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French Yearbook *of* Public Law

Issue 1, 2023

Presentation

The objective of the "French Yearbook of Public Law" is to narrow the gap which has tended to develop between the French and the international debate on public law. The former remains too often isolated from the latter, for various reasons, ranging from the conviction of the French model's exemplary nature to an insufficient openness of French public lawyers to the international academic language, which English has undoubtedly become nowadays. This has two serious consequences. On the one hand French lawyers might often be unaware of developments in other legal systems, and on the other hand foreign lawyers face serious difficulties to follow French legal developments.

The French Yearbook of Public Law (FYPL) was created to mitigate precisely this mutual ignorance. This project has three main aims. On the one hand, it seeks to apprise English-speaking readers of important developments and scholarly debates in French public law. On the other hand, we wish to introduce French lawyers to key changes and academic discussions in foreign public laws. Lastly, it is our hope that the reciprocal information thus made available will foster international and comparative debates among legal scholars.

The FYPL is based at the Chair of French Public Law at Saarland University (Lehrstuhl für französisches oeffentliches Recht - LFOER), headed by Professor Philippe Cossalter. Thus, the FYPL relies on the administrative and technical capacities of the LFOER without constituting a segment of it. Some of its researchers (Jasmin Hiry-Lesch, Enrico Buono, Sofia van der Reis, Lucca Kaltenecker) are especially involved.

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Foreword

What is the objective of the *"French Yearbook of Public Law"*?

Our objective can easily be summed up. It is to bring to the international public law forum some products of the French Public Law doctrine and some prominent events in the current constitutional, legislative and jurisprudential evolution of French Public Law.

And to do so in what has become the internationally dominant language in law, including public law: English. This has a twofold meaning: proposing to English speaking lawyers to be at a minimum informed on where French Public Law is moving towards and to give French Public lawyers the possibility to participate in the international debate concerning their research field.

We took up this project as the four of us believe that our different experiences allow us to successfully achieve the set aims. The four of us have for long worked on comparative law and entertain strong relations with the English speaking international public law doctrine. We have acquired this common experience in partially different manners, though. Dominique Custos taught American law, Comparative law and European law in the US for a long time, Giacinto della Cananea and Jean-Bernard Auby are more familiar with the UK academic world, Philippe Cossalter, whose doctoral thesis was a comparative administrative law one, is in charge of the Public Law Chair at Sarrebrück University. The 'Mutations de l'Action Publique et du Droit Public' Chair at Sciences Po, driven by Jean-Bernard Auby, hosted a long series of 'Global, European and Comparative Law' seminars between 2006 and 2016. Some years ago, Giacinto della Cananea set up an 'Italian Journal of Public Law', which serves as a model for our initiative.

In order to smooth the diffusion of our Yearbook, we have decided that it would be available online.

We very much hope to receive feedbacks from our readers, in order to ensure that our project indeed has an added value and is considered useful within the community.

We have been fortunate enough to be joined by two young scholars, Jasmin Hiry-Lesch and Enrico Buono, who helped us review the contributions we receive, both linguistically and on the substance. We thank them for their implication.

Jean-Bernard Auby

Giacinto della Cananea

Philippe Cossalter

Dominique Custos

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The Future of the French Model of Public Law in Europe[1]

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Abstract:

This short contribution explores the evolution and impact of the French historical model of public law on European legal systems. It delves into the origins of this model, highlighting its emergence and development. The contribution also examines the extent to which the French model of public law has transformed due to the influences of European law and globalization. Lastly, it reflects on the contemporary relevance of French public law, pondering whether there are valuable lessons that Europe can still learn from it.

Keywords:

French public law, Legal history, European administrative law

1 This article is an update of the conclusions of the Colloquium organised in Paris on 11 March 2011 by the MADP Chair of Sciences Po, under the patronage of the Council of State, with the support of the Mission de recherche Droit et Justice. It was first published in the review *Droit administratif* 2012, n° 11, special issue, pp. 94-96.

The French model in the European context: the issues

In this short contribution I aim to answer four key questions:

1) How did the French historical model of public law emerge and how has it influenced other European legal systems?

2) How did the concept of a French model of public law emerge?

3) To what extent has the French model of public law changed under the influence of both European law and globalisation, and what is left of the original model?

4) Is there still something for Europe to learn from the French model of public law?

The French historical model of public law

The historical French model of public law was shaped under the influence of both the Old Regime (*Ancien Régime*) and the French Revolution. According to Tocqueville, centralisation and administrative paternalism are a product of the Old Regime,[2] while the Revolution sought to strengthen the power and rights of the public authority.[3]

The key components of the historical model can be summarized as follows:

a. Supremacy of the Constitution and written law more generally. Additionally, the historical model had a very strong nationalist focus, which is to say that public law was considered to be closely linked to national traditions, and hence the historical outcome of each individual nation state. An integration of the French model into other national models was therefore not foreseen;

b. It is also in that context that the term 'étatisme' (statism) should be understood as the preponderance of the role of the state, centralisation, administrative uniformity and a strong control over intermediate powers;

c. Bonapartism: concentration of powers in the executive; extensive regulatory power of the executive; development of a high status of the civil service, centrality of the principles of equality and merit ('la carrière ouverte aux talents') and dismissal protection of civil servants, from which stems the partial subjugation of the administration to judges;

d. Large schools and corporations; central role of the Council of State, which drafts normative texts, performs senior administrative functions and resolves administrative disputes;

e. Separation of public and private law and duality of jurisdictions ;

f. Development of the study of public law: constitutional law by Constant and administrative law by Gérando, Cormenin, Macarel and Vivien.

Despite its nationalistic focus, the historical French model of public law did have an influence beyond the French borders: it was imposed and imitated in other countries. With Napoleon it became sort of an export model (but it has also changed a lot: 'ces gouvernements du midi de l'Europe, qui semblent ne s'être emparés de tout que pour laisser tout stérile': Tocqueville[4]).

The historical French model of public law thus expanded internationally - it even became universal.

2 Tocqueville, A., *L'Ancien Régime et la Révolution* (1856-1858), 1986, Paris, Laffont, p. 973.

3 Ibid, p. 964.

4 Ibid, p. 992.

The two paths of the state in the West *'Les deux voies de l'État en Occident'* - Voltaire

One must distinguish between the historical French model of public law and the concept of a French model of public law. The former developed at the beginning of the 19th century, the latter in the second half of the 19th century, as opposed to the English model.

It was in the second half of the 19th century that the idea of an opposition between the French model of public law and the English model of Common Law was established. The former was conceived as a model characterised by the absolute power of the executive, centralisation and the supremacy of the principle of equality over liberty. The English model, on the other hand, was characterised by a liberal tradition, the supremacy of Parliament, *self-government*, and the progress of equality in harmony with liberty and freedom.

The key components of the English model can be summarized as follows:

The absence of a written constitution (i.e. a 'fluid' constitution), the importance of custom and the openness of the model to the outside world;

A stateless society and '*self-government*', i.e. local government entrusted to local authorities;

The central role of liberty and freedom and the central role of Parliament;

Legal monism, in the sense that public law is not recognised, and judicial monism, in the sense that there is only one judge, for both civil law and for administrative law;

The rejection of a legal science applied to the study of the state. The English constitutional law professor Albert Venn Dicey refused in 1885 to translate the expression '*droit administratif*' into English, which goes to show that the very term 'state' is almost unknown in the English system. It can thus be said that the English model is a model of '*droit commun'*. This is not to translate the English expression "*common law*", but only to indicate the absence of a special branch of law to regulate the affairs of the state.

The French model of public law and the English model of 'common law' developed towards convergence in the course of the 20th century. While the French model developed a liberal component, lawyers in the English model had started to recognise the existence of administrative law, mainly because of the rise of the welfare state (one of the first was William A. Robson of the '*London School of Economics*').

