Climate litigation, separation of powers and federalism *à la belge*: a commentary of the Belgian climate case

Cour d'appel de Bruxelles 30 November 2023, *Klimaatzaak and others v the Belgian State, Wallonia, Flanders and the Brussels Region*

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INTRODUCTION

Climate litigation is booming worldwide.[1] Belgium is no exception to that trend. In the latest development, on 30 November 2023, at the start of COP 28,[2] the Brussels Court of Appeal delivered its long-awaited ruling in the climate case (*Klimaatzaak*/*Affaire climat*),[3] the Belgian counterpart to the well-known Dutch

[1]J. Setzer and C. Higham, *Global Trends in Climate Change Litigation: 2024 Snapshot* (Grantham Research Institute on Climate Change and the Environment, London School of Economics and Political Science 2024), https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2024/06/Global-trends-in-climate-change-litigation-2024-snapshot.pdf, visited 28 September 2024; I. Alogna et al. (eds.), *Climate Change Litigation in Europe. Regional, Comparative and Sectoral Perspectives* (Intersentia 2023).

[2]COP stands for 'Conference of the parties', a body established by Art. 7 of the United Nations Framework Convention on Climate Change as the supreme body of this convention.

[3]Cour d'appel de Bruxelles (Brussels Court of Appeal) 30 November 2023, *Klimaatzaak and others* v *the Belgian State, Wallonia, Flanders and the Brussels Region* (hereafter: the Court of Appeal ruling). Information on the case, including a copy of the ruling discussed here as well as of some of the submissions in the case, is available at https://www.klimaatzaak.eu/en, visited 28 September 2024. For the first online comments, *see* e.g. M. Petel and N. Vander Putten, 'The Belgian Climate Case: Navigating the Tensions Between Climate Justice and Separation of Powers', *Verfassungsblog*, 5 December 2023, https://verfassungsblog.de/the-belgian-climate-case/, visited 28 September 2024; A. Briegleb and A. De Spiegeleir, 'From Urgenda to Klimaatzaak: A New Chapter in Climate

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Urgenda case.[4] The Belgian ruling is long and detailed and partially confirms the first instance decision from June 2021: the Belgian federal and regional governments – with the exception of the Walloon Region – have breached Articles 2 (right to life) and 8 (right to respect for private and family life) of the European Convention on Human Rights (ECHR) to which Belgium is a party, as a result of their failure to take the necessary measures to mitigate their greenhouse gas emissions appropriately. For similar reasons, these authorities are also extra-contractually liable under Articles 1382 and 1383 of the former Belgian Civil Code.[5] In establishing a breach of Article 8 ECHR, the Brussels Court of Appeal was a precursor to the later decision from the European Court on Human Rights of 9 April 2024 in the *KlimaSeniorinnen* case,[6] which itself contains an explicit reference to the Belgian case.[7] In contrast with the first instance decision, the judgment of the Brussels Court of Appeal also includes an injunction against those state authorities which the Court found to be in breach of the ECHR and extra-contractually liable. More precisely, the appeal judges ordered the Belgian federal and regional governments to take appropriate measures to reduce the total volume of their annual greenhouse gas emissions by at least 55% by 2030, compared to 1990 levels. In its November 2023 decision, the Court of Appeal further decided that it would monitor the enforcement of its decision and that it could impose penalties if its injunction was not respected by the Belgian federal government and the Flemish and the Brussels regions. No penalties have been imposed so far.

This decision of 30 November 2023 from the Brussels Court of Appeal has been hailed by the claimants, by civil society groups, by parts of the Belgian political landscape and by segments of legal academia as a landmark decision that paves the way for a more ambitious climate policy in Belgium, and as another example of a successful climate litigation case.[8] At the same time, however, it has

Litigation', *Verfassungsblog*, 5 December 2023, https://verfassungsblog.de/from-urgenda-to-klimaatzaak, visited 28 September 2024.

[4]Hoge Raad (Supreme Court of the Netherlands) 20 December 2019, *The Netherland* v *Urgenda*, ECLI:NL:HR:2019:2007.

[5]The Belgian Civil Code has been progressively reformed in recent years, including the provisions that regulate extra-contractual liability.

[6]ECtHR (GC) 9 April 2024, No. 53600/20, *Verein KlimaSeniorinnen Schweiz and others* v *Switzerland*.

[7]Ibid., paras. 269-272.

[8]E.g. D. Philippe and I. Jeanmart, 'À circonstances alarmantes décision exceptionnelle!', 9 *Revue de Jurisprudence Liège, Mons, Bruxelles* (2024) p. 390; A. Bombay and J.-B. Lemaire, 'Klimaatzaken: wie A(ansprakelijkheid) zegt, moet B(evel) zeggen? Inleidende beschouwingen bij het klimaatarrest over de scheiding der machten, toetsing via open normen, en het rechterlijk bevel', 1 *Tijdschrift voor Milieurecht* (2024) p. 24; L. Lavrysen, 'Mensenrechten dwingen tot verdergaande emissiereducties in historisch klimaatarrest', 1 *Milieu en Energierecht* (2024) p. 41.

been widely criticised in economic circles, by other parts of legal academia, by the Flemish government and, more generally, by Flemish right-wing parties.[9] The Flemish Minister for the Environment, for example, labelled the decision as an example of judicial activism, particularly problematic in her view as the decision came from 'French-speaking' judges. This is a reference to the fact that a French-speaking chamber of the Brussels Court of Appeal issued the November 2023 decision, rather than a Dutch-speaking one. In fact, the language in which the case would be decided was initially contested, before the Belgian Supreme Court (*Cour de cassation/Hof van cassatie*) concluded in 2018 that it should be tried in French.[10] The Flemish Minister for the Environment immediately announced that an appeal would be lodged against the November 2023 decision before the Belgian Supreme Court, in order to have the decision quashed.[11] The Flemish government lodged this appeal in April 2024. The decision from the Supreme Court is not expected before several months, or even years. The reaction from the Belgian Prime Minister, Alexander de Croo, to the decision was also dismissive: in his view, cases such as the Belgian climate case would have no practical impact in real life and the discussion on the merits of the case was disconnected from reality.[12] Other members of his own government, however, were more positive about the decision, highlighting the need to take stock of the decision to improve Belgian climate policies.[13] Eventually, the federal government did not join Flanders in its appeal before the Supreme Court.

