

Cambridge University Press

978-0-521-87970-5 - Adjudicating Climate Change: State, National, and International Approaches

Edited by William C. G. Burns and Hari M. Osofsky

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Courts have emerged as a crucial battleground in efforts to regulate climate change. Over the past several years, tribunals at every level of government around the world have seen claims regarding greenhouse gas emissions and impacts. These cases rely on diverse legal theories, but all focus on government regulation of climate change or the actions of major corporate emitters. This book explores climate actions in state and national courts, as well as international tribunals, in order to explain their regulatory significance. It demonstrates the role that these cases play in broader debates over climate policy and argues that they serve as an important force in pressuring governments and emitters to address this crucial problem. As law firms and public interest organizations increasingly develop climate practice areas, this book serves as a crucial resource for practitioners, policymakers, and academics.

William C. G. Burns is the Class of '46 Visiting Professor with the Center for Environmental Studies at Williams College. Most recently, Dr. Burns was a Senior Fellow with the Center for Global Law & Policy at the Santa Clara University School of Law. Additionally, he serves as editor in chief of the *Journal of International Wildlife Law & Policy* and cochair of the International Environmental Law Committee of the American Branch of the International Law Association. He received his B.S. in political science from Bradley University and his Ph.D. in international law from the University of Wales – Cardiff School of Law. Prior to his academic career, he spent more than twenty years in the nongovernmental sector, including as executive director of the GreenLife Society/Pacific Center for International Studies, a think tank that focused on implementation of international wildlife law. He has published more than 70 articles in a range of law, policy, and science journals, including the *Georgetown International Environmental Law Review*, the *Journal of the American Medical Association*, and *Global Change*, and he has served as the coeditor of three books.

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Adjudicating Climate Change

STATE, NATIONAL, AND INTERNATIONAL APPROACHES

Edited by

WILLIAM C. G. BURNS

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Foreword

Peter E. Roderick*

The world's political process has been slow to react to the serious, and potentially catastrophic, consequences for life on our planet that flow from the burning of fossil fuel. In one sense, this is understandable: turning around the global energy base is not a simple task. In another sense, it is inexcusable: a myopic failure to act in the face of clear scientific evidence. And among those who have failed to act, until recently, I include the legal profession. But as the pages of this book demonstrate, the long slumber of the lawyers is over.

I was one of those fast asleep. In the late 1980s, long after scientists had been researching the problem, but with global awareness of climate change emerging, I was horrified to realize that as a legal adviser to Shell I was facilitating extraction of the hydrocarbons at the heart of the problem. The obvious answer was to leave the fossil fuel in the ground and to begin the arduous, yet critical, task of “decarbonizing” the world's economy. But I was naive to imagine that hope for such a turnaround would start with the very corporations whose legal structure drives their slavish servicing of the “demands” of the stock exchange.

It took me quite a while though to awaken fully. It was in 2001 that the Intergovernmental Panel on Climate Change published its finding that most of the observed warming at the Earth's surface over the past fifty years was likely to have been due to human activities. If the world's scientists were saying that human activities had led to temperature increases, with the qualitative nature of the effects well understood, then it was time for the courts to have something to say about it. This was the spur for Roda Verheyen and me to begin thinking about enforcement of the law around the world in order to combat climate change. This book tracks much of the development of climate change law in the five years since we scribbled down our thoughts, and spilt our wine, on the tablecloth of a North London restaurant. Alas, the restaurant is no more, but the development of climate change jurisprudence has moved on apace.

What is to be made of this jurisprudence? Its *origin* lies in the inadequate political and corporate response to the planet's biggest threat. Its *content* is a varied, innovative,

* Co-Director, Climate Justice Programme, <http://www.climatelaw.org/>.

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barely formed mix across a spectrum of legal theories in domestic and international forums addressing both the causes and effects of climate change. Its *results*, to date, in purely legal and policy terms, include positive outcomes in the United States (for example, under the National Environment Policy Act, the Clean Air Act, and the Endangered Species Act), in Australia (on land use planning decisions in respect of coal mines), in Nigeria (on human rights violations from gas flaring), in Germany (on access to information on export credits), and at the UNESCO World Heritage Committee (adopting a world heritage and climate change strategy in July 2006); while negative judgements in the United States are under appeal with the support of some of the world's top climate scientists. Its *future* can be expected to include more damages cases, such as the one filed by the state of California against the automobile companies in September 2006, and if, as I hope, the May 2006 submission by the Group of 77 and China to the UNFCCC/Kyoto Protocol Compliance Committee concerning the noncompliance by fifteen Annex I countries with Article 3.1 of the Kyoto Protocol is a sign of the increased willingness of developing countries to hold the developed world to account, then perhaps the future will see some of the public international law avenues discussed in this book playing a more important role than they have so far.

The *implications* of the use of petitions and lawsuits to combat climate change should be judged by whether significant reductions in greenhouse gas emissions, and compensation for those who suffer from climate change damage, ensue. Although the effects of climate change are already upon us, I believe it is still possible to avoid the more serious consequences, but only if we make the right choices over the next few years. Until those choices are made, enforcing the law must play its full role.

Of course, going to court isn't the answer. It is rarely better in my experience than the lesser of two evils. The substance and procedure of the law usually favours the rich. Elitist language and a mismatch of resources too often shut out those who could benefit most from justice. And far better that political and corporate leaders would make decisions in the interests of life on the planet without being forced to do so.

But worse would be to allow these pervasive and entrenched imperfections to determine the outcome of the human response to climate change. The individuals, organizations, government entities, and lawyers who have brought these cases, several of whom have written the chapters of this book, are among those who are not prepared to do that, and I salute them. The ultimate justification for law is that it offers the possibility of resolving disputes without us killing each other. And there can be no bigger dispute than over the future of our planet.

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