 climate laws and policies worldwide; 106 have been introduced since the Paris Agreement was reached.
- Strategic court cases against governments are seeing some success. More climate-related human rights cases are emerging.

Summary

All Paris Agreement signatories or ratifiers have at least one law addressing climate change or the transition to a low-carbon economy. 139 have framework laws that address climate mitigation or adaptation holistically. These form a substantial legal basis on which further action builds. The challenge now is to strengthen existing laws.

Of the 106 new laws and policies passed since the Paris Agreement was reached, 28 explicitly reference the Agreement. Further analyses will be required to determine if these new laws and policies are consistent with the Paris Agreement and countries' nationally determined contributions. Alignment between national and international goals will be pivotal to meeting the Paris targets.

A new wave of strategic court cases linking climate and rights is emerging. They make up a small number of the 1,000 climate court cases now identified but could have significant impact in holding governments and greenhouse gas emitters accountable for climate change.

Policy briefs provide analysis on topical issues, presenting specific recommendations to inform ongoing policy debates. Drawing on the Grantham Research Institute's expertise, they summarise either our research findings or the state of knowledge about a particular issue.

This policy brief has been written by **Michal Nachmany** and **Joana Setzer**.

An accompanying **Annex** containing additional figures is available at www.lse.ac.uk/GranthamInstitute/publication/global-trends-in-climate-change-legislation-and-litigation-2018-snapshot/

“It is likely that the recent wave of climate change legislation not only supported but enabled the Paris Agreement”

Trends in legislation

The global stock of climate legislation has grown...

There are 1,500 climate laws and policies globally, up from 72 in 1997. In the 20 years since the Kyoto Protocol, the number of climate change laws has increased by a factor of more than 20. All 197 signatories or ratifiers to the Paris Agreement explicitly address climate change or transitions to low-carbon economies in national laws or policies.

From 2009 to 2015, the period that included the Copenhagen climate summit and ended in the Paris Agreement, between 100 and 143 new climate change laws were passed each year. It is likely that this wave of action not only supported but enabled the Paris Agreement on climate change: in the words of former Executive Secretary of the United Nations Framework Convention on Climate Change, “Nothing is going to be agreed internationally until enough is legislated domestically” (Figueres, 2013).

...but the pace of passing new legislation has slowed significantly

In 2016 64 new laws and policies were passed globally and in 2017 that figure dropped to 36. This is consistent with the fact that having a body of existing laws and policies that already cover substantial ground reduces the need for new laws (Clare et al., 2017).

However, the Paris Agreement requires countries to implement their nationally determined contributions (NDCs), and to ratchet up their ambitions over time, necessary for keeping the rise in global mean temperature well below 2°C (Rogelj et al., 2016). This will require countries either to introduce new laws and policies, or to revisit, revise and strengthen their existing laws and policies, to keep up with increased ambition. Countries will also have to address issues of monitoring, reporting, and verification (MRV) in order to comply with the Paris Agreement. Therefore, a sustained low level of

Invitation to contribute

We endeavour to make the datasets as comprehensive and accurate as possible. However, if you believe we have missed a law, policy or court case, please contact us, including supporting documents if possible, at: gri.cgl@lse.ac.uk

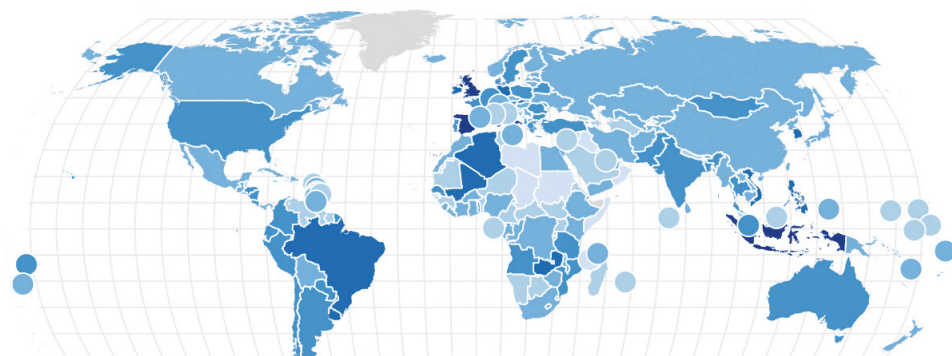
Research scope and data source

This analysis covers legislative activities globally and is the latest in a series of publications dating back to 2010.

