

PRIVATE LAW AND SUSTAINABILITY

How private law can (and should) contribute to a (more) sustainable society



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Workshop "Mise au vert" 24/5/2022

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PURPOSE AND AGENDA

- Explain our research on how private law can (and should) support the transition to a more sustainable society
 - 1) Our wake-up call : disruptions that threaten sustainable living conditions and are caused by law
 - 2) The key : democratic principles, purpose and operating rules
 - 3) How (private) law has a role to play in the sustainability debate
 - 4) (Main) private law sustainability safeguards

- Discussion based on Q&A

1. OUR WAKE-UP CALL : DISRUPTIONS ...

➤ Financial crisis 2007

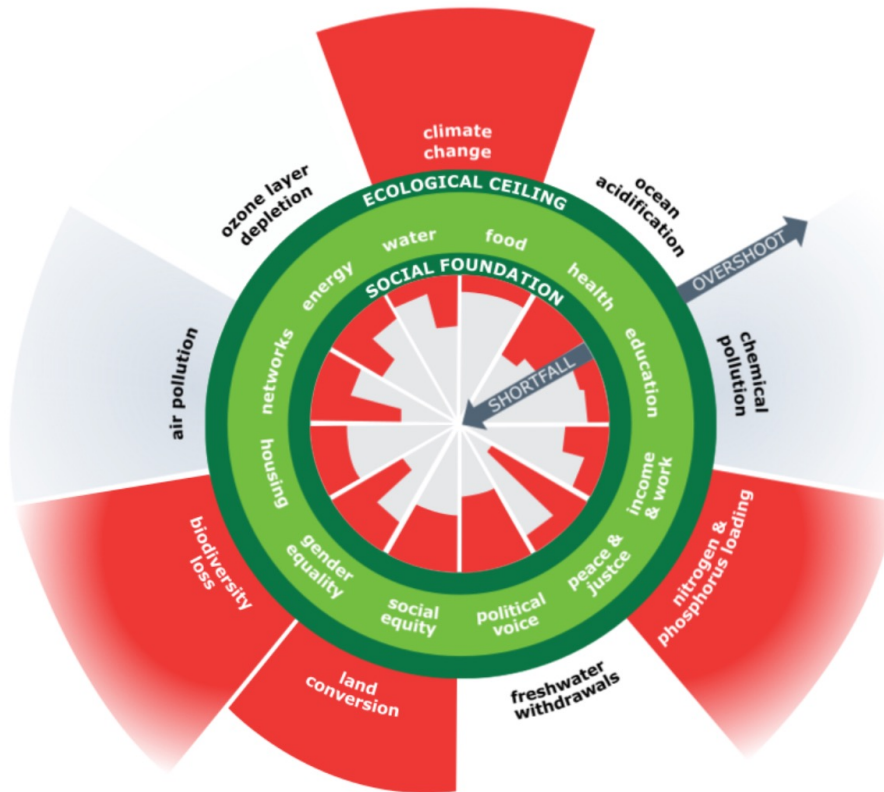
- Finance and law: twins in trouble

➤ Other disruptions

- Climate change, ecological imbalances, environmental disruptions
- Increasingly uneven distribution of income and wealth, rise of inequality, different life expectancy depending on income and wealth
- Health crises, unequal access to education and information
- Growing disappointment and disillusionment with democracy

1. OUR WAKE-UP CALL : ENDANGERED SUSTAINABLE LIVING...

The Doughnut of social and planetary boundaries (2017)



K. Raworth

Doughnut Economics - Seven Ways to Think Like a 21st-Century Economist (2017)

"To meet the needs of all within the means of the planet. In other words, to ensure that no one falls short on life's essentials (from food and housing to healthcare and political voice), while ensuring that collectively we do not overshoot our pressure on Earth's life-supporting systems, on which we fundamentally depend – such as a stable climate, fertile soils, and a protective ozone layer."

1. OUR WAKE-UP CALL : (PRIVATE) LAW AS ROOT CAUSE

- **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...
 - Lead to excessive income and wealth accumulation by the “happy few” causing harm to others and the environment
- **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**

(Private) law and justice are off track!

The good news: they can be brought back on track... (www.lawbackontrack.org)

2. THE KEY : DEMOCRATIC PRINCIPLES, PURPOSE AND OPERATING RULES

- Broadening to private law in general the lessons (that should be) learned from the financial crisis
 - Liability & human rights
 - Public order
 - Economic law
 - Law of obligations & contract law

- The key: principles, purpose and operating rules in a democracy
 - Purpose: ensure best possible and thus comparable living conditions to all

 - Instruments : effective constitutional and human rights for all

3. (PRIVATE) LAW BACK ON TRACK

- 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
 - Highest norms = Constitution, European Convention on Human Rights, TEU/TFEU

- Private law must at all times comply with the higher norms
 - Ensure the concrete and effective functioning for all individuals of the constitutional and human rights in private relations
 - Property law, contract law, IP, legal personality ...

