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Climate Change Litigation in the EU

A Concise Analysis of Landmark Cases in Belgium, France, Germany, and the Netherlands

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1. Introduction

In recent years, the link between climate change and positive obligations of a preventive nature that are incumbent upon States under human rights law has been increasingly debated. In Europe, there is currently a surge of climate change class actions in which domestic courts have ruled in favour of claimants. In spite of significant efforts, the national reduction trajectories have not followed a linear degressive curve. To the contrary, either the emissions are still increasing or they are not reduced as quickly as expected.
In the landmark Urgenda case (section 1), the Supreme Court of the Netherlands (Hoge Raad, hereafter HR) held that, given the severity of the impact of climate change, the Dutch State is subject to a duty of care in accordance with Articles 2 (right to life) and 8 (right to privacy and family life) of the European Convention on Human Rights (ECHR). These articles have direct effect and the Dutch State is required to adopt mitigating measures. Accordingly, an over-cautions policy for reducing greenhouse gas (GHG) emissions breaches Articles 2 and 8 of the ECHR. The French Council of State in a judgment of 19 November 2020 (Grande-Synthe) has been condemning the French authorities for failing to comply with the GHG reduction trajectory (section 2). By the same token, the German constitutional court ruled that the absence of legal guidance regarding the implementation of the post-2030 trajectory breached fundamental freedoms (section 3). Last, public authorities are likely to incur liability under domestic tort law in developing a haphazard climate change policy (section 4). Given that we comment upon judgments handed down by courts belonging to the civil law family, we have been paying heed to standing issues, which are much more complex than in common law courts.

2. Dutch review of the duty of care placed on the authorities to safeguard human rights: The Hoge Raad judgment of 20 December 2020 in the Urgenda case

The judgment of the HR given on 20 December 2019 in the *Urgenda* case upheld the Court of Appeal judgment of 9 October 2018 ruling on a collective interest action brought by the Urgenda Foundation on behalf of 886 Dutch citizens objecting to the inadequacy of

measures to reduce GHG emissions in the Netherlands. The HR judgment is of particular interest in view of the personal, temporal and substantive scope of Articles 2 and 8 ECHR.

In the landmark *Urgenda* case, the HR held that, given the severity of the impact of climate change, the Dutch State is subject to a duty of care in accordance with Articles 2 (right to life) and 8 (right to privacy and family life) ECHR. These articles were held to have direct effect and the Dutch State is required to adopt mitigating measures.

Where the risk is 'real and immediate', which is the case for the Netherlands, the State is under a positive duty to take preventive action. The preventive nature of the positive obligations does not require any acute or immediate danger. Even though there is scientific uncertainty concerning the exact nature of the risks that any sea level rise may have on the human population in the Netherlands over an extended period of time, the Dutch authorities are not relieved of their positive obligations to prevent such a risk from being realised. Accordingly, human rights law requires the State to mitigate (prevention) rather than to promote adaptation (harm reduction).[1]

In determining the scope of Articles 2 and 8, consideration must be given to the nature of the damage involved. With respect to untargeted risks, the concept of 'victim' and the 'demonstrable' nature of the damage or risk of damage must be interpreted more broadly than is required for industrial or technological risks. It follows that both ECHR provisions offer general protection to society against the risks associated with climate change.[2]

These measures must involve a 25% reduction of GHG emissions by the end of 2020, instead of the government's projected reduction of 20%. Such a target is deemed to be necessary to limit the concentration of GHG in the atmosphere to 450 ppm in order to prevent the dangerous climate change that would be associated with any temperature rise in excess of 2°C.

Because the 25% reduction of GHG emissions in 2020 ordered by the Dutch courts is deemed to be the minimum target to avoid significant damage from rising sea levels, the Dutch State has no margin of appreciation to postpone compliance with that target. Indeed, were the reduction to be put off any longer, additional efforts would be insufficient to exclude the risk of exceeding the 2°C temperature increase threshold.[3] Moreover, the scope for discretion left to the authorities as to the nature of the measures to be taken in order to achieve a target reduction of 25% does not prevent Articles 2 and 8 from having direct effect, and does not preclude judicial review of the exercise of that margin of appreciation.[4]

