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French Yearbook *of* Public Law

Issue 1, 2023

Presentation

The objective of the "French Yearbook of Public Law" is to narrow the gap which has tended to develop between the French and the international debate on public law. The former remains too often isolated from the latter, for various reasons, ranging from the conviction of the French model's exemplary nature to an insufficient openness of French public lawyers to the international academic language, which English has undoubtedly become nowadays. This has two serious consequences. On the one hand French lawyers might often be unaware of developments in other legal systems, and on the other hand foreign lawyers face serious difficulties to follow French legal developments.

The French Yearbook of Public Law (FYPL) was created to mitigate precisely this mutual ignorance. This project has three main aims. On the one hand, it seeks to apprise English-speaking readers of important developments and scholarly debates in French public law. On the other hand, we wish to introduce French lawyers to key changes and academic discussions in foreign public laws. Lastly, it is our hope that the reciprocal information thus made available will foster international and comparative debates among legal scholars.

The FYPL is based at the Chair of French Public Law at Saarland University (Lehrstuhl für französisches öffentliches Recht - LFOER), headed by Professor Philippe Cossalter. Thus, the FYPL relies on the administrative and technical capacities of the LFOER without constituting a segment of it. Some of its researchers (Jasmin Hiry-Lesch, Enrico Buono, Sofia van der Reis, Lucca Kaltenecker) are especially involved.

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Analysis of constitutional provisions concerning climate change

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Abstract:

Whilst action against climate change requires undoubtedly internationally coordinated efforts, treaties often suffer from a lack of concrete justiciability and immediate effects. Thus, constitutional law presents – by its place in the legal hierarchy and its jurisdictional protection – several qualities that have favoured its use to back up efforts to fight climate change and adapt to the latter's consequences. The present article aims to give a comprehensive overview of the different ways environmental constitutionalism has developed in different legal systems worldwide – from explicit legal provisions to judges' efforts to recognize implicit constitutional values to environmental rights. It also mentions the challenges environmental constitutionalism faces, especially in regards to an often-times insufficiently precise legal framework and in regards to the dependency on bold judgements, which requires reliance on strong constitutional courts capable of imposing clear obligations for public policy and a meaningful liability for failure to adopt those.

Keywords:

Environmental constitutionalism, Climate change, Environmental rights, Climate litigation, Climate liability

I. Introduction

It has not escaped anyone's notice that legal concerns about climate change thrive better in the international sphere. The atmosphere superbly ignores boundaries, which is why international law continues to be the most natural fora to address climate change. Yet, also regional legal systems (such as European Union law) are increasingly creating space for climate topics due to the classic technique of 'law concretization by degrees'. Furthermore, given the structural and cyclical weaknesses of international law and diplomacy, it is not surprising that most climate change litigations have taken place in the national context. Institutionally speaking, these are, for now, the most binding for the actors of this field, even though the States' international commitments may well back these litigations.

All this is to say, that irrespective of the predominantly international focus on the matter, there have also been national constitutional concerns about the climate for some time now. This coincides, more or less successfully, with the increasing power of 'environmental constitutionalism', which can be defined as 'the constitutional incorporation, implementation, and jurisprudence of rights, duties, procedures, policies and other provisions to promote environmental protection'.[1]

Before understanding the place of the climate in environmental constitutionalism, it is useful to offer some introductory considerations on the legitimacy of the environmental field's entry into the highest legal order - as a new mutation of constitutionalism.

Firstly, it should be recalled that the constitution is not only the legal object at the top of the legal hierarchy, but also the political instrument that reflects the values that form the foundation of any society. The constitution is part of the social contract and constitutes the framework for the relationship between citizens and public authorities. Thus, it is a synthesis, a marriage between a political and a legal instrument.[2]

Jacques Chevallier observes that the 'post-modern State' must face challenges which profoundly question the State's institutions and law.[3] It seems that the ecological crisis, which is becoming increasingly apparent in the 21st century, is the cause of many of the challenges he mentions. In the legal systems of states, the necessary protection of the environment is being enshrined as a new value of the social contract. This is quite logical, as it is clear that the consequences of climate change will significantly impact individuals and property security, which is at the heart of liberal constitutions. However, according to Hobbes, it is initially the safety need that gives birth to the social contract. Today's constitutions, without doing away with Locke's liberal philosophy, obviously include provisions aimed at ensuring security for each member of society. If climate makes human societies vulnerable, the constitution becomes a coherent benchmark to address this problem, notwithstanding the diffuse causalities and the impact of decoupling between actions, legal provisions (according to their origin) and the results of policies implemented at national level, on a situation that, by construction, still exceeds this framework.

