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Climate litigation in France, a reflection of trends in environmental litigation

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Abstract

While climate litigation has developed somewhat in recent years and has received much attention from both media and legal scholars, we examine it in the French context to determine its degree of originality compared to environmental litigation as a whole. On the one hand, the main successes of climate litigation can be explained by two important trends in environmental litigation. It builds on the strength of the European legal system and takes advantage of the progress made in legal redress for ecological damage. However, on the other hand, it faces the same limitations as environmental litigation. It is difficult to impose positive obligations on the legislator and environmental objectives are poorly integrated. We conclude that climate litigation reflects the major trends in contemporary environmental litigation. Its real originality lies rather in the establishment of a "trajectory review" by the judge in the Grande-Synthe case

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1 Introduction

Although climate litigation has developed strongly in recent years[1], as society has become more aware of the threat posed by climate change, is it unique in the context of environmental litigation? This is the question we propose to examine in the French context. As with any area of litigation, it does of course have its share of novelties and specificities. However, its prominence in the media and in legal scholarship should not be misleading. In France, climate litigation follows, for the most part, the same general trends as other kind of environmental litigation. Its originality is limited to the establishment of a 'trajectory review' by the judge.

Like many other countries, France has seen an increase in climate litigation in recent years. However, it should be remembered that this is not completely new. At least since the mid-1990s, shortly after the adoption of the United Nations Framework Convention on Climate Change, claimants have been using legal arguments based on climate law before French judges[2]. In France, access to justice in environmental matters is relatively broad[3]. This corresponds to the French legal tradition and was amplified in the 1970s on the occasion of the first major environmental protection laws. Consequently, associations specialising in environmental matters, which are used to litigation[4], did not wait for the Paris Agreement, nor for the *Juliana* or *Urgenda* cases, to invoke climate arguments before the courts. On the contrary, the novelty of the last few years comes rather from the openness of the judges to this type of argument. After having ignored them for a long time[5], the success of the cases *Commune de Grande-Synthe* and *Association Oxfam et al.* (modestly referred to as the "*case of the century*" by the applicant associations) in 2020 and 2021 marked a turning point.

Climate litigation – understood as legal actions in which climate change is raised as a legal issue, i.e. litigation in which legal norms whose primary objective is the mitigation of climate change or adaptation to its effects are mobilized[6] – has received considerable attention in the literature[7], including in France[8]. The *Grande-Synthe* decision was even described as "*historic*"[9], while the *Oxfam* decision has been analysed as a "*heist of the century*"[10]. In our view, the situation calls for more caution as it is surely too early to have a precise idea. For example, it is currently difficult to assess the impact of litigation on the reduction of greenhouse gas emissions[11]. History will tell whether these decisions mark an important change in French climate policy.

While waiting to shed light on these issues, we propose here to place climate litigation in the context of environmental litigation in order to assess its originality. If we take a step back, what can we observe? Is climate litigation unique in relation to current trends in environmental litigation in France, or is it merely a mirror image?

We argue that climate litigation is more or less a mirror of environmental litigation. It is generally in line with the same trends as environmental litigation. Although it is not an exact replica of environmental litigation, climate litigation does not present any major originality. Apart from greater politicisation and consistent media coverage, the same trends can be found as in environmental litigation.

After presenting the three main cases (2), we will defend two ideas. On the one hand, the main successes of climate litigation can be explained by two important trends in environmental litigation (3). It builds on the strength of the European legal system and takes advantage of the progress made in legal redress for ecological damage. However, on the other hand, it also faces the same limitations as environmental litigation (4). It is difficult to mobilise positive obligations on the legislator and environmental objectives are poorly integrated.

1 See the Global Climate Change Litigation Database of the Columbia Law School, 2022. See also Setzer and Higham, 2021; Sindico and Mbengue, 2022; Ivano Alogna et al., 2021; Peel and Osofsky, 2015; Cournil, 2020.

2 See *inter alia* Conseil d'Etat, 1998, Collectif Alternative Pyrénéenne à l'axe européen, Case 175723; 1998, Comité Somport d'opposition totale à l'autoroute Caen-Rennes, Case 159385; 1999, Commune de Liffre et association Verts pour une alternative à l'autoroute des estuaires, Case 162034.

3 For a presentation of NGOs' access to justice, see Bétaille, 2019, p. 48 and Bétaille, 2016. For information in English, see E-justice portal, 2021.

4 For example, in 2020, the France Nature Environnement federation, the main national environmental protection association, took 236 legal actions alone.

5 See Bétaille, 2022, p. 119.

6 See Bétaille, 2022, p. 109.

7 Setzer and Vanhala, 2019, e580.

8 For an overview, see *inter alia* Torre-Schaub and Lormeteau, 2021.

9 See Parence and Rochfeld, 2020.

10 Cournil and Fleury, 2021.

11 According to the latest IPCC report, "*it is still unclear the extent to which climate litigation actually results in new climate rules and policies*", Dubash et al., 2022.

