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CASE NOTES

Climate Change Risk and Climate Justice in France: The High Administrative Court as Janus or Prometheus?

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Conseil d'Etat (France) Commune de Grande-Synthe, 14 November 2020[1] *and 1 July 2021*[2]

Abstract

Climate change emergency requires rapide and determined action. The procrastination of the French state is not without consequences. One of them is that the High Administrative Court (Conseil d'Etat) found that climate risk is not taken seriously enough and is insufficiently addressed. In two decisions ruled in 2020 and 2021, the Conseil d'Etat in France had the opportunity to express itself on these issues. This is the case known as "Grande Synthe", referring to the city that filed the petition before the High Court, in an appeal for "exces de pouvoir" –exces of power -, asking the administration to take further action in the fight against climate change. Civil society in France is indeed becoming impatient and taking legal action challenging the lack of ambition of the State in climate matters. The decision commented here will no doubt serve as a model for other similar decisions and for other European countries. It will lead to an increase of climate litigation in France and abroad.

Keywords: climate change law; climate justice; climate litigation; climate risk

I. Introduction

Even though the best time to act for the mitigation of climate change was almost thirty years ago,[3] and even though acting today would still be acceptable, the fact remains that most of the action and effort that must be made to reduce greenhouse gas (GHG) emissions have been postponed until tomorrow. This procrastination is not without consequences. One of them is related to the fact that the phenomenon is insufficiently addressed. Inevitably, this leads to an increase in the risk of climate litigation.[4] In two decisions in 2020[5] and 2021, the Conseil d'Etat (High Administrative

[1] Conseil d'Etat, n° 42730, section du contentieux, 6ème et 5ème chambres réunies, 19 November 2020 <https://www.conseil-etat.fr/actualites/emissions-de-gaz-a-effet-de-serre-le-gouvernement-doit-justifier-sous-3-mois-que-la-trajectoire-de-reduction-a-horizon-2030-pourra-etre-respectee>.

[2] Conseil d'Etat n° 427301 ECLI:FR:CECHR:2021:427301.20210701, 1 July 2021, 5 et 6e chambres réunies <https://www.conseil-etat.fr/fr/arianeweb/CE/decision/2021-07-01/427301>.

[3] Intergovernmental Panel for Climate Change <https://www.ipcc.ch/reports/>.

[4] 6th IPCC Report, 2022 <https://www.ipcc.ch/reports/>; <https://www.unep.org/resources/report/global-climate-litigation-report-2020-status-review>.

[5] CE, section du contentieux, 6ème et 5ème chambres réunies, 19 November 2020, n° 427301.

Court; hereafter, the High Court or the Court) in France had the opportunity to rule on these issues. This article comments on the case known as "Grande-Synthe", referring to the city that filed the petition before the High Court. The origin of the case is an appeal for "exces de pouvoir"[6] (excess of power), asking the administration to take further action in the fight against climate change.

The Grande-Synthe case, with the decision of November 2020 completed by that of July 2021, is the first major climate case in France that will enshrine the obligation for the State to honour its reduction targets by establishing a reduction trajectory that is staggered in time, credible and achievable. The judges of the High Court exercised control over the trajectory for the first time.[7] "The Conseil d'Etat has adapted to the time of the fight against climate change by inaugurating a new type of control, which can be called trajectory control. Even though the objectives enshrined in law have distant horizons – 2030, 2040, even 2050 – the judge cannot wait ten, twenty or thirty years to verify that they have been achieved, unless he denies the urgency of acting today, unless he deprives his control of any useful effect from the outset, given the very strong inertia of the climate."[8] The control of the trajectory is then similar to control of "compliance", which leads the judge to ensure, on the date of the judgment, that the objectives of reduction "can be reached".[9] This control is a pioneering function that no judge had so far undertaken in other climate litigation in Europe. It allows the judge to have a prospective vision. Finding that the French State has failed to combat climate change on its territory, the injunction to take all necessary measures to curb emissions of GHG is the solution that judges have applied. This is to say that the judges have been able for the moment only to enjoin the administration to act in a preventative way. Of course, the nature and the extent of these "measures" cannot be precisely stated by the judges, who, remaining limited by their "office", can only "show the way" for the government without, however, indicating to them how to achieve GHG emissions reductions. This delicate balance between, on the one hand, control of administrative action and, on the other hand, the injunction to act is at the heart of the Grande-Synthe case that is commented on here.

What seems essential is the new function that administrative judges will take on in France from these two decisions commented on here. Indeed, by playing a role that allows them to control the achievement of climate objectives embodied in both past and future GHG reduction trajectories, French judges are taking on a new, more forward-looking function. The judges of the High Court, finding that the French State has failed to combat climate change, inaugurate a new trend in climate litigation that will undoubtedly permeate through climate justice in Europe.

[6] Appeals to the administrative judge are classically divided into four main categories: contentions regarding excesses of power, contentions regarding full jurisdiction, contentions regarding the interpretation and assessment of legality and contentions regarding repression. As a legal construction, the recourse for excess of power is the action by which the litigant, called the "petitioner", asks the judge to assess the legality of an administrative decision and to pronounce on its cancellation. The remedy for excess of power is defined as "the remedy which is open even without text against any administrative act and which has for effect to ensure, in accordance with the general principles of the law, the respect of legality". (CE Assemblée Dame Lamotte, 17 February 1950).

[7] H Delzangles, "Le premier 'recours climatique' en France: une affaire à suivre!" (2021) 4 L'Actualité juridique. Droit administratif 217.

[8] Webinar Yale University and Conseil d'Etat autour de la décision Grande-Synthe, 24 February 2021 <https://www.conseil-etat.fr/actualites/mercredi-24-fevrier-webinar-avec-l-universite-de-yale-autour-de-la-decision-grande-synthe>.

