Conceptualising Just Transition Litigation

Annalisa Savaresi, Joana Setzer, Sam Bookman, Tiffanie Chan, Isabela Keuschnigg, Kim Bouwer, Chiara Armeni, Alexandra Harrington, Corina Heri, Ian Higham, Chris Hilson, Riccardo Luporini, Chiara Macchi, Linnéa Nordlander, Pedi Obani, Lauri Peterson, Andrea Schapper, Navraj Singh Ghaleigh, Maria Antonia Tigre, Margaretha Wewerinke-Singh.

The transition towards low-carbon societies is creating winners and losers, raising new questions of justice. Around the world, litigation increasingly articulates these justice questions, challenging laws, projects and policies aimed at delivering climate change adaptation and/or mitigation. In this Perspective, we define and conceptualise the phenomenon of 'just transition litigation'. This concept provides a new frame to identify and understand the diverse justice claims of those affected by climate action. We set out a research agenda to further investigate this phenomenon, with a view to enhancing societal acceptance and support for the transition.

In 2010, the Norwegian government issued licenses for the development of two wind farms on the Fosen Peninsula. The wind farms are part of one of Europe's largest renewable energy projects, but also curtail the Saami's Indigenous Peoples ability to herd reindeer in the area. The Saami opposed the project in a lawsuit – *Statnett SF et al. v. Sør-Fosen sijte.*[1] In a unanimous judgment, Norway's Supreme Court found that the licenses violated the Saami's right to enjoy their own culture and were therefore invalid.

This case exemplifies the fundamental questions of justice that arise during the transition. Who should bear the burdens of transitioning away from fossil fuels-based energy generation? What is owed to communities affected by the construction and operation of wind farms, hydroelectric dams, or biomass plants? And to workers in fossil fuel industries who lose their jobs? And to farmers affected by the introduction of climate-friendly soil management practices? Policy decisions over these matters can reinforce pre-existing unjust socio-economic structures or create new ones. It is thus unsurprising that the grievances of these groups are increasingly framed in litigation.

Litigation provides a window into how claims of justice are articulated. While scholars have long noted the use of litigation to challenge projects such as wind farms[2,3,4,5] or hydroelectric dams,[6,7] to date little effort has been made to conceptually frame and systematically analyse this phenomenon. If anything, the abundant literature on energy and climate justice evidences varying, and at times incompatible, conceptions of justice,[8] and diverse normative claims over what should be done.[9] The term 'just transition litigation' has been used in the literature on climate change litigation,[2,10,11] but this notion is yet to be theoretically justified and conceptualised. Understanding how justice-related questions over the transition are expressed, contested, and resolved through litigation is however crucial to gauge what a 'just transition' entails in a given context.

In this Perspective, we conceptualise 'just transition litigation' as lawsuits raising questions over the justice and fairness of laws, projects or policies adopted to deliver climate change adaptation and/or mitigation. This litigation challenges how climate action is designed and delivered, rather than the need for such action. We argue that analysing this litigation allows us to understand the competing claims about what is just and fair – and identify the individuals or

groups advancing these claims. By conceptualising and investigating just transition litigation, we can generate much-needed empirical evidence on the impacts of the transition, the challenges it raises and how these may be resolved. This knowledge is crucial, as just transition litigation may have a chilling effect, potentially discouraging states and corporations from pursuing climate change adaptation and mitigation efforts. Scholarly inquiry into the phenomenon of just transition litigation can therefore provide valuable insights into how to more effectively integrate principles of justice into law and decision-making concerning the transition.

We begin this Perspective by offering a working definition of just transition litigation and identifying its key characteristics, drawing on evidence from existing datasets. We then propose a taxonomy to identify and analyse just transition litigation and support future research efforts. Finally, we outline a research agenda to demonstrate the implications of this emerging field for law and policy-making.

