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Climate Change Litigation and Legitimacy of Judges towards a « wicked problem »: Empowerment, discretion and prudence

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ABSTRACT

For the past ten years climate litigation has received growing attention from academics, lawyers and civil society.¹ Although the first climate trials emerged twenty years ago, they have recently increased and constitute nowadays a new trend in international, administrative and civil law.² While climate litigation has acquired interest as a relatively new procedural and judicial phenomenon, the contribution that judges make to the construction and implementation of ecological transition in the context of the climate crisis has become an object of studies in itself. This article belongs to the latter category of studies in that it explores the role of the judge in the context of climate litigation and presents both its possibilities and limits, while also highlighting the progress that has been made in this area.

INTRODUCTION

Climate litigation emerged as a new kind of environmental litigation in the early 2000s in the United States and Australia. This type of litigation has however multiplied in a spectacular

¹ United Nations Environment Program, *The Status of Climate Change Litigation: A Global Review* (2017) ; D. Markell & J.B. 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. Varvařian, “Climate Change Litigation, Liability and Global Climate Governance – Can Judicial Policy-making Become a Game-changer?” Berlin Conference “Transformative Global Climate Governance after Paris” 2016 ; L. Fournier, *The cost of inaction. The role of Courts in Climate Change Litigation*, LLM Thesis, 2017, University of Edimbourg.

² J. Smith, D. Shearman, *Climate Change Litigation*, Présidians, Australia, 2006 ; M. Torre-Schaub, « Justice et justiciabilité climatique : état de lieux et apports de l’Accord de Paris » in M. Torre-Schaub (dir.) *Bilan et perspectives de l’Accord de Paris, Regards croisés*, éd IRJS, coll. Institut André Tunc, T. 8, 2017, p.p. 107-124 ; M. Torre-Schaub (dir.) *Les dynamiques du contentieux climatique. Usages et mobilisations du droit*, mare & martin, Paris, 2021 ; M. Hautereau-Boutonnet, « Les procès climatiques par la « doctrine du procès climatique » », in C. Courril, L. Varisson (dir.), *Les procès climatiques. Entre le national et l’international*, Paris, Pedone, 2018, p. 46 ; W. Kahl, M.-P. Weller (ed), *Climate Change litigation. A Handbook*, Hart. Beck. Soman, Oxford U. Press, 2021 ; I. Alogna, C. Bakker, J.-P. Gucci, *Climate Change litigation: Global perspectives*, BICCL, London, 2021.

way, mostly in Europe, since 2015. This trend can be explained mainly by two factors: Firstly, the Paris Agreement was negotiated around that time and constituted an opportunity for civil society to mobilize. Secondly, next to the Paris Agreement several NGOs called for further possibilities to bring the matter of climate change before judges.

Several definitions of climate litigation coexist. The broadest definition includes any action in which its object, in fact or in law, is linked to climate change.³ For the purpose of this article however, we will limit ourselves to a more restricted definition according to which climate change is either the object of litigation in a direct way or is used as central argument. Climate trials occur above all in the domestic context and can be directed against the State or private actors. The plaintiffs on the other hand are most often NGOs, individuals, cities or foundations. Our study will focus in particular on trials demanding new commitments and more ambitious actions from the public administration and the recognition of more effective climate laws as well.

In public planning and public policy making, a “wicked problem”⁴ is a problem that is difficult or impossible to solve because of incomplete, contradictory, and changing requirements that are often difficult to recognize. It refers to a problem that cannot be fixed, where there is no single solution; and the adjective “wicked” implies resistance to solutions. Climate change has exemplified for decades this kind of problem, “whose social complexity means that it has no determinable stopping point”⁵. Moreover, because of complex interdependencies, the effort to solve one aspect of a “wicked problem” may reveal or create other problems, for example a cascade effect in litigation.

Because of the complexity and difficulties States and public policies have to face, climate change litigation testifies a trend towards a new polycentric climate governance that is no longer limited to the framework of UN negotiations, which never had found efficient solutions to tackle climate change.⁶ Indeed, the fight against climate change is no longer conducted exclusively in the international arena. Domestic and local levels are becoming an increasingly favorable and effective framework for fighting climate change with legal tools. In this evolving context, domestic courts cannot be an exception to the broadening of the venues for climate discussion and governance.

