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Chapter 7

Climate Change Litigation in France: New perspectives and trends

Marta Torre-Schaub[*]

I. INTRODUCTION

Since 2018 several events have contributed to the social and political context that triggered an increase in climate change lawsuits in France.[1] The most relevant include the resignation of Nicolas Hulot, the former Minister for the Ecological and Inclusive Transition, due to government inaction on climate change and environmental issues; youth protests in September 2018 and the 'yellow vests' protests in response to the government's fuel tax increases. The context is also, of course, strongly influenced by the increase in the number of countries around the world bringing climate change issues before the courts.[2] It also involves further factors, such as the European Court of Justice decision on France's excessive air pollution levels since 2010,[3] the reaffirmation of justiciability of climate change cases in *Urgenda*,[4] and the influence of the doctrine of the 'rights of nature' (recognized recently in the *Future Generations* case in Colombia)[5] on the French legal concept of 'ecological

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[1] See M Torre-Schaub, *Justice climatique. Le climat au prétoire*, Paris, CNRS éd, forthcoming September 2020, especially Chapters 4 and 5; also, A Van Lang, 'Le changement climatique devant le juge adminsitratif ', *Revue française de Droit Administratif*, July-August, 2019; see, M Torre-Schaub a.o. (eds.), 'Les recours climatiques en France: influences et convergences de la décision Urgenda et du rapport du GIEC sur l'avenir du contentieux français', Special Issue, *Revue Energie, Environnement, Infrastructures*, n° 5, Mai 2019, 13-46; C Huglo, (n 1).

[2] D Markell and JB Ruhl, 'An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual?' (2012) 64 *Fla. L. Rev*. 15 (2012); E. Fisher, 'Climate Change Litigation, Obsession and Expertise: Reflecting on the Scholarly Response to Massachusetts v. EPA' (2013) 35:3 Law & Policy 236; S Varvaštian, 'Climate Change Litigation, Liability and Global Climate Governance – Can Judicial Policy-making Become a Game-changer?' Berlin Conference 'Transformative Global Climate Governance après Paris', 2016; M Torre-Schaub, 'La justice climatique. À propos du jugement de la Cour de district de la Haye du 24 juin 2015', *RIDC*, n° 3, 2016, p. 672-693; M Torre-Schaub, 'Les procès climatiques gagnent la France : quatre initiatives à suivre de près', *The Conversation*, 10 January 2019, <https://theconversation.com/les-proces-climatiques-gagnent-la-france-quatre-initiatives-a-suivre-de-pres-109543> accessed 15 June 2020; M Torre-Schaub, 'Les procès climatiques à l'étranger', *Revue française de Droit Administratif*, July-August, 2019, 660-667.

[3] Case C-636/18 *European Commission v France* [2019] OJ C 445. See 'France has systematically and persistently exceeded the annual limit value for nitrogen dioxide since 1 January 2010' (Press Release No 132/19, *Court of Justice of the European Union*) <https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-10/cp190132en.pdf> accessed 17 February 2020; CE, 12 juill. 2017, *Les amis de la Terre c/ Min. de la Transition écologique*, n°394254, Dir. 2008/50, 21 May 2008, JO L 152/1.

[4] *Urgenda Foundation v State of the Netherlands*, Rechtbank Den Haag, C/09/456689/HAZA 13_1396, June 24, 2015; Court of Appeal The Hague, oct 9 2018, Eerste aanleg, Bekrachting/bevestiging, ECLI :NL :GHDHA :2018 :2610, n° 200.178.245/01 and C/09/456689/HA ZA 13-1396; Hogue Raad, 20 December 2019, ECLI:NL:GHDHA:2018:2591, accessed 17 February 2020. Cf. C. Bakker, *Climate Change Litigation in the Netherlands*, Chapter 9 in this volume.

[5] *Future Generations v. Ministry of the Environment and Others* (2018, Supreme Court, Colombia). See 'Future Generations v. Ministry of the Environment and Others' (*Grantham Research Institute on Climate Change and the Environment*) <https://climate-laws.org/cclow/geographies/37/litigation_cases/7304> accessed 17 February 2020. See M Torre-Schaub, 'La

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damage'.[6] Additionally, there has been a push by the Green Party to include a reference to climate change in Article 1 of the French Constitution,[7] a declaration by the French Parliament of a climate emergency, and a new Climate Change Act.[8]

As a consequence of this dynamic context, both legal and political, national and international, several climate cases have emerged in France since 2019.[9] This emergent dynamic is the result of a combination of French legal innovation, more climate change-adapted environmental legal tools and the multiplication of climate litigation in other countries.[10] The hybridation of these elements[11] has resulted in a new and interesting climate change litigation context in France that could result in changes to the courts' procedural paradigm.[12]

This chapter describes the emergence of climate change litigation in the Hexagone. Section II studies the origins of climate justice and climate litigation in France. Section III examines the requirements for bringing the State before its courts with a special focus on the analysis of the most publicised case: '*l'Affaire du siècle*'. The study focuses on its potential, its limits and its possible legal consequences. In this respect, special attention is brought on the 'ecological damage' concept. Section IV considers the use of environmental law tools (mostly environmental impact assesments) as a new trend of climate change litigation in France.

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protection du climat et des générations futures au travers des « droits de la nature »: l'émergence d'un droit constitutionnel au « buen vivir »', *Revue Droit de l'Environnement*, n° 264, May 2018, 171-179.

