

ELI Webinar Series on the Conference on the Future of Europe

# Climate Justice – New Challenges for Law and Judges

11 November 2021

Event Report

## 1. Background

Founded in June 2011 as an entirely independent non-profit organisation, the European Law Institute (ELI) aims to improve the quality of European law, understood in the broadest sense by initiating, conducting and facilitating research, making recommendations, and providing practical guidance in the field of European legal development. ELI is committed to the principles of comprehensiveness and collaborative working, thus striving to bridge the oft-perceived gap between the different legal cultures, between public and private law, as well as between scholarship and practice. ELI undertook to contribute to the Conference on the Future of Europe by holding three lectures dedicated to the three pillars of its project portfolio:

### Rule of Law in the 21st Century

- Business and Human Rights: Access to Justice and Effective Remedies (with input from the EU Agency for Fundamental Rights, FRA), 30 November 2021

### Law and Governance for the Digital Age

- Artificial Intelligence (AI) and Public Administration – Developing Impact Assessments and Public Participation for Digital Democracy, 25 November 2021

### Sustainable Life and Society

- Climate Justice: New Challenges for Law and Judges, 11 November 2021

Below is a brief report on the **Climate Justice webinar**.

## 2. Context, purpose, subject and structure/methodology of the event

In Europe and beyond, NGOs and citizens are demanding more action from governments concerning climate change and are bringing new cases before the courts. While specific legal rules already exist, they might not be adequate to tackle increasingly urgent challenges.

Climate change problems are of cross-border nature, and the courts must therefore also address extra-territorial issues, and in doing so deal with questions relating to both private international and public international law. Furthermore, the interface and overlap between international legal instruments, EU law, European human rights law, national constitutional law, private law, public law, and criminal law, pose crucial methodological challenges for the courts. Indeed, they must in their legal reasoning find a balance between these different levels of law.

In order to address these, and other related issues, ELI's Council has since given a mandate for a project to be conducted on 'Climate Justice – New Challenges for Law and Judges'.

### **3. Number and type (general or specific public with details if possible) of participants present**

There were 60 participants from 22 different countries who took part in the event. The event was opened to the public and advertised on the ELI website and on social media, as well as the Conference on the Future of Europe portal. The majority of participants (almost 65%) came from the legal field, followed by education and training occupations and students (12% each), with several individuals representing other occupations.

### **4. If available, demographic information about participants (eg age, gender, etc.)**

62% of participants were female, 37% male and 1% identified themselves as 'other'.

Most participants indicated their age as falling within the 50–59 brackets (14 participants) and 20–29 (14 participants). 13 participants were aged 40–49, 9 participants were 60 or over, 8 were 30–39 years old and there were 2 participants under 20 years old.

### **5. Main subjects discussed during the workshops**

ELI President, Prof Dr Pascal Pichonnaz, introduced the event and the proposers of an ELI Project on 'Climate Justice – New Challenges for Law and Judges' – Prof Dr Henrik Andersen and Prof Dr Alberto De Franceschi. Prof Andersen emphasised that there is a rise in the number of cases before national and international courts on liability for potential breaches of obligations by States and corporations based on national, European and international law, and that the problems are very complex and guidance is needed to help judges navigate the above cases. It is a jungle of both hard and soft law across different levels. ELI hopes to tackle this by issuing guiding Principles on the liability of States and corporations. The need to engage the public on this was emphasised, before attendees were asked to provide their views on several questions including the following via polls on open and closed questions:

1. Should an individual's access to a safe climate be a human right?
2. How does climate change affect your life?
3. Should animals have rights to protection against climate change?
4. Who should the biggest economic burden of reducing CO2 emissions fall on and why?
5. Which measures should be enacted in the financial sector for example in order to stimulate sustainable business models? Which measures should be enacted in the insurance sector to reduce pollution and fight climate change?
6. What is the best way to get consumers to change habits that cause harm to the environment?
7. Assuming the regulator steps in, should corporations be held liable for climate changes even if they comply with a State legislation?
8. If States do not make specific and practical solutions to combat climate change, should the courts intervene to impose liability on States even if the law is not clear on this point?

