

Insights

FRANCE AND CLIMATE CHANGE: STATE FAILURE AND LIABILITY FOR ENVIRONMENTAL HARM

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SUMMARY

France & Climate Change: Jean-Pierre Delvigne and Maryne Gouhier analyse the landmark French jurisprudence on State failure and liability for environmental harm.

While the technical feasibility of a decarbonised economy essentially based on renewable energies is taking shape,^[1] the French Republic has just been found liable for environmental harm in relation to climate change by the French administrative judge. At stake, France's breach of the objective of reducing greenhouse gas emissions and the aggravation of climate change.

Here is an analysis of the judgment of the Administrative Court of Paris dated 3 February 2021^[2] and the decision of the Conseil d'Etat (the French administrative supreme court) dated 19 November 2020.^[3]

These rulings are unprecedented in France and announce the judge's arrival on the climate stage with significant media coverage.

The judge agreed to play a lead role as controller and potential accelerator of the effective implementation by the State of its own climate policy.

The non-governmental organizations (NGOs) Oxfam France, Notre Affaire à Tous, Fondation pour la Nature et l'Homme and Greenpeace France referred to the Administrative Court of Paris on a compensation claim known in France as "L'Affaire du Siècle" ("The Case of the Century").^[4] This claim stemmed from a climate justice campaign following a petition showing +2.3 million signatories.

On the other hand, the decision of the Conseil d'Etat was issued in the context of an appeal to quash the State's refusal to act (recours pour excès de pouvoir) filed by the French city of Grande-Synthe with further support from the above NGOs.^[5]

Breach of the objective of reducing greenhouse gas emissions

The French government committed to reduce greenhouse gas emissions by 40% compared to their 1990 levels by year 2030 and achieve carbon neutrality by 2050.^[6]

This objective was incorporated into the Energy Code by the Energy Transition for Green Growth Act 2015 (LTECV).^[7] This same year, the Paris Conference (COP21) was held by the French Government with the United Nations Framework Convention on Climate Change. COP21 led to the adoption of the Paris Climate Agreement.^[8]

In the City of Grande-Synthe case, the Conseil d'Etat considered this objective as intended to ensure the effective implementation of the principles laid down by the Paris Climate Agreement as far as France is concerned.

Technically, the goal has been broken down by the National Low-Carbon Strategy (SNBC) into carbon budgets setting annual emission ceilings for the 2015-2018 period and for 5-year periods thereafter.

In this respect, the Conseil d'Etat judged that the State substantially exceeded the first carbon budget set for the 2015-2018 period^[9] and insufficiently reduced emissions for year 2019 considering the second carbon budget set for the 2019-2023 period.^[10]

The Conseil d'Etat also noted that the Government postponed the reduction efforts after 2023 by revising downwards the emission reduction target for this 2019-2023 period with a decree dated 21 April 2020.

In these circumstances, the Conseil d'Etat gave the French Government three months to justify, in the context of a supplemental investigation, that its refusal to take additional actions is compatible with complying with the trajectory set by the carbon budgets and reaching the 40% reduction target by 2030.

In other words, the Conseil d'Etat considers the objective of reducing greenhouse gas emissions as binding and agrees to verify whether the Government's measures are likely to allow for its achievement.

If not, the Conseil d'Etat can quash the State's refusal to act and will possibly require implementing all useful measures to curb the greenhouse gas emissions to ensure an effective achievement. A second decision of the Conseil d'Etat on this subject is therefore awaited. The Government's memo has already been submitted.

State liability for environmental harm linked to climate change

The nature of the claim underlying “L’Affaire du Siècle” gave to the Administrative Court of Paris the opportunity to rule on the responsibility of the State.

Indeed, the Court considered that the State had failed to take the necessary actions to reduce greenhouse gas emissions by exceeding the first carbon budget. For the Court, this inaction constitutes a partial wrongful failure (carence fautive).

Recognition of this wrongful failure led the Administrative Court of Paris to hold the State liable, not only for the non-material damage suffered by the NGOs (préjudice moral), but also for environmental harm (préjudice écologique).

The préjudice écologique was incorporated into the French Civil Code by the Biodiversity Act 2016.

^[11]It is a “not insignificant damage to the elements or functions of the ecosystems or to the collective benefits derived by mankind from the environment”.^[12]

Sources of the judge notably included the reports of the Intergovernmental Panel on Climate Change (IPCC)^[13] and the work of the French National Observatory on the effects of global warming,^[14] which established the following points:

- in France, the average temperature increased by 1.14°C for the decade 2000-2009 compared to the period 1960-1990;
- global warming is mainly due to anthropogenic greenhouse gas emissions and is already responsible for a modification of the atmosphere and its ecological functions, particularly giving rise to accelerated ice melting, rising sea levels and an increase in extreme climatic phenomena;
- global warming will reach 1.5°C between 2030 and 2052 if greenhouse gas emissions continue to increase at the current rate and will continue to increase for several centuries even if these emissions decrease, due to the persistence of greenhouse gases in the atmosphere;
- a global warming of 2°C would seriously increase the above-mentioned phenomena and their consequences.

In this context, the Court ruled that the breach of the first carbon budget contributed to the aggravation of greenhouse gas emissions, therefore causing environmental harm due to the consequences of global warming on the ecosystem.

Moreover, the Court granted the request for compensation in kind^[15] and rejected the pecuniary requests given payments can only be required if compensation in kind of the environmental harm is not possible. Besides, compensation can be used to prevent further aggravation of the damage.

The Court ordered further investigations in order to accurately determine the measures required by such compensation. Again, a second judgment is awaited on this matter.

The judge will have the power to order the State to take effective measures to compensate the aggravation of greenhouse gas emissions caused by its wrongful failure. This is a significant step forward in the fight against climate change.