1 Case C-19/0035, *Urgenda* [2019] HR: 2019: 2006, § 7.5.2; Procurator General's Opinion, § 3.14.
2 Procurator General's Opinion, § 3.11.
3 Procurator General's Opinion, § 3.24.
4 Ibid, para 2.69

As a result, where the authorities are aware of a real and imminent threat, they must be required to take preventive action in accordance with their obligations under international and EU law.[5]

Scope of Articles 2 and 8 ECHR

There is no mention of the Paris Agreement obligations on the ground that the HR, as a Court of cassation, had to review the approach taken by the Court of Appeal in The Hague in its judgment of 9 October 2018, that was based on Articles 2 and 8 of the ECHR. Although this interpretation may appear bold, it is in fact in line with the case law of the European Court of Human Rights (ECtHR).

For around twenty years, environmental concerns have progressively been incorporated into the interpretation of first-generation human rights, including, in particular, the right to life (Article 2) and the right to respect for private and family life (Article 8) guaranteed under the ECHR. Thanks to a constructive and dynamic interpretation of the Convention, the ECtHR has been able, by extension, to guarantee a minimum level of environmental protection.

Until the The Hague Court of Appeal (judgment of 9 October 2018[6]) held that Articles 2 and 8 ECHR had been violated due to an overly cautious policy to combat global warming, the application of fundamental rights to this problem was still a disputed matter. The debate is now in full swing as climate risks may be distinguished from industrial and technological risks both due to their temporal unpredictability as well as the collective nature of the harm they are liable to cause. Specifically, the potential victims are by definition less easy to identify than residents living in the vicinity of a classified installation. However, with only a few exceptions (*di Sarno v. Italy*), the disputes ruled on to date by the ECtHR have generally concerned risks for which the victims had been able to establish a causal link between the activity in question and the violation of their rights.

The HR first recalled that the State is subject to positive obligations under Articles 2 and 8 (§5.2.2 and 5.2.3). The court then went on to reject the narrow interpretation of these provisions proposed by the claimant.

Ratione personae, the protection guaranteed under these two provisions is granted to the "society or population as a whole" that is threatened by an "environmental risk", and not exclusively to individual natural persons (§5.3.1 and 5.6.2).

Ratione temporis, whilst the "danger" that must be averted must be "tangible and direct", its "immediacy" does not imply that the damage suspected must arise immediately (§5.2.3), which would be impossible to demonstrate in relation to climate risks.

5 The Hague Court of Appeal, 9 October 2018, *Netherlands v Urgenda*, §43.
6 ECLI:NL:GHDHA:2018:2591.

Ratione materiae, in accordance with the precautionary principle,[7] which the HR inferred from Articles 2 and 8 ECHR, "preventive measures" that must be adopted in order to combat the climate emergency are required, even if there are doubts as to its specific manifestation (§5.3.2). According to the precautionary principle, "the existence of a tangible possibility that such a risk may manifest itself" results in a requirement to take appropriate action (§5.6.2). It is clear that since the case involved an application for an order of specific performance rather than a liability action, a more flexible approach was followed as regards the causal link between the inaction on the part of the State and the violation of the rights concerned.

This reasoning seems to be in line with the ECtHR case law. Where the risk is "serious and substantial", i.e. not purely hypothetical, neither the distance in time between the suspected impacts nor the absence of absolute scientific certainty as to the occurrence of the risk can discharge States from adopting all preventive measures to ward it off.[8]

If the risk is established as being "tangible and immediate", the State is thus required to adopt preventive measures, without prejudice to its margin of appreciation (§5.3.2). The HR went on to add that the State "policy" must not only be "coherent" and "timely", but must also take all action required in relation to the matter according to a "due diligence" approach (§5.3.3). The decision as to whether these measures are "reasonable and adequate" must be subject to judicial review. It follows that the State must bear the burden of proving that it has complied with these requirements.9 Finally, the obligation at issue pertains to the means and not to the result (§5.3.4; §2.53 of the advisory opinion of the Procurator General and the Advocate General).

As regards the tangible nature of the risk, the HR stressed the vulnerability of certain "communities" residing in the Netherlands to sea-level rises (§3.12). Nevertheless, the State could not require that The Hague Court of Appeal should identify with precision the communities the fundamental rights of which were liable to be violated, as this would be tantamount to requiring this court to furnish a *probatio diabolica* (§5.6.2). Large swathes of the population of the Netherlands may be exposed to such a risk (§5.6.2). The HR also stressed that the Court of Appeal had noted an "accumulation of specific risks" and not a global risk threatening the entire human race.