The aim of the present case note is to offer a contextual analysis of the decision from the Brussels Court of Appeal of 30 November 2023 in the Belgian climate case. A short analysis of the decision from the Court is first undertaken to describe the reasoning of the Court of Appeal and highlight the most salient and

[9]*See* the examples mentioned in V. Lefebve, 'Où en est l'Affaire climat?', *Les analyses du CRISP en ligne*, 5 April 2014, https://www.crisp.be/crisp/wp-content/uploads/analyses/AL2024-07.pdf, visited 28 September 2024. *See also* the discussion and the hearings held in the select committee energy and climate plan of the Flemish Parliament on 17 January 2024, notably the hearing of the lawyer and legal academic Jürgen Vanpraet: *Parliamentary Documents*, 2023-2024, p. 1, https://www.vlaamsparlement.be/nl/parlementaire-documenten/gedachtewisselingen-hoorzittingen/1793467, visited 28 September 2024.

[10]Cour de cassation/Hof van Cassatie (Belgian Supreme Court), 20 April 2018, unpublished.

[11]A. François and Belga, 'Zuhal Demir en cassation contre l'ordre de la cour d'appel de supprimer 55% des gaz à effet de serre d'ici 2030', *VRT News*, 1 December 2023, https://www.vrt.be/vrtnws/fr/2023/12/01/zuhal-demir-en-cassation-contre-lordre-de-la-cour-dappel-de-supp/, visited 28 September 2024.

[12]J. Struys, 'De Croo vecht klimaatarrest niet aan: 'Dit soort rechtszaken maakt nul verschil", *De Standaard*, 1 December 2023, https://www.standaard.be/cnt/dmf20231201_95167155, visited 28 September 2024.

[13]M. De Muelenaere, 'La Belgique une nouvelle fois condamnée pour son inaction climatique', *Le Soir*, 30 November 2023, https://www.lesoir.be/552575/article/2023-11-30/la-belgique-une-nouvelle-fois-condamnee-pour-son-inaction-climatique, visited 28 September 2024.

innovative features of the decision compared to global trends in climate litigation. Beyond this short overview of the case, this case note discusses two aspects in particular: first, the conformity of the decision with the separation of powers principle, a point of contention during the case and in the discussions following the decision; second, the decision is placed in the broader perspective of the tensions between the different levels of Belgian government and the role adopted by the Court in the face of the failures of Belgian federalism to address successfully the challenge of climate change is highlighted. As the contrasting reactions to the decision have made clear, the federal dimension is a peculiarity of the Belgian climate case compared to other similar cases worldwide.

The Belgian climate case: an overview

After describing the main facts and procedural stages of the Belgian climate case, this case note describes the two pillars on which the case is based: human rights law; and tort law.

The Belgian climate case in a nutshell

In 2015, citizens and the ASBL Klimaatzaak ('Climate case' in Dutch) filed a claim against the Belgian federal government, the Walloon Region, the Flemish Region and the Brussels-Capital Region.[14] Belgium is a federal state and those three regions are federated entities, each with legislative and executive powers in areas relevant to the fight against global warming. Regional powers include the environment, planning and building regulations, and regional aspects of energy policy such as the development of renewable energies.[15] Under Belgian constitutional law, climate change is not a responsibility that belongs to a single level of government as such.[16] It is a shared responsibility of all levels of Belgian government. Echoing a famous article from 1972 by Christopher Stone,[17] 82 trees of a sort threatened by climate change also applied to intervene in the

[14]On the case, *see* e.g. D. Misonne, 'Renforcer l'ambition climatique de l'État global dans un régime fédéral? "Klimaatzaak": la Belgique a aussi son affaire climat', in C. Cournil and L. Varison (eds.), *Les procès climatiques entre le national et l'international* (Pedone 2018) p. 149; P. Lefranc, 'Het klimaatzaakvonnis: wachten op "De man die bomen plantte"?', 4 *Tijdschrift voor Milieurecht* (2021) p. 332; V. Lefebve, 'L'Affaire climat (Klimaatzaak). Une mobilisation sociale entre droit, science et politique', (2553-2554) *Courrier hebdomadaire du CRISP* (2022).

[15]Art. 6 of the Special Majority Act on Institutional Reforms of 8 August 1980.

[16]Legislative section of the Belgian Council of State, 4 March 2019, Opinion 65.404/AG and 65.405/AG, p. 27.

[17]C. Stone, 'Should Trees Have Standing? – Towards Legal Rights for Natural Objects', 45 *Southern California Law Review* (1972) p. 450.

proceedings. The significant number of applicants in the Belgian climate case – almost 60,000 citizens – is the first striking feature of the case. More broadly, the Belgian climate case is an example of a strategic use of the courtroom by civil society, in an attempt, in this case, to push Belgium to adopt more ambitious climate policies.[18]

In their complaint, following the strategy and the line of argumentation used in the Dutch *Urgenda* case (Roger Cox, the Dutch lawyer from the *Urgenda* case, has also been involved in the Belgian climate case), the claimants argued that the Belgian public authorities that were sued had not and would not sufficiently reduce their greenhouse gas emissions by 2020 compared with 1990 levels. This failure would give rise to extra-contractual liability on the part of these public authorities and result in a breach of Articles 2 (right to life) and 8 (right to respect for private and family life) ECHR, as well as of Articles 6 (right to life) and 24 (right to health) of the International Convention on the Rights of the Child. This latter aspect was not discussed in much details in subsequent rulings in the case as the International Convention on the Rights of the Child lacks direct effect under Belgian law and could thus not be judicially enforced.[19] Extra-contractual liability under Belgian law requires fault (i.e. the breach either of a statutory rule or of a standard of prudent behaviour), harm and causation between the fault and the harm suffered. The claimants in the Belgian climate case also asked the court to issue an injunction against the Belgian State and the three regions involved which would order them to do more in terms of mitigation. The claimants, finally, requested the court to monitor compliance with the targets that would thus be assigned to the public authorities party to the case, and to impose penalties to ensure compliance with the court's decision.

The Brussels Court of First Instance ruled in favour of the claimants, but only in part.[20] On the admissibility of the claim, the first instance court gave a broad reading of the requirement for standing and accepted that the individuals and the NGO Klimaatzaak that had submitted the complaint did have standing to bring

[18]Lefebve, *supra* n. 14, p. 88.

[19]Brussels Court of First Instance 17 June 2021, 2015/4585/A, *Klimaatzaak and others* v *the Belgian State, Wallonia, Flanders and the Brussels Region*, p. 63 (hereafter: the first instance decision).