2 A brief presentation of the main climate litigations in France

Although climate litigation is very diverse, 3 cases of national scope have targeted insufficient state action in France[12], either by the government or by the legislator. Without going into detail[13], these three cases are outlined here to facilitate understanding of the developments that follow.

2.1 Grande-Synthe case

Firstly, the case *Commune de Grande-Synthe* is the most important[14]. The municipality of *Grande-Synthe*, which is located on the coastline and suffers from sea level rise as well as coastal erosion, appealed directly before the Conseil d'Etat, i.e. the administrative supreme court. It was seeking the cancellation of the government's refusal to take further actions against climate change and an injunction on the State to take any useful measure to comply with its own "*climate trajectory*". Therefore, the Conseil d'Etat was asked whether the State should adopt additional measures to combat climate change, given that it was not currently on the path to meet the reduction trajectory set out in its international commitments. The final decision of the Conseil d'Etat take into account that past reductions in greenhouse gases have been quite small and that the reductions due to the covid-19 pandemic in 2020 are only transitory. It finally states that the measures already in force are not sufficient to achieve the government's own reduction goals and that additional measures are required. Therefore, the government's refusal to take further measures is not compatible with the trajectory for reducing those emissions set by the decree of 21 April 2020 in order to achieve the reduction targets set by Article L. 100-4 of the Energy Code and by Annex I of Regulation (EU) 2018/842 of 30 May 2018. The Conseil d'Etat finally enjoined the government to take all necessary measures before 31 March 2022.

2.2 "Case of the Century"

Secondly, the case *Association Oxfam et al.* (also named 'Case of the Century')[15] was brought before the Administrative Tribunal of Paris, a court of first instance, by 4 associations, namely *Oxfam France*, *Greenpeace France*, *Notre Affaire à Tous* and the *Fondation pour la nature et l'homme*. The associations sought the recognition of the State's fault-based liability, the compensation of their moral damage and the "ecological" damage, each of which was assessed at 1 euro per association, and an injunction on the State to take any useful measure to comply with its own "*climate trajectory*". In the classic manner of a liability action, the judge had to rule on the fault, the damage, and the causal link between the two. The question of fault was whether the State's action has been sufficient to comply with its legal obligations in relation to climate change. The administrative tribunal's reasoning in this respect is, moreover, quite comparable to that of the Conseil d'Etat: the State did not comply with the trajectory for reducing greenhouse gas emissions that it had set itself in the framework of the 'carbon budget' for the period 2015-2018 (an effective reduction of 1.1% per year instead of 1.9%). Finally, the tribunal found that the French State was liable for failing to fully meet its own goals in reducing greenhouse gases. Because such wrongful failure is detrimental to the collective interest they are defending, the moral prejudice of the associations was compensated at the rate of 1 euro. The tribunal also found that the failure of the State was the cause of an 'ecological' damage, but decided that it cannot be financially compensated, the law giving priority to compensation in kind. With regard to the request for an injunction, the tribunal ordered a further investigation to determine its content. Finally, it found that, despite the reduction in emissions due to the pandemic in 2020, there remained a surplus of 15 megatons of emissions and that consequently, the government must take all necessary measures to remove this surplus by 31 December 2022.

2.3 Constitutional case

Lastly, the recent legislative act "*to combat climate change and strengthen resilience to its effects*" was challenged by members of the parliament before the Conseil constitutionnel, the French equivalent of a constitutional court[16]. They were seeking the whole cancellation of the act because of its lack of ambition regarding climate change mitigation, which was considered to be contrary to the right to the environment constitutionally guaranteed by Article 1 of the Charter of the Environment. Some environmental NGOs have also made arguments against the Act. In particular, *Greenpeace France* used the proportionality principle to argue that the insufficient action of the legislator against climate

[12] Climate litigation in France also includes actions against private companies or local administrative acts authorising climate-damaging projects. Concerning litigation against companies, see Boutonnet, 2020, p. 609; Michon et al., 2021, p. 9.

[13] For further information in English about those cases, see Torre-Schaub, 2021, p. 1445.

[14] Conseil d'Etat, 2020, Commune de Grande-Synthe, Case 427301, ECLI:FR:CECHR:2020:427301.20201119; 2021, Commune de Grande-Synthe, Case 427301, ECLI:FR:CECHR:2021:427301.20210701.

[15] Administrative Tribunal of Paris, 2021 (3 February), Association Oxfam et al., Cases 1904967, 1904972, 1904976/4-1; 2021 (14 October), Association Oxfam et a., Cases 1904967, 1904968, 1904972, 1904976/4-1.

