Interview with Delphine Misonne and Marine Yzquierdo

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Why are environmental organisations so committed to litigation?

MY: Faced with political inaction on climate change, litigation can force States and companies to reduce their greenhouse gas emissions while also bringing about political change. States, as regulators and negotiators in international trade deals, have become active participants in the fight for climate justice, with all the responsibilities that this implies.

Rather than seeking financial compensation, the goal of such lawsuits is to strengthen the existing law or change its interpretation. Since jurisprudence is a source of law, it allows for positive law to be developed, which evolves alongside changes in society itself. These lawsuits thus contribute to changing the regulatory framework by pushing public authorities to adopt more ambitious laws and regulations to reduce greenhouse gases.

As such, the judge becomes an active participant in the process. Didier-Roland Tabuteau, Vice-president of France's administrative Supreme Court (*Conseil d'État*), stated that "*It is the role of the Council of State to make sure that the objectives of the Paris Agreement on climate are respected*".[1] The administrative judge thus becomes the judge "*of how credible government actions are*", and not just how realistic they are; verifying whether the projected path is being followed and whether the actions carried out are sufficient to reach the objectives set.

Furthermore, because lawsuits are also used by civil society as a tool of mass mobilisation, they contribute to social change. This is because law is a means of whistle-blowing, of defending, of criticising, and of fighting for the recognition of our rights. This new social function of law has led to a change in the concept of the separation of powers. Montesquieu's famous words according to which "*judges are no more than the mouth that pronounces the words of the law, mere passive beings, incapable of moderating either its force or rigour*" are not quite true anymore.

DM: The involvement of civil society in litigation is also, in certain cases with a collective scope, the result of legal advances concerning access to justice for associations in environmental matters. In Europe, we benefit from the effects of the 1998 Aarhus Convention, undertaken under the auspices of United Nations Economic Commission for Europe ("*UNECE*"), a pillar of which deals

1. "*C'est le rôle du Conseil d'État de faire respecter les objectifs de l'accord de Paris sur le climat*" ["*It is the Council of State's role to ensure the objectives of the Paris Agreement are respected*"], Le Monde, 18 November 2022.

with the need to open the doors of justice to environmental protection organisations. In Latin America, the Escazú Agreement, which entered into force in 2021, has a similar aspiration. Who else would be the official defender of the environment, including the climate? Having said that, the first civil law cases taken on climate in Europe were mainly about the liability of public authorities with regard to *people*, not with regard to climate *per se.*

Climate cases differ from more traditional environmental cases (which have been numerous for a very long time, but receive much less media attention) in their emphasis on communication. They often have a website, call for fundraising, and are accompanied by festive events, press coverage, and detailed explanations on social networks. Many of them are led by well-known figures, from TV stars to young people involved in the YouthforClimate movement to mayors. Many emphasise the mass effect, involving hundreds of co-applicants. The case is therefore also being played out outside the courtroom.

As Marine noted, it is first and foremost strategic litigation, the particularity of which is that it is strongly rooted in the progress of scientific knowledge. In many cases, it is based on the scientific consensus crystallised in the Intergovernmental Panel on Climate Change ("*IPCC*") reports, on the seriousness of the issue, and on the urgency to act.

The effect of this litigation does not, however, ease all the tensions, nor does it necessarily lead to great leaps forward. However, it does have the merit of taking the climate issue out of diplomatic circles. Climate is not just a matter for the COPs, it is also a matter for citizens who are calling their respective states to account, or who are turning to the protection of supranational courts such as the European Court of Human Rights in Strasbourg.

How can fundamental rights be used? Have new principles and new positive obligations also been recognised?

DM: The link to fundamental rights was made, in the first judgement obtained in Europe (*Urgenda* 2015),[2] by recourse to the fundamental elements of civil law on State liability. It is through the notions of tort and duty of care – concepts that have been present in well-known texts for centuries – that the first injunction issued by a judge against a government emerged in the field of climate. It was on this basis that the judge ordered a government to reduce greenhouse gas emissions by a certain amount and by a certain date. So everything was there in the codes, it was just a matter of seeing it and seizing it. The Urgenda case demonstrated the State's failure to respect of its international commitments on human rights, including articles 2 ECHR (the right to life) and 8 ECHR (the right to respect for one's home), even though the danger to be avoided was foreseeable.