 - **Ensure that individuals, through their private activities, do not violate the human rights and fundamental freedom of others**
 - Via tools to correct excesses / distortions / abuses / disequilibria by providing safeguards through mandatory prohibitions or injunctions => with a view to restoring the social balance via restrictions on the human rights and fundamental freedoms
 - Restrictions must be 1) imposed by a precise and accessible rule of law, 2) necessary in a democracy, 3) required to respond to an imperative social need, 4) pertinent and proportionate (reasonability test)
 - Courts must apply the rules and tools of law in accordance with the prevailing higher norms

- Private relations and activities ≠ the kingdom of freedom & private law is not as suppletive as generally told
 - Private law safeguards applied in respect of the democratic principles, purpose and operating rules enables to tackle and to mitigate the disruptions

4. (MAIN) PRIVATE LAW SUSTAINABILITY SAFEGUARDS

Tools

- Most commonly thought of : liability for fault or negligence

- Other tools?
 - Abuse of rights
 - Prohibition to deviate from public order / good morals
 - Lawful object and cause of legal acts
 - Fraus omnia corrumpit

4. (MAIN) PRIVATE LAW SUSTAINABILITY SAFEGUARDS

Tool 1 - 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 that cause ecological and climate distress (e.g. by producing or using fossil fuels that increase CO2 emission) commit a fault, especially if they are aware of the damage caused and do not take action to mitigate it
 - 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
 - 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
- “Too big to fail”–reasoning or speculation on the risk?
- Liability for fault can serve as safeguard and could also be used to address market distortions, **but may not act preventively / come too late to restore the harm done**

4. (MAIN) PRIVATE LAW SUSTAINABILITY SAFEGUARDS

Tool 2 – 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 – taken up in art. 1.10 NCC)
 - 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 courts are given the power to consider this exercise as unlawful
- 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 harm / threaten life and goods of other persons?

➤ Potential remedy to address excessive behaviours, **although it remains a questionable interference with the legislative powers**

4. (MAIN) PRIVATE LAW SUSTAINABILITY SAFEGUARDS

Tool 3 - Prohibition to deviate from rules concerning public order / good morals

- 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
 - Expression of the submission of private initiative to the general interest
 - Broad scope: coming into being, interpretation, effect, performance, termination
 - Sanction : unenforceability of the contract
- Economic and industrial activities are based on the successive conclusion and execution of multiple legal acts (contracts or unilateral / collective acts)
 - Business activities that harm directly or indirectly health, life, security, property violate fundamental rights and freedom of others guaranteed by rules of public order => the legal acts that make them possible thus breach art. 2 Civil Code (art. 1.3, al. 3 NCC)
- Article 2 Civil Code (art. 1.3, al. 3 NCC) serves as safeguard
 - **Provided it is correctly applied by the courts (which has not been the case up to now)**
 - Its potential can be increased by enacting further clear and accessible rules that prohibit or limit certain actions or activities with a view to preserve health, life, property

4. (MAIN) PRIVATE LAW SUSTAINABILITY SAFEGUARDS

Tool 4 – Lawful object and cause of obligations

- To be valid contracts / legal acts must have a lawful cause and a lawful object
 - Lawfulness test concerns an evaluation of compliance with public order, to be performed at the time the contract / legal act is concluded
 - Sanction : obligation (/ contract / legal act) may be declared null and void by a court
 - Gradual narrowing down by the Supreme Court of the scope of both conditions and of the sanction, recently confirmed in Book 5 NCC

- Legal acts entered into by businesses to support/allow activities conducted by these businesses knowing that they cause ecological and climate disruptions which harm health, life and property of others, violate human rights and fundamental freedoms of those affected = violation of public order legislation => lawful object / lawful cause?
 - Supreme Court already accepted direct application of art. 12 & 23 Constitution / art. 4 ECHR in this context (a contract denying a person a fundamental right has an unlawful cause)
 - Not concluding to an unlawful object/cause may lead to granting unreasonable priority to self-determination (as expressed in the freedom to contract and to do business)
 - Potential applications
 - Contract for extraction and sale of fossil fuels / the purchase of polluting production means / production of goods through polluting production processes; financing / insurance of polluting activities?; board / shareholder's decisions externalising ecological damages / approving aforementioned contracts

4. (MAIN) PRIVATE LAW SUSTAINABILITY SAFEGUARDS

Tool 5 – Fraus omnia corrumpit

- 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 (and not denatured, see 1.11 NBW)**

4. (MAIN) PRIVATE LAW SUSTAINABILITY SAFEGUARDS

Conclusion

- 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 fundamental change is to be expected from the legislator : the Books 1 (General provisions) and 5 (Obligations) of the new Civil code will not bring much change
 - Merely incorporation of Supreme Court jurisprudence and traditional doctrine, without assessing compliance with higher norms on human rights and fundamental freedoms
 - However the foreseen safeguards may in practice not lead to the freedom of business activities unreasonably prevailing over the human rights & fundamental freedoms related amongst others to the protection of security, health and life