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The separation of powers doctrine: a barrier to climate litigation?

By Jillian Sprenger

Climate campaigners are increasingly bringing claims against governments and corporations for policies and activities perceived to be contributing to climate change. Since 2015, numerous jurisdictions globally have seen rapid growth in the number of climate-related cases heard in court.[1] While many of these cases have indeed led to outcomes favourable to climate campaigners, there are several extrinsic factors that often serve as a barrier to the success of their claims. One such factor is the separation of powers doctrine.

What is the separation of powers and why does it matter in climate litigation?

The term 'separation of powers' does not refer to one single concept or doctrine. It has important differences in meaning and application depending on the jurisdiction and temporal context. However, in the broadest of terms, the separation of powers refers to the way in which governmental responsibilities are divided in constitutional democracies, typically among three branches: legislative (an assembly with the power to make laws), executive (the branch with responsibility for governance and enforcement of laws), and judicial (the branch that decides disputes arising under the law). Each branch has distinct and complementary powers, although there is some overlap in the branches' roles. This prevents a concentration of power by assigning specific duties to each branch and by providing for checks and balances between them.

While the separation of powers doctrine is considered fundamental to democracy, it is a barrier to climate litigation because of what is perceived as a tension between law and politics: in climate cases, judges are asked to decide on what is often seen as a political issue, and which would thus be the exclusive mandate of the legislative or executive branch rather than the judicial branch. The separation of powers is a key factor in determining whether a matter is justiciable (i.e., capable of being decided by a court of justice). As stated by Brown J. of the Ontario Superior Court of Justice in *Mathur v. Ontario*, "[t]he doctrine of justiciability ensures respect for the functional separation of powers among the legislative and judicial branches of government in Canada."[2] The idea is that courts are ill-suited to determine what policies or laws are in the public interest and should leave such decisions to the legislature, which has the

[1] Joana Setzer & Catherine Higham, "Global Trends in Climate Change Litigation: 2021 Snapshot" (2021) at 10, online (pdf): *Grantham Research Institute on Climate Change and the Environment* <www.lse.ac.uk/granthaminstitute/wp-content/uploads/2021/07/Global-trends-in-climate-change-litigation_2021-snapshot.pdf>.

[2] *Mathur v. Ontario*, 2020 ONSC 6918 at para 105 [*Mathur v. Ontario*].

expertise to make such determinations.[3] Indeed, courts in many jurisdictions have grappled with the boundary between exercising their judicial role and potentially violating the separation of powers by ruling on climate issues. In some circumstances, such as in *Urgenda Foundation v. State of the Netherlands*, courts are willing to rule on climate issues and to issue a judgement in favour of climate action. In other cases, such as *VZW Klimaatzaak v. Kingdom of Belgium & Others*, courts are unwilling to "overstep", thus declining to set emissions reductions targets or in some instances declining to rule on climate cases altogether.

How is the separation of powers doctrine invoked in climate cases?

The degree to which the separation of powers is a barrier to climate litigation varies by case and by jurisdiction.

In many instances, the doctrine is considered an unsurmountable barrier to climate-related claims. A clear example of this can be seen in the Canadian case of *La Rose v. Canada*. In this case, a group of youth sued the federal government, alleging that the country contributes to emitting greenhouse gases in a manner incompatible with a safe and stable climate. The plaintiffs argued that the government's actions violated their rights under the *Canadian Charter of Rights and Freedoms*, as well as the rights of current and future Canadian children under the public trust doctrine. The Federal Court found that "the diffuse nature of the claim that targets all conduct leading to [greenhouse gas] emissions cannot be characterized in a way other than to suggest the Plaintiffs are seeking judicial involvement in Canada's overall policy response to climate change."[4] Similar reasoning has been employed in many other cases around the world, including in the Australian case of *Sharma and Others v. Minister for the Environment*, in which a group of young people filed a lawsuit to stop the Australian government from approving an extension to a coal mine. While the plaintiffs won in a lower court when the judges ruled that the federal government owed them a duty of care, the government appealed, and the ruling was unanimously overturned by Australia's Full Federal Court in 2022. The Chief Justice's primary reason was that the issues at hand were "core policy questions unsuitable in their nature and character for judicial determination."[5]