According to the case law of the ECtHR, and specifically the principle of effectiveness, Articles 2 and 8 ECHR cannot be interpreted in isolation. Pursuant to Article 31(3)(c) of the Vienna Convention on the Law of Treaties (the HR referred to the judgment in *Nada v. Switzerland*, §5.4.2), these provisions must be interpreted in the light of an understanding of the scientific facts ("*wetenschappelijke inzichten*") and general standards ("*algemeen aanvaard standaarden*") (§5.6.2). This openness towards science of the ECHR explains why

7 N. de Sadeleer, *Environmental Principles: from Political Slogans to Legal Rules*, 2nd ed. (Oxford, Oxford University Press, 2020) 135-369.

8 O. De Schutter, 'Changements climatiques et droits humains: l'affaire Urgenda' (2020) Rev. Tr. Dr. H. 15.

9 See further *Jugheli v. Georgia*; advisory opinion of the Procurator General and the Advocate General, § 4.181.

the HR followed the reasoning of the District Court of The Hague (judgment of 24 June 2015) and The Hague Court of Appeal, insisting repeatedly on the "scientific consensus" regarding the severity of the phenomenon, a consensus which has progressively consolidated over the last two decades within various international circles. For instance, the IPCC AR4 report from 2007 subsequently played a decisive role in establishing the substance of the requirement of due diligence.

According to Article 13 ECHR, States are required to put in place appropriate "means" in order "to prevent effectively the most severe harm" (§5.4.3). Thus, effective judicial relief must be guaranteed (§5.5.1, §5.5.2 and §5.5.3).

The Dutch Government also objected to the reasoning of the Court of Appeal that the Netherlands should adopt more stringent measures to reduce GHG emissions because it is a global phenomenon (§5.6.3). The HR drew on a number of sources of international law in support of its conclusion that the global nature of the phenomenon does not preclude individual responsibility on the part of the State (§5.7.7). The HR thus referred to treaty law (United Nations Framework Convention on Climate Change (UNFCCC)), customary law (the no harm principle that codifies customary international law10) and soft-law (draft articles of the International Law Commission on state responsibility) (see §5.7.2 to 5.7.7). Moreover, the possibility of judicial review is by no means called into question by the principle of the separation of powers (§6.3). It follows that the faint-hearted nature of the Dutch measures to combat climate change could be objected to with reference to Articles 2 and 8 ECHR on the grounds that the State "had failed to exercise due diligence by pursuing a policy that was suitable and coherent" (§6.5).

Since Article 53 ECHR requires a minimum level of protection, there is nothing to prevent the national courts from granting additional protection to victims (see §2.40 of the advisory opinion of the Procurator General and the Advocate General).

The objective of cutting GHG emissions from 25% to 40%

Whilst the objective of cutting GHG emissions by 80-95% by 2030 (compared to 1990 levels) did not appear controversial, the parties disagreed concerning the efforts that had to be made to achieve the intermediate objective for the end of 2020. Whereas the Urgenda Foundation called for a 25% reduction of global GHG emissions, the Dutch State on the other hand considered that both international and EU law allowed it to abide by its 2011 objective of a 20% cut. It will be recalled that the Court of Appeal had found against the Dutch State owing to its failure to achieve the scenario recommended by the IPCC in its 2007 report (AR4), according to which the industrialised states mentioned in Annex I to the UNFCCC are required to reduce their GHG emissions by 2020 by between 25% and 40% compared to emissions recorded in 1990. The aim of such a scenario is to avoid reaching a threshold of

10 See *Legality of the Threat or Use of Nuclear Weapons*, ICJ Rep 2 [1996], AO.

450 ppm CO_2, which would make it possible to limit overall global temperature increases to 2°C above pre-industrial levels. In its appeal to the HR, the Government argued that the distinction between industrialised States included in Annex I and other States had become blurred due to the breakneck industrialisation of a number of developing countries such as China (§7.2.5). The HR declined to follow this line of reasoning, invoking a variety of instruments (decisions, recommendations, reports, etc.) adopted both by the United Nations and by the EU. According to these texts, "an international consensus" has been established as regards "the urgent need for a GHG cut of 25-40% by 2020 in order to prevent heating in excess of 2°C" (§7.2.11). Moreover, the intermediate objective of 20% instead of -25% adopted by the State authorities is more in line with the Paris Agreement, which seeks to achieve a scenario under which global temperatures increase by 1.5°C rather than 2°C (§7.3.2).