This model of governance involves new alliances between different actors (NGOs, citizens, local authorities) but it shows a “pathological” side of climate Law and of the “wicked” difficulties public Administrations have to address. Climate change litigation is the reflection of either the absence of climate change laws and/or public Policies, their inadequacy, or, more in general, their unsuitability for accommodating climate phenomena. In order to fill these gaps or to respond to the growing demands of civil society, a paradigm shift is taking place

³ K. Thail, R. Lord, « What is climate change litigation ? », Practice Note, <https://www.lexisnexis.co.uk/legal/guidance/what-is-climate-change-litigation> (consulted April 2022)

⁴ R. J. Lazarus, Super wicked problems and climate change: Restraining the present to liberate the future, 94 *Cornell L. Rev.* 1153, 1160 (2009) quoted in *The Status of Global Climate Change Litigation: a Global Review*, UN Environment Report, Sabin Center for Climate Change Law, Columbia University, 2017, p. 7.

⁵ *Ibid.*, p. 8

⁶ H. Van Asselt, and F. Zelli, “International Governance: Polycentric Governing by and beyond the UNFCCC” In *Governing Climate Change. Polycentricity in Action?*, ed. A. Jordan, D. Huitema, H.V. Asselt, and J. Forster, 2018, Cambridge, UK, Cambridge University Press 29–46 ; R. Hirschl, 2008, « The judicialization of politics ». In *The Oxford Handbook of Political Science*, ed. R.E. Goodin, Oxford, UK, Oxford University Press, p.p. 253–274

throughout the courts in order to crystallize the right to access to justice in climate matters. Judges are increasingly called upon to fix climate change issues, but their role is still not comfortable nor free from difficulties and limitations. This article aims to show how judges face this challenge which places courts somewhere between empowerment, discretion and prudence. Several questions arise here. The one that immediately comes to mind is the legitimacy of judges to decide or rule on climate issues. Is the court the place to address climate issues? Can – and should – judges do something to "compensate" for the slowness and lack of ambition of climate texts in international law?⁷ Let us recall that climate litigation is mostly developed before national judges and that its primary purpose is to appeal to national laws. But, in practice, climate lawsuits present elements that refer not only to domestic law, but also to international law.⁸ Are national judges entitled to undertake such an approach?⁹ By the same token, at least in our European legal systems, judges should interpret the law without creating it. Also, in the face of this kind of limitation, it seems appropriate to ask what role can judges play in the fight against global warming. What can they do? What should they do? With what kind of means? What limits and obstacles do they face? At the end of the day, what is then their contribution?

First of all, this article aims to analyse the role of judges in climate change litigation and the enforcement of climate Law (I). Secondly, this article will study the contribution of judges to tackle climate change. In doing so, this article traces what limits and difficulties judges must face, but also which opportunities are open to them (II). Our aim is to present, through the analysis of several decisions, what is the actual contribution of administrative jurisdictions in the implementation of climate laws. From this perspective, this article has the ambition to shed some light on the part played by judges in pursuing the ultimate target of the Paris Agreement and of European legislation on climate change, i.e. to reach carbon neutrality by 2050.

I. Shall judges play a role in Climate Change?

Portalis wrote that "the law does not have all the power and cannot say everything".¹⁰ The primary function of Law "is to fix, through essential lines, the general principles of law, to establish fruitful principles and not to descend to the details of questions that may arise in different matters. And, it is the judge, inspired by the general essence of the laws, who must direct the application". The judge who refuses to address a case, alleging insufficiency or non-existence of the law, would be denying justice to those who deserve or need it. However, the judge is not allowed to create law by recurring to existing regulation or general provisions, while drafting his decision. "Jurisprudence" is recognized by the law but not as a "source"

⁷ M. Torre-Schaub, « Les procès climatiques à l'étranger » in *Le juge administratif et le changement climatique*, Dossier spéc., *RFDA*, juillet-août, 2019 ; M. Torre-Schaub et B. Lormeteau, (dir.). Dossier *Les recours climatiques en France*, *EEI* n° 5, May 2019, p.p. 12-45

⁸ Sabin Center for Climate Change Law, Columbia University <https://climate.law.columbia.edu/> et Grantham Institute –Law and Environment, imperial College of London <https://www.imperial.ac.uk/grantham/> ; See also. C. Voigt, « Climate Change as challenge for Global governance », in W. Kahl and M. Wellers (eds.), *Climate Change litigation –Liability and Damages from a comparative perspective*, Verlag CH. Beck/Hart, 2021, p.p. 1-19 p. 15, §72

⁹ M. Torre-Schaub, « Decision Making Process at the Courts Level: The example of Climate Change Litigation », *Revista de la Universidad de Granada, Special Issue Derecho y Cambio Climatico*, n° 12, 2008, p.p. 57-72

