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The "Commune de Grande-Synthe" decision: the administrative litigation in the service of the climate

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On November 19, 2020, the French State Council (Conseil d'État) handed down an interim judgment largely favorable to the plaintiffs in the case brought before it by the commune of Grande-Synthe (Nord department, on the outskirts of Dunkirk) following the government's implicit refusal to take additional measures to comply with the objectives of the Paris Climate Agreement and, in this specific case, to limit the impacts of climate change, particularly the risks of flooding of this coastal commune.[1](#) In this blog post (to be read in parallel with Marta Torre Schaub's post on the issue), Lucien Chabason first analyses the legal grounds for this decision, then insists on its innovative character linked to the mobilisation of public climate policy instruments.

A typical application of administrative litigation

The decision of the State Council is a complete expression of the "control of legality" practiced and perfected by the administrative courts for more than 150 years. The entire tradition and practice of administrative litigation is here put at the service of climate justice.²

This is the case of the interest to act of the plaintiffs, cities and NGOs, in particular the city of Grande-Synthe which, although the future harm is still far away, is recognized because of the inevitability of the climate impact as established by the Intergovernmental Panel on Climate Change (IPCC), which gives it a direct and certain character, a criterion required by the case law. This is perhaps the truly innovative point of the judgment, since the interest to act is often examined in a restrictive manner.

To assess this character, the State Council also relied on data published by the National Observatory on the Effects of Global Warming (ONERC in French), which highlighted the high exposure to climate risk in the Dunkirk region. This illustrates the fruitful relationship between international and national scientific production and the legal approach, with scientific data being used to establish the materiality of the facts and to qualify them legally.

Also classic is the invocation of the principle of the separation of powers, which prohibits the judge from ordering the government to submit bills to Parliament. Thus, in the next phase, if the State Council were to use the injunction to invite the government to take action, it would not be able to do so in the areas covered by the law, which can singularly weaken the scope of a possible injunction.

Finally, very classic is also the reasserted position of the State Council concerning the direct applicability or invocability of international treaties, in this case the United Nations Framework Convention on Climate Change (UNFCCC) and the Paris Climate Agreement, which are not retained. On the other hand, the State Council indicates that their "stipulations [...] must nevertheless be taken into account in the interpretation of the provisions of national law", in this case the provisions of the 2015 and 2019 energy and climate laws and their implementing decrees. It is therefore European law and national law that are themselves invocable and directly applicable and which are the subject of the attention of the State Council. It is by carrying out a thorough examination of them that the State Council has exercised the legality control of the implicit decisions rejecting the requests of the commune of Grande-Synthe.

The National Low Carbon Strategy and the High Climate Council at the heart of the State Council's decision

What is innovative in this case, and paves the way for climate justice, is less the decision itself than the legal provisions embedded in the National Low-Carbon Strategy (SNBC in French), which itself represents a major innovation allowing for real accountability. Indeed, it is characteristic of these laws (2015³ and 2019) to have recalled the objectives of the Paris Agreement and to have translated them into national objectives and strategic form, by setting out a trajectory to be followed accompanied by implementation periods (the carbon budgets) in order to meet the objectives of 2030 (reduction of GHG emissions by 40% compared to 1990) and 2050 (attainment of carbon neutrality). These carbon budgets are adopted by successive decrees that set emission ceilings that can easily be compared to actual annual emissions in order to verify whether the authorities are implementing the law and taking the necessary measures in the event of any deviation.⁴

In addition, the 2019 law created an independent body, the High Climate Council (HCC), which evaluates the implementation of the SNBC. It was on the basis of its work that the Council of State was able to observe that the emission ceilings of the first carbon budget had been exceeded, that the government had drawn the consequences by adopting the decree of 21 April 2020 which raised the ceiling of the 2nd carbon budget (2019-2023) while maintaining the objectives of the 3rd carbon budget (2024-2028) and by setting a very ambitious target for the 4th and final budget. This is a kind of "rolling" planning, which postpones the insufficient effort of recent years to the years to come. The Council of State notes that this postponement contrasts with the climatic urgency demonstrated by the IPCC, which led in particular to the acceleration of emission reduction efforts decided by the European Union in preparation for its next nationally determined contribution (NDC) and the UNFCCC COP26 in Glasgow in 2021.