Defining Just Transition Litigation

The term 'just transition' is commonly used to refer to concerns over the socio-economic and environmental impact of laws, policies and projects aimed at fostering the shift to low-carbon emission and climate-resilient societies.[12,13] Early uses of this term focused on the specific impacts of climate action on workers and communities, seeking an equitable sharing of the benefits and burdens of the transition, in line with justice principles.[14] This ethos is apparent in the International Labour Organization's 'Guidelines for a Just Transition towards Environmentally Sustainable Economies and Societies for All'[15] and in the Paris Agreement's reference to 'a just transition of the workforce'.[16]

From these origins, the notion of just transition has expanded to encompass all sectors of society.[17,18] It is by now widely recognised that the transition has the potential to 'create new injustices and vulnerabilities, while also failing to address pre-existing structural drivers of injustice in energy markets and the wider socio-economy'.[19] Just transition has thus become a broader concept, drawing on theories of environmental, climate, and energy justice.[18,20] The use of this term has gained traction in policy parlance, leading to the adoption of tools aimed to try and mitigate the social impacts of climate action, such as the European Union's Just Transition Fund[21] and Paris Agreement's Just Transition Work Programme.[22]

Much literature has attempted to articulate the meaning and implications of a 'just transition'.[12,13,17,18,20] So far, this elusive matter has received limited attention in legal scholarship.[23,24] However, law is the forum where societal conflicts are mediated, adjudicated and eventually resolved. By analysing litigation, we can formulate and test new hypotheses and theories, which in turn can help us better understand society. In this Perspective, we are especially interested in the different, and at times incompatible, conceptions of justice articulated in litigation concerning policies or projects aimed at delivering climate change adaptation and/or mitigation.

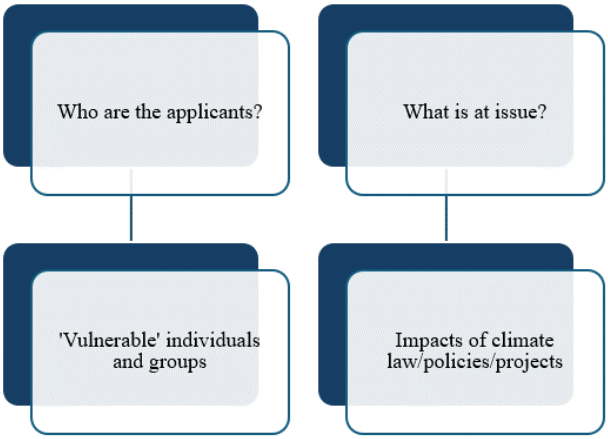
This litigation highlights how some segments of the population are negatively affected by the transition, giving voice to their grievances. The applicants typically are actors – such as workers, Indigenous Peoples and local communities, women, children, minorities and other marginalized or vulnerable groups – who typically struggle to gain adequate representation in legislative and decision-making processes. Like the Sámi in *Statnett SF et al.*, these individuals and groups therefore resort to litigation to challenge the adverse and disproportionate socio-

economic and environmental impacts of discrete climate change laws, policies and projects. The focus on these applicants excludes from our conception of 'just transition litigation' lawsuits brought by corporations, particularly under investor-state dispute settlement mechanisms, which seek to entrench the privileged position of one category of stakeholders over others.

Just transition litigation is not brought with the stated purpose of undermining climate action. Instead, it contends that laws, policies and projects must better balance the pursuit of climate objectives with the rights and interests of adversely affected communities. Just transition litigation therefore shines a spotlight on the inequalities associated with the transition, particularly in terms of the distribution of socio-economic and environmental benefits and burdens, and of participation in decision-making. It provides parties whose circumstances, opinions and knowledge are often less reflected in law- and decision-making an opportunity to air their grievances and pursue protection of their rights and interests.

Just transition litigation is thus characterised by its subject matter – i.e., *questions of justice* – as well as by the litigants who formulate these questions (**Figure 1**). Such questions of justice can be raised explicitly (for example, in claims brought under human rights law), or implicitly, for example, in claims brought under planning law). Lawsuits may target state authorities or corporate actors, or both.