[20]Ibid. For comments on the case, besides the references mentioned *supra* in n. 14, *see* e.g. M. Wuine, 'Analyse du jugement du tribunal de première instance dans l'affaire climat à la lumière des décisions rendues dans "l'Affaire du siècle" et Urgenda', 8 *Revue de Jurisprudence de Liège, Mons, Bruxelles* (2022) p. 363; X. Thunis, 'Dérèglement climatique: y a-t-il un pilote dans l'avion?', 1 *Aménagement – environnement* (2022) p. 27; B. Dubuisson, 'Responsabilité civile et changement climatique. Libres propos sur le jugement rendu dans l'affaire "Klimaatzaak"', in *Liber amicorum Xavier Thunis* (Larcier 2022) p. 259; M. De Winter, 'Belgische klimaatzaak: als het overstroomt in Den Haag, druppelt het in Brussel', 2 *Tijdschrift voor Belgisch Burgerlijk recht/Revue Générale de Droit Civil* (2023) p. 99.

their claim to court. This reading of the admissibility of the claim is broad and generous when envisaged in comparative perspective, notably compared to what applies before the European Court of Justice or the European Court of Human Rights.[21] However, the Court rejected the intervention of the trees, citing their lack of legal personhood under Belgian law. On the merits, the Brussels Court of First Instance found that the climate policies of the different Belgian public authorities involved in the case were insufficient both from the perspective of Articles 2 and 8 ECHR and from the perspective of the standard of behaviour required under Articles 1382 and 1383 of the former Belgian Civil Code. Despite this, the Court refused to enact binding targets in terms of reduction of greenhouse gas emissions which should be respected by the Belgian federal and regional governments. The Court cited concerns regarding the separation of powers to resist granting such an injunction, stating that the scope and the rhythm of the Belgian reduction of greenhouse gas emissions and the sharing of this burden internally 'are and will be the result of a political decision with which the Court cannot interfere'.[22] As a result, although it was hailed as a victory for the climate movement,[23] the result obtained by the claimants was primarily symbolic.

Both the claimants and the defendants appealed against the 2021 judgment. This appeal gave rise to the decision of the Brussels Court of Appeal that is the subject of this case note. In short, the Court of Appeal confirmed that the Belgian federal government and the Flemish and Brussels regions had breached Articles 2 and 8 ECHR and the standard of care flowing from the Belgian Civil Code because of the lack of ambition and effectiveness of their climate policies. However, the Court of Appeal found that the Walloon Region had carried out its share of the effort, by complying with the climate targets it had set for itself for 2020 (a 30% reduction in greenhouse gas emissions compared to 1990) and by including the 55% reduction target for 2030 in a draft regional legislative provision. Having so established the respective responsibilities of the Belgian state authorities involved in the case, the Brussels Court of Appeal also reversed the decision of the first instance judge on another point. It did so by issuing an injunction against Brussels, Flanders and the federal government ordering them to take the appropriate measures to achieve together the target of reducing greenhouse gas emissions by at least 55% by 2030 compared to 1990 level, using whatever means they deemed most appropriate to do so. Here, the Court ruled that the principle of the separation of powers did not prevent it from granting

[21]ECJ 25 March 2021, Case C-565/19 P, *Armando Carvalho et al.*; *Verein KlimaSeniorinnen Schweiz and others* v *Switzerland*, *supra* n. 6, paras. 478-488.

[22]First instance decision, *supra* n. 19, p. 82 (author's translation).

[23]Klimaatzaak NGO, 'Affaire Climat. Le juge donne raison à l'Affaire Climat, mais n'impose pas d'objectifs concrets', 17 June 2021, http://rvvx.mjt.lu/nl2/rvvx/mj3l7.html?hl=en, visited 28 September 2024.

such an injunction for a series of reasons: because of the persisting failure of the Belgian climate policy and the certainty of the harm to come if climate change is not contained; because of the need to protect individual rights effectively; because of the gravity and the urgency of the threat of climate change for humankind; and because of the need to make sure that each state carries out its share of the efforts to contain climate change within (relatively) safe limits. On this, the decision from the Brussels Court of Appeal is innovative because the possibility for a judge to issue an injunction to prevent future harm from happening remains contested under Belgian tort law.[24]

Climate change as a human rights issue

The first pillar on which the Belgian climate case is built is human rights law; it relies, more precisely, on Articles 2 and 8 ECHR. This approach to climate change as a human rights issue is not a novelty: climate change has increasingly been approached as such since the mid-2010s,[25] and the link between climate change and human rights is also made in the Preamble to the Paris Agreement of 2015.[26] Yet, the reasoning followed by the Brussels Court of Appeal contains some innovative elements, while it also confirms some global trends in climate litigation.

First, the discussion of the Brussels Court of Appeal on the scope of Articles 2 and 8 ECHR and the direct effect of these provisions in Belgium is of particular interest because the ruling is innovative in this regard. The direct effect of treaty provisions is a necessary condition for Belgian courts to enforce them against state authorities. For international law provisions to have such direct effect, their requirements must be clear and precise.[27] Here, the Court reaffirmed first the existence of a positive obligation for the state under Article 2 ECHR to take appropriate steps to safeguard the lives of those within its jurisdiction in the face of a real and immediate threat to these lives, as well as of a state duty under Article

[24]Dubuisson, *supra* n. 20, p. 286; F. Auvray, *(On)wettigheid binnen (overheids)aansprakelijkheid* (Intersentia 2023) p. 95-96; Bombay and Lemaire, *supra* n. 8, p. 35.

[25]J. Peel and H. Osofsky, 'A Rights Turn in Climate Change Litigation?', 7 *Transnational Environmental Law* (2018) p. 37 at p. 39; M. Petel, 'Droits humains et contentieux climatique: une alliance prometteuse contre l'inertie politique', 2 *Journal européen des droits de l'homme* (2021) p. 144; A. Savaresi and J. Setzer, 'Rights-based Litigation in the Climate Emergency: Mapping the Landscape and New Knowledge Frontiers', 13 *Journal of Human Rights and the Environment* (2022) p. 7.

[26]Paris Agreement, 12 December 2015, https://unfccc.int/sites/default/files/english_paris_agreement.pdf, visited 28 September 2024.

[27]I. Hachez, 'L'effet direct comme condition d'application du principe de primauté: de filiations en désaveu partiel?', 31 *Journal des tribunaux* (2021) p. 602 at p. 603.

