

CLIMATE LITIGATION AGAINST PRIVATE COMPANIES

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3 TYPES OF CLIMATE LITIGATION AGAINST PRIVATE FIRMS

TYPES OF LITIGATION

- 1. **Disclosure** related:
 - Greenwashing claims, misleading disclosures
 - Cf. SEC v. Vale
 - To force companies to disclose data (eg CO2 emissions), climate policies or lobbying in relation to such policies
 - Cf. AG and OLG Braunschweig 16.3. and May 2023 concerning Volkswagen climate lobbying
- 2. tort-based damages for past (realized) **damage**
 - Very rare in climate cases
 - RWE case is about damages, but *future* damages

TYPES OF LITIGATION

- **3. directed at changing corporate policies**
 - Some disclosure-related claims are aimed at this: by forcing company to disclose policy, you force it to have one, sometimes to change its policy
 - Cf. AG Braunschweig: duty to report has “konkrete Steuerwirkung”
 - Sometimes continuation of shareholder activism by NGOs through litigation
 - claims against directors about corporate policies
 - Shell derivative action
 - **Injunctions based on the coalition between tort and human rights** (focus of this presentation)
 - Eg Shell Milieudefensie (climate case The Hague)

EXAMPLES

EXAMPLES: GERMAN CARMAKERS

- LG Stuttgart 13.9.2022:
 - Continued car production could limit personal life development of plaintiff if it leads to government measures that limit everybody's freedom; but unsure such government measures are coming
 - Constitutional separation of powers does not allow judge to ban combustion engines by 2030

EXAMPLES : GERMAN CARMAKERS

- LG München I 7.2.2023: no current infringement of “Persönlichkeitsrecht” of plaintiff
 - Government has leeway about how to tackle climate change
 - While it is certain that German government must reduce CO2 emissions before 2030, the law does not order it to do so by concentrating on the car sector
- LG Braunschweig 14.2.2023: § 1004 BGB, injunctions protecting private property central

LG BRAUNSCHWEIG 14.2.2023:

- BVerfG 24.3.21: was about to what extent citizens are protected against infringements of their “freedoms” because of state actions on climate change; did NOT create right to protection against climate change (court says)
- Fundamental rights only have indirect effect in horizontal relations => mainly applied through interpretation of “Generalklauseln” in civil law, like § 1004 BGB
- § 1004 BGB, injunctions protecting private property central
 - But there may be duty of plaintiff to “endure” (“Duldungspflicht”)
 - But when firm respects regulation, this is an indication that the property infringement is not very serious= > has to be tolerated

LG BRAUNSCHWEIG VOLKSWAGEN EMISSIONS

- Horizontal effect (“mittelbare Drittwirkung”) of fundamental rights cannot go further than direct vertical effect (“unmittelbare Abwehrfunktion”) and therefore cannot create duties for private persons that would not fall upon the state when legislating to perform its protective function (Schutzpflicht)
- The “Duldungspflicht” should be construed in this light
 - Fact that commercial activity is allowed by regulation does not mean it has to be “endured” or that no liability can attach; but
 - BVerfG did not find violation by state of its duty to protect, and recognized it has broad discretion about how to tackle climate change => even more so for private firms

EXAMPLES: GERMAN CARMAKERS

- LG Detmold, 24.2. 2023: plaintiff complains that VW is responsible for 1% of worldwide emissions and will in future (when he is old) cause health problems for him (heat stress) and droughts/extreme weather will damage his trees (woods) he grows as a biofarmer
- This is allegedly infringement of his property => § 1004 BGB applies
- Court:
 - In § 1004 it is the debtor who may decide how to repair the infringement caused
 - Measures asked for by plaintiff might not prevent damage to his property
 - Plaintiff has not shown he is otherwise affected than other older people and treegrowers
 - Even if plaintiff has a right to a climate that does not heat too much, then this right would not be a “sonstiges recht” in the sense of § 823 abs. 1 BGB because it cannot be relied upon against all third parties
 - BVerfG has not recognised the existence of a new fundamental right, let alone a “sonstiges Recht” concerning climate change

SHEL CLIMATE CASE DEN HAAG

- General interest claim by NGO, representing the interests of inhabitants of The Netherlands and the “Wadden” area
- Base claim on tort of negligence
- But do not pursue damages, but injunction
- Shell top holding ordered to reduce emissions of whole Shell group with 45% by 2030 compared with 2019

SHELL CLILMATE CASE DEN HAAG

- Court bases injunction on tort of negligence
- From these statutory provisions flows a duty of care
- The content of that duty is deduced from
 - Soft law provisions that are indicative of a societal consensus (says court)
 - Right to life and respect for private life (arts. 2 and 8 ECHR), which had been basis for Dutch supreme court to condemn climate change plans of Dutch state as insufficient

SHELL CLIMATE CASE DEN HAAG

- Court rules that it does not have to balance the duty of Shell against other interests
 - Since the duty of Shell corresponds to a *right* of plaintiffs
- Court says Shell has reduction duty of result for scope 1 and 2 emissions, but “only” best efforts duty for scope 3 emissions (=96% of Shell emissions)
- Court mentions that Shell leadership may choose between various routes through which emissions reduction can be reached

SHELL DERIVATIVE ACTION

- Brought by ClientEarth NGO against 12 Shell directors
- before High Court of London
 - First decision 12.5.2023, then confirmation in second decision after oral hearing
 - Court has to give permission for derivative action and refuses permission; condemns NGO to pay costs including fees of Shell lawyers

SHELL DERIVATIVE ACTION

- Directors are alleged to have breached their duty towards Shell, by
 - Adopting an inadequate climate change risk mitigation strategy
 - Taking insufficient action to have Shell comply with the Den Haag climate judgement
- Plaintiffs do not ask for damages, but
 - Declaration of breach of duty
 - Injunction to make better climate plan and comply with Dutch judgement

SHELL DERIVATIVE ACTION

- Suit rejected because judge thinks a director promoting the best interest of the company would not have pursued it
- Clearly judge dislikes fact that NGO is trying to determine the company's climate change strategy
 - While it only holds 27 Shell shares and is supported by less than 1% of shareholders
 - Whereas majority of shareholders have supported Shell's disclosed climate change strategy
- Developing such a strategy means Shell has to weigh competing interests, and court cannot do that; is commercial decision

THE LEGAL TRENDS

THE BIG COALITION

- civil procedure, tort law and human rights law evolve
- Leads to coalition between general interest litigation, preventive tort law claims that do not pursue damages but injunctive relief to enforce duties, the substance of which flows from human rights understood as subjective rights instead of policy goals
 - Cf. C. Van Dam: tort and human rights: “brothers in arms”
- => **Dutch** court takes over from legislator/regulator <-> **British** court respects business judgement; **German** courts respect discretion of state and firms and rule no new “climate change fundamental right” has been created

PURSUIT OF THE GENERAL INTEREST

- Civil procedure traditionally focused on individual, personal interests
- 1960s US, after 2000 Europe: class actions = procedure by lead plaintiff on behalf of class consisting of people with enough commonality= common interests
- From 1970s: representative litigation by non-profit organisations; now often “strategic litigation”

ENVIRONMENTAL/CLIMATE LITIGATION

- Everybody has an interest in *res nullius* “commons” like clean air and water (soil is usually private or state property, not commons these days)
 - But that does not mean everybody is a legal co-owner with rights to that air and water, on the contrary
- Aarhus Treaty from 2003 forces every signatory, including EU countries, to give everybody access to court proceedings, also against private persons, for violations of environmental law if interest of plaintiffs are touched
 - Belgian constitutional court: equality principle demands that the same access is given for (other) fundamental/human rights
 - => NGOs can sue to have court determine what is in the general interest, if this framed as alleged violation of human right
 - But cannot claim damages

- Netherlands: art. 3.305a Code of civil procedure: allows NGOs to start general interest litigation;
- statute says: protecting interests of large groups of people that are diffuse
 - Shell court says: allows pursuit of the general interest, including protection against climate change
 - In this case: in the interest not of all citizens of the world (too diverse, says court), but of all inhabitants of the Netherlands (have common, non-conflicting interests according to court...)

THE USE AND ABUSE OF TORT LAW

- From pursuit of damages for past damage to preventive injunctions
- Not to protect interests, but rights
- Content of those rights determined by human **rights** (to life, esp.) of which horizontal effect is assumed
- So instead of claiming damages based on fault/negligence, **plaintiffs enforce duty**
 - Duty based on **principle of precaution** and fleshed out by human rights; fault is not being cautious enough and thus violating human rights

HUMAN RIGHTS

- From fundamental “freedoms” –*Abwehrrechte* to...
- ... fundamental rights as positive policy goals to...
 - “2nd generation” social rights
- ... Human rights as subjective rights ?
 - Right to (private) life, arts 2 and 8 ECHR
 - Enforceable through tort law, in which a duty is read to behave with respect for other people’s human rights

- All this allows courts to make policy and regulation at level of the state and at level of companies
- Is incompatible with trias politica: courts become political: instead of applying law to specific cases, they set policy by making new regulation
- At corporate level incompatible with division of powers and with business judgement rule
- Changes nature of both tort law and human rights

THE PROBLEMS

THREE CASES USED TO ILLUSTRATE

- Shell Climate litigation in The Netherlands: reduction of emissions
- Client Earth v. Shell Directors, High Court of London, derivative action
- ClientEarth v. Volkswagen (Braunschweig) about production of combustion engines

SHELL CLIMATE CASE REASONING

- Starts from duty of everybody including Shell to behave in accordance with what is acceptable in society
 - Otherwise you are negligent in the tort sense of the word, and can be sanctioned under tort law
- What is acceptable in society and what society demands are determined by court based on 1. societal consensus 2. human right to life
 - Societal consensus deduced from international soft law
 - But it is soft law *because* there is *no* consensus!

THE DUTY OF CARE

- In French-inspired tort law there really is no such thing
 - Neither is there in German law
 - Of course people use the expression, “devoir de diligence, zorgvuldigheidsplicht, Sorgfaltspflicht”
- But Code civil, BW, BGB do not contain a duty to behave carefully
- Move towards prevention, duty to prevent damage and tort-based injunctions do assume there is such a duty

EXAMPLE: THE “RASER”

- Imagine a country with no speed limits on highway
- Idiot systematically drives his Ferrari at 200 on busy, dark, winter rush hour roads
- This is clearly negligence, which endangers other users of the road
- But at least in France or Belgium, judge could not issue tort-based injunction banning the idiot from rush hour traffic
- Because Code civil requires damage or imminent certain future damage
- And art. 1382 CC (cf § 823 BGB) contains no enforceable duty to behave carefully/without fault!
- ***Rights can be enforced through injunctions, a non-existent duty to behave carefully or prevent damage cannot be thus enforced***

A SECOND OBJECTION AGAINST SHELL CASE

- It confuses between Calabresian liability rules and property rules

CALABRESI/ MELAMED

- Liability rules: *interests* that are protected by rule that if you violate the interest, you have to pay damages; person may destroy entitlement if he pays the value
- Property rule: *rights* that nobody may violate without first buying it from entitlement holder in voluntary transaction= > “seller” has veto power and determines value(price)
 - Dworkin: rights are trumps; no cost-benefit analysis, no weighing of interests
 - That has already been done when legal system first recognised the right

- Shell climate court treats *interest* people have in a climate that is not too hot to be viable and that does not cause excessive health problems, as a *right* that everybody has (and can enforce through tort law) to a climate that does not heat up too much

CONFUSION IN SHELL CLIMATE JUDGEMENT

- Claim for injunction awarded because every inhabitant of the Netherlands is said to have a *right* (property rule) to an environment that does not warm up too much
 - => court enforces that right;
 - **Since it is a right, this entitlement does not need to be balanced against other interests, like that of Shell, its employees and shareholders to keep selling oil**
 - **Since it is a right, plaintiffs can avoid questions about damage and causation**

SHELL CLIMATE CASE

- Dutch court does not apply tort law, but imposes self-made **regulation** on company, based on *right* of plaintiffs
- This is not only violation of separation of powers (trias politica) -see next slide- but again a confusion of liability rule and property rule: only state can award rights (or grant possibility to create them, e.g. through contract), after balancing of interests at stake

TRIAS POLITICA AND DEMOCRACY

- Shell decision violates trias politica
- Not separation, but balance of powers
- Core political decisions are about balancing incommensurable interest and deciding, without meaningful guidance from ethics or efficiency analysis, who will win and who will lose (Mouffe, based on Schmitt)
- Precisely because such political decisions are “power decisions”, not substantively guided by objective or rational criteria, they are only legitimate if decision-making procedure allows all interested parties to have a voice in them= > democracy, in which politicians make regulation and award rights, not courts

BUT AREN'T HUMAN RIGHTS *RIGHTS* ?

- In systems that allow judicial review –and if you don't, you don't take your constitution seriously- constitutional courts – which should be considered political bodies, not ordinary courts- can test legislation against fundamental/human rights
- But even they can only find that state is not doing enough to combat climate change/ to meet its treaty duties
- **Even they cannot develop a climate policy themselves**
- That is what the court in The Hague nevertheless did

SHELL DERIVATIVE ACTION (LONDON)

- court recognizes that board should determine a corporation's (climate) policy /strategy
- Of course directors must obey the law and also judgements (like the The Hague judgement)
- But climate policy entails balancing of interests of stakeholders
- Minority shareholders, whose views have been rejected by majority shareholders, cannot impose their view on climate policy on the majority
 - Note again: plaintiffs were not pursuing damages, but injunction against the directors and declaration that they they were not doing enough

CONCLUSION

- a limited number of huge firms are responsible for large part of CO2 emissions
- NGOs increasingly target them
- NGOs try to use courts to take political decisions about climate regulation and corporate climate change policies
- So far largely unsuccessful (Germany, UK)
- Exception: The Hague ruling (under appeal), which is bad legal reasoning on so many fronts