

BLOG POST June 30th 2021

Climate justice: new trends, new opportunities

Auteur

Marta Torre-Schaub

Associate Researcher

 Reading time: 8 min

The field of climate justice has been growing exponentially since 2015, and the year 2021 illustrates a fruitful dynamic in this area¹ which makes the legal framework evolve in a convergent manner in several national contexts, and which contributes to the coherence of the concrete framework of action of public and private actors with the commitments made in the long term. Courts are increasingly dealing with issues related to the climate emergency, which is now a central element in a growing number of disputes that have become known as “strategic litigation”.² This blog post analyses the potential of these legal dynamics in terms of predictability for all actors (public and private, civil society) and the effective implementation of climate change commitments.

The current wave of litigation spreading across Europe has three characteristics. Firstly, most cases acknowledge the Paris Climate Agreement as a kind of “gatekeeper” that can set legal benchmarks in terms of obligations imposed on States to meet greenhouse gas emission reduction targets by 2050. Secondly, climate litigation at the national level aims to obtain the recognition of “rights” (fundamental, constitutional, human) or of a binding “national climate law”. Often, these two aims are convergent and complementary: securing a “subjective right to a stable climate, or a right to life or to privacy” first necessitates an acknowledgement of the existence of a “general right” that can be harnessed in the fight against climate change, i.e. a climate law or a national climate strategy. This international and national double dynamic coexists in most climate-related legal action.³ It leads to the strengthening of international climate law, and of the Paris Agreement and the (re)definition of a more demanding and ambitious national level climate law. Alongside this type of action, there has been an increase in the mobilization of private and corporate law to litigate against companies in the fossil fuel sector.

“Strategic” litigation

The predominant form of strategic climate litigation has been challenging either State inaction or the insufficient or incorrect decision-making of governments under legislation or territorial planning. In terms of actors, while legal challenges were initially instigated solely by NGOs, an increasing number of citizens, municipalities and local elected officials are now also taking action. In terms of jurisdiction mobilized, we see that even constitutional courts, civil courts and human rights tribunals are now getting involved in these legal proceedings. These actions can play a “regulatory” role, in that they can aim to control or influence the behaviour of governments, companies and individuals. In summary, the aim is to move towards the construction of a “climate obligation”. Thus, as a sort of “model”, the Dutch Urgenda II decision on appeal, of October 9, 2018,⁴ affirmed the existence of two types of general climate obligations: one relating to the Duty of Care, the other contained in Articles 2 and 8 of the European Convention on Human Rights. Both were ultimately based on the Paris Agreement. The Supreme Court in Ireland ruled that a right to an environment that is consistent with human dignity and the well-being of citizens is a necessary precondition to the enjoyment of all human rights;⁵ the decision stated that this right would become enforceable once concrete duties and responsibilities are defined and demarcated. The Court also found that Article 15 of the Constitution creates a climate obligation that is consistent with the objectives of the Paris Agreement.

“Specific” climate obligations

Other litigation may seek recognition of specific climate obligations allowing for more sector-specific requirements (private sector companies, finance) and the development of more transparent climate law. For example, in a 2019 decision,⁶ the Supreme Court of Canada ruled that bankrupt oil and gas companies must meet their provincial environmental obligations before paying their creditors. Moreover, the corporate world is unwilling to accept other climate obligations, giving rise to a wave of litigation regarding “failure to disclose” and “false accounting”.⁷ This trend lies at the intersection of business law and climate change law, showing the importance of the “hybridization” of law in the advent of a legal regime for climate.

New trends: rights-based litigation

The most recent decisions in Europe this spring can be seen as confirmation of the trends outlined above.⁸

For example, the decision of the German Constitutional Court last March tended to affirm the rights and freedoms of youth and future generations to declare the unconstitutionality of the federal climate law.¹⁰ This remarkable judgment, based on the individual and collective rights of the plaintiffs, but also supported by the Paris Agreement’s

international law objectives, is also based on specific scientific data that led the judges to consider that future generations will never be able to live with the same freedoms and opportunities in terms of quality of life, dignity and well-being as the present generations, and that this therefore constitutes a “violation” of their constitutional rights. The case is part of a long-term legal strategy.

The case judged on 17 June 2021 by the Court of First Instance in Belgium found that the Belgian federal state had not acted in a sufficiently prudent and diligent manner with regard to the fight against climate change, and that it therefore violated Article 1382 of the Civil Code on the duty of responsible care.¹⁰ The court also found that the plaintiffs’ rights to life and privacy, protected by Articles 2 and 8 of the European Court of Human Rights (ECHR), had been violated. The court considered, however, according to the principle of the separation of powers, that it was not within its competence to instruct the government to act in practical ways. It is clear therefore that legal advances have been both considerable and limited. For example, given the highly political nature of the climate issue, judges are not able to extend their power of interpretation or injunction beyond their own jurisdiction. This boundary between powers is currently one of the major obstacles to progress in climate litigation.