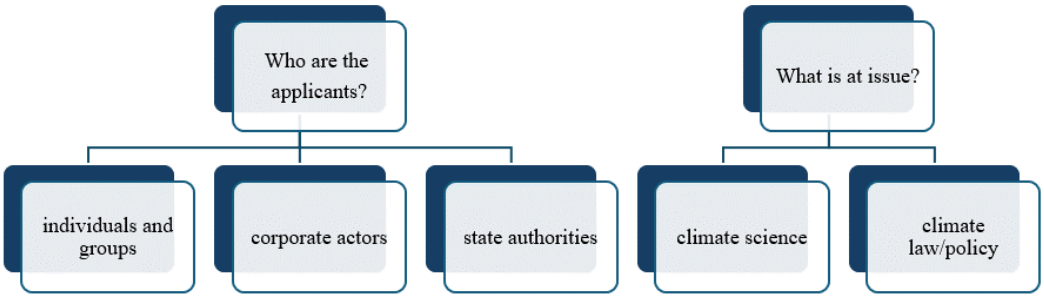
Figure 1. The key players ("who") and main issues ("what") of just transition litigation



Just transition vs climate change litigation

The phenomenon of just transition litigation is closely associated with that of 'climate change litigation'.[6] Climate change litigation is commonly defined as lawsuits which involve material issues of climate change science, policy, or law.[10,11] These lawsuits may be brought by a variety of applicants, including corporate actors, state authorities, as well as individuals and groups (**Figure 2**). This phenomenon has gained widespread visibility, thanks to high-profile cases that have been widely reported in the media and extensively studied.[25,26,27]

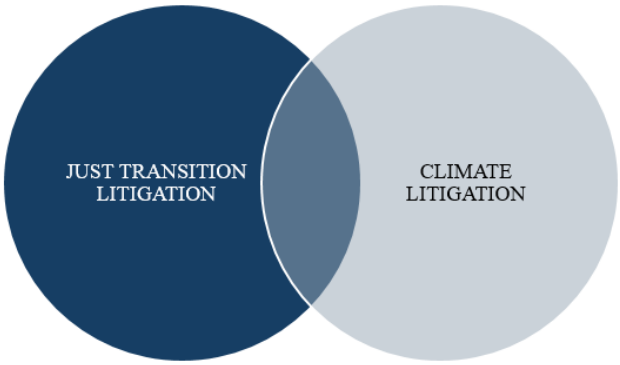
Figure 2. The key players ("who") and main issues ("what") of climate change litigation



Some climate change litigation implicitly or explicitly raises questions of justice. Yet these questions do not necessarily pertain to the transition itself. For example, lawsuits brought by or on behalf of children or youth – like *Neubauer v. Germany*[28]–challenged the inter-generational justice of inadequate climate action, questioning how the burdens of the transition should be shared between generations. Other iconic climate lawsuits – like *Urgenda v. the Netherlands*[29] – raised concerns over the intra-generational justice of inadequate climate action in the Global North. These justice questions therefore focus on the need to enhance climate change mitigation to protect current and future generations, rather than addressing the grievances of those that are presently affected by the transition.

Conversely, just transition litigation do not necessarily concern material issues of climate change science, policy, or law (**Figure 3**). While litigants challenge laws, policies of projects implemented to deliver climate change adaptation/mitigation, they do not necessarily contest the need for climate action. In fact, just transition litigation may not mention climate change at all. As a result, just transition litigation is oftentimes not captured in databases collecting climate change litigation.[2]

Figure 3. Just transition vs climate change litigation



It is therefore important to keep these two categories of litigation conceptually separated. It is also necessary to distinguish just transition litigation from other types of litigation that are specifically aimed to obstruct the path towards a low-carbon future – which the literature describes as 'anti-regulatory'[30] or simply 'anti' climate.[31]

By distinguishing just transition litigation from climate change litigation, we can focus on the diverse and competing claims of justice underlying the transition, the societal conflicts it engenders, and their implications for law and governance. In particular, studying just transition litigation can deliver precious insights to inform policymakers' understanding of justice claims that might otherwise be overlooked in decision-making processes.

