

Risk Communication

This section discusses issues related to risk communication across a range of publicly perceived high risk industries (such as pharmaceuticals, nuclear, oil, etc.). It reports critically and provides analysis on risk communication as an outcome of risk research within these industries. Contributions are intended to include methods working towards the advancement of risk perception research and describe any lessons learned for successfully communicating to the public about risk.

Towards a Regime of Emission Litigation based on Science

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Courts in Europe increasingly acknowledge an individual right to emission reduction against states. Such a right forms a new policy tool that can be used to enforce emission reduction. It can also be used to enforce scientifically sound environmental policy, as Courts recognise science as a default position when determining the content of the right. The individual right to emission reduction is another tool in the making to consider when implementing scientific insights into policy making.

Reducing emissions is a global concern, framed as international standards in several international and supranational regimes. These standards often form the minimum requirements determined by science. Yet, in practice states are prone to enforce these requirements as they are pressured by local demands.¹

One way to overcome such an enforcement gap is to litigate states in front of courts to enforce good regulation (so-called regulation-through-litigation-approach²). This approach has often failed in the past mainly because Courts denied the existence of individual rights against the state to take action for emission reduction. A recent trend shows that European

Courts increasingly admit such claims. They thereby acknowledge an individual right to emission reduction enforceable in courts. This opens up new avenues to implement international environmental obligations and scientific insights into law and using the law to enforce effective emission reduction. I assesses this new development and identify coherency flaws in the legal reasoning about the implementation of scientific insights, which directly impact the effectiveness of emission litigation. To overcome the effectiveness problem I argue for a unified approach to determine the new right to emission reduction based on scientific insights. Depending on the context of the legal system, this approach can serve as a benchmark for other rulings to come.³

I. The Judgments

Two major Courts have made use of litigation to tie states to emission reduction, thereby acknowledging the individual right to emission reduction. Path-breaking was the Janecek decision of the European Court of Justice in 2008.⁴ The Court ruled that where there is a risk that the limit values or alert thresholds stipulated in a Directive on air quality⁵ may be exceeded, individual persons have to be equipped to require the competent national authorities to draw up

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1 A. Chayes and AH Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge MA, 1995), 8-10.

2 Kip Viscusi, Overview, in: Kip Viscusi (ed.) *Regulation Through Litigation* (Washington: Brookings Institutions Press, 2002) pp. 1-21.

3 Q Schiermeier, Europe braces for more climate litigation, 532 *Nature*, 18-19 (02. July 2015).

4 Case C-237/07, Dieter Janecek v Freistaat Bayern, ECLI:EU:C:2008:447.

5 Council Directive 96/62/EC of 27 September 1996 on ambient air quality assessment and management (OJ 1996 L 296, p. 55), as amended by Regulation (EC) No 1882/2003 of the European Parliament and of the Council of 29 September 2003 (OJ 2003 L 284, p. 1; 'Directive 96/62').

an action plan, “if necessary by bringing an action before the competent courts”.⁶ By acknowledging such a right, a state’s failure to comply would ultimately result in litigation charges at the EU level. This right was derived directly from the wording of the Directive and the fact that it was intended to protect public health. There was no doubt about the threshold levels set in the Directive, which were based on scientific insights. The Janecek judgment therefore only granted a right to draft a working plan, not a specific measure or application of a threshold level. The second case concerns an action brought forward by Urgenda in the District Court in The Hague. The Court ruled on the 24 June 2015 that the Dutch State must take more action to reduce the greenhouse gas emissions in the Netherlands.⁷ The State has to ensure that the Dutch emissions in the year 2020 will be at least 25 % lower than those in 1990. The current Dutch policy might achieve a reduction of 17% at most by 2020. The court found this policy to infringe the duty of care the Dutch state is obliged towards its citizen. The court held that due to the severity of consequences of climate change and the great risk of hazardous climate change occurring, the State has a duty of care resulting from civil law to take mitigation measures. Regarding the exercise of this duty of care the state enjoys discretion. It has to exercise it in a way that mitigation measures are sufficiently effective to avert the danger of hazardous climate change. In determining the minimum level of reduction required, the Court turns to climate science. As climate science sets the minimum level at 25 %, this also determines the minimum target for mitigation measures of the Dutch state. The Court rejected arguments that citizens can derive such as right to the reduction of greenhouse gas emissions from the international principle of “no harm”, from Art. 21 of the Dutch constitution, the UN Climate Change Convention, Art. 191 Treaty on the Functioning of the EU, and Art. 2 and 8 European Charter of Human Rights. These provisions would form no directly enforceable rights for the claimant. They would, however, still hold meaning when interpreting the duty of care discussed above.

II. Science as a Determinant of the Right to Emission Reduction

Both cases acknowledge that individual or natural persons have a right to ask for emission reduction

enforceable against the state. The common reasoning is as follows: States are tied to the respective goals, determined by politics. Janecek concerned the goal of the reduction of air pollution, Urgenda the reduction of greenhouse gas emissions. Both courts acknowledged that states enjoy discretion regarding how they pursue this goal. These discretionary powers need to be executed so that they are sufficiently effective to achieve the goal. In Janecek, the Court held that this obligation turns into an individual right only insofar as the State has to draw up an action plan how to achieve this goal. In the Urgenda case, the Court directly granted the individual a right against the state to be protected according to the minimum requirements determined by science. This leaves doubt as to what such a new right to emission reduction should be based upon. Is it based on political decisions, informed by science, as implemented in the law (Janecek) or is it based on science directly (Urgenda)?

This newly created individual right to emission reduction should be based on laws as informed by science. The rule of law is of such importance that it will cut off possibilities to base any rights directly on scientific insights. Where laws have implemented scientific insights as threshold levels, these will form the starting point for evaluation. However, when deviation from scientific insights and the laws is so severe that the threshold levels as enshrined in the law are not sufficiently effective to reach the overall goal of emission reduction, thresholds generally agreed on in science may determine a default option and trump the respective laws. In this way, after the path-breaking decisions, the individual right to emission reduction is another tool to consider when implementing scientific insights into policy making.

⁶ Case C-237/07, Dieter Janecek v Freistaat Bayern, ECLI:EU:C:2008:447, para 39.

⁷ C/09/456689/HA ZA 13-1396, see K Purnhagen, Climate law: dutch decision raises bar, 523 *Nature* 410 (2015).