In the case of the European Convention on Human Rights, it is in particular Articles 2 and 8 mentioned above, but also Articles 11 (freedom of expression) and 14 (non-discrimination) that are used, not always successfully, before national courts. Indeed, the record is mixed. Some cases also involve human rights enshrined in national constitutions. Paradoxically, however, few cases are linked to the right to protection of a healthy environment, which is still imperfectly enshrined at several levels today (but for which much is expected since the universal recognition of the right to

2. *Urgenda Foundation v State of the Netherlands*, Hague District Court, 24 June 2015, C/09/456689/HA ZA 13-1396, ECLI:NL:RBDHA:2015:7145.

a clean, healthy and sustainable environment as a human right in July 2022 by the United Nations General Assembly).[3]

In terms of principles, certain climate cases revive the potential of the principle of preventing damage caused beyond the jurisdiction ("*no-harm*"),[4] reexamine the contours of social and climate justice in the light of the principle of common but differentiated responsibility,[5] strengthen the contours of the duty of vigilance of companies and begin to address the issue of the violation of human rights in the event of the insufficiency of adequate adaptation policies. Among other things, these cases also discuss the relationship between the concept of ecological damage and the degradation of the functions performed by the atmosphere, as well as demands for the affirmation of the right to a stable climate in law.

MY: There is a leveraging of fundamental human rights in several major climate cases. Some academics talk about a "*shift in rights*" regarding this new generation of litigation that invokes human rights. In the Urgenda case, which I will detail further below, as Delphine Misonne stated, the 2019 decision by the Dutch Supreme Court highlights the link between climate change and protection of human rights.

When studying climate litigation, we can observe three clear tendencies: (i) a hybridisation of rights regimes, in which human rights support the right to healthy climate (as in the *Urgenda* case in the Netherlands[6] and the *Klimaatzaak* case in Belgium)[7]; (ii) a creation of new legal obligations based on case-law, for States and companies, based on human rights (for example, in the French case *Affaire du siècle*, the complainants asked the judge to recognise a general principle of the right to live in a sustainable climatic system); (iii) an evolution in human rights to anticipate future climate-related violations (such as in decision of the German constitutional court dated 24 March 2021 regarding German climate law).[8]

The judge thus finds himself/herself in the delicate, yet essential, position, of reviving human rights texts, written in an entirely different context which, according to Christel Cournil,[9] calls for a renewed reading of human rights through an approach that is collective, generational, and based on solidarity; all of this in the midst of an unprecedented global crisis.

It should however be noted that the human rights argument can be limiting in certain ways. Firstly, some consider this approach to be individualistic, whereas the need is for collective action when it comes to climate urgency. There is a doctrinal debate on this point, as the goal of human

3. https://digitallibrary.un.org/record/3983329?ln=en.

4. "*States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.*" (Rio Declaration on Environment and Development, 1992, principle 2).

5. Founding principle of the 1992 Framework Convention on Climate Change (UNFCCC), according to which all the Parties are concerned by climate change, but pursuant to their asymmetric commitments; some are more in need of development than others. At the time, due to their historic responsibility and their financial capacities, only States listed in Annex I (developed countries) had to be at the forefront of tackling climate change.

6. *Urgenda Foundation v State of the Netherlands*, Hague District Court, 24 June 2015, C/09/456689/HA ZA 13-1396, ECLI:NL:RBDHA:2015:7145.

7. https://www.klimaatzaak.eu/en.

8. https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2021/bvg21-031.html;jsessionid=EE77D0CFD261AFA03AD532B660DE34FF.2_cid344.

9. *Les droits de l'Homme au service de l'urgence climatique?* [Are human rights serving the urgency of climate change?] Christel Cournil and Camila Peruso, JEDH 2022/2, p. 101-102.

rights is to protect the individual's interests, rather than collective interests. Furthermore, there are timescale limitations as climate issues are often future-oriented and concern not just current generations, but future ones also.