[16] Most of the French constitutional legal scholars consider that it is not a real constitutional court, at least because of the political nature of the way its members are appointed (see *« Les droits des justiciables » méritent un Conseil constitutionnel « à l'abri de toutes sortes d'influences »*, *Le Monde*, 10 April 2022). It raises issues in terms of impartiality and fair trial (for an illustration in environmental matters, see Graefe and Perroud, 2022).

change results in a violation of individual freedom[17]. It asked the constitutional judge to review the excesses of the legislator as well as its omissions. In its decision of 13 August 2021[18], the Conseil constitutionnel found that it "*does not have a general power of injunction vis-à-vis the legislator*" and that "*in the present case, the applicants are making a general criticism of the legislature's ambitions and the inadequacy of the act as a whole. They therefore did not challenge any particular provision of the bill in order to seek cancellation. The appeal against the bill as a whole can therefore only be dismissed*".

3 Climate litigation driven by two trends in environmental litigation

The two main successes in French climate litigation, the *Grande-Synthe* and *Oxfam* cases, were able to build on two important trends in environmental litigation. Firstly, the influence of European Union law is probably decisive, mainly because the European provisions provide for obligations of result that are imposed on the State and that the judge absolutely cannot ignore, at the risk of European sanctions (2.1.). Secondly, the recognition of ecological damage by the administrative judge was expected insofar as this evolution was almost imposed on him given the legal foundations of this concept in the legal order (2.2.).

3.1 The UE legal system, a driver of climate and environmental litigation success

In both the *Grande-Synthe* and *Oxfam* cases, the applicants invoked a wide range of norms – international climate law, the European Convention on Human Rights (ECHR), European Union law, the Constitutional Charter of the Environment, the legislative provisions of the Energy Code, and regulatory provisions – as a basis for the state's obligation to act against climate change, which was a necessary condition for the success of both cases.

The administrative judge did not accept the arguments based on the ECHR or the constitutional charter. As regards international climate law, its direct effect in domestic law was not admitted, but the judge took it into consideration when interpreting legislative and regulatory provisions. This is what allowed him, according to the conclusions of the 'rapporteur public' in the *Grande-Synthe* case[19], to consider that the reduction targets set in Article L. 100-4 of the Energy Code are not only programmatic in scope but are indeed binding on the State.

Nevertheless, even if the *Grande-Synthe* decision is not extremely clear from this point of view, it seems that European Union law has played a decisive role. Indeed, of all the norms invoked, European norms are the only ones that set an obligation of result, with a quantified target, a time limit and sanctions that are potentially dissuasive enough, given the action for failure to fulfil obligations before the European Court of Justice.

The decision of the Conseil d'Etat in the *Grande-Synthe* case refers to the European decision n° 406/2009/EC of 23 April 2009 which sets a reduction target for France of 14% by 2020, and to the European Regulation n° 2018/842/EU of 30 May 2018 which sets a reduction target of 37% by 2030. However, it is above all the conclusions of the 'rapporteur public' that show the importance of European Union law in this case. Indeed, according to Stéphane Hoynck, these are obligations "*which the Conseil d'Etat must monitor to ensure that they are effectively implemented*" by the State[20]. He insists that "*these are not purely programmatic targets but binding targets, with the 2018 regulation providing for corrective measures in the event of insufficient progress by a Member State and a compliance monitoring mechanism*"[21]. Stéphane Hoynck concludes that "*the French law and the 2018 EU regulation set a binding course of action for the government*"[22]. Recognition of the climate obligation, which was necessary for the success of both cases, is therefore clearly established, with EU law playing a decisive role.

The decisive role of EU law, and the European legal system as a whole, in the success of climate litigation is not surprising. Indeed, it corresponds to a basic trend in environmental litigation as a whole. Indeed, cases in which there is a risk of European sanctions in the background seem to be quite successful, for example in the field of air pollution or the protection of biodiversity.

With regard to air pollution, the case law of the European Court of Justice[23] had a direct influence on the French administrative judge[24]. The obligation of result affirmed by the Court of Justice finally led to the condemnation of the French State by the Conseil d'Etat to pay a penalty of 10 million euros[25]. The State

17 Article 4 of the 1789 Declaration of the Rights of Man and the Citizen.

18 Conseil constitutionnel, 2021, Loi portant lutte contre le dérèglement climatique et renforcement de la résilience face à ses effets, Case 2021-825 DC, ECLI : FR : CC : 2021 : 2021.825.DC.

19 The 'rapporteur public' before the French administrative courts is the equivalent of the advocate general before the European Court of Justice. See the conclusions of Stéphane Hoynck on the *Grande-Synthe* case (Hoynck, 2020).

20 Hoynck, 2020, p. 6.

21 Hoynck, 2020, p. 15.

22 Hoynck, 2020, p. 18.

23 CJUE, 2014, ClientEarth, Case C-404/13, ECLI:EU:C:2014:2382.

24 Conseil d'Etat, 2017, Les Amis de la Terre, Case 394254, ECLI:FR:CECHR:2017:394254.20170712.

25 Conseil d'Etat, 2021, Les Amis de la Terre, Case 428409, ECLI:FR:CECHR:2021:428409.20210804.

was subsequently condemned twice for failure to fulfil its European obligations by the Court of Justice[26].