[6] 'Recently, with the adoption of the 2016-1087 law of 8 August 2016 on the conquest of biodiversity, nature and landscapes, the concept of 'ecological damage' ('*préjudice écologique'*) became formally recognized in the French Civil Code. Thus, article 1247 consecrated a "non-negligible damage to the elements or the ecosystem functions or the collective benefits obtained by man from the environment," whose remedy is supported by 'anyone liable for ecological damage' (article 1246). (…) The recognition of 'pure' ecological damage, suffered exclusively by nature, allows for expansion of the system of civil liability for environmental damage, which was traditionally based on indirect damage suffered by the environment (damage to property, economic loss, personal injury), focusing on the media rather than the "victim".' See I Alogna, 'Environmental Law of France', in N Robinson a.o. (eds), *Comparative Environmental Law and Regulation* (Thomson Reuters, New York, 2018) Ch 21 para 38. See M Torre-Schaub, 'La réparation du dommage du fait du changement climatique reflexions à l'aune du préjudice écologique', in Actes du colloque Justice et Environnement, 30 January 2019, Assemblée Nationale, https://www.berangereabba.fr/blog/assemblee-nationale/save-the-date-colloque-justice-environnementale.html, accessed 15 April 2020.

[7] French Constitution of 1958, art 1. See the English translation on the French Constitutional Council website: <https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/anglais/constiution_anglais_oct2009.pdf>, accessed 19 February 2020.

[8] Climate emergency voted on 27 June 2019, and Climate and Energy Act of 8 Novembre 2019, *Loi n° 2019-1147* <https://www.legifrance.gouv.fr/affichTexte.do;jsessionid=BD575E23B610C988E8E663D10B90C9AD.tplgfr37s_1?cidTexte=JORFTEXT000039355955&categorieLien=id> accessed 15 June 2020

[9] M Torre-Schaub a.o. (eds.), (n 1), 13-46; 'Le contentieux climatique devant le juge administratif français', *RFDA,* 2019, 629.

[11] M Torre-Schaub, 'La gouvernance du climat: vieilles notions pour nouveaux enjeux', in M Torre-Schaub (ed) Special Issue 'Climat et Droit', *Cahiers de Droit, Science et Technologies*, n° 2, 2009, 143-165; M Torre-Schaub, 'Le contentieux climatique: quels apports au droit de l'environnement ? ou comment faire du neuf avec de l'ancien', *Dr Env*, n° 263, January 2018, 6-13; M Torre-Schaub, 'L'affirmation d'une justice climatique au prétoire (quelques propos sur le jugement de la cour du district de La Haye du 24 juin 2015)', 29 *Revue québécoise de droit international*, (2016), 161-183; J Lin, 'The First Successful Climate Negligence Case: A Comment on *Urgenda Foundation v. the State of the Netherlands'*, 5 *Climate Law* (2015) 65-81; JK De Graaf and JH Jans, 'The Urgenda Decision: Netherlands Liable for Role in Causing Dangerous Global Climate Change', *J. Environmental Law*, 27 (3), 2015, 517-527; J Van Zeben, 'Establishing a Governmental Duty of Care for Climate Change Mitigation : Will *Urgenda* Turn the Tide ?', 4 *Transnational Environmental Law*, 2015, 339-357; R Cox, 'A Climate Change Litigation Precedent: *Urgenda Foundation v. the State of the Netherlands'*, 34 *Journal of Energy and Natural Resources Law* (2016) 143-163.

[12] We use here the term « paradigm » in the sense of Thomas Kuhn. He suggested replacing it by 'disciplinary matrix'. It tends to designate the set of beliefs, values and techniques which are shared by the members of a scientific community, during a period of theoretical consensus. For further developments on this aspect, see M. Torre-Schaub (dir) Special Report, Mission Droit et Justice, *Les Dynamiques du contentieux climatique, usages et mobilisations du droit pour la cause climatique* (2017-2019) <http://www.gip-recherche-justice.fr/publication/les-dynamiques-du-contentieux-climatique-usages-et-mobilisation-du-droit-face-a-la-cause-climatique-2/> accessed 17 February 2020; M. Torre-Schaub (dir), *Le contentieux climatique, dynamiques en France et dans le monde*, Paris, Mare & Martin, forthcoming October 2020.

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Section V focuses on climate litigation against private actors and French fossil fuel companies. This chapter concludes in Section VI considering other new possibilities for climate change litigation in France as a consequence of the declaration of climate emergency.

II. THE ORIGINS OF CLIMATE JUSTICE AND CLIMATE LITIGATION IN FRANCE

Climate change litigation in France can be traced back to an opinion published in 2017 by the *Conseil Economique, Social et Environnemental* (CESE) arguing for the need to reflect on climate justice in France.[13] On the basis of that report, parliamentary Committees out to work around this notion, notably at the initiative of Maina Sage, MP for Polynesia, a French territory particularly vulnerable to climate change and the inequalities engendered by it. This first initiative was not successful, in part arguably due to the parliamentary majority's lack of interest in this subject. Since then, several climate justice forms of events have appeared in France. In this regard, the year 2019 is particularly significant: Four appeals were launched against the State and one against the fossil fuel company TOTAL. These actions have all been brought by environmental NGOs and some of them those organisations where accompanied by local authorities and city elected officials.[14]

Even if the practice of litigation is not as common in France as in the Anglo-Saxon world, the fact remains that recourse to the courtroom is spreading, in particular in environmental matters. Two reasons can explain this: first, the applicants' interest in bringing action against general standards is quite wide recognised in France[15]. Second, citizens are increasingly mobilizing the law in order to challenge failure of or inadequate action on the part of the public authorities in Environmental matters.

