Implementing the Paris Agreement: What role for the courts?

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The Paris Agreement

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- ***United Nations Framework Convention on Climate Change***
  - **1992 Mitigation –** UNFCCC's Synthesis Report on commitments made for Paris indicates a 2.7° C rather than a 3.2° C (2010 Cancun Agreement) to temperature rise – whereas international goal is below 2° or 1.5° C
  - **2010 Adaptation Framework –** although Green Climate Fund and Adaptation Funds report a serious lack of funding to engage in activities
  - **2013 Warsaw International Mechanism for Loss and Damage associated with the Impacts of Climate Change –** to deal with climate disasters in developing countries

- **2015 *Sustainable Development Goals*** - require urgent action to combat climate change and it impacts (SDG 13); build resilient infrastructure (SDG 9); make cities and human settlements safe, resilient and sustainable (SDG 11);

- **2015 *Sendai Framework for Disaster Risk Reduction 2015-2030* –** contains 7 global targets, including for mitigating climate disaster risks

Domestic implementation of Paris targets: climate science and economic rationalism

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From climate science to Paris targets

- One might imagine that climate science compels urgent national, state and local responses to meet domestic Paris commitments

- However, the pathway from available evidence to regulation is far from clear

- Climate science lies at a complex interface with law- and policy-making - where the complexities and uncertainties have been deliberately exacerbated by vested interests especially the fossil fuel industry and climate sceptics in government

The different normative underpinnings of science, law and politics

- **Normative underpinnings of science**
  - **science is the domain of systematic verification to which social purposes are quite irrelevant, with science harbouring a deep aversion to populist legitimations of decision-making authority**
- **Normative underpinnings of law**
  - **Law and science have different orientations towards distributive consequences as the culture of science requires scientists to be dispassionate whereas the culture of law is normative to its core**
- **Normative underpinnings of politics**
  - **Democratic politics unlike science and law appeals to the capacity of participation, accommodation and accountability to justify the State's regulatory authority**

Peter Schuck, 'Multiculturalism Redux: Science, Law, and Politics' (1993) 11 *Yale Law and Policy Review* 1

Legitimacy depends on both law and science

- Law often completes the work of politics and public affairs, and science as frequently underwrites the rationality of public decisions.
- As relatively apolitical institutions, law and science are powerful generators of trust.
  - Social order in democratic nations depends on both institutions living up to this ethos, or at least strenuously attempting to do so.
- Together, law and science have underwritten a time-honoured approach to securing legitimacy in public decisions.
  - If their interactions are governed by flawed principles then the capacity of either to control the arbitrariness of power in greatly diminished. (@s49)

Sheila Jasanoff 'Law's Knowledge: Science for Justice in Legal Settings' (2005) *American Journal of Public Health* s49

The impacts of neoliberalism

- A sizeable body of literature exists to show the link between neoliberalism and the abuse of science by conservative governments
- The mantra is that government is too large and complex and that its regulatory activities unnecessarily disrupt the efficient operation of the market economy
- This is a deliberate attempt to challenge the gains won by progressive social movements, including the environmental movement
- In fact, meeting all of the Paris commitments requires the delivery of 'public goods' by government, including urgent and effective law and policy responses, large-scale infrastructure solutions and an appropriate social safety net

Australian State governments increase disaster risk

- **Despite risks of flooding under future climate change scenarios, NSW 2012 *Controlled Activities in Riparian Corridors* policy states that:**
  - **The NSW Government has identified the protection of riparian corridors (which are flood prone zones) as impacting on the supply of housing – 25,000 new houses are needed each year**
  - **The 'Reforms' – making riparian corridors available to development – will increase land availability and decrease regulation as a streamlined controlled activity approval assessment process is adopted**
  - **The changes will contribute towards reducing red tape for businesses and the community by 20 per cent by June 2015**

Turning to the courts: where are the barriers?