In view of this postponement, the Council of State therefore questions the feasibility of the SNBC's new trajectory and asks the government to provide additional information on this subject within three months, this additional instruction allowing the parties to produce their analyses.⁵

By creating bodies such as ONERC and especially the HCC, the French system has considerably facilitated the judge's task and allowed for a real legal accountability, in relevant cases, which one might wish to be generalised.

Towards a climate injunction?

In the Grande-Synthe case, we are only in the middle of proceedings. In view of the forthcoming supplementary instruction, the State Council will have the choice of rejecting the claims if it is convinced by the government's arguments, or, conversely, of overturning the government's implicit decision not to grant the claimants' requests, or, finally, of accompanying such a decision to cancel an injunction to act.⁶

Already, the State Council has made it known that it cannot order the government to submit a bill to Parliament. Regarding the regulatory measures to be derived from the SNBC, will it want to proceed by injunction and, if so, how will it do so if it is no longer an act but a climate policy of a multidimensional nature that needs to be strengthened or made more effective?

It should also be recalled that this beginning of climate justice is only possible because France is a State governed by the rule of law in which the principle of legality is applied under the control of independent courts with a litigation mechanism, the recourse for excess of power, which is freely open to civil society (despite some recent restrictions). This right of recourse to the courts is an indispensable complement to the commitments made in the Paris Agreement.⁷ The Aarhus Convention, with its right of access to justice, and the European Convention on Human Rights and its Article 13 are the guarantors of this in Europe.

If compliance with climate commitments is not assured, at least accountability is there, democratic debate is enriched, and civil society action is facilitated.

¹ (in French) <https://www.conseil-etat.fr/actualites/actualites/emissions-de-gaz-a-effet-de-serre-le-gouvernement-doit-justifier-sous-3-mois-que-la-trajectoire-de-reduction-a-horizon-2030-pourra-etre-respectee>

² They have served the cause of the environment since the emergence of environmental law. Let us recall in this respect that without the intervention of the administrative judge, the Littoral law was destined to remain a dead letter because of the hostility displayed by many coastal communes and the inaction of the administration.

³ (in French) <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000031044385/>

⁴ It should be noted that the mechanism of the National Low-Carbon Strategy contrasts in its precision and its requirements with the technique of the Grenelle laws, which only set objectives that were certainly quantified but global and far-reaching in areas such as pesticide spraying, the modal

share of rail freight or the construction of offshore wind turbines, objectives that have remained ineffective. Lessons could be mobilised in this respect in the preparation of the next National Biodiversity Strategy.

5 Here the State Council is well assisted by the creation of the HCC, while applying its case law established since the Couespel du Mesnil judgment of May 1, 1936, according to which it is up to the judge "to require from the competent administration the production of all documents likely to establish his conviction and allow verification of the petitioner's allegations"; a position confirmed by the Barel judgment of May 28, 1954.

6 It will be recalled that, since a law of 1995, codified by article L. 911-1 of the Code of Administrative Justice, "when its decision necessarily implies that a legal person of public law [...] takes an enforcement measure in a given sense, the court, seized of conclusions to this effect, shall, by the same decision, prescribe this measure accompanied, where appropriate, by a time limit for enforcement". Thus, in July 2000, at the request of France Nature Environnement, the Conseil d'État had enjoined the government within six months to publish, which it did, the decree establishing the list of communes bordering an estuary subject to the Littoral law that had been awaited for 14 years! Obviously, this provision was written to ensure the effective application of a decision to cancel an illegal act, even if it was an act of abstention; the use of the singular inclines to think so.

7 Read IDDRI's blog post on this issue: <https://www.iddri.org/fr/publications-et-evenements/billet-de-blog/comment-analyser-la-portee-juridique-de-laccord-de-paris>

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