

Transcript

Emmanuel Kattan, Host: This is “Vis à Vis”, a podcast series brought to you by the Alliance Program at Columbia University. “Vis à Vis” features conversations that challenge our understanding of key global, economic and social issues by casting them in a transatlantic perspective. I’m Emmanuel Kattan. I head the Alliance Program, a partnership between Columbia University and 3 French universities: Sciences Po, Paris 1 Panthéon Sorbonne and École Polytechnique. Every episode, I sit down face to face — or, as we say in French, “Vis à Vis” — with some of the most insightful thinkers on both sides of the Atlantic. I hope you enjoy our conversation.

(Theme music out)

Kattan: On August 14, 2023, a Montana judge issued a landmark ruling in favor of 16 young climate activists who claimed that the state of Montana violated their right to a clean and healthy environment. The judge declared that a state law violated this right by stopping agencies from considering climate impacts when conducting environmental reviews. This decision is likely to have ripple effects around the world. Today, there are close to 1,000 court cases against companies or public authorities that don't fulfill their climate obligations. Does this mean that courts are becoming the new battlefield to combat climate change? Are climate litigations a sign that collective action to combat climate change has failed, and that as a desperate measure, taking governments and companies to court is the only solution? Or on the contrary, are climate court cases features of a vibrant, healthy democratic culture? Are climate-related trials aimed at punishing polluters? Or do they also play a preventive role?

In order to cast light on these questions, I'm joined today by Marta Torre-Schaub and Michael Burger. Marta Torre-Schaub is a professor of environmental law at Paris 1 Panthéon Sorbonne. She's a senior researcher at the French National Center for Scientific Research, and the director of the CLIMALEX research group. Professor Torre-Schaub is the author of *Law and Climate Change: How to Answer the Climate Crisis? (Droit et changement climatique: Comment Répondre à l'urgence climatique?)*, published in 2020, and several other books and articles on climate justice and environmental law. Michael Burger is the executive director of the Sabin Center for Climate Change Law at Columbia University. He leads a dynamic team that is at the forefront of domestic and international efforts to reduce greenhouse gas emissions and promote climate change adaptation through pollution control, resource management, land use planning and green finance. Professor Burger is a widely published scholar, a frequent speaker at conferences and symposiums and a regular source for media outlets. He has taught at Columbia Law School, NYU Law School, and Roger Williams School of Law. Professor Torre-Schaub, Professor Burger, welcome to “Vis à Vis.”

Marta Torre-Schaub: Hi.

Michael Burger: Thank you.

Kattan: Professor Torre-Schaub, let me start with you. On October 14, 2021, a Paris tribunal ruled that the French state had failed to keep its gas emission reduction commitments, and that it needed to compensate this failure through additional measures. What is the real impact of these kinds of actions? Can they really force countries to keep to their net zero emission commitments?

Torre-Schaub: Well, yes, and no, I will say. These kind of judgments are meant to put pressure on governments. Their aim is to be more ambitious in climate change policy. But in the majority of these kinds of judgments, the execution of the judgment is complex, and sometimes it even fails. So they are very different, the decisions, when it comes to public law and the state and when it comes to private law and private companies. In public law and the cases against states, in some cases, the governments feel a little challenge. But when it comes to private companies, it's complicated. For example, banks or financial institutions, I'm not really sure they really feel under pressure except maybe for the, their public image and the communication of green activities they can give to the public. But I don't think it goes farther for the moment.

Burger: Can I jump in on this?

Kattan: Yes, go ahead, please.

Burger: Because I think it's a, it's a really important and sort of central topic in thinking about the role of climate litigation in addressing the full scope of problems and solutions to the climate crisis. I think it's, it's worth thinking about, at a sort of relatively abstract level, what is it that courts do? There are three primary forms of relief that courts can offer: there's injunctive relief, monetary damages, and declaratory judgment. And so an injunction from a court directing a corporate actor or government to do something promises the plaintiffs, the petitioners, whoever brought the case, that, that there will be some action. Implementing that action and ensuring that the injunction is followed is a complex matter. And, you know, we're going to see how that plays out as more and more cases reach final decisions.

Monetary damages — payment for harms that had been caused by some past behavior — we haven't seen a climate case yet reach that kind of result. But in that context, it's hard to imagine somebody, you know, there are procedures in place to get the money if somebody fails to pay the damages that are awarded by a court.