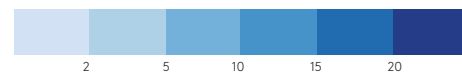
The information comes from two databases maintained by the Grantham Research Institute on Climate Change and the Environment and the Sabin Center on Climate Change Law at the Columbia Law School. One database contains national laws and policies dealing with climate change and transitions to low-carbon economies; the other contains climate litigation cases brought before administrative, judicial and other investigatory bodies that raise issues of law or fact regarding the science of climate change, mitigation and adaptation efforts, and loss and damage.

The datasets are available at www.lse.ac.uk/GranthamInstitute/legislation.

Figure 1. Climate laws and policies around the world in 2018



KEY: No. of climate laws and policies



Note: Data from March 2018

Source: Climate Change Laws of the World database, Grantham Research Institute on Climate Change and the Environment and Sabin Center for Climate Change Law (2018)

legislative developments could be a sign for concern.

Stronger links between the national and the international agendas are still needed

Linking the international process and national policymaking processes will not only guarantee that countries' actions will be aligned with the Paris Agreement goals, but also make the national pledges more 'credible' – defined as the likelihood that policymakers will keep promises to implement their pledges (Averchenkova and Bassi, 2016).

Of the 106 laws and policies passed since the Paris Agreement was signed (that is, since 2016), 28 explicitly reference the Agreement or NDCs. These include 11 of the 23 framework laws and policies that were passed after the Paris Agreement. The countries whose laws reference the Agreement or the NDCs¹ represent a range of economies, emissions, vulnerability, and regulatory approaches.

Countries can, de jure, advance their climate ambition even without making explicit links to the international process – as is true of the UK and its Climate

Change Act (2008), for example (see next page). However, a de facto disconnect between the national and international processes might hinder countries' ability to measure their progress towards the targets in their NDCs, and to ratchet it up.

The ability to import internationally declared targets into actionable national laws and policies, and to translate those targets into action, will have a great impact on the success of the Paris Agreement.

The importance of framework legislation

Implementing the Paris Agreement requires a stable, long-term and overarching approach to climate governance, rooted in law. Within the set of possible legislative interventions, 'overarching' framework laws play a foundational and distinctive role in supporting effective climate governance (Fankhauser et al., 2018). 139 countries address climate change through such framework laws, which often set the agenda, create institutional infrastructures for action, and cause momentum that increases the passage of subsequent legislation (Clare et al., 2017).

“Overarching’ framework laws play a foundational and distinctive role in supporting effective climate governance”

1. The countries whose laws reference the Paris Agreement or the NDCs are: Benin, Brazil, Canada, Chile, Finland, France, Ireland, Israel, Lebanon, Luxembourg, Malawi, Marshall Islands, Montenegro, Netherlands, Peru, Romania, Samoa, Singapore, Slovenia, Tonga, United Arab Emirates, United Kingdom.

“A recent review suggests that the UK’s Climate Change Act has been instrumental in advancing British climate change policy over the last 10 years”

The UK’s Climate Change Act

One of the earliest framework laws is the UK Climate Change Act (2008). A recent review suggests that the UK’s Act has been instrumental in advancing British climate change policy over the 10 years it has been in force (Fankhauser et al., 2018). Key legislative features that made the UK Act a success and are being replicated elsewhere, include:

- A science-based, long-term emissions target, and economy-wide five-year carbon budgets that define the path towards the long-term target
- Continual adaptation planning towards climate resilience
- An independent advisory body, which ensures evidence-based decision-making and safeguards against political backsliding
- Mandatory progress monitoring and accountability

Laws are focused on different topics and integrated into different sectoral policies

While approximately a quarter of all the laws and policies are explicitly framed as climate change mitigation or adaptation