8 ECHR to take measures to prevent grave interferences with the right to private and family life resulting, e.g. from environmental nuisances.[28] The applicability of these principles in the context of climate change has since been reaffirmed by the European Court of Human Rights in the *KlimaSeniorinnen* case.[29] However, previous case law from the Belgian Supreme Court seemed to suggest that only negative obligations flowing from the ECHR – rather than positive obligations flowing from it – were sufficiently clear and precise so as to have direct effect under Belgian law. Only they could, thus, be enforced by the judge.[30] Yet, the Brussels Court of Appeal found that a binary approach to the concept of direct effect – one which relies on a formal distinction between the negative and the positive obligations flowing from the ECHR – was too simplistic and that a contextualised and gradual approach to this notion of direct effect should be adopted, as also suggested in some academic circles.[31] In this respect, the Brussels Court of Appeal found that Articles 2 and 8 ECHR were breached if state authorities did not adopt the appropriate and reasonable measures that they should minimally adopt following the best available scientific evidence in order to avoid, within the limits of their powers, risking endangering life and gravely interfering with the right to private and family life from people falling under their jurisdiction.[32]

The second salient feature of the decision from the Brussels Court of Appeal relates to its heavy reliance on science and on the evolution of the domestic and international political consensus as to what should be done in terms of mitigation to address the challenge of climate change, even though the Court does not always make clear whether it is the existence of a scientific consensus or the existence of a policy consensus that is the driving force of its reasoning whenever they diverged. The ruling is notably full of references to the successive reports of the International Panel on Climate Change, to the reports and the discussions in the different COPs, and to the evolution of international law, notably the adoption of the Paris Agreement in 2015. For the past, this allowed the Court to conclude that Belgian authorities should have known by 2009 that they had to aim at reducing their greenhouse gas emissions by 25% by 2020 in order to limit a rise of global temperature to 2°C, even though this target of 25% has been criticised as lacking

[28]Court of Appeal ruling, *supra* n. 3, p. 72-75, with references to the case law of the ECtHR.

[29]*Verein KlimaSeniorinnen Schweiz and others* v *Switzerland*, *supra* n. 6, paras. 507-520.

[30]Cour de cassation/Hof van cassatie (Belgian Supreme Court) 6 March 1986, 4792, ECLI:BE:CASS:1986:ARR.19860306.14.

[31]Court of Appeal ruling, *supra* n. 3, p. 79, with references to Hachez, Pieret and de Schutter.

[32]Ibid., p. 83.

sufficient scientific basis in the context of the *Urgenda* case.[33] Then, Belgian authorities should have known by 2015 at the latest that they had to increase their efforts even more – a reduction of greenhouse gas emissions of 30% by 2020 – in order to carry out their share of the work to attain the aim of limiting the global temperature increase to 1.5°C. Yet, while the Walloon Region managed to achieve these targets, this was not the case of the other Belgian regions – Flanders and Brussels – and of the federal government. Turning then to the ongoing period 2021–2030, the Brussels Court of Appeal again found the climate ambition and achievements to date from Flanders, Brussels and the federal government to be lacking compared to the requirements of the ECHR. Looking again at 'the best available climate science',[34] and at the political consensus existing at national, European and international level, the Court ruled that a 55% reduction in greenhouse gas emissions by 2030 was the '*minimum minimorum*' to be achieved at the Belgian level,[35] i.e. the target below which Articles 2 and 8 ECHR would be breached. However, on the date of the decision, Flanders, Brussels and the federal government had not developed the necessary policies to attain this target.

Finally, the decision from the Brussels Court of Appeal is also noteworthy on a third account, in that it confirms a broader trend in climate litigation, following which the global and diffuse character of climate change does not deprive individual states from their own climate responsibility.[36] The Brussels Court of Appeal found more particularly that a breach of Articles 2 and 8 ECHR existed even though more ambitious climate policies from Belgium would not necessarily have prevented or would not necessarily prevent dangerous climate change from happening given the limited impact on global emissions that a decrease in Belgian emissions of greenhouse gas would have. Similarly, given the global nature of climate change, there can only be a loose link between individual state actions and impacts on the lives of specific individuals falling under their jurisdiction. Yet, according to the Court, Belgium had to do its share in the fight against climate

[33]L. Meyer, 'Urgenda-vonnis ontbeert goede wetenschappelijke onderbouwing', 36 *Milieu en Recht* (2016).

[34]Court of Appeal ruling, *supra* n. 3, p. 100. The Court makes more specific references to International Panel on Climate Change reports, in particular its Sixth Assessment Report, to a study from Joeri Rogelj from the Grantham Institute discussing climate mitigation pathways for Belgium (J. Rogelj, 'Belgium's National Emission Pathway in the Context of the Global Remaining Carbon Budget', March 2023, https://api.core.ac.uk/oai/oai:spiral.imperial.ac.uk:10044/1/104829), to various political and legal reports on climate change, and to Regulation (EU) 2021/1119 of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 (the European Climate Law): Court of Appeal ruling, *supra* n. 3, p. 99-111.

[35]Court of Appeal ruling, *supra* n. 3, p. 105.

[36]More recently, this has been confirmed by *Verein KlimaSeniorinnen Schweiz and others* v *Switzerland*, *supra* n. 6, paras. 269-272, 441-444.

change by reducing its greenhouse gas emissions (rather than working solely on adaptation, for example) to the extent determined by the Court: every step contributing to reducing greenhouse gas emissions mattered as it would contribute to making dangerous climate change less likely. Thus, the Court found that it was in the light of the objectives from Belgian authorities in terms of reducing greenhouse gas emissions and in the light of their results in terms of such reductions that the compatibility of their actions with the ECHR should be assessed, rather than by looking at the actual impact of Belgian policies on the global problem of climate change.[37] Here, the Brussels appeal judges made explicit references to the decisions of the German Constitutional Court in the *Neubauer* case and the Dutch Supreme Court in the *Urgenda* case to back up their ruling.[38] This illustrates how foreign judgments can be used by domestic judges both as a source of inspiration when interpreting international instruments and as a legitimacy-enhancing tool for their decisions.[39]

Climate change as a tort law case

The second pillar on which the Belgian climate case is built is tort law. In this regard, for reasons similar to those underlying the finding of a breach of the requirements of the ECHR, the Court first held that Brussels, Flanders and the federal government had behaved in a faulty way, giving rise to extra-contractual liability for the harm thereby incurred.[40] Here, the Court found that the damages incurred by the individual claimants corresponded to the harm suffered because of climate change, both existing and future (eco-anxiety, loss of a chance to avoid the negative impact of climate change today and in the future, the decrease in the remaining carbon budget available, etc.), and the harm incurred by the NGO Klimaatzaak consisted in the fact that the interests that it defends had been breached.[41] In addition, as was the case in relation to the ECHR, the Brussels Court of Appeal also accepted the existence of a causal link between the faults of Belgian state authorities and the harm suffered by the claimants despite, again, the absence of a direct link between them, given the diffuse and global character of climate change and the multiplicity of the actors responsible for it.[42]

[37]Court of Appeal ruling, *supra* n. 3, p. 86.

