Liability for Climate Change in Europe

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The matter of accountability for the creation and implementation of effective climate policies is considered with increasing urgency. Climate-change litigation as a tool for finding answers and remedies has been on the rise in Europe in recent years.

A major distinction must be drawn between cases that are pursued against *states or national governments* and the liability of *private entities*:

The *Urgenda case* saw an order being pursued in the Dutch courts against the State of the Netherlands requiring the government to reduce emissions by 2020 by at least 25% of 1990 levels. The claimant (a foundation who acted on behalf of Dutch citizens) argued that the government owed a duty of care to its citizens.

In 2018, the Dutch Court of Appeal ruled that the emission of greenhouse gases must be reduced by at least 25% by the end of 2020. It shared Urgenda's view that the State should take action to achieve lower emissions sooner than within the time frame currently envisaged by the State in order to protect the life and family life of citizens in the Netherlands (rising sea levels!).

The Court of Appeal based its ruling on the State's legal duty to ensure the protection of the life (Art 2 of the European Convention of Human Rights (ECHR)) and the right to the private family life of citizens (Art 8 ECHR). This and the State's duty of care imposed obligations on the State in the face of industrial activities which by their very nature are dangerous and pose a serious risk. A final ruling by the Supreme Court is expected for late 2019/early 2020.

Beyond the Urgenda case, two other administrative cases are illustrative less of how such actions can presently succeed, but how they may over time shape how the liability of states may be established. In Switzerland, the case brought (unsuccessfully) by the *Klimaseniorinnen* ("senior citizens") against the Swiss authorities was for

an alleged failure in their obligations to protect the environment and thus citizens' lives and health. In Austria, the construction of the third runway at Vienna's international airport initially failed an environmental impact assessment, with concerns about greenhouse gas emissions and climate protection overriding perceived public interest in better transport provision, until later overturned on appeal.

A case brought against a private entity in Europe illustrates some of the challenges presented to holding private commercial entities to account for adverse impact on the climate. A Peruvian farmer, *Saul Luciano Lliuya*, filed a lawsuit before a German court against a German electric utilities company, *RWE* for compensation for the precautionary measures he was obliged to take to protect his Peruvian home against flooding from a rising glacial lake. This was confined to 0.4% of the cost, based on the company's supposed contribution by its activities to the melting of the world's glaciers.

The court held that Lliuya could sue RWE in the German Court (RWE's domicile per the Brussels rules) and that Peruvian law governed the alleged liability (Rome II regulation: the law where the damage occurred in a non--contractual case).

In most countries, it is essential to prove harm, inflicted by misconduct between which there was a causal link. Did the emissions amount to *misconduct*? Not according to most if they were "innocently" caused when the missing element, being the foreseeability of damage, was not widely known. Denying foreseeability of damage is possibly harder after 1992 when the UN Framework Convention on Climate Change came into force, but then the next obstacle shows up. Can an entity be held accountable for wrongdoing in tort if *publicly authorized*?

Even if public authorization does not bar liability: satisfying the legal test for the *causal link* between harm and any misconduct is widely regarded as the "major stumbling block" for establishing liability. If it can be shown that harm suffered would not have occurred "but for" the defendant's misconduct the link is established, but in climate change cases this is rarely possible. Proportionate damages for minimal causation have been permitted in some cases and courts, where so-called market share liability can be apportioned, such as in drug manufacturing cases. Again, climate change cases pose additional challenges, where not all elements contributing to harm are man-made.

In conclusion, over recent times there has been *increasing judicial review* of climate change policy. The step from capping emissions to liability for failure to do so could be small. However, litigation is in its infancy and many questions still need an answer. The next years will most likely bring not only rising temperatures but also cases against governments and private entities. ●

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