The French integrated model

In the course of sixty years of participation in the construction of the European Union, the French model of public law has changed. This transformation is not only due to the fact that the EU imposed certain obligations towards its Member States, but also due to the opening up of the French model itself towards different national legal orders (reciprocal influences) and spontaneous imitation, because European law is a composite law, partly 'Community', partly multi-national. That being said it should be noted that the Union is not completely alien to the French model, because France is part of the Union and plays an important role in the latter.

Further factors for this transformation can be identified. The latter seems to equally stem from globalisation and the development of a globalised administrative law, in which certain rights are universally recognised, such as the right to participate in the decision-making process, transparency or the right to a judge.

The current French model can be described as integrated, modernised and enriched, because new features have been added to the original ones, both because - I repeat - of the French participation in the European Union and due to the influence of globalisation.

The question is therefore how the French public law model has changed concretely and what remains of its original features. The essential components of the integrated French model are as follows:

a. Shared sovereignty, resulting from the supremacy of European law and the opening of the civil service to EU citizens from other Member States, with the consequence of a sort of denationalisation of public law; the administration is henceforth subject to two levels of law: French law and European law, of which the latter is considered supreme; 5 human rights are protected at several levels (Paris - Strasbourg - Luxembourg);

b. New citizens' rights: competition, participation, transparency; certain authorities take up the role of an arbitrator in a trilateral relationship between authorities, producers and consumers, as well as between authorities, managers of public services and users;

c. A certain kind of fusion of the notions of public and private law, as well as a destabilization of the functional identification of the state (e.g. public law bodies): hybridisation between public and private law, penetration of private law into the state and bipolarity of public law; loss of specificity and mutation of public law in general; conventional instruments as a means of public action; diminishing role of administrative privileges;

d. Polycentrism of the state apparatus (ministries, independent administrative authorities, regions) and partial anchoring of the administration in the executive (the government can dispose of the ministerial administration, not of the independent administrative authorities, especially so since several authorities are connected in a European network; the Union contributes to the fact that administrative authorities remain independent; decentralisation: more power to the periphery (regional and local authorities);

e. Reinvention of a national constitutional identity to defend itself, but, at the same time, to allow for a controlled invasion of rights stemming from the supranational level into national law; this confirms the findings of historians: national identities are almost never a given, but rather a construct in constant change; one needs to establish and confirm one's identity when the latter is called into question.

The convergence of European models and the trivialisation of public law have also had led to a scientific result: it was realised that in the past the differences between legal systems had been overestimated because of legal nationalism. It has been recognized that the different systems had in the past been considered alien to each other mainly for cultural reasons. The Europeanisation of law thus led to a loss of specificity of national legal systems.

The future of the French integrated model

Is there anything the European legal orders can learn from the integrated French model?

a. To begin with, we must abandon the contrastive view, such as that between Hauriou, who praised the French model, and Dicey, who strongly defended the rule of law based on the English model. There is now a European legal area in which there has been a strong exchange between national legal systems;

b. One must also take into account that the construction of the European Union has re-

inforced certain traditional features of the French model, in particular statism, the written Constitution and the 'Bonapartist' concentration of powers. Statism: the EU imposes limitations on states' sovereignty, which is to say that they have to share their powers; on the other hand, it equally gives them the opportunity to exercise influence beyond national territories, which in turn puts Member States in competition to one another. The written constitution: it can serve as a dividing line between the national legal order and the two supranational legal orders, European Union and Council of Europe, (the absence of a written constitution in the United Kingdom has in the past raised several problems). Concentration of power: participation in Union institutions requires the Member States to assert their individual strengths as to defend their interests;

c. Thirdly, the dissemination of public law must be recognised as a typical contribution of the French legal system, from which three characteristics emerge. Firstly, a certain degree of homogeneity: in the past, national public law had different scopes, so that what was considered to belong to the branch of public law in one country was not part of public law in another; nowadays these fundamental differences have largely disappeared. Secondly, the concept of public law that has prevailed in Europe consists of multiple components as public law has lost its strict connection to the nation state. Finally, there are shared features across jurisdictions: subsidiarity, proportionality, participation in administrative decision-making processes, duty to state reasons;

d. Fourthly, the French model of senior civil service spread when the European Union required a dialogue between the different legal systems. Cooperation between national political as well as administrative systems – especially in the context of comitology committees - requires a well-selected senior civil service with outstanding management skills;

e. Fifthly, the French model continues to make a substantial contribution to the national laws of other European countries as well as to European law in general in relation to the concepts of public service and public power; these are instrumentalised, transformed, adapted, have endured, and contributed to the progress of law in Europe. For example, the notion of public service has been broadened (universal service, service of general interest), redefined, but have always remained present (*Treaty on the Functioning of the European Union*, art. 14);

f. Sixthly, the French model of public law participates and contributes to the construction of a common European administrative procedural law by developing third generation rights (civil society participation): such as public consultation;

g. Finally, the French model offers an interesting approach to study public law in a way that is not only systematic – following the German model – or simply casuistic – following the English model. This is an important lesson in times when a European space of legal research is emerging.

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Conceptual and Linguistic « Surprises » in Comparative Administrative Law[1]

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Abstract:

This paper shares amusing and surprising examples from the world of comparative administrative law. It explores cases of "unexpected asymmetries" where identical legal categories are interpreted differently in various administrative systems. These examples, categorized from linguistic quirks to institutional shifts across borders, offer a glimpse into the playful and intriguing aspects of comparative law.

Keywords:

Comparative administrative law, Comparative methodology, Law and language

1. This paper has no theoretical or methodological ambition. It simply aims to share with its readers a few amusing and/or astonishing examples, stemming from a relatively long experience in the land of comparative administrative law, of what follows: the constant back-and-forth movement practicing comparative administrative law forces oneself to make between "the same" and "the other".

1 This paper, paying tribute to our colleague and friend Jacques Ziller, was published in French in: Jacques Ziller, a European scholar, European University Institute, 2022.

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Comparative law is in many ways a rather profound endeavor: as George Steiner has written somewhere about translation, it makes us feel the universal. It also has its share of playful aspects, akin to the pleasures that physical travel may offer us when we discover delightful places or interesting people.

Among its many surprises, some can be characterized as "unexpected asymmetries", that is, cases in which the very same legal category is defined, analyzed, or practiced differently in two or more administrative systems.

I would like to provide here some examples of these cases, within a rough typology, ranging from linguistic surprises to asymmetries affecting the practice of the law through several conceptual shifts operating when the same institutions transcend national borders.

Just a few examples, a personal list of sorts, which could obviously be extended.

2. Even though they cannot be regarded as the most exciting examples, there are, first of all, some typical linguistic asymmetries, in which the same legal reality is designated by different expressions in various legal traditions, while this difference in wording does not correspond to any perceptible difference in conceptualization.

It seems to me that good examples of this are provided by two rather incomprehensible deviations that French administrative law's vocabulary makes in relation to all neighbouring legal languages without this seeming to reflect any real substantial originality.

While all neighbouring languages employ the term "globalization"—*globalización* in Spanish, *globalizzazione* in Italian, etc.—the doctrinal language of French administrative law often prefers the term "*mondialisation*", and thus "*droit de la mondialisation*", without any identifiable shift in the conceptual backdrop.

Likewise, while neighboring administrative legal systems went in search of the secrets of "*digital*" administrative law—broadly the same adjective in English, Spanish, Italian...—French law is trapped in the national habit of designating these phenomena by the term "*numérique*".

These purely linguistic asymmetries do not, of course, represent the most interesting aspect. They are rather a sort of unpleasant friction, deceiving in the way they suggest false theoretical differences.

3. Without any doubt, the most fascinating cases are those in which a concept can be found in one administrative legal system while it is ignored in another one, even though the same underlying legal realities are present in both legal orders.

a) A first such case is that in which specific legal mechanisms are given a theoretical framework in certain administrative systems, while they are not conceptualized in other legal orders, even though those very same elements are, nevertheless, present. Here are three different examples.

