



On Climate Justice: An Interview with Professor Hendrik Schoukens

By Sien Deroo

Climate change poses one of the biggest threats to our planet. Droughts, floods, and fires not only impact everyday society, but also threaten the realization of fundamental human rights. The paradox inherent to this problem is that the consequences of climate change are not distributed equally. In most cases, people or generations whose contribution to climate change is comparatively limited are affected to most, whilst major polluters only experience a minor fraction of the total impact. This dilemma calls for climate justice and underscores the entanglement of climate change and human rights. I'm here today with Professor Schoukens, an expert in environmental rights, and he's going to tell us more about how climate change affects human rights and what implications this has for the violation of these rights.

First of all, thank you for participating in this interview. Could you briefly introduce yourself and your field of expertise?

My name is Hendrik Schoukens, I'm environmental lawyer in Belgium, and also professor of Environmental Law at Ghent University focusing on biodiversity protection, climate change litigation, and environmental impact.

To really start of this interview, what is the connection between climate justice and human rights? In what ways does climate change threaten the realization and enjoyment of human rights?

Well, climate change is of course one of the most fundamental challenges for mankind throughout the next centuries. Climate change is capable of affecting many human rights, such as right to life, the right to property,... First of all, we can think of periods of sustained drought, which might impact the right to water, which might impact cultivation in certain areas of the globe and can lead to famine. But also in the past years, successive heat waves in Europe have led to so-called surplus deaths during the summer months. So there is a direct indication that climate change kills, unfortunately.

And of course, climate change might lead to desertification, which impacts property rights, but also paradoxically to more periods of sustained precipitation. We can refer to the Belgian context, sadly enough, to the floodings in the Vesder valley or more recently in the Ijzer valley, where you see that accumulated precipitation can lead to massive floodings, which in turn affect properties and can lead to deaths. So if climate

changes go beyond these tipping points, there will be either directly or in any event indirectly an impact on several basic human rights.

Climate change is of course caused by countless people and organizations. In a classic judicial system, who do we blame when climate injustice occurs? Who can be held accountable?

This, of course, is pretty much dependent on the litigation strategy you try to execute. I think up until recently, the most easy option was to sue governments. Nowadays there are countless examples of European governments that have been held accountable for their lack of ambition in terms of climate mitigation, so the reduction of emissions of greenhouse gases. The reasoning is that naturally governments should be committed to ensure that their populations are not put in jeopardy in terms of dangerous climate change. Some judges reason that the right to life, right to privacy – since dangerous climate change might impact these rights – there is a positive duty resting upon the shoulders of states to do their utmost best to take due diligence vis-à-vis these climate change related impacts.

And a government, of course, is competent and has the necessary instruments to tackle greenhouse gas emissions that are originating from activities on their territories. Some governments, however, try to maintain that their share in the global amount of greenhouse gases is limited, for example like in the Netherlands. But courts increasingly dismiss this 'drop in the ocean argument' stating that since the Netherlands and almost all countries have ratified the UN climate change conventions, that they have accepted to do their share, even if their share is limited. So you can sue governments, and that has proven to be a successful strategy, at least in certain European countries such as the Netherlands. But judges sometimes waiver and state that they cannot push or force governments to achieve certain targets that are being based upon scientific reports. So in some countries this has still proven to be an important obstacle.

But you do also have a tendency to sue private companies, like oil companies, on their alleged contribution to climate change. Is that successful? Well, sometimes it is, sometimes it isn't. Because I mean, climate change is indeed the result of accumulated impacts of both existing and historic emission. So it's really hard to prove a one-on-one causal link. What has however proven to be more successful, at least in the Netherlands, where they tried to sue Shell over their failure to effectively address climate mitigation in their future company policies... the reasoning was different, was just merely focusing on preventing future damage to arise. And in such a context the lack of an one-on-one causal link is less important because it can of course not be denied that oil companies also, if they continue with greenhouse gas emissions, will ultimately contribute to climate change. So that's a strategy which has proven to be, at least for now, successful in the Netherlands in this specific Shell case. But an appeal is pending, so we have to see.

A third strategy is to bring forward climate arguments in the context of planning permits. So basically, there you try to argue that certain planning permits are unlawful because they authorize fossil fuel based projects.

There are still a lot of pending questions, but I think the preliminary conclusion is that climate change has entered the courtroom. It's no longer possible to state that it is completely irrelevant when addressing certain environmental claims, but the extent of the claim still has not crystallized.