With regard to biodiversity, the decisive role of EU law is also widely documented. This is obvious in the application of the Birds Directive[27]. For example, in the case of glue hunting, the fact that an infringement procedure had been opened against France by the European Commission probably prompted the Conseil d'Etat to refer a question to the European Court of Justice[28], which finally forced the Conseil d'Etat to consider this method of hunting as contrary to EU law[29], something that was not obvious a few years earlier[30]. This example shows that it is not only the existence of EU directives that is important, but the European legal system as a whole, including the infringement procedure, the action for failure and preliminary ruling.

Similarly, in the case of the brown bear in the Pyrenees, the European Commission opened an infringement procedure. The administrative tribunal of Toulouse considered that the inability of the State to restore the brown bear to a favourable conservation status constituted a failure to act, for which it was liable[31]. Here again, an obligation of result resulting from a European directive[32] was at the origin of the associations' success. More recently, and based on the same obligation of result, the State's decisions to authorise the scaring of bears to limit damage to livestock were cancelled by the Conseil d'Etat[33].

In the end, climate litigation is not very different from environmental litigation in terms of the decisive influence that EU law has on the outcome of the case. In the same way, climate litigation is following in the footsteps of environmental litigation by reaping the benefits of the recognition of ecological damage.

3.2 The recognition of ecological damage: a ripe fruit

Ecological damage is a damage to nature itself, to its intrinsic value, i.e. harm to nature which cannot be equated with harm to property or moral damages. One of the reasons why the *Oxfam* case has been noticed is that it is the first decision of an administrative judge in France that conceptually accepts the legal reparability of ecological damage[34]. Indeed, the position of the administrative judge with regard to the concept of ecological damage has been very closed until now. Since the case *Ville de Saint-Quentin* of 12 July 1969[35], the Conseil d'Etat has always refused to admit this type of damage in administrative law[36].

In the *Oxfam* case, the reparability of ecological damage is admitted in the course of the reasoning. In particular, the tribunal states that associations "*have the right to bring an action for compensation for ecological damage before an administrative court*". In general, it applies the legal regime defined in Articles 1246 et seq. of the Civil Code. It is this choice to literally apply existing law – whereas traditionally the administrative judge adapts the rules of civil liability to the context of administrative liability – that leads the judge to admit reparability but also to reject, in this case, the associations' claims[37].

In the end, the Paris administrative tribunal simply applied the law. The contribution of the decision is limited to the fact that the application of the law results from the administrative judge and not from the civil judge, as was already the case for more than ten years. In other words, the *Oxfam* decision embodies the recent progress of civil environmental litigation in the field of administrative law.

This development is logical and was highly expected. Indeed, the legal context has evolved considerably under the triple effect of the case law of the civil judge, European Union law and the constitutionalisation of the environment. It was EU Directive 2004/35 on environmental liability which represented the first cautious step towards a more comprehensive scheme of redress in the context of ecological harm[38]. In France, some important additional steps were taken in this regard. Since 2005, ecological damage has had a constitutional basis with Article 4 of the Charter of the Environment, according to which "*everyone must contribute to repairing the damage they cause to the environment*", but it was not yet recognised by the law. Then, with its landmarking ruling in the *Erika* case of 2012, the *Cour de cassation* formally accepted that redress was possible for

26 CJUE, 2019, Commission vs. France, Case C-636/18, ECLI:EU:C:2019:900; CJUE, 2022, Commission vs. France, Case C-286/21, ECLI:EU:C:2022:319.

27 For an overview, see Bétaille, 2020, p. 315.

28 CJUE, 2021, One Voice et Ligue de protection des oiseaux, Case C-900/19, ECLI:EU:C:2021:211.

29 Conseil d'État, 2021, Association One voice et Ligue française pour la protection des oiseaux, Cases 425519 and 434365, ECLI:FR:CECHR:2021:425519.20210628.

30 See Bétaille, 2019, p. 1172.

31 See Bétaille, 2018, p. 2346.

32 Article 1 of the Habitats Directive (Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora).

33 Conseil d'Etat, 2021, Association Ferus et al., Case 434058, ECLI:FR:CECHR:2021:434058.20210204; Conseil d'Etat, 2022, Association Ferus et al., Case 442676; ECLI:FR:CECHS:2022:442676.20220425.

34 Administrative Tribunal of Paris, 2021 (3 February), Association Oxfam et al., Cases 1904967, 1904972, 1904976/4-1.

35 Conseil d'Etat, 1969, Ville de Saint-Quentin et al., Cases 74546, 74933, 74934, 74942 and 74943.

36 See Conseil d'Etat, 2015, ASPAS, Case 375144, ECLI:FR:CESSR:2015:375144.20150330; 2016, ASPAS, Case 390081, ECLI:FR:CESJS:2016:390081.20160226.