Accelerating the Government's climate agenda

Aware of the risk of condemnation, the French Government had in the meantime organized a Citizens' Convention for Climate. The Convention was set up in 2019 by the Economic, Social and Environmental Council (CESE) with 150 voluntary citizens chosen by lot.

The Government has now written two bills, which take up most of the measures put forward by the Citizens' Convention for Climate:^[16] a bill entitled "Climate and Resilience"^[17] and a constitutional bill.^[18]

The constitutional bill aims to integrate the fight against climate change and the preservation of the environment into the body of the French Constitution following its adoption by the French Parliament and approval by the citizens via a referendum, adding up to the already existing Constitutional Charter of the Environment.^[19]

The Climate and Resilience Bill puts forward around 60 measures to combat climate change. It was submitted by the Government to the Assemblée nationale (the French National Assembly) at the beginning of February.

The CESE and the National Council for Ecological Transition (CNTE) issued two critical opinions on the proposed measures. They recalled that the contemplated Act will have to make it possible for the State to achieve the climate objective set at national level, considering social justice.^[20]

These two bodies expect in particular the new measures to get a broader scope of application, an accurate estimate of their climate impact and shorter implementation deadlines.

The Conseil d'Etat and the Haut Conseil pour le Climat also noticed inadequacies and listed some issues to be revised in their opinion delivered as advisors.^[21]

Deputies have until beginning of March to submit amendments to the Climate and Resilience Bill, which will soon be examined by the Parliament. Let's stay tuned.

The abovementioned texts are available on the following web links:

- [the judgment of the Administrative Court of Paris](#)
- [the decision of the Conseil d'Etat](#)

- [the Climate and Resilience Bill](#)
 - [the IEA and RTE report](#)
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[1] The International Energy Agency (IEA) and France's transmission system operator, RTE, carried out a framework study showing that scenarios in which the power system would be based on very high shares of renewables are technically feasible upon meeting analysed conditions and requirements (IEA, RTE, Conditions and Requirements for the Technical Feasibility of a Power System with a High Share of Renewables in France Towards 2050, January 2021). RTE will additionally publish in 2021 a comprehensive analysis of the various scenarios to achieve carbon neutrality.

[2] Tribunal administratif de Paris, 3 février 2021, Association OXFAM France, Association Notre Affaire à Tous, Fondation pour la Nature et l'Homme, Association GREENPEACE FRANCE, req. N°1904967, 1904968, 1904972, 1904976/4.

[3] Conseil d'Etat, 19 novembre 2020, Commune de Grande-Synthe et autres, req. N° 427301.

[4] The main goal of this compensation claim is to obtain the acknowledgment of the responsibility of the State for its wrongful conduct and its condemnation to compensate the loss. Effectivity lies in the power of the judge to require the State to take all necessary actions pursuant to Article L. 911-1 of the Administrative Justice Code.

[5] The main goal of this recours pour excès de pouvoir is to obtain the quashing of the State's unlawful refusal to act and its condemnation to implement all necessary actions. Again, effectivity lies in the power of the judge to require the State to take all necessary actions pursuant to Article L. 911-1 of the Administrative Justice Code.

[6] Carbon neutrality means a balance, in France, between anthropogenic emissions by sources and removals by sinks of greenhouse gases, as defined by Article 4 of the Paris Agreement.

[7] Article L. 100-4 of the French Energy Code. Loi n° 2015-992 du 17 août 2015 relative à la transition énergétique pour la croissance verte. In the European Union, Annex 1 of Regulation (EU) 2018/842 dated 30 May 2018 fixed for France a -37% greenhouse gas emission reduction objective by 2030 compared to the 2005 levels. This objective may be increased by the European Union. Heads of Member States agreed in December 2020 to increase the European objective to reduce greenhouse gas emissions to reach a reduction objective of at least 55% by 2030 compared to the 1990 levels.

[8] Paris Agreement, adopted on 12 December 2015 and ratified on 22 April 2016.

[9] More specifically, an excess of 3,5%. Data comes from annual reports of the Haut Conseil pour le Climat (an independent organism created by Decree dated 14 May 2019) and the Centre Interprofessionnel Technique d'Etudes de la Pollution Atmosphérique (CITEPA, a State operator).

[10] The reduction was of only 0,9% in 2019 (compared to 2018) whereas a 1,5% reduction per annum is required to comply with the second carbon budget.

[11] Loi n° 2016-1087 du 8 août 2016 pour la reconquête de la biodiversité, de la nature et des paysages.

[12] Articles 1246, 1247 and al. of the French Civil Code.

[13] Besides, France actively participates in IPCC's works.

[14] Organism attached to the French Ministry for the Ecological Transition.

[15] Within the limit of the contribution to the aggravation of greenhouse gas emissions caused by the breach of the first carbon budget.

[16] Other measures being taken up in the Finance Act, in the stimulus package or to be implemented at the European Union level.

[17] Projet de loi portant lutte contre le dérèglement climatique et renforcement de la résilience face à ses effets, n° 3875 rectified, submitted on 10 February 2021.

[18] According to the constitutional bill: « [France] guarantees the preservation of biodiversity and of the environment and fights against climate change. » (Article 1).

[19] Loi constitutionnelle n° 2005-205 relative à la Charte de l'environnement, 1 March 2005.

[20] CNTE, Avis, February 2020. CESE, Avis sur le projet de loi portant lutte contre le dérèglement climatique et renforcement de la résilience face à ses effets, M. Badré et C. Bordenave, January 2021.

[21] Conseil d'Etat, 4 February 2021, avis n° 401933. Haut Conseil pour le Climat, Avis portant sur le projet de loi Climat et Résilience, Février 2021.

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