[9] Delzangles, supra, note 7; M Torre-Schaub, "Le contentieux climatique : du passé à l'avenir" (2022) 1 Revue française de droit administratif 72–85; J Bétaille, "Climate Litigation in France, a Reflection of Trends in Environmental Litigation" (2022) 22 ELNI Review 63–71.

The question raised and implicitly analysed in this article is whether French judges act as "ferryman", opening a path of control from the past to the future, like Janus,[10] the Greek god. Do they extend their function over time? Or do they act more like Prometheus,[11] limiting themselves to improving the existent legal tools to better control the GHG reduction curve and reduction trajectories? Are those two roles incompatible? We will here to show that, far from being irreconcilable, these two roles converge in the work undertaken in the Grande-Synthe case. In our view, French judges are now assuming a double role that allows them to extend their office into the present and the future, as required by the climate change issue. At the same time, French judges are revealing multiple possibilities of control by using the tools that French law places at their disposal. The possibility of deciding whether the actions of the administration are or are not compatible with the commitments made on climate matters is no more nor less than the function that they are expected to carry out.

But let us first introduce the case itself in order to better contextualise and understand the questions we are putting forward here. It is important, then, to place the case in its context in order to understand the facts and the procedure in itself.

1. Placing the Grande-Synthe case in context

Grande-Synthe is a small town in the north-west of France in a high-risk climate change area considering the strong probability of its flood immersion due to rising seawater levels. The application of Grande-Synthe before the Council of State consists of a request made by several applicants: firstly the city of Grande-Synthe, then its mayor, and then in a second step the cities of Paris and Grénoble and three other municipalities, with the contribution of four non-governmental organisations (NGOs).[12]

2. Facts and procedure

The Grande-Synthe case includes two decisions ruled upon by the High Court. The first Grande-Synthe decision of 20 November 2020 is an appeal aimed at the implicit decisions of the Government to take all necessary measures to enable France to respect its commitments to reduce GHG emissions in its territory. The High Court considered the commune's appeal and the interventions of the cities and certain associations admissible – by adopting an extensive conception of the interest to act. In its November 2020 decision, the Court issued "that all useful measures should be taken to curb the curve of greenhouse gas emissions produced on national territory so as to respect at least the commitments made by France at the international and national levels".[13] However, before making a final decision on the application, the Court postponed the ruling until the State would take all useful measures to reduce GHG emissions more effectively. Before giving a final ruling on this

[10] Janus is the Roman god of beginnings and ends, of choices, of passage and doors. He is two-faced and is represented with one face turned towards the past and the other towards the future.

[11] Prometheus symbolically brought technology to humankind. This myth shows that what seemed to be a weakness of humanity, namely humankind's original deprivation, is in fact what allowed humanity to become the only species free to reinvent itself constantly.

[12] The same NGOs had also brought the request before the Administrative Court of Paris (Tribunal administratif de Paris) called the "*affaire du siècle*" (case of the century), implicating the State in causing harm to the atmosphere due to global warming. *Affaire du siècle I, Oxfam France, Notre Affaire A Tous, Greenpeace France, Fondation pour la nature et l'homme* TA Paris, 3 February 2021; JurisData n°2021-000979 and TA Paris, 14 October 2021.

[13] "2°) d'enjoindre au Premier ministre et au ministre d'Etat, ministre de la transition écologique et solidaire, de prendre les mesures et dispositions susvisées dans un délai maximum de six mois" CE N° 427301ECLI:FR:CECHR:2020:427301.20201119, 19 November 2020 <https://www.conseil-etat.fr/fr/arianeweb/CE/decision/2020-11-19/427301>.

request, the Court asked the Government to justify, within three months (ie before 19 February 2021), that the GHG emissions reduction trajectory for 2030 (40% reduction compared to 1990) could be met without the need to take additional measures.

In January 2021, the High Court received a brief from the Ministry of Ecological Transition (MTE) justifying that the measures taken by the Government were sufficient to achieve this objective. In February 2021, the Court published a press briefing intending to follow up on the litigation and specifying the future schedule. The High Court also sent the MTE's brief to the defendants for their comment.

In April 2021, the High Court opened the investigation phase with an adversarial procedure on the basis of all of the elements received. The MTE sent four new briefs. On 11 June 2021, a new public hearing was held at the Court in the presence of the communities, the applicants and Government representatives, who had also been present at the hearing on 19 November 2020. The public rapporteur concluded that the High Court should enjoin the Government to take all necessary measures within nine months to comply with its commitments. Based on the conclusions of the rapporteur, the Conseil d'Etat ruled an unprecedented decision on 1 July 2021. It partially granted the petitioners' request, recognising explicitly the normative scope of the objective of the reduction of GHG emissions.[14]

The purpose of the following pages is to analyse the two decisions in a grouped way in order to provide a coherent overall reading. The aim is to comment on these decision by identifying their scope in France and in Europe. The judgment and the questions raised will first be presented (Section II). Then, the main contributions of the two decisions will be presented by sketching out their scope (Section III). This will allow us to provide some perspectives regarding the future of climate litigation in France and Europe (Section IV), before concluding (Section V).