37 Indeed, the associations' request is rejected here because they had limited themselves to asking for monetary compensation, up to a symbolic one euro, whereas the Civil Code provides for the principle of compensation in kind. For more information, see Bétaille, 2021, p. 2228.

38 Since then, the International Court of Justice recognized the ecological damage (ICJ, 2018, Costa Rica vs. Nicaragua, Case 150).

ecological damage, confirming the appeal and first instance rulings from 2010 and 2008[39]. Most importantly, though, the 2016 Act on biodiversity modified the French Civil Code and provided an explicit legal regime for the compensation of ecological damages[40]. In this context, ecological damage is defined as a damage to "*ecosystems elements or functions*"[41] and is distinguished from economic and moral damages. These provisions now appear as "*a declination of Article 4 of the Charter*"[42], as recently confirmed by the Conseil constitutionnel[43].

In this context, the recognition of ecological damage by an administrative judge seemed, sooner or later, inevitable. Moreover, it was eagerly awaited by environmental legal scholars[44] and would most probably have taken place even in the absence of 'climate' litigation, as announced by a rapporteur public of the Conseil d'Etat a few years earlier[45].

Therefore, climate litigation has been driven by these two trends in environmental litigation, the influence of European Union law and the strong development of environmental civil liability, which explains some of its success before the administrative courts. Nevertheless, climate litigation also suffers from the same limitations as environmental litigation as a whole. Of course there are obvious limits, such as those related to the principle of separation of powers. As Frédéric Rollin has shown, the administrative judge's interpretation of this principle considerably limits the operational scope of the decisions in the *Grande-Synthe* and *Oxfam* cases[46]. In the end, injunctions ruled by the judge remain a "paper tiger"[47]. For the time being, there have been no financial penalties imposed on the State and, even if financial penalties were ordered, a large portion could be finally allocated to the budget of public authorities by the judge, thus virtually eliminating their deterrent effect[48]. Nevertheless, the limits of climate litigation are even deeper. Their examination allows us to look in more depth at the current issues of environmental litigation as a whole.

4 Climate litigation faces the same limitations as environmental litigation

Climate litigation does not produce miracles. Like environmental litigation as a whole, it comes up against the difficulty of mobilising a positive obligation – understood as an obligation imposing action, as opposed to a negative obligation which imposes abstention[49] – against the legislator (4.1) as well as the insufficient integration of environmental objectives (4.2).

4.1 The difficulty of mobilising positive obligations against the legislator

Effective legal protection of the environment requires States to take action in favour of the environment. This naturally raises the question of how litigation can be used to combat the inertia of public authorities in this area and force them to act in favour of the environment. With regard to the government's regulatory power, the issue is fairly straightforward, as the *Grande-Synthe* and *Oxfam* cases show. In both cases, the remedies used – an action for annulment of the decision to refuse to take action in the first case, and an action for liability for failure to act in the second case – can have the effect of compelling the government to act. The question is much more delicate, however, when it comes to obliging the legislator to act. This is the result of a demanding conception of the separation of powers, stemming from the French revolution, and the fact that France remains, despite the advent of constitutional review in the second half of the 20th century, marked by a form of legicentrism. This is a classic issue that goes far beyond the context of climate litigation[50], but which nevertheless limits its scope.

Of course, the direct violation of norms superior to a legislative act can be sanctioned by the Conseil constitutionnel and by supranational courts. However, insufficient action by the legislator to implement supralegislative objectives is much more difficult to sanction. This is very important in practical terms. The government is not the only one to act in environmental matters. According to Article 34 of the Constitution, it is even the legislator who is competent to determine the fundamental principles in environmental matters. The question of the sanction for legislative omission is therefore central.

39 See Cour de cassation, crim., 2012, Erika, Case 10-82.938; Paris Court of Appeal, 2010, Erika, Case 08/02278; Tribunal de grande instance of Paris, 2008, Erika, Case 9934895010.

40 Article 4 of Act No. 2016-1087 of 8 August 2016 for the recovery of biodiversity, nature and landscapes. See Taylor, 2018, p. 81.

41 Article 1246 of the Civil Code.

42 Martin, 2021, p. 379.

43 Conseil constitutionnel, 2021, Association Réseau sortir du nucléaire et a., Case 2020-881 QPC, ECLI : FR : CC : 2021 : 2020.881.QPC.

44 See Lucas, 201; Huglo, 2013, p. 667.

45 The rapporteur public, Xavier de Lesquen, mentioned this hypothesis in 2015 in his conclusions on the ASPAS case (Conseil d'Etat, 2015, ASPAS, Case 375144, ECLI:FR:CESSR:2015:375144.20150330).

46 Rolin, 2021.

47 It is interesting to note that, in the Urgenda case, if the judge orders by means of an injunction to achieve the reduction targets, he leaves it to the legislator to determine whether it is necessary to legislate and in what way (see De Sadeleer, 2020, p. 11).