The fact that such an obligation is incumbent upon all industrialised countries and not specifically on the Netherlands did not alter the individual responsibility of the Dutch State (§7.3.6). The HR also stressed the fact that the Netherlands have to date pursued a particularly lax policy compared to other industrialised countries and that CO_2 emissions in this country are particularly high.

In addition, the HR pointed out that the public authorities had committed before 2011 to achieving a cut of 25% by 2020 (§7.4.2). Upholding the Court of Appeal judgment, the HR held that the State had not been able to demonstrate how this more relaxed approach (a 20% cut in GHG emissions instead of the 25% reduction initially recommended) was indispensable.

In one of its numerous heads of cassation, the Government had argued that the Hague Court of Appeal had interpreted the obligation of due diligence in the light of the 2007 AR4 report of the IPCC on the assumption that it was a binding obligation, even though the IPCC is only a consultative scientific body. This interpretation was also argued to be mistaken (advisory opinion, §4.97). This head of cassation was rejected by the HR on the grounds that the interpretation of the obligation of due diligence was based on both factual and legal considerations regarding the responsibility of the Dutch State (advisory opinion, §4.205).

The Government also took the view that the goal of a 25% cut was disproportionate having regard to the costs associated with a more drastic reduction target. Specifically, the imposition of a 20% cut would only enable global temperature increases to be reduced by 0.000045°C by the end of the century (advisory opinion, §4.200). However, the HR did not find that the proportionality principle had been violated as it considered that the Dutch State is required to shoulder is international responsibility.

Finally, the discretion over whether to adopt adjustment measures rather than preventive measures did not convince the HR (§7.5.2).

Order to legislate ("bevel to wetgeving") and declaratory ruling of unlawfulness

The HR recalled that the courts must not become involved in the political decision-making process in terms of whether it is appropriate to enact legislation with specifically-defined content when issuing an order to legislate. Whilst it is a matter "solely for the legislator concerned to decide, taking account of constitutional rules, whether legislation with a certain content must be adopted", the courts may nevertheless issue a declaratory ruling of unlawfulness (§8.2.4).

The HR recalled that the contested judgment of the Court of Appeal did not specify the precise content of the measures to be adopted in order to achieve the intermediate target of a 25% reduction. It is in fact for the State to decide which action must be taken and to assess whether it is essential to enact legislation to achieve the reduction targets (§ 8.2.7).

Respect for the principle of the separation of powers

The Dutch Government had alleged a violation of the principle of the separation of powers ("*het stelsel van machtenscheiding*") on the grounds that the order issued by the Court of Appeal impinged upon the exercise of legislative and executive powers. The HR held that it falls "to the courts to review whether the Government and Parliament have properly exercised their powers in accordance with the legal framework established for them" (§8.3.2). The HR recalled in this regard that "the protection of fundamental rights is an essential element of a democratic State governed by the rule of law" (§8.3.3). The HR insisted on the exceptional nature of this case as it involved a "threat of dangerous climate change and it is clear, as was held by the first instance court and the Court of Appeal, and as is recognised by the State itself, that urgent action needs to be taken" (§8.3.4).

It will be noted that the Court of Appeal did not order a reduction in excess of the minimum target of 25% recommended by the IPCC in 2007 in order to avoid serious climate disruption (advisory opinion, §4.79).

3. French administrative review of legality: The French Council of State condemns the postponement of GHG emissions reduction

The French Council of State was called upon to rule on a case concerning compliance with commitments to reduce greenhouse gas (GHG) emissions. The applicant municipality challenged before the High Administrative Court the silence kept by the national authorities regarding its request that all useful measures be taken to curb the curve of GHG emissions on the national territory in compliance at least with the commitments made by France at both the international and national level. France had committed to reducing GHG emissions by 40% between 1990 and 2030 (Article L. 100-4 of the Energy Code) by providing for a

succession of five-year caps on GHG emissions. Moreover, Decision 2018/842/EU requires Member States to limit their GHG emissions annually "in a linear manner".

