

Implementing a climate conscious approach in daily legal practice*

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Climate change is often seen as a global problem, one that is remote and removed from the daily practice of lawyers and courts. But in fact climate change is a multiscale problem. It is as much a small scale, local and immediate issue as it is a global issue. Climate change is a cumulative problem and the combined effect of many insignificant actions is significant. The climate change problem will be solved not in one fell swoop, but by a series of small, incremental responses across all levels of governance: global, regional, national, provincial, local and individual scales.

The potential for interaction between scales helps us appreciate that local and individual action (including litigation) has potential to impact on provincial, national, regional and global climate change policy and law. This also helps us appreciate that climate change issues are as relevant in small scale or mundane disputes as in mass liability claims.

Recognising that addressing climate change depends on responses on a small scale and that any legal action which involves climate change issues will impact on climate change policy gives rise to a responsibility on lawyers to be aware of climate change issues in daily legal practice. It calls for a climate conscious approach rather than a climate blind approach.

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A climate conscious approach demands, first, actively identifying the interfaces between the subject matter and issues of the legal problem or dispute and climate change issues and, second, giving advice and litigating or resolving the legal problem or dispute in ways that meaningfully address the climate change issues. A climate blind approach is where the outcome of the legal problem or dispute will have some impact on climate change issues but legal advice is given or the dispute is litigated or resolved without any attention being given to this impact.

How can lawyers implement a climate conscious approach in their daily legal practice? I suggest there are at least four ways, consistent with legal ethics. Each of these ways challenges common conceptions, in fact misconceptions, about the role and duties of a lawyer.

First, a commonly held view is that lawyers should give advice only about the law. The law is a lawyer's area of expertise and they should confine themselves to that expertise. The problem with this view is that legal problems and disputes are never only about the law. Providing clients with sound advice to solve a legal problem or dispute requires addressing not merely the legal issues but also the financial, the emotional and psychological, the relational and social, the environmental, and the ethical consequences of different courses of action. Clients can thereby understand the consequences, costs and uncertainties associated with alternative courses of action and make an informed choice. This wholistic advice is given by lawyers to clients in many areas of the law on a daily basis. Adding the climate change consequences as a consideration is a natural extension of this everyday practice.

Adopting a climate conscious approach will involve identifying the climate change issues and consequences of different courses of action and incorporating these into the preferred solution to the legal problem or dispute.

For example, in relation to businesses and activities that have social and environmental impacts, such as climate change consequences, merely having a legal licence to carry out the business or activity may be insufficient; a social licence may also be required. A social licence refers to the latitude or freedom that society allows a business to use land and its resources without interference by society. It is a notional licence that society gives the business to carry out its activities.

In the climate change context, businesses that contribute to climate change, such as those that are significant greenhouse gas emitters, might have legal licences but not a social licence and are thereby exposed to significant business risk by society seeking to protest against and interfere with the business and its activities. A climate conscious lawyer would provide advice about such business risks and the need to earn a social licence.

Second, the law that is applicable to a legal problem or dispute is rarely clear cut.

There is another common belief amongst lawyers, some politicians and sections of the media, consonant with Blackstone's declaratory theory of judicial decision-making, that judges do not and can not make law; they merely discover it and declare it. So too, the argument goes, lawyers in providing advice to clients should act likewise; they should merely discover the law that that is applicable and provide advice as to its declared meaning and its application to the facts of the legal problem or dispute.

However, this declaratory theory of legal decision-making has been trenchantly criticised as a fiction or myth. The explicit legal rules may not readily apply to the legal problem or dispute and new rules may need to be supplied; there may be competing legal rules, necessitating selection of the appropriate rule; the meaning of the legal rules may be unclear; and there may be doubt as to how to apply the legal rules.

The reality is that the processes of identification, interpretation and application of the law to be applied to a particular legal problem or dispute are rarely clear cut and will require choices to be made. In making these choices, lawyers and judges can be aware of the climate change consequences of each choice. Let me expand briefly on the steps in the process of legal decision-making to illustrate where these choices arise.