For instance, in 2005, a Charter of the Environment was incorporated in the French Constitution. Thus, these issues have regained importance in legal doctrine: enshrining

1 May, J. R., Daly, E., "Six trends in Global Environmental Constitutionalism", in Sohnle, J. (dir.), *Environmental Constitutionalism. What Impact on Legal Systems?*, 2019, PIE Peter Lang, p. 46.

2 Ponthoreau, M.-C., *Droit(s) constitutionnel(s) comparé(s)*, 2010, Economica, p. 297.

3 Chevallier, J., *L'Etat post-moderne*, 2017, LGDJ, p. 326..

the right to a healthy environment implies the duty of 'every person' to protect and even improve the environment (Article 2). This can be seen as a reinterpretation of the social contract, which becomes an 'ecological pact'.[4]

As of today, approximately 78% of constitutions, which amounts to roughly 170 constitutions, have incorporated at least one environmental provision. This is unquestionably logical: it is a new fundamental value that rightly finds its place at the highest level of every State, as set out above. Moreover, although environmental issues can be local, at the end of the day the entire planet will be impacted by climate change. No region in the world can count on immunity.[5] In addition, the doctrine also stresses the influence of the international system on environmental constitutionalism. Suppose international and constitutional law are two sides of the same coin (sovereignty). In that case, one can observe an emulation of constitutional provisions following great international summits. They give substance to international environmental law, which then fuels national law, which may fuel international law. The 'environmental constitutionalisations' is indeed a stimulus for the organization of international meetings. A 'snowball effect' between constitutional and international law[6] contributes to a certain harmonization of legal systems.

In their contribution to Jochen Sohnle's book on the impact of environmental constitutionalism,[7] James R. May and Erin Daly identify six possible trends that characterize this "greening or rather ecologizing" of constitutions: (1) climate constitutionalism, (2) sustainability, (3) environmental rights divided into procedural rights and dignity rights, (4) rights of nature, (5) subnational environmental constitutionalism, and (6) procedural environmental rights.[8]

This overview of the constitutional protection of the environment, its impetus and its legitimacy within the constitutional framework lead us to focus on the real topic of this contribution: the nexus between climate and the constitution.

Constitutional protection of the climate can occur at several levels. First, one can look at the plain constitutional text to see whether it explicitly mentions climate issues or whether environmental and fundamental rights provisions can be interpreted to substantially cover climate issues (section II). This will be the beginning of the jurisprudential issue, through which climate litigations have spawned the idea of a 'constitutional value' beyond the constitutional text, thus branching out the constitutional concern with climate operations.

II. The explicit and implicit presence of climate within constitutional provisions

This section will start by focusing on some of the plain provisions on climate protection (A), before seeking climate constitutional protection through a classic means: the

4 Fonbaustier, L., « Environnement et pacte écologique – Remarques sur la philosophie d'un nouveau "*droit à*" », *Cahiers du Conseil constitutionnel* 2004, vol. 15, pp. 140-144.

5 From rising water causing loss of territory for coastal States, to the future hostility of some areas preventing agricultural production and population safety, to hosting 'climate refugees' in every spared region, there is no state that is protected from the current climate change.

6 Cohendet, M.-A., Fleury, M., op. cit., p. 279.

7 Sohnle, J. (dir.), Environmental Constitutionalism. What Impact on Legal Systems?, 2019, PIE Peter Lang.

8 May, J. R., Daly, E., op. cit., p. 50-63.

constitutional protection of fundamental rights (B).