The municipality of Grande-Synthe has standing to obtain the annulment of implicit decisions of the French State because of “its immediate proximity to climate change and coastal flooding” and the increased risk of flooding, even though the “effects of climate change are likely to affect the interests of a significant number of municipalities”. The territory of the municipality of Grande-Synthe is in fact exposed to rising water levels, without the sea defences being able to guarantee full protection against the sea-level rise.

On the merits, the Council of State ruled that France's emissions reduction trajectory has not followed a linear degressive curve in recent years, as emissions increased between 2016 and 2017. The government decided on 21 April 2020 to postpone efforts over the longer term and thus shift the emissions reduction trajectory. The possibility of achieving the final objective of reducing GHG emissions by 40% in 2030 by postponing the bulk of the efforts after 2020 "along a trajectory that has never been achieved before" clearly does not convince the Council of State. Before giving a final ruling on the petition, the Council of State requires further investigation of the elements and reasons for establishing the compatibility of the refusal of the petitioner with the reduction trajectory set by the government.

On 1 July 2021, the Council of State (case 427301) required the French State to take "all useful measures" by 31 March 2022 to comply with the reduction trajectory set by Article L. 100-4 of the Energy Code. However, the administrative court did not specify the criteria for defining the "useful measures" that must be taken to comply with the legal trajectory. Being bound by the principle of separation of powers, the administrative court cannot determine the content of the measures that the State is required to take.

4. German constitutional review: The constitutional obligation placed upon the German lawmaker to set a GHG emission reduction pathway after 2030

In order to comply with the obligation under the Paris Agreement to limit the temperature increase to 2°C above the pre-industrial level, the Federal Climate Protection Act ("Klimaschutzgesetz") of 12 December 2019 set out a pathway to achieve a 55% reduction in GHG emissions by 2030 compared to the amount emitted in 1990. This trajectory should enable Germany to achieve climate neutrality by 2050. While the reduction in emissions was planned up to 2030, the federal lawmaker empowered the government to adopt ordinances to cover the period after that, without specifying the method to be applied.

On 24 March 2021, the German constitutional court (*Bundesverfassungsgerichts*) reviewed the constitutionality of the means by which the lawmaker intended to comply with the

objectives of the Paris Agreement.11 The review was carried out not in relation to secondary EU law and Articles 2-8 of the ECHR (right to life, right to privacy), but to all rights enshrined in the German Constitution (Grund Gesetz, hereafter GG). The fundamental rights that may be threatened by insufficient mitigation measures are interpreted in the light of Article 20(a) GG. This provision states that "Conscious of its responsibility towards future generations, the state is obliged to protect the foundations of life and animals by legal, judicial and executive means, ...".

Regarding standing of the applicants, the claims brought by individuals are deemed admissible while those brought by environmental NGOs are not.

A first plea concerned the violation of the protection of life and physical integrity (Article 2(2) GG) and the right to property (Article 14(1) GG).

The Constitutional Court accepted that, as an extension of the duty to protect against environmental damage (Article 20(a) GG), these two constitutional provisions include the duty to protect life, health and property against climate hazards. However, it held that the lawmaker had not exceeded its margin of appreciation. Indeed, by pursuing an objective of limiting the temperature increase to 2°C, in accordance with the Paris Agreement, it did not exceed the limits of its discretion (§211). Moreover, the lawmaker is able to increase the level of constitutional protection by adopting adaptation measures that would complement the mitigation measures.

Subsequently, the Constitutional Court ruled that the contested provisions produce a 'pre-interference effect' (*eingriffsähnlische Vorwirkung*) on all constitutional freedoms. Since the harmful effects of the emissions produced are irreversible (§262), the legislature cannot refrain *ad infinitum* from regulating them. Moreover, as the currently allowed emissions narrow the range of future reduction options that have to be adopted according to Article 20(a) GG, the exercise of (economic) freedoms related to activities leading to CO_2 emissions will have to be subject to more restrictive regimes. Furthermore, if the residual CO_2 budget were to be exhausted as early as 2030, fundamental freedoms enshrined in the GG would be jeopardised. Indeed, more restrictive measures — implying a societal change — would have to be rapidly adopted in order to ensure the transition to climate neutrality by 2050.

