

An aerial photograph of a dense forest, likely a coniferous forest, with a road or path cutting through the center. The trees are in various shades of green, and some dead, grey trees are visible. The overall scene is lush and natural.

# **Law and justice in a sustainability context**

**The (underestimated) role of private law (revisited) in  
the transition to a sustainable society**

Prof. em. L. Cornelis & Prof. dr. R. Feltkamp

Presentation The Shift 24/2/22



# 1. Purpose and agenda

---

- Overall purpose: show how private law can and should support to steer the sustainability transition by businesses
  
- Plan
  - The urgency of action
  - The narrow relation between business activities, private law and sustainability
  - The (forgotten) role of private law
  - Main general private law tools to tackle societal disruptions : the safeguards
  - How to bring private law back on track

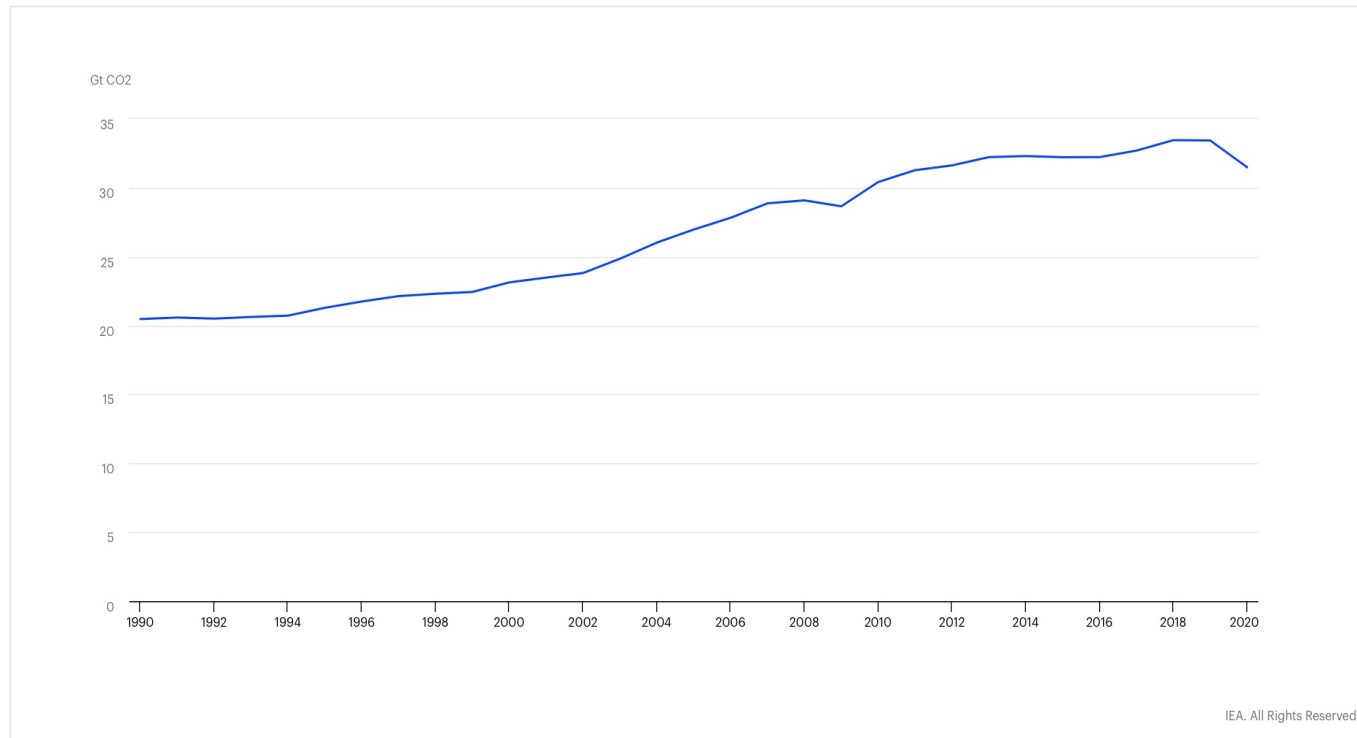


## 2. The urgency of action (1)

- Global warming is reaching alarming levels causing an effective risk of serious and irreversible damage to the life and wellbeing of persons in the near future (if damage is not already caused now)
- These climate and ecological disruptions and their causes are known since 1970'
- Several initiatives have been undertaken at UN / EU level, without however the results hoped for : planetary boundaries are exceeded via emission of greenhouse gases and other pollutants, excessive resource extraction, continued massive waste production
- It is generally recognized that industrial and economic activities are the root cause, but these activities are not adapted and costs, risks and damage related to the disruptions continue to be externalised
- CO2 emissions should globally be reduced by 45% (compared to the level in 2010) before 2030 and to net-zero emissions by 2050 to avoid irreversible disruptions & tipping points
  - Challenging considering that the drop in CO2 emissions in 2020 as a result of the Covid-19 pandemic was in average almost 10 % for developing countries (unstats.un.org)