A. Plain constitutional provisions explicitly referring to climate protection

Some States, due to their geographic position, feel more threatened by the current and future climatic disturbance. However, compared to the importance of the issue in the 21st century, the number of climate devotees remains surprisingly small. In fact, only a dozen countries have climate provisions in their constitutions.[9] Some of these, enshrined in the preambles, appear merely symbolic (1); while other constitutional provisions aim to be somewhat effective (2).

1. The symbolic constitutional protection of climate

The Preamble of the 2016 Ivory Coast Constitution provides that the people commit to 'contribute to the preservation of the climate and a healthy environment for future generations'. While the 'healthy environment' is reinforced by further articles of the Constitution as binding law,[10] the same cannot be said for the climate which seems to be a symbolic commitment of the people of the Ivory Coast. The same is true for the Algerian Constitution, which mentions a climate concern only in the Preamble through a relatively weak formulation.[11]

The Tunisian Constitution of 2014 seems to repeat its climate protection ambition mentioned in the Preamble[12] in Article 45 in a clearer manner: '[t]he State shall guarantee the right to a healthy and balanced environment and contribute to climate security'. It thus seems as if climate protection in Tunisia goes beyond a symbolic character. However, while the State shall *guarantee* the right to a healthy environment, it only needs to *contribute to* climate security, which makes it difficult to consider it as a right that belongs solely to the State (this is a controversy that was recently discussed in France).[13] This formulation implies that the State could not be singled out as the sole responsible party. It owes only one *contribution* amongst others which, moreover, are not further listed or specified in the remainder of the constitution. This provision, therefore, does not impose an effective obligation upon the State to fight against climate change, meaning its justiciability for plaintiffs who wish to hold the Tunisian State accountable is far from guar-

9 Bolivia, art. 407. – Dominican Republic, art. 194. – Tunisia, art. 45 – Ecuador, art. 414. – Venezuela, art. 127. – Vietnam, art. 63. – Nepal, art. 51. – Ivory Coast, Preamble. – Thailand, sect. 258 of the Constitution of 2017. – Zambia, art. 257, g) of the Constitution of 2016, v. Cournil, C., « Du prochain "verdissement" de la Constitution française à sa mise en perspective au regard de l'émergence des procès climatiques, in Colloque « La Constitution face aux changements climatiques » of 8 March 2018, Assemblée nationale, Paris, *Revue Energie - Environnement – Infrastructures* Dec. 2018, n° 12, p. 19.

10 Article 27.

11 Constitution of 28 Nov. 1996, Preamble, paragraph 18: 'The people also remain concerned about the degradation of the environment and the negative consequences of climate change and are anxious to guarantee the protection of the natural environment, the rational use of natural resources and their preservation for the benefit of future generations'.

12 Constitution of 27 Jan. 2014: 'Conscious of the need to participate in the security of the climate and the safeguarding of a healthy environment'.

13 After the work of the 'Climate Convention', a potential modification of the first article of the French Constitution of 4 Oct. 1958 has been questioned.

anteed. Thus, if the government were to pass a law that is clearly insufficient to respect the necessary climate trajectory, but that nevertheless addresses climate change, it would probably be accepted by judges as the State's *contribution* to climate security, in accordance with its obligations.

These provisions, although enshrined in constitutional text, do not seem sufficiently binding as to consider that the climate is, within these States, a constitutional object to be protected over other interests. In contrast, some constitutions, also few in number, seem to take the constitutional protection of the climate more seriously, as will be seen in the next section.

2. The effort towards binding climate protection

Article 127 of the Venezuelan Constitution states that it is

> *"a fundamental duty of the State, with the active participation of the society, to ensure that the population develops in a pollution-free environment in which air, water, soil, coasts, climate, the ozone layer and living species receive special protection, in accordance with the law".*

Although climate is not presented as an overriding concern, it is nonetheless a *fundamental* duty of the State that cannot be avoided. This stands in stark contrast to the aforementioned Tunisian Constitution: In the latter, the notion of fundamental duty has a much more tangible normative power than that of *contribution*. It acts as a guiding principle for public policies.

