Climate change litigation in European private law

Or: Environmental constitutionalism and European civil courts

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Structure of this presentation

1. Background: research project

2. Theory: role of the judiciary and Habermas’ co-originality thesis

3. Climate cases in European private law as a contribution to the public sphere; parallel with civil disobedience

4. Constitutionalisation of the environment

5. Concluding remarks
I. Introduction

II. Boundaries of democratically legitimate judicial law-making in European private law

III. National boundaries. People abroad

IV. Temporal boundaries. Future Generations

V. Conclusions

VI. Epilogue: Boundaries of Imagination. Non-human entities
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Article ‘Should Judges Make Climate Change Law?’ published open access in *Transnational Environmental Law*
Climate change: law versus politics

• Global climate change litigation: over 1000 cases (nine in European private law)

• “We believe that climate change is a complex societal challenge that should not be addressed by courts”
  🍄 Shell, 4 April 2018

• Academic critique to 2015 Urgenda decision by Hague District Court: Court overstepped its role in separation of powers
Role of the Judiciary

- Habermas

- Democracy principle
  → means boundaries to the role of the judge

- The ‘system of rights’

- Co-originality thesis
Climate change litigation

1. Aimed at (judicial) law-making

2. Contribution to the ‘public sphere’
Civil disobedience

• Mass grave action
Timeline contributions to public sphere

1. ‘Regular’ contribution (op-ed, protest march, etc)
   → Law must change in the future

2. Civil disobedience
   → Law must change right now

3. Climate change litigation
   → Law has already changed
Constitutionalisation of the environment

• A ‘rights turn’ in climate change litigation (Peel & Osofsky 2018)

• (Global) environmental constitutionalism
Constitutionalisation of the Environment

- 2015: *Urgenda* case on first instance, the Netherlands
  → Articles 2 and 8 ECHR *relevant*

- 2017: *Magnolia* case, Sweden
  → no damage, but climate change within scope articles 2 and 8 ECHR

- 2017: *Arctic oil* case, Norway
  → case lost, yet constitutional provision justiciable on climate change

- 2018: *Urgenda* case on appeal, the Netherlands (confirmed 2019 by SC)
  → directly relies on Articles 2 and 8 ECHR

- 2019: *People’s Climate Case* against the EU
  → appeals to human rights as an *independent* basis for the claim
Concluding remarks

Climate change litigation indicates a growing consensus that a sound environment forms a constitutional norm, and is therefore a prerequisite for democracy, to be protected by judges.

Questions? Remarks? Criticism?

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