The first major climate change cases in France covered issues such as climate change adaptation plans,[16] climate change impact assessments,[17] and human rights due diligence.[18] The first case was the '*Grand Synthe'* case introduced before the *Conseil d'Etat* (Administrative Supreme Court) for 'illegal action of the administration' ('*excès de pouvoir*') and 'failure to adapt'.[19] Introduced in the same period, '*L'Affaire du Siècle*'[20] ('the case of the century') inspired by *Juliana v. United States*[21] is expected to produce important contributions to climate change law in France. The case, a legal initiative launched by four NGOs (*Notre*

[13] Conseil Economique, Social et Environnemental, CESE <https://www.lecese.fr/sites/default/files/pdf/Avis/2016/2016_10_justice_climatique.pdf> accessed 15 April 2020.

[14] See M. Torre-Schaub a.o. (ed.), (n 1), 13-46; M. Torre-Schaub (dir), Special Report Mission Droit et Justice (n 11) 20; M Torre-Schaub (dir), *Les contentieux climatiques, dynamiques en France et dans le monde*, Paris, Mare & Martin, forthcoming, November 2020.

[15] See CE, 3 juill. 1998, n° 158592, Bitouzet : Lebon p. 228, also affaire Motais de Narbonne c/ France CEDH, 2 oct. 2002, n° 48161/99 ; Soler-Couteaux P. et Carpentier É., Droit de l'urbanisme, coll. Hypercours, 2015, Dalloz, p. 904, CAA Nantes, 2e ch., 10 nov. 2009, n° 08NT02570, inédit au recueil Lebon et CAA Nantes, 2e ch., 5 oct. 2017, n° 16NT01991.

[16] *Commune de Grande-Synthe v. France* (2019, *Conseil d'Etat*, France). See 'Commune de Grande-Synthe v. France' (*Grantham Research Institute on Climate Change and the Environment*) <https://climate-laws.org/cclow/geographies/62/litigation_cases/7321> accessed 19 February 2020.

[17] *Guyane* (October 2018); *Europacity* (March 2018).

[18] Les Amis de la Terre v. Total (2019-2020). See 'Friends of the Earth et al. v. Total' (*Grantham Research Institute on Climate Change and the Environment*) <https://climate-laws.org/cclow/geographies/62/litigation_cases/7362> accessed 19 February 2020. See also the French Duty of Vigilance Law (Law No. 2017-399 of 27 March 2017), < https://www.legifrance.gouv.fr/eli/loi/2017/3/27/2017-399/jo/texte.> accessed 19 February 2020.

[19] *Commune de Grande-Synthe v. France,* ibid.

[20] *Notre Affaire* à *Tous and Others v France* (2018, France). See 'Notres Affaire a Tous and Others v. France' (*Grantham Research Institute on Climate Change and the Environment*) <https://climate-laws.org/cclow/geographies/62/litigation_cases/7316> accessed 19 February 2020.

[21] *Juliana v United States*, 339 F.Supp.3d 1062 (2018). Cf. M Gerrard, *Climate Change Litigation in the United States*, Chapter 1 in this volume.

Affaire à Tous, *la Fondation pour la Nature et l'Homme*, Greenpeace France and Oxfam France) before the Administrative Court of Paris, requests the French government to remedy its inaction on climate change (so called '*carence fautive*'). The plaintiffs are arguing for the recognition of a new general principle of law relating to the 'right to live in a sustainable climate system', also based on the concept of 'pure ecological damage'. They are doing so by asking the court to issue an injunction for the government to take all necessary steps to contain global warming below 1.5°C.

The status of climate change litigation in France requires consideration of the national judge as an 'effective' adjudicator of international law obligations, in order to enforce this body of law against the domestic government. Additionally, the application of the uniquely French concept of 'pure ecological damage'[22] (described as any harm or damage to ecosystems' functions) to the climate change field is an important legal development and a new avenue for challenging government and corporate acts that are detrimental to mitigating climate change.

It's also important to note that there is much discussion lately in France, specially within some academics events and recent publications, on expanding the right to a healthy environment to entail certain duties with respect to climate change[23], and the recognition of a general climatic obligation based on general principles of law.

III. CLIMATE CASES AGAINST THE STATE

A. Taking the French State to Court: Types of Actions

There are two types of actions that can be brought under French law to challenge the administration for deficiencies in climate matters: actions for the illegality of an administrative act and actions for liability.[24] As noted above, in France two cases – in February and March 2019 respectively – illustrate these types of contentious proceedings.

The first case was filed in February 2019 before the *Conseil d'Etat* by the mayor of Grande-Synthe for climate inaction, on the basis of an 'excess of power'.[25] This kind of action seeks to annul an administrative act. In this particular case the adaptation plan to climate change was deemed insufficient by the applicants. In this case, standing is relatively simple to prove. The municipality of Grande-Synthe can demonstrate that climate policies have a direct impact on it – for example, given its geographical location as a coastal municipality, which is particularly vulnerable to the risk of submersion linked to sea level rise.

A second case, known as the '*Affaire du siècle*', was filed before the Paris Administrative Court for wrongful acts of the State and for ecological damage due to climate change, therefore engaging its liability.[26]

[22] [Article 1386-20 Code civil has been replaced by Article 1247 since 1st October 2016.]

[23] See M. Torre-Schaub, « L'émergence d'un droit à un climat stable. Une construction interdisciplinaire », in *Droit et Changement Climatique. Quelles réponses à l'urgence climatique ? Regards interdisciplinaires*, (Actes du colloque Lancement du GDR ClimaLex, 9 cotobre 2018, Université Paris 1), Paris, Mare & Martin, September 2020, p.p. 63-84.

[24] Y Aguila, « Petite typologie des contentieux climatiques contre l'État », *AJDA* 2019. 1853.

[25] See Special Issue, *Le contentieux climatique devant le juge administratif français*, *RFDA* 2019. 629; C Huglo, 'Le recours de la commune de Grande-Synthe contre l'insuffisance des actions mises en œuvre par l'Etat pour lutter contre le changement climatique', in M Torre-Schaub (ed) Special Issue, *Revue Energie, Environnement, Infrastructures*, n° 5, 2019, 36-38; C Huglo, 'Procès climatiques en France : la grande attente. Les procédures engagées par la commune de Grande-Synthe et son maire', *AJDA* 2019, 1861.

