

Ius Commune Conference 2021

Workshop: Liability and Insurance

Friday, 26 November (9.00 – 12.00)

Theme: Liability Law and Climate Change

A few recent court decisions and some pending litigation demonstrate that the fight against climate change has opened a new front in the field of private law, with private parties and associations seeking recourse against companies and governments within the framework of liability law.

Some of the most publicized and discussed cases come from the Netherlands and Belgium. On 26 May 2021, in the case of *Milieudefensie v Shell*, the District Court in The Hague ordered Royal Dutch Shell to reduce its CO₂ emissions by at least 45% at the end of 2030 as compared to 2019 levels. This was the first time worldwide that a court ordered a major oil company to reduce its CO₂ emissions. But it was not the first time Dutch courts made bold steps in the fight against climate change. Two years prior, in the highly publicized *Urgenda* case, the Supreme Court of the Netherlands upheld a claim brought by the *Urgenda* Foundation and a group of (around 900) citizens against the Dutch State by ordering the State to reduce its greenhouse gas emissions by at least 25 per cent below 1990 levels by the end of 2020. In Belgium, in the *Klimaatzaak* case, the Brussels court of first instance held that the Belgian government had breached its duty of care by failing to take more serious measures to prevent the harmful effects of climate change, but declined to issue any specific order due to concerns about separation of powers.

It is important to note, however, that similar developments are brewing in other European jurisdictions and in other parts of the world as well. In the same year that the first instance decision in the *Urgenda* was published (2015), a similar decision was reached by an appellate court in Pakistan – the case of *Leghari v. Federation of Pakistan*, and similar cases to *Milieudefensie v Shell* have recently been (and some are still being) litigated in France and Germany.

Employing private law mechanisms in the fight against climate change comes, however, with many challenges and legal conundrums. Is liability law, with its logic of corrective justice and its specific vocabulary of duty of care, breach, damage, causation, and so on, an appropriate avenue for regulating climate change? How does liability law integrate international commitments and human rights obligations into its specific legal arguments and legal reasoning? Is the general fault-based standard for liability employed so far by courts appropriate for climate change litigation? What are the legal frameworks and what are the legal obstacles that private parties face when engaging in climate change litigation? What are the right remedies for combatting climate change, and is a change of paradigm toward prevention and non-monetary relief needed (and perhaps also more appropriate)? And how effective are court orders in the fight against climate change anyway?

Part 1: New venues

Chair: Daniel On (Maastricht University)

09.00 – 09.20 **Laura Burgers** (University of Amsterdam) & **Tim Bleeker** (Free University Amsterdam)
Can I be sued for flying to my holiday destination? Judicial enforcement of private parties' climate obligations

Though applauded by environmentalists, the recent ruling of the Court of First Instance of The Hague in the climate case against oil giant Royal Dutch Shell also made some people raise their eyebrows. Especially within the national legal debate, various critics feared a slippery slope. This fear had arisen due to a number of other judgements, including those in the world-famous Urgenda case, in which the Dutch State was ordered to increase the ambition of its greenhouse gas (GHG) reduction target. Unlike Urgenda, the case against Royal Dutch Shell is directed at a private party. Everybody is to some extent implicit in global warming, can therefore everybody be held liable for emitting greenhouse gasses? Given this weariness of judicial enforcement of private parties' climate obligations, we ask: can the Dutch judiciary enforce climate obligations of private parties, including of medium and small enterprises and of individuals?

09.20 – 09.40 **Simon van Eekert** (KU Leuven)
Fear damage in climate change litigation

“Fear damage” is a concept that allows plaintiffs to claim recovery for harm caused by the fear that future harmful events may occur. This claim is a particularly useful tool in cases where the occurrence of future individual damage is still uncertain. In those cases, the fear itself is a certain type of damage, which can support the whole claim. The utility of such a tool in climate change cases cannot be disputed. However, it is unclear how courts should react to this type of claim. Legal scholarship and caselaw leave a troubled image of how to deal with fear damage. Simon van Eekert will further investigate the potential impact of that claim in climate change cases by asking the following question: How should the civil judge assess fear damage in climate change litigation?

09.40 – 10.00 **Mohamed E. Elagouz** (University of Twente)
Legal obligations for mitigation of climate damages caused by NSAs ex ante Paris Agreement

In order to invoke State responsibility for climate damages caused by NSAs there must be a primary climatic obligation on States to curb GHGs emissions of the carbon corporate majors. Mohamed Elagouz will analyse whether international law climate obligations ex ante Paris Agreement (PA), if there are any, address State (negative or positive) behaviour towards the climate harmful activities of NSAs. His inquiry is focused specifically on the extent to which the climate international legal regime ex ante PA could establish a legal underpinning of State responsibility for NSAs' climate damages.

10.00 – 10.20 **Discussion**

10.20 – 10.30 **Coffee break**

Part 2: Underpinnings of liability

Chair: Tim Bleeker (Free University Amsterdam)

10.30 – 10.50 **Laurien Nijenhuis** (University of Amsterdam)
The role of the judiciary in climate change actions

Laurien Nijenhuis will discuss in what way the legitimacy of the courts could be improved in climate change actions. The Urgenda case led to criticism on the role of the judiciary in relation to the legislator and that same argument made the Belgian court of first instance in the Klimaatzaak-case decide not to impose any specific order. Also the German constitutional court decided to stay away from imposing specific reduction percentages. And although the 'separation of powers' argument might be less relevant when it comes to corporate actors, even in these climate change actions the court's legitimacy remains being questioned. Since climate change litigation might be a useful asset in combating climate change, it's worth thinking about ways in which the courts legitimacy could be improved. Are there any pre-conditions that should be met? Providing the courts with reliable and sufficient information sources and setting up a defined time-frame in which governments or corporate actors should comply with the court's ruling might be suitable options.

10.50 – 11.10 **Cees van Dam** (Erasmus University Rotterdam/ Maastricht University)
Unpacking the District Court's decision in the climate case against Royal Dutch Shell

Cees van Dam will discuss the decision of the District Court in The Hague of 26 May 2021, in which it ordered Shell to reduce its greenhouse gas emissions by 45% before 2030 as compared to its 2019 emission levels. He will analyse the building blocks the court used to constitute the relevant standard of care under Dutch law. These include the Dutch Supreme Court's Urgenda case, the United Nations Guiding Principles, the IPCC reduction paths, and the Sustainable Development Goals. His comments will include a reflection on the need for public interest litigation, on the parent company's broad responsibility for its group emissions and the emissions in its upstream and downstream supply chains, and on Shell's counterarguments that were dismissed by the court.

11.10 – 11.30 **Francesca Leucci** (Erasmus University Rotterdam/University of Bologna/Hamburg University)
Is restoration the economically efficient remedy for environmental liability?

Francesca Leucci will argue that current remedies for environmental liability are unlikely to optimally deter potential polluters from committing accidents and to ensure full compensation of harm. This is due to various issues, such as the low probability of detection, the polluter's insolvency and information gaps. Interesting challenges arise therefore in the domain of climate change where the application of restoration orders and the calculation of interim losses is more complicated. Her argument will lead to the conclusion that clear guidelines on how to combine restoration orders with monetary sanctions for interim losses would be needed in view of enhancing the efficiency and justice of liability laws.

11.30 – 11.50 **Discussion**

11.50 – 12.00 **Concluding remarks**