

SPEECH

When you need change to preserve continuity: climate emergency and the role of law

Speech by Frank Elderson, Member of the Executive Board of the ECB and Vice-Chair of the Supervisory Board of the ECB, ECB Legal Conference 2021

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Introduction

It is with great pleasure that I would like to welcome you all to this year's ECB legal conference. Our annual legal conferences have always focused on the most pertinent topics in the field, bringing together the most distinguished legal experts and academics. Today's event is no different.

Being a trained lawyer myself, I am well aware of the topicality of the issues that will be discussed here today and tomorrow from a legal point of view. However, their relevance goes far beyond law: these topics clearly have a wider impact on society.

Later, I will introduce the speakers of today's first panel, which will focus on the future of legal pluralism and the dialogue between courts. First, though, I would like to use this opportunity to share my thoughts on a topic close to my heart, where the role of courts has proven crucial and where the dialogue and cooperation among courts is intensifying. This conference deals with continuity and change, so I have decided to focus on the change that is going to be the single defining issue for humankind in this generation: climate change. In particular I am going to talk about a specific aspect of the relationship between climate change and the legal system: climate change litigation. I would like to share some of my thoughts on how climate-related human rights – which I will refer to as climate rights – may be seen as branches stemming from the tree of fundamental rights, and how the community of lawyers has specific responsibilities to uphold these rights. Against this background I would then like to consider the role of courts and highlight their importance in the European context in general and for the ECB in particular.

From fundamental rights to climate rights and the role of lawyers

The law has always mirrored developments in society. And vice versa, the law has a profound impact on society, in that it governs many of our daily actions and interactions.

A very important historical example is the emergence of human rights after the Second World War, most notably the adoption of the Universal Declaration of Human Rights and, in Europe, the European Convention on Human Rights, both of which are seen as direct responses to the atrocities committed during the war. The European Convention's impact and importance today is thanks in particular to the work of courts – first and foremost the European Court of Human Rights. Alongside other courts, it played a crucial role in developing human rights and fundamental principles such as proportionality, which is another topic you will delve into this afternoon. Human rights and fundamental principles are two concepts that are closely intertwined and it was no coincidence that they gained ground simultaneously after the war. And proportionality and its implications have become so topical that we decided to dedicate a separate panel to the subject this morning.

Coming back to climate change, I would like to echo the words of Mary Robinson, the former United Nations High Commissioner for Human Rights, who defined climate change as the “greatest human rights issue of our time”^[1].

I would like to use this opportunity to remind all of you, and the community of lawyers at large, of the central role that lawyers can play in the climate change field. Remember that how the law is interpreted and applied is as important as how it is written, and this is relevant each step of the way – from academic writing to judicial proceedings. Lawyers, as a community, share a huge responsibility towards future generations and the world as a whole.

The role of courts

Court proceedings are inevitably going to gain prominence in the climate change field. Individuals and non-governmental organisations have been bringing cases against polluting companies, and increasingly against governments, for quite some time already. Climate-related litigation, which has been defined by the United Nations Environment Programme as “cases that raise material issues of law or fact relating to climate change mitigation, adaptation, or the science of climate change”^[2], is not a new phenomenon.

This year, however, we have seen an increase in the number of impactful judgments in climate-related cases in many different jurisdictions. Maybe in 50 years we will look back at those rulings in the same way we today look at the first seminal judgements on human rights after the war.

The cases I want to briefly mention to you today were categorised and described by the Network for Greening the Financial System in a recently published technical document.^[3] These cases are important because they show that the attitude of courts is changing, and there is more willingness on their part to follow the plaintiffs’ arguments and to hold governments and companies accountable for not taking sufficient action to combat climate change. The cases are informed by highly accurate scientific evidence on the seriousness of climate-related developments that has been published in recent years, and show an increasing willingness of courts to recognise an individual right to the environment for future generations.

In the Urgenda case, the Dutch Supreme Court, citing among other things the European Convention on Human Rights, ordered the Dutch Government to reduce greenhouse gas emissions by at least 25% by the end of 2020 compared with 1990 levels. The case has received widespread attention because of the way it established a link between human rights and what was considered insufficient action to combat climate change.