¹⁰ Portalis, Discours préliminaire Code civil, « La loi ne peut tout pouvoir et ne peut tout dire »

that creates it, at least in our Romano-Germanic legal system.¹¹ Likewise, in the Kelsenian pyramidal model, the jurisdictional act appears at the bottom of the pyramid. The judge applies the law and, according to Kelsen, it is an act subordinate to legal norms with general effect.¹²

However, more and more often, judges are producing general provisions in certain particular cases, under the guise of an interpretative act of the law in force. The supreme courts of several countries of civil law go even further and the French *Cour de cassation*, for example, enjoys great freedom in this respect, as it is able, on occasion, to lay down certain general and abstract rules. To this must be added the aforementioned rule prohibiting the denial of justice on the basis of silence, obscurity or insufficiency of the law. This provision obviously allows the judge to create law. The law thus created must be standardized (become the standard of application). This operation allows the judge to rule again in the same sense as he did in the first place.

In common law systems, case law can be regarded as a genuine source of law. However, British legal culture refer to case law as "judge creating Law" rather than only "deciding case law". Whatever the appropriate term, common law systems are based on the principle of *stare decisis*, according to which the answer to a question of law and the solution applied in that particular case should be applied to as many similar cases as possible. This principle, moreover, informs all lower jurisdictions. Even the judge who ruled in the first place has to comply with his decision, according to the *stare decisis* principle. The future legal force given to the decision entails – when judging identical or similar questions – a work of casuistry¹³ that often requires a high dose of creativity.¹⁴ Thus, both in our Romano-Germanic legal system (civil law), in order to not deny justice when statutory law is silent, or in the common law system – because judges have more creative freedom – judicial decisions can produce law. The question that this article raises in the first place is therefore whether the opposition between law and jurisprudence as sources of law is really still a current issue or whether we should not revise the existing position on the matter and apply some flexibility to the traditional assertion (A). This question must however be asked with regards to environmental law and, more specifically, to climate change (B).

A. The legitimacy of the judge to enforce the law

It is often the case that in new branches of law, such as environmental law, new problems and issues arise to which the law does not provide a direct answer. It also happens, as in the case of climate change, that positive law does not yet have all the solutions or answers, given its novelty and the scientific uncertainties surrounding its subject. In these cases, the judge can play a determining and creative role.¹⁵ It therefore seems relevant to us to emphasize that the judge can be a producer of law in relatively new legal scenarios that have not yet been

¹¹ Also called « Civil Law », See, <https://www.britannica.com/topic/civil-law-Romano-Germanic> (consulted on March 2022)

¹² F. Ost, M. Van de Kerchove, *De la pyramide au réseau ? Pour une théorie dialectique du droit*, Univ Saint-Louis, Brussels, 2002

¹³ *Casuistry*, the moral theology devoted to resolving problematic cases, offered general rules to swearing lawfully, <https://dictionary.cambridge.org/fr/dictionnaire/anglais/casuistry> (consulted on June 2022)

¹⁴ J. Foyer, Allocution d'ouverture, in *La création du droit par le juge*, *Archives de Philosophie du droit*, T. 50, p. 5

¹⁵ *Chevron USA in Les grands arrêts de la Cour Suprême*, p. 1017

regulated by the law, such as those opened by climate change. The issue to be examined here is to what extent the judge participates in the "governance" of climate change law.

The answer to the question: "what precise role the judge can play in climate change issues" ? requires some preliminary remarks. Using the dichotomy that divides law into its procedural and substantive aspects, the question of the judge's involvement in tackling climate change falls somewhat between the two. The procedural aspect is essential, because by addressing it we obtain the answer to the question: who is entitled to go to court to settle a dispute concerning climate change. But substantive law is also relevant, because without its analysis, we would never be able to answer the question of what could be claimed. In short: what is the core of a climate change lawsuit? The two questions will therefore be analysed together, as they seem to be inseparable in this particular context.

Likewise, environmental law is made up of new elements, but also makes use of classical legal concepts. Thus, legal principles such as the principle of participation or the right to environmental information are new legal concepts. The parties and the judge will have to use them in a trial involving an environmental issue. The precautionary principle also seems to be particularly well suited to questions relating to climate change, mostly because it's a matter of great scientific uncertainty.¹⁶

Environmental law also makes use of existing legal tools such as contract law, liability law or property law. Thus, the second question addressed by this article is the extent to which new mechanisms and principles of law are used to solve issues related to climate change, or to what extent the judge can interpret already existing instruments to solve legal issues related to this global crisis.¹⁷