Fundamental rights are deemed to be the "intertemporal guarantees of freedom". An interference with fundamental rights can only be justified if it is consistent with all constitutional principles, including Article 20(a) GG. This implies that the lawmaker must avoid placing a disproportionate burden on the exercise of the applicants' fundamental freedoms.

11 BvR 2656/18, 1 BvR 96/20, 1 BvR 288/20, 1 BvR 78/20.

Admittedly, the Constitutional Court accepts that Article 20(a) GG does not take precedence over other constitutional interests, as the climatic interest must be placed on the same scale as the latter (§246). However, the traditional weighing of interests must be reconsidered: if the situation were to worsen, the interest in securing climate protection would have to be given greater weight in the weighing of interests.

Moreover, the German authorities claimed that a more ambitious climate policy would hardly prevent the rise of temperatures. The Constitutional Court dismissed that argument by stressing that the global nature of the phenomenon does not diminish the responsibility of the federal state, since Article 20(a) GG has an international dimension (§199).

Similarly, the fact that Article 20(a) GG is open-ended and is intended to be implemented by the legislature does not exclude the possibility that the legislative provisions carving out the projections are subject to constitutional review.

By pursuing the objectives laid down in the Paris Agreement, the federal Act of 12 December 2019 clarifies the scope of Article 20(a) GG.

The Constitutional Court recognises that, a priori, the contested provision does not violate the obligation to carry out climate action under Article 20(a) GG (§214). Due to the many uncertainties surrounding the available carbon budget (§222 to 229) and the effectiveness of the GHG emission reduction trajectories (§247), the lawmaker is endowed with some room for manoeuvre (§215; 229).

That said, this room for manoeuvre is not unfettered as Article 20(a) GG imposes a duty of care. In this connection, the lawmaker is obliged to take into account the probability of serious and irreversible damage occurring, as long as the scientific data are sufficiently credible. Moreover, it is settled case law that Article 20(a) GG imposes a permanent obligation on the legislature to develop environmental law in line with the latest scientific developments.

It follows that the lawmaker has breached the precautionary principle by not prudently planning the reduction of GHG emissions in order to protect fundamental rights.

As the present generation is consuming the remaining carbon budget while contributing minimally to the reduction efforts, future generations will bear the brunt of the burden. While it is of course possible to share the effort over the present and the forthcoming generations, the Constitutional Court noted that the efforts after 2030 will be considerable. At this stage it is not possible to determine to what extent the current policy places an unacceptable burden on the rights of future generations. However, the balancing of respective interests requires that precautionary measures be adopted to ensure a balance between the reduction efforts after 2030 on the one hand and respect for fundamental rights on the other.

The search for this balance requires that the reduction effort be programmed as far in advance as possible (§249 and 253). In this respect, the Court considers that the contested federal Act does not provide sufficient guarantees. Thus, while the legal provisions applicable to the pre-2030 period do not violate the duty to act with diligence, the same cannot be said for the post-2030 reduction trajectory. The lawmaker has been empowering the federal government to carve out the post-2030 commitments without proper guidance.

The Court left open the question raised by some of the applicants as to whether the fundamental right to a minimum level of subsistence (*menschenwürdiges Existenzminimum*) includes a minimum level of ecological subsistence. Although the Court did not reject this argument in principle, it found that the government had taken the necessary measures to avoid "catastrophic or even apocalyptic" events that could pose a direct threat to lives and livelihoods.

To conclude with, the importance of balancing the rights and duties of generations with those of future generations (to which Article 20(a) GG refers), as well as the duty of care in view of the prevailing uncertainty, are highlighted in this judgment. Although Article 20(a) GG leaves a lot of discretion to the authorities, legislation can be reviewed against this broadly-framed constitutional provision. Last, this constitutional provision obliges the lawmaker to favour ecological interests over economic interests in order to protect the fundamental rights of future generations.

This judgment had concrete implications on the German climate change policy. Despite being granted more than a year and a half to react to the Constitutional Court's judgment, the German lawmaker amended the Climate Change Act with stricter emission goals.

5. Belgian tort law: Tortious omissions to pursue a climate change policy consistently with international law

According to Article 1382 of the Belgian Civil Code, that was laid down in 1804 in the *Code civil des Français*: “Any act whatever of man which cause damage to another obliges him by whose fault it occurred to make reparation”. In other words, it recognises a subjective right to compensation for damage caused by the fault of others. The general character of this provision implied that the lawmaker only gave the rough guidelines to the civil courts. As a result, the civil courts were able to keep such a provision up to date over centuries in a completely changed society. Nobody expected that Article 1382 would one day be applied to the faulty behaviour of the public authorities in pursuing their climate change policy.