II. The judgment and the legal questions raised

Through a petition, a reply brief and a new brief, registered on January 23 and December 21 2019 and 30 October 2020, respectively, the municipality of Grande-Synthe asked three main questions to the High Court. In the first place, it was asked to cancel the excess of power of the implicit decisions of rejection resulting from the silence kept by the Government. Their request tended, on the one hand, to take all useful measures enabling the curbing of the curve of GHG emissions produced on the national territory so as to respect the commitments agreed by France at the international and national level. On the other hand, they asked for the implementation of immediate measures to adapt to climate change in France. Finally, the request aimed to order the administration to take all necessary legislative and regulatory initiatives to "make climate change a priority" and prohibit any measure likely to increase GHG emissions.[15]

[14] Article 1: Le refus implicite de prendre toutes mesures utiles permettant d'infléchir la courbe des émissions de gaz à effet de serre produites sur le territoire national afin d'assurer sa compatibilité avec les objectifs de réduction des émissions de gaz à effet de serre fixés à l'article L. 100-4 du code de l'énergie et à l'annexe I du règlement (UE) 2018/842 du 30 mai 2018 est annulé. Article 2: Il est enjoint au Premier ministre de prendre toutes mesures utiles permettant d'infléchir la courbe des émissions de gaz à effet de serre produites sur le territoire national afin d'assurer sa compatibilité avec les objectifs de réduction des émissions de gaz à effet de serre fixés à l'article L. 100-4 du code de l'énergie et à l'annexe I du règlement (UE) 2018/842 du 30 mai 2018 avant le 31 mars 2022.Article 3: L'Etat versera à la commune de Grande-Synthe une somme de 5 000 euros au titre de l'article L. 761-1 du code de justice administrative. Article 4: Le surplus des conclusions de la requête et des interventions est rejeté". CE N° 427301ECLI:FR:CECHR:2021:427301.20210701, 1 July 2021 <https://www.conseil-etat.fr/fr/arianeweb/CE/decision/2021-07-01/427301>.

[15] <https://www.conseil-etat.fr/fr/arianeweb/CE/decision/2021-07-01/427301>.

As a second question, the request aimed to order the Government to take the measures and provisions mentioned above within a maximum period of six months.

As a third request, the applicants asked as an alternative to refer to the Court of Justice of the European Union several questions for a preliminary ruling on the interpretation of the provisions of Articles 2, 3 and 4 of the Paris Agreement in order to determine whether they constitute provisions having a direct effect, thus making individuals entitled to rely upon them. They also asked to include the provisions of Article 3 of Decision No 406/2009/EC of the European Parliament and of the Council of 23 April 2009 and the provisions of Directives 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency and 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources.

With the two decisions, successively that of 2020 (Section II.1) and that of 2021 (Section II.2), the European Commission has taken a pioneering position in France on the binding nature of the State's GHG reduction obligations. The Court, by noting the delay in France's public policies on GHG reductions, has laid an essential stone in the construction of climate justice in France. Judges from now on will be empowered to review not only past actions, but also the feasibility of future actions to meet reduction targets. This new control will no doubt be used in other decisions in France and elsewhere.

1. The 19 November 2020 decision

The November 2020 decision noted first that, in order to implement the Paris Agreement, France has committed to adopting an GHG emission reduction pathway that will enable it to achieve a 40% reduction by 2030 compared to its 1990 level.[16]

Then, and with regard to the legal scope of the United Nations Framework Convention on Climate Change (UNFCCC) and the Paris Agreement invoked by the applicants in French law, the High Court noted that these agreements leave it up to each signatory State to take national measures to ensure their implementation. The Court nevertheless specified that the objectives set by France in this respect should be understood in the light of these agreements in order to give them full effect in French law. In France, explained the High Court, the legislator has set a target of reducing GHG emissions by 40% between 1990 and 2030. To reach this objective, the Government adopted by decree a reduction trajectory extending over four periods (2015–2018, 2019–2023, 2024–2028 and 2029–2033), each including an emissions cap (called a "carbon budget") that progressively decreases. As the decree of 21 April 2020 postponed part of the emission reduction effort to be achieved after 2020 and in particular after 2023, the Court asked the Government to justify that its refusal to take more stringent measures is compatible with meeting the 2030 target.[17]

On the merits, the High Court noted that although France has committed to reducing its emissions by 40% by 2030, in recent years it had regularly exceeded the emission ceilings (carbon budgets) it had set for itself, and that the decree of 21 April 2020 postponed most of the reduction efforts until after 2020.

2. The 1 July 2021 decision

The High Court's decision of 2021 that confirmed the 2020 ruling is considered for several reasons a benchmark climate decision in France. The Conseil d'Etat noted that the National

[16] Points 13 and 14 of CE Grande-Synthe, 19 November 2020 decision.
[17] Point 16 of CE Grande-Synthe, 19 November 2020 decision.

Low Carbon Strategy (Stratégie Nationale Bas-Carbone; SNBC)[18] provides for a 12% reduction in emissions for the period 2024–2028, compared with only 6% between 2019 and 2023. It considered that the various elements transmitted showed that this 12% reduction objective would not be achieved if new measures are not adopted in the short term.

The High Court also noted that the agreement between the European Parliament and the Council of the European Union in April 2021 raised the target for reducing GHG emissions from 40% to 55% compared to their 1990 levels.

Finally, the Court observed that the Government admitted that the measures currently in force were not sufficient to achieve the 40% reduction target for GHG emissions set for 2030, since it is relying on the measures provided for in the "Climate and Resilience Bill" to achieve this target.[19] In the absence of additional measures in force at the time of the decision that would allow the GHG emissions reduction trajectory to be met, the Court granted the petitioners' request and enjoined the government to take all useful measures before 31 March 2022 to achieve the objective resulting from the Paris Agreement.[20]

By making its statement, the High Court's judges first had to perform a "timing" exercise of true expertise of the past while questioning the feasibility of GHG reduction trajectories into the future, thus adopting a Janus-like role. At the same time, and to conclude these three questions, the judges, like Prometheus, used a possibility offered by their office: that of controlling the activity of the administration. This activity must be based on the legal rules and commitments of France as much in international, European and domestic Law. Like Janus, the Court made an innovative statement on "looking to the future" regarding the need to take its GHG reduction obligations seriously.[21] At the same time, like Prometheus, the Court showed the need for judges to constantly "reinvent" themselves in climate matters. The proof of this lies in the renewed question stemming from the fact that the interpretation of legal documents relating to GHG reduction obligations is still at an embryonic stage, and the administration has long taken refuge in passivity supported by the existing ambiguities surrounding the legal nature of climate obligations.