[26] A Van Lang, 'L'hypothèse d'une action en responsabilité contre l'Etat', *RFDA* 2019. 629

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B. *L'Affaire du Siècle*

1. *The Real Issues, the real Limits*

L'affaire du siècle (The Case of the Century) is an action brought against the French Adlinsitration for its failure to comply with its obligation to tackle climate change.[27] The plaintiffs claim from the State symbolic damages (a token amount of 1 euro) for non-material harm to their collective interests.[28] In other words, the State is accused of having committed a fault by its legislative and regulatory 'failures' in climate matters. The French State, according to the plaintiffs, has not done enough, or not enough in time, in the fight against climate change. As a result of this 'failure', the State is responsible for 'ecological damage'. 'Ecological damage' is defined by the Biodiversity Act of 8 August 2016 – which introduced it in the French Civil Code – as 'consisting of a significant damage to the elements or functions of the ecosystems or to the collective benefits human-drawn from the environment'.[29] The case argues that the degradation of an ecosystem constitutes a real harm,[30]. It can be assimilated to damage falling under civil liability and thus it can be brought before the civil courts. If such damage is identified, it can then justify material or financial compensation whether necessary (when the repair of the natural environment is factually impossible)[31].

A number of challenges must be overcome for such an action to succeed: First of all, the judge must determine climate change to be a 'systemic and ecological damage'. Secondly, in the *Affaire du siècle*, the request was filed before the administrative judge, while the concept of ecological damage falls within the civil sphere. It will therefore be necessary for the administrative judge to demonstrate a willingness to broadly interpret what is meant by ecological damage, and to accept its applicability in this case and the court's competence to adress it.

Even if French administrative law holds a fairly 'broad' concept of fault, in this case, it seems difficult for the judge to establish the existence of a fault on the part of the State. Such determination is done in two phases. First, the judge defines the contours of this 'pre-existing climate obligation'. Second, the judge assesses the actions of the public administration in relation to the alleged acts. According to an already well-established French doctrine, a 'simple' fault is enough to engage State liability. Such a fault can result from a legal act or from a certain behavior of the administration. It can result from an action or an omission.

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[27] C Broyelle, 'L'affaire du siècle, le recours peut-il aboutir ?', Blog du Club des juristes, 26 march 2019, https://blog.leclubdesjuristes.com/laffaire-du-siecle-le-recours-peut-il-aboutir/, accessed 15 June 2020.

[28] C Baldon, 'L'affaire du siècle: une action juridique inédite pour contraindre l'Etat à lutter efficacement contre le changement climatique', in M Torre-Schaub (ed) Special Issue, *Revue Energie, Environnement, Infrastructures*, n° 5, 2019, 38-40.

[29] *Loi n° 2016-1087 du 8 août 2016 pour la reconquête de la nature, de la biodiversité et des paysages*, Article 1247 of the Civil Code. See n 6.

[30] https://actu.dalloz-etudiant.fr/le-billet/article/la-reparation-du-prejudice-ecologique/h/614de84395c17d3048a43efcc072f84d.html accessed February 2020; see also, Crim. 25 sept. 2012, n° 10-82.938 P, *AJDA* 2013. 667, étude C Huglo; *D.* 2012. 2711, note P Delebecque; *ibid.* 2557, obs. F-G Trébulle; *ibid.* 2673, L Neyret ; *ibid.* 2675, chron. V Ravit and O Sutterlin; *ibid.* 2917, obs. G Roujou de Boubée, T Garé, M-H Gozzi, S Mirabail and T Potaszkin; *AJ pénal* 2012. 574, note A Montas and G Roussel; *AJCT* 2012. 620, obs. M Moliner-Dubost; *Rev. sociétés* 2013, 110, note J-H Robert; *RSC* 2013, 363, obs. J-H Robert; *ibid.* 447, chron. M Massé; *RTD civ.* 2013, 119, obs. P Jourdain.

[31] *Loi n° 2016-1087 du 8 août 2016 pour la reconquête de la nature, de la biodiversité et des paysages*, Article 1247 of the Civil Code. See n 6.

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Under French Law, any illegality tainting an administrative act is considered a fault. Therefore, the issuance of an administrative authorization may constitute a fault – for example, if it has not fulfilled the legal conditions which are imposed thereon. A deficient act can also be considered a 'fault', as a form of omission.

The problem facing the judge is to show that the State has committed a fault through its inaction – either total or partial. The appreciation of a fault of this nature is not new, having been identified in previous cases such as those concerning asbestos exposure, and those regarding green algae in Brittany or the Mediator drug.[32]

In the asbestos case, the judge clarified the extent of the obligation on the State, explaining that the public authorities responsible for risk prevention should keep workers informed in the context of their professional activity.[33] Furthermore, the *Conseil d'Etat* affirmed that the State had the obligation to adopt, on the basis of scientific knowledge, the most appropriate measures in order to limit or, if possible, to eliminate these dangers. This case created the link between the duty to inform and the duty to act. Could this link, which therefore exists in French case law, be extrapolated to the climate issue? Therein lies the greatest legal question to be determined by the *Affaire du siècle*.

Moreover, it is worth recalling the decisions of 2017 and 2019, respectively concerning air pollution and the deficiency for which the French State was deemed to be at fault.[34] The Council of State (Conseil d'Etat) twice considered that the State had violated an obligation of result in line with the objectives set by the European directive on air quality.[35] The judges clarified that an obligation to act was clearly a requirement of the European directive, and concluded that the lack of results achieved was the consequence of a lack of 'effective' measures to improve air quality, which should have been – but had not been – taken. Accordingly, they determined the existence of a fault on the part of the State.