## 2. The urgency of action (2)

### Global energy-related CO2 emissions, 1990-2020



Source : IEA, Global energy-related CO2 emissions, 1990-2020, IEA, Paris <https://www.iea.org/data-and-statistics/charts/global-energy-related-co2-emissions-1990-2020>

## 2. The urgency of action (3)

- Drastic change of "business as usual" is needed => how?
- What do **you** think?

Share your view by responding to our poll

Go to [www.menti.com](https://www.menti.com)

Insert the following code : **1189 0045**

Select the options in the order of effectiveness you believe in (most effective first, ...)

## 2. The urgency of action (3)

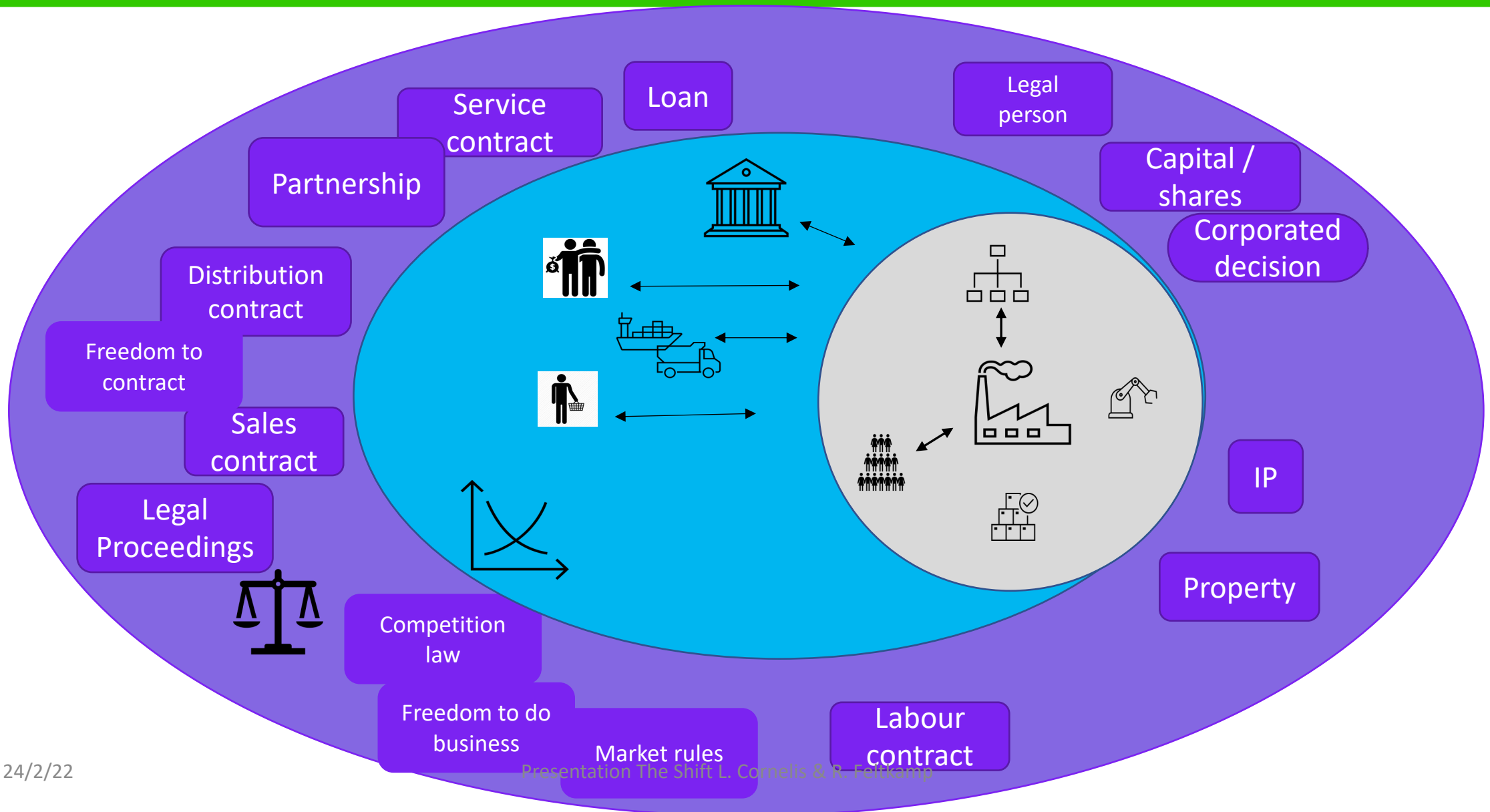
### ➤ Drastic change of "business as usual" is needed => how?