III. The scope of the decisions

In addition to the above content of the decisions, the Court can be seen as going further and marking a new era in the fight against climate change in France. This is pioneering because it is the first time that a climate decision of this scope has been taken by the High Court. This is also innovative because undoubtedly the decision renews and opens new perspectives in the construction of ecological transition. The High Court has decided on the mandatory nature of the programmatic texts concerning the timetable and objectives for reducing GHG emissions in France (the trajectory of reduction). This places a certain number of obligations on the State that they must "do". These obligations that will now be enacted by the administration and Government and by all citizens.

In the two decisions (from 2020 and 2021), for the very first time, the High Court pronounced on several issues that are critical to the fight against climate change and are likely to shape the future of climate justice. First, the Court pronounced itself regarding the existence of a climate risk (Section III.1). Second, the Court gave a response about the

[18] The SNBC is the programmatic text that determines France's timetable and carbon budgets while setting reduction targets. Despite its planificatory nature, the text is now considered legally binding.

[19] The Climate and Resilience Bill was enacted after the Grande-Synthe second decision on 22 August 2022.

[20] Point 5 CE, 1 July 2021 decision.

[21] B Lasserre, webinar Yale University and Conseil d'Etat autour de la décision Grande-Synthe, 24 February 2021 <https://www.conseil-etat.fr/actualites/mercredi-24-fevrier-webinar-avec-l-universite-de-yale-autour-de-la-decision-grande-synthe>.

legitimacy of the applicants asking for strong measures in order to protect themselves against the risks posed by climate change (Section III.2). The judges accepted other requests subsequently (Section III.3). Another essential issue raised was about the bindingness of climate change law (both international and domestic; Section III.4). This last question will certainly be of great importance for the future of climate litigation.

1. The existence of a highly probable climate risk

The High Court decided first "that the municipality of Grande-Synthe, having regard to its level of exposure to the risks arising from the phenomenon of climate change and to their direct and certain impact on its situation and the interests for which it is responsible, justifies an interest giving it standing to request the annulment of the contested implicit decisions, the circumstance, invoked by the Minister in support of her objection, that these effects of climate change are likely to affect the interests of a large number of municipalities not being such as to call into question this interest".[22]

The High Court considered that the municipality of Grande-Synthe, because of its immediate proximity to the coast and the physical characteristics of its territory, was exposed in the medium term to increased and high risks of flooding and to an amplification of episodes of severe drought, with the consequence not only of a reduction and degradation of freshwater resources, but also of significant damage to built-up areas, given the geological characteristics of the soil.[23]

2. The legitimacy of asking for measures to fight against the climate risk

The High Court acknowledged the absence of preventative measures and recognised the legitimacy for the applicants to ask for stronger measures. The Court said that "although these concrete consequences of climate change are only likely to have their full effect on the territory of the municipality by 2030 or 2040, their inevitability, in the absence of effective measures taken quickly 'to prevent' their causes and in view of the time frame for action by public policies in this area, is such as to justify the need to act without delay to this end".[24] Consequently, the municipality of Grande-Synthe, having regard to its level of exposure to the risks arising, was justified in its interest to request the annulment of the contested implicit decisions.

3. The subsequent acceptance of other requests

The judges examined the other parts of the petition, partially accepting some of them. First, the Court said in its 1 July 2021 decision that even if the level of emissions in 2019 (441 metric tons of carbon dioxide equivalent (Mt CO_2e)) respects the indicative annual cap of the second carbon budget, the decrease in emissions between 2018 and 2019 (−0.9%) appears to be limited, whereas the first carbon budget (2015–2018) aimed at a decrease of approximately 1.9% per year and the third carbon budget (2024–2028) foresees, according to the SNBC revised by the decree, a reduction of 3% on average per year, starting in 2025.

Second, the High Court also said that it is clear from the documents in the file that this reduction occurred in the context of measures taken since March 2020 to manage the health crisis caused by the COVID-19 pandemic, which led to a sharp reduction in levels

[22] Point 3 of CE, 19 November 2020 <https://www.conseil-etat.fr/fr/arianeweb/CE/decision/2020-11-19/427301>.

[23] <https://www.conseil-etat.fr/fr/arianeweb/CE/decision/2021-07-01/427301>.

[24] <https://www.conseil-etat.fr/fr/arianeweb/CE/decision/2021-07-01/427301>.

of activity and, consequently, the level of GHG emissions. In this context, this reduction for 2020 appears to be "transitory" and "subject to rebounds" and cannot, therefore, be considered as a "reduction of the emissions".

In a third step, the Court expressed that while the second carbon budget, which resulted from the revision of the SNBC, published by the decree of 21 April 2020, is limited to a decrease in GHG emissions of approximately 6% over the five-year period concerned (2019–2023), a decrease of approximately 12% is planned for the following five-year period (2024–2028), corresponding to the third carbon budget, in order to reach France's 2030 reduction target of –40%. In this context, based on several reports and opinions published between 2019 and 2021, it appears that this new GHG emissions reduction trajectory implies the adoption of additional measures in the short term in order to obtain the acceleration of the emissions reduction targeted from 2023 onwards, even though the European Union (EU) has raised its target from –40% to –55%.

The need to increase efforts to reach the 2030 targets and the impossibility with the measures adopted to date to achieve them were not seriously contested by the Government, which highlighted the various measures that will be provided for in the Climate and Resilience Bill. The Government admitted that the measures already in force would not allow the achievement of the 2030 objective of –40%, since it was counting on the measures planned for the new Climate and Resilience Bill to reach this target. The Court granted the petitioners' request and enjoined the Prime Minister to take all necessary measures before 31 March 2022 to curb the curve of GHG emissions produced on national territory in order to ensure its compatibility with France's national 2030 target of –40% and the national target assigned to France of –37% (base 2005) for sectors outside the EU *entreprises transnationales* (ETS; transnational companies) set by the so-called Environmental and Social Responsibility Regulation (2018/842). The High Court gave the Government nine months to adopt additional short-term reduction measures to achieve the 12% reduction over the 2024–2028 period set by the third carbon budget. At the end of this period, the Council of State could decide to impose a penalty on the State. The Court also ordered the State to pay €5,000 to the municipality of Grande-Synthe.