Similar arguments were brought forward in the Irish Climate Case. In this one, the Irish Supreme Court examined whether the Irish National Mitigation Plan complied with the Irish Climate Act. The Supreme Court found that it did not, as the plan had failed to specify in enough detail how Ireland could transition to a low-carbon, climate-resilient and environmentally sustainable economy by the end of 2050.

Another prominent case earlier this year involved the German Constitutional Court. It decided that the provisions of the German Federal Climate Change Act governing national climate targets and the annual emission amounts allowed until 2030 were incompatible with fundamental rights. In particular, the court found that the targets did not sufficiently specify emission reductions from 2031 onwards and were thus disproportionately violating the freedoms of younger generations as protected by the German constitution.

But it is not only cases against governments. Plaintiffs are also increasingly suing corporations. One of the most prominent recent examples was a case against the oil company Shell, in which a Dutch court in the first instance found that Shell had violated its duty of care and had to cut its greenhouse gas emissions in the entire supply chain, throughout its worldwide operations, by 45% by 2030. Another case that has received considerable attention is currently pending before German courts: a Peruvian farmer is suing the utilities company RWE, alleging that their emissions are partially responsible for the dangerously high water levels in his area.

As for central banks, it is worth mentioning that the first climate case against a central bank is currently pending before courts in Belgium, and the hearing took place last week. We will know in about a month whether this case will be referred to the European Court of Justice.

These cases show that courts are giving more weight and relevance to the protection of the right to a clean environment, and they are finding legal bases for such climate-related claims.

First of all, courts are increasingly relying on the human rights law that has been developed over the last 70 years. For instance, in the Urgenda case, the court found a violation of both Article 2 of the European Convention, which protects the right to life, and Article 8, which protects the right to respect for private life. From these core provisions, the Dutch Supreme Court derived an obligation of the State towards the residents of the Netherlands to take adequate measures to reduce greenhouse gas emissions.

Second, courts are also ready to use well-developed concepts of civil and tort law, such as the duty of care, in innovative ways. For example, the first instance decision against Shell largely relied on Shell's duty of care under Dutch law.

Third, the protection of the environment as a global right that transcends borders leads to the assertion of claims with an extraterritorial nature. This is exemplified by the two cases against the companies I mentioned earlier. In the case of Shell, the court of first instance held that Shell is also responsible for emissions from its subsidiaries and supply chain partners around the world. And in the case of RWE, the plaintiff is trying to hold the company responsible for the impact of its actions on an area that is thousands of kilometres away, on another continent. As I said, there is no verdict in the RWE case yet, but the fact that such arguments are increasingly being made is proof of the understanding that climate change, just like human rights, has no territorial limits.^[4] This means that courts will also have to cooperate internationally, as their decisions will have a cross-border reach.

These cases are also testament to the importance of cooperation and dialogue. For instance, the German Constitutional Court made explicit reference to the arguments developed in the Urgenda case and the case before the Irish Supreme Court. This is a good example of how cooperation helps each judge further refine the arguments and apply climate rights to different jurisdictions, applicable laws and factual settings.

The interaction with EU law

Climate litigation is a worldwide phenomenon. A Columbia Law School database keeping track of relevant cases across the globe currently contains close to 500 entries of lawsuits against governments, corporations and individuals outside the United States. As you may have noticed, all of the cases I have mentioned were decided by courts in the EU. The openness of courts in the EU to this new stream of cases raises two questions. First, how could different emerging judicial practices be reconciled at EU level in the future? And second, what is the likelihood of similar cases being more directly based on EU law?

Earlier this year, when individuals were arguing that the EU's existing targets to reduce domestic greenhouse gas emissions were insufficient, the Court of Justice of the European Union (CJEU) dismissed the action for annulment due to a lack of standing.^[5] However, it is very likely that plaintiffs will continue to rely on comparable arguments before national constitutional courts, which may then bring such questions to the attention of the CJEU through a request for a preliminary ruling. This may bring questions into EU law that would otherwise not have been admissible as happened in the OMT case^[6].