And then there's declaratory relief, where sometimes people are just seeking a declaration from the court that climate rights exist, that climate rights have been violated, that governments have obligations to be more ambitious. And in that case, you know, the declaration itself is, is the result.

So in terms of what are the impacts of these cases, there's the direct effect that a case can have: the injunction being issued and the injunction being followed, or the damages being awarded and the damages being paid. But then there's also the indirect effect, which I think gets to the sort of larger, broader social function that litigation plays, which is, what does it mean to have a court declare that climate rights exist in a particular context? Or that a particular

corporation or a government has an obligation to undertake more ambitious climate action? That kind of indirect effect, which can change the way that people think about, talk about, share understandings of climate change, is significant in its own right.

Kattan: I see. And in the American context, there's a long-standing case called *Juliana v. the United States*. We learned recently, in June, that a judge finally cleared the way for the case to go to trial. I don't want you to, you know, put out a crystal ball and predict what will happen. But this case — which was brought against the U.S. government by 21 youth plaintiffs back in 2015, accusing the government actually to have violated their rights to life, liberty and property — do you think that this case stands a chance, as you said, to produce an injunction?

Burger: So this is a fascinating case. And I think it embodies the kinds of different results that we were just talking about. *Juliana* was, as you mentioned, filed first in 2015, during the Obama administration, at a time when the U.S. government was actually beginning to undertake some climate action for the first time. And yet the level of action and the ambition was not really adequate to address the needs of the climate crisis. And so these youth plaintiffs brought this lawsuit, under the theory that the U.S. Constitution provides them with a right to a stable climate system. And that the failure of the government to take adequate action in the affirmative actions that the government has undertaken in, for instance, permitting fossil fuel extraction on public lands and setting emission standards that are inadequate to really reduce emissions consistent with a 2 degree then, or now 1.5 degree, global warming scenario, violate those those constitutional rights.

The case was initially dismissed. The Ninth Circuit Court of Appeals in the United States federal court system dismissed the case because the specific remedy that the plaintiffs were seeking, which was a court-ordered plan for climate drawdown — that is, an injunction to the federal government to create a plan to reduce emissions at a level that would be consistent with achieving global atmospheric concentrations of 350 parts per million — was just beyond the power of the courts to grant. What the district court judge and the federal court system in Oregon has now done is granted the plaintiffs leave to amend their complaint. And what they've done is they filed an amended complaint that says, "Well, we're not seeking that dramatic remedy — a court to order the federal government to do this economy wide plan and capture, you know, emissions, and so forth and so on — but rather to declare the rights exist and that the government is in violation of those rights."

It is not 100% clear that this case is going to trial. We will see how the U.S. government responds. There will be further activities. One way or the other, I would say that *Juliana* has been a phenomenal success already and has made a major impact in the United States and worldwide in being one of the, one of these leading cases — like *Urgenda*, like other cases, like the, like the case in France — that really capture the public imagination, that really center the conversation on not just: What are the technocratic fixes to climate change? But: What does this mean for future generations? What does this mean for our kids, and the quality of life that they can, that they can enjoy?

Kattan: Professor Torre-Schaub, I'd like perhaps to, you know, focus on some of the countries that are really suffering the brunt of of climate change. Bangladesh, for example, is emitting only 0.4% of the world's carbon gas emissions. And yet, as we have seen with recent flood and other disasters, its population is suffering the impact of climate change really in a disproportionate manner. At the COP 27 conference, the international community agreed to create a loss and damage fund, which could assist countries like Bangladesh in the future. Turning to international law, do you believe that international law could also be mobilized? There's a principle, I understand, called "polluter pays," according to which those who produce pollution should bear the cost of preventing damage to human health and the environment. Could such a principle being invoked in order to protect the countries that are most vulnerable to climate change?