In climate matters, it will be up to the applicants of the *Affaire du siècle* to prove this 'lack of results'. However, and even if the judge accepts a 'delay' in State action, thereby creating a 'fault of the administration', the judge will at most have to determine the obligation to 'a' result (such as lowering greenhouse gas emissions), but in no case will the judge be able to determine obligations of 'means'. In other words, even if the *Affaire du siècle* was successful, this success would be limited because the French judge himself is constrained in his power to give orders to the administration. The judge cannot determine what precise measures or means the State should take, because it would interfere with the principle of separation of powers.[36]

2. The recognition of ecological damage as a basis for climate justice

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[32] Y Aguila, 'Petite typologie des contentieux climatiques contre l'État', *AJDA* 2019, 1853; see Special Issue, *Le contentieux climatique devant le juge administratif français*, *RFDA* 2019. 629; A Van Lang, 'L'hypothèse d'une action en responsabilité contre l'Etat', *RFDA* 2019. 629; C Broyelle, (n 24).

[33] CE 3 March 2004, N°241150, N°241151, N°241152 and N°241153, accessed 15 June 2020.

[34] Case C-636/18 *European Commission v France* [2019] OJ C 445. See 'France has systematically and persistently exceeded the annual limit value for nitrogen dioxide since 1 January 2010' (Press Release No 132/19, *Court of Justice of the European Union*) <https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-10/cp190132en.pdf> accessed 17 February 2020; CE, 12 July 2017, *Les amis de la Terre c/ Min. de la Transition écologique*, n°394254; Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe, OJ L 152, 11.6.2008.

[35] EU Directive 2008/50/CE of the European parlement and the Counsel, 12 May 2008 https://eur-lex.europa.eu/legal-content/FR/TXT/HTML/?uri=CELEX:32008L0050&from=EN, accessed 15 June 2020.

[36] M Torre-Schaub (dir), Special Report Mission Droit et Justice (n 11).

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So far, the French administrative court has only once ruled on the basis of ecological damage: in the recent case concerning illegal fisheries in the Mediterranean.[37] This new concept and its related civil liability is enshrined in article 1246 of the French Civil Code, which provides that anyone responsible for ecological harm is required to remedy the damage. The basis for the obligation to make reparation is thus clearly laid down. Under the Code, the action for compensation for ecological damage is open to anyone with the standing and interest to act, including registered environmental NGOs, recognised as legal persons. They can therefore claim a remedy for having been injured by this damage. It is not completely excluded, despite its inclusion in the Civil Code, that the administrative judge may take this opportunity to expressly recognise the applicability of this damage to climate change.

Clearly, the probabilities of success do not lie so much in the existence or non-existence of a French law 'adapted' to climate change, but in the will of the judges to interpret and apply the law in a flexible way, as the Dutch judges did in the Urgenda case.

3. The consequences of a future decision in L'Affaire du siècle

In legal terms, and assuming that the judge decides to interpret the State's 'fault' broadly, the conviction would result, at most, only in an injunction to 'act'. The judge would decide that the State should do more. But in no case will the judge be able to tell the government exactly what to do and by what means.

In the event that ecological damage is recognized, it would be a success for Environmental Law in general and in particular for the fight against climate change. However, the compensation sought is only of a symbolic nature, since the requesting NGOs only asks for one euro in damages. The judge could also possibly ask for compensatory measures for the damage recognized, but what kind of compensation should be envisaged in such case? Should he grant compensation for CO2 emissions by planting trees, for example? And if yes, where? In what proportion? At what time? Can we 'compensate' for an overflow of CO2 emissions in a place 'X' at a time 'T' by planting trees in a place 'Y' which will grow at a time 'T + 10'?[38]

The success of a positive decision would therefore be both symbolic and political. However, if the judge does not accept the existence of the ecological damage, consideration must be given to the effects of such a 'negative case-law' in an area where there is still very little jurisprudence and a narrow number of law cases. This would indeed risk undermining future environmental decisions on that matter for an indefinite period. Politically, the value of this action is obvious. First of all, the participating NGOs, now recognized as 'pioneers' in French climate justice are more committed to a Green political path. Their political visibility has increased considerably since the filing of this case.

Furthermore, in terms of public policy, if the case results in a favorable decision, it may show the way for more and better climate action by the State. This appeal could speed up the legislative process in favor of more effective provisions in the fight against climate change. As proof, in June 2019, barely three months after filing two appeals on climate justice in France, the first climate-energy Act was passed by the Parliament, setting the goal of 'carbon neutrality' as one of the flagship measures of French public policy on climate change. And just a few weeks before, the National Assembly had voted a declaration of 'climate

[37] *Parc national de Calanques*, Tribunal judiciaire de Marseille, 6 March 2020, https://www.actu-environnement.com/ae/news/prejudice-ecologique-braconnage-parc-calanques-marseille-35111.php4, accessed 15 June 2020.

[38] M Torre-Schaub (dir), Special Report Mission Droit et Justice (n 11); *Justice climatique. Le climat au prétoire*, (n 1).

emergency'[39]. The political petition leading to the judicial request of the *Affaire du siècle* have already been an unprecedented popular success, with more than 2,000,000 electronic signatures; even supposing that it did not succeed judicially, this initiative can already be considered a political and social success.