In both Spanish and Italian administrative law, the possibility for the administration to reverse a unilateral act is conceptualized as "self-supervision" ("*autotutela*" in both languages), whose theoretical equivalent cannot be found, for example, in French administrative law. Yet it is indeed a practice common to all these legal systems, which refers to the possibility of modifying, abrogating or withdrawing an administrative decision. But French administrative law treats the question in an essentially practical way, through a set of solutions that concern the application of administrative acts over time. These solutions have been incrementally built up by case law in a pragmatic way, without any the-

orization of a specific administrative power and they are today mostly placed into the *Code des relations entre le public et l'administration* (CRPA), with no further conceptual cover.

A French administrative lawyer can also be estranged by the distinction that Italian law makes between "*procedimento*" and "*provvedimento*". Of course, she would understand the difference between administrative procedure and the administrative act that results from it, but her weak historical interest for the former does not clarify the theoretical link with the latter.

Here is another, very different example. Recently, doctrinal works have emerged—notably at the initiative of Dutch and Spanish colleagues—around the idea that distribution of scarce resources is one of the essential attributes of public administration. This is an original and certainly fruitful approach, which is not—yet—found in neighboring literatures.

b) In other instances, one can point out that certain administrative legal systems propose a specific theorization of instruments which are elsewhere included in broader terminologies, without a distinct intellectual construction. Here are also three examples.

Within the issues that other administrative systems indiscriminately connect to the concept of legality, Italian administrative law distinguishes between "*legittimità*", which concerns the possession of competences, and "*legalità*", which concerns the exercise of power.

The question of how administrations obtain information on society, economy, etc.—by what means, on the basis of what powers, or within what obligations—is today an especially important question. In some administrative legal systems, this function and the corresponding powers are not subject to any particular theorization, but they are specifically analyzed in others: for example, under the notion of "*administrative investigation*" in American administrative law, which relates the issue to the adoption of regulatory acts.

The analysis of discretionary power put forward by Italian administrative lawyers distinguishes a sub-set referred to as "*discrezionalità tecnica*", i.e., the cases in which an administrative authority bases its assessments on technical or scientific knowledge. In other administrative legal systems, this sub-set is not isolated, even if judges give a specific orientation to their review of assessments based on scientific or technical data.

c) We might add here those cases in which a concept, commonly accepted in certain administrative systems, is difficult to transpose due to the influence of different theoretical frameworks.

This is the case with the "*droit de la ville*" (law on/of cities), intended as a composite system of the elements which govern the legal functioning of cities. Although it is easily accepted in certain legal systems, it has difficulty finding its footing into others, for example in French administrative law. The reason can be attributed to the typically positivist vision which permeates French legal scholarship: as long as "city law" is not enshrined in legal texts or in case law, French administrative lawyers will be reluctant to recognize it as a legitimate object of study.

4. In addition to the above, there are cases in which the same concepts and intellectual constructs are found in several administrative systems, but do not have the same meaning and/or scope.

This may arise from the fact that an international concept can be used in a particular administrative system with a meaning that is partly different from the one it has in

other administrative laws. A good example of this is how dominant French scholarship has employed the concept of regulation. Whereas international literature on the subject perceives regulation as a general theory of public intervention, French authors tend to use it to designate new regulatory instruments enacted by independent administrative authorities.

While retaining the same concept and giving it the same meaning *a priori*, in fact, different administrative systems may diverge in the scope attributed to such concepts. Here is an example in the form of an anecdote. Whilst participating in a collective work on the notion of public power, led by a Spanish colleague, I realized that we couldn't quite agree on what to consider an expression of public power. Thus, according to the Spanish authors involved in this project, the development of contractual mechanisms in administrative action is a symptom of the strengthening of public power; whereas, on the contrary, French authors will interpret this trend as a symptom of a tendency by the administration to escape the use of public power instruments.

Sometimes identical legal concepts turn out to be articulated differently due to the way in which statutes or case law implement them. A good illustration of this is provided by judicial review of questions of law and questions of fact in the different administrative traditions. The most astonishing asymmetry can be observed on this issue between judicial practices in Common Law and Civil Law systems. In the former, particularly in the United States, judges adopt a certain self-restraint when dealing with the interpretations of statutory law adopted by administrative authorities; in the latter—as in the French case—judges feel fully capable of verifying the legal bases of administrative decisions, whereas they are more reluctant than their Anglo-Saxon counterparts in checking the matters of fact.

Finally, there are cases in which the same group of mechanisms, broadly conceived in the same way, have a different practical impact in different administrative systems. This can be observed with regards to public enquiries of infrastructural projects in the UK and in France. The procedure is legally organized in a fairly similar way in the two countries, yet its practical importance is quite different: whereas the British public enquiry presents a quasi-judicial character and has significant repercussions on the final decision, the French counterpart is generally rather superficial in its procedure and does not usually have a heavy impact.

*

Comparative law is a Florentine art: its practice requires a kind of determined flexibility in the face of the complexity of reality. One can truly appreciate its charms to the same degree that one is happy with the midst of sophisticated scents of jasmine and honeysuckle wafting over the hill of Fiesole in spring. The very same hill on which the European University Institute had the good idea of settling on. And had another good idea: to entrust its Law Department to the friendly and expert guidance of our friend Jacques Ziller for a long period of time.

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Dossier: Climate Change and Public Law

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Issue 1, 2023

Climate Change and Public Law Dossier: Introduction

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Keywords:

Comparative environmental law, Comparative administrative law, Climate change litigation, International environmental law

«Man has finally reached a stage where he deserves to disappear» (Cioran, Entretiens)

«Since everything is inside us» (Henri Barbusse, L'enfer)

I. Framing the issue: why such a question (climate change and public law)?

When we proposed to our contributors to undertake the present dossier, we were well aware that climate change is not by itself a legal phenomenon. Yet we strongly believe that the law is nevertheless somewhat relevant in respect of the possible causes of climate change and might also play a central role in the efforts to mitigate and deal with it in the long run.

Given that we are public lawyers after all, we naturally focused on the potential of public law concepts and instruments, where they could be mobilized to support climate change mitigation and adaptation and conversely, where public law might effectively hinder such mitigation/adaptation.

A. To what extent is the Law (in general) likely to make a difference?

One might question the ability of the law to mitigate climate change, especially when one might limit oneself to think that climate change could only be addressed by technical, economic and/or political solutions. Law might not be the first solution one would think of given that it is often considered to create confusion, delay action and might possibly discourage goodwill.

Yet it should be clear, that if we want to bring about change in the long run, it is insufficient to rely solely on civic virtue and/or trust in science to mitigate climate change. If we want public authorities, private institutions and citizens to adopt certain behaviours which are crucial to fight climate change, we ultimately have to make use of sanctioned rules.

That said, it is worth asking how, and by what means, law is likely to influence social actions, public or private, that contribute to global warming or, on the contrary, curb it. This question essentially targets both goals and methods: what the law can achieve and through which procedures can it bring about change.

To address this question, one has to be aware of the complexity of the system of norms in both national systems and in the international order. Beyond the law in the organic-material sense and formal regulations, there is, as is well known, a multitude of normative instruments that should not be neglected. These include the development of "soft law", but also the increasingly present dimension of guidance and planning: environmental law, which is obviously of particular interest to us here abounds in programmes, schemes, plans, etc.

In short, we must be open to accept that potentially, all forms of legal normativity could be mobilised to mitigate climate change.

II. What specific reference does Public Law have to this question?

Having said that, the focus of this dossier will nevertheless be on what impact public law can have on the question of climate change.

We will not dwell on the questions of definition and boundaries that the concept may raise. We will confine ourselves to admitting that it refers to that part of the law – that side of the legal coin – which involves public authorities, regardless of the ways in which their presence is manifested.