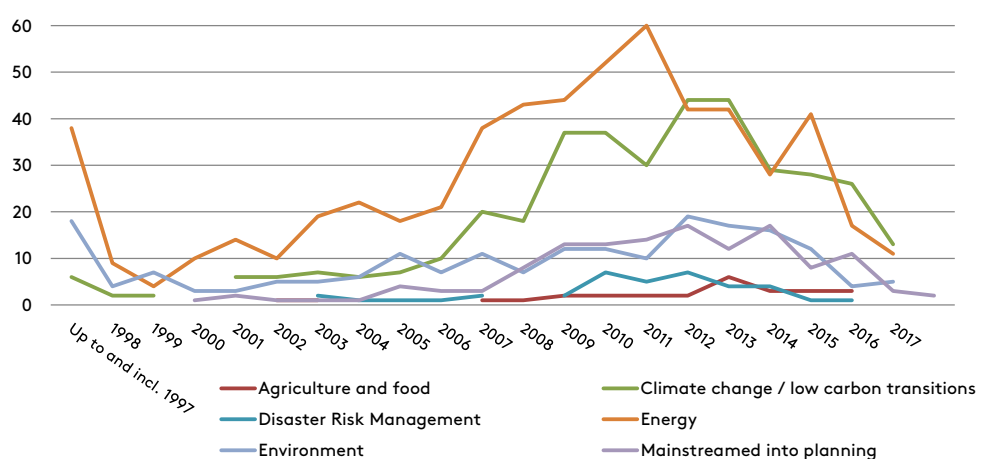
laws, or as laws that target the reduction of greenhouse gases, other laws and policies integrate climate change considerations into laws that are focused on specific sectors or activities such as energy, forestry or transport (see Figure 2).

In 86 per cent of countries there is at least some integration of climate concerns into energy policy, the most prominent focus yet, despite a decline in the introduction of new energy-focused laws. These laws and policies, concerned with electrification, energy efficiency, conservation, and renewable energy, account for 39 per cent of laws and policies in the dataset.

Some laws incorporate climate change considerations into wider frameworks, such as economic development or ‘green growth’ plans. On a much smaller scale, climate change is also incorporated into general environmental regulation, as well as into forestry, transport and agriculture legislation and policies. Many of the contexts in which climate is framed are consistent with meeting the UN’s Sustainable Development Goals.

Source: Climate Change Laws of the World database, Grantham Research Institute on Climate Change and the Environment and Sabin Center for Climate Change Law (2018)

Figure 2. Focus of new laws passed each year, to end of 2017



Trends in litigation

The Climate Change Litigation of the World database includes over 276 court cases across 25 national courts (excluding the United States) and international adjudicatory bodies. While the data continues to be updated, it is not yet comprehensive.

Over 800 cases already identified in the US are included in a separate database:² see Box 2, p6 for trends.

The majority of cases in the database deal with mitigation (77 per cent of cases are primarily concerned with emissions reductions), but there is some jurisdictional variation — for example, Australia has notable cases on adaptation, mostly dealing with coastal planning and risks from climatic hazards.

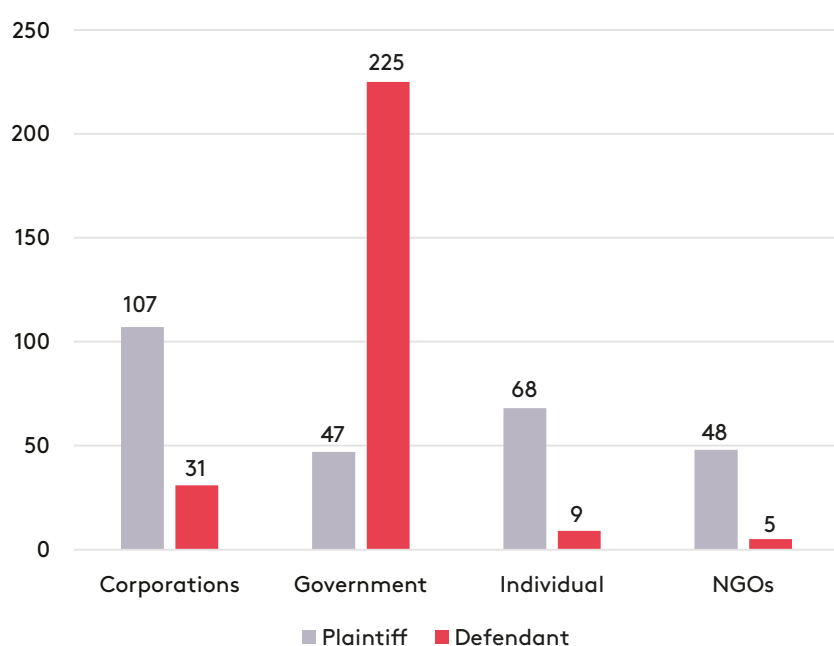
Corporations are the single most represented group of plaintiff; they bring 40 per cent of cases to court (Figure 3), 90 per cent of