- More direct evidence (human casualties / extinction?) ?
- Effective awareness that climate and ecological disruptions will entail other disruptions that negatively affect businesses' (human and other) resources and thus their activities and return on investment?
- Innovation? Can innovation alone save the planet? And at whose cost?
- Law & justice
  - Disclosure obligations / taxonomy?
  - Legal constraint - more (environmental) regulation (bans?) and public action to ensure compliance?
  - Pressure by private law action?
    - Public authorities (Urgenda, BE climate case)?
    - Companies (Shell)?
    - Directors?
    - Shareholders?



Success requires strong injunctions to be imposed on public authorities to take effective measures and on businesses to adapt 'business as usual'

### 3. Business activities, private law and sustainability (1)



### 3. Business activities, private law and sustainability (2)

- **Fact 1:** Economic and financial activities cause distortions that endanger sustainability and wellbeing on our planet
- **Fact 2:** Economic and financial activities are governed by and enforceable by virtue of legal rules and instruments => these activities can only “thrive” thanks to law and justice
  - E.g. legal personality, contracts, ownership, representation, liability, intellectual property, rules governing markets and businesses, legal proceedings...
- **Fact 1 + Fact 2 = If economic and financial activities cause distortions that endanger sustainability and wellbeing on our planet it is because our legal system allows so**
- In democratic societies, law and justice are not what they ought to be when their application results in global warming, loss of biodiversity (as well as health crises, unequal access to education and information, and different life expectancy depending on income and wealth...)

**Law and justice are clearly off track!**



## 4. The (forgotten) role of private law (1)

- Main role of law is to regulate (human) conduct in a society to allow a peaceful living together in accordance with the essential values of that society
  - By prohibiting or imposing certain behaviours, the legal rules define how the “living together” should take place within a society and the life conditions of its members
- Private law governs the “private” relations between individuals
  - Private law is not a “stand-alone” set of rules
  - It is part of the overall set of legal rules called “the law” ( “het objectief recht” / “le droit objectif”) and is subject to the hierarchy amongst all these norms
    - Highests norm = Constitution, European Convention on Human Rights, TFE/TFEU

## 4. The (forgotten) role of private law (2)

- Private law must at all times be in compliance with the higher norms
  - Ensure the concrete and effective functioning for all individuals of the human rights and fundamental freedoms in private relations
  - Ensure that individuals, through their private activities, do not violate the human rights and fundamental freedom of others
  
- How?
  - Foreseeing rules and legal institutions that allow all individuals to develop activities and determine their life conditions in a way comparable to others
    - Property law, contract law, IP, legal personality ...
    - Tools to correct excesses / distortions / abuses by providing safeguards through mandatory prohibitions or injunctions  
=> restore the social balance via restrictions on the human rights and fundamental freedoms
      - 4 conditions are to be respected :
        - 1° the restriction must be imposed by a precise and accessible law
        - 2° the restriction must be necessary in a democracy
        - 3° the restriction must be required to respond to an imperative social need
        - 4° the restriction must be pertinent and proportionate (reasonability test) (in sustainability context: balance between life, health, security ... and the principle aim of the activity (revenue, return on investment))

## 4. The (forgotten) role of private law (3)

### ➤ Conclusion

#### Private law

- ≠ kingdom of freedom
- ≠ a set of autonomous stand-alone rules
- Is not so “suppletive” as we think

Since private law rules give effect to human rights and fundamental freedoms, they relate to public order and cannot be deviated from, unless the legislator indicates so.

