In defence of the climate

Those frustrated with political inertia on climate change are increasingly seeking an alternative route through the courts, but here too they are likely to see slow progress.

World governments have categorically failed in their duty to enforce legislation to minimize the threat of dangerous climate change. Despite more than two decades of international negotiations, beyond 2012 global carbon-reduction commitments will be the stuff of a voluntary and piecemeal accord, unless a new global treaty emerges from talks in Durban later this year.

The lack of a globally binding treaty to replace the Kyoto Protocol is in no small part due to long-standing opposition from the US Senate and Congress, and so it is perhaps fitting that those seeking alternative routes to climate justice are now primarily doing so through the US legal system. As reported in the Feature on page 127, between 2009 and 2010 the number of climate-related lawsuits filed in the US tripled to 132. Elsewhere in the world, the trend is similar, though the cases are fewer.

Although the charges and the accused vary from case to case, many of the plaintiffs in climate litigation trials are aiming for the same goal: to hold the government, or the big emitters, legally accountable for polluting the atmosphere with greenhouse gases.

If history has a lesson here, it's that the legal route will take considerable time to bear fruit. Successful claims against the tobacco and asbestos industries came after decades of ineffective legal efforts. There is ample evidence that certain industrial giants have funded research to sow doubt in the public psyche over the validity of climate change science while continuing to pollute the atmosphere. But the experience of the tobacco industry suggests that this will probably only boost the compensation paid in a successful case, rather than being the grounds on which climate litigation is actually won.

Indeed, the case whose ruling is most likely to set a precedent for how climate will fare in the courts in future takes a different tack. In the State of Connecticut versus American Electric Power, several US states are charging six US power companies with the offence of causing a public nuisance by emitting greenhouse gases, and are ordering the companies to cut their emissions. The ruling — which is currently pending in the US Supreme Court — will depend not on whether emissions are deemed a public nuisance, but on whether the courts decide that regulating emissions in fact comes under their jurisdiction.

Another approach that has come to light while the Feature on page 127 was in the press is the argument that the atmosphere is a 'public trust' worthy of protection, much like the land and sea, and that government officials thus have a responsibility to protect it for present and future generations. This line — which has won environmental protection cases in the US before, though not for the air — is the basis of a suite of lawsuits now being taken against individual US states. The plaintiffs are concerned youths, from the US and elsewhere, one of whom is the head of an organization called Kids vs Global Warming.

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According to legal experts, the chances of any of these cases being successful are slim. In the case of Connecticut versus American Electric Power, the Supreme Court judges — the majority of whom are Republican — are unlikely to rule in favour of the plaintiffs, as doing so would open the door to years of litigation by citizens and states against utility companies. In the public-trust cases, the probable outcome is less clear-cut, though the state of California — certainly the most progressive on climate change policy — has already countered the charge. A win in even one state, however, would be a major victory, though it would ultimately be up to the state how it enforces a public-trust commitment. The courts could not specify, for example, that a state implement a carbon tax.

None of the above trials are being judged on the basis of merits — where a court would have to decide whether polluters are ultimately responsible for climate impacts. But as climate litigation becomes commonplace, science can expect to see a shift to centre stage in court. Although attributing damage to any one emitter or to any one errant nation is impossible, increasingly science is capable of attributing specific physical impacts, and particular events, to human activity. Scientists can now say with confidence, for example, that the Russian heatwave in 2010 would probably have happened without human greenhouse-gas pollution, whereas our continued emissions were in part to blame for floods that struck the UK in 2000.

More robust attribution science is a necessity, though not a guarantee, of successful climate litigation. And such efforts are to be applauded for their scientific merit as much as their societal relevance. As science becomes increasingly adept at apportioning responsibility for climate impacts to human activity — if not blame to specific nations or companies — scientists will almost certainly find themselves being questioned by those seeking to claim damages, be they the victims of floods, storms, crop failures or heatwaves. As is always the case with information that will ultimately determine decisions and line pockets, the caveats of any one study must be communicated with caution.

Whether the courts can provide an effective route for tackling climate change has yet to be determined. The Supreme Court ruling in Massachusetts versus the Environmental Protection Agency (EPA), which in 2006 gave the EPA authority to regulate greenhouse gases under the Clean Air Act, suggests that progress through the courts is possible. A ruling in favour of the plaintiffs in the State of Connecticut versus American Electric Power would affirm this. More likely, the judges will rule that climate change is the remit of policymakers, and much like the health and environmental cases before, any progress on climate regulation achieved through the courts will occur in slow steps. ❐