which are against governments, to overturn administrative decisions made on the basis of climate change to deny a licence (e.g. for a coal-fired power plant or water extraction); and to challenge allocation of allowances under emissions trading schemes or governmental schemes (e.g. for production of renewable energy). In 70 per cent of the cases, climate change is actually at the periphery of the argument. Nevertheless, even in lawsuits where climate change is not central, the judiciary is increasingly exposed to climate change arguments in cases where, until recently, the environmental argument would not have been framed in those terms (Setzer and Bangalore, 2017). For instance, challenges to fossil fuel-related projects have been brought for many years, but it is only in the last decade that climate change has been used as part of the argument or as a motivation for those cases.

“The judiciary is increasingly exposed to climate change arguments in cases where, until recently, the environmental argument would not have been framed in those terms”

2. To access data on litigation in the United States, visit <http://climatecasechart.com/us-climate-change-litigation/>. This database is maintained by the Sabin Center and the Arnold and Porter law firm.

Figure 3. Plaintiffs and defendants in litigation dataset by type (25 countries excluding US)



Source: Climate Change Laws of the World database, Grantham Research Institute on Climate Change and the Environment and Sabin Center for Climate Change Law (2018)



Figure 4. Post-Paris lawsuits

Pictured: Plan B, co-claimants and supporters outside the Royal Courts of Justice, London, March 2018. Plan B and others are challenging the UK government to increase the ambition of its 2050 carbon target to a post-Paris Agreement scenario (this is also an example of rights-based litigation – see p7).

In a lawsuit brought in Norway by Nature and Youth and Greenpeace Nordic, the plaintiffs argued that the government is contravening the Paris Agreement and violating the Norwegian constitutional right to a healthy and safe environment for current and future generations. The case currently awaits a decision on the appeal filed by the plaintiffs against Oslo District Court's ruling in favour of the Norwegian government.

(Photo: Tim Crosland/Plan B)

Box 2. Overview of strategic climate litigation in the United States

- Resisting deregulation:** More than a dozen lawsuits have been filed to directly challenge the Trump Administration's undoing of regulatory efforts to address climate change. Some deal with specific regulations; others focus on rules that apply to regulation more generally.
- Federal government transparency:** Plaintiffs have brought lawsuits under the Freedom of Information Act seeking records from the Trump Administration on its climate-related actions and communications.
- Environmental review and permitting:** Lawsuits seeking to enforce consideration of climate change as part of environmental review and permitting – both in terms of a project's potential greenhouse gas emissions and how climate change impacts may affect a decision or project – continue to be a significant trend.
- Opposition to climate action:** Industry, conservative NGOs and others have brought suits to support climate change deregulation, reduce climate protections generally or at the project level, and target climate protection supporters.
- Municipality-led suits against fossil fuel companies:** San Francisco, Oakland and New York City, as well as several Californian municipalities, have filed lawsuits against major fossil fuel companies, alleging that they continued to produce fossil fuels while knowingly concealing the climate risks. Litigants brought several claims under common law, including: liability for public nuisance, failure to warn, design defect, private nuisance, negligence, and trespass.
- Public trust doctrine:** Plaintiffs have argued to several courts that the sovereign's responsibility to preserve the integrity of natural resources in its territory – the public trust doctrine – requires it to address climate change. In effect (or explicitly), these plaintiffs are seeking recognition of a right to a stable climate.
- State-led efforts to decarbonise electricity:** States including California, Illinois, New York and Connecticut are creatively pushing their portions of the electric grid away from fossil fuels. Challengers allege these novel efforts overstep legal bounds.
- Liability for failure to adapt:** Only a few plaintiffs have brought cases seeking relief for injuries arising from an alleged failure to anticipate and address foreseeable consequences of climate change. However, more cases of this sort are expected, particularly as investors and insurers pay attention to the growing gap between scientific understanding of climate change and sluggish adaptation efforts.

Strategic cases are innovatively challenging governments and corporations on climate action

A rise in strategic³ cases has occurred, with NGOs, individuals, and subnational governments filing such cases as a bottom-up strategy to push courts to examine linkages between climate change and rights protection, as well as to influence public policy by urging mitigation, adaptation and compensation. These cases are small in number but could have big impacts beyond the courts.