4. The bindingness of the legal obligation on reduction targets

The High Court reminded in its 19 November 2020 decision that, "although the Agreement does not have direct effect, it must be taken into account in order to better orient and guide National Law".[25] The Court confirmed its 1997 and 2012 Gisti Assembly decisions, according to which an international treaty can only be usefully invoked before the national judge if it has direct effect. However, in the case at hand, it affirmed that its content must be "taken into consideration in the interpretation of the provisions of national law … which, referring to the objectives they set, are precisely intended to implement them".[26] This statement, confirmed in the July 2021 decision, is crucial because not only does it remind us of the importance of aligning national law with the objectives of the Paris Agreement, but also it implicitly recognises the need to have a national reference framework that is consistent with its objectives as well as those set out in the European commitments.

[25] Commune de Grande-Synthe et autre CE, section du contentieux, 6ème et 5ème chambres réunies, 19 November 2020, n° 427301.

[26] Commune de Grande-Synthe et autre CE, section du contentieux, 6ème et 5ème chambres réunies, 19 November 2020, n° 427301; Conseil d'Etat N° 427301 ECLI:FR:CECHR:2021:427301.20210701, 1 July 2021, 5 et 6e chambres réunies <https://www.conseil-etat.fr/fr/arianeweb/CE/decision/2021-07-01/427301>.

The High Court first recalled the commitments made by France, noting that "the European Union and France, signatories of the UNFCCC and the Paris Agreement, are committed to fighting the harmful effects of climate change …".[27] It then stated: "If the stipulations of the UNFCCC and the Paris Agreement require the intervention of complementary acts to produce effects with regard to individuals and are, consequently, devoid of direct effect, they must nevertheless be taken into account in the interpretation of the provisions of national law, in particular those referring to the objectives they set, which are precisely intended to implement them."[28]

Although the Court considered that the Paris Agreement only imposes an obligation close to diligence on the French State, and that the latter remains "master of the precise level of effects of the Agreement on national law", it confirmed that the government was nevertheless under an obligation to follow the objectives set by the Agreement[29] in its legislative, regulatory and administrative acts, and to which France has committed itself. This statement was made by the High Court in both of its decisions of 19 November 2020 and 1 July 2021.[30]

By raising these questions and providing fairly innovative answers, the Court is setting a hopeful course for the development of other climate litigation.

IV. The future of climate change litigation

Through its November 2020 decision, the High Court for the first time ruled on the question of the temporality and coherence between France's climate objectives and the measures taken. As Janus, the High Court opened the path, as the ancient god opened the "passage". The Court has initiated a new era within these two decisions. Janus, generally honoured as an initiating god, represented transition – endings, beginnings and passages. The High Court as Janus is linked to the passage of time and thus opens the door to the construction of a climate and energy transition, while at the same time making it possible to draw up a timetable from the past to the future, highlighting the shortcomings of past GHG reduction policies and indicating the need to take further measures by 2030 and then 2050. In addition, thanks to Prometheus, humanity learnt the techniques to make the tools necessary for their survival – they learned civilisation. The Court also acted as this mythological figure, indicating to the Government the legal tools through which to base the need to adopt more ambitious GHG reduction policies. Also like Prometheus, the High Court demonstrated the tools for considering the legal basis of the fight against climate change and the need to deal with the climate risk by using the SNBC. Finally, the High Court, highlighting the essential role that the Paris Agreement should play in French Law, underlined the importance of the Treaty as an efficient legal instrument in the fight against climate change.

By doing this, and allowing us to use this mythological metaphor again, the Court adopted the techniques of these two characters. The Court renewed governance for climate change (Section IV.1). Several consequences for the future of climate litigation stem

[27] Commune de Grande-Synthe et autre CE, section du contentieux, 6ème et 5ème chambres réunies, 19 November 2020, n° 427301.

[28] Commune de Grande-Synthe et autre CE, section du contentieux, 6ème et 5ème chambres réunies, 19 November 2020, n° 427301; O Fontan, "Le caractère contraignant des obligations climatiques" (2021) Revue Energie, environnement, Infrastructures §10.

[29] About the connections between the Agreement and national courts, see A-JJ Saiger, "Domestic Courts and the Paris Agreement: The Need for a Comparative Approach" (2020) 9(1) Transnational Environmental Review 37–54.

[30] Commune de Grande-Synthe et autre CE, section du contentieux, 6ème et 5ème chambres réunies, 19 November 2020, n° 427301; Conseil d'Etat N° 427301 ECLI:FR:CECHR:2021:427301.20210701, 1 July 2021, 5 et 6e chambres réunies <https://www.conseil-etat.fr/fr/arianeweb/CE/decision/2021-07-01/427301>.

from this first aspect (Section IV.2). In addition, the Court established a new rule of interpretation of the State's climate obligations (Section IV.3). These three main contributions of the Grande-Synthe decisions will very certainly affect the trends in climate change litigation in other European countries raising similar questions.[31]

1. A new governance of climate change: the necessity to act

The Court in both decisions denounced the delay taken by France and the "gap" existing between the measures taken and the objectives set.[32] The Court had therefore come back to the question of the temporality inherent to the climate crisis. The Court gave its own version of what the "climate emergency" implies[33]: "To respond to the ecological and climate emergency, the national energy policy has the following objectives:/1° To reduce greenhouse gas emissions by 40% between 1990 and 2030 and to achieve carbon neutrality by 2050 by dividing greenhouse gas emissions by a factor greater than six between 1990 and 2050 . . . "[34]