## 5. Main private law safeguards (1)

### 1° Prohibition to deviate from rules concerning public order / good morals (art. 2 Civil Code)

- Economic and industrial activities are based on the successive conclusion and execution of multiple legal acts (contracts or unilateral / collective acts)
  - = autoregulation of business activities based on the freedom to contract / autonomy of “will” / freedom to conduct a business
- Limitation by the legislator: private contracts / legal acts may not deviate from rules concerning public order / good morals or, added by case law, imperative law
  - Coming into being, interpretation, effect, performance, termination
  - Expression of the submission of private initiative to the general interest
  - Sanction : unenforceability of the contract

## 5. Main private law safeguards (2)

### 1° Prohibition to deviate from rules concerning public order / good morals (art. 2 Civil Code) (ct'd)

- Public order = the societal organisation of the “living together” achieved by laws in respect of which the legislator indicated that nobody can deviate from his orders or prohibitions
    - = expressed through the laws that realize the human rights and fundamental freedoms ensuring security, health, property, private life and freedom
  - Business activities that affect directly or indirectly health, life, security, property.... and are based on legal acts manifestly breach art. 2 Civil Code
- ⇒ Article 2 Civil Code serves as safeguard, especially combined with clear and accessible rules that prohibit or limit certain actions or activities with a view to preserve health, life, property  
... **provided it is maintained (cfr. proposal new Book 1 Civil Code) and correctly applied by the courts (which has not been the case up to now)**

# 5. Main private law safeguards (3)

## 2° Lawful object and cause of obligations

- To be valid contractual obligations must have a lawful cause and object
- Lawfulness test concerns
  - Each obligation deriving from a contract / legal act
  - An evaluation to be performed at the time the contract / legal act is concluded
- Sanction : obligation (/ contract) may be declared null and void by a court => cannot have any effect => all consequences are retroactively unwound
  - Since a few years Supreme Court advocates flexible application
    - Application of partial nullity
    - No nullity if illegality is or **may** be remedied
    - No nullity if this sanction would not be appropriate in light of the objectives of the violated legal provision

# 5. Main private law safeguards (4)

## 2° Lawful object and cause of obligations (ct'd)

- Lawful object
  - Object: the performance parties agreed to do, not to do, to give
  - Invalidity (Supreme Court) :
    - Initially: if it obliges to a performance prohibited by a law of public order
    - End '90 : if the performance results in creating or maintaining an illegal situation => test = is the performance a means to achieve an illegal result?
      - Criterion is no longer the contracted obligation (“prestatie” / “prestation”), but the result
        - Lawful: insurance of a stolen car / house without permit
        - Unlawful: contract for construction works that violate the building permit
- Lawful cause
  - Determining reasons that brings a party to agree to the performance
  - Knowledge by the other party / beneficiary of such motive is not required?
    - Since 2020 Supreme Court changed its view and requires that the other party should know or have known the determining reason(s)
  - Unlawfulness – art. 1133 (old) Civil Code : prohibited by law, contrary to the public order or good morals / imperative laws

# 5. Main private law safeguards (5)

## 2° Lawful object and cause of obligations (ct'd)

- Business knowingly performing activities that cause ecological and climate disruptions violate human rights and fundamental freedoms of those affected
  - = violation public order legislation
  - Lawful object?
  - Lawful cause?
    - Supreme Court already accepted violation of art. 12 & 23 Constitution / art. 4 ECHR in this context
- Examples
  - Contract for sale of fossil fuels
  - Contract for the purchase of polluting production means
  - Contract for production of goods through polluting production processes
  - Financing / insurance of polluting activities?
  - Board / shareholder's decisions externalising ecological damages



## 5. Main private law safeguards (6)

### 3° Fraus omnia corrumpit (FoC)

- General principle of law according to which “fraud destroys everything”
  - Any fraudulent act or behaviour is considered ineffective
    - No legal effect
    - Regardless the knowledge of the damage caused, the consent or fault of the victim, the positive contribution to the economy (cfr. employment, increase GDP)
  - Fraudulent is any act or behaviour of a person who knowingly causes harm to another person
  - Businesses that cause ecological and climate distress with their activities (e.g. by producing or using fossil fuels that increase CO2 emission), cannot seriously claim not to know that their activities harm (the human rights and fundamental freedoms of) others
- ⇒ FoC serves as safeguard, **provided it is properly raised and applied**