IV. THE NEED FOR MORE ENVIRONMENTAL CONTROL AND ASSESSMENTS: A NEW LITIGATION TREND IN FRANCE

In addition to these cases, a decision was rendered by the Administrative Court of Cergy-Pontoise on February 1, 2019. The decision originated from an emergency appeal by the NGO Greenpeace France, contesting the authorization given to the fossil fuel company TOTAL by the prefect of Guyana to carry out offshore drilling.[40]

The ultimate objective of the procedure before the Cergy-Pontoise Administrative Court requesting the cancellation of the drilling license in Guyana was to require the State to declare its committement to a policy of 'disengagement' from fossil energy. The judge, however, decided against the cancellation of the license. In the meantime, the company had given up on its project, for lack of sufficient economic interest.

Whatever was the judge's decision on the merits of the procedure (in this case he decided that the license should carry on), one might think, from an optimistic point of view, that this kind of appeal involves a change in mentality in climate matters.

That is to say that, eventhough in this particular case, the judge didin't ruled in favour of the protection of the fight against clilate change, the petition was based on the lack of the initial environmental assessment study, which has not taken into sufficient account the climate issue. We want here to point out that this type of case law, -based on the reproach of insufficient attention payed to the climate issue in the environmental assessment previous to any licence-, shows a new trend on climate change litigation in France.

Similar legal actions are being prepared against palm oil exploitation activities in the south of France and against projects that may have a significant impact on the increase in GHG emissions, for example the enlargement projects for Charles de Gaulle airport in Paris or the Nice-Côté d'Azur airport.[41] In this sense and following this new trend, many promising new climate change cases have been emerging in France in the last few months.[42]

V. MULTINATIONALS CALLED TO ORDER: THE FOSSIL FUEL COMPANY TOTAL ON TRIAL

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[39] http://www.assemblee-nationale.fr/dyn/15/textes/l15b1943_proposition-resolution# voted on June the 27th 2020 ; https://www.lefigaro.fr/flash-eco/l-assemblee-nationale-vote-l-urgence-ecologique-et-climatique-20190627

[40] Ordonnance n°1813215 *Tribunal administratif de Cergy-Pontoise* http://cergy-pontoise.tribunal-administratif.fr/A-savoir/Communiques/Environnement-le-tribunal-administratif-de-Cergy-Pontoise-rejette-les-referes-tendant-a-la-suspension-des-arretes-relatifs-aux-forages-en-Guyane, accessed 15 June 2020. See L Monnier, 'Quel rôle pour la justice administrative dans la lutte contre les projets climaticides ? Le cas de Guyane Maritime', *Revue Energie, Environnement, Infrastructures*, n° 5, May 2019, 32-35.

[41] Fifteen NGO recently prepared a legal action againt the enlargement of the CDG airport: https://www.batiactu.com/edito/recours-contre-extension-aeroport-roissy-58840.php accessed 15 June 2020; and another legal action against the enlargement of Nice International airport was presented before the *Tribunal administratif de Nice* on February 2020 but failed in the first hearing: https://www.francebleu.fr/infos/faits-divers-justice/le-projet-controverse-d-agrandissement-de-l-aeroport-de-nice-valide-par-la-justice-1582902699 accessed 15 June 2020.

[42] M Torre-Schaub (dir), Special Report Mission Droit et Justice (n 11); *Justice climatique. Le climat au prétoire*, (n 1).

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A lawsuit against the company TOTAL was launched in France in January 2020 accusing it of not having updated its vigilance plan based on a mapping of climate risk.[43] At the heart of this litigation are the duty of vigilance and the climate risk, which must now be taken into account in the extra-financial reporting of certain transnational companies.

The question of the 'justiciability' of businesses climate obligations is complex and shows another new trend fo clilate litigation rising presently in France..[44]

Bussiness climate obligations that should be imposed to companies don't rely on international obligations flowing from the Paris Agreement, which currently covers only States.[45] In addition to self-regulatory mechanisms or voluntary commitments such as CSR (social and environmental responsibility), and apart from other legal remedies,[46] it has become urgent to find legal mechanisms capable of creating binding obligation for large multinationals on environmental and social questions.

It is in this sense that the law on the Corporate duty of vigilance was adopted in France on 21 February 2017.[47] Article 1 of this law, codified in article L 225-102-4 of the French Commercial Code, specifies that companies with at least 5,000 employees within their direct or indirect subsidiaries, whose head office is located in France, are required to establish and effectively implement a vigilance plan. Those who have at least 10,000 employees in their value chains are also subject to the same obligations. Among those obligations and in the name of this duty, they must draw up a risk 'mapping', regular evaluation procedures, appropriate actions to mitigate risks or prevent serious harm, an alert mechanism, a system for monitoring the measures implemented and evaluating their effectiveness.[48] This law creates a duty for these large companies to carry out a risk analysis by identifying and assessing risks, and describing the measures implemented to address them. This duty can thus be defined as a new 'standard' of business behavior fueled by the principles of prevention and precaution in order to contain, among other risks, the climate risk. This has the consequence of enrolling these companies in a process of constantly reducing emissions, as indicated in Article 2 of the Paris Agreement (to keep the increase in the global average temperature well below 2°C and if possible at less than 1.5°C).[49]

[43] Tribunal Judiciaire de Nanterre, *Sherpa, NAAT et autres c. Total*, January 28th 2020; see S Mabile and F de Cambaire, 'L'affirmation d'un devoir de vigilance des entreprises en matière de changement climatique', in M Torre-Schaub Spécial Issue, *Revue Energie, Environnement, Infrastructures*, n° 5, May 2019, 40-46; S Mabile, 'Une action climatique contre l'entreprise Total sur la base du devoir de vigilance' in M Torre-Schaub (ed), *Les dynamiques du contentieux climatique en France*, Paris, Martin & Martin ed, forthcoming November 2020.