### **6. Main ideas suggested by participants during the workshops and the shared or debated narratives and arguments that led to them**

The debate started with the question whether an individual's access to a safe climate should be a human right. Only 70% of those present voted. A clear majority of voters, 85%, were in favour of that idea; 15% were not. That a recent decision of the UN Rights Council calls on States around the world to implement the right to a safe environment was mentioned. This may pave the path for the recognition of this right at international and national level. It was also mentioned that the EU Charter of Fundamental Rights and some national constitutions (eg the Norwegian one) include a principle of environmental protection and

that a recent judgment of the German Constitutional Court recognised the protection of the environment under the constitution. Further, the fact that the Council of Europe is also discussing an additional protocol to the European Convention of Human Rights on the right to a healthy environment was mentioned. It was concluded that legal developments seem to head in the direction of recognising such a right.

This led to a discussion on what the threshold for a safe climate/environment should be, especially in light of the increase of extreme events in some regions. Would different standards apply, depending on the extent to which a region is accustomed to extreme events?

The discussion then focused on personal experiences of climate change, with most participants indicating that they had experienced a change in the weather, as well as flooding and/or forest fires.

The focus turned to the effectiveness of potential claims resulting from a human right to a safe climate in light of the problem of causation, which is a major issue in climate-related cases. Harm to the climate has been going on for hundreds of years. To point the finger at one State raises the question of whether it should be liable on the basis of past action (done hundreds of years ago) or only recent action.

Further, participants discussed whether existing rights, such as the right to life or health, are sufficient. Some doubted this citing, among other reasons, that some of the above 'rights' are perceived as principles rather than rights. It was also emphasised that not much can be achieved through existing rights in many legal systems and that the introduction of a right to a safe climate might overlap or create confusion with existing ones at the level of interpretation and application. That said, such an introduction would facilitate enforcement. One participant emphasised General Comment No 36 on the right of life of the UN Human Rights Committee, in particular its para 62 which states, inter alia, that the implementation of the obligation on States to respect and ensure the right to life, and in particular life with dignity, depends, inter alia, on measures taken by States parties to preserve the environment and protect it against harm, pollution and climate change caused by public and private actors.

That the time has come for lawyers to overcome the effectiveness issue was emphasised, with one participant stating that having general rules in international treaties is essential to improve environmental protection and they should be used in practice. The discussant referred to the International Court of Justice, which has already provided some guidance in this regard.

Concerning the potential right to a healthy environment, participants wondered who or what would be the object of protection? Human beings or the environment itself? If human beings, it might indeed overlap with other human rights. On the other hand it was questioned whether protecting the environment as such could be considered a human right.

Participants also shared their views on whether animals should have rights to protection against climate change. Some were against the idea and opined that humans in developing countries do not even have basic needs met like access to food. On the other hand, it was mentioned that legal constructs, eg corporations have rights – they also have obligations. If animals have rights, what about plants? That some Criminal Codes in Europe already contain rules protecting animals against abuse was mentioned by Prof De Franceschi as something that can be built upon.

Since the survival of animals (stopping mass extinction) is crucial for the survival of ecosystems, animal rights could be seen as a part of the environmental package, according to one participant. An example of Denmark was provided, where farmers are already required to leave a certain percentage of farm land

unattended for the wellbeing of animals. Participants also discussed whether it is necessary to provide animals with rights or whether it is enough to impose obligations on human beings. Further, they suggested possible representatives of animals, and said that many legal systems allow an 'agent', such as a non-governmental organisation, to represent animals in court but a law would need to be in place to allow this.