The separation of powers is not the only barrier to climate litigation; in some instances, it is raised as an important consideration but is not the deciding factor in the outcome. In the Canadian context, the justiciability of climate issues was raised in *Mathur v. Ontario*, in which youth sued the provincial government, alleging that it had violated the *Charter* by taking insufficient action to address climate change. Vermette J. of the Ontario Superior Court of Justice discussed the issue of justiciability, finding that the *Charter* issues raised were justiciable

[3] *Ibid.*
[4] *La Rose v. Canada*, 2020 FC 1008 at para 44 [*La Rose v. Canada*].

[5] *Minister for the Environment v. Sharma* [2022] FCAFC 35 at para 15 [*Sharma*], online (pdf): <climatecasechart.com/wp-content/uploads/non-us-case-documents/2022/20220315_VID-389-of-2021-2021-FCA-560-2021-FCA-774-2022-FCAFC-35-2022-FCAFC-65_decision.pdf>.

because the applicants challenged specific state actions rather than its general conduct.[6] However, Vermette J. did not find that there was in fact a violation of *Charter* rights, and the application was thus dismissed. In the international context, a similar example is the case of *Juliana et al. v. United States of America*, in which youth plaintiffs sued the US government, claiming that their due process rights of life, liberty, and property were being violated by the continued allowance and encouragement of fossil fuel-based industries. The government sought dismissal of the case, partially on the basis that a judicial solution to climate issues was barred by the separation of powers. The Ninth Circuit Court of Appeals disregarded this argument, saying that simply proceeding with discovery and trial would not in itself violate the doctrine.[7] However, in 2020, the Ninth Circuit Court of Appeals granted dismissal on the basis that the plaintiffs lacked standing. Thus, while the separation of powers was not the primary barrier to this case, it was raised as a relevant issue.

A 'rights turn' in climate litigation

It is worth noting that litigants are working to bring novel and creative arguments to overcome the issue of justiciability. Many of these new arguments are based on human rights claims and stem from a well-established tradition of human rights interests being raised in a variety of public interest contexts.[8] Courts have long had to confront the issue of justiciability in such contexts, as they attempt to balance judicial protection of rights with deference to governmental policy.[9] In the climate litigation-human rights context, *Urgenda* is highly influential: in that case, the government of the Netherlands argued that judicial action should be barred based on the separation of powers doctrine, but the Supreme Court of the Netherlands rejected this argument, in part "because the State violates human rights, which calls for the provision of measures".[10] The Court thus ruled that the state had a legal obligation to respond to the threats of climate change partly on the basis of the European Convention on Human Rights (ECHR) Article 2 (right to life) and Article 8 (right to respect for private and family life), while allowing the State

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[6] *Mathur v. His Majesty the King in Right of Ontario*, 2023 ONSC 2316 at para 106 [*Mathur v. Ontario*].

[7] United States Court of Appeals for the Ninth Circuit in *Juliana et al. v. United States of America*, Opinion at page 13, online (pdf): <climatecasechart.com/wp-content/uploads/case-documents/2018/20180307_docket-17-71692_opinion.pdf>.

[8] César Rodríguez-Garavito, "The Global Rise of Human Rights–Based Litigation for Climate Action" in César Rodríguez-Garavito, ed., *Litigating the Climate Emergency: How Human Rights, Courts, and Legal Mobilization Can Bolster Climate Action* (Cambridge: Cambridge University Press, 2022), online: <www.cambridge.org/core/books/litigating-the-climate-emergency/rights-turn-in-climate-litigation/085BFAD7C384201E8D14A0AEEE1668CD>.

[9] *Ibid.*

[10] *Urgenda Foundation v State of the Netherlands* 200.178.245/01 (Supreme Court of the Netherlands) [English translation] at para 67, online (pdf): <climatecasechart.com/wp-content/uploads/non-us-case-documents/2020/20200113_2015-HAZA-C0900456689_judgment.pdf>.

to determine the means by which it would comply with the order.[11] Other climate campaigners globally are seeking to learn from this and to replicate aspects of the rights-based arguments to ensure successful climate litigation.