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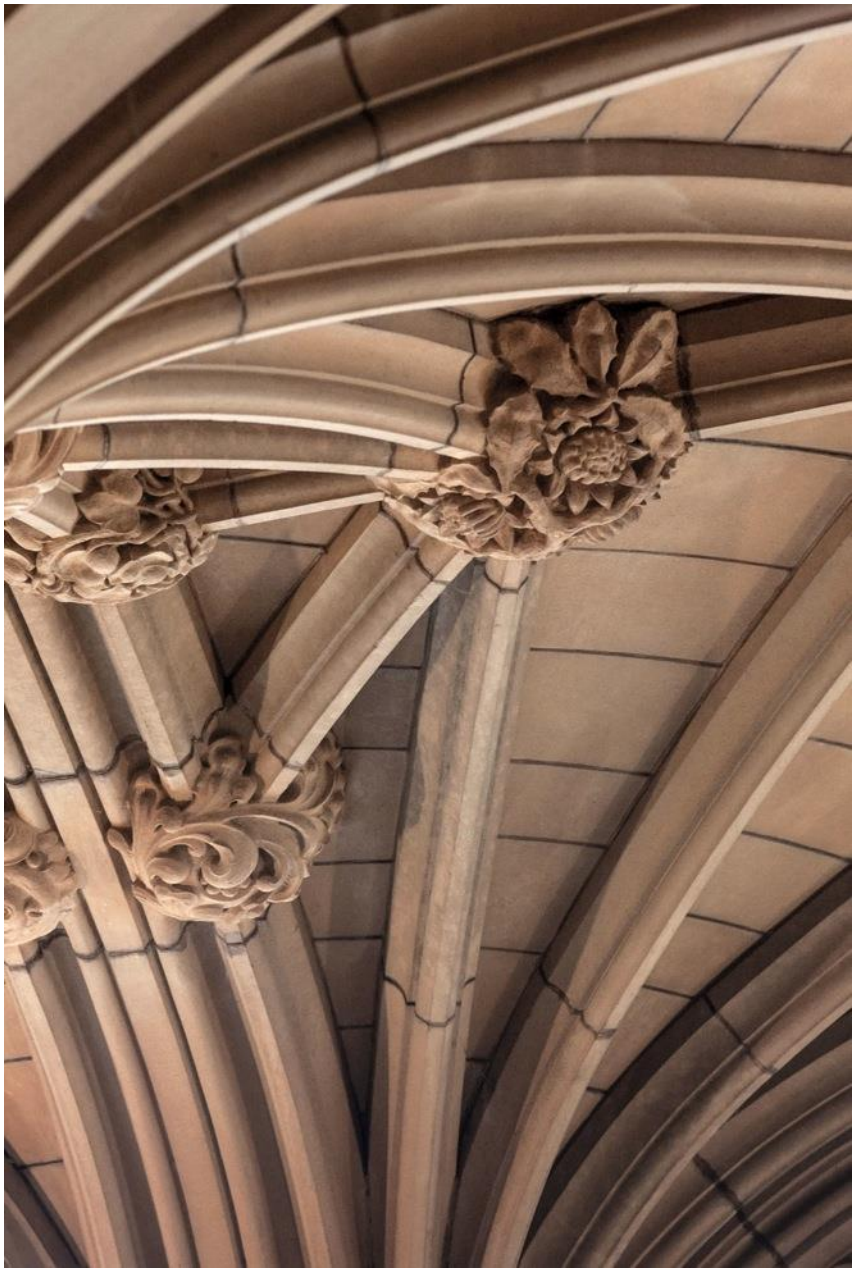
The Courts and Scientific Evidence



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Judicial competence

- *Massachusetts v EPA*
- **Mr Milkey: Respectfully, Your Honor, it is not the stratosphere. It's the troposphere.**
- **Justice Scalia: Troposphere, whatever, I told you before I'm not a scientist.**
- **(Laughter)**
- **Justice Scalia: That's why I don't want to have to deal with global warming, to tell you the truth.**
- **Transcript of Oral Argument at 22-23**

Admissibility and presentation of scientific evidence

- **United States**

- *Daubert v Merrell Dow Pharmaceuticals, Inc* 509 US 579 (1993) (torts)
  - In pre-trial adversarial hearings, judges (acting as 'gatekeepers') can exclude scientific evidence, upon motion of a party, unless 'relevant' and 'reliable'

- 2000 *Federal Rules of Evidence* revised to require expert testimony be based on 'sufficient facts or data' arrived at by 'reliable principles and methods', 'reliably applied to the facts of the case'