48 See for example, in relation to air pollution, Conseil d'Etat, 2021, Les Amis de la Terre, Case 428409, ECLI:FR:CECHR:2021:428409.20210804.

49 This ultimately corresponds to the status positivus described by Georg Jellinek as the "legally protected capacity to demand positive benefits from the state" (Georg Jellinek, quoted by Jouanjan, 1998, p. 44.). See as well interesting developments by Hans Kelsen (Kelsen, 1979, p. 136-137).

50 See Bétaille, 2012, p. 427 et seq.

A first way to force the legislator to act is to force the government to table a bill in Parliament. However, the Conseil d'Etat clearly stated in the *Grande-Synthe* case that "*the fact that the executive branch refrains from submitting a bill to Parliament concerns the relationship between the constitutional public authorities and is therefore outside the jurisdiction of the administrative court*"[51].

Regarding constitutional remedies, it should first be pointed out that there are no appeals for omission of legislation before the Conseil constitutionnel, unlike in Brazil for example. Indeed, the Conseil constitutionnel can be seized of the constitutionality of a legislative act, but not of the absence of such an act. There is no remedy available to challenge the absence of a legislative act. One way around this problem is to consider the inadequacy of a law in terms of constitutional obligations. This is precisely what some Members of Parliament did with the latest climate bill. They argued that the climate bill as a whole was contrary to the Constitution by not providing the necessary guarantees for the respect of the right to the environment. As mentioned above, in its decision of 13 August 2021[52], the Conseil constitutionnel finds that it "*does not have a general power of injunction vis-à-vis the legislator*" and that "*in the present case, the applicants are making a general criticism of the legislature's ambitions and the inadequacy of the act as a whole. They therefore did not challenge any particular provision of the bill in order to seek cancellation. The appeal against the bill as a whole can therefore only be dismissed*". However, even if the Conseil constitutionnel refuses here to annul a bill as a whole, it has recently opened the door to the possibility of annulling a particular legislative provision because of its inadequacy to ensure compliance with the Charter of the Environment. The case brought by the association *France Nature Environnement* indirectly concerned the exploitation of gold mines in French Guyana[53]. The association challenged the constitutionality of Article L. 144-4 of the Mining Code, which allows, in certain circumstances, the automatic extension of mining concessions, even though this extension is likely to harm the environment. It considered that this mechanism was contrary to Article 1 (right to the environment) and Article 3 of the Charter of the Environment (obligation of all persons to prevent, under the conditions defined by the law, damage to the environment)[54]. The Conseil constitutionnel found that "*neither (the provisions of Article L. 144-4 of the Mining Code) nor any other legislative provision required the administration to take into account the environmental consequences of such an extension before making a decision*" and concluded that the legislator had disregarded Articles 1 and 3 of the Charter. Therefore, in this case, it is indeed the legislator's omission that is sanctioned, but the scope of this decision is relatively limited. It is difficult at this stage to conclude that constitutional review can oblige the legislator to implement positive obligations and raise the ambition of a law in the fight against environmental issues.

If we then turn to the European courts, we must first examine the influence of the case law of the European Court of Human Rights. The latter has highlighted numerous positive obligations in environmental matters, but, in operational terms, how can these obligations be mobilised outside the hypothesis of a direct appeal to the Court? The answer is simple: a positive obligation arising from the case law of the European Court of Human Rights cannot be invoked against the legislature because the European Convention on Human Rights itself is simply not invocable in the context of constitutional review of legislative acts[55]. However, constitutional review by the Conseil constitutionnel is the only one likely to lead to the annulment of a legislative provision. The control of conventionality of laws exercised by the Conseil d'Etat is only a control by way of exception. It is not likely to oblige the legislator to act. In any case, the influence of the environmental case law of the European Court of Human Rights on a French administrative judge is close to zero. This is particularly visible in the *Grande-Synthe* and *Oxfam* cases. In both cases, Articles 2 and 8 of the European Convention on Human Rights were invoked by the applicants. In both cases, the judge's decision did not even address this argument[56]. More generally, the situation is the same in all administrative environmental litigation. There is no significant decision in which the judge agreed to apply Articles 2 or 8 of the Convention in environmental matters. Consequently, as far as France is concerned, it would

[51] Conseil d'Etat, 2020, Commune de Grande-Synthe, Case 427301, ECLI:FR:CECHR:2020:427301.20201119.

[52] Conseil constitutionnel, 2021, Loi portant lutte contre le dérèglement climatique et renforcement de la résilience face à ses effets, Case 2021-825 DC, ECLI : FR : CC : 2021 : 2021.825.DC.

[53] Conseil constitutionnel, 2022, France Nature Environnement, Case 2021-971 QPC, ECLI : FR : CC : 2022 : 2021.971.QPC.

[54] The full provisions of the Constitutional Charter of the Environment are available in English (see Constitutional charter of the environment, 2005).

[55] Conseil constitutionnel, 1975, IVG, Case 74-54 DC; 2010, Case 2010-605 DC. See Delzangles, 2020, p. 30.

