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

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.