The first step is in identification of the applicable legal rule. The problem may be that there may be more than one legal rule that is potentially applicable or that none of the existing legal rules may be appropriate and a new one needs to be selected. Choices may need to be made as to what is or should be the legal rule to be applied to the legal problem or dispute. There are different methods to choose or develop the legal rule to be applied to the case at hand. The rule may be developed along the line of logical progression (reasoning by analogy), the line of historical development, the line of customs of the community or the line of justice, morals and social welfare. Choices are involved in selecting the method and in applying the selected method.

Having identified the legal rule to be applied, its meaning and scope needs to be determined. Here too there will be leeways of choice. All legal rules require

interpretation. There will be some clear cases where a rule certainly applies but many where there is doubt as to when and how the rule applies. The language in which legal rules are expressed is often indeterminate and open textured. Rules can never in advance cover every case, thereby making uncertain the applicability of a rule to the circumstances at hand. Rules may use very general standards, such as reasonableness, fairness or what is just and equitable, thereby incorporating extra legal norms into the law. The use of these standards enables changes in society's values to be incorporated into the law, and thereby for the law to be relative to the time and place.

The need for interpretation of legal rules creates opportunities for climate conscious lawyers and judges to adopt an interpretation of legal rules that promotes or better implements climate change goals if to do so is consonant with and required by the principles of genuine interpretation.

Having found and identified the law, the lawyer or judge needs to apply it to the relevant facts in order to resolve the legal problem or dispute. At this stage, there will often be a discretion as to the course of action, remedy or relief that ought to be pursued or granted. A range of considerations will be relevant, pertaining to the private interests of the client, the parties to the dispute or third parties, as well as the public interest. Moral considerations may be as relevant as legal ones. A climate conscious approach will identify and consider the climate change consequences of different courses of action, remedies and relief.

This problem of identifying, interpreting and applying the law is made more acute in an area of law that is rapidly evolving. The laws relating to climate change and its consequences is one such area. What are the legal responsibilities of governments

and enterprises in relation to climate change? The view that they have no or very few obligations has been challenged by litigation throughout the world. The Hague District Court decision in *Urgenda v The Netherlands*¹ holding the Netherlands government in breach of its duty of care and ordering it to reduce the country's greenhouse gas emissions is a recent illustration of how quickly the law can change.

Third, lawyers are officers of the court and have duties to support the integrity of the legal system and judicial process. These duties to the legal system override any particular client interests that are contrary to the duties. As earlier indicated, there are grey areas in the identification, interpretation and application of the law to a legal problem or dispute. Lawyers have obligations to choose in these grey areas ways that contribute to the equity, effectiveness and enforcement of the law and that uphold the fundamental values and integrity of the legal system. Justice, in many senses, underpins the legal system. Climate change has had, is having, and will have justice implications and impacts for people and planet. Climate justice, like environmental justice generally, has distributive, procedural and recognition implications and impacts. Climate change threatens the enjoyment of a vast range of human rights and the human rights obligations of governments encompass dealing with climate change and its consequences on human rights.

Climate conscious lawyers should advise and act in ways to uphold and advance the fundamental values and integrity of the legal system, including climate change justice. Conversely, climate conscious lawyers will not use loopholes, procedural rules or arguments without legal prospects of success to frustrate the substance and spirit of the law and the legal system. Climate conscious lawyers will not advise and

¹ The Hague District (24 June 2015) ECLI:NL:RBDHA:2015:7196 (original language: ECLI:NL:RBDHA:2015:7145).

act for clients to bring unmeritorious Strategic Litigation Against Public Participation (SLAPP suits) against persons and groups seeking to advance climate justice.

Fourth, there is a personal ethical approach. Lawyers may have scope in their daily practice to bring into accordance their advice and actions with their moral convictions. Through client counselling, lawyers may be able to discuss with their client the rightness or wrongness of the client's projects or business activities and the impact of those projects or activities on people and planet, including the climate change consequences of different courses of action. By moral persuasion and negotiation, the client may be prepared to modify its behaviour to mitigate the climate change consequences and promote climate change justice. I know from my own experience as a barrister for nearly two decades that most clients were amenable to such persuasion and were prepared to modify their behaviour to lessen the environmental and social impacts of their projects and activities.

These are four ways in which lawyers can implement a climate conscious approach in their daily legal practice.