The Court recognised that France has committed to a series of objectives defined by the law, including that of achieving carbon neutrality by 2050. The conclusions of the rapporteur about the Court's 2021 decision also had much to say regarding the delays in this area in France. They asked for judges to have control over the actions of the Government in order to verify that its actions were in line with the objectives of the law.[35] The judges followed the rapporteur's conclusions in both decisions by making the link between the question of procrastination and the lack of general coherence of the climate policies.[36]

From this observation, which suggested that France was behind schedule in reaching its objectives and that the State is obliged to be accountable for this moratorium, it followed in the 2019 decision that the State had to provide information within three months to clarify this point.[37] The 2021 decision had the purpose of verifying whether the government had provided additional information to justify its delay. The 1 July 2021 decision reached the same conclusion as the 2020 decision and found that the government was considerably behind schedule and had fallen far short of its reduction targets for the period 2015–2018. From this delay, explained the Court, it emerges that the time remaining to allow France to reach carbon neutrality by 2050 is running out, and that the efforts to be made will become increasingly great. The Court explained that the State will have to show before the end of March 2022 what measures have been taken to compensate for this delay and what means of prevention will be applied to fight against the acceleration of the climate emergency.[38]

The deadline of six months was due by 31 March 2022 and has now passed. A new decision is expected shortly. The Government is late in rendering their additional information about the new measures taken. Consequently, the Court itself has not yet said its "last

[31] Concerning previous trends, see the report at <https://www.lse.ac.uk/granthaminstitute/publication/global-trends-in-climate-change-litigation-2022/>.

[32] Conclusions of S Hoynck, point 3.3, published in Revue Energie, environnement, Infrastructures, (2021) 1, p 6.

[33] M Torre-Schaub, "Dynamics, Prospects, and Trends in Climate Change Litigation. Making Climate Change Emergency a Priority in France" (2021) 22(8) German Law Review 1145–58.

[34] Commune de Grande-Synthe et autre CE, section du contentieux, 6ème et 5ème chambres réunies, 19 November 2020, n° 427301, point 12 <https://www.conseil-etat.fr/actualites/actualites/emissions-de-gaz-a-effet-de-serre-le-gouvernement-doit-justifier-sous-3-mois-que-la-trajectoire-de-reduction-a-horizon-2030-pourra-etre-respectee>.

[35] Conclusions of S Hoynck, affaire 427301 Commune de Grande-Synthe II, hearing on 11 June 2021.

[36] <https://www.hautconseilclimat.fr/publications/rapport-annuel-2020/> and <https://www.hautconseilclimat.fr/publications/rapport-2019/>.

[37] Point 14: "It is therefore necessary to order a supplementary investigation to produce these elements."

[38] Conseil d'Etat N° 427301 ECLI:FR:CECHR:2021:427301.20210701, 1 July 2021, 5 et 6e chambres réunies <https://www.conseil-etat.fr/fr/arianeweb/CE/decision/2021-07-01/427301>, Point 12.

word". In the absence of serious measures presented by the Government showing proof of a real policy for reducing GHG emissions, the High Court will sooner or later have to determine a late payment penalty for the State. The climate risk still persists in France; the town of Grande-Synthe is still at risk of being flooded by rising sea water, and no further measures have been taken since the beginning of the case.

2. The effects of the new governance regarding climate change

There are several consequences that follow from the previous analysis. The first concerns the future developments of climate litigation in France. this implies a broader reading and a wider approach of the decisions of the Grande-Synthe case while putting them in tune with other climatic decisions rendered by other administrative courts in France (Section IV.2.a). The second extends its effects to Europe and also poses a challenge to the European Court of Human Rights (ECtHR; Section IV.2.b).

a. The effects for the future of climate litigation in France

With regard to climate litigation in France, a second case is just as remarkable as the Grande-Synthe case: the "*affaire du siècle*", which was judged twice by the Administrative Court of Paris (hereafter "the court"). In a first decision rendered on 14 February 2021, the court ruled partially in favour of the plaintiffs. This was an appeal brought by four NGOs demanding that the court decide on the responsibility of the State for climate inaction.[39] The State was accused of having caused ecological damage to the atmosphere through its inaction and delay in acting ambitiously to reduce GHG emissions sufficiently.[40] The court ruled in favour of the NGOs and found that damage had indeed been done to the atmosphere, which had been altered by GHG emissions.[41] The court explained in its first decision of February 2021 that the State was therefore responsible for its inaction.

In its second decision ruled in December 2021, the court affirmed the first decision, finding the State liable for causing ecological harm to the atmosphere due to its lack of climate action and weak GHG reductions policy for the period from 2015 to 2018.[42] The court ordered compensatory measures to be taken by the State to remedy this damage. These measures had to be reflected in the fact that the State had to show, by 31 December 2022, whether it had taken measures to avoid further damage to the atmosphere.

The *affaire du siècle* decisions follow quite closely from the decisions in the Grande-Synthe case. At the same time, because the court has recognised that GHG emissions had been too high during a given period, other courts are now empowered to find that these excessive emissions caused an alteration to the atmosphere and, therefore,

[39] Affaire du siècle I, Oxfam France, Notre Affaire A Tous, Greenpeace France, Fondation pour la nature et l'homme, TA Paris, 3 February 2021: JurisData n°2021-000979; R Radiguet, "Responsabilité de l'État – Climat" (2021) 46 Revue juridique de l'environnement 407–19.

[40] Ecological damage is one of the causes admitted in French law for triggering the rules of civil liability. It is defined as follows: "Any person responsible for ecological damage shall be required to make reparation for it. Ecological damage consisting of a non-negligible harm to the elements or functions of ecosystems or to the collective benefits derived by man from the environment shall be compensable under the conditions provided for in this Title." Arts 1246–1252 Code Civil.

[41] Affaire du siècle II, Oxfam France, Notre Affaire A Tous, Greenpeace France, Fondation pour la nature et l'homme, TA Paris, 3 February 2021: JurisData n°2021-000979 and TA Paris, 14 October 2021.

[42] Affaire du siècle II, Oxfam France, Notre Affaire A Tous, Greenpeace France, Fondation pour la nature et l'homme, TA Paris, 14 October 2021.

ecological damage. One case law feeds into another, and this will continue for future climate litigation in France, which will undoubtedly develop exponentially in the future.

b. The effects for climate justice in Europe

The other major consequence of the Grande-Synthe case concerns climate justice in Europe. Evidence of this major effect can be found in the recent request presented before the European Court of Justice by Mr Damien Carême, former Mayor of Grande-Synthe, asking the Court for the recognition of the violation of his human rights (right to life and right to a private life) by the French Government. Those rights are recognised in the European Convention of Human Rights (ECHR).[43]

On 7 June 2022, the ECtHR relinquished jurisdiction to the Grand Chamber to hear the application lodged on 28 January 2021 on behalf of Mr Carême on the basis of Articles 2 and 8 of the ECHR.[44] This application involves the tenth climate case for which the ECtHR had been called upon in recent months.[45] The Carême case – which can be seen as a kind of continuation of the Grande-Synthe case – is interesting in several respects. While it shares some characteristics with other climate change cases, it differs in some key respects, making it a unique case of its kind at the moment. Like other climate applications before the ECtHR (eg Swiss and Norway cases), the Carême application is a continuation of a climate case presented before national courts – in this case, the French Administrative High Court Conseil d'Etat. However, it had a unique feature, since it was presented personally by Mr Carême, given that his individual application had been rejected by the French High Court for a lack of interest in acting. This makes this case quite unique before a European court and opens new possibilities for the development of climate justice before the ECtHR in Europe. If the case finds a favourable decision from the European judges, it will certainly impose positive obligations regarding the fight against climate change and the protection of citizens on the French State. It may set a pioneering precedent for climate justice in Europe.

3. Changing the future of climate litigation in France and in Europe through the reinforcement of "preventative" measures

The main objective of climate litigation and of the decisions commented upon here is to "prevent" future aggravations rather than truly to "repair" climate damage. The fight against climate change has indirectly become a new cause for French judges. The High

[43] M Torre-Schaub, "The Future of Climate Litigation: The Carême Case before the European Court of Human Rights" (*Verfassungsblog*, 10 August 2022) <https://verfassungsblog.de/the-future-of-european-climate-change-litigation/>; "La protection de l'air et de l'atmosphère en Europe. Focus sur la Cour européenne des Droits de l'Homme. Quelles potentialités pour la lutte contre le changement climatique?" (*Blog de ClimaLex*, 30 May 2022) <https://climalex.wordpress.com/>; see also M Torre-Schaub, "La doctrine à la 'rescousse' de la justice climatique en Europe" (*La Semaine Juridique, JCP-G*, December 2022), Etude 5.

[44] <https://hudoc.echr.coe.int/fre-press#{%22itemid%22:[%22003-7353639-10043718%22]}>.

[45] N Kobylarz, "Balancing Its Way Out of Strong Anthropocentrism: Integration of Ecological Minimum Standards in the European Court of Human Rights Fair Balance Review" (2022) 13 Journal of Human Rights and the Environment 16–85; M Feria-Tinta, "Climate Change Litigation in the European Court of Human Rights: Causation, Imminence and Other Key Underlying Notions" (2021) 3 Europe of Rights & Liberties 51–71; F Tulkens, "La Cour européenne des droits de l'homme et les procès climatiques" (2022) 1 Revue internationale de droit comparé 74; N Kobylarz, "Derniers développements sur la question environnementale et climatique au sein des différents Organes du Conseil de l'Europe" (2022) 1 Revue internationale de droit comparé 66; H Keller and C Heri, "The Future Is Now. Climate Cases before the ECtHR" (2022) 2 Nordic Journal of Human Rights 15; M Torre-Schaub, supra, note 43. Regarding human rights trends in climate litigation, see L Maxwell, S Mead and D van Berkel, "Standards for Adjudicating the Next Generation of Urgenda-Style Climate Cases" (2022) 13(1) Journal of Human Rights and the Environment 35–63.

Court in the Grande-Synthe case exercised control over future trajectories thanks in particular to the duty of prevention.[46]

"Grande-Synthe is a decision that puts the judge ahead" underlined both Vice-President of the High Court Mr Laserre and the President of the 6th Court Room, Mr Raynaud.[47] The judges must therefore control what will happen in the future. For them, this case law will have historical significance because the decision is "looking towards the future", much like Janus. Indeed, the decisions relate to past periods and delays, but they also set a roadmap for the future. What emerges from the two decisions is that if the State continues to follow the same reduction trajectory that was followed until the year 2020, achieving carbon neutrality by 2050 and a reasonable GHG reduction by 2030 will be very difficult to achieve, or even "impossible".[48]

One can understand the important role of the prevention duty. This trend is also underlined in the *affaire du siècle* case previously mentioned of 3 February 2021[49] and 14 November 2021.[50] The judges explained in this case that the remedy should take the form of compensation with the objective of "preventing" and not "aggravating" the damage caused to the atmosphere because of the insufficient action of the State to reduce GHG emissions.[51] The *affaire du siècle* case is still ongoing, just like the Grande-Synthe case. It is expected that the Council of State will render a decision on the Grande-Synthe case probably around February 2023. A new decision in the *affaire du siècle* case is also expected, as the deadline given to the Government by the Administrative Court of Paris to take "preventative measures" against aggravating the damage caused has already passed. In the *affaire du siècle* case, the State had to provide information showing the measures it had taken to "prevent" the aggravation of this damage. In the absence of such evidence, the Court will be entitled to ask for a penalty and a fine for the delay.

Finally, and with regard to European climate litigation, the decision that the ECtHR will take within the framework of the continuity of the Grande-Synthe case (ie the Carême case) could undoubtedly change the game of climate justice in Europe.[52] If the ECtHR accepts the hypothesis that the inhabitants of the municipality and Mr Carême are suffering a risk of marine submersion, it should be regarded as a natural disaster for the purposes of the violation of Article 2 of the ECHR.[53] In this case, the ECtHR will no doubt look at the various preventative options available to the public authorities. Questions as to whether the risk has been sufficiently mitigated will be raised by the Court. The Court's interpretation of the violation of positive obligations in this case will consist in examining the State's capacity to deal with this type of violent and extreme natural phenomenon. The condition of the foreseeability of the risk would be fulfilled in this case as the existence of the risk itself was admitted in the French High Administrative Court's decision of 2020 and reaffirmed by the decision of 1 July 2021. The preventative measures, as in other cases before the ECtHR, would consist in particular in the adoption of land-use policies and the control of urban planning in the areas

[46] In this respect, see M Torre-Schaub and P Bozo, "L'affaire du siècle : ombres et lumières" (*JCP – Administration et Collectivités Territoriales*, May 2021); M Torre-Schaub, "Le contentieux climatique. Du passé vers l'avenir" (2022) 1 Revue française de droit administratif 75; Delzangles, supra, note 7; Bétaille, supra, note 9.

[47] Webinar Yale University and Conseil d'Etat autour de la décision Grande-Synthe, 24 February 2021 <https://www.conseil-etat.fr/actualites/mercredi-24-fevrier-webinar-avec-l-universite-de-yale-autour-de-la-decision-grande-synthe>.

[48] See Torre-Schaub, supra, note 46; Delzangles, supra, note 7, 217.

[49] Affaire du siècle I, Oxfam France, Notre Affaire A Tous, Greenpeace France, Fondation pour la nature et l'homme, TA Paris, 3 February 2021: JurisData n°2021-000979.

[50] Affaire du siècle II, Oxfam France, Notre Affaire A Tous, Greenpeace France, Fondation pour la nature et l'homme, TA Paris, 14 October 2021.

[51] Torre-Schaub, supra, note 33.

[52] Carême c. France (requête n° 7189/21) CEDH 184 (2022), 7 June 2022.

[53] Torre-Schaub, supra, note 43.

concerned, which do not seem to have been implemented given the absence of a sufficiently protective and realistic adaptation plan.

Last but not least, the question of "legitimate aim", which is a common point bringing several climate cases pending before the ECtHR together, will necessarily have to be decided by the ECtHR.[54] In the Carême case, this "aim" could be interpreted by the Strasbourg Court as the need to preserve the stability and sustainability of the applicant's living conditions and well-being in the enjoyment of his home. If such a legal basis is accepted by the ECtHR, it will be a revolution within the Strasbourg Court, a remarkable step forward for climate justice in Europe and a source of hope for future victims of climate change.

V. Conclusion and comment

The Grande-Synthe case shows that we cannot postpone the bulk of GHG reduction efforts. Whether by means of controlling their future trajectory or whether by means of an injunction made to the State to "prevent" the aggravation of the ecological damage caused, the new trends in climate change litigation in France converge towards the same essential goal, which is that of registering the obligation to achieve carbon neutrality by 2050. This standard of prevention manifests itself indirectly through the obligation given to the administration to submit to the control of the judges in the months to come.

Concerning other cases in Europe, judges must both look to the past but also to the future. If such a hypothesis is understood, it would imply accepting that this purpose could have a systemic effect on the future of the obligations of the State, including an increased "duty of vigilance" regarding the activities committed under its responsibility. At least this will be the case in France. As Prometheus, the judges "reinvent" themselves constantly, and climate change poses a significant challenge to them. If this "new standard" of preventative behaviour and vigilance is to be understood broadly, it would follow that the administrative authorisations granted to private operators, which may have a negative effect on the fight against climate change or might not help with achieving the final objective of carbon neutrality by 2050, would fall under the scope of possible liability actions in other climate cases, such as the case against RWE in Germany,[55] the case against Shell in The Netherlands[56] or the case against Total in France.[57] The Shell case already asked the question of judges as to whether the company's climate duties were or were not respected. The case against Total, which is presently being judged, asks the question as to the extension of the duty of diligence of the company. If climate change obligations of prevention are to be set in stone after the Grande-Synthe decision, this may change the landscape of climate obligations in the public and private sectors and also significantly increase the number of such disputes. This could have unintended consequences for many other climate cases in Europe and open new avenues for climate litigation all over the world.

Finally, the door opened by the acceptance by the ECtHR of the petition presented by Mr Carême represents a first step in an advance in European climate justice. While ten applications are currently pending before the judges in Strasbourg, the Carême case is considered one of the most interesting because it is the Grand Chamber that has taken up the application. If the judges apply a broad interpretation of the violation of Articles 2 and 8 of the European Convention, the Carême case has a chance to succeed.

[54] The "legitimate aim" is one of the main doctrines built by the ECtHR concerning environmental matters. See Kobylarz, supra, note 45; Feria-Tinta, supra, note 45.

[55] <https://www.germanwatch.org/en/rwe>.

[56] <http://climatecasechart.com/non-us-case/milieudefensie-et-al-v-royal-dutch-shell-plc/>.

[57] <https://www.latribune.fr/entreprises-finance/transitions-ecologiques/total-assigne-en-justice-pour-inaction-climatique-par-plusieurs-villes-francaises-838204.html>.

This will have a snowball effect for other climate disputes in Europe at both the domestic level and at the level of the ECtHR itself.

French judges have acted as both Janus and Prometheus, opening a way towards new solutions, while revisiting the tools made available by the law. It is expected that this will last beyond the continuation of the Grande-Synthe case and the *affaire du siècle*. Let us hope that this new path will be followed by the judges in Strasbourg and those in other European domestic courts.

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