This definition incorporates various aspects of public action. It includes situations in which public authorities are the exclusive actor, in which they impose their choices, but it

also includes situations in which they co-act with private actors to achieve a public good, or even the effort to design the latter. In concrete terms, for example, this means that if in a given context climate action requires the creation of a "common ground" between public and private actors, the result will be a "public-private" co-production of the public good. Despite all this, we will not leave the realm of public law as we understand it.

That said, if public law mechanisms can make a contribution to mitigate the causes of climate change, this will be due to what they convey in terms of going beyond the private sphere. In light of the extent of the crisis, we cannot avoid having recourse to public law to address it.

We will obviously have to ask ourselves - and this will be a major part of the problem - whether this intense collective work can be accomplished while respecting the rights and freedoms to which our highly individualistic societies have become accustomed.

III. The ecological impregnation of public law

The history of the ecological impregnation of public law is not easy to describe, yet certain essential stages can be identified. In theory, we could go way back in time: town planning regulations of medieval cities were already full of hygiene and sanitation standards that can be considered pre-ecological. Later on, during the industrialisation, it became evident that the latter might cause major damage: in this respect, a crucial reference in French law remains until today in the imperial decree of 15 October 1810 "relating to factories and workshops that spread an unhealthy or unpleasant odour" - as the first step towards legislation on classified installations.

But it was not until the 1970s that French legislation began to be seen as environmental, and a Ministry of the Environment was created.

In jurisprudence, after the famous "*Ville Nouvelle Est*" case (Council of State, 1971) in which it was found that that in ruling on questions of compulsory purchases judges had to strike a balance between benefits and inconveniences of the envisaged action, the ruling in "*Sainte-Marie de l'Assomption*" (Council of State, 1973) added environmental damage to the list of inconveniences that should be taken into account in striking the aforesaid balance.

Much later, in the wake of the Kyoto Protocol, climate change would become the strong banner on the pediment of public environmental law.

At the same time, ecological considerations had been implemented at both "horizontal" – particularly European and national – and "vertical" level. In respect of the latter, it should be mentioned that general and specific environmental protection requirements had been implemented throughout the legal system and, more technically, within each public policy.

It is true that ecological norms are situated on a scale of normativity ranging from relatively weak constraints ("taking into account") to much more demanding requirements, potentially coinciding with stronger effectiveness (through compatibility or even strict conformity).

In addition, public policies which, on the basis of standards classically considered as "public law", have an impact on activities traditionally considered private in nature (eg corporate environmental responsibility) must also be considered.

In fact, it is relatively easy to show that, in their own way, all branches of public law are increasingly impacted by ecological considerations. The precise impact obviously varies from country to country and no doubt from continent to continent, but a basic trend has emerged over the last fifty years.

As we know, these developments have affected international law as much as national public law. In the wake of an earlier, relatively stimulating period in public international law, we have witnessed national laws increasingly taking up environmental problems: questions of ecological taxation went hand in hand with detailed reflections on environmental criteria in public procurement.

To take just one aspect of administrative law, ever more special administrative policies, some of which have been in force for a long time already, deal with a particular sector of the environment (air, waste, water, fauna and flora, protected areas, etc.).

At the same time a systemic change in the attitude of the administration can be witnessed. The administration is starting to take a more comprehensive, rational, and integrated approach to its actions. It adopts an "environment" rather than an "element" approach, through measures based on coordination and cooperation where possible. In this context one might mention the French initiative the "basin coordinating prefect", who began to do, albeit still insufficiently of course, in the field of water what we would like to see deployed at various spatial and temporal scales across the territory.

We also understand the extent to which the (admittedly gradual) penetration of sectoral and global ecological issues into national public law may shake some of our certainties about the territorial and institutional network to which we are accustomed (it may be that public law is also caught in this 'territorial trap' described by some geographers). This is all the more so since the French administrative culture and, to put it bluntly, a certain historical style of institutions and actors (with all due respect to the sociological approach, of course) is perhaps not ideally suited to the temporality of ecological needs, which are somewhere between extreme urgency and long, even very long, timeframes.

It should not be forgotten that already in the 1970s far-reaching environmental principles and objectives, often in the form of constitutional laws, have been established in national legal systems. This development might well be interpreted as having 'declaratory' character, raising (legal) awareness of the consequences of scientific ecology at national, continental and global level. Ideologically and economically the conditions for intervention by public authorities have been profoundly redefined: the emergence or consolidation of a toolkit inspired by private law, somewhere between tradition and innovation, whose instruments are linked to contract, liability and property law is actively mobilised to support public authorities fulfilling its tasks, which seems to require ever more open competition. These developments are sometimes described too easily as 'neo-liberalism'.

In this rather complex interplay of ecological and legal elements, for various reasons which are hard to pinpoint, climate change has taken its own route. It cannot be ruled out that previous legislation on hazardous activities and the subsequent rather negative coverage at both European and national level, might have served as a rather bad example in this too slow move. In France alone, nearly twenty laws over the last thirty years have either directly or indirectly addressed climate change, either by trying to combat, mitigate or by trying to adapt to it.

It can equally not be ruled out that the limited attention given to climate issues so far is somewhat related to a general confusion between the transition of means and the transition of ends. We would have to consider alternatives to politicising the profound issues raised by ecology, potentially limiting oneself to an essentially technological change that would make it possible to remain within a logic of growth. In this respect, the emissions trading market and carbon offsetting tools, with their relative effectiveness, deserve to be discussed in detail.

The fact remains that, undeniably, institutionally, materially and procedurally, the growing attention on ecological issues, most prominently climate change itself, in both

national and international political discourse can be interpreted as the first sign of a greening of public law, provided, of course, that we take into account public law's capacity to resist on the one hand and to process these sensitive issues with a view to reformulating them, on the other.

IV. Situating the issue within the evolution of environmental law

The importance that the climate issue has acquired in environmental law is strangely proportionate to the ineffectiveness of international and even national or European policies to combat it.[1] The first dimension of the dossier aims to analyse the way in which climate policies are changing and how their role is increasingly strengthened - moving away from combating climate change towards mitigating its effects and adapting to it.

France, for example, could be "within the limits" of the Paris Agreement, but given that France itself only emits between 0.8% and 1.4% of global emissions, irrespective of how strict French citizens will adhere to the rules in place, France acting in isolation will never be able to stop a temperature rise to 45°C in Bordeaux in 2050.

The way in which climate issues are dealt with might be somewhat linked to what we are already witnessing in the field of biodiversity. This is clearly a very complex issue, but certain 'stock' and 'availability' logic and fairly quantitative approaches are perhaps at work in the perception of the overall problems. All this obviously merits careful and specific study, but the fact remains that environmental law is profoundly affected by climate and energy issues, which do not exclusively consist of ecological challenges.

V. The papers of this dossier

1°. Part I of the dossier specifically focuses on a global approach of our topic.

a) It starts with Sandrine Maljean-Dubois' paper on "Climate Change in International Law: The Paris Agreement: A Renewed Form of States' Commitment?". Her main argument is that:

In a tense and difficult context, the adoption of the Paris Agreement required a great deal of inventiveness and ingenuity on the part of the negotiators. In order to convince all States to become parties to it, the form and substance of this new treaty were adjusted in relation to its "predecessor", the Kyoto Protocol. At first glance, the Paris Agreement seems to have been designed to be much more flexible. On closer inspection, however, it actually represents a relatively balanced compromise between those in favour of a flexible agreement and those in favour of a more binding one. From this point of view, its form and content mark a certain renewal of the forms of State commitment under international law, and even of the control exercised over the implementation of their international obligations.

b) Emilie Chevalier describes the considerable effort made by EU law in the direction of the fight against climate change. She shows it went through institutional adaptations as well as substantive normative production.

1 The improvement of the situation in France, due to the gross confusion of inventory and footprint, is not really convincing.

