



Practicing Law in the Anthropocene: Exploratory Reflections from Japan

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*Practicing Law in the Anthropocene: Exploratory
Reflections from Japan*

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June 2020: ‘It is not just *climate change*, but a *climate crisis* that could shake the very foundations of survival for all life’.¹ Both linked with the recurrence of ‘once in a century’ disasters and increasingly perceived as a ‘long emergency with dire consequences’ (Stein 2021, 194), ‘climate change’ has become part of the Japanese government’s lexicon.² A few months after the Japanese government used for the first time the term ‘climate crisis’ (*kikô kiki*) and committed to a firm timetable for net-zero emissions, Japanese lawmakers finally adopted on November 20, 2020 a climate emergency declaration (*kikô hijôjitai sengen ketsugi-an*)³ in a symbolic vote aimed at increasing pressure for climate action. Drafted by a cross-party group of legislators, this non-binding declaration cites ‘unprecedented damage’ from disasters exacerbated by climate change at home and abroad. In a subsequent attempt to integrate disaster risk reduction and climate action policies, Japan’s Minister of the Environment and the Minister of State for Disaster Management announced a new joined-up approach to better address the growing threat of climate-induced disaster risks and support ‘adaptive recovery’.⁴

¹ Ministry of the Environment, Annual Report on the Environment, the Sound Material-Cycle Society and Biodiversity in Japan 2020, White Paper.

² The White Paper on Disaster Management 2020 acknowledges that ‘disasters caused by climate change are becoming increasingly frequent and severe’ and reiterates that ‘in the future, risks of climate disasters nationally and globally may increase due to the influence of climate change’. Cabinet Office, White Paper, Disaster Management in Japan (2020) 35-36.

³ Available in Japanese. About 40 climate emergency declarations have been adopted at the local level; see on Climate Emergency Declaration and Mobilisation in Action the information page about Japan.

⁴ Minister for Disaster Management R. Takeda and Environment Minister S. Koizumi, ‘Strategy for Enhancing the Synergy between Climate Action and Disaster Risk Reduction in the Era of Climate Crisis: Shifting from

As climate change policy in Japan cannot be viewed in complete isolation from disaster risk reduction or vice versa, merely developing a portfolio of dedicated legal rules on prevention, emergency response, recovery and rebuilding, as well as compensation and risk transfer is no longer adequate; against the backdrop of a potentially existential threat, there is an increasing need to integrate knowledge on disaster risk reduction with knowledge on climate change mitigation, adaptation, and loss and damage. What follows is part of a research in progress on the emergence of new legal practices in the Anthropocene-Japan. Exploratory, this note focuses the attention on how different types of practicing lawyers can address the many legal disruptions generated by a continuously rising risk of more frequent and higher-impact climate change-induced extreme events.

Climate Disaster Law as an Emergent Area of Legal Practice

A number of recent declarations worldwide have emphasized the leading role of practicing lawyers—who represent the legal interests and rights of all sides (the State, corporations, communities, civil society organizations and most vulnerable individuals)—in ‘*maintaining and strengthening the rule of law, and supporting responsible enlightened governance in an era marked by climate crisis*’ (Bernardes Neto 2020). The International Bar Association (IBA), commonly called *the global voice of the legal profession*, adopted in that sense a Climate Crisis Statement urging lawyers not only to take ‘a climate conscious approach to problems encountered in daily legal practice’, but also to advise clients ‘of the potential risks, liability and reputational damage arising from activity that negatively contributes to the climate crisis’, and to engage with ‘current and future policymaking efforts to address the climate crisis’.⁵

Climate change presents several conundrums for lawyers and defies the way they think about and deal with disaster risks. At present, the differing ways in which practicing lawyers can deal with legal disruptions caused by climate disaster risks are not clearly identified and remain insufficiently discussed. Expanding on Rosemary Lyster’s work on the convergence of Climate Change Law and Disaster Law (Lyster 2016, Lyster et al. 2018) as well as on recent studies on crisis lawyering (Brescia and Stern 2021), my most recent research proposal explores the practical and theoretical conditions under which climate disaster risks arise as a new area of legal practice in Japan. The main question addressed is how, in ‘an era of unlimited harms’ (Ewing and Kysar 2011), different types of practicing lawyers utilize their expertise to shape the legal system’s response to a continuously rising risk of more frequent and higher-impact climate change-induced disasters. In so doing, this research seeks to elucidate whether

Restoring the Status Quo to *Adaptive Recovery*’, Joint Statement.

⁵The International Bar Association Climate Crisis Statement is available [online](#).

there is a particular approach to climate disaster risk that lawyers in Japan have started to or could embrace, or something distinctive about climate crisis lawyering that calls for specific skills and knowledge.

By scrutinizing how attorneys, in-house counsels, as well as government lawyers deal with climate disaster risks in either their contentious or non-contentious legal practice, this research project aims principally at: 1) illuminating the opportunities for, and the barriers to the development of effective ‘climate crisis lawyering’ in Japan; 2) assessing the conditions under which good or best lawyering practices in the field of Climate Disaster Law are transferable across jurisdictions, in particular from Japan to other jurisdictions in East Asia. Such an inquiry implies not only to identify several lawyering tools, techniques, and patterns compellingly operating both through disaster law and across the mitigation, adaptation, and loss and damage issue-areas of climate change law; but also to delineate the corresponding complex skills, competences, and knowledge required in this area of legal practice.

Climate Crisis Lawyering and the Opening Up of Legal Reasoning

One first question concerns the extent to which practicing lawyers can manage the scientific information available to ground actions in climate emergency matters. Climate attribution science—which provides a growing body of evidence linking increases in atmospheric greenhouse gas concentrations to specific extreme events and harmful impacts on humans and natural systems—has been playing an increasingly significant role in policy-making, planning, and litigation. In several climate change litigation cases involving claims that a government or private actor should be held accountable for their contribution to or failure to regulate GHG emissions, attribution science has been used to establish standing and define parties’ contributions to GHGs as well as causal connections to a broad range of on-the-ground impacts and harms. In Japan, attribution science has been helping litigants to argue, but it remains to be seen whether it will also support judges’ decision. Similarly, the extent to which government lawyers and in-house counsels refer to or make further use of global-change science concepts and frameworks to delineate the notion of climate risk needs to be investigated.

The question of how practicing lawyers construct climate disaster as an object of legal practice, however, goes beyond this first aspect: it also necessarily relates to how and the extent to which legal reasoning is transforming in the Anthropocene. Anthropogenic climate change-induced extreme events are disruptive of legal systems—and Japan is no exception. Thought of as legally disruptive, climate disasters require ‘a *break* in the continuity of existing legal practices and doctrinal *business as usual*’ (Fisher et al. 2017, 174). As stated by Linda Ross Meyer, ‘law is constantly colonizing catastrophe, reframing it as injustice, expanding

the bounds and jurisdiction of law, and consequently expanding the zone of human control and responsibility' (Meyer 2007, 20-21). However, such collective response remains ambiguous as it shares with 'nihilism' (the other possible stance toward catastrophe) the same basic commitment to the normative status quo: prevailing norms and ordinary legal frames, whose integrity has to be maintained along with the values they embody, are not fundamentally questioned. In the face of climate disaster risks and the challenge that climate change-induced extreme events represent, would practicing lawyers seek to stretch the bounds of substantive frameworks (tort, constitutional law)? Or, confronted with different forms of legal disruption generated by climate change, would they have to innovate further, thus contributing to the progressive recrafting of Japanese law normative project, beyond the application and incremental development of existing rules and doctrines?

Historically, Japanese courts have performed a significant role in the development of tort law rules in the field of pollution. Additionally, civil lawsuits and administrative lawsuits have been used by environmental protection groups and citizens affected by environmentally unfriendly development. Although global warming can be linked to the increased occurrence of many extreme weather events and risks of disasters at scales not previously experienced, the legal response has not followed the familiar pattern seen in the aftermath of other environmental disasters. Yet, climate change generates disputes. To date, there have been four climate change-related litigation actions in Japan, two against the State and two against a corporation.⁶ As these cases are still pending, uncertainties remain as to whether the judge will either expand the bounds of judicial authority to address anthropogenic climate change-related disaster risk or refuse to engage the court's *juris* generative potential in this domain. While the effects of climate change multiply and intensify, my research proposal scrutinizes how lawyers might contribute through their contentious practice to progressively bring an increasing number of disasters, even the 'unpredictable and unexpected', within the bounds of Japanese law. This proposal, however, is not limited to climate change litigation and adjudicative forums. It also explores how different types of lawyers, including government lawyers and in-house counsels, build on their most recent experience in times of crisis (Okamoto 2016, 2018) and develop more proactive legal strategies, at the interface of Earth system science and Earth system governance and law, that help to progressively open up Japanese law to the notion of climate disaster risk.

⁶Namely: *Market Forces v. SMBC, MUFG and Mizuho*, National Point of Contact for OECD Guidelines (filing date: 2018, status: pending); *Citizens' Committee on the Kobe Coal-Fired Power Plant v. Japan*, Osaka District Court (filing date: 2018; status: pending); *Citizens' Committee on the Kobe Coal-Fired Power Plant v. Kobe Steel Ltd., et al.*, Kobe District Court (filing date: 2018; status: pending); *Yokosuka Climate Case*, Tokyo District Court (filing date: 2019; status: pending.)

As anthropogenic climate change-induced extreme events are ‘a particularly vexing threat to social meaning and justice’ (Weaver and Kysar 2017), legal reasoning will need to open up to a wider range of narratives (including the Anthropocene and its competing accounts), understandings (Disaster-STs,⁷ critical approaches to environmental law, in particular) and modes of thinking (such as assemblage thinking⁸). A decade after the 3-11 triple disaster, any attempt to configure the normative project of a mixed jurisdiction such as Japan to Climate Disaster Law and crisis lawyering frameworks is certainly fraught with further analytical and practical difficulties. Yet the exercise is crucial, which should help clarify what *to think like a lawyer* means and implies in the Anthropocene.

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⁷Disaster-STs refers to an emergent subfield of Science and Technology Studies.

⁸I. Giraudou, ‘Climate crisis lawyering in Japan: Why legal reasoning needs to open up to social-science-based assemblage thinking’, Roundtable, *Pluralising the Sources of Knowledge About Climate Crisis: Insights from Japan*, The Sainsbury Institute for the Study of Japanese Arts and Cultures / The Climate Crisis Thinking in the Humanities and Social Sciences, University of Oxford, July 13, 2021.

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