Thus, to a certain extent, the climate issue goes beyond the boundaries of human rights. That is why some academics, like Catherine Le Bris,[10] suggest the recognition of new fundamental rights, namely the rights of humanity, and in particular the right of humanity to a healthy environment. These rights of humanity are collective and intergenerational, aiming to protect the environment, maintain peace, and our common natural ressources.

The Council of Europe is currently working on adopting an agreement on the right to a healthy environment. Indeed, The Council of Europe's Parliamentary Assembly adopted a resolution in 2021 in which States declared themselves "*resolved to define the right to a healthy environment as an autonomous human right*". As the right to a healthy environment has already been recognised by the UN as part of human rights, the challenge now is to define, before the courts, the outline of a real, subjective right to a healthy environment. Climate litigation can contribute to this, provided that the victims of climate change are involved in these cases. The outline of this subjective right to a healthy environment has not been developed yet.

Which European and international cases have proved most effective in their recourse to the courts, and have they paved the way for later cases?

MY: As detailed in *Les grandes affaires climatiques* [The Major Climate Court Cases][11] edited by Christel Cournil, the movement for climate justice at global level dates back to the mid-2000s in the United States, where climate litigation has been particularly well developed, notably in resistance to President Bush's attitude when he refused to ratify the Kyoto protocol.

In Europe, it started in 2015 with the well-known Urgenda case in the Netherlands. This was an action initiated by the NGO Urgenda and 886 Dutch citizens against the Netherlands Government, aiming to raise the country's ambitions to fight climate change. In 2019, the Dutch Supreme Court confirmed the judgement on appeal which had compelled the Dutch State to reduce its greenhouse gas emissions by 25% by 2020. Following this Supreme Court decision, the Dutch government launched a EUR 3 billion action plan in April 2020 that included curtailing maximum speed limits on roads, closing coal-fired power plants, reducing cattle and pig herds, and greening cities. This action led to a remarkably effective legal outcome that no other environmental activism actions, either associative or political, had been able to achieve until then.

There are other cases such as one in Belgium (2015, Klimaatzaak, still ongoing[12]) and one in Germany (2021, regarding German climate law). In the latter, the German constitutional court judged that German climate law was not aligned with fundamental rights, basing its decision in part on article 20a of the German Constitution which provides for the protection of the natural foundations of life and animals for future generations.[13]

10. *Droits de l'homme et droits de l'humanité au service de la crise climatique* [Human rights and rights of humanity in tackling the climate crisis], Catherine Le Bris, JEDH 2022/2, p. 137-153.

11. Cournil, Christel, Les Grandes Affaires Climatiques [The Major Climate Court Cases], 2020.

12. https://www.klimaatzaak.eu/en.

13. Constitutional court of Karlsruhe, decision of 24 March 2021 published 29 April 2021.

In France, it is still in its early stages but there have been noteworthy victories with *Grande Synthe*[14] and the *Affaire du siècle.*[15]

Outside of Europe, two other victories deserve a mention. In Pakistan in 2015, a farmer initiated legal proceedings because government policy on adapting to climate change was inadequate, thus threatening the claimant's right to life, to health, and to food security. The judge engaged in judicial activism by using the claimant's arguments to require that the State set up a commission on climate change in order to rethink and rewrite climate regulations at regional and national level.

In Colombia, in 2018, the NGO DeJusticia along with 25 young people filed a special constitutional claim called "*tutela*" used to enforce fundamental rights, following the government's failure to reduce deforestation of the Colombian Amazon.[16] The Supreme Court ruled in their favour and ordered the State to present an action plan to reduce deforestation and to present an intergenerational pact for the life of the Colombian Amazon.

DM: There are many cases now in Europe, not all of which deal with human rights. As legislation on the governance of the climate issue multiplies, the content of lawsuits changes. They no longer only deal with ambition or lack thereof, but they also question how well certain measures are being interpreted, and their effects. Thus, they focus on the legality of some implementation measures, on the relevance of the content of plans, and even on the binding force of carbon budgets. The litigation extends to administrative jurisdictions. There are also criminal proceedings, which will continue to increase in number with recent civil disobedience actions and new protest types, such as those that have been carried out in museums.