This knowledge is crucial, as just transition litigation may curtail the range of measures available to policymakers or slow the transition to accommodate the claims of adversely affected communities. Relatedly, the threat of litigation might prompt restrictions on access to law- and decision-making processes. This phenomenon is already apparent in the European Union and in the US, where measures to expedite the transition have increasingly been coupled with controversial reforms aimed at simplifying the licensing process for wind farms[32,33,34] and facilitating the extraction of critical raw materials for the transition.[35,36] Such reforms restrict established rights and interests. By studying the grievances put forward in just transition litigation, we can evince insights on how to craft laws and policies that better factor in the rights and legitimate interests of those affected by the transition. In turn, these insights can be used to enhance societal acceptance and support for climate action, facilitating a more equitable and inclusive transition.

What we know

As yet, no dedicated just transition litigation database exists. We therefore relied on our collective knowledge and existing databases – most saliently, those of the Sabin Center for Climate Change Law at Columbia Law School (https://climatecasechart.com), the Climate Rights Database of the University of Zurich (https://climaterightsdatabase.com), and Business & Human Rights Resource Centre (https://www.business-humanrights.org/en/from-us/just-transition-litigation-tracking-tool/) – to identify examples of litigation which we used to formulate the conceptualisation expounded in this paper (**Table 1**).

Table 1. Examples of just transition litigation

Case	Summary of facts	Justice frames	Legal bases
Company Workers Union of Maritima & Commercial Somarco Limited and Others v. Ministry of Energy	Applicants, being union workers, allege that they were not consulted or involved in an agreement between the Chilean government and energy sector companies to phase-out coal plants.	Procedural justice	Constitutional law, specifically the right to equality before the law, freedom of labour, freedom of association and right to property
Consórcio Norte Energia (re Belo Monte dam in Brazil)	Applicants allege that public authorities failed to consult with Indigenous and local communities prior to the construction of a hydropower dam.	Procedural and recognition justice	Human rights law, specifically the rights of Indigenous Peoples
FOCSIV and others v. FCA Italy (Stellantis NV)	Applicants allege that the automaker, which purchases cobalt from the Democratic Republic of Congo, has failed to provide adequate information about its suppliers and potential human rights violations.	Procedural justice	OECD Guidelines for Multinational Enterprises (soft law instrument). This complaint was filed under the non-judicial grievance mechanism of the OECD

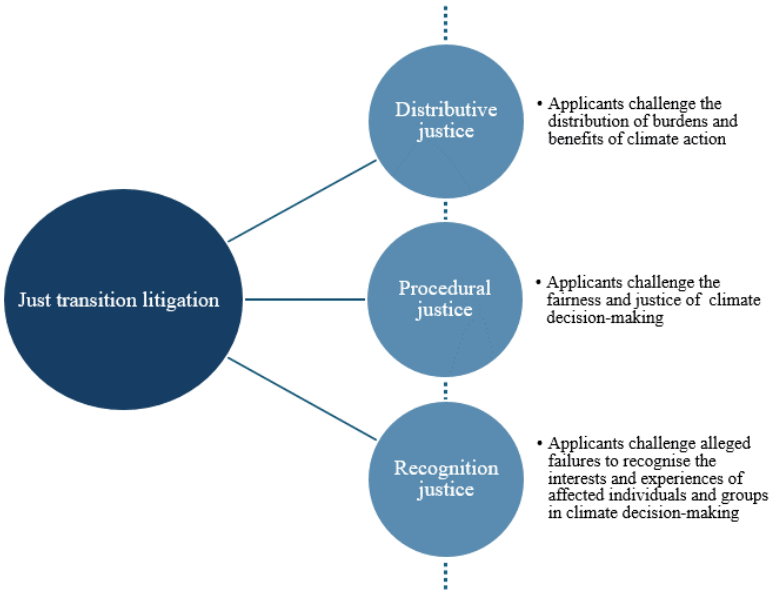
Pirá Paraná Indigenous Council and Association of Indigenous Traditional Authorities of river Pirá Paraná "ACAIPI" v. Ministry of Environment and Sustainable Development and others	Applicants, being Indigenous communities, allege that private companies are implementing REDD+ projects in their territory in violation of their rights to self-determination and cultural integrity. They also argue that they were deliberately ignored and excluded in negotiations.	Procedural and recognition justice	Human rights and constitutional law
ProDESC and ECCHR v. EDF	Applicants allege that the energy company violated the Indigenous community's right to free, prior and informed consent and failed to identify risks and take adequate steps to prevent human rights abuses or environmental damage that could arise from their activities.	Procedural justice	Human rights law, specifically the rights of Indigenous Peoples, and the French Corporate Duty of Vigilance Law
Statnett SF et al. v. Sør-Fosen sijte	Applicants allege that the construction of two wind power plants interfered with their rights as reindeer herders to enjoy their own culture and livelihoods.	Distributive, procedural and recognition justice	Human rights law, specifically the International Covenant on Civil and Political Rights
Uren v. Bald Hills Wind Farm Pty Ltd	Applicants allege that the operation of wind farms caused substantial and unreasonable interference with the amenity of their homes, affecting their ability to sleep.	Distributive justice	Common law nuisance and planning law