[38]Ibid., p. 84-85 (with references to *The Netherland* v *Urgenda*, *supra* n. 4, and BVerfG, Order of the First Senate of 24 March 2021, 1 BvR 2656/18, ECLI:DE:BVerfG:2021:rs20210324.1bvr265618).

[39]M. Siems, *Comparative Law*, 2nd edn. (Cambridge University Press 2018) p. 246.

[40]Court of Appeal ruling, *supra* n. 3, p. 119-132.

[41]Ibid., p. 136-137 and p. 140.

[42]Ibid., p. 137-140.

The principle of the separation of powers and its impact on the admissibility and the merits of the claim of the Klimaatzaak NGO and of the thousands of individual claimants is a recurring theme in the ruling and in the comments thereon. This is not surprising, given that the proper role of judges in contemporary climate governance is at the core of the discussions in much climate change litigation.[43] Taking into account the sensitivity of the issue, it is both unsurprising and reassuring that the Brussels Court of Appeal took great care to give reasons to justify how it conceived the boundaries of its role when finding in favour of the claimants, in particular for the more audacious parts of its ruling. There are also good functional reasons why courts should push the boundaries of their constitutional responsibilities a little further when they rule on climate cases. Yet, the controversy surrounding this decision of the Brussels Court of Appeal, and its conformity with the requirements of the separation of powers raise questions both regarding the merits of the reasoning of the Court and the practical effects that the decision will have. These aspects of the case are discussed in more detail below.

The Belgian climate case and the separation of powers

The Belgian climate case is a prime example of a climate litigation case in which the claimants seek to challenge the existing targets (or lack thereof) that state authorities set themselves as far as the reduction of greenhouse gas is concerned, typically because these targets lack ambition from a climate perspective. This type of climate litigation cases raises more sensitive questions related to the separation of powers than cases such as the French *Commune de Grande-Synthe* case,[44] where the courts are mainly asked to assess whether state authorities comply or are on course to comply with the targets that they have set for themselves. Claims that challenge the climate ambition of a state are more sensitive from the perspective of the separation of powers because courts are asked to substitute their judgement for the assessment from the representative institutions as to the targets to be pursued. Yet, this kind of decision is not value-free and setting climate targets is a formidable task to undertake for a court, even when the choice of the means to achieve those targets is left to the representative institutions: setting a mitigation target requires the court to make several choices that have distributional implications. Determining the ambition of the target, the timescale following

[43]L. Burgers, 'Should Judges Make Climate Change Law?, 9 *Transnational Environmental Law* (2020) p. 55 at p. 58; S. Lavorel, 'Le rôle des juges dans l'émergence d'une responsabilité climatique des État', 46 *Revue juridique de l'environnement* (2021) p. 37 at p. 58.

[44]Conseil d'État (French Council of State) 19 November 2020, 427301, 1 July 2021, 427301 and 10 May 2023, 467982, *commune de Grande-Synthe*.

which the target must be attained, whether the target is sectoral or cross-sectoral, whether some degree of flexibility is allowed, whether some intermediary targets must be complied with, etc.: these are questions that require choices to be made,[45] choices which might intuitively be envisaged as the realm of politicians accountable to the citizens who will ultimately bear the consequences of these choices, rather than the object of judicial determination.[46] Yet, in the Belgian climate case, the Brussels Court of Appeal stated very clearly that the question whether the 55% reduction target that it had set should be pursued fell outside the realm of politics: given the seriousness of the consequences if this target is not achieved, in the words of the Court, 'there is no longer any need to arbitrate with other interests, such as the preservation of social cohesion or economic growth'.[47] This is an example of a judicial decision constitutionalising the protection of the climate system, by approaching this protection through the lenses of fundamental rights. The result of this approach is to withdraw parts of what climate policies should look like – in particular the targets that it should pursue – from the realm of politics and to bring them into the realm of the law.[48]

When undertaking the formidable task of enacting a binding mitigation target applicable to the Belgian authorities, the Brussels Court of Appeal took great care to explain at lengths the reasoning behind its choices and why making such choices did not interfere with the prerogatives of the representative institutions. In doing so, the Court attempted to establish the legitimacy of its decision and escape the risk of arbitrariness when enforcing the open norms – ECHR requirements and liability standards – on which it relied for its decision.[49] In particular, the approach of the Court is characterised by its reliance on science and on its willingness to set a target of reduction of greenhouse gas emissions that reflects a broad consensus internationally and domestically, as described above. Furthermore, despite ruling in favour of the claimants, the Court also exercised significant restraint *vis-à-vis* the representative institutions on a number of occasions. It did so, for example, when it decided on a target at a lower level than the target which the claimants had hoped would be enacted: they had aimed at an 81% reduction, or at least a 61% reduction, in greenhouse gas emissions by 2030. The reason why the Court went for a lower target is precisely because of the

[45]C. Hilson, 'Hitting the Target? Analysing the Use of Targets in Climate Law?', 32 *Journal of Environmental Law* (2020) p. 195.

[46]J. van Zeben, 'Establishing a Governmental Duty of Care for Climate Change Mitigation: Will *Urgenda* Turn the Tide?', 4 *Transnational Environmental Law* (2015) p. 339 at p. 353-356; L. Bergkamp and J. Hanekamp, 'Climate Change Litigation against States: The Perils of Court-made Climate Policies', 24 *European Energy and Environmental Law Review* (2015) p. 102.

[47]Court of Appeal ruling, *supra* n. 3, p. 124 (author's translation).

[48]Burgers, *supra* n. 43, p. 58.

[49]Bombay and Lemaire, *supra* n. 8, p. 28-29.

principle of the separation of powers. The Court argued that, in the light of this principle, it could only enact a target corresponding to the minimal efforts that Belgium should make in terms of mitigation according to the best climate science available. By this, the Court meant that it could only enact the target which was the least ambitious for Belgium in terms of greenhouse gas emission reduction but which would nevertheless allow it not to infringe the right to life and to private and family life of the persons subject to its jurisdiction or to cause them harm. In other words, the reasoning of the Court is that it could not impose on state authorities climate mitigation duties which would go further than appears strictly necessary for Belgium to do its share of the work in the global fight against climate change, in order to comply with the principle of the separation of powers.