In a well-reasoned 84-page judgment, the Brussels Court of First Instance declared itself competent to assess whether the Belgian public authorities committed a fault within the

meaning of Article 1382 of the Belgian Civil Code.12 The claim was lodged by an NGO, Klimaatzaak, as well as 58,000 applicants.

With regard to the admissibility of the claim, the Court held that the applicants have a direct and personal interest in the liability action they had brought on the grounds that climate change poses a risk to present and future generations living in Belgium. Their direct and personal interest in the liability claim does not amount to an action in the general interest, which is precluded under Article 17 of the Judicial Code. It is justified because of the direct impacts the applicants could suffer from the existence of "a real threat of dangerous climate change", which is confirmed by "the diplomatic consensus based on the most authoritative climate science". The fact that other Belgian citizens may suffer damage comparable to that of the plaintiffs is not sufficient to "requalify the personal interest of each applicant as a general interest". The interest of the plaintiffs is also considered to be 'born and present" since they seek to "prevent the violation of a right that is seriously threatened" within the meaning of Article 18 of the Judicial Code.

Klimaatzaak's action was deemed admissible insofar as its social purpose, which is to prevent climate change, cannot be confused with the defence of the general interest. The moral damage claimed by the NGO does not coincide with ecological damage *sensu stricto* which, unlike French law (Article L142-1 of the French Environmental Code), has not yet been enshrined in the Belgian Civil Code.

The admissibility of the claims made by both the NGO and the 58,000 individuals has been assessed in light of Article 9(3) of the Aarhus Convention on access to information, public participation in decision making and access to justice in environmental matters. This paragraph obliges States Parties to guarantee "broad access to justice". According to the Brussels Court, the reference to "national environmental law" in this provision encompasses Article 1382 of the Belgian Civil Code, which constitutes "one of the foundations of domestic law for the environmental liability of public authorities".

On the other hand, the Court considered that the claim brought by 82 trees was not admissible in the current state of Belgian judicial law, as only human beings are endowed with legal personality.

On the merits, the plaintiffs based their claim on the violation of Article 1382 of the Belgian Civil Code due to the wrongful conduct (or negligence) of the federal state and the three Belgian regions (Flanders, Wallonia, Brussels), which are competent in environmental matters. The Court examined in detail both the scientific data and the international and EU obligations incumbent upon the Belgian authorities. Although the civil liability judge has, in principle, only a marginal control over the action of the public authorities insofar as he

12 Brussels civil court, 19 June 2021.

cannot substitute himself for the lawmaker, the wrongfulness of public action can be assessed in the light of their degree of knowledge of the risks.

By pursuing a deficient policy, the Court held that the public authorities were infringing the right to life, to respect for private and family life, and to respect for the home enshrined in Articles 2 and 8 ECHR. It thus followed the reasoning of the Dutch Supreme Court, which on 20 December 2019 condemned the Dutch State for violating these two fundamental rights. However, it rejected the violation of Articles 6 and 24 of the Convention on the Rights of the Child, in respect of which no positive obligation on the part of the Parties can be deduced. Nor did the Brussels Court base its reasoning on a violation of Article 23 of the Constitution, which enshrines a right to a healthy environment.

The factual data submitted to the Brussels Court allowed it to make three findings: (1) the authorities failed to meet the GHG emission reduction targets due to mixed results; (2) there was a lack of "good climate governance"; and (3) there had been "repeated warnings" from the European Commission.

First omission

Even if political statements and opinions from the scientific community do not constitute binding commitments, they can still be taken into account in assessing misconduct or tortious behaviour of public authorities. A close examination of various obligations placed on Belgium shows that it has failed to comply with the obligation of reducing GHG emissions in a timely manner. As for the future, the Court considered that the objective of carbon neutrality will not be achieved despite the possible adoption of additional measures.

Second omission

The complexity of the federal structure, the overlapping of competences between the Federation and the three regions and the absence of real consultation are evidence of faulty behaviour. Both Belgian (Court of Auditors, Senate) and EU institutions (European Commission, European Environment Agency) have confirmed this "failure", which constitutes a fault within the meaning of Article 1382.

