

## Time to Make Climate Change Illegal

By Hugh Macleod and Sarah Tak

### STARTS

Is climate change legal? Whenever we ask that question of leading lawyers or academics we usually get a similar response: 'Erm, I'm not sure. That's difficult to answer.' Explanations of the problems inherent in enforcing international treaties, such as the Paris Agreement, or the reluctance of judges to rule on policy issues, or of targets for net emissions that are legally binding, but only decades ahead, usually follow.

And in a sense, of course, our interviewees are right in their reluctance. For despite decades of debate at the UN, millions marching in protests across the globe, and record breaking heat waves and ice melts, almost no government in the world has yet set itself a legally binding target for greenhouse gas emissions enforceable in court by citizens today.

Does that make climate change legal? Well, we know Mother Earth already has a high temperature: 1C [hotter](#) now than the 10,000 year average which sustained human civilization before the Industrial Revolution. And we know that, in the [words](#) of UN Secretary General Antonio Guterres last month, States are "way off target" on emissions, meaning our planet is set to develop a really serious fever over the lifetime of our children: [3C](#) over normal by the end of the century, twice the agreed safe target.

So we're on course for catastrophic climate change - the kind of climate change that will [kill millions](#), [flood cities](#) and drive a [billion](#) people out of their homes and in search of new ones - and there are no laws in place today by which citizens can directly challenge that outcome. Put that way it seems like climate change is entirely legal. But if that statement makes you wince a little, then we're on the same page.

For we, and a growing number of lawyers, scholars, and citizens bringing cases to [court](#) - most often children understandably distressed by the mess they're going to inherit - believe the time has come to state clearly what must be true: catastrophic climate change *is* illegal.

And the reason we can say that with some certainty, despite the failure of governments to acknowledge it as such, is much more simple than many experts and policymakers might have you believe. Next week, Belgian NGO [Klimaatzaak](#) joined with nearly 60,000 co-claimant citizens - the largest such civil suit in Europe's history - will be asking a court in Brussels whether that government's failure to translate the science of climate change into the policy actions required to avoid it becoming catastrophic is lawful or not.

The State will argue that these are complex questions, that ministers must be allowed discretion over policy choices, and that it is undemocratic and unconstitutional for unelected judges to be encroaching on the separation of powers by telling the executive what it must do.

Here are three simple reasons we believe those arguments are wrong, and why exercising public powers in ways that fuel climate change is actually unlawful.

Firstly, the rule of law ensures that the actions of the state are accountable to the courts. That is a fundamental principle of any constitution in a democratic society. The first responsibility of government is "to protect and safeguard the lives of its citizens" as the House of Lords [ruled](#) in 2004, paraphrasing Thomas Jefferson. "That is where the public interest lies." That was in a terrorism case. Does climate change represent a comparable threat? Not comparable; much,

much more serious. Terrorism arguably never represented an existential [threat](#). We know for sure that climate change [does](#). So if governments fail to take appropriate action to safeguard citizens against climate change they are failing in their first responsibility. That failure is a misuse of the power the electorate have, temporarily, invested in them, and using power for wrongful purposes is unlawful. This could be considered the constitutional guarantee against climate change, notwithstanding the fact that over 100 [states](#) already have the right to a healthy environment written into their constitutions.

Secondly, although almost no government has set itself a legally binding target on emissions enforceable today, there are existing laws that protect people under the state's jurisdiction from its harmful acts. We are all familiar with the principle of taking care when driving. If we drive carelessly and knock someone over then we will be held legally responsible for that action. Of course, we have no contract with the pedestrian, so we have not broken some particular promise to drive carefully. But we do owe that pedestrian, at all times and in all places, a duty of care. When you can foresee the harm that will be caused to a particular person because you act towards them in a negligent way, and that harm then arises, the law will find you liable. Climate change is undoubtedly foreseeable harm, and it is caused by the acts of pollution over which states exercise their jurisdiction. Can we identify a particular claimant, or set of claimants, towards which the state would thus owe a duty of care? Of course we can, whether that be all citizens, whose [taxes](#) the state uses directly to influence the energy market, or a particular group whose homes and lives will be most directly harmed. Human rights law, whether domestic as in the UK's Human Rights Act, or international, creates positive obligations on the state to secure for all persons under its jurisdiction full enjoyment of rights to life, property, and private and family life. The outcome of catastrophic climate change are incompatible with human rights law. Which is another way of saying that climate change is illegal.

Finally, climate change is fundamentally undemocratic. The world's largest [survey](#) of global opinion on climate change from January 2021 found 64 percent of people believe it is a global emergency, despite the on-going pandemic. In the UK, more than [two thirds](#) of the public want the government to be a world leader on climate change, [half](#) would like to see the same urgency applied to climate as to Covid, and [78 percent](#) believe it is primarily the state's responsibility to act. In Belgium, [85 percent](#) of respondents believe climate change is a problem that needs to be tackled urgently. Furthermore, it is today's children, who cannot yet vote, who will be disproportionately affected by climate change. We will be long gone by the end of this century, but all our sons and daughters will live and die in a world forever harmed by climate change if action is not taken by those who can now.

Yet in the UK, the government is off track [[link needed](#)] to meet its next two carbon budgets even as it continues to license [coal mines](#), pays BP tax [rebates](#) from the public purse, and pushes ahead with [plans](#) for a third runway at Heathrow which the Court of Appeal – a decision later overturned by the Supreme Court – found was [unlawful](#) because it actively dismissed the government's commitments to the Paris Agreement. In Belgium, unlike the UK, there is no Climate Change Act with a target for net zero emissions by 2050, a failure of policymaking that *Klimaatzaak* claim is negligence and therefore a breach of the state's duty of care.

Where a state fails to act, contrary to the will of the electorate, and that failure violates the rights citizens enjoy under their constitution and their laws, it is the duty of the courts, when asked, to uphold those rights. Catastrophic climate change will harm fundamental rights and is irreversible. It can only be avoided now and cannot be avoided in the future. It is illegal, and courts exist to control illegality of state action and uphold the public interest and human rights.

And although, as we have said throughout, almost no citizens of the world today have a legally enforceable right to prevent catastrophic climate change, there is one such group: the Dutch. Not, crucially, because their government had decided to set a contemporary target for safe levels of emissions. But because a [court](#) found that negligent climate policies were a breach of the state's duty of care. That was five years ago. It's time all courts everywhere realised the same fact: climate change is illegal. Now is the time to make it so.

ENDS

Hugh Macleod is a barrister and journalist, who spent a decade reporting from the Middle East and now specialises in international human rights law. Sarah Tak is a lawyer and former political advisor who is now coordinating Belgium's *Klimaatzaak*.