# 5. Main private law safeguards (7)

## 4° Abuse of rights

- General principle of law prohibiting the abuse of rights
  - Abuse of rights : exercising a right in a way which manifestly exceeds the boundaries of the use a normal prudent and diligent person would make of such right (Supreme Court since 1971)
    - E.g. use of a right with the sole intention to harm, without reasonable interest, in a disproportionate manner, in a way that causes excessive harm
  - Supreme Court: also applicable to the exercise of freedoms (freedom to contract)
  - Acting within the ambit and scope of the granted right as determined by the law, but nevertheless considered as unlawful by courts
  - Sanction: reduction of the exercise of the right to what the court deems lawful (or damages if the right has already been exercised)
- Business activities are based on the performance of various (fundamental) rights and freedoms => abuse of right test can be applied
  - Would a normal, prudent and diligent person use rights/freedoms to do business in a way that causes ecological and climate disruptions that affect / threatens life and goods of other persons?
- Potential remedy to address excessive behaviours, **if it were not a questionable interference with the legislative powers (cfr. 4 conditions for restrictions)**

# 5. Main private law safeguards (8)

## 5° Liability for fault / negligence (art. 1382/1383 Civil code)

- Principle rule: a person causing harm to another person due to a fault / negligence should “repair” it
- Requires proof of 3 conditions
  - Fault / negligence : violation of a law imposing or prohibiting a conduct or of the general norm of diligent conduct, whether deliberately or by negligence
    - Normal prudent and reasonable person does not cause harm to others
    - Businesses that continue to do business with emission of greenhouse gases or other pollutants commit a fault, especially if they are aware of the emissions and their effect
  - Damage : negative difference between the situation of the victim after the damageable act and the situation if this act would not have taken place
    - Violation of a legitimate interest is sufficient
    - Any loss whether physical, psychological / immaterial, material
      - Ecological and climate disruptions cause all these types of losses
    - Damage must be certain, but can be future damage
  - Causal lien = “*conditio sine qua non* test”
    - Not existing since damage occurs anyway even if a business would adapt its business?
      - Conflicts with the right to effective remedy including damages (see further)
- “Too big to fail” –reasoning or speculation on the risk?
- Liability for fault can serve as safeguard, **but may not act preventively and all depends on how the causal lien criterion is applied**

## 6. How to bring private law back on track (1)

- Private law contains several safeguards to address excesses
  - They originally stem from a time (1804) where democracy & human rights protection were not yet on the agenda
  - Main goal of the provisions was to protect the elite against unwanted interference
  - Even when democracy stepped in, the courts and majority doctrine have chosen to interpret the safeguards in a “flexible way” to support freedom of business activities (and the (neo)liberal model)
  - No immediate change is to be expected from the legislator : the proposals regarding the law of obligations as currently suggested in Parliament will not bring change
    - Merely incorporation of Supreme Court jurisprudence and traditional doctrine, without assessing compliance with higher norms on human rights and fundamental freedoms
  - Nevertheless : as such the safeguards can be applied to address the ecological and climate disruptions, especially to the extent due account is given to the superior norms related to human rights & fundamental freedom protection

## 6. How to bring private law back on track (2)

- Underestimated role for human rights / fundamental freedoms as an “enforceable right” (“droit subjectif” / “subjectief recht”)
  - Human rights grant the right to a person to require, through legal proceedings, that public authorities and private actors are obliged to respect the lawful use it makes of these human rights
    - Lawful use implies respecting the reasonable boundaries set by the legislator to ensure effectiveness of the human rights (such as the discussed safeguards)
  - Art. 1 ECHR: *“The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.”*
  - Art. 13 ECHR: *“Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”*
    - Injunction to stop acts or activities that violate human rights / fundamental freedoms
    - Imposing preventive measures
    - Compensation of damages

## 6. How to bring private law back on track (3)

- Victims of the ecological and climate disruptions should be granted effective means to remedy the violation of their human rights and fundamental freedoms
  - Decisions that postpone such remedy, e.g. by leaving it up to businesses to decide how to adapt their activities and by when, do not correctly restore the fundamental rights of these persons
  - Effective remedy requires immediate action, reduction or eventually stopping harming activities
  
- What about the human rights & fundamental freedoms of the concerned businesses?
  - Can business do what they want in absence of any specific regulation prohibiting activities and in absence of non effective “safeguards”?
  - No : their human rights / fundamental freedoms are not absolute and are to be balanced against the human rights / fundamental freedoms of the others that have been violated, taking into account the allowed justifications for restrictions

Thank you for your attention.  
Any questions?

Interested to follow read more on this topic?

Visit our publication platform

[www.lawbackontrack.org](http://www.lawbackontrack.org)

You are also welcome to participate to our research!