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RESPONSE

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

A Rejoinder to Benoit Mayer[1]

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A rejoinder to Benoit Mayer's response to our article "Causality and the fate of climate litigation: The role of the social superstructure narrative"[1].

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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

[1] Mayer, B. (2022) Attribution science and the fate of climate litigation. *Global Policy*, 13, 831–832. Available from: https://doi.org/10.1111/1758-5899.13153

scope of a defendant's liability may be extended' ([2002] UKHL 22 [40], emphasis added). With our argument, we hope to initiate and contribute to a discussion around the scope of the defendant's liability in the context of climate change, based on the premise that courts apply the law to achieve justice. Separating law and justice, as Mayer suggests, not only fails to engage with our argument, but also fundamentally undermines the role of courts. As recognised by Lord Justice Hoffmann in the same judgement cited above, '[O]nce it is appreciated that the rules laying down causal requirements are not autonomous expressions of some form of logic or judicial instinct but creatures of the law, part of the conditions of liability, it is possible to explain their content on the grounds of fairness and justice in exactly the same way as the other conditions of liability' ([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.

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 worlwide 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' (*Massachusetts v EPA* 549 US 497 (2007) at 524-25). Questions of measurable thresholds, criteria to define *de minimis* and proximate cause require as a first-step the engagement with scientific evidence within given legal criteria. Legal reasoning, and courts' consideration of scientific evidence, we believe, is by far more nuanced than Mayer's response implies.

Mayer's related point that '[I]n particular, as courts change the law only in an incremental manner, they are rarely able to solve structural injustices, such as global inequalities' raises two issues. The first is the extent to which a positivist approach to the law opens the space for judicial change of the law (be it incremental or otherwise), and our article is not concerned with the arguments that define the scholarly debate around positivism. Our argument is based on a positivist approach to the law. The second issue with which we are dealing in the article is the ability of courts to address and solve structural inequalities. Mayer's proposition entails a significant constraint of the role of the judiciary. Depending on the constitutional context, courts *can* address structural injustices, within the context of climate change and beyond. For example, in *Neubauer v Germany*, the German Federal Constitutional Court declared the 2019 Climate Protection Act partially incompatible with fundamental rights insofar as they lacked provisions for updating the reduction targets after 2030 that satisfied the constitutional requirements (Order of the First Senate of 24 March, 1 BvR 2656/18). The Federal Constitutional Court addressed intergenerational injustice, and it addressed a global challenge, within its judicial powers as guardian of the constitution. It found that respecting future freedoms required initiating the transition to climate neutrality in good time and it clarified that it was a constitutional obligation to take climate action and to restrict greenhouse gas emissions to levels that have a net zero impact on greenhouse gas concentrations in the Earth's atmosphere (English translation. https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2021/03/rs20210324_1bvr265618en.html, para. 198).

We explain that the societal perception of climate change and the urgency of the issues involved influence the decision-making of courts. Courts contribute to this societal perception and they are influenced by it, in their application of the law and the interpretation of legal concepts. This includes the causal analysis, and we demonstrate that this causal analysis does not in all instances sufficiently reflect the scientific evidence that can be produced. Mayer's conclusion that '[C]ourts could not possibly deal with eight billion plaintiffs claiming compensation from every corporation that contributed to causing climate change' spells out a general truth that is not connected to or engages with our argument. The outcome of a case in court must depend on the application of the law and cannot be defined by general policy considerations pertaining to the risk of setting

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 unoffical English translation, 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, 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 benefitted indirectly from the economic impact of the economic development generated by RWE and other emission-intensive activities'.

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