This exercise was instrumental to develop and test some hypotheses that serve to conceptualise just transition litigation as a discrete phenomenon. Our working hypotheses revolve around two distinct sets of variations within a single taxonomy. Firstly, just transition litigation concerns questions across three fundamental dimensions of justice commonly identified in the climate, environmental and energy justice literature. Secondly, just transition litigation draws upon a variety of legal doctrines, rights and interests. The remainder of this section illustrates both categories of variations through illustrative examples.

Justice frames in just transition litigation

The literature on climate, environmental and energy justice commonly identifies three main dimensions: distributive, procedural, and recognition justice[37,38,39,40,41] Distributive justice concerns the allocation of benefits and burdens, focusing on how these are distributed among different communities or groups. Procedural justice addresses the fairness of the processes through which decisions are made. Recognition justice considers whose interests and experiences are acknowledged and who has a voice in decision-making and legislative processes (**Figure 4**).

Figure 4. Dimensions of justice in just transition litigation



We applied these frames to the cases identified in Table 1 to detect the discrete justice claims implicitly or explicitly formulated by the applicants.

First, *distributive justice* claims contest the distribution across space, time, and communities of the benefits and burdens of climate action, as well as its implications for access to resources. These just transition lawsuits thus typically contest the disproportionate social and environmental impacts inflicted on individuals and/or communities by projects such as wind farms or hydroelectric dams. For example, in *Uren v. Bald Hills Wind Farm Pty Ltd*,[42] local residents sought compensation for the nuisance produced by the operation of wind farms in Australia.

Second, *procedural justice* claims challenge the way in which decisions over the transition are made. For example, in *Consórcio Norte Energia (re Belo Monte dam in Brazil)*,[43] representatives of Indigenous and traditional communities complained about the inadequate impact assessment and lack of oversight by the Brazilian authorities regarding the operation of a dam.

Third, *recognition* justice grievances challenge decision-makers' failure to recognise the interests of particular groups. For example, in *Pirá Paraná Indigenous Council and Association of Indigenous Traditional Authorities of river Pirá Paraná "ACAIPI" v. Ministry of Environment and Sustainable Development and others*[44] Indigenous Peoples argued that private companies implementing forest carbon storage projects on their lands violated their rights to self-determination, cultural integrity, autonomous governance, and territory.

Finally, just transition litigation may combines distributive, procedural, and recognition justice frames. In the *Statnett* case discussed above, the claimants challenged the distributive impacts of renewable energy infrastructure situated in a culturally significant area. They furthermore contested the procedural fairness of the decision, as well as the authorities' failure to protect their distinct culture and their right to be heard.

The legal bases of just transition litigation

Just transition litigation may be brought before various adjudicatory bodies at both national and international levels, and can rely on a range of legal bases, including administrative, constitutional, energy, environmental, human rights, labour, and planning law.