Plaintiffs may even challenge the EU institutions directly and argue that the EU itself is not doing enough to address climate change, for example because its greenhouse gas reduction targets are not ambitious enough or because the institutions are not taking sufficiently effective action to comply with them. This is not surprising, as one of the key objectives of the EU is to improve the quality of the environment. After all, the European project was born out of the post-war wish for peace, and without peace you cannot enjoy human rights or preserve the environment.

Protecting the environment and tackling climate change are global challenges. Courts in the EU need to be aware that, while they are independent, they have a collective role and responsibility. I would even go so far as to say that they could be seen as having a mandate to preserve fundamental rights

– including climate rights. Cooperation among courts is key to marrying their individual independence with their collective responsibilities.

In the European context it is equally necessary to preserve the institutional framework which enables such cooperation. The EU's arrangements for a multi-layered judicial system are a precondition for courts to deliver on this collective responsibility and mandate, and both the European Court of Justice's exclusive power to interpret the Treaty, and the supremacy of EU law over national law, are crucial elements.

Beyond the courts

But while the EU and its courts can make significant contributions to the fight against climate change and to supporting climate rights, they have their limits.

As I have said many times before, the climate emergency is a global issue that requires urgent responses and a global approach. Fortunately, we are seeing civil society play a very active role by raising awareness of this issue around the globe. As a result, many governments are adopting more ambitious climate laws that aim to curb emissions. And while governments and parliaments have the primary responsibility to act on climate change, central banks and supervisors have also increasingly shown their commitment to contribute within their mandate to addressing the ongoing climate crisis.^[7] As you may know, two weeks ago the ECB pledged to contribute, within all our fields of competence and responsibility, to decisive action by policymakers to implement the Paris Agreement and mitigate the consequences of climate change.^[8] As examples of concrete measures we will take, we presented a climate change action plan for our monetary policy and have set expectations for the management of climate-related and environmental risks in our banking supervision.

Climate change has profound implications for price stability, financial stability and the soundness of banks. It therefore falls squarely within our mandate to take the implications of climate change into account in all our tasks and responsibilities, in line with the EU's climate goals and objectives.

Conclusion

Just as the financial risk implications of climate change place it squarely within the mandates of central banks and supervisors, the fact that climate rights branch off from the tree of fundamental rights places them squarely within the mandates of the courts. I am confident that courts around the world will take inspiration from each other to ensure that climate rights – and I would say environmental rights, too – are being served by our legal system in the same way as any other human right. In this context, I trust that everyone will continue working together – and within their mandate – to develop solid legal foundations to address the challenges of climate change.

Let me end by quoting the Greek philosopher Heraclitus, who said that “big results require big ambitions”. So all of us here, in both our professional and our private lives, must take action to preserve our planet for future generations.

Thank you very much for your attention.

1. Robinson, M. (2013), “[Video Message to the Panel of Experts on Climate Leadership, on the eve of the Pacific Islands Forum](#)”, 2 September.

2. United Nations Environment Programme (2021), “[Global Climate Litigation Report: 2020 Status Review](#)”, 26 January.

3. Network for Greening the Financial System (2021), “[Climate-related litigation: Raising awareness about a growing source of risk](#)”, November.

4. However, the German Constitutional Court held that there is no need to decide at this point whether duties of protection arising from fundamental rights also place Germany under an obligation vis-à-vis

the complainants living in Bangladesh and Nepal to take action against impairments – both potential and actual – caused by global climate change.

5. [Armando Carvalho and Others v European Parliament and Council of the European Union](#), C-565/19 P, ECLI:EU:C:2021:252.

6. [Peter Gauweiler and Others v Deutscher Bundestag](#), C-62/14, ECLI:EU:C:2015:400.

7. Since its foundation in 2017, the Network of Central Banks and Supervisors for Greening the Financial System (NGFS) has grown from eight to over 100 members, encompassing central banks and supervisors from five continents, covering 88% of the global economy and 85% of all global emissions. The work of the NGFS covers all tasks and responsibilities of central banks and supervisors.

8. See the [ECB pledge on climate change action](#).

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