

Lawyer Insights

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The EU should wrest back leadership on climate change from the courts

by Lucas Bergkamp

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A recent judgment by a Dutch court signals a trend towards the judiciary getting involved in setting climate policy. Lucas Bergkamp argues that this confuses the separation of powers, and that the EU should restore the balance.

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In June, the district court of The Hague found the state of The Netherlands liable under tort law for failing to adequately combat climate change. At the request of a sustainability organisation called “Urgenda,” a contraction of “urgent” and “agenda”, the court instructed the state to ensure that greenhouse gas emissions are reduced by at least 25% from 1990 levels by 2020, not the mere 17% for which it currently aims.

The court grounded the state’s obligation on the open concept of “social responsibility” with respect to “danger creation.” Based on the IPCC reports, climate change has been found to be an unacceptable, unlawful danger. Causation requirements, which normally preclude claims for indivisible, diffuse damage caused by multiple parties, have been set aside by the court.

In bringing the lawsuit against the state, Urgenda was inspired by a book entitled Revolution Through Litigation. It seems that this revolution is now beginning. Climate action groups in other countries, including Belgium and the US, have launched similar lawsuits against their governments to force them to beef up their climate policies. In the view of these organisations, the judiciary is just another instrument to achieve political objectives.

These law suits raise fundamental questions about the rule of law and the separation of powers in constitutional democracies. The judiciary does not have the authority to dictate general policies in areas such as climate change. Courts are not well positioned to determine the state of the science and assess the related complexities; they are bound to be misled by “scientific necessity,” as the Dutch judgment shows. In addition, courts hear only from the parties before them, not from third parties, and have no authority or ability to weigh the various interests involved. To set climate policies, courts have to make value judgments without a sound basis or process for doing so. In short, the Revolution through Litigation turns all into politics. Logic suggests, however, that when all is politics, nothing is law.

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Court-made climate policies raise serious issues for the European Union. For one, court judgments may influence the strategy of states at the forthcoming Paris conference of the parties to the UN Framework Convention on Climate Change (COP 21). States may be reluctant to agree to legally binding commitments so as to avoid possible court judgments holding them to their commitments. Those states that have been ordered by courts to revise their climate policies may be reluctant to do more than what their courts have ordered.

Further, these kinds of judgments challenge existing European law. In the Urgenda case, the Dutch policy was found to be insufficient to avert dangerous climate change, even though its policy is entirely consistent with the EU's Efforts Sharing Decision. So, by finding the Dutch policy insufficient and unlawful, the Dutch court implicitly found the EU Efforts Sharing Decision unlawful. National courts, however, do not have authority to rule on the lawfulness of EU legislation. Instead, they must seek a preliminary ruling from the European Court of Justice.

True, the European Court of Justice has created a doctrine of member state liability, also known as "Francovich liability." Under this doctrine, a member state can be held liable for damages caused by a failure to implement EU legislation, if that legislation confers a right on the claimant and there is a causal link between the state's breach and the loss suffered by the claimant. In the Dutch case, however, there was no breach of EU law, nor did the EU law concerned grant any individual right. On the contrary, the state of The Netherlands complied perfectly with the EU Efforts Sharing Decision. But even if there had been a breach, the EU climate change laws do not grant any individual rights.

Aimed at the prevention and restoration of environmental damage, the EU Environmental Liability Directive (ELD) does not apply to diffuse, widespread damage, where it is impossible to link the damage with individual actors. In these cases, as the ELD explicitly recognises, "liability is not a suitable instrument". Under the ELD, member states are not required to prevent or restore diffuse damage, or take any other measures with respect to it. There is no doubt that climate change causes widespread, diffuse damage, and, as a result, member states are not required to address it.

Thus, there is more than one reason for the EU to be worried about climate change litigation against member states. The supremacy of EU law is at stake. The rule of law and the separation of powers are threatened by court-made climate policies, which cannot be coordinated, nor adapted to changing circumstances.

The EU should act now to restore the balance of powers and avoid a patchwork of counterproductive, national judicial solutions to a global problem. Governments, not courts, should set climate policies.