[44] F-G Trebulle, 'Le rôle des acteurs privés' in M Torre-Schaub (ed) *Bilan et perspectives de l'Accord de Paris, Regards croisés*, Paris, IRJS ed. Collection Bibliothèque André Tunc, T. 84, 2017, 127-138; L d'Ambrosio, 'La responsabilité climatique des entreprises: une première analyse à partir du contentieux américain et européen', in M Torre-Schaub et al. (eds), Special Issue, Changement climatique et responsabilité, quelles normativités, *Revue Energie, Environnement, Infrastructures*, n° 8-9, August-September 2018, 39-44.

[45] F-G Trebulle, 'Responsabilité et changement climatique: quelle responsabilité pour le secteur privé ?' in M Torre-Schaub et al. (eds), Special Issue, Changement climatique et responsabilité, quelles normativités, ibid., 20-27.

[46] Like those taking place in the United States currently against ExxonMobil and Chevron, founded on the violation of the duties of information or on fraud to consumers and shareholders, See for exemple *Exxon Mobile corp. derivative litigation* 2019, *Commonwealth v. Exxon Mobile corp.* 2019, *People of the State fo New York v. Exxon Mobile corp*. 2018, http://climatecasechart.com/case-category/securities-and-financial-regulation/, accessed 15 June 2020.

[47] Loi n°2017-399 March 27th 2017.

[48] S Mabile and F de Cambaire, 'L'affirmation d'un devoir de vigilance des entreprises en matière de changement climatique', in M Torre-Schaub Spécial Issue, *Revue Energie, Environnement, Infrastructures*, n° 5, May 2019, 40-46; S. Mabile, (n 38).

[49] S Mabile and F de Cambaire, (38).

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More precisely, the existence of this provision in the French legal system, which is unique in the world, has made it possible to file two climate justice claims against one of the largest French companies in the fossil fuel sector. In this sense, anyone demonstrating an interest in taking action can put this company on notice, in order to ensure the respect of its climate-related obligations under its duty of vigilance. This is what was sought on January 28, 2020 in a case brought before the Court of Nanterre.[50] The claim was based both on the aforementioned French law and on a report produced by one of the plaintiff NGOs, substantiating practices and activities contrary to the duty of care and vigilance by several oil groups in the world. The company TOTAL was asked to comply and respect this duty, eventually through a court order.

The Court of Nanterre, however, declared itself incompetent a few weeks after the filing of the case, justifying its position by the fact that the complaint should have been brought before a commercial court. The Court, in this disappointing decision, highlighted the fact that the very basis of the complaint – the law on the duty of vigilance – is codified in the Commercial Code and therefore lies within the competence of the commercial courts.[51]

A second appeal was brought in January 2020 against the same group and also on the basis of the duty of vigilance.[52] This second appeal relates more to the activities of the TOTAL group which may infringe human rights in the exercise of its activities in Africa, but environmental repercussions are also expected, in particular concerning the obligation to rework a vigilance plan for the company. This new plan will have to contemplate the possible risks that could jeopardize human rights in Tanzania, as well as the environmental risks, including climate change.

We can see that in France presently and in the name of this duty of vigilance '*à la française'*, the stakeholders (shareholders, consumers, investors), victims of climate change or exposed to its effects, can force a company to take the necessary measures to reduce its emissions. A hope that remains open to future trials.

VI. CLIMATE JUSTICE AND 'CIVIL DISOBEDIENCE': TOWARDS A 'NEW TURN' ON CLIMATE LITIGATION?

Climate litigation in France has recently presented another aspect which is undoubtedly less 'emblematic' and more complex than that created by the major cases previously discussed. This is the 'criminal' aspect of climate justice.

In February 2019, eleven activists took down a presidential portrait in the town hall of the *2nd arrondissement* of Lyon. The mayor lodged a complaint and the prosecution requested a fine of 500 euros. Released in September 2019 by a judgment rendered by the correctional court of Lyon[53], the same activists were however considered guilty of theft of public property on October 17, 2019 by the court of Bonneville for another act. The cases are part of a campaign called '*Décrochons Macron'*, in which environmental activists have been denouncing the French government's lack of climate action for more than a year and have decided to take action. Today there are up to approximately 133 portraits of President Emmanuel Macron

[50] TGI Nanterre, *Sherpa, NAAT et autres c. Total*, January 28th 2020.
[51] *Ibidem*.
[52] TGI Nanterre, *Les Amis de la Terre et Survie* c. Total, January 8th 2020.
[53] Tribunal correctionel de Lyon, September the 16th 2019.

unhooked all over France to denounce the 'emptiness' of government environmental policy. This time, it was not a matter of bringing a legal action, as shown previously, but of acting outside the framework of the law, through a activism close to civil disobedience. These various actions have given rise to some court decisions.

As part of this new form of citizen mobilization for the climate, on August 25, 2019, for example, environmental activists exhibited in Bayonne portraits of the President of the Republic unhooked from various town halls. The militant action – carried in particular by *Alternatiba*, ANV-COP21 and the *Bizi* movement – aimed to denounce, also through the international press, the inadequacies of government action in the field of ecology, energy transition and social justice. This media exposure also allowed environmental activists to shed light on the prosecutions of their 'unhooking' colleagues: there are currently approximately 74 searches and 93 people in police custody, which have resulted in at least 57 criminal prosecutions. Some of these activists have been prosecuted for taking off the walls presidential portraits in town halls (Mouvement "Déccrochons Macron) [54]. However, they received support by public figures, such as the former French Minister of the ecology and some scientists, who tried to demonstrate how government action was insufficient both considering the climate emergency and the international and European commitments binding on France. The defendants stressed the idea that 'the use of legal channels and the warnings of scientists were not sufficient leverage and that raising public awareness for political change seemed to them to require non-violent civil disobedience'. The acquittal was therefore requested in the name of a state of necessity: 'legitimizing a criminal act proportionate to the removal of a serious and imminent danger, the defendants having had no other choice within their reach than to confront the authorities with a measured reaction'.[55]