With a different formulation, the Dominican Republic Constitution states in Article 194:

> *"[t]he formulation and execution, through law, of a territorial ordering plan that ensures the efficient and sustainable use of the natural resources of the Nation, in accordance with the need for adaptation to climate change, is a priority of the State".*

Under the notion of *priority*, one might think that this article is as non-binding as the Venezuelan provision. Yet, also a different interpretation is possible given that the notion of *priority* can allow constitutional conciliation in favor of this rule rather than others. Another advantage of this provision compared to the Venezuelan Constitution is that it is more precise. Even though it requires further specification via legislation, the Constitution requires the state to set up a territorial regulatory plan that takes into account 'the need for adaptation to climate change'. Thus, although the constitutional judges must respect the law's competence on the matter, they could evaluate the adaptation of the territorial regulatory plan to climate change, despite the well-known dialectic in 'climatic law': fight against… or adapt to.

Another example in this respect is Article 414 of the constitution of Ecuador.

> *'The State must adopt adequate and transversal measures to mitigate climate change, by limiting greenhouse gas emissions, deforestation and air pollution; it must take measures in favor of the conservation of forests and vegetation; and it must protect the population at risk.'*

By putting climate change inclusiveness at the highest level of the legal hierarchy, this Constitution avoids making climate an isolated issue, separate from all other public policies. The provisions' accuracy limits the legislator within a defined range of possibilities, so that effective constitutional review by the Ecuadorian constitutional judges can be expected.

B. The 'climatization' of other constitutional provisions: working towards the inclusiveness of fundamental and environmental rights

The starting point is simple: even if the climate is not explicitly mentioned in constitutions, there are still ways to protect it. Firstly, climate protection can be achieved by protecting the right to a healthy environment, as a 'meta-constitutional' component (1). Second, this possibility can be expanded to all fundamental rights, as most have a 'climate absorption' capacity (2). In the following, this section will show that climate litigation has already considered this issue.

1. The right to a healthy environment: axiological center of environmental rights, including the constitutional climate protection

In 1998, Étienne Picard claimed that the law is not made by the State, but the State is made by the law as an instrument for legal implementation.[14] To this end, fundamental rights are guaranteed at the highest level of the legal system, where they are enshrined in the universally recognized value of human dignity. Picard's theory continues by defending the idea that a value can be at the origin of the law, despite the uneasiness of the positivist doctrine on this matter. He reconciles two contradictory concepts: law and value. Thus by observing the values the essential meaning of the rule can be understood. The rule will then materialize within the formal legal hierarchy. However, Étienne Picard emphasizes that all this starts from a substantial hierarchy of values, in which human dignity, as the axiological center of fundamental rights, takes precedence.

Similar to human dignity as the axiological center of fundamental rights and highest value that can be objectified and accepted by all, the right to a healthy environment can take this place among environmental rights. In other words, if all fundamental rights are the direct consequence of the guarantee of human dignity by the State, environmental rights, including climate, are the consequence of the guarantee of the right to a healthy environment.

Such a hypothesis seems to offer two possibilities: while the right to a healthy environment would remain enforceable in and of itself as a subjective right, it would also be an inclusive right from which would other environmental rights would derive, such as the 'right to a stable climatic system' that can sustain human life and that so many organizations and associations have sought to recognize in climate litigations in recent years.[15]

This hypothesis can already be observed in courts, as claimants have no choice but to invoke the right to a healthy environment, which is enshrined in several constitutions. As

14 Picard, É., « L'émergence des droits fondamentaux », *AJDA* 1998, n° spécial, p. 6-42.

15 Cournil, C., « Les convergences des actions climatiques contre l'État. Étude comparée du contentieux national », *Revue juridique de l'environnement* 2017, vol. spécial, n° HS17, p. 255.

its 'fundamentality' is still disputed in doctrine,[16] claimants are eager to link climate protection to all relevant constitutional rights.