Torre-Schaub: Well, the "polluter pay" principle is indeed one of the general principles of international environmental law. But I'm not really completely sure that it is the most effective, because many companies still find that to pay is cheaper than to afford the real costs of climate change and climate change risks. So I think that we should continue to make progress in the Warsaw Mechanism, on the loss and damages that was, which was agreed in last Conference of the Paris, COP 27. Things are going extremely slowly, because these Warsaw Mechanism is exist since 2014 and was only agreed last year. So things are not going as fast as climate change is increasing, which is unfortunate and dangerous, but international law is doing some other progress. Recently, the United Nations Human Rights Commission agreed on accepting a new human right to a healthy environment. So I think that at the international level, that will have some influence concerning climate change damages and compensations and recognition of violation of human rights caused by climate change. And last but not least, the United Nations General Assembly also voted in favor of asking to the International Court of Justice for an advisory opinion on which are the obligations for all states under the Paris Agreement and concerning climate change. So I think that we are doing some progress here.

Kattan: Very often when there's an extreme weather events, you see media coverage very polarized between those outlets that tend to blame climate change and others that claim that these extreme weather events — hurricanes, tornadoes — are really part of normal _ so-called "normal" climate cycles. And as a result, there's a new field that has developed called "attribution science," which examines the causal links between human activity on the one hand, and then climate change and the impacts of climate change. You've written extensively, Professor Burger, on attribution science, and in particular, how it can be used in litigations. Isn't there a fundamental difficulty or challenge, which is that much of the science that is used in these cases is based on probabilities. So we can declare with 80% confidence, for instance, that this hurricane was caused by human-related activities that resulted in climate change. But does that stand up in court?

Burger: The short answer is yes. I'd like to take a quick step back just to sort of put this in its context. You know, the, I guess at the outset, I would, I would question whether there really is this polarization that you describe in the media coverage and in the understanding of whether or not particular extreme events are attributable to climate change. The truth is, is that some events can be attributed with higher levels of confidence to climate change, and some, some can't. With global warming, with sea level rise, with ocean acidification, now with wildfires; with

the issue of cyclones, typhoons, hurricanes, it's a little bit more variable. But in certain contexts, you know, the attribution of a slow-onset change or an extreme event can be quite high-level confidence. 80% 90%, or even higher. And they do judge these things in terms of probability. So I guess maybe it's just my media exposure. I don't see a whole lot of the "Well, this isn't climate change" kind of representations. But I do know that it's out there. I think it's also important to note that, you know, attribution science has been central to climate science since the beginning. What's really new, in addition to advances in that detection and attribution science, is this specific field or practice of extreme event attribution.

Now, all of this is not unfamiliar to courts. Courts regularly deal with probabilistic harm. And courts regularly deal with conditions of scientific uncertainty in attributing particular injuries suffered by individuals to environmental exposures or to other sorts of factors. The standard that courts will apply often is: Is it more likely than not that X was the cause of Y? And in many of these instances, though, not all of them, you know, I think the the plaintiffs or petitioners in these lawsuits will be able to say — and, in fact, they already have expert reports that have been filed in some of these cases saying — you know, this hurricane was more likely than not caused by climate change. Not the hurricane itself, right? It's not the event itself. But the intensity of the event. The severity of the event. It gets even more complicated, because then at some level, the impacts that are experienced by individuals and by communities and by cities are not only attributable to the extreme event. It's not just the drought, or the wildfire, or the hurricane that causes harm. It's also where people live. It's also what other conditions contribute to their exposure, to their vulnerability. And to their resilience to the impacts. So it does get quite complicated once you start accounting for those confounding factors. And we're really just at the beginning of seeing how courts are going to address, you know, all of the science that's going to be coming in.

Kattan: And this complexity of attribution raises the question of the competence of judges, also, to really properly understand these issues and then, and then, and then rule based on on these facts. Professor Torre-Schaub, what is your view on, on the role of judges? And one question that also intrigues me is: Is there a specific training that judges should undertake in order to take on these climate-related cases?

Torre-Schaub: Oh, well, that's a very good question. The majority of judges, they limit their job to interpret the law, existing law. Nevertheless, interpretation is not mathematics. It's not an exact science. So judges have some space to answer the questions in a more or less large manner. And they can use different tools. So they can use international law, combine it with, for example, in Europe, European law, human rights law, environmental law, and so on. So this is where judges can consider that to answer to those questions can be do with more or less freedom and more or less capacity to interpret in a large manner. But I don't think that they feel responsible. And concerning these special training, yes, I think that judges should have some, at least environmental knowledge. Some of them, at least in France and in Europe, are really asking for having either special training, some environmental questions, at least to be aware of what is at stake, what is climate change. So they asked for some scientists, or environmental lawyers, specialists, to do some training for them or to share some knowledge.