The Criminal Court of Lyon, in a decision dated 16 September 2019, acquited the defendants.[56] The main argument of the defense was the state of necessity stated in article 122-7 of the Penal Code according to which 'is not criminally responsible the person who, faced with a current or imminent danger who threaten him, performs an act necessary for the safeguarding of the person or property, unless there is a disproportion between the means employed and the gravity of the threat'.[57] The court therefore had to assess the proportionality between a current or imminent danger and the means employed in relation to the seriousness of the threat (taking off the walls a portrait). In its decision, the court seems to have considered that the current danger was characterized by a 'failure by the State to respect objectives which can be perceived as minimal in a vital area'[58]. In acquitting the defendants, the court showed great flexibility in the legal argument. It concluded that the activists' gesture should be 'interpreted as the necessary substitute for the impracticable dialogue between the President of the Republic and the people', within the framework of a representative regime introducing a special relationship between the Head of State and his fellow citizens, who are

[54] https://www.lemonde.fr/societe/article/2019/09/16/selon-le-tribunal-de-lyon-decrocher-un-portrait-de-macron-est-une-interpellation-legitime-du-president_5511134_3224.html

[55] *Tribunal correctionel de Lyon*, 16 September 2019, 19168000015, accessed 3 September 2020; see M Harscouët de Keravel, 'Tu ne voleras point le portrait de ton président sauf en cas d'urgence climatique', Dalloz Actu-étudiant, 23 September 2019 https://actu.dalloz-etudiant.fr/a-la-une/article/tu-ne-voleras-point-le-portrait-de-ton-president-sauf-en-cas-durgence-climatique/h/7ce0bf7da9e5444dfa91b50e301d2a76.html accessed 15 April 2020; also https://www.lexisactu.fr/le-tribunal-correctionnel-de-lyon-relaxe-les-decrocheurs-des-portraits-demmanuel-macron accessed 15 June 2020. M Torre-Schaub (dir), Special Report Mission Droit et Justice (n 11).

[56] *Tribunal correctionel de Lyon*, (n 48).

[57] Ibid.; M Harscouët de Keravel, (n 48).

[58] Ibid.; Tribunal *correctionel de Lyon*, (n 48).

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'admitted to exercise control over national policy without being able to question this authority individually'.[59]

Although legal, the debate quickly becomes political, even more than in other climate cases analyzed above. Indeed, the link between unhooking a portrait in a town hall and climate change and/or the ineffectiveness of environmental policies is not obvious. This judgment is not surprising since it is contrary to the strictness consubstantial with criminal matters.[60] If this judgment is indeed legally questionable, it is no less daring. It has received as much (or even more) media coverage as the *Affaire du siècle*. Nevertheless, its possible scope should be considered: it is uncertain whether it will be confirmed on appeal, or before the *cour de cassation*. And even in the case of a positive outcome, it would not guarantee systematic impunity for any form of civil disobedience, or for future citizen actions in the name of climate justice. That would undoubtedly be a risk of 'denaturing' the primary function of justice, which is to restore a balance of responsibilities in order to address the inequalities created by climate change.

Following the latest events in London, Brussels and other places all over the world, it is not excluded that these acts of peaceful disobedience multiply, thus giving rise to other trials. A shift could occur, going from the search for climate justice to the search 'at all costs' for measures to fight against the 'climate emergency'. This new interesting turn of Climate Change Litigation should be carefully observed in the future.[61]

VII.. CONCLUDING REMARKS

It is quite clear that today civil society (NGOs, unions and citizens) has the capacity to emerge as a counterbalance to State activities regarding fossil fuel and also private industrial projects. Climate change litigation, even in France, can be an interesting way to show new paths to fight against climate change.

In general, the different climate change cases around the world and in France recall both the commitments made under the Paris Agreement as well as the data from the latest IPCC reports. These legal actions are also part of a favorable context, against the backdrop of the Dutch Urgenda decision of December 2019, the latest youth movements led by Greta Thumberg and other young activists, and the actions of supporters of civil disobedience.

More specifically and to conclude, in France the different emerging climate change cases are characterized by five traits. First, in the most publicized disputes (*Affaire du siècle*, *Grande Synthe*), we find the same 'climate change litigation pattern' used in other major climate disputes such as *Urgenda* in the Netherlands or *Leghari* in Pakistan: searching for public responsibility and more ambitious carbon reductions' targets. Second, we note that climate change litigation in France takes particular forms, better adapted to French law. This is evidenced by the characterization of the State's fault and the emergence of the ecological damage recognition. Even if a negative decision in the *Affaire du siècle* could set a bad precedent, we are seeing a new trend in a 'French-style' climate change litigation. Thirdly, there is a new trend in French climate disputes to persevere on an open road by the possibility of invoking more 'classic' environmental tools such as environmental impact assessments. Fourthly, the path opened in France by actions based on 'civil disobedience' seems also

[59] Tribunal correctionel de Lyon, (n 48).
[60] M Harscouët de Keravel, (n 48); M Torre-Schaub (dir), Special Report Mission Droit et Justice (n 11).
[61] M Torre-Schaub and B Lormeteau, 'Aspects juridiques du changement climatique: de la justice climatique à l'urgence climatique', *Etude, JCP ed G*. n° 52, December 2019, 2382-2389.

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promising. Finally, the last feature, the law on the duty of vigilance (d*evoir de vigilance)* applied to fossil fuel companies, could also be at the origins of a new climate change litigation trend, full of promise in France and abroad. Specially in EU countries, if the adoption of a new Duty of care's UE Directive, establishing new obligations for fossil fuel companies, becames a reality in the near future.

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