2. Constitutional rights: possible implications for constitutional protection of the climate

Between May 2018 and December 2020, the French government proposed three bills to modify the French Constitution in order to add the term 'climate'. A 2018 bill proposed to include a legislative competence in order to combat climate change although Article 34 of the Constitution already provides a general competence to preserve the environment.[17] Another constitutional project suggested adding a paragraph about France's action for the preservation of biodiversity and climate change to Article 1 of the Constitution twice, in 2019,[18] and in 2020.[19]

Some scholars sharply criticized this effort to include 'climate' in the constitution, arguing that it was pointless to reinforce something that was already included in the constitutional provisions under the broad term 'environment'.[20] Aside from the question of utility, splitting environmental protection in this way may result in examining only one part of the effort rather than the ecosystems as a whole. One could well imagine then those public policies that adequately protect climate, successfully achieve carbon neutrality, but at the same time have devastating effects on biodiversity,[21] and set back global environmental protection. To draw an analogy with liberty in France: it is a constitutional right enshrined in Article 4 of the Declaration of the Rights of Man and of the Citizen (1789). It has an open definition, in that it only describes what liberty is not: liberty cannot include harming others. This constitutional right is then concretized in legislation, for instance by the guaranteeing of pluralism, explaining in detail some freedoms and suppressing those who, whilst believing they enjoy their rights, actually harm others[22]. For example, the freedom of expression does not permit defamation.

How then can one legally justify acting differently on an issue as inclusive as the ecological crisis?

The most protective interpretation for the environment is, therefore, that any State

16 da Silva, V. P., « Portugal. Le vert est aussi couleur de Constitution », *Annuaire international de justice constitutionnelle,* vol. 35, n° 2019, p. 455-469.

17 Projet de loi constitutionnelle n° 911 du 9 mai 2018, pour une démocratie plus représentative, responsable et efficace.

18 Projet de loi constitutionnelle n° 2203 du 29 août 2019, pour un renouveau de la vie démocratique.

19 Projet de loi constitutionnelle n° 3787 du 20 janv. 2021, complétant l'article 1er de la Constitution et relatif à la préservation de l'environnement.

20 Bétaille, J., « Inscrire le climat dans la Constitution : une fausse bonne idée pour de vrais problèmes », *Droit de l'environnement* 2018, n° 266, p. 130-131.

21 In this respect, nuclear energy can be taken as an example: considering that it does not emit any greenhouse gases (which requires accepting that the extraction of uranium and its transport to the power plants are not counted as emissions attributable to it) compared to fossil fuels, nuclear power plants require very large quantities of water to cool the reactors, which heats up natural basins in which an entire ecosystem loses the balance of its survival. Hydroelectric dams follow the same logic, interrupting ecological continuities that are sometimes crucial for an unsuspected number of species.

22 We can understand by this the damage in civil law, but also all the criminal laws.

that protects 'the environment' includes climate protection as a part of the environment. Moreover, it is known that the climate issue jeopardizes fundamental constitutional rights. Constitutional courts have already begun recognizing this interconnection and use it to require more serious climate public policies, such as the Pakistani[23] and South African judges.[24] Since the success in the *Urgenda* case, invoking constitutional rights protection has become a litigation strategy for plaintiffs.[25] It is quite efficient as constitutional courts influence each other around the world to recognize this climate protection from constitutional rights through a sort of domino effect.

This last point prompts us to focus on climate litigation because it shifts the question from 'constitution' to 'constitutional value' and makes our case: climate can have a praetorian constitutional value without being explicitly enshrined in constitutional provisions.

III. The implicit constitutional tool: the 'constitutional value' of praetorian climate provisions, driven by the climate litigation impulse

Many constitutional judges have elevated climate protection to the constitutional rank by giving climate protection a certain value over other interests. Laurence Gay and Marthe Fatin-Rouge Stefanini conceptualized this by differentiating three kinds of climate litigation concerning constitutions.[26] Their taxonomy will be retained here: constitutional review (A), the indirect method of constitutional protection through fundamental rights,[27] and another strategy which seeks State responsibility through constitutional principles (B). These litigations have allowed national judges from every legal tradition to raise the climate issue to the constitutional level.

A. Constitutional review and climate policies

Constitutional review, which is an objective review of a rule, has enabled several constitutional judges to make a choice as to whether climate is to be a constitutional matter or not. The reviewed norms can relate to climate (2), but it is not a prerequisite for bold jurisprudential decisions (1).