The judge plays a central role in environmental law, as litigation in this area has increased dramatically since the end of the 1970s¹⁸. Jurisdictions at international, regional (European Union, Inter-American Commission on Human Rights, Merco-Sud) and national level have seen numerous trials that opened up new paths in the development of environmental law.¹⁹ Several international conventions encourage and follow this trend, such as the Lugano Convention of 1993, the Aarhus Convention, or the Strasbourg Convention of 1998 on criminal law. This seems to create what we could call a "community of judges" who collaborate at international, regional and national level, each using principles and concepts that emerge in other jurisdictions at their own level of competence.²⁰ Thus, principles such as

¹⁶ O. Bodanski, N. Haigh 1994. *Interpreting the precautionary principle*. In T. O'Riordan & Cameron, *Earthscan*, London, 220 p ; G. J. Martin 1994. « Principe de précaution, mesures provisoires et protection de l'environnement », *Aménagement-Environnement*. Kluwer Éditions Juridiques Belgique 4, 215 ; A. Laudon 1996. « Le droit face à l'incertitude scientifique: risques, responsabilité et principe de précaution ». *Colloque international, Quel environnement pour le XXI^e siècle ?* ; M. Rémond-Gouillou 1993. « Le risque de l'incertain : la responsabilité face aux avancées de la science », *La vie des sciences, CR. série générale t 10*, 4, 311 ; L. Boy, « La nature juridique du principe de précaution », *Nature, Sciences et Société*, 1999, 7, 3, p.p. 5-

¹⁷ M. Torre-Schaub, « Le droit des changements climatiques : vieux instruments pour nouveaux problèmes », *Cahiers de Droit Science et Technologies*, 2009, n° spécial M. Torre-Schaub dir *Dossier Droit et climat* ; M. Torre-Schaub, « Le rôle des incertitudes dans la prise de décision aux Etats-Unis. Le réchauffement climatique au prétoire », *Revue internationale de droit comparé*, 2007, n° 3, p.685-713

¹⁸ S. Maljean-Dubois, dir *Le rôle du juge dans le développement du droit de l'environnement*, Bruylant 2008

¹⁹ G. Canivet, « Les influences croisées entre juridictions nationales et internationales : éloge de la bénévolence des juges » in *Les influences croisées...* <http://www.ahjucaf.org>

²⁰ S. Maljean-Dubois, p. 195.

precaution, sustainable development, or prevention appear in decisions in the international, regional and national arenas. As some authors have claimed, we are moving towards a "common law" on the environment.²¹ The question that emerges here is whether going to court to settle issues not clearly regulated by the law gives judges the ability to offer solution to this legal [vacuum/void].

If this question was indeed often asked in the early 2000s, when climate change litigation timidly started in the US and Australia, it seems that it's no longer pertinent today. As the European Union's impulse is felt greatly in domestic climate legislation, and the Paris Agreement has had a similar effect, the question to be asked now should be whether the judges (civil and administrative) can assist the implementation of existing laws by interpreting them in such a way that their "normative" content (or lack thereof) is no longer an excuse for the government's inaction in climate change policies.²²

B. Judges' role in climate change litigation

This section will examine the actual contribution of judges to the improvement of climate law first (a). In a second step, this section analyses the incipient [stage] [also, of development] of climate change litigation (b).

a) The contribution of judges to the improvement of Climate Law

Calling on the judge to solve a question not previously regulated by the law occurs frequently, especially in common law countries. It is not, however, a general rule, nor is it as obvious as it may appear at first glance. We will take the United States as an example here, as some cases have shed much light on this issue since the early '00s. A debate has been raging in the United States for more than twenty years. This debate has been settled to some extent in favor of the judiciary, empowering it to make decisions on issues on which the law is somewhat silent.

We know that the separation between the executive, legislative and judiciary powers is the basis of the rule of law. Nor can we ignore that, even in the United States, the judge does not have the power to substitute himself to the Congress (in legislative matters) or to a Governmental Agency (in regulatory matters). There is, however, also an obligation for Governmental Agencies to act in a "reasonable" manner. It is often in the interpretation of this "reasonableness" that judges have been able to slip their ability to make decisions in the face of regulatory "inaction" from an Agency. In other words, faced with a specific, unregulated problem, the executive branch, through its regulatory capacity, and the legislative branch, are required "to do something about it", so that the situation is sorted out. This is the recent interpretation of the "reasonableness" obligation. It is thus an obligation to do.