Kattan: Another question that this raises is also whether the body of law that currently exists is sufficient, and whether new laws should be created. In 2017, New Zealand made the news for granting the Whanganui River legal rights. The same year, Colombia's constitutional court recognized legal rights to the Atrato River. And today I understand that seven countries in the world have legally recognized, in some form, the rights of nature. I'm wondering whether, you know, this is something that is a new trend in, you know, climate justice, and do we need those laws? I mean, are, aren't the laws that already exist, that ban pollution and protect against environmental degradation, aren't those, those laws and principles sufficient? Do we really need to grant special rights to protect rivers and mountains independent of human activity?

Burger: So I think this is, this is a really fascinating development. I am not somebody who, I mean, I think that you can find scholars and practitioners and advocates who, who fall firmly into the area of rights of nature as a critical element in providing for environmental protection. I'm not in that in that group. I believe that the rights of nature movement is a very important and high-impact movement in its expression of a set of values — biocentric values rather than anthropocentric values — and in the way in which it seeks to have the law serve an expressive function for, for society, which is an expression of the respect for non-human entities within our legal system. Does it actually answer the question of what the appropriate level of, you know, phosphorus in a given river is, or what the appropriate level of forestry on a particular mountainside is? Not really. But you still revert to the same sorts of values-based, science-informed, administrative decision making, through which we decide what the appropriate levels of pollution are, what the appropriate levels of resource use are. But it can serve that very important function in embodying values in the law and expressing respect for, for nature.

Kattan: Right. And perhaps to end, I'd like to take a little bit of a step back and look at at fundamental legal principles for protecting the environment. In his 1979 book *The Imperative of Responsibility*, the philosopher Hans Jonas formulated a new moral imperative according to which we should act so that the effects of our actions are compatible with the permanence of genuine human life. In other words, we have a moral responsibility towards future generation. And this idea, of course, has become increasingly popular. But does this mean that there's also a legal responsibility towards future generations? Is that is that a right that is embedded in in law?

Torre-Schaub: Well, I am persuaded that there is a legal obligation to protect future generations. It comes from the Stockholm Conference, 1972. It was then repeated in the Brundtland Report about sustainable development in the '80s. And again, in the '90s, in the climate change frame-convention of the United Nations. And again, in the Paris Agreement. In parallel, there are many constitutions — at least in France, in the constitution, in the "Charte de l'environnement," articles one and two gives this right. And also, in Germany, two years ago, there is a very interesting judgment from the constitutional court, the Neubauer case that consider that the climate change law could be partially unconstitutional because it was taking chances to future generations, and youngs could not have the same choices and the same way of life as we have now because the climate change law was not ambitious enough. So there are some stages and some progress.

Kattan: Professor Burger, do you think that this principle, the, the legal principle of responsibility towards future generation helps support and strengthen climate change law generally?

Burger: Yes, I think it does. I mean, I think that we, recognizing that we have not just a moral obligation, but a legal obligation, which, in the United States, in the, in the youth lawsuits, including the Juliana lawsuit that we talked about earlier, and in similar litigation brought in other countries around the world, the idea of the public trust doctrine really has been used to sort of encapsulate this notion of the legal obligation to future generations. The public trust doctrine, which is an ancient doctrine, long before 1972, going back to Roman law, and maybe even before — that holds that, you know, the government, the representative body of the people, has an obligation to preserve and maintain certain public resources for future generations — provides a vehicle to get into court and make claims about the inadequacy of government and corporate action, or really government action, to address these crises. And recognizing that climate change, what we do today, contributes to a problem that will only worsen in time and potentially be far worse for those that are two or three generations down the line from where we are now, really does provide more of a sense of urgency to taking immediate action and to doing everything we can in this generation to provide for a sustainable future.

Kattan: Wonderful. Thank you so much to both of you. Thank you, Professor Torre-Schaub, thank you, Professor Burger, for a very enlightening conversation that really made us understand much more clearly the crucial role that the courts can play in the general combat against climate change and in the preservation of the human and natural environment. Thank you so much.

Torre-Schaub: Thank you.

Burger: Thank you.

(Theme music in)

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