Strategic public climate litigation has seen some success. The landmark case of *Massachusetts v. Environmental Protection Agency (EPA)* (2007) confirmed that the US EPA must regulate greenhouse gas emissions under the Clean Air Act if the EPA determined that emissions endanger the public's health or welfare (which it did in 2009). But it was the 2015 decision in *Urgenda Foundation v. Kingdom of the Netherlands* that inspired a whole new wave of cases. The District Court of the Hague's decision, still under appeal, held that the Dutch government breached its 'duty of care' for failing to adopt sufficiently ambitious mitigation targets.

Months later, the Lahore High Court mandated Pakistan's government to implement its climate adaptation plan (*Ashgar Leghari v. Federation of Pakistan*), determining that the delay in implementing the country's climate policy constituted a breach of its human rights obligations (Peel and Osofsky, 2017). The momentum created by these cases led to similar lawsuits elsewhere.

New cases have started forcing courts to rule on the consistency of countries' actions with the Paris Agreement. While the Agreement in itself is not enforceable, the increased level of ambition that it established has allowed litigants to question governments' or private entities' actions in relation to the new international climate change policy context (see Figure 4 for examples). Another important development has been the recognition of rights claims (see Figure 5 for examples).

Strategic litigation against corporations is on the increase

Strategic climate litigation has also been used to influence corporate behaviour and strategies in relation to climate change. Initial failed attempts in the early 2000s to bring oil, gas and electric companies in North America to court have not dampened enthusiasm for the cause. Indeed, a second wave of strategic lawsuits and investigations against corporations can now be observed, in the US and beyond (Ganguly et al., forthcoming), in which plaintiffs typically seek compensation from major carbon producers for climate change-related damage. These cases draw on Heede's study (2014), which mapped and quantified the cumulative emissions of the 90 largest carbon producers from 1854 to 2010 — known as the 'Climate Majors' — and on developments in climate attribution science.

Prominent examples include a petition filed in 2015 by survivors of Typhoon Haiyan in 2013, and advocates and NGOs including Greenpeace Southeast Asia, with



Figure 5. Rights-based litigation

In Colombia, 25 young plaintiffs filed a special constitutional claim against the government, alleging that failure to ensure zero-net deforestation in the Colombian Amazon by 2020 constitutes a threat to their rights. A lower court ruled against the plaintiffs, and an appeal was filed in February 2018. Contributing to this argument, an advisory opinion issued by the Inter-American Court of Human Rights in February 2018 recognised for the first time an autonomous right to a healthy environment and nations' extraterritorial responsibility for environmental damages under the American Convention on Human Rights.

The Philippines case discussed on this page and overleaf is a further example of a case using rights-based arguments.

(Photo: Pixabay)

3. We classified those climate court cases that aim to have impact beyond their individual case in the court room as 'strategic'. These cases, like 'test cases' or 'impact litigation', test a legal point that would apply to other cases, create awareness, encourage public debate or spark policy change. They are 'strategic' because they are being used as a mechanism for climate governance. They are used to encourage or force action and to hold governments and corporations to account (see Public Law Project, *Strategic Litigation*, 2014).

the Commission on Human Rights of the Philippines. The petitioners argued that the Carbon Majors' contribution to climate change constitutes a violation of human rights of the Filipino people. Recently the Commission on Human Rights agreed to investigate the petition and is holding fact-finding missions and public hearings in 2018. This case was followed by the lawsuit filed by Peruvian farmer Saúl Luciano Lliuya against the German utility RWE, which he accuses of contributing to climate change that is threatening his family, property and home city of Huaraz. Recently Lliuya's appeal was accepted and his case allowed to proceed.

Other innovative strategies can be observed in private climate litigation involving shareholders of financial services firms over climate risk disclosure. In *Guy Abrahams v. Commonwealth Bank of Australia*, the shareholder plaintiffs argued that the Bank failed to address climate risk and did not include reference to funding for a coal mine in Queensland. The case was dropped as the Bank included in its 2017 annual report an acknowledgement that climate change posed a significant risk to its operations, with a promise to conduct climate change risk assessments the next financial year.

What future for climate litigation?

It is still too early to assess whether or not plaintiffs will succeed in holding corporations and political branches of governments accountable. A number of cases are under appeal. Nevertheless, even unsuccessful

attempts might contribute to driving climate change action in the long term. Arguably, the boldness and creativity of these cases is already raising awareness and provoking a broader public discussion on climate change-related issues.

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