[56] It is therefore to refer to the conclusions of the rapporteur public to get some insight. In the *Grande-Synthe* case, he considers that "*these conventional norms were not enacted to constrain the margin of appreciation of the States by imposing a standard of behaviour of case law origin*". He also refers to the abstract nature of litigation to justify the rejection of the application of the European Convention. In his view, "*it is the existence of an adverse effect on the private or family sphere of a person, and not merely the general degradation of the environment*" that Article 8 of the Convention allows to be taken into account (Hoynck, 2020, p. 9).

be very unwise to put forward the hypothesis of a "*rights turn*"[57] in climate or environmental litigation.

Finally, there is the possibility of an action for failure initiated by the European Commission. On paper, this type of action would very likely force the legislator to act. However, here too it seems difficult to be optimistic. Indeed, since 2004, there has been a drop in the number of infringement proceedings launched by the Commission against Member States. Kelemen and Pavone recently provided evidence that "*by embracing dialogue with governments over robust enforcement, the Commission sacrificed its role as guardian of the Treaties to safeguard its role as engine of integration*"[58]. Therefore, according to them, the Commission has deliberately under-enforced EU legislation. As European climate policy needs integration, enforcement is probably not the Commission's priority.

The mobilisation of positive obligations against the legislator will therefore necessarily have to go through the national judge, unless these obligations are left unenforced. Unfortunately, these are not the only limitations of climate and environmental litigation. Environmental objectives are not sufficiently integrated into domestic legislation, which allows the judge to overemphasise formalism.

4.2 The insufficient integration of environmental objectives

The *Grande-Synthe* case put the climate objectives transcribed into domestic law in Article L. 100-4 of the Energy Code in the spotlight. The Conseil d'Etat implemented what its vice-president called "*trajectory review*"[59]. This is a review of compliance by anticipation[60]: the probability of complying with the objectives is reviewed before their temporal deadline. This innovation has been noticed, also at international level[61]. Nevertheless, shortly after its creation, the scope of trajectory review was carefully delimited by the Conseil d'Etat.

In the *Grande-Synthe* case, it was France's climate policy as a whole, in its abstraction, that was reviewed. The scale of the case was relatively large and distant from the field. However, a fast and radical climate transition, as it necessarily follows from these ambitious objectives, not only requires the review of policies, but also implies confronting the projects having an impact on climate with these objectives[62].

The Conseil d'Etat was recently called upon to rule on this issue, in relation to the *Larivot* thermal power plant in French Guyana. In its decision of 10 February 2022, it refused to exercise its trajectory review over this project[63]. The thermal power plant was subject to two types of permits: a permit to operate under Article L. 311-5 of the Energy Code and the environmental permit under Article L. 181-3 of the Environmental Code. In substance, Article L. 311-5 of the Energy Code specifies that the operating permit must take into account the greenhouse gas reduction objectives set out in Article L. 100-4 of the Energy Code. In contrast, Article L. 181-3 of the Environmental Code does not specify this concerning the environmental permit. However, in this case, it was the environmental permit that was challenged before the administrative judge, not the operating permit. The Conseil d'Etat deduced that the argument based on the fact that the environmental permit was incompatible with the objectives of Article L. 100-4 of the Energy Code was not such as to create a serious doubt as to the lawfulness of the environmental permit, contrary to what the Administrative tribunal of Guyana had ruled at first instance. This results in a rather formalistic position of the Conseil d'Etat: only the compatibility of the operating permit can be reviewed, not the environmental permit.

The conclusions of the rapporteur public in this case, the same rapporteur as in the *Grande-Synthe* case, provide some insight. According to him, "*checking whether each permit is compatible with the legislative GHG reduction targets, which are formulated in a very general way, amounts in reality to checking the GHG reduction trajectory, decision by decision*". He adds that "*apart from cases where the legislation has decided otherwise, such as for (operating) permits under Article L. 311-5, (...) it therefore seems impracticable to us to engage in a compatibility review and to require the judge to make political priority choices between different options for achieving the objectives*"[64].

While the judge's self-restraint is understandable from a political point of view, this argument nevertheless seems to pose several difficulties. Firstly, it contains a contradiction within itself. How could the compatibility review of an environmental permit be 'impracticable' when it is imposed by law on operating permits? While this type of review may be uncomfortable for the judge, they will have to carry it out regarding operating permits. The refusal to exercise this review regarding environmental permits

57 Peel and Osofsky, 2018, p. 37.

58 Kelemen and Pavone, 2021.

59 Lasserre, 2021.

60 See Delzangles, 2021, p. 2115.

61 Members of the Conseil d'Etat were even invited to present the *Grande-Synthe* decision at Yale University (see Conseil d'Etat, 2021).