Third omission

Since 2011, the European Commission has noted "the systematic and almost repetitive nature" of these failures. These findings underscore the difficulties Belgium has in achieving the climate objectives assigned to it.

Conclusion of the Belgian Court

Due to the combination of poor results in reducing GHG emissions, chaotic climate governance and repeated warnings from the European Commission, the Belgian authorities have not acted with the prudence and diligence expected of a good father (*bonus pater*

familias) in the sense of Article 1382. This wrongful conduct does not require that legislation has been annulled by the Constitutional Court. Nor does it require that the rules of European Union law have direct effect.

The applicants also asked the Brussels Court for an injunction against the public authorities to take the necessary measures to reduce GHG emissions. In particular, they asked for a judicial follow-up, sanctioned by a penalty payment. However, their request was not granted on the grounds that it would infringe the principle of the separation of powers. The Brussels Court considered that it should not deprive the public authorities of their discretion in determining the measures to be taken. Its review is limited to establishing "fault" within the meaning of Article 1382.

The Court emphasised that the Paris Agreement does not require the Belgian authorities to respect a trajectory and that EU secondary law only requires a 35% reduction in emissions of GHG compared to 2005 by 2030. In *Urgenda*, the Dutch Supreme Court had taken a more nuanced position: the principle of separation of powers had not been violated by the Dutch courts that had required a reduction threshold going beyond the minimum 25%.

Although the authorities have escaped a court injunction, the possibility remains that future victims of damage caused by droughts or floods could claim damages because the authorities' wrongful conduct has been established.

6. General Conclusion

Four conclusions may be drawn from our brief comparative analysis.

Firstly, framed by scientific imperatives and international obligations, the discretionary power of legislators and governments is not absolute. The political agenda cannot obliterate scientific findings and international obligations. Moreover, the State's margin of appreciation will be all the more restricted where climate change policies that have been adopted by the State have been poorly implemented and breach international and EU requirements.

Secondly, the French, German, Dutch and Belgian courts have been taking into consideration binding and non-binding rules. They referred to treaty law (UNFCCC), customary law (the no harm principle), soft law (draft articles of the ILC on State responsibility), as well as scientific reports in order to determine the due diligence obligations placed on the State authorities. The international law that is taken into consideration goes beyond treaty law (eg the Kyoto Protocol). Moreover, human rights formulated in relatively vague terms in the 1950 ECHR coexist alongside State commitments formulated in more precise terms, even though the respective beneficiaries are not identified. This is an example of reciprocal influences, which enable individual legal systems to be decompartmentalised. From a European perspective, this interaction between different legal systems is nothing new. This hybrid approach

enables the obligations resulting from the ECHR to be interpreted with reference to soft law commitments. In addition, the due diligence required under Articles 2 and 8 must be assessed not only having regard to Human Rights Convention obligations, but also in relation to the scientific consensus.

Thirdly, the precautionary principle is likely to be breached by the authorities on the ground that they have not been prudently planning the reduction of GHG emissions

Fourthly, irrespective of the State's contribution to this global phenomenon, it is required to shoulder its responsibilities. These responsibilities are not diluted by the fact that climate change is a global phenomenon and that more ambitious domestic restrictions placed upon emissions will not prevent ongoing climate change. The argument according to which a more ambitious climate policy would hardly prevent the rise of temperatures has been dismissed time and again. The fact that international instruments impose obligations on a group of industrialised States, without however specifying individual contributions, does not dilute State responsibility.

Last but not least, the question arises as to how effective these judgments are. Being bound by the principle of separation of powers, the French High Administrative Court and the German Constitutional Court could not determine the content of the measures that each State was required to take in order to comply either with their legal or constitutional requirements. The Belgian Court discarded the injunction suggested by the potential victims. Ultimately, the authorities are endowed with much room for manoeuvre in determining the relevant measures, as long as they comply with the reduction trajectories.

Author

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EU Climate Change Agenda in External Trade and Investment

This project seeks to investigate mechanisms for improving implementation of climate change policy responses in EU foreign trade and investment agreements. It bolsters shared knowledge between academic and policy experts in designing more efficient regulatory responses to climate change in global trade and investment contexts.