In practical terms, the Brussels Court of Appeal decided, for example, that the mitigation target should be set taking into account a pathway in which there is a 50% likelihood that the threshold of 1.5°C would not be exceeded, rather than e.g. a 66% likelihood. This choice is made despite, of course, the riskier character of a 50% likelihood pathway from the perspective of preventing the worst adverse effects of climate change from materialising.[50] Yet, for the Court, it is the responsibility of the representative institutions to do more should they wish to do so. In the same vein, the Court enacted the target of a 55% reduction in greenhouse gas emissions by 2030 based on studies and scenarios that rely on the principle of 'grandfathering', according to which 'prior emissions increase future emission entitlement'.[51] Again, this is because such an approach would be more respectful of the separation of powers and of the constitutional responsibilities of the legislative and executive powers than imposing an approach that would be less favourable for historically high emitters such as Belgium. The Court states in this regard that the principle of the separation of powers forbids it to 'determine a level of reduction of [greenhouse gas emissions] that it would deem desirable or fair in the light of the historical responsibility of Belgium in terms of [greenhouse gas] emissions'.[52] The Court makes this choice even though it is aware that grandfathering might be unfair from the perspective of global climate justice.[53] Here again, it is for the representative institutions to decide to go further if they believe that, for example, global climate justice so requires.

Yet, even adopting such a cautious approach, the decision from the Brussels Court of Appeal has had to face critical voices arguing that the Court had overstepped its constitutional powers. The criticisms are in part similar to those

[50]Court of Appeal ruling, *supra* n. 3, p. 102.
[51]C. Knight, 'What is grandfathering?', 22 *Environmental Politics* (2013) p. 410.
[52]Court of Appeal ruling, *supra* n. 3, p. 100.
[53]Ibid., p. 100 and 101.

addressed in the Netherlands to the *Urgenda* decision of the Dutch Supreme Court.[54]

A first line of criticism relates to the previously mentioned difficulty for a court, in general, to set a climate target that goes beyond what is provided in legislation, given the range of choices to be made and the expertise that is needed to make these choices – an expertise which the Court may lack.[55] In the Belgian climate case in particular, the Court decided that the duties in terms of reducing greenhouse gas emissions falling on Belgian state authorities under Articles 2 and 8 ECHR did not stop at abiding by their EU law requirements.[56] EU law targets are the only mitigation targets binding on all levels of Belgian government so far. While the mitigation target for the EU overall is set at a reduction of 55% for greenhouse gas emissions, the specific target for Belgium requires it to reduce its emissions by 47% in non-emissions trading scheme sectors by 2030,[57] while Belgium remains within the European cap and trade system for activities in the emissions trading scheme sectors.[58] According to the Court, when it comes to reducing greenhouse gas emissions, EU law requirements set for Belgium are minimal requirements and, as a matter of principle, it cannot be excluded that more stringent requirements apply under the ECHR.[59] In other words, the ECHR may require Belgium to do more than its EU obligations and, in this case, the Court decides that Belgium should reduce its greenhouse gas emissions by 55% by 2030. The Court does not here make a distinction between emissions trading scheme and non-emissions trading scheme sectors, as is done under EU law. Yet, this decision of the Court to depart from EU law requirements when setting the target of reduction in greenhouse gas emissions to be followed by Belgian state authorities has led to criticisms from some legal scholars and from

[54]E.g. C. Backes and G. van der Veen, 'Urgenda: The Final Judgment of the Dutch Supreme Court', 17 *Journal for European Environmental and Planning Law* (2020) p. 307; L. Besselink, 'The National and EU Targets for Reduction of Greenhouse Gas Emissions Infringe the ECHR: The Judicial Review of General Policy Objectives: Hoge Raad (Netherlands Supreme Court) 20 December 2019, *Urgenda* v *The State of the Netherlands*', 18 *EuConst* (2022) p. 155.

[55]Bergkamp and Hanekamp, *supra* n. 46, p. 107. *See also* on the limits of judicially-imposed climate targets, B. Mayer, 'The Contribution of *Urgenda* to the Mitigation of Climate Change', 35 *Journal of Environmental Law* (2023) p. 167.

[56]Court of Appeal ruling, *supra* n. 3, p. 85.

[57]Annex 1 of Regulation 2023/857 of the European Parliament and of the Council of 19 April 2023 amending Regulation (EU) 2018/842 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement, and Regulation (EU) 2018/1999.

[58]Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a system for greenhouse gas emission allowance trading within the Union and amending Council Directive 96/61/EC.

[59]Court of Appeal ruling, *supra* n. 3, p. 85.

some politicians.[60] This is because there remain uncertainties regarding the implications of the decision from the Court in relation, for example, to the possibility recognised under EU law of using so-called 'flexibility' mechanisms or the distinction made under EU law – but not by the Court – between emissions trading scheme and non-emissions trading scheme sectors and for which the margin of manoeuvre of the Member States is different, given that the targets to be pursued for emissions trading scheme sectors are set at EU level. In addition, arguably, the reasoning of the Court also leads it to challenge indirectly the conformity of EU law climate targets with the right to life and to private life as guaranteed under EU primary law, which should have led the Court to make a preliminary reference to the European Court of Justice.[61]

A second line of criticism that the Court of Appeal decision has faced is even more fundamental and comes from a principled resistance to judicial attempts to constitutionalise the protection of the climate system by withdrawing it from the realm of politics and political debate. The critique here is thus concerned with the reduction of the space left to the representative institutions by the increased judicialisation of climate change. Such a trend is perceived as undemocratic, given that unelected judges substitute their judgments for the decisions made by elected representatives through deliberation and votes, especially as judges do so on the basis of open-ended and vague provisions in the law.[62] The prevalence of this critique in some political, economic and legal circles following the decision under discussion shows that the political consensus that the Court thought that it had identified regarding the extent to which Belgium should act to mitigate climate change – the objectives it should pursue and the extent to which they should trump other considerations and socio-economic interests in particular – is perhaps more apparent than real. The critique further resonates with the observation that, as explained above, courts might be ill-equipped to enact binding mitigation targets that go beyond those already set in legislation. Yet, by putting so much

[60]Hearings held in the select committee energy and climate plan of the Flemish Parliament on 17 January 2024: *see Parliamentary Documents*, *supra* n. 9, p. 1.

[61]C. Jenart, 'The Belgian Climate Case and Rising (Sea) Levels: Human Rights, Separation of Powers and Multi-level Constitutionalism', *Maastricht Journal of European and Comparative Law* (forthcoming).