On the other hand, in the very first climate decision ruled by the US Supreme Court – *Massachusetts v. EPA* – the judges enabled their participation in decision making because "Nor can EPA avoid its statutory obligation by noting the uncertainty surrounding various features of climate change

²¹ M. Delmas-Marty, *Vers un droit commun de l'humanité*, Interview with Ph. Petit, coll textuel, Paris 2004

²² *Massachusetts v EPA & al. 05-1120, 549 U.S 04/02/2007, Connecticut v Electric Power co*, NO 04-CV-05669, 2004 (SDNY, 07/21/2004, M. Torre-Schaub, « Le rôle des incertitudes dans la prise de décision aux Etats-Unis : le réchauffement climatique au prétoire », *Revue internationale de droit comparé*, n° 3, 2007, p.p. 685-713

and concluding that it would therefore be better not to regulate at this time. See 68 Fed. Reg. 52930–52931. If the scientific uncertainty is so profound that it precludes EPA from making a reasoned judgment as to whether greenhouse gases contribute to global warming, EPA must say so». ²³ In this context, the next question to ask is how the issue of climate change was solved by the judges in the very first landmark climate change case. ²⁴

b) The incipient stage [of the development of] climate change litigation

In 2006, numerous scientists have concluded that the increase in GHG emissions from fossil fuels such as CO₂ was a major contributor to global warming. The legal instruments regarding climate change were at the time already a complex patchwork of legal and scientific issues. The legal issues surrounding this problem were only solved in part because of international law, and especially thanks to the Kyoto Protocol (1997). As far as Europe was concerned, the 2004 GHG Emissions Trading Directive triggered the creation of GHG regulations and legislation at the domestic level. But no special climate laws were really enacted at that time in the member States, nor any universal treaty concerning climate change.

The climate change crisis, as described by the scientists of the IPCC, was originally fraught with uncertainty. This uncertainty led to a great deal of institutional inertia on the part of many industrialized countries who, driven by the lack of specific and irrefutable data, exploited these deficiencies to avoid any legal initiative on global warming. Countries such as the United States had no specific legal instruments, neither federal nor state, to regulate or limit greenhouse gas emissions at that time. They were not yet under any international obligation to legislate. In countries without specific emission regulations, what legal instruments could citizens wield in courts? Would citizens be entitled to be parties in lawsuits concerning the damage caused by GHG emissions? The main question emerging from the very first cases on the matter was the qualification of “climate damage” as a specific damage, thus ascribable to a specific behavior and, ultimately, to global climate change phenomena.

Global warming and its consequence on the climate was treated by judges as a phenomenon that went beyond isolated scientific predictions. It became therefore a “danger” or “risk” that affected different populations, cultures, communities and countries. For this reason, climate has been considered a “global good” in more than one occasion, since climate damages have global dimensions. Global damage harms the general public. Furthermore, this kind of damage was and is still considered to be a problem of general interest. Lastly, the damage caused by global warming affects at the same time individuals, collectivities and, above all, common goods such as the atmosphere. Climate change has been considered global damage since the first declarations of the United Nations on the environment (especially after the Rio Declaration of 1992). But with that being said, the question that arose before the courts was how could a “global damage” be assessed. Is it reparable? Or is it insubstantial, undermined by the lack of sufficient specificity and individualization of the victims? Given the aforementioned practical difficulties, is it considered as a damage caused “to no one in

²³ *Massachusetts v EPA & al.* 05-1120, 549 U.S. 04/02/2007, p. 31, <https://www.supremecourt.gov/opinions/06pdf/05-1120.pdf> (consulted on July 2022)

²⁴ *Massachusetts v EPA & al.* 05-1120, 549 U.S. del 02/04/07. See also the previous decisions about this topic *Connecticut v Electric Power co.*, NO 04-CV-05669, 2004 (SDNY, July 21, 2004, <http://www.ag.ca.gov> ; For a deep analysis of this decision see M. Torre-Schaub, « Le rôle des incertitudes dans la prise de décision aux Etats-Unis. Le réchauffement climatique au prétoire », *Revue internationale de droit comparé*, 2007, n° 3, p.685-713

particular but to everyone in general"? In short, how did the judge position himself with regards to this kind of damage and how did he qualify both the damaged good (the atmosphere) and the victims of the damage (the population as a whole)?

This raised the problem of the definition, qualification and evaluation of the damage caused by climate change. Although the judge had the last word on these three questions, at the end of the day it was the scientific experts who informed the judges in their decision. It is therefore necessary to consider the importance of the assistance of scientific experts in such cases as the *Massachusetts v. EPA*. Close collaboration between the two bodies revealed to be crucial for the decision.²⁵ (1).

