Law, justice and the role of courts in changing the social superstructure narrative in climate litigation

A Rejoinder to Benoit Mayer

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RESPONSE

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A Rejoinder to Benoit Mayer


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In the article Causality and the fate of climate litigation: The role of the social superstructure narrative, we argue that an enhanced and wider understanding of attribution science will shape the social superstructure narrative of climate change. This social superstructure narrative influences courts in their decision-making. Benoit Mayer, in the same issue, has commented on our article. We use this rejoinder to clarify three elements of Mayer’s comments in his response to help avoid any misconception of our argument or misunderstanding of the German Civil Code and thus hopefully enrich the discussion. These clarifications speak to the role of the courts first to preserve the rule of law and second in the context of climate change with the third clarification relating to the legal basis of a specific claim under German law.

First, Mayer claims that our argument confuses law and justice by concluding that climate change is an issue of injustice and therefore is a matter for courts. Mayer’s proposition ignores the fundamental role of law—which is to serve justice. Mayer continues to suggest that because we confuse law and justice, our argument misconstrues the conditions under which courts can ‘impose compensation’. Our argument is not about courts imposing compensation but courts applying the law. The role of courts in any society is to preserve the rule of law and, in so doing, ensure that decisions are fair and just. We explain that what constitutes justice or injustice pertains to societies’ and courts’ perceptions, and this inevitably influences the interpretation of the law. The author not only misses our point about the interlinkages of societal fairness perceptions, the law, and adjudication but also ignores the academic and judicial debate that framed, for example, the application of the law in asbestos litigation and medical exposure cases. Famously, in Fairchild v. Glenhaven Funeral Services, Lord Justice Nicholls of Birkenhead stated that ‘[O]n occasions the threshold “but for” test of causal connection may be over-exclusionary. Where justice so requires, the threshold itself may be lowered. In this way the
The potential relevance of attribution science to climate litigation not only misconstrues the premise of our article, but also leaves unclear the way in which Mayer would substantiate his argument that separating law and justice would support the role of attribution science. Furthermore, prominent historic and present examples demonstrate that separating law and justice in courts leads to immense human suffering. We would like to distance ourselves from any argument that proceeds on that basis.

The second point relates to the role of courts in the context of climate change. Mayer states that there are ‘many injustices that courts cannot (or, otherwise, do not) address’. This is a truism that does not advance his point or disrupt our argument. We demonstrate in detail that it is possible to evidence the whole chain of causality while recognising that not every impact of an extreme weather or climate-related event is due to climate change. This detailed engagement with available scientific evidence is very different from assuming ‘that any scientifically proven causal link, however remote, is legally relevant’. First, this misrepresents our argument. We argue that scientific causal links can inform adjudication, but of course are not in and of themselves sufficient for establishing legal causation. Second, Mayer’s comment ignores that the approach of (climate) science-informed judicial practice is supported in the case law. For example, in Juliana v the United States, the 9th Circuit Court agreed that causation can be established even if there are multiple links in the chain and stated that ‘plaintiffs’ injuries were caused by carbon emissions from fossil fuel production, extraction and transportation, and that a significant portion of those emissions occurred in the United States (Case 18-36082 92020 at 19, 20). The 9th Circuit Court thus acknowledged the causal link (but the case failed to satisfy the standing requirement of redressability). Another example (and quoted in Juliana) is the US Supreme Court’s decision in Massachusetts v EPA where the US Supreme Court found that emissions amounting to about 6% of the worldwide total ‘showed cause of the alleged injury’, stating that ‘[J]udged by any standard, U. S. motor-vehicle emissions make a meaningful contribution to greenhouse gas concentrations’ ((2002) UKHL 22 [54]).

For these reasons, Mayer’s claim that we ‘misrepresent the potential relevance of attribution science to climate litigation’ not only misconstrues the premise of our article, but also leaves unclear the way in which Mayer would substantiate his argument that separating law and justice would support the role of attribution science. Furthermore, prominent historic and present examples demonstrate that separating law and justice in courts leads to immense human suffering. We would like to distance ourselves from any argument that proceeds on that basis.

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precedent and/or instigating further litigation. This goes back to the point made earlier about the importance of courts in protecting and advancing the rule of law.

The third and final element in Mayer's response is directly related to the legal basis for the claim brought against the German energy provider RWE. In *Lliuya v RWE*, the claimant relies upon §1004 German Civil Code, a provision that belongs in the system of the German Civil Code to nuisance law, not to the law of torts. Mayer states ‘[T]he authors allude to another tort, nuisance (p. 745), but, not unlike negligence, nuisance occurs only when the defendant has interfered in an unordinary, illicit, or otherwise intolerable manner with the rights of the claimants (e.g., German Civil Code, §1004)’.

This is not a correct representation of the German law, as Mayer equates tort with nuisance. To satisfy §1004 Civil Code, a breach of a duty or otherwise unlawful action are not required. Accordingly, the claimant is not arguing that RWE acted in breach of the law. Rather, this is a claim about the nuisance created by lawful action (emitting GHG within the allowed limits for RWE). Nuisance law in the German Civil Code is about the unlawful (and often unintended) result of lawful action.

For that reason, we explain in our article that ‘[A]llocating responsibility for harm does not always involve a breach of a duty or unlawful action. It can be sufficient that the situation that has occurred as a result of the lawful activity is unlawful. In the case *Lliuya v RWE*, pending before the Higher Regional Court Hamm at the time of writing, a claim is brought under German nuisance law (section 1004 Civil Code)’.

Mayer, in his response, continues to state that ‘A court must attribute the harm to the defendant's fault, rather than simply to the defendant's conduct, before it can order compensation’.

Again, it is important to understand that §1004 Civil Code is not concerned with compensation for the defendant's fault or unlawful conduct, rather with the removal of the disturbance, either through the claimant who can then seek reimbursement or through the disturber directly. Courts regularly take care not to confuse a claim in which the claimant seeks removal of the disturbance (or the recovery of the costs for the removal) with a claim for compensation for a breach of duty. As already explained, a successful claim under §1004 Civil Code does not require such breach of duty.

Therefore, the Higher Regional Court Hamm found that the case was conclusively argued and allowed the case to proceed to evidentiary stage (Az. 2 O 285/15, Indicative Court Order and Order for the Hearing of Evidence, 30 November 2017). It is clear from the case material (available in German and in unofficial English translation, [https://www.germanwatch.org/en/rwe](https://www.germanwatch.org/en/rwe)) that the claimant is not arguing that RWE has breached a duty, and neither the District Court Essen in the first instance, nor the Higher Regional Court Hamm in its indicative order, nor our article, would suggest otherwise.

To quote the legal counsel in the case '[T]his claim is not a claim of compensation for damages and also does not signify a breach of the system of strict liability and fault-based liability – it is rather based on the same conflict also assumed by the legislator, namely that one party's use of its property leads or contributes to an unacceptable impairment of the other party's property' ([https://www.germanwatch.org/sites/default/files/announcement/20822.pdf](https://www.germanwatch.org/sites/default/files/announcement/20822.pdf), at 26).

The above explanation concerning the correct reading of §1004 Civil Code deflates Mayer's final point that the requirement of ‘fault significantly reduces the relevance of Otto et al.'s argument (there is no such requirement of fault) and makes it redundant to reply to any further points that are based on his incorrect representation of German nuisance law. Lastly, it should be noted that nuisance law in accordance with §1004 Civil Code does not provide for considerations such as Mayer's suggestion that ‘Lliuya himself might have benefited indirectly from the economic impact of the economic development generated by RWE and other emission-intensive activities’.

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