Climate justice has both a spatial and temporal component. How can we protect the rights of future generations?

That's also a difficult question. First, in terms of future generations, you need to determine who are these future generations and how to delineate them. Secondly, what are the living standards of these future generations? There is a case in Germany where the constitutional court stated that the German law addressing climate change and including greenhouse gas emission reduction targets was not stringent enough. And the German constitutional court took into account the fact that by not implementing strict reduction goals, also the rights of future generations could be impacted. The German court referenced to the notion of carbon budget, so this is the idea that in order to avoid a certain temperature rise, for instance of two degrees, that you can only emit a certain amount of CO₂.

But of course if your goals that you try to achieve by 2030, for instance, are relatively lenient, then this carbon budget will be spent already by a certain date. And this means that future generations, if they want to stick with certain goals, that they will have to implement even more far reaching cuts in CO₂ emissions. So the more lenient you are today, the more heavy the burden will be on the future generations. There is this tendency, at least in this German court case, to take into account future generations. But I think still a lot of questions revolve around the concrete delineation of these future generations.

Are there possible scenarios in which different human rights come into conflict with each other and what rights should be given priority if this happens?

Conflicts of rights are inevitable in some ways, it depends on who's entitled to a certain right. Of course, you can claim that if I'm the owner of an oil company, it's my human right to gain profits. So I think different interpretations of certain rights will come into conflict. But I think ultimately a classic example is the conflict between property rights – owners of companies or owners of forests that want to cut down forests – and so-called environmental interests, which then restrict property rights. These are conflicts that have existed for over 40 years because it's always the same story: if you want to implement stricter environmental policies, then inevitably you will impact property rights. It's legal, of course, to restrict property rights if you provide certain financial subsidies and so on and so forth. So there is a balancing exercise that you can take into account in any event. But what is also possible are intergenerational conflicts between people focusing on the property rights of older generations, that want to keep things as they are, versus people that are approaching property rights in a more intergenerational perspective. And so I think conflicts are inevitable, but then again, we've always had conflicts.

In several countries rivers have been given legal rights. For example, in New Zealand the Whanganui River has been given rights of personhood. How can we give nature a stronger voice in politics and decision-making?

There is indeed a tendency to give more, I mean to recognize certain explicit rights on behalf of nature, to create guardianships and so on and so forth, which is very interesting. My personal perspective is that – for example, if you approach it from the context of EU environmental legislation – indirectly we have already granted nature certain rights. For instance, many rivers are already protected under EU nature conservation law. The nitrogen crisis is also an example: in former days it would be relatively easy to solve the nitrogen crisis by simply doing away with the protected sites and claiming that the economic interests of the people prevail, regardless of the protected sites. Now we notice that it's not that easy. You cannot simply do away with certain protected sites. So we have to intrinsically protect them. And I think that's poorly understood in Europe, that we now have legislation which basically tells you to protect certain components of your territory.

With rivers, the same story applies to some extent. It is no longer that easy to simply turn a river into a canal like we used to do a hundred years ago. It would be challenged also under EU environmental law. So in Europe, we lack this explicit recognition of rights on behalf of nature, but to my understanding, we are certainly evolving in that sense. In Spain, there is one example of a lagoon, which has been accorded legal rights, but also this lagoon was already protected under EU environmental legislation. So I think it is recommendable to more explicitly recognize these rights to some extent. So for me, it's not no longer a kind of contested issue, it's more like a kind of logical evolution. Whether we like it or not, we'll have to do it to some extent, even to preserve human rights, we'll have to acknowledge that ecosystems have certain rights.

What can an interdisciplinary approach contribute to the whole debate around climate justice?

I think it's important for lawyers to understand climate science, and the basic problem is that most lawyers don't have a proper understanding of hard science and see science as a threat to the law. The law is to prevail over science. You also see it in nature conservation cases: we try to delineate nature and protected areas, and just one meter farther down the road it's no longer protected. We try to delineate, nature needs to fit certain boxes, but of course it's a bit of an illusion to think that nature fits into certain boxes. So because ecology is dynamic, it can also help us to understand and to grant flexibility in some instances. But I think the interdisciplinary nature of climate change is vital and therefore also lawyers should be interested in science.

Then I want to thank you for answering these questions and I'm looking forward to the HRRN conference.

Thank you.