Suing climate culprits. On the role of courts in climate change law.

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Introduction

- Climate litigation is a form of ‘strategic and public interest litigation’ – SPIL.
- Every litigation has a strategy. Not every litigation though is strategic.
- Strategic and public interest litigation describes the phenomenon of lawsuits brought by civil society actors (activists and NGOs) in order to promote legal, political or social change
- In particular to get around standing issues, the claim is often formulated as one advancing the case of one individual, or a group of individuals

Introduction

- SPIL in the intensity we see it now, is a recent phenomenon. This is due to a variety of factors.
  - Statute is too slow, without teeth, and, at both the national and the international level (Treaties), often deliberately opaque
    - This is often the result of successful corporate lobbying: Merchants of Doubt
  - Information technology allows the lawyers involved to keep abreast of lessons learnt elsewhere and yes, legal Twitter acts as an amplifier
  - Chicken and egg issue of availability of funding, incl third party commercial funding, and law firms developing SPIL as a business model: see further

Introduction

- USA under the Alien Torts Statute became the first focal point of SPIL. This has now shifted to other jurisdictions (E&W, Netherlands, France) for business & human rights litigation; and for climate, it has turned into a global phenomenon
  - For B&HRs it calls into Q the global economic model of outsourcing, global supply chains, local standards applying to local issues >>neo-colonialism?
  - For climate it has many governments fuming with anxiety: will international climate shenanigans end them up in trouble even after so many decades of successful inaction?

Main lines of enquiry

- **Who is my claimant**
  - In environmental cases, the perennial challenge of ‘trees do not have standing’.
    - Linked to William Forster Lloyd 1833, unregulated grazing on common land, and Garett Hardin 1968 ‘tragedy of the commons’. Their (ultimately unsophisticated) insights into property rights and conservation has a procedural equivalent in restrictive notions of ‘standing’
    - BUT see interesting developments in eg NZ, India, re nature,

Main lines of enquiry

- **Where do I sue**
  - A myriad of reasons in international litigation as to why you might one to sue in one jurisdiction and not in the other

- **Who do I sue**
  - First up: am I suing ‘horizontally’ or ‘vertically’: between individuals, or vis-à-vis a government authority

Main lines of enquiry

- **Who do I sue ctd**
  - If am suing a Government, I am likely to find myself in the realm of national public law, however
    - Even against a Government, my claim may be entirely ‘civil and commercial’; such claims are unlikely however to have a SPIL character
    - If I am suing a foreign Government, I need to take account of sovereign immunities and –doctrine
    - Can I use public international law if I am suing a Government?
      - The availability of international fora such as the ECtHR or the IACtHR
      - Monism, dualism
      - Shifting nature of MNCs in public international law
      - The odd position of international investment law

Main lines of enquiry

- **What is my claim based on**
  - State v State claims: see current Vanuatu request of ICJ Opinion
  - Pure implementation of international environmental law: unlikely: see issues of monism /dualism, and see inclarity in the bulk of international climate law
  - Duty of care of either private corporations or of governments, informed by international env law such as the Paris Agreement: see eg Urgenda (Netherlands), Klimaatzaak (Belgium)
  - Investor suits: based on ia fiduciary duties (eg E&W: Client Earth v Shell) or simple investment dilution suits
  - Judicial review forcing Governments no longer to permit fossil fuels extraction, or to take all GHG emissions into account in doing so.

Trias politica

- ‘In every Government there are tree sorts of power’: Charles de Secondat baron de La Brède et de Montesquieu >>Montesquieu: De l’Esprit des lois 1758.
- This has had an impact on what is generally seen as a core issue in judicial review cases: the possibility or not of ‘merits review’
- Merits review implies that a person or a body, other than the original decision-maker, reviews not just the facts and the law surrounding the original decision, but also the policy aspects of same and therefore revisits what is not just the correct, but also the ‘preferable’ decision
- Personally I don’t think we needed Montesquieu’s esprit des lois to realise that merits review by constitutionally independent judges is not a good idea.

- See eg also Shell UK v NN [2022] EWHC 1215 (QB) [57]
  - ‘It is not for the court, on this application, to adjudicate on the important underlying political and policy issues raised by these protests. It is for Parliament to determine whether legal restrictions should be imposed on the trade in fossil fuels.’
- And in the climate field, see Clarke CJ in FOE v Irish Government [2019] ISC 205:
  - held the sufficiency or not of the Irish Government’s statutory plan to tackle climate change, IS justiciable: [6.27] whether the Plan does what it says on the statutory tin is a matter of law and clearly justiciable.
  - However on the argument on basis of ECHR rights, FOE were found not to have standing: [8.16] there are also matters which may involve policy, but where that policy has been incorporated into law or may arguably impinge rights guaranteed under the Constitution, where the courts do have a role;
  - [8.17] the ill-defined right to a healthy environment sought to be relied on is either superfluous or lacking in precision and I would not suggest that a right as so described can be derived from the Constitution.

Trias politica

- Contrast with Urgenda ECLI:NL:HR:2019:2007:
  - [8.2.4] the courts cannot order the legislator to create legislation with a particular content.
  - [8.3.2] in the NL constitutional system of decision-making on the reduction of greenhouse gas emissions is a power of the government and parliament. They have a large degree of discretion to make the political considerations that are necessary in this regard. It is up to the courts to decide whether, in availing themselves of this discretion, the government and parliament have remained within the limits of the law by which they are bound.
  - [8.3.3] The limits referred to in 8.3.2 above include those for the State arising from the ECHR
  - [8.3.4] State policy since 2011 and [future planned policy] whereby measures are postponed for a prolonged period of time, is clearly not in accordance with this, as the Court of Appeal has established.


IN RURITANIA, JUSTICE IS OPEN TO ALL
COST ORDERS
— LIKE THE SUEZ CANAL.

Civil procedure rules and true access to courts: TPF, other cost mechanisms

- Reality: 'Justice is what you can afford to be done' (GAVC). ***'In England, justice is open to all—like the Ritz Hotel'*** - Sir James Matthews' (1830-1908)
- ***Fiat Justitia, ruat caelum***. Let justice be done though the heavens fall: Roman law, Lord Mansfield, 1772 King's Bench case of Somerset v Stewart [1772] 98 ER 499.
- Proponents of TPPLF (third party for profit litigation funding) argue that it assists access to justice. TPPLF in this view funds parties that struggle with financing the ever-increasing cost of litigation
- Various examples of ground-breaking cases in environmental, health and safety, human rights etc cases against powerful corporations where claimants gained access to courts via TPPLF
- There are also downsides to unregulated TPPLF, and some States simply prohibit it (eg Ireland)

- Barriers to access to justice in SPIL cases lie in
  - Difficulties and costs in securing legal representation
  - Resources and time required to prove what falls under claimant's burden or proof, and related access to information issues
  - Time limits in bringing claims
  - Immunities
  - Non-justiciability doctrines
  - Jurisdictional challenges in particular forum non conveniens
  - Applicable law issues
  - Complexity of corporate structures, SPVs
  - Remedies: nature (eg reconciliation?), reach, enforcement
  - The many areas of legal practice involved: CPR, public int law, private int law, corporate law, investment law, insolvency, contract and tort.

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