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Strategic climate litigation and polarisation: Fanning or smothering the flames of societal conflicts?

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What, if any, should the role of courts be in reconciling the pressing need for climate action in an atmosphere of deep-running social tension?

Energy transition

Excruciatingly slowly, politicians and society are realising the pressing need for, and magnitude of, the socio-economic transition required to avoid the worst consequences of the climate emergency. Like any transition of this magnitude, quitting carbon has a huge impact on entrenched interests and habits, and has

tangible redistributive effects. Not surprisingly, views differ on what is needed, when, and how to go about this transition. Positions are hardening, and those disappointed by the political process are turning to the judiciary. Do courts have a role in reconciling the pressing need for climate action in an atmosphere of deep-running social tension? This is the core question of my contribution to the conference ‘Courts as an Arena for Societal Change’ in Leiden on 8 and 9 July 2022.

More polarisation to come

As changes in the climate become more severe, hazardous weather conditions are becoming an increasingly frequent occurrence. Those who are less wealthy risk missing out on life choices, such as private car ownership. One result of the direct impact and far-reaching socio-economic changes to our carbon-dependent societies is an increasing polarisation in society in relation to climate issues. While anthropogenic climate change is largely accepted in Europe, agreeing that temperatures are rising due to human activity does not mean that we agree on how disruptive the consequences are or what changes in society are necessary. More climate polarisation can be expected as the climate emergency worsens and mitigation measures take effect. This adds to other ongoing polarisation trends in Europe (*e.g.* Covid-19, migration) which are threatening democracy at a time when it is **already under pressure**.

Courts increasingly involved

Climate litigation in the national, European and international context is inevitably mushrooming in a climate of political discontent. Courts can only take action when cases are brought to them. In the cases that come before them, however, courts must deliver justice^[1] - even if such action may include declining jurisdiction. In practice, courts are increasingly assuming a more active role in strategic climate litigation. They accept jurisdiction, establish a breach of law, or even require relief action.^[2]

Separation of powers in a polarised society

This trend puts the separation of powers and the judiciary’s potential capacity for mitigating polarisation to an exceptional test. Some argue that **the idea of separation of powers** gives the independent judiciary the potential to institutionalise antagonistic voices and authoritatively settle disagreement. They identify an inherent capacity of institutional interaction under separated powers to turn paralysing antagonism into productive antagonism.

One core value of litigation is that it *rationalises* the exchange between the different camps. Litigation imposes a strict procedural framework that is meant to establish (authoritative) *legal*, rather than scientific ‘truth’, a common language, rights, and

obligations. Litigation is intended to settle conflict in society in a way that is accepted by both sides, among other things because it follows a pre-agreed procedure that is meant to guarantee impartiality.

Depending on the legal and political context, as well as the tools and arguments, mushrooming climate litigation may, at least potentially, either fan or smother the flames of societal conflict and polarisation. Trust in public institutions, inter-institutional respect, and convincing reasoning appear to be three key factors in the ability of courts to carry out their mandate of resolving social conflicts. They are the basis for the parties and society to accept the authority of judicial decisions.

Bringing science into the debate

Litigants and courts in strategic climate litigation rely heavily on scientific climate information that is collected and presented by the **Intergovernmental Panel on Climate Change (IPCC)**. The IPCC is the United Nations body for assessing (rather than producing itself) the science related to climate change. The inclusive and transparent process of establishing what best science is in the IPCC procedurally guarantees impartiality at a level that goes far beyond other science used in court, *such as* expert testimony.

Strategic climate litigation offers a forum for an institutionalised exchange, in which independent courts need to be convinced, not only of what the law is and what legal obligations may flow from it within the particular case, but importantly of the climate science that should underpin any political and judicial decision-making on climate issues. The rules of procedure and evidence in litigation are pre-agreed because of their promise of impartiality, transparency, and reason. By bringing science in a rational, non interest-driven fashion back into the public debate, by exposing scientific myths (e.g. vague future plans to rely on large-scale carbon capture that does not yet exist), and by attracting the attention of a larger share of the population, strategic climate litigation can contribute to a continuous societal exchange of what is really necessary in the face of the climate emergency.

*More than 120 scholars from all over the world will share their findings and views on 8 and 9 July 2022 at Leiden Law School during the conference **Courts as an Arena for Societal Change**. Several blogs will be published on the Leiden Law Blog on the themes of the conference.*

[1] E.g. Art. 13 Wet AB neergelegde verbod van rechtsweigerig (prohibition to deny justice). This is also how ‘duty’ is read in the famous citation: ‘It is emphatically the province and duty of the judicial department to say what the law

is' from US Supreme Court, Marbury v Madison, 5 U.S. (1 Cranch) 137 (1803).

[2] J Nedevska, C Eckes, J Setzer, 'Climate litigation and separation of powers' in M Wewerinke-Singh and S Mead (eds.), Judicial Handbook on Climate Litigation, lawyers and legal scholars (project of IUCN's World Commission on Environmental Law (WCEL) Climate Change Law Specialist Group (CCLSG)).

ENERGY TRANSITION

COURTS AS AN ARENA FOR SOCIETAL CHANGE

UNITED NATIONS

CLIMATE CHANGE

CONFLICTOPLOSSENDE INSTITUTIES