1. The diversity of the reviewed rules

To give climate protection constitutional status does not necessarily require climate change legislation to be constitutional reviewed. In 2016, the Colombian Constitutional Court took advantage of a 2015 bill on the Paramos ecosystem to make climate protec-

23 Lahore High Court Green Bench, 7 and 14 Sept. 2015, *Asghar Leghari v. Federation of Pakistan.*

24 North Gauteng High Court, 8 March 2017, n° 65662//16, *EarthLife Africa Johannesburg (ELA) c. Ministry of Environmental Affairs and others.*

25 Cournil, C., « Étude comparée sur l'invocation des droits constitutionnels dans les contentieux climatiques nationaux », in Cournil, C., Varison, L. (dir.), *Les procès climatiques : entre le national et l'international*, 2018, p. 90-94.

26 Gay, L., Fatin-Rouge Stefanini, M., « L'utilisation de la Constitution dans les contentieux climatiques en Europe et en Amérique du Sud », in Colloque « La Constitution face aux changements climatiques », op. cit., p. 27-33.

27 We will not return to this point, which has just been analyzed in the first part, but in fact each case mobilizes several arguments at once, which does not exclude reviewing the same cases in other parts of the analysis.

tion a constitutional interest,[28] and was hence able to prohibit deforestation. The Court makes a clear causal link between the ecosystem that is being jeopardized by the law in question, and the climate issue, as the Paramos region supplies water for roughly 70% of the Colombian people and is a carbon sink. The Court adds new words to the Constitution so as to protect an ecosystem. This led the Court to "ensure a real control of the laws that affect the country's climate policy".[29]

The controlled legal object may also be an administrative act.[30] For instance, the German Constitutional Court curbed judicial activism,[31] and prevented the recognition of climate as an overriding public interest, as in Colombia, despite a promising decision by the Court of Appeal. The federal government of Lower Austria had authorized the construction of a third runway at Vienna airport and the relocation of a freeway. The Constitutional Court found that there was no justification to put the environmental, and therefore climatic, interest over other constitutional interests.

The Irish High Court, less shy about the constitutional importance to be given to climate, came to a similar conclusion.[32] Even if the violation of the right to a healthy environment cannot be said to be disproportionate, there is a link to climate, which implies a constitutional value for the climate issue. Once again, the litigation involved a normative act that was not about climate change, but it gave the Constitutional Court an opportunity to derive a constitutional value for climate.

2. The climatic nature of the reviewed norms

It is worth mentioning the resounding ruling of the German Federal Constitutional Court in spring 2021.[33] By censoring the law and its insufficient goals, in the name of fundamental rights, the Court provided a quantified and more binding climate goal, as the law was declared unconstitutional. This time, a constitutional review of a climate law is an opportunity to constitutionalize something even more binding than before.

However, the German Constitutional Court is well-known for its bold decisions, notably by considering itself in a position to give the legislator instructions, especially when there is a link with fundamental rights. The Bundesverfassungsgericht presents itself as a game referee, based on a supposedly clear separation between law and politics. The members of the Court are expected to focus exclusively on legal technicalities. However, in reality, the Court assumes that some axiological postulates,[34] which predate the 1949 Constitution, must guide its interpretation. Thus, when it needs to justify its law-making

28 Sent. C-035/16, 8 Feb. 2016.

29 Cournil, C., « Étude comparée sur l'invocation des droits constitutionnels dans les contentieux climatiques nationaux », op. cit., p. 96.

30 The jurisprudence can also justify the control, v. Gay, L., Fatin-Rouge Stefanini, M., op. cit.

31 Bundesverwaltungsgericht (BVwG), 2 Feb. 2017, W109 2000179-1/291E. See the two-part commentary by Émilie Gaillard and Laurent Fonbaustier, and in particular (but not only) Fonbaustier, L., « Le tribunal de Karlsruhe et la décision du 24 mars 2021 : quelques réflexions sur ce que signifie être juge constitutionnel par gros temps », *EEI* July 2021, n° 7, p. 39-40.