The decisions that set the most solid groundwork are clearly those of the Supreme Courts. There have already been about ten of these decisions in Europe. Several cases are currently pending before the European Court of Human Rights and promise at least a landmark ruling, as they have been entrusted to the Grand Chamber.

Legislating or taking legal action, there is no predefined route to take as both make sense: is moving swiftly from one to the other a guarantee of constant progress for fundamental social rights?

DM: Yes, in a way, with the caveat that the judge cannot solve everything. He/she will thus signal from the outset the limits of his/her powers, by in some cases stating to the lawmaker: "*It is up to you, not me, to change that.*" The most striking cases are those in which the judge considers that he/she can issue injunctions to a government (*Urgenda*), or even a legislator (*Neubauer*), and where this attitude is validated by the highest courts.

In Europe, the Paris Agreement has encouraged the adoption of new legislation on climate governance. The European Union adopted a "*European Climate law*" in 2021, which mainly sets common targets for the member states. Once the legislator has exercised its discretion in this way, it becomes more difficult, if not impossible, to question its choices in terms of ambition through the courts.

14. Council of State, 19 November 2020, n°427301.

15. Paris administrative court, 14 October 2021, n° 1904967-1904968-1904972-1904976.

16. Supreme Court, *Future Generations v Ministry of the Environment and Others*, 5 April 2018.

MY: There is no predefined route, but the decisions issued as a result of strategic litigation announce the promise of legal revolutions by forging key concepts such as the State's duty to protect with a duty of care. These concepts are linked to fundamental rights contained in constitutions and with the human rights enshrined in the European Convention on Human Rights.

With regard to fundamental social rights, although there is no reference to the right to adequate housing in the European Convention on Human Rights, elements of this right can be inferred from other fundamental rights such as the right to respect for private and family life and the right to a healthy environment. This, after all, is the same reasoning that was adopted for the right to a healthy environment – before it was recognised by the UN and later by the Council of Europe – which was inferred from the jurisprudence of the European Court of Human Rights.

The specific link between climate change and housing was demonstrated by the Foundation Abbé Pierre in their brief as part of their voluntary third-party intervention in the *Affaire du siècle*. However, this intervention was rejected by the court as the Foundation's claims were different from those of the four other claiming associations to the extent that the Foundation had not requested for reparation for environmental damage.

What lessons and limits have you identified through this brave journey?

DM: This litigation has the immense merit of putting the human element back at the centre of the debate and of making it clear to states, but also to companies (and soon to universities, banks, insurers, etc.) that the climate danger is a matter of responsibility, of obligations to achieve results and of human rights. The climate is not an issue reserved only for the great international cenacles. It is about people's lives. It is about protecting the habitability of territories and, more specifically, reacting to the loss of habitable areas. The link between climate, housing, and living environments becomes obvious. It is courageous but also necessary. One of those invited as an actor to the table, the judge, who is independent from the other elements of the state, governed by law, and who must be listened to. But, beyond the rhetoric, it happens that some judgements denouncing breaches and shortcomings are not followed up. This is not, however, the case with climate judgements alone.

MY: From a legal perspective, these legal actions facilitate innovation by creating new jurisprudential obligations or by strengthening existing laws. Furthermore, they encourage structural change because they also have political repercussions. What is important is not just the court's decision but also the citizen's mobilisation that emerges around the case as well as the effects it has at political level. However, we need to ensure that the court decisions are fully respected and implemented. The recent judgment requiring the French State to pay two record penalties of EUR 10 million for air pollution demonstrates that the measures taken by the State – in this case to improve air quality – are insufficient. Furthermore, these legal proceedings take place over a long period of time, which is at odds with the climate urgency and the need to drastically reduce greenhouse gas emissions. In the Urgenda case, the legal action started in 2012 and the Supreme Court issued its decision in 2019. In the *Affaire du siècle* case, the preliminary claim was made in December 2018 and the administrative court issued its decision on 14 October 2021. The slow wheels of justice – a result of a chronic lack of resources – is detrimental to litigants, climate, and biodiversity. But yet, such litigation is a valuable means of highlighting and advancing action on climate change.