As part of a medium-term strategy, the lawsuit against Shell in the Netherlands, which was heard on May 26 by the District Court of The Hague, sought to modify the company’s activities on the basis of the duty of care and a duty of extended responsibility.¹¹ The court found that the company’s vigilance and control over its activities should be included in the scope of an “extended sphere of influence”, thus including its scope 1, 2 and 3 emissions.¹²

Three cases were recently submitted to the ECHR. A regional complaint was filed by six young Portuguese plaintiffs against 33 countries on 2 September 2020. The plaintiffs claimed that their right to life is being threatened by the effects of climate change (such as forest fires in Portugal), that their right to privacy includes their physical and mental well-being, which is threatened by heatwaves that require them to spend more time indoors. The Union of Swiss Senior Women for Climate Protection filed a lawsuit on similar grounds, as has Greenpeace Norway, alleging that the Norwegian government’s continued granting of permission for oil development in the Barents Sea is a violation of the plaintiffs’ right to life and privacy.

An important aspect of rights-based litigation is that there is a high degree of homogeneity between individual and collective rights-based regimes. As a result, jurisdictional differences notwithstanding, there is a considerable amount of case law transferability on this topic, across countries and throughout the world. It is therefore clear that new strategic climate change litigation is both evolving and innovative. The Grande-Synthe decision handed down by the Council of State in France on July 1, 2021, is an example.¹³ Three conclusions can thus be drawn: 1) no country acts alone on climate change; however, countries differ in their approach to climate policy; 2) such disputes are based on the principle of “mutual reliance” on the individual efforts of each country; ultimately, this will enable an increase of the nationally determined contributions that countries have committed to produce under the Paris Agreement; and 3) the impacts of these strategic disputes are threefold: direct (injunctions), indirect (legislative changes) and economic/financial.¹⁴

¹ Grantham Research Institute’s 2021 Global Trends in Climate Change Litigation Policy Report <https://www.genevaassociation.org/research-topics/climate-change-and-emerging-environmental-topics/climate-litigation> ; Data base Sabin Center for Climate Change Law, Columbia University, NY, NY. M. Torre-Schaub, “Regards comparés sur les litiges climatiques : nouvelles tendances”, in Colloque Lausanne 17 and 18 June 2021 Environnement, climat : quelle justiciabilité ?

² M. Torre-Schaub and B. Lormeteau, “Les contentieux climatiques stratégiques face à l’urgence climatique. Quelles temporalités” in Colloque annuel de la SFDE 2021, n° spécial RJE 2021, to be published.

³ M. Torre-Schaub, (in coll. B. Lormeteau), forward L. Tubiana and M. Colombier, Les dynamiques du contentieux climatique. Usages et mobilisations du droit. Paris, Mare & Martin, 2021 ; Peel, J., and H.M. Osofsky. 2015. Climate Change Litigation Regulatory Pathways to Cleaner

Energy. Cambridge, MA: Cambridge University Press

4 Urgenda Foundation v. State of the Netherlands, 9 October 2018

5 Friends of the Irish Environment v. Ireland, 29 July 2020

6 Supreme Court of Canada, Alberta, 31 January 2019, Orphan Wells Association c/ Grant Thornton Ltd.

7 Solana, J. 2020, "Climate Change Litigation as Financial Risk", Green Finance 2 (4): 344–372. Doi: 10.3934/GF.2020019; Solana, J. 2019. "Climate Litigation in Financial Markets: A Typology", Transnational Environmental Law 9 (1): 103–135 ; F.-G. Trebulle, "Entreprises et climat, vers un changement de cap ?", REEI, n° 7, 1 July 2021, p. 1.

8 Setzer, J., and R. Byrnes 2020 "Global Trends in Climate Change Litigation: 2020 Snapshot". https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2020/07/Global-trends-in-climate-change-litigation_2020-snapshot.pdf .

10 Order of 24 March 2021 1 BvR 2656/18, 1 BvR 96/20, 1 BvR 78/20, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20

10 https://prismic-io.s3.amazonaws.com/affaireclimat/18f9910f-cd55-4c3b-bc9b-9e0e393681a8_167-4-2021.pdf

11 Milieudefensie c. Royal Dutch Shell

12 <https://www.bilans-ges.ademe.fr/fr/accueil/contenu/index/page/bilan%2Bges%2Borganisation/siGras/1>

13 CE 1er juillet N° 427301, Commune de Grande-Synthe et autre

14 Setzer, J. 2020, "Climate Litigation Against 'Carbon Majors': Economic Impacts" Open Global Rights. <https://www.openglobalrights.org/climate-litigation-against-carbon-majors-economic-impacts/> ; The Geneva Association. 2021, Climate Change Risk Assessment for the Insurance Industry: A Holistic Decision-making Framework and Key Considerations for Both Sides of the Balance Sheet. Authors: Maryam Golnaraghi et al. February. https://www.genevaassociation.org/sites/default/files/research-topics-document-type/pdf_public/climate_risk_web_final_250221.pdf

CLIMATE

GOUVERNANCE ET DROIT