However, rights-based arguments are no silver bullet for climate campaigners. As demonstrated in *Mathur v. Ontario*, rights-based arguments have some potential, but it is certainly not a given that rights violations exist in all situations of inadequate governmental action. Indeed, many courts globally have still shown significant deference to the legislature despite the rise in rights-based arguments. *VZW Klimaatzaak* clearly demonstrates this. While climate campaigners welcomed the Belgian court's judgment which found that the state had breached its obligations under the ECHR as well as its duty of care by failing to take concerted climate action, the court avoided setting specific emissions targets by invoking the separation of powers doctrine.[12] The case thus resulted in the liability of the Belgian government being established, but also in the court declining to provide reparations to the claimants or guidance as to how the government's obligations could be met, leaving questions remaining as to the practical effectiveness of the ruling.

Looking to the future

The European Court of Human Rights has heard three climate-related cases in 2023, culminating with the hearing for *Duarte Agostinho and Others v. Portugal and 32 Other States* which took place in September. In *Agostinho*, the Court will be asked to find that the 33 states are not meeting their positive obligations under the European Convention on Human Rights, due to their failure to adopt ambitious climate policies.[13] While the Court does not have the power to specifically direct member states' policies, the states are still bound by the Court's decisions and must execute them, though they may choose the means of compliance. This could thus serve as a high-profile test case for how courts may choose to approach the separation of powers in this context.

While the first wave of climate cases has primarily been brought against governments, a new wave of cases against corporations is expected in the near future. The number of cases against companies involved in the fossil fuel industry is already increasing rapidly, with a significant number now outside the United States. These cases are also being filed against an increasingly diverse range of corporations and defendants, including, for example, the recent case against Shell directors launched by ClientEarth in the English courts. This case was dismissed by the

[11] *Ibid* at paras 67 and 5.6.2.
[12] Matthias Petel and Antoine De Spiegeleir, "Guest Commentary: Lessons from the Belgian Climate Case: the devil is in the details" (2021), online: *Sabin Center for Climate Change Law at Columbia University* <blogs.law.columbia.edu/climatechange/2021/11/15/guest-commentary-lessons-from-the-belgium-climate-case-the-devil-is-in-the-details/>.

[13] European Court of Human Rights, "Climate Change: Cases Pending Before the Grand Chamber of the Court" (2023), online (pdf): <www.echr.coe.int/documents/d/echr/FS_Climate_change_ENG>.

High Court for several reasons, including the fact that most Shell shareholders voted to approve the company's Energy Transition Strategy.[14] ClientEarth also failed to convince the Court that it was motivated by something other than its views on the correct strategy for dealing with climate change risk.[15] While ClientEarth's appeal also failed, it remains to be seen what impact the separation of powers may have on the outcome of other such cases. It is possible that courts may be more willing to rule on climate cases when they are brought against corporations rather than governments, since the perception of "judicial overstep" may be blunted by the lack of direct government involvement. It is likely that outcomes will vary by jurisdiction due to differences in interpretation of the separation of powers, as well as the creativity of new arguments brought by litigants.

From a business standpoint, operating in a jurisdiction in which courts have shown more willingness to engage with and rule on climate issues may involve more risk. Climate-related judgements may have a "trickle-down" effect: that is, in places where the courts determine that climate change litigation against the government is justiciable, they may also find that climate litigation against corporate actors is appropriate for a court to decide. It is notable that the same court that ruled on *Urgenda* also ruled against a corporation in *Milieudefensie et al. v. Royal Dutch Shell plc* after finding that the corporation's emissions reduction targets were insufficient. This gives an indication of the jurisdictional approach to the issue. Following and understanding climate cases globally will allow for a more comprehensive understanding of courts' approaches to environmental claims against corporations.

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[14] *ClientEarth v Shell Plc & Ors (Re Prima Facie Case)* [2023] EWHC 1137 at para 68 [*ClientEarth v. Shell*], online: <www.bailii.org/ew/cases/EWHC/Ch/2023/1137.html>.

[15] *Ibid* at para 65.