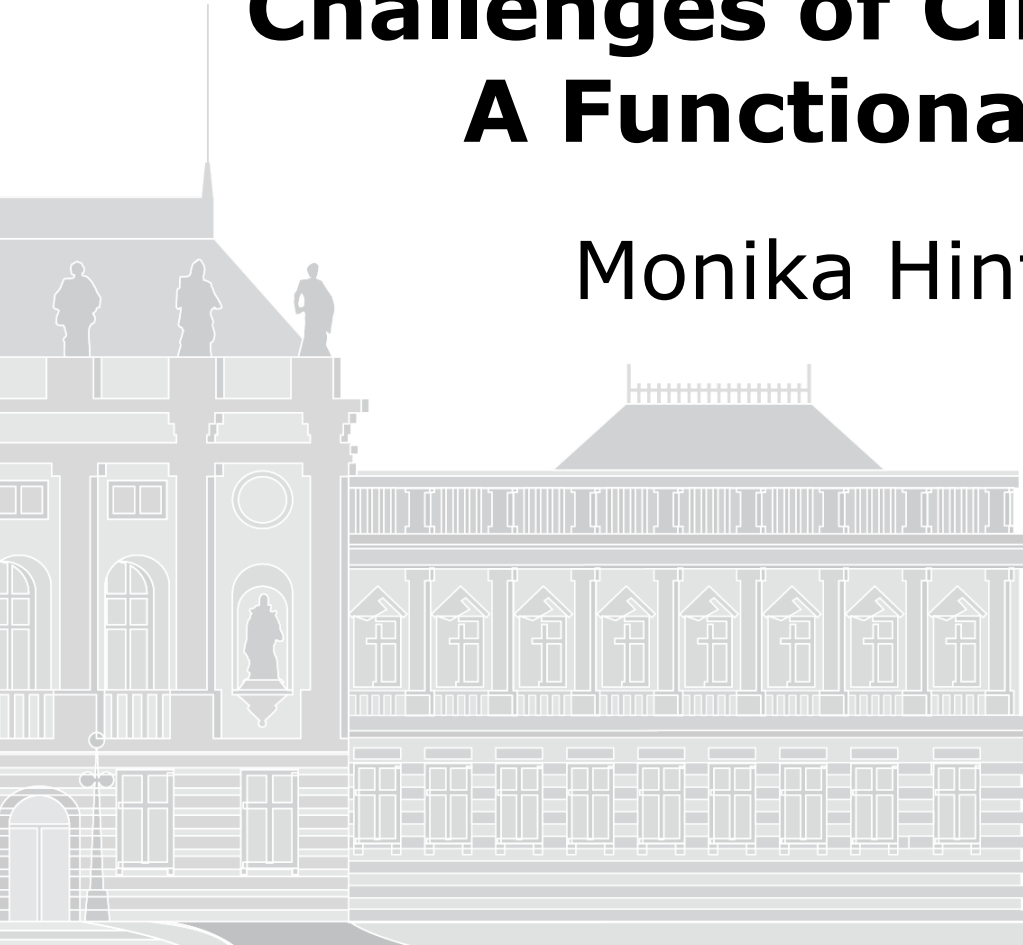


Civil Liability and the Challenges of Climate Change: A Functional Analysis

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'loss and damages'

1992 UN Framework Convention on Climate Change (UNFCCC)

- 2013 Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts in Developing Countries
- 2016 Paris Agreement
 - Article 8
 - Deliberation 51: 'Article 8 of the Agreement does not involve or provide a basis for any liability or compensation.'

Thesis 1

Civil liability claims already play an important role for climate change related damage.

- Service providers (builders, architects)
- Public authorities
- Seller of products
- Potential for EU litigation (including state liability)

Thesis 2

Tort law is not the most effective way to approach climate change damage, but it has some merits.

➤ Tort law instruments

- are available (need not be created in a tiresome political process).
- are flexible.

➤ Tort law

- provides compensation for victims (compensatory function) and induces emitters to lower their emissions of greenhouse gases (preventive function).
- is enforced by private parties (not by public authorities).
- can cover cross border damage.

Thesis 3

Climate change liability must be addressed to entrepreneurs and operators of industrial installations.

- Are the main emitters of greenhouse gases
- Efficiency arguments:
 - cheapest cost avoiders
 - can spread the loss (insurance, prices)
 - Use of market mechanism:
 - reduction of emissions
 - makes consumers bear their share

Thesis 4

The damage of today and tomorrow is caused by the emissions of the past. The preventive effect of tort law affects the damage of 'The day after tomorrow' (climate science: after 2050), but there is no time to lose.

Thesis 5

In civil law jurisdictions the most realistic cause of action against the emitter of greenhouse gases is fault-based liability.

- Existing concepts of no-fault liability cannot easily be applied to climate change damage.
- Laws of the neighbourhood (Austria, Germany, Greece, Catalonia, Italy) and the concept of *troubles de voisinage* (France) require an interference of polluting substances with neighbouring land.
- EU-Environmental Liability Directive: instrument of public law, no basis for civil law litigation (but an increasingly important tool to address natural resource damage).

Thesis 6

Fault (unlawfulness) of emitters of greenhouse gases is best assessed according to the Learned Hand-formula.

- Ex ante-assessment (foreseeability)
- Cost of precaution

Thesis 7

Compliance with public law rules does not protect from civil liability (no 'permit defense'), but breach of emission limits constitutes fault (unlawfulness).

Thesis 8

The but-for-test (conditio sine qua non) is a useful tool to allocate liability according to the principle of corrective justice and the principle of efficiency. In cases where the but for test cannot achieve a just and efficient result legal doctrine must employ alternative concepts.

Difficult constellations of causation:

- Concurrent causes
 - Cumulative causes
 - Alternative causes
 - Intervening causes
 - Minimal contributions by many tortfeasors
 - Synergetic effects
- } often solidary liability



In climate change cases all thinkable causality scenarios culminate !

Answers:

- That climate change is caused by anthropogenic emissions of greenhouse gases is nowadays 'beyond reasonable doubt'.
- Each damage scenario needs individual solutions:
 - Concept of minimal causation
 - Concept of proportional liability (models: e.g. market share liability, *perte d'une chance*)
 - Broad legal standing for entities who must bear the loss (personal injury: social insurance, property damage: insurance) or provide protective measures (municipalities, regions, states).

Thesis 9

Climate change litigation should concentrate on property damage, personal injury and pure economic loss.

The protection of natural resources (flora and fauna) is better achieved by administrative law.

Problems:

- Legal standing
- Definition of harm (gradual and comprehensive changes)
- Assessment of damage
- Effective restitution of impaired natural resources

Thesis 10

Climate change damage is mass damage. Climate change litigation needs effective instruments of collective redress.