[62]*See* the arguments from J. Vanpraet in 'De Klimaatzaak. *Business as usual* of *gouvernement des juges*?', 13 February 2024, online debate, recording available at https://corporatefinancelab.org/2024/02/14/video-juridisch-dispuut-over-de-klimaatzaak/, visited 28 September 2024. P. Lambrecht, 'Het klimaatbeleid juridiseert: "Rechtbank mag geen alternatief worden voor parlement"', *De Tijd*, 14 December 2023, https://www.tijd.be/politiek-economie/belgie/algemeen/het-klimaatbeleid-juridiseert-rechtbank-mag-geen-alternatief-worden-voor-parlement/10511167.html, visited 28 September 2024. *See* more generally e.g. M. Koskenniemi, 'The Effect of Rights on Political Culture', in P. Alston (ed.), *The EU and Human Rights* (Oxford University Press 1999) p. 99.

emphasis on the need to protect the prerogatives of the representative institutions from judicial interference, the critiques of the decision of the Brussels Court of Appeal tend to forget that the representative institutions in Belgium – as elsewhere – are themselves structurally ill-equipped to address successfully global and long-term challenges such as climate change.[63] As the Brussels Court of Appeal makes clear in its November 2023 decision, their record in doing so has in any case not been reassuring. In this context, the decision of the Court of Appeal and, more broadly, the strategy to address the issue of climate change through the prism of fundamental rights rather than as instances of judicial overreach, are attempts at correcting structural imbalances in the way decisions are made within the representative institutions, to the detriment, for example, of interests such as those from future generations, foreigners or nature that are underrepresented in the decision-making processes of those institutions. This idea can be connected to Bruno Latour's claim that addressing the challenge of climate change requires rethinking which interests are represented in collective decision-making processes.[64] As the European Court of Human Rights itself stated, the obligation to protect the climate system:

> must be viewed in the light of the already existing harmful impacts of climate change, as well as the urgency of the situation and the risk of irreversible harm posed by climate change. In the present context, having regard to the prospect of aggravating consequences arising for future generations, the intergenerational perspective underscores the risk inherent in the relevant political decision–making processes, namely that short–term interests and concerns may come to prevail over, and at the expense of, pressing needs for sustainable policy–making, rendering that risk particularly serious and adding justification for the possibility of judicial review.[65]

Courts, thus, domestic or supranational ones, have the potential to empower actors that suffer or will suffer from climate change to influence climate policies even though they are not adequately represented within the representative

[63]D. Bourg and K. Whiteside, *Vers une démocratie écologique. Le citoyen, le savant et le politique* (Seuil 2010); I. González-Ricoy and A. Gosseries, 'Designing Institutions for Future Generations. An Introduction', in I. González-Ricoy and A. Gosseries (eds.), *Institutions for Future Generations* (Oxford University Press 2016) p. 3. *See also* S. Gardiner, *A Perfect Moral Storm: The Ethical Tragedy of Climate Change* (Oxford University Press 2011), as well as L. Enneking and E. de Jong, 'Regulering van onzekere risico's via *public interest litigation?*', 23 *Nederlands Juristenblad* (2014) p. 1542 at p. 1545-1550 (for a comparison of the respective institutional merits of the courts and of the political institutions when it comes to regulate risks).

[64]B. Latour, *Face à Gaïa. Huit conférences sur le nouveau régime climatique* (La Découverte 2015).

[65]*Verein KlimaSeniorinnen Schweiz and others* v *Switzerland*, *supra* n. 6, para. 420.

institutions.[66] Overall, this leads me to advocate that taking seriously the respective institutional strengths and weaknesses of the courts and of the political institutions in the face of the challenge of climate change requires approaching their respective proper constitutional responsibilities on an *ad hoc* and issue-specific basis, rather than seeking to allocate the problem of climate change to the exclusive constitutional realm of one or other type of institution in abstract and general terms.

The Belgian climate case and federalism

Another specific feature of the decision of the Brussels Court of Appeal in the Belgian climate case relates to the contribution that it makes to the dynamics of Belgian federalism and the difficulty of Belgian federal arrangements to address successfully the challenge of climate change. Belgian federal arrangements have also proved an additional hurdle for the Court when it had to decide on the scope of its proper constitutional responsibilities.

In both the first instance and the appeal decision issued in the Belgian climate case, the failures of Belgian federal climate governance have been repeatedly flagged as elements that contribute to explaining the failures of Belgium climate policies compared to the requirements of the ECHR or those flowing from the Civil Code.[67] These failures of Belgian federal governance as far as climate change is concerned are well documented.[68] They result from the repeated lack of agreement between the different Belgian regions and the federal government on the climate policies that should be pursued for Belgium globally and by each of the subnational entities individually. Yet, mitigation policies are necessarily transversal and constitutional responsibilities in matters such as the environment, energy and transport, for example, are shared between the regions and the federal government. Accordingly, developing a coherent climate policy at the Belgian level requires coordination and cooperation between the different levels of government, for example through the conclusion of agreements or discussions in formal and less formal arenas. However, the willingness to coordinate and cooperate through these formal or informal means has not always been present.

[66]L.J. Kotzé et al., 'Courts, Climate Litigation and the Evolution of Earth System Law', 15 *Global Policy* (2024) p. 5 at p. 12.

[67]E.g. Court of Appeal ruling, *supra* n. 3, p. 130-131.

[68]Lefebve, *supra* n. 14, p. 53-57; K. Reybrouck, *Een moderne bevoegdheidsverdeling voor het federale België. Naar een balans tussen duaal en coöperatief federalisme* (Intersentia, 2023) p. 327-333; C. Romainville et al., 'L'organisation fédérale belge et l'enjeu climatique: sortir de l'impasse', in C. Romainville and E. Slautsky (eds.), *Quel fédéralisme pour la Belgique de demain ? Bilan et perspectives d'un modèle atypique* (Larcier forthcoming).

Examples of this failure of governance are: the persistent difficulties for Belgium to punctually submit its integrated energy and climate plans, which are mandatory under EU law,[69] to the European Commission; the difficulty for Belgium to speak with one voice on climate matters at the international level, for example at the COPs; the development of conflicting and inconsistent policies, for example in energy matters, at the national and regional levels respectively.[70] Admittedly, beyond Belgium, there seems to be a difficulty for federal states generally to address successfully the challenge of climate change.[71] Yet, the Belgian failures in the federal governance of climate change arguably find fertile ground in the foundations of Belgian federalism. On a comparative perspective, Belgium adheres quite strictly to the principles of dual federalism,[72] the preoccupation of which is mainly the protection of the autonomy of the regions rather than organising the interactions and the cooperation of the different members of the federation.[73] However, when differences in ideological preferences, political landscapes, means, and interests between the Belgian regions and communities exist and when they have few legal incentives to collaborate, decisional deadlocks on transversal issues are bound to arise. In this case, a city-region like Brussels, a region that is economically thriving like Flanders but that strongly relies on the port of Antwerp and the surrounding industries active in petrochemistry for its prosperity, and a region like Wallonia that is still in the process of recovering from the closure of its coal and steel industries, are obviously in different positions when it comes to envisaging their climate policies. Their preferences and interests may conflict – all things which complicate cooperation in a context where the incentives to come to agreement are not always strong and where no one actor is able to impose its will on the others.