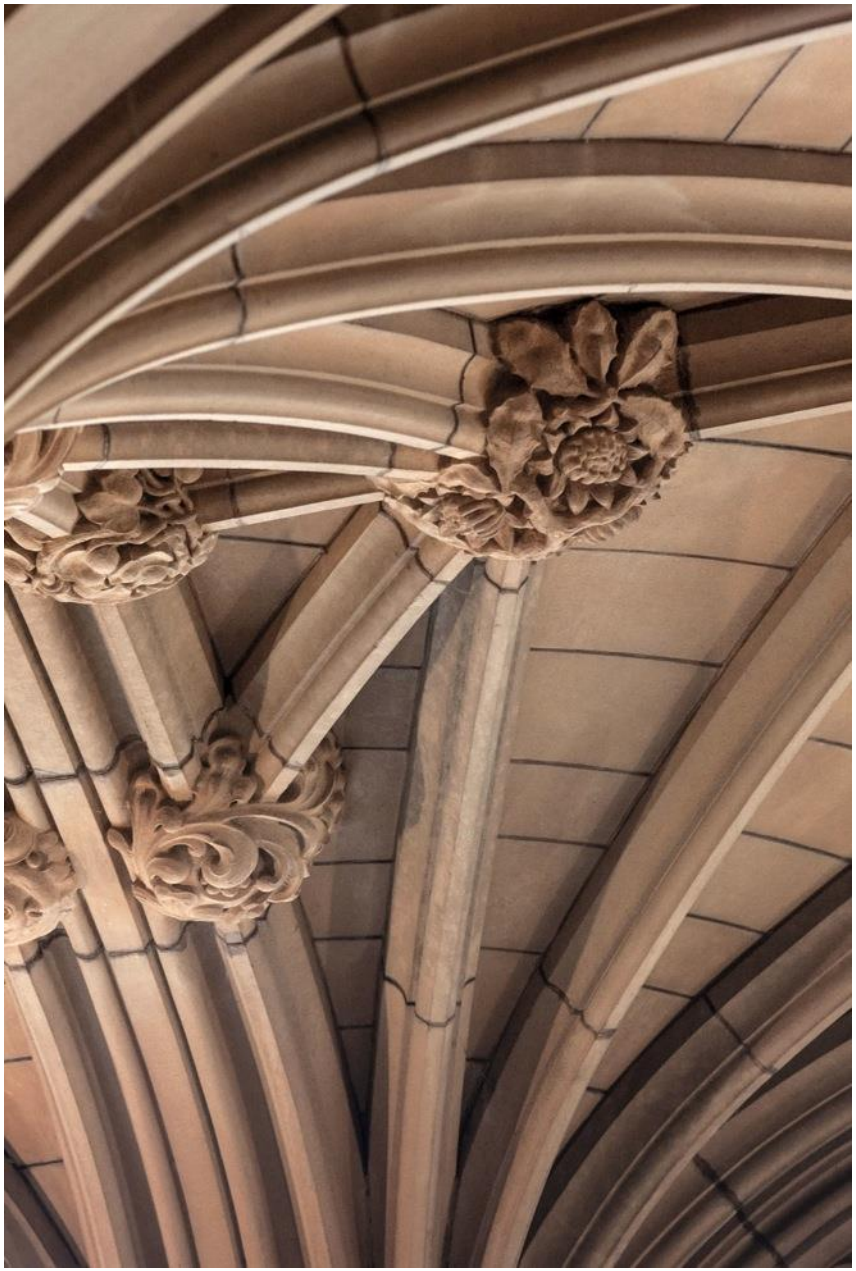
- *Information Quality Act* requires federal agencies to subject all 'influential' information used in the rulemaking process to minimum peer-review standards
  - Peer-review standards are more stringent than those followed by the IPCC
  - Subject to 'hard look' judicial review i.e. no deference by courts (*Our Children's Trust)*

- **Other jurisdictions such as EU and Australia IPCC reports are found to be 'reliable' and 'relevant' (*Urgenda*, Land and Environment Court of New South Wales (but this is a specialist court in Australia cf Federal Court)**

- **The precautionary principle is applied in cases of scientific uncertainty – which is endemic to all science including or especially climate science**

- **It is possible to reduce the adversarial nature of scientific evidence through court appointed experts (see 'Expert Evidence in the Land and Environment Court', or domestic science agency)**

The courts and judicial decision-making: how do courts really decide?



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Take your pick!

- **Legal Formalism –** judges mechanically and dispassionately apply the law
- **Legal realism –** Karl Llewellyn – judges make choices that reflect their political ideology
- **Law and economics scholars**
  - Judges make self-serving decisions to advance their political fortunes
  - 'Selection hypothesis' – litigants carefully consider judicial ideology and choose to settle. So judges end up adjudicating matters that should not lend themselves to ideological decision-making ((Priest and Klein (1984)
- **Political scientists and Attitudinal Model –** empirically based research posits that judicial decision-making is determined by attitudes and preferences of individual judges *unconstrained by legal precedent* (Segal and Spaeth (1993))
- **Law and psychology movement –**
  - **Psychology, heuristics and cognitive illusions** – relying on mental shortcuts (heuristics) can lead judges to produce erroneous decisions (Chris Guthrie et al. (2001))
  - **Naive Realism** – judges posses *subjective unconscious perception biases* rather than demonstrating judicial manipulation or partisanship
    - But this can be overcome by the collegial environment of the courts in the interests of reaching the right decision (Brian Lammon (2009))
  - **Cognitive psychology and behaviour economics** – in response to naive realism, judges must *actively cultivate an independent ideology* that is self-conscious of any personal biases and overcome them to strengthen the Rule of Law (Daniel Hinkle (2013))
- **The constrained judicial pragmatism model –** judges exercise discretion based on public policy and other unorthodox authorities but are also pragmatically 'boxed in' by legal norms (Posner *How Judges Think* (2010))

Does 'situational sense' prevail?

- A study using actual judges, rather than cases, in ideologically biased-reasoning experiments
- Evidence is strongly at odds with the conclusion that judges are influenced by political predispositions
- Judges of diverse cultural outlooks – even polarised on their views of climate change - converged on results in cases that strongly divided comparably diverse members of the public
- These results strongly support the hypothesis that professional judgment can be expected to counteract 'identity-protective cognition'
- Legal training and experience endows judges with a specialised form of cognitive perception called 'situation sense' that focuses their attention on the case notwithstanding the tug of influences that are irrelevant and indeed inimical to impartial legal decision-making.

Ideology Or Situation Sense - An Experimental Investigation Of Motivated Reasoning And Professional Judgment, Dan M. Kahan, (2016) 64 *University of Pennsylvania Law Review* 349

Can we rely on courts to help implement the Paris Agreement?

Presentation builds upon Rosemary Lyster *Climate Justice and Disaster Law* (Cambridge University Press: 2015)

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