62 Furthermore, the Conseil d'Etat ruled that the provisions of Article 4(1) of the Paris Climate Agreement "are not intended to prevent in principle any new motorway construction project" (Conseil d'Etat, 2021, Ville de Genève, Case 438686, ECLI:FR:CECHR:2021:438686.20211230).

63 Conseil d'Etat, 2022, Associations France Nature Environnement et Guyane Nature Environnement, Case 455465, ECLI:FR:CECHR:2022:455465.20220210.

64 See Hoynck, 2022.

therefore seems to be tainted by an excess of formalism. This was in a way confirmed by the rapporteur public when he recalled that "*it is in the permit under energy law that the legislator wanted the GHG emissions of this type of installation to be taken into account*". Nevertheless, let us take this assumption seriously. After all, if the compatibility review with the climate objectives of Article L. 100-4 of the Energy Code can be exercised regarding the operating permit, why impose a duplication in the context of the environmental permit? One could almost find a common-sense argument here. In reality, it is not duplicated. Indeed, even if the case law does not yet seem to be stabilised in this respect – at least we hope so – it turns out that environmental associations do not have standing to challenge the operating permit[65], whereas they do regarding environmental permits. Therefore, the practical result of the *Larivot* decision is that the so-called 'trajectory review' regarding permits is practically impossible.

In the end, the climate objectives are not sufficiently integrated. Beyond the formalism shown by the Conseil d'Etat, the Environmental Code does not explicitly provide for the compatibility of environmental permits with the climate objectives of Article L. 100-4 of the Energy Code. Under those circumstances, it is very easy for the judge to invoke the so-called 'independence of legislations' principle to dismiss the claims of the applicants, as was implicitly the case in *Larivot*[66].

Again, this type of problem is not unique to climate litigation. The application of the principle of 'independence of legislations' has long been criticised in the field of environmental litigation[67]. According to this principle, when a project is subject to several types of permits under different legislations, the irregularity of one permit has no influence on the lawfulness of the other. From the outset[68], the administrative judge has applied this principle to projects that are the subject of a building permit and an environmental permit. For example, a building permit can theoretically only be cancelled if it is contrary to legislation under the planning code. In principle, its irregularity regarding legislation under the environmental code does not imply its unlawfulness. Such a formalistic principle is justified by the search for legal certainty to the detriment of lawfulness and integration between legislations.

That said, since the adoption of the Environmental Charter in 2005, there is a fairly simple way of getting around this principle of independent legislations. Indeed, while this principle may impose a form of watertightness between two types of legislative provisions, it cannot prevent the application of constitutional provisions, as shown by the case law of the Conseil d'Etat[69]. While the lawfulness of an environmental permit cannot be directly reviewed regarding the Energy Code, it can be confronted regarding the provisions of the Constitutional Environmental Charter, which could be interpreted in the light of France's climate commitments. Of course, this remains largely hypothetical and highly dependent on the will of the judge. The full implementation of France's environmental objectives, however, would require overcoming shortcomings in the integration of domestic law.

5 Conclusion

The media and scholars' attention received by climate litigation should not be misleading. Although climate litigation has undeniable political significance – even if its positive impact on the reduction of greenhouse gas emissions remains to be seen – its originality in legal terms remains limited compared to other areas of French environmental litigation. It is subject to the same trends as environmental litigation.

In the end, its originality is limited to the establishment of a 'trajectory review' by the Conseil d'Etat in the *Grande-Synthe* case. The judge accepts to project himself into the future, without waiting for the end of the reference period, to verify that the State's action is sufficient to achieve the objectives it has set itself. According to the vice-president of the Conseil d'Etat, this review "*leads the judge to ensure, on the date of the ruling, not that the objectives have been achieved, but that they can be achieved, that they are on the way to being achieved, and that they are part of a credible and verifiable trajectory*"[70]. This form of anticipatory monitoring is, in itself, a step forward. Trajectory review offers an operational translation of the king principle in environmental matters, the only one that really counts – the prevention principle. The emergence of trajectory review finally reflects the strength of the law, of climate law, the law of the climate transition. By providing for quantified objectives with regular deadlines, it has become anchored in reality and has moved away from the incantatory declarations to which environmental law was largely accustomed in the past.

65 Nantes Administrative Court of Appeal, 2018, Association Non aux éoliennes entre Noirmoutier et Yeu, Case 17NT00609.

66 Even if the rapporteur public considers that "*this is not a simple argument of independence of legislation*".

67 See Bouyssou, 1984, p. 169; Delhoste, 2001.

68 This principle was created by the case law of the Conseil d'Etat (Conseil d'Etat, 1959, Sieur Piard, Case 38893). It has no legislative foundation.

69 Conseil d'Etat, 2010, Association du quartier les Hauts de Choiseul, Case 328687.

70 Lasserre, 2021.

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In many countries lawyers are working on aspects of environmental law, often as part of environmental initiatives and organisations or as legislators. However, they generally have limited contact with other lawyers abroad, in spite of the fact that such contact and communication is vital for the successful and effective implementation of environmental law.

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