A discussant wondered whether the law should be harsher against companies that 'accidentally' drain/spill oil and just pay a fine to compensate, which led to the question of whether corporations are bound to comply with human rights. They may say they do so in their Corporate Social Responsibility statements, etc but they have a soft law character meaning they are not binding on corporations. Some say that given that some corporations are wealthier than some States, more should be expected of them. On the other hand, imposing a human rights obligation on companies may result in States pushing their responsibilities under human rights law to companies. The role of competition law was also mentioned in the context of the imposition of fines. Fines may lead to 'green-washing', where companies turn to produce goods in countries with low environment protection standards, while other companies, based in countries with higher standards, have higher costs, thus distorting competition. Enhancing the level of protection in the EU may therefore lead to the relocation of companies to third countries with lower expectations. Competition law instruments could admittedly address this.

Discussions turned to who the biggest economic burden of reducing CO2 emissions should fall on and why. Most participants thought that corporations should shoulder the biggest economic burden (followed by States, and consumers). That the State has the means to influence the behaviour of corporations and consumers was mentioned. However, the fact that the 'controlled', especially in light of the digital revolution, is sometimes more powerful than the 'controller', was raised. A shift to more public law enforcement, eg by making green-washing an unfair commercial practice, was suggested as one way of tackling existing problems. Participants again emphasised that the current level of fines for companies for actions or omissions that lead to the destruction of the environment are not significant. That this may change in light of the Modernisation Directive, which makes reference to the annual revenue of corporations in imposing fines on them, was highlighted by Prof De Franceschi as a means to steer corporate behaviour. The fact that demand pushes supply was also mentioned, meaning that consumers also have a role to play. The need to afford companies the means towards a shift to more sustainable options (thus avoiding carbon leakage) was emphasised. It was also noted that at the end of the day, the burden is on the individual (if the burden is primarily on the State – taxes might be raised; if it is primarily on corporations, prices rise).

A lively discussion followed on the role of the World Trade Organization's (WTO) green goods list and its potential incentives of lower tariffs as well as the best way to get consumers to change habits that cause harm to the environment, with most respondents suggesting that alternative products (including electricity based on green energy sources) should be subsidised. Participants were also in favour of encouraging a change of culture, eg by making the 'green way' of living fashionable, but were not supportive of introducing regulations that would severely punish non-environmentally-friendly activities. It was mentioned that algorithms, which are now employed for targeted advertisement purposes, with a view to stimulating consumption, should be used to nudge environmentally-friendly options instead. Legislators have a role to play in this regard. 'Green' algorithms could make consumers aware of the impact of their choices and offer them positive choices, in a manner that does not impact freedom of choice. This would empower consumers, who can make an impact, to make virtuous, rather than

compulsive, choices. That corporation would need to produce substitutes that have a reasonable price, and this may require subsidies that may be prohibited under EU law, but the Green Deal seeks to address this. WTO law, however, prohibits this without exceptions.

Questions such as whether corporations should be held liable for climate change even if they comply with a State's legislation and whether courts should intervene to impose liability on States, if the latter do not make specific and practical solutions to combat climate change, were also discussed. As regards the first, the fact that damage may occur in one State and manifest in another, both of which have different laws was raised. Would complying with one State's laws be sufficient and if so which one? The one with the highest level of protection? If so should this affect the other State's legislation? In this regard, it was emphasised that the rule of law, and the need for legal certainty in the form of a legal basis in imposing liability, is of utmost importance. As regards the last question, Prof Andersen emphasised that this is the crux of the ELI project. Although a mosaic of possible indirect laws exists, specific laws that serve as guidance for the courts would be helpful, eg the European Climate Law. Reference to ELI's prospective Ecocide project was mentioned in answer to the suggestion on the need for a crime in this field. One participant thought, in particular, that international crimes against humanity (against the global climate) should exist. In addition to the importance of legal certainty, the need for new legal frameworks not to hinder investment and innovation was emphasised, as innovation is essential to steer behaviour. On the other hand, it was opined that the fact that innovation entails production and possible threats to the climate means a balance needs to be struck between the two.

#### **7. General atmosphere and expected follow-up**

While there were no unanimous conclusions, it was generally thought that more needs to be done to protect humanity, animals, the environment, our ecosystems, etc from catastrophic climate changes and that lawyers can make a difference. It is hoped that ELI's team will make an important contribution in supporting judges as they address 'climate justice'.