Another point discussed in these first cases was related to the nature of the damage caused by climate change. Such an inquiry leads to the establishment of different responsibilities, which were not individual, but considered as collective, shared and multiple.²⁶ Proof as a procedural, but also substantial, element was therefore essential in these cases. This issue raised the problem of State action or inaction related to climate change policies and legislation (2). At the same time, the first climate change decisions referred to broader legal principles that allowed the recognition of the damage caused by GHG emissions, whatever its degree of certainty (3).

1. Scientific expertise and the judge: the co-construction of the decision

The question related to the qualification of global environmental damage in the United States dates back to the 1990s. In 1990, the *City of Los Angeles Florida Audubon* case raised the issue of whether certain kinds of damage to agriculture, natural resources and coastal populations was caused by global warming as a global phenomenon, thus causing a harm "to all".²⁷ In this case, the judges stated that in order to establish this type of damage it was necessary to demonstrate certain required criteria, such as the fact that the damage was "specific" and not "merely general". To carry out this demonstration, the judges required a sufficient and necessary causal connection relating specific damage (agriculture, coastal population, etc.) to a global phenomenon (climate change). The establishment of this causal link and its evidence could not be proved without resorting to scientific experts. Although the parties in court produced the requested scientific reports, the judges decided that evidence of global damage due to climate change was not sufficiently clear and did not accept the claim for global damage to a common good.

While this case proved to be a great disappointment to environmental groups and to a large part of the American public in general, it should not be dismissed as such. On the contrary, it is important to point out that this decision marked a hopeful beginning in the history of American litigation on climate change. Although the judges did not admit the existence of "harm to all", they laid the foundations of a specific reasoning and a specific vocabulary for environmental matters. It is also important to point out that this decision imposed the requirement of a causal link for the first time, which remains today an important condition to establish the existence of damage, its extent and especially its qualification (global or individual). It is therefore necessary, in order to establish the existence of a global damage

²⁵ S. Jasanoff, « Making order : law and science in action in E. J. Hacket, O. Amsterdamska, M. Lynch, J. Wajcman eds, *The handbook of sciences and technology studies*, MIT Press, Cambridge, 2008, p. 779

²⁶ J. Smith y D. Shearman, *Climate change litigation*, Presidian, Australia, 2006

²⁷ 912 F.2d 478 (D.C Cir 1990) 94 F. 3d 658 (D.C Cir 1996).

caused "to all", to be able to provide the necessary evidence and link it to the causes and consequences of the damage.²⁸ This is the only way to find satisfactory legal solutions for the eventual victims of climate change. Therefore, the study of these claims leads us to examine the legal instruments employed in the first cases related to climate change.

2. The first steps to build causality

Since the victims of climate change cannot always be precisely identified, the damage caused by climate change can be minimized or overlooked. There has also always been a certain inertia of the authorities of many industrialized countries towards climate litigation, so that the damage to an imprecise community could not be easily repaired. Examples of this kind of environmental damage are those caused over time by accidents such as oil spills, acid rain or nuclear incidents or by substances such as asbestos. Climate change is also an imprecise ecological phenomenon, both in space and time, making it difficult to identify the victims. However Environmental Law has dramatically improved these gaps, so that litigation on these issues has grown increasingly successful over time and victims can be compensated in some way.

Bringing our attention back to the first cases about climate change, the main issue raised in the *Massachusetts* decision was the Federal administration's responsibility, since it did not fulfill its role as a regulator of environmental risks such as climate change. This claim had to be proven before the court, since the link between GHG emissions and the damage caused did not constitute an easily provable damage and the connection to global warming was not easy to prove as well. Thus, the fact that a State refused to regulate GHG emissions did not automatically imply that the plaintiff could prove the State's fault and that the excess emissions were directly associated with global warming. The issue was far from being obvious.

Both points of view converged. The elements required to establish the State's inadequacy and lack of regulation and the elements required to establish the responsibilities of the GHG emitters had to be provided as evidence. These elements were necessary to establish the aforementioned causal link and to determine the connection between the specific damage to individuals or a community, the GHG emissions and the global damage or climate change.

