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Rulings on new genomic techniques and climate change mitigation - are the courts overstepping the mark?"

ABSTRACT

This contribution will be an analysis of the rationale given by the European Court in the Mutagenesis case and the decisions of the Dutch and the German Constitutional Courts on the respective national activities with regard to climate change mitigation. All three cases raise the question, how far the courts can interfere in the domain that is usually reserved for the legislator and if we see a kind of "political activism" of the judges in these cases.

In its ruling in case C-528/16 the Court of Justice of the European Union held that targeted mutagenesis techniques using oligonucleotides or targeted nucleases are not covered by the exemption for mutagenesis techniques from the scope of the EU GMO regulation Art. 3(1), Annex I B Directive 2001/18/EC. The decision is remarkable not only because the Court did not follow the opinion of the Advocate General but also because its reasoning breaks with established principles of legal interpretation and gives priority to the precautionary principle even beyond the boundary of the possible meaning of the wording of the law. In doing so, the Court stands in for the European legislator who, despite being aware of the technological developments in the field of mutagenesis, stayed inactive. It must be doubted though, if in such a politically controversial field like the use of genetical modification in plants (and subsequently foods), where a lot of conflicting interests must be considered and balanced out, it can be the role of a Court to take the decision what should be acceptable for human society in general.

Similar developments can be observed in the field of climate change mitigation. Here the Dutch Supreme Court ("Hooge Raad") ruled that the state of The Netherlands is obliged to take suitable preventative measures if it is aware of the risks associated with climate change and confirmed the decision of the lower courts that ordered the Durch government to reduce greenhouse gas (GHG) emissions by more than the 20% to which the government had itself committed. In Germany, the Constitutional Court declared the first version of the Federal Climate Act unconstitutional because according to the planning of GHG reductions contained in the Act much of the remaining "carbon

budget" still available if global temperature increase should be limited to max. 1.5°C was already exhausted by 2030. According to the Court, postponing major reduction efforts to the future severely limits the remaining options for emission reductions and future measures would therefore trigger much stronger restrictions of freedom than are required today. The Court held that fundamental rights have an intertemporal effect that protects against the burden of GHG reductions being unilaterally offloaded onto the future. Thus, the burden of GHG reduction must be distributed over time in a proportionate manner that respects fundamental rights of all generations.

At present, nine cases concerning state climate-change action are pending before the European Court of Human Rights, based on case-law in environmental matters invoking Art. 2 and 8 of the ECHR.

All these cases are examples where the Courts are entering an arena that in the past was considered the sole domain of the legislator. In effect, this leads to a rebalancing of the division of powers between executive, legislative and judicial bodies.