

The role of judge: The Role of the Judge faced with Climate Issues

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Attendees:

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Judges are confronted with climate change issues, due to its universal cause and effects. The increase in the amount of climate change litigation worldwide and, particularly, in France raises not only the question of the role of judges and the expectations of society but also the extent to which judges should take action to curb climate change, which is now recognised as a global emergency.

To address this issue, Marc Clément¹ and Stéphanie Reiche-de Vigan² organised this lecture with two eminent judges (one Belgian and the other Brazilian) who actively participate in European and international judicial networks, to raise awareness of the important role played by judges in protecting the environment and tackling climate change.

Luc Lavrysen, Presiding Judge of the Belgian Constitutional Court and President of the European Union Forum of Judges for the Environment (EUFJE), noted that although there was a marked development of climate justice in 2017, things had changed as in recent cases, where the applications filed by climate activists had been dismissed by Supreme Courts in Europe, notably in Austria in a case challenging an extension of the Vienna airport, and in Norway, in a case challenging oil and gas exploration licences in the Arctic Ocean. The most significant exception is the Urgenda case brought against the government of the Netherlands, which has become famous around the globe as the first case in which the courts have upheld a claim by citizens that their government has an obligation to prevent climate change. On 20 December 2019, the Supreme Court of the Netherlands upheld the rulings of the lower courts, finding that the Government of the Netherlands did have an obligation to take urgent action to significantly reduce emissions in compliance with its human rights obligations. Although some other cases have also made a stir, such as the judgment issued on 31 July 2020 by the Irish Supreme Court and the application filed on 3 September 2020 by a group of young Portuguese people with the European Court of Human Rights, some cases have not been judged on the merits at all, as judges have dismissed the applications for lack of legal standing, for example the

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Order of the General Court of the EU issued on 8 May 2019 in the Armando Carvalho case and the ruling issued by the Federal Supreme Court of Switzerland on 5 May 2020 in the case brought by “Ainées pour la protection du climat”.

Antonio Benjamin, Justice of the National High Court of Brazil and Chair of the Commission on Environmental Law of the International Union for Conservation of Nature (IUCN) spoke about whether society should put its trust in the courts to judge climate change issues. Although many judges are not fully aware of the existential threat posed by climate change to every single person on the planet, despite the reports published by the IPCC and many national committees, including the High Council on Climate in France, it is not a matter of personal opinion: judges do not make the law. They enforce, within the limits of the concept of the separation of powers, the rules drawn up by the legislature and the executive. Judges are not therefore expected to take on that role and must merely implement the rights and obligations adopted by the legislator directly as otherwise they will become ghost laws, like many other laws that are not enforced or are not enforceable. The activist nature of a court decision should not be mistaken for that of a law. Likewise, as judges are involved in all areas of social life, why should they not also have a legitimate role to play in tackling climate change? What is more, the technical difficulties or political dimension of this type of litigation should not be overestimated, as other types of litigation are just as complex from a scientific and political point of view, for example medical malpractice cases.

However, climate change does raise some new issues for the role of judges. Firstly, the global scale of the problem raises the problem of extraterritoriality for the claimants and also regarding the impact of the effects of national carbon emissions outside the jurisdiction of the court. These problems are formidable. They are closely related to the issue of access to justice and the problem of establishing legal capacity and standing in cases where everyone is potentially affected. The Aarhus convention and the Escazu agreement have introduced a practical dimension to environmental democracy and provide a framework for the acceptance of this type of litigation by the courts. Secondly, there is the problem of the marginal contribution of each country to the effects of climate change, which is perceived as an obstacle to individual state responsibility. This is not necessarily the most problematic issue for judges, as it can be based on the commitments made by each State as restated in international, EU and national legislation.

Beyond these spatial issues, new legal possibilities also emerge from the temporal aspects. Judges have traditionally been asked to ascertain facts and consider past legal situations. However, even though the effects of climate change can already be seen today, particularly in certain developing countries where the most vulnerable communities are already suffering the direct effects of climate change, its impact is mainly of concern due to the projected scenarios for 2030 and 2050. However, we cannot wait until 2050 to rule that the 2020 generation breached its duties. Any ascertainment of that breach by the courts would be pointless. The role of judges should therefore be based on the recognised urgency of the problem, to find that emission reduction trajectories are not sufficient. However, these are new methods of reasoning for judges and their justification also requires an ethical consideration of the judicial function.

So what can we expect in the near future? There is wide agreement that climate issues need to be included in judicial training programmes, as judges will increasingly be confronted with climate issues that have implications in most branches of law. Comparative law also has an important role to play in this field as shown by the impact of the decisions issued in this area, transcending national borders and legal circles: on the one hand, the global dimension of the problem means that the positions taken by other courts are obviously relevant and, on the other, the legitimacy of judges and their ability to deal with a new type of litigation are issues that arise worldwide. Judges must play a key role in the major overhaul of societies that has already commenced, due to the need to tackle and adapt to climate change.