32 High Court, 21 Nov. 2017, n° 201 JR, *Friends of the Irish Environment CLG v. Fingal County Council.*

33 BverfG, 24 March 2021, published on 29 April 2021, 1 BvR 2656/18, 1 BvR 96/20, 1 BvR 78/20, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20.

34 i. e. a set of values.

interpretations, it claims to apply the values that are imposed upon the Court, the Constitution and on each institution and individual. In doing so, the Bundesverfassungsgericht has created strength out of an initially fragile position, between law and politics.[35]

However, few constitutional judges are as bold as the Karlsruhe Court's members. The French Constitutional Council, which is frequently pointed out for its shy interpretation of the Charter of the Environment,[36] also had the opportunity to review the recent French law about climate.[37] While the Council's members highlighted with ease several irrelevant provisions, the same could not be said when the claimants requested it to declare the law unconstitutional because of its general economy, without pointing to a particular provision:

> *'In the present case, the applicants develop a general criticism of the legislator's ambitions and of the inadequacy of the law as a whole. They do not therefore challenge any particular provision of the law in question in order to request its censorship. The complaint against the law as a whole can therefore only be dismissed'.*[38]

By refusing to review the law in a more generally in light of the fight against climate change, without focusing on a specific provision (although this legal reasoning could be considered well founded), the Constitutional Council retreats to its classic fall-back position. It does not turn the 'climate' into a clear constitutional interest and does not indicate whether it could be part of the right to a balanced and healthy environment protected by the first article of the Charter. Its position on the protection of the environment is profoundly different from that of other European judges in Germany or the Netherlands,[39] or even Latin American judges from Colombia[40] or Costa Rica.[41]

B. The States' climate liability based on constitutional grounds: the emergence of climate duties and obligations

Marta Torre-Schaub points out an interesting fact: quantitatively, climate litigation

35 Basset, A., « Droits fondamentaux et droit constitutionnel : une confusion allemande », in Bottini E. et al. (dir.), *Nouveaux regards sur des modèles classiques de démocratie constitutionnelle : États-Unis, Europe,* 2018, Mare & Martin, p. 173-177.

36 Gay, L., Vidal-Naquet, A., « France », *Annuaire international de justice constitutionnelle* 2020, vol. 35, n° 2019, p. 301-331: the authors believe that it has led to the undermining of the rights originally provided for in the Charter of the Environment.

37 CC, 13 Aug. 2021, n° 2021-825 DC, *Loi portant lutte contre le dérèglement climatique et renforcement de la résilience face à ses effets.*

38 Cons. 4.

39 Petrinko, E., « De la décision d'Urgenda aux perspectives d'un nouveau contentieux climatique », in Cournil, C., op. cit., p. 113-128.

40 Lafaille, F., « Constitution éco-centrique et État social de droit. À propos du constitutionnalisme andin », *Revue française de droit constitutionnel* 2019, vol. 118, n° 2, p. 333-355.

41 Cerda-Guzman, C., « Chili et Costa Rica », *Annuaire international de justice constitutionnelle* 2020, vol. 35, n° 2019, p. 197-213.

aimed at establishing state liability is minoritarian worldwide, but it accounts for almost a quarter of European climate litigation.[42] These cases demonstrate that the judge is sometimes receptive to the use of constitutional arguments for climate protection to supervise the public authorities (1), and / or establish climate obligations attributable to the States (2).

1. The control of public authorities based on constitutional grounds

Public authorities act within the powers conferred upon them by the constitutions and cannot go beyond them. This analysis is thus related to the above analysis of constitutional review, since one could reuse some of the judgments already mentioned, such as the Colombian one, which simply frames the authorities' actions by asserting that the law infringing upon the Paramos ecosystem is unconstitutional. In general, decisions about major construction projects, such as the cases before the Irish High Court and Austrian Constitutional Court, reflect the need to assess the public policies in the light of climate change. These cases[43] allow us to see how similar arguments used by plaintiffs around the world have led judges from every continent to render decisions on the same topics: the review of rules or projects, in light of fundamental rights, showing the need to frame politicians and public powers, and, consequently, private activities that require official authorizations.