For example, in *Company Workers Union of Maritima & Commercial Somarco Limited and Others v. Ministry of Energy*,[45] labourers employed by carbon-intensive industries relied on their constitutional rights to challenge the Chilean government's failure to consult workers over its decarbonisation plans.

Lawsuits targeting corporate actors, instead, might specifically rely on the emerging body of corporate due diligence legislation. For example, in *ProDESC and ECCHR v. EDF*, [46] Indigenous Peoples and civil society organisations asked French courts to order energy company EDF to suspend the building of a wind farm in Mexico, due to concerns over breaches of the company's due diligence obligations under French law.

Just transition grievances may also rely on soft law guidance and voluntary complaint mechanisms. For example, in *FOCSIV and others v. FCA Italy (Stellantis NV)*[47] a National Contact Point established under the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct[48] was asked to consider the grievances of communities in the Global South who bear the brunt of the extraction of transition minerals, including loss of biodiversity, cultural heritage, and water, as well as human rights violations.

What we do not know

The transition poses a complex policy challenge: how can we rapidly and urgently decarbonise, while maintaining distributive, procedural and recognition justice? These goals are often in tension with one another. As noted above, the most significant benefit of a robust scholarly approach to just transition litigation is that to aid policymakers in harmonising their efforts to achieve these goals. Just transition litigation can potentially impede projects, discourage investment and trigger, or be a symptom of, political resistance against climate action. Analysing the impacts of such litigation through a justice perspective is therefore important to appreciate the tensions inherent in the transition and explore avenues for resolving these tensions.

More generally, there is a need to better understand whether litigation can advance a just transition or, conversely, hinder it. Addressing this question requires a deeper understanding of how just transition litigation influences the behaviour of governments and corporations. While establishing direct causal links between litigation and regulatory changes can be challenging, existing studies on the impact of climate change litigation[26] or human rights litigation[49] offer valuable insights that can inform the development of analytical methods to assess impacts and identify correlations. We propose a research agenda to further test and develop our hypotheses and deliver these insights.

An important first step is to go beyond our initial scoping to identify a dataset of just transition litigation cases in one specific or in a group of selected jurisdictions. Our analysis in this Perspective was limited by the lack of systematic data collection. This gap could be addressed by applying our definition of just transition litigation and using advanced search techniques to explore existing case law databases. This effort would deliver a distinct just transition litigation dataset. This population of cases could subsequently be interrogated through a case study approach, selecting cases from different sectors (e.g. renewable energy), based on discrete types

of legal sources (e.g. planning law), and brought before discrete adjudicatory bodies (e.g. domestic courts). These case studies could then be analysed to evaluate the impacts of just transition litigation. Qualitative and mixed-methods empirical research, comprising both text analysis and interviews, could be used to investigate the drivers, as well as the effects of just transition litigation.[50,51] Quantitative research and descriptive statistics could be used to identify patterns, and inferential statistics to test and refine hypotheses, for example about which litigants file cases under which conditions and against whom.

Looking ahead

This Perspective has conceptualised just transition litigation, offering a working definition of this expanding global phenomenon. We identified the main characteristics of this litigation and started to analyse it, based on two distinct sets of variations within a single taxonomy. The examples we considered show that just transition litigation is a dynamic field of practice, relying on a range of legal instruments and mechanisms to articulate justice complaints associated with the impacts of climate policies or projects. As the transition accelerates, this litigation is bound to expand and diversify, increasingly shaping the understanding of what a just transition entails in practice.

This Perspective has highlighted the diverse justice claims intersecting in the transition and outlined a research agenda to examine the impacts and normative implications of just transition litigation. A systematic study of this litigation would provide valuable insights into the tensions between climate action and justice claims. Such research would deepen our understanding of how litigation affects various levels and areas of governance and its role in either facilitating or hindering a just transition to a low-carbon future. These insights are crucial for identifying pathways to ensure that climate policies and projects are designed and implemented to protect the rights and legitimate interests of the segments of the population most exposed to the negative impacts of the socio-economic transformations associated with the transition.

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