If the burden of proof lies usually with environmental associations or other entitled plaintiffs, in Environmental Law, the burden of proof can be reversed and it is the damaging party (e.g. a polluting industry) who has to prove that it has done everything necessary to avoid the harm. Since climate change would still not rank among "major environmental risks", there was no presumption of negligence on the part of industry. Therefore, the burden of proof was not reversed: it was up to the plaintiff to prove the existence of the causal link. In the US, evidence is governed by specific rules that give the parties considerable latitude to call upon experts. This flexibility becomes a race between who will be able to pay more expensive and better renowned experts, so that their scientific reports have more weight in the process. Notwithstanding this danger, it is clear that the judge has sufficient power to set certain limits to this competition between the parties. The Federal Rules of Evidence (FRE) have put order in this game. Rule 702 states that "if scientific or technical knowledge will assist the judge in better understanding the evidence or issues presented, a witness, as an expert qualified by

²⁸ B.C. Mank, « Standing and Global warming: is injury to all, injury to none ? », *Lewis Clark Law School Env Law Revue*, 2005, p. 35

knowledge, experience, education, or training, may testify by giving his opinion or making his knowledge available to the judge, provided that the knowledge is the result of reliable methods and that the expert has applied such methods to acquire his knowledge." Rule 706 allows the expert to be appointed by the parties, by the judge or by both. In Climate Change litigation in the US, it has been common for the parties to choose their own expert witnesses. Although the criteria of method and standardized knowledge recognized by the scientific community are respected, the parties appoint the experts whose reports best demonstrate the arguments invoked by each party, leading to a better chance of winning the case.²⁹ Expert reports served several purposes in climate change litigation. They establish the causal link between CO₂ emissions and the caused damage. They also highlight the consequences of climate change and global warming. It was therefore essential that the reports of scientific experts could be based on sufficiently reliable methods so that the judge could clearly establish the damage and its connection to an excessive number of GHG emissions. Aided by this knowledge, the judge in the Massachusetts climate case pronounced a very interesting and pioneering decision.

Nevertheless, the establishment of direct and individual causal connections between CO₂ emissions and climate change remains today one of the biggest obstacles for the judge. Very few climate change decisions have clearly recognized a direct causal relation between a Public or Private actor and climate change.³⁰ Exceptions to this general trend appeared very recently only in France and the Netherlands.³¹

3. The judge and the uncertainties of climate change litigation: broadening a flexible application of State responsibility

Few scientists today would deny the fact that the science of global warming is subject to numerous uncertainties. This argument has long been the basis for the authorities of some industrialized countries not to regulate this problem and not to set legal limits on GHG emissions. However, judges, relying on the theory of public nuisance, have been able to find a satisfactory solution to this problem. This theory has developed strongly in the United States to such an extent that it allowed the Supreme Court, in the case *Massachusetts v. EPA* (3 April 2007), to accept the causal link between GHG emissions from electricity industries and certain damages due to climate warming. In general terms, this theory was based on the fact that "GHG emissions from human activities are more likely than not to produce an excess of carbon associated with climate warming impacts".³²

Plaintiffs in global warming lawsuits are clearly faced with the question of the extent to which scientific evidence and expert reports allow the establishment of the causal link with the flexibility required for this specific matter. We are faced here with an objective question (the content of the reports and their scientific reliability) but also with a subjective situation, since, at the end of the day, it is the judge and the judge alone who must demonstrate a certain

²⁹ See *Daubert v. Frye*, *Daubert v. Dow Chemical*, 509 U.S. 579 (1993).

³⁰ *Connecticut*, 564 U.S. at 415 ; *Kivalina*, 696 F.3d at 856 ; *Greenpeace New Zealand v. Northland Regional Council*, [2007] NZRMA 87, 10/12/2006, High Court of New Zealand CIV 2006-404-004617 ; *Zoe and Stella Foster et al v Washington Department of Ecology*, No. 14-2-25295-1 SEA

³¹ *Oxfam, Greenpeace & others v. Ministère de l'Écologie & others*, TA Paris, February 3th 2021 and October 14th 21 ; *Millieudéfensie & al. v. Royal Dutch Shell Plc.* 05/ 26/ 2021 Rechtbank Den Haag, C/09/571932 / HA ZA 19-379

³² *Amicus brief, Brief petitioners Friends of the earth amicus, Scientific NAS amicus, Scientific association amicus*, en *Massachusetts v. EPA* cit

interpretative flexibility. Everything will depend on his willingness to "believe" in certainties, but also to give appropriate space and importance to uncertainties. The causes of damage are examined differently in different cases. In some cases, there might be clear evidence of a root cause of the damage.³³ With regards to the damages caused by climate change, evidence might be lacking. The judge will mostly assume causes that are – as some authors have stated – "weak but highly significant".³⁴ This means that while it is difficult to say with certainty that GHG emissions are the defining cause of global warming, it is nevertheless true that GHG emissions have a decisive influence on global warming.

The applicability of the precautionary principle was an issue that arose in the first climate change decisions. This principle allows to take into account the existence of uncertainties, without these being an obstacle to the discovery of proof of damage. Also, the rules of evidence become more flexible, making it easier for victims of damage caused by climate change to prove that there is a "causality link" between emissions and global warming. While the burden of proof is not reversed, it is nonetheless clear that proof is greatly facilitated, so that the damage party in the trial can more easily provide evidence. The precautionary principle also had the effect of changing the mentality of judges. Indeed, they no longer reason in the same way while employing the precautionary principle. Since the adoption of the aforementioned principle, judges must take into account a "margin of uncertainty" that should be treated as such, i.e. as a possibility of damage, such as that caused by climate change. Once uncertainty is accepted as a "driving" element and not as a generator of legal inertia, the judge can overcome the traditional relationship between evidence and the causal nexus, thus inducing a progressive relaxation of this rule. This new attitude of the judge started with the *Massachusetts* case, entailing changes towards a new vision of climate change responsibility and the role played by the judges in it.

In the *Massachusetts* case, scientific reports indicated that uncertainty was decreasing and that certainty was increasing correspondingly.³⁵ Scientific information, in turn, encouraged the evolution of administrative responsibility on climate change, shifting the balance in favor of its victims rather than in favor of those who "create the risk" by emitting GHGs without precaution. In this particular case, judges interpreted the precautionary principle as if its respect was an obligation in "decision making" to be fulfilled by executive and environmental administrations. In other words, despite the separation of legislative, judicial and executive powers,³⁶ in cases of major environmental danger or threat, judges should not hesitate to put the administration in front of its own responsibilities, so that it can regulate GHG emissions with regards to the precautionary principle.

This requires, of course, taking certain "precautions" with the judges' power of decision.³⁷ It is not a question of justifying the creative powers of the judge, who is subject to the Law, so that the democratic process can be respected. It is, however a matter of emphasizing that the judge has an important role to play in the interpretation of climate change law. This role was little explored in legal scholarship until the *Urgenda* climate case in 2015, which completely changed climate change litigation and which can be considered the very first successful

³³ O. Leclerc, *Le juge et l'expert*, Paris, 2005, LGDJ

³⁴ E. Penalver, « Acts of God or toxic torts ? Applying tort law principles to the problem of climate change » *Natural resources journal*, 1998, vol 38, p. 563

³⁵ See IPCC Report 2008 <http://www.ipcc.ch/>

³⁶ *Defenders*, 504 U.S. 555, 476-77, 1992

³⁷ A. Scalia, "The Doctrine of Standing as an essential element of the Separation of Powers" (1983) 17 *Suffolk UL Rev* ; See also M. Torre-Schaub, « Les contentieux climatiques à l'étranger », *RDFa* 2019, p.p. 24-43

climate law case in Europe and in the world. This case represents a starting point in both civil and administrative climate change litigation. It introduced several new climate change litigation “standards”, allowing judges to follow similar pathways and to explore some others. However, the question of the real power of judges to address climate change is still a subject of legal conversation today, also in the US. The question, even if some progress has been made in this area, remains an open question to this date.³⁸

II. New pathways and perspectives in Climate Change litigation

The "first wave" of climate litigation -led by the Massachusetts case- allowed for a better understanding of the advances in environmental law and the role played by judges in climate change litigation. At the same time, this “first wave” pointed out the difficulties these lawsuits were facing. Some progress has been made since.

This article showed the way judges have been playing a role in tackling climate change during the last twenty years. The role played by Courts in contributing to the fight against climate change is of course partial and not homogenous, depending on many factors as the legal system in which the decisions are made, the existence of climate change laws at the domestic level, and the part of international law in domestic Courts. Despite these differences and the many difficulties mentioned (difficulties to interpret uncertainties, difficulties to establish a clear causality link, lack of ambition of many climate change laws and the principle of the separation of powers), the role of judges became timidly but surely more and more important. Through the different « waves of climate litigation », a "duty to ensure" that the low carbon transition trajectories are respected by the Administration has emerged in French jurisprudence. This particular role of administrative judges in « controlling » the action (or lack thereof) of the Administration will be verified and renewed as climate change cases appear here and there. In France, more particularly this will arrive soon: first, at the end of March 2022, then at the end of December 2022, in order that the GHG reduction targets set for 2030 and 2050 could be achieved.

Paris le 3 avril 2022

³⁸ *Juliana v. United States*, No. 6:15-CV-01517-TC, 2016 WL 6661146 ; Also in Belgium, *ABSL Klimaatzaak c. Royame de Belgique*, Cours de Cassation, 04/20/ 2018 and 2021.