The South African case is another example: Article 24 of the Constitution calls for the recognition of environmental rights in order to protect climate. The judge in this case was to decide about a coal-fired power plant.[44] The Court said:

> *"Climate change poses a substantial risk to sustainable development in South Africa. The effects of climate change, in the form of rising temperatures, greater water scarcity, and the increasing frequency of natural disasters pose substantial risks. Sustainable development is at the same time integrally linked with the principle of intergenerational justice requiring the State to take reasonable measures to protect the environment "for the benefit of present and future generations" and hence adequate consideration of climate change. Short-term needs must be evaluated and weighed against long-term consequences".*[45]

From this last decision it is clear that the need to evaluate public policies is accompanied by a more global climate obligation expressed in emblematic litigations.

2. Constitutionally grounded State obligations regarding climate

One cannot talk about the successes of the liability litigations without mentioning the

42 Torre-Schaub, M., « L'émergence d'un contentieux climatique comme réponse à l'urgence climatique : dynamiques, usages et mobilisations du droit », in Torre-Schaub, M. (dir.), *Les dynamiques du contentieux climatique : usages et mobilisations du droit*, 2021, Mare & Martin, p. 27.

43 See above, II-A-1.

44 North Gauteng High Court, 8 March 2017, n° 65662//16, *EarthLife Africa Johannesburg (ELA) c. Ministry of Environmental Affairs and others.*

45 Cons. para 82.

Urgenda case, which inspired the claimants' activism, and even possibly the judges' activism. Based on Article 21 of the Dutch Constitution,[46] judges have found a diligence duty attributed to the Netherlands regarding climate, allowing the judges to justify reviewing climate policy.

Scholars have argued that this Dutch case inspired subsequent climate litigation and ushered a new "era" of climate litigation once the main obstacles to these lawsuits (admissibility, causal link, etc.) were overcome.[47] Indeed,

> *"[w]hile Urgenda marked the emergence of climate litigation, it has now grown and diversified considerably, making the courts the new frontline of climate action. Despite the specificities of each claim and each national jurisdiction, a common language and jurisprudence are emerging, recognizing similar obligations for all actors – States and companies – in the name of global climate justice".*[48]

Pakistani judges,[49] seemingly inspired by the *Urgenda* case, found climate obligations based on constitutional fundamental rights, in particular the right to life (Article 9 of the Pakistani Constitution), the right to human dignity (Article 14) and environmental rights. They also relied on constitutional principles such as democracy, equity, social justice, etc. Therefore, the Court condemned the immobility of public policies and imposed obligations upon public authorities to adapt to climate change.

IV. Conclusion

In conclusion, constitutional provisions on climate – whether to combat climate change or, more rarely, to adapt to its consequences – appear in constitutional instruments only hesitantly and in a multilayered fashion. However, as is often the case when faced with new questions fraught with conflicting rationales and legitimate tensions, much is expected of judges, especially at the constitutional level. Let us not be fooled: when judges are involved, this means that the need for protection, which must be at the heart of the environmental protection goals, has been violated in one way or another. However, constitutional jurisprudence cannot be reduced to a 'last resort' function. It is, in turn, a melting pot that feeds on the texts when it can relate to them, but also from the Zeitgeist (dare we write on this subject). Through feedback and ripple effect, climate jurisprudence can in turn influence national legal orders and spread to all continents as a new source of inspiration, contribution to the development of the new climatic, and, above all, ecological framework that we urgently need.

46 'It shall be the concern of the authorities to keep the country habitable and to protect and improve the environment'.

47 Torre-Schaub, M., « L'émergence d'un contentieux climatique comme réponse à l'urgence climatique : dynamiques, usages et mobilisations du droit », in Torre-Schaub, M. (dir.), op. cit., p. 31-32.

48 Petrinko, E., « De la décision d'Urgenda aux perspectives d'un nouveau contentieux climatique », in Cournil, C., op. cit., p. 128.

49 Lahore High Court Green Bench, 7 and 14 Sept. 2015, *Asghar Leghari v. Federation of Pakistan.*