It is in such context that the Brussels Court of Appeal decided on 30 November 2023 that, in the past, Flanders, Brussels and the federal government had not done enough to reduce their emissions and issued an injunction, for the

[69]Art. 3 of Regulation 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action, amending Regulations (EC) No 663/2009 and (EC) No 715/2009 of the European Parliament and of the Council, Directives 94/22/EC, 98/70/EC, 2009/31/EC, 2009/73/EC, 2010/31/EU, 2012/27/EU and 2013/30/EU of the European Parliament and of the Council, Council Directives 2009/119/EC and (EU) 2015/652 and repealing Regulation (EU) No 525/2013 of the European Parliament and of the Council.

[70]Romainville et al., *supra* n. 68.

[71]A. Fenna et al., 'Climate Governance and Federalism: An Introduction', in A. Fenna et al. (eds.), *Climate Governance and Federalism: A Forum of Federations Comparative Policy Analysis* (Cambridge University Press 2023) p. 1-13.

[72]H. Dumont, 'Préface: sur les liens entre les principes et leur cohérence', in M. El Berhoumi and S. Van Drooghenbroeck (eds.), *Principes de la répartition des compétences* (Larcier 2022) p. 8.

[73]Reybrouck, *supra* n. 68.

future, that they should together reduce their greenhouse gas emissions by 55% by 2030. Beyond this, the Court left it to these public authorities, in concert with the Walloon region, to agree how they would share the mitigation burden between them. Such an agreement may still be difficult to reach, in the light of the contrasting reactions to the decision, but the injunction nonetheless puts pressure on the Belgian regions and the federal government to find an agreement on how to share the mitigation effort between them given that they are now judicially accountable to do so. The Court decision might, therefore, apply some pressure for an agreement to happen in a context – dual federalism – where few instruments to do so exist. The Belgian climate case can thus be analysed as an example of a court stepping in to create an arena in which the different entities of the Belgian federation are held to account as to how they collaborate in the face of the transversal and common challenge that is climate change. Yet, if such an agreement is not found, the risk exists that the Brussels Court of Appeal would have to keep further navigating in uncertain constitutional waters, when it must assess whether its injunction that greenhouse gas emissions should be reduced by 55% by 2030 for Belgium overall has been complied with by each of the convicted Belgian authorities, which it will do at the request of the parties on the basis of the reports on Belgian greenhouse gas emissions for the years 2022, 2023 and 2024. This is because assessing whether the different levels of Belgian government are doing enough to comply with the Court's requirement for Belgium overall to reduce greenhouse gas emissions by-55% will logically require the Court to decide, in the absence of an agreement between the Belgian regions and the federal level of government as to the extent of the effort that each should accept, on the scope of the respective responsibilities of these levels of government in this regard, particularly if the overall target is not on course to be achieved. Yet, establishing such an internal Belgian burden-sharing would be another formidable task for the Court to undertake, which risks exposing it to further accusations of overstepping its constitutional boundaries and intruding in the realm of (federal) politics.

Conclusion

The decision from the Brussels Court of Appeal of 30 November 2023 in the Belgian climate case is based on two main pillars: on the one hand, a breach of ECHR requirements by two Belgian regions and by the federal government; and a violation by the same authorities of the standard of care that applies under the Belgian Civil Code, giving rise to extra-contractual liability, on the other. On both accounts, the decision of the Court of Appeal is innovative, but not revolutionary, and testifies to the willingness of the Court to join other judges worldwide who

have proved willing to push forward the boundaries of the law in the context of climate change.[74] Thus, the decision from the Brussels Court of Appeal shows once again the potential and strength of civil society and judges working hand-in-hand to challenge the climate inaction of public authorities and to respond to the failures of climate governance, as well as the development of a transnational dialogue between judges worldwide in the context of climate litigation and of a global trend to constitutionalise climate rights away from politics. At the same time, however, reactions to the decision of the Court of Appeal make it clear that there might be limits to the practical effects of the decision. By painting the Brussels Court of Appeal's decision as an example of judicial activism undermining democracy, politicians and even some legal commentators might have paved the way for the concerned state authorities not to comply with this decision. This risk of non-compliance is not a theoretical risk, even though the Brussels Court of Appeal might in the future provide for the payment of fines if its decision is not complied with, and it is unclear, at this stage, whether the ongoing negotiations between the political parties that must lead to coalition governments for the federal level, Flanders and Brussels following the legislative elections of 9 June 2024 will show ambition as far as climate change mitigation is concerned.[75] The risk of non-compliance is further compounded by the tensions that exist between the different levels of Belgian federal government, given their diverging preferences and interests. These tensions may result in a lack of agreement as to the scope of the mitigation effort to be supported by each region and by the federal level of government in the coming years. In other words, it is far from excluded that the 30 November 2023 decision of the Brussels Court of Appeal might join the increasing number of judicial decisions convicting Belgian state authorities that have not been implemented in Belgium in recent years, for example in the context of asylum and migration.[76] Thus, the decision from the Brussels Court of Appeal in the Belgian climate case is both an example of successful climate litigation and of the role played by judges in contemporary forms of climate governance, but also an example of the limits of climate litigation and of the attempts to constitutionalise climate as a strategy to achieve more ambitious and effective climate policies when the underlying political consensus to address this challenge is more apparent than real. Time will tell whether the

[74]Lavorel, *supra* n. 43, p. 48-49.

[75]E. Hertogen et al., 'Lettre ouverte à Bart De Wever et aux négociateur·rices : Le climat doit être au cœur des politiques fédérales', *Le Soir* (12 August 2024), https://www.lesoir.be/615651/article/2024-08-12/lettre-ouverte-bart-de-wever-et-aux-negociateurrices-le-climat-doit-etre-au, visited 28 September 2024.

[76]Federal Institute for the Protection and Promotion of Human Rights, *Annual Report 2023*, 23 May 2024, at p. 11-12, https://institutfederaldroitshumains.be/fr/rapportannuel2023, visited 28 September 2024.

Belgian Supreme Court will confirm the decision of the Brussels Court of Appeal and whether this decision will eventually have an actual impact on Belgian climate policies.

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