Then, she stresses that, while using many legal solutions and mechanisms similar to the ones domestic systems recur to, the specific legal and political context in which the EU acts determines some peculiarities. In particular, the EU is bound by the principle of conferral of competences, which may potentially limit its action. Also, the Union's legal order is essentially based on a solid procedural basis, which can provide a basis for individuals to develop ways of monitoring the actions of public authorities. However, the adequacy of these mechanisms to the challenges of the climate crisis remains a central issue.

c) Yseult Marique's paper raises the question: « Transnational » climate change. A case for reimagining legal reasoning?

She argues that climate change is by its very nature transnational in its causes and effects. Decisions and choices regarding how to produce goods are taken in one country, then are implemented in another country, possibly on a different continent building on global supply chains. Goods are transported all the way to a different country, where they are consumed and then the waste is processed in yet a different country with a risk of pollution for the air, the ground, or the water. People located in different legal orders are affected by this process directly and indirectly. In addition, energy is supporting this cycle with its own global networks; gas emissions are travelling around without knowing any borders.

The profoundly transnational nature of climate change implies that space, distance and territories, as its key dimensions, need to be included in legal reasoning and legal imagination so that distant others and distant spaces are internalised in norms, decisions and behaviour. This means a deep disruption of the legal reasoning.

2°. In Part II, our dossier moves to Climate Change in Constitutions.

Laurent Fonbaustier and Juliette Charreire's paper provides for an "analysis of constitutional provisions concerning climate change."

They show that, nowadays, such provisions are all but rare: of today, an estimated 78% of constitutions have included at least one provision about the environment, i.e., up to 170 constitutions.

They also demonstrate the existence of a "snowball effect", between constitutional and international law, which contributes to a certain harmonization of legal systems in what they dedicate to the climate change issue.

3°. Part III addresses the very timely issue of Climate Change Litigation.

a) Ivano Alogna's paper, 'Increasing Climate Litigation: A Global Inventory', views climate litigation as an important component part of the current global, regional and local governance framework that has emerged to regulate how states respond to climate change, thanks to lawsuits in which citizens and NGOs challenge the actions or inactions of local authorities and national governments.

At the same time, climate change-related lawsuits have been filed against private actors, primarily fossil fuel and cement companies, also referred to as "Carbon Majors" because they are significant greenhouse gas emitters.

The paper examines this dual perspective – climate change litigation involving governments and corporations – by synthesising some notable cases worldwide and proposing a categorisation for this brief inventory.

b) Christian Huglo examines the question of efficiency of climate change litigation at both international and national level. He points out that, currently, there is no international court which would be competent to deal with questions of climate change.

The situation is quite different at the national level, where climate change litigation fosters in many countries.

However, the efficiency of national judges' 'intervention in climate change is restricted by the limits of both their legitimacy and their powers.

c) The issue of judges' legitimacy for adjudicating on climate change is further analyzed in Marta Torre-Schaub's paper: "Climate Change Litigation and Legitimacy of Judges towards a 'wicked problem'. Empowerment, discretion and prudence".

In the context of French law, the "*Affaire du siècle*" litigation led the judges to clarify the way they interpret the standard of prudence, which could become a new standard of behavior for the Public Administration regarding activities related to Climate Change. Once this path has been mapped out and guided by prevention, it will be possible for judges in future decisions to establish the ultimate goal of carbon neutrality. We are still today at the stage of a "small steps" jurisprudence because judges self-restraint in the name of their "historical prudence and proximity to the Administration" and in the name of separation of power principles. Accordingly, they always consider that a margin of appreciation must be left to the Administration.

That being said, a new path has been opened up by administrative judges that can in the future lead to the establishment of a new "standard" of diligent behavior for the Administration. For the time being this evolution is still in a preliminary and even prospective stage, based on the "duty of prevention".

d) In their paper, Laurent Fonbaustier and Renaud Braillet raise the question "Could national judges do more? State deficiencies in climate litigations and actions of judges. One hundred years after the evocation of a "government of judges".

The fact is that, in many countries, courts have decided to become rather proactive when dealing with climate change litigation. In addition to interpreting and applying the law, it is possible for them to recognize that provisions that seemed to have no legislative or legal value have a real normative scope, or conversely to set aside acts that appear to constrain the legislator.

Particular attention should be paid to the decision of the Karlsruhe Court in March 2021. From the constitutional provisions of the Basic Law, the court deduces the existence of a number of constraints for the legislator and thus decides that it is obliged to legislate in order to comply with these higher standards: in particular, a duty of protection also exists towards future generations.

Nevertheless, there remains a significant degree of self-limitation by judges. This is due to concerns for separation of powers and the desire not to be too aggressive in their way of adjudicating.

4°. Part IV considers the multilevel dimension of our topic and addresses: "Cities, States and Climate Change: Between Competition, Conflict and Cooperation".

a) In "Global climate governance turning translocal", Delphine Misonne bases her analysis upon the decentralized orientation of the Paris Agreement.

The latter entrusts the implementation of the global objectives adopted in the context of the Agreement the state parties.

This confers a very important role to national climate laws.

It also has a further decentralising effect in the sense that local governments and cities can shape their own policies by making their own decisions on issues that fall within their remit and by challenging the state when its inertia causes damage that can be felt in the local community.

b) In his paper on "America's Climate Change Policy: Federalism in Action", Daniel

Esty shows how the US policy on climate change is influenced by the pluralistic character of the US system.

Climate change policy in the United States is driven in part by federal authorities, but not entirely. State-level and city-level leadership also plays a major role. This multi-layer governance structure provided a *safety net* against climate change policy inaction during the Trump Administration. But this same dynamic makes it very difficult to significantly redirect policies (especially at the politically driven federal level) – even on issues where circumstances demand bold new thinking and associated policy reform.

Thus, America's fundamental legal framework stands as a bulwark against climate change policy failure, but at the very same time the horizontal and vertical distribution of power has become an obstacle to the adoption of deep decarbonization strategies and the transformative policies required to move the United States toward a clean energy economy and a sustainable future.

c) Camille Mialot's paper "Local Policies on Climate Change in a Centralized State: the Case of France" confirms the complexity of the relationship between central policies and local initiatives, even in a unitary and markedly centralized country like France.

It shows that this relationship is not properly apprehended if the attention is restricted to the margin of discretion left by central law to local authorities.

Much depends on the type of legal instruments that are allocated to the different levels of power and on the articulation between them.

Camille Mialot also insists on how important it is to combine all forms of encouragement to local climate policies with the common definition of what requires climatic justice.

5°. Part V addresses the quite sensitive question of "Climate Change and Democracy".

a) Considering what could be the fate of "Subjective Rights in Relation to Climate Change", Alfredo Fioritto reckons that restrictions on some of them are to be expected: most probably property rights, economic rights, personal rights.

Then, the perspective changes if we start to consider subjective rights as collective values and not only as individual legal positions. Only by recalling that rights correspond to duties, that the protection granted to them may concern each member of the community and that rights belong not only to us but also to future generations, may subjective rights remain a strong democratic pillar, even in front of the climate change pillar.

b) The agenda proposed by Emmanuel Slautsky is "Overcoming Short-Termism in Democratic Decision-Making in the Face of Climate Change: a Public Law Approach".

The capacity of democracies to address the challenge of climate change is debated. Calls for more technocratic or authoritarian forms of climate governance can be heard. And nevertheless, Emmanuel Slautsky demonstrates, it is possible to evolve varied institutional innovation which can make democracies overcome their natural short-termism, and even do so more efficiently than non-democratic institutions.

Some such institutional answers to the problem of short-termism in the context of climate change rely on constitutional provisions and constitutional courts. Others include amendments to electoral rules as to ensure the representation of future generations in legislative processes. And yet others include requirements for politicians or state authorities to declare whether and to what extent the measures that they defend or propose for adoption impact the (climate) interests of future generations.

Another group of solutions can be found in setting up special bodies endowed with a sufficient degree of independence and a sufficient number of papers so they can influence policies and recall them to climate adaptation and resilience.

c) Delphine Hedary describes an experiment in participatory democracy applied to climate change that took place in 2020-2021: the "convention citoyenne pour le climat".

She shows that the involved citizens put forward proposals that would likely not have become law if the citizens would not have been involved. It is not certain that these are the most effective measures to reduce greenhouse gas emissions as this can hardly be determined in abstract. Yet the measures adopted at least enjoy broad public support due to the consultations preceding their adoption.

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June 2023

fypl
french yearbook *of* public law
Issue 1, 2023

Climate Change in International Law. The Paris Agreement: A Renewed Form of States' Commitment?

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Abstract:

This paper discusses the adoption of the Paris Agreement, which took place in a challenging and tense context, requiring significant innovation and resourcefulness from negotiators. To ensure the participation of all states, this new treaty underwent adjustments in both structure and substance compared to its predecessor, the Kyoto Protocol. While the Paris Agreement may initially appear to emphasize flexibility, a closer examination reveals it to be a well-balanced compromise between advocates of a flexible accord and proponents of a more binding one. This study explores the agreement's form, highlighting a nuanced blend of hard and soft law in Section I. In terms of substance, it argues for an equally nuanced combination of bottom-up and top-down approaches, as discussed in Part II. The Paris Agreement thus represents a notable evolution in the way states engage with international law.

Keywords:

International environmental law, Paris Agreement, Soft law

The international climate regime as we know it today is the outcome of a lengthy process which started in 1988 with the establishment of an expert body, the Intergovernmental Panel on Climate Change (IPCC). In 1992, states then developed a specific international legal regime,[1] based on the United Nations Framework Convention on Climate Change (UNFCCC, 1992). In 1997, the Kyoto Protocol set out obligations for the reduction of greenhouse gas emissions for the period 2008-2012 relative to 1990 levels, but only for industrialised countries. Negotiations on the post-2012 regime, and later on the post-2020 regime, were slow and arduous.

The challenge to engage states – that is all states around the globe and not only industrialised countries - in the fight against climate change became apparent during the Bali Conference in 2007. Two years later, the Copenhagen Conference offered a striking example thereof, and so did the chaotic negotiations that ultimately led to the adoption of the Paris Agreement in 2015. In one Conference of the Parties (COP) after the other, the positions of the various parties seemed to make no headway, and if they did, it was only on issues that were ancillary to the negotiation agenda. Meanwhile, as both scholarship and the IPCC openly addressed the issue, awareness grew that actions needed to be taken. Yet while states henceforth agreed on the risks of climate change and were in principle willing to mitigate them, negotiations continued to stall.

It would take until 2015 for an agreement to be finally reached in Paris. The resulting treaty was signed by a large number of countries and was quickly ratified. It entered into force within a year, despite the very strict conditions attached to it.[2] As of January 2022, there are 195 signatories and 193 parties to the treaty. Fortunately, when the U.S. under Donald Trump withdrew from the treaty, this did not have the anticipated domino effect.[3] On the contrary, it has led the other state parties to reaffirm their will to implement the agreement. Many even claimed that the agreement's implementation should be "*irreversible*" (at the COP 22, during G20 summits, etc.).[4] The American withdrawal became effective on 4 November 2020, but one of the first decisions of Trump's successor, Joe Biden, at the beginning of 2021, was to re-join the agreement.

Against this background, one may wonder how such an agreement could have been reached in the first place. A comprehensive answer to that question would evidently require a thorough analysis from the perspective of international relations, and a detailed consideration of how the positions of the various parties evolved, and what coalitions were formed. However, for the purpose of this contribution, I will limit myself to the legal analysis of the apparent miracle that is the Paris Agreement.

From a legal point of view, it seems that the Paris Agreement greatly differs in form and substance from its predecessor – the Kyoto Protocol – and might have been accepted for exactly that reason by so many states. At first glance, the Agreement appears very flexible. However, on closer examination, this paper argues that this flexibility is at least

1 See the definition of international regimes by Krasner, S., *International regimes*, 1983, London, Cornell University Press, p. 2.

2 It required the ratification of at least 55 Parties to the Convention, incorporating Parties included in Annex I which accounted in total for at least 55 per cent of the total carbon dioxide emissions for 1990 of the Parties included in Annex I (Art. 25, §1).

3 Watts, J., "World leaders react after Trump rejects Paris climate deal", The Guardian, 2 June 2017.

4 See for instance "G20 Leaders Says Paris Agreement is Irreversible". Available at: https://unfccc.int/news/g20-leaders-says-paris-agreement-is-irreversible (accessed on 22 January 2022).

partly diluted or even nullified. It actually took a lot of ingenuity and a lot of collective intelligence on the part of the negotiators to strike a balance between the proponents of a flexible agreement and the proponents of a stricter agreement, and ultimately between the reluctance or the constraints of some and the willingness of all to take action and draft an effective agreement. The agreement reached in Paris represents a relatively balanced compromise from this point of view, and that was the key to its success - a diplomatic success, if not yet an environmental one.

From this perspective, the compromise reached in Paris illustrates a certain evolution in the way states commit themselves. This paper will highlight that in terms of form, the agreement shows a subtle combination of hard and soft law (Section I). In terms of substance, it will be argued that an equally subtle combination of bottom-up and top-down approaches was adopted (Part II).

I. The form of state commitment: a subtle combination of hard and soft law

The negotiators' roadmap, established in Durban in 2011, had not settled the question of the legal form of the future agreement. The parties then agreed to "*launch a process to develop a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties*".[5] Leaving the issue entirely open was the price to pay for initiating a discussion that could lead to a global and unified regime that would include all countries in the same set of international rules. The debate primarily pitted proponents of a treaty form against proponents of a non-legally binding agreement in the form of one or more COPs. This debate long remained unresolved until eventually a proposal for a compromise emerged: a proposal for a composite and skilfully diverse legal form, avoiding the need to make a binary and divisive choice.[6] The parties ultimately agreed upon a package that includes both, a legally binding agreement – a treaty – which is relatively concise and general, and a decision of the COP (with many decisions to come). This is an interesting choice as it subtly combines hard and soft law elements. The two instruments do not exist without one another. Their content and legal force are instead complementary.

A. Different but complementary contents

The Paris Agreement is composed of a COP decision, Decision 1/CP.21,[7] adopting a treaty, the Paris Agreement, the text of which is annexed thereto. The classification of this treaty is however far from straightforward. On the one hand, it looks very similar to a protocol to the Convention, even though it does not bear that name as this would have reminded some (especially the U.S.) too much of the Kyoto Protocol. On the other hand, it could also be interpreted as a *"related legal instrument"*, a term which is used in the Convention on a number of occasions in a rather ambiguous manner.[8] While both classifications are possible, in this author's view, the Paris Agreement comes closer to a proto-

5 Decision 1/CP.17, 2011.
6 Maljean-Dubois, S., Spencer, T. & Wemaëre, M., The Legal Form of the Paris Climate Agreement: A Comprehensive Assessment of Options, *Carbon and Climate Law Review* 2015, n°1, pp. 1-17.
7 Decision 1/CP.21, 2015, *Adoption of the Paris Agreement*.
8 Article 14 in particular seems to indicate that these could be conventional instruments.

col, as it has many characteristics of a protocol. Only the parties to the Convention are allowed to adhere to it. It refers to several provisions thereof and opts for the same dispute resolution mechanism. It also uses the bodies of the Convention such as the COP, which is convened as a meeting of the parties to the Agreement, the subsidiary body for implementation, the subsidiary body for scientific and technological advice, the Green Climate Fund and the other UNFCCC-related funds, and even the secretariat.[9] Notably, this institutional linkage has facilitated the transition in the period leading up to the entry into force of the Agreement, as it clearly eased the transition until 2020 when the first cycle of national contributions began.

The decision and the Agreement cannot be read in isolation. The decision supplements and clarifies the Agreement on a number of matters. It also prepares the entry into force of the Agreement. Deciding what should be laid down in one or the other, and in possible future decisions, occupied the negotiators for a large part of 2015 and was not fully settled when the COP started.[10] This allocation thus constituted itself an additional variable to be taken into account to reach the final compromise during the COP. The issue of financing illustrates this very well. The Agreement addresses financing in article 9, which requires developed country parties to provide "*financial resources to assist developing country Parties*" (Art. 9§1). It further states that the "*mobilisation of climate finance should represent a progression beyond previous efforts*" (Art. 9§3). This wording is however rather vague as commitments are not quantified. The meaning of "*previous efforts*" is not specified. In fact, these collective "commitments", covering the period until 2020, were set out in the Copenhagen Agreement and the Cancun Agreements.[11] On this issue, the Paris Agreement must be read together with the COP decision, in which a clear amount is mentioned: *"prior to 2025 the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement shall set a new collective quantified goal from a floor of USD 100 billion per year, taking into account the needs and priorities of developing countries"* (§54).

U.S. constitutional law requirements have had a significant impact on this allocation. President Obama wanted the Paris Agreement to be considered an executive agreement rather than a treaty. While both these U.S. law categories amount to treaties under international law, U.S. law requires the ratification of a "treaty" to be authorised by the Senate with a 2/3 majority. Since the Senate, which was predominantly Republican at the time, was (and remains) hostile to this agreement, ratification of the Agreement if it were called a "treaty" was more than unlikely. However, an "executive agreement" may come into force pursuant to a decision of the President.[12] The latter may adopt such a decision even without prior consultation of Congress provided that he acts "*under existing legislative and regulatory authority*" and "*complements domestic measures by addressing the transnational nature of the problem*".[13] This is how, for instance, the United States became a party to the Minamata Convention on mercury by simple acceptance. These considerations evi-

9 See Art. 24 of the Paris Agreement, referring to Art. 14 of the UNFCCC, on settlement of disputes. The Paris Agreement makes 51 references to the UNFCCC.

10 Maljean-Dubois, S. & Rajamani, L., "L'Accord de Paris sur les changements climatiques du 12 décembre 2015", *Annuaire français de droit international 2015*, vol. 61, pp. 615-648.

11 Decisions 2/CP.15, §8 and 1/CP.16, 2010, *The Cancun Agreements*, §98.

12 Henkin, L., The President and International Law, *AJIL* 1986, pp. 930-937.

13 Bodansky, D., & Day O'Connor, S., *Legal options for U.S. acceptance of a new climate change agreement*, Center for Climate and Energy Solutions, May 2015. Available at: http://www.c2es.org/publications/legal-options-us-acceptance-new-climate-change-agreement (accessed on 21 December 2021).

dently impacted the form of the Paris Agreement, which, in order to be viewed as an executive agreement, imposes rather general and unquantified obligations of conduct and does not contemplate any sanction should commitments be breached. Even though the U.S. had thereafter expressed its intention to withdraw, it initially became a party to the Agreement on 3 September 2016, after signing on 22 April 2016.[14]

B. Different and complementary legal forces

While the COP decision and Paris Agreement are hence complementary, they do not have the same legal effect. Formally, the Agreement is binding on all ratifying parties. The scope of the COP decisions is more controversial. The UNFCCC provides that the COP "*may adopt, and shall make, within its mandate, the decisions necessary to promote the effective implementation of the Convention"* (Art. 7). But the legal force of these "decisions" remains ambiguous. It can only be determined through a case-by-case analysis of the individual provisions. Can these decisions create new obligations, bearing in mind that, whether or not they are binding, they undeniably have a significant practical and operational effect and may even apply *de facto* to states? Both the Bonn-Marrakesch "package", which operationalised the flexibility mechanisms of the Kyoto Protocol, and the Decision establishing the Protocol's control mechanism, have provided a remarkable example thereof.[15]

Decisions may lay down new rules or influence the interpretation of existing rules. In 1996, the International Court of Justice (ICJ) ruled in its *Whaling in the Antarctic* (Australia v. Japan) case that recommendations of the Whaling Commission "*which take the form of resolutions, are not binding. However, when they are adopted by consensus or by a unanimous vote, they may be relevant for the interpretation of the Convention or its Schedule*".[16] Furthermore, the ICJ stated that resolutions of the UN General Assembly, "*even if they are not binding, may sometimes have normative value*".[17] That is to say that even though COP decisions may be formally non-binding, they do carry normative value. Firstly, each state is bound to review these decisions in good faith, given that it reflects the opinion of all or most of the states that are party to a treaty. Secondly, in order to comply with the decision, a state may have to repeal the application of an existing norm, provided that it does not infringe established rights of other states. In that sense, a decision has at least a permissive value.

In the case of the Paris Agreement, the COP decision clarifies the Agreement on a number of matters, most notably in that it prepared its entry into force, which could have otherwise taken considerable time. The third part of the COP decision is thus entitled: "*Decisions to give effect to the Agreement*". It "*recognises that Parties to the Convention may provisionally apply all of the provisions of the Agreement pending its entry into force*" (§5), even though states are usually reluctant to do so. Part three also creates the Ad Hoc Working Group of the Paris Agreement, which is tasked with preparing the entry into force and the full implementation of the Agreement. This new body is tasked to "*prepare draft decisions to*

14 Rajamani, L., Reflections on the US withdrawal from the Paris Climate Change Agreement, *EJIL Talk*, 5 June 2017. Available at: https://www.ejiltalk.org/reflections-on-the-us-withdrawal-from-the-paris-climate-change-agreement/ (accessed on 12 December 2021).

15 Brunnee, J., Coping with Consent: Law-Making Under Multilateral Environmental Agreements, *Leiden Journal of International Law* 2002, vol. 15, issue 1, pp. 1-52.

16 Judgement of 31 March 2014, *ICJ Reports,* 2014, § 46.

17 Advisory Opinion of 8 July 1996, *ICJ Reports,* 1996, p. 254.

be recommended through the Conference of the Parties to the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement for consideration and adoption at its first session" (§11). It is asked, together with other bodies such as the Subsidiary Body for Implementation, to clarify a number of provisions of the Agreement, such as the form, characteristics and accounting methods of national contributions, the operation of a public registry of national contributions (Art. 4), or a transparency framework for the Agreement (Art. 14). The Ad Hoc Working Group was thus responsible to prepare the adoption of the so-called "rule book" of the Paris Agreement, a set of COP decisions operationalising its implementation.[18] Conscious that "*enhanced pre-2020 ambition can lay a solid foundation for enhanced post-2020 ambition*", the decision also aimed to encourage "*Enhanced action prior to 2020*", yet without much success.[19]

Paradoxically, the content of the treaty is not always normative in the sense that not all its provisions impose binding obligations. Having said that, it is interesting to note that a third of the decision's provisions are clearly intended to be binding. According to the decision, the Conference of the Parties "*decides*" in 50 out of 140 paragraphs. The decision further produces *de facto* real and operational effects (adoption of the Agreement, creation or continuation of various bodies, material organisation of various meetings, etc.) and even imposes various obligations on parties (e.g. guidelines for the submission of national communications by the parties). For instance, Article 4§9 of the Paris Agreement specifically states that parties "*shall communicate*" a Nationally Determined Contribution (NDC) every five years "*in accordance with decision 1/CP.21*" and paragraph 25 of the decision "*decides that Parties shall submit"* future NDCs 9 to 12 months in advance of the relevant COP. Paragraph 25 is therefore undoubtly legally binding and can hence rightly begin with "*decides*".[20] This illustrates how the decision and the treaty closely complement each other and are even inextricably linked. Similarly, when the COP decision states that "*in accordance with Article 13, paragraph 2, of the Agreement, developing country Parties shall be provided flexibility in the implementation of the provisions of that Article, …*" (§89), it is evident that this provision was meant to have binding effect. Lastly, when the decision provides that "*Article 8 of the Agreement does not involve or provide a basis for any liability or compensation*" (§52), this is a clear interpretation and even specification of a provision of the Agreement.

In conclusion, the decision clarifies and specifies the Agreement. It prepares both its entry into force and its implementation. This interpenetration of soft and hard law is commonplace in international environmental law, as a treaty, as part of a legal regime, is often only the tip of the iceberg. Non-binding soft law instruments adopted by treaty bodies are far more common and *"provide the detailed rules and technical standards required for implementation by the parties to a multilateral treaty and thereby ensure a common understanding of what that treaty requires*."[21] Contrary to what some might think, this is not a sign of a diluted normativity.[22] In fact, soft law is flourishing around a treaty where previously the treaty would have been the only instrument adopted. This represents a shift towards more law, even if it is *soft* law, in order to complement the treaty, rather than constituting an overall relaxation of regulations. It does however blur the lines between what is

18 This has also been the case for its predecessor under the Kyoto Protocol.
19 See below.
20 Bodansky, D., The Legal Character of the Paris Agreement, *RECIEL* 2016, vol. 25, issue 2, pp. 142-150.
21 Boyle, A. & Hey, E., Soft law, *Oxford Handbook of International Environmental Law,* 2021, Oxford, OUP, p. 425.
22 Weil, P., Towards Relative Normativity in International Law?, *American Journal of International Law* 1983, pp. 413-442.

or is not law, and thereby increases the porosity between hard and soft law. In international environmental law, "*de-formalisation*" is a fact of life;[23] it means that the question of whether instruments are legally binding becomes secondary. In fact, many dubiously binding instruments are nevertheless applied on a daily basis without the question of their bindingness ever being raised. Then again, many contractual or customary obligations are poorly applied. Ultimately, "*as long as the stage of mutual interest continues peacefully, the legal aspects of the relation can seem secondary*".[24] Isn't the central issue in the concept of "*compliance pull*"[25] primarily related to the legitimacy of the instruments in question? This does not mean denying the importance of the procedures and processes of law-making. The more open, transparent, inclusive the law is, the more it meets certain criteria of internal legitimacy.[26]

This interpenetration may be commonplace, but in the Paris Agreement it is clearly taken to the extreme. Not only were many future COP decisions necessary to specify the operational details of the Agreement, but perhaps more strikingly, the decision, which was meant to supplement the Agreement, was adopted at the very same time as the latter. This is a new feature, which can be explained not only by the demands of U.S. constitutional law but also by the requirements of international administration, which are ever more increasing and are accompanied by a significant bureaucratisation.

II. The content of state commitment: a subtle combination of top-down and bottom-up approaches

Not only the form of the Paris Agreement exhibits hybrid features, also its substance shows a hybrid mixture of bottom-up and top-down approaches. The contributions determined at national level do reflect a bottom-up approach, while other provisions in the Agreement like the transparency framework clearly demonstrate a top-down approach. As will be shown below, the Agreement therefore subtly combines both approaches in order to protect the sovereignty of states while engaging them in a process that is designed to be dynamic and incentivising.

A. The bottom-up approach at the heart of the Agreement

The bottom-up approach is at the heart of the Agreement, through the central tool of national contributions, but also through the recognised role of non-national and subnational actors.

- **Nationally determined contributions**
  In the negotiation marathon that led from Durban to Paris,[27] the 2013 Warsaw Con-

23 Koskenniemi, M., *The Politics of International Law*, Oxford, Hart, 2011; Pauwelyn, J., Wessel, R. & Wou, J., When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking, *EJIL* 2014, vol. 25, issue 3, pp. 733-763.
24 Lachs, M., Some Reflections on Substance and Form in International Law, in *Transnational law in a changing society. Essays in honour of Philip c. Jessup* 1972, New York, CUP, p. 100.
25 Boyle, A., & Chinkin, C., *The Making of International Law*, 2007, Oxford, OUP.
26 Brunnee, J., Coping with Consent: Law-Making Under Multilateral Environmental Agreements (2002), op. cit., pp. 1-52.
27 Decision 1/CP.17, 2011, *Durban Platform for Enhanced Action.*

ference constituted a key milestone. Up until then, the negotiations had pitted the proponents of a Kyoto Protocol-inspired approach, a prescriptive approach with "top-down" coordination, against the supporters of the approach adopted in Copenhagen, which offers more incentives and is based on "bottom-up" coordination. The latter approach prevailed in Warsaw. The COP thus invited "*all Parties to initiate or intensify domestic preparations for their intended nationally determined contributions"* (Decision 1/CP.19 (2013), *Further advancing the Durban Platform)* - thus launching a process that essentially had two advantages. First of all, it was to lead each party to undertake a reflection on its contribution to the future agreement in terms of form, content and level of ambition, and thus to prepare for it well in advance, often initiating a national debate within and/or outside of parliaments. In addition to that, it led states to "*lay all their cards on the table*" before the COP 2021 to enable each state to approach that conference with the knowledge of the others' commitment. This process, which is the opposite of the one adopted for Copenhagen, strengthens trust between parties and facilitates negotiation, especially as it is specified that these "*domestic preparations*" are "*without prejudice to the legal nature of the contributions*" (A/CP.19 §2 b).

During the following months, the form of the agreement emerged, but the legal force of the national contributions to the global effort to be submitted by the states remained to be determined. Right up until the end, drafts of the agreement left open the possibility for these contributions to be annexed to the treaty. However that seemed rather unlikely as many states strongly opposed this approach. Furthermore, this option had the disadvantage of freezing these national contributions, even if a mechanism facilitating their review was contemplated.[28] Shortly prior to the COP 21, their recording in a register held by the secretariat seemed to be the most likely option. But what would be the status of these contributions? Was the treaty going to impose their submission? Or was it going to impose the submission and implementation thereof? Or were they going to remain non-binding under international law?

It was eventually decided that these contributions were to be recorded in a public register held by the secretariat (Art. 4§12 & 7§12). The advantage of this approach, which was already used in respect of states' pledges to reduce emissions pursuant to the above-mentioned Cancun Agreements, lies in its flexibility. This is all the more important as contributions are renewed every five years and in the meantime "*a Party may at any time adjust its existing nationally determined contribution with a view to enhancing its level of ambition*" (Art. 4§11).

As to the legal force of these contributions, it was also a compromise that prevailed. Article 4§2 provides that "*each Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions*". The parties thus do have the (procedural) obligation to prepare and submit a national contribution, no later than at the time when they submit their ratification instrument. The parties' obligation is not one of result but one of conduct: they are obliged to adopt internal measures to achieve their objectives. In addition, nationally determined contributions may be seen as unilateral declarations which also create legal obligations of various types. As demonstrated by Benoît Mayer, the potential "*double-bindingness"* of NDCs should be a central consideration in the interpretation of international law obligations regarding climate change.[29]

28 Kerbrat, Y., Maljean-Dubois, S. & Wemaëre, M., Conférence internationale de Paris sur le climat en décembre 2015 : comment construire un accord évolutif dans le temps ?, *Journal du Droit International* 2015, issue 4.

29 Mayer, B., International law obligations arising in relation to Nationally Determined Contributions, *Transnational*

- **Mobilizing non-state and sub-national actors**

In line with the Lima Paris Action Agenda (LPAA) which played an important role in the preparation of COP 21, the Paris Agreement also directly addresses non-state and sub-national stakeholders. Whether civil society, large corporations, or mayors of the world's biggest cities - COP 21 has demonstrated at official and informal level how many initiatives there are to help create an optimistic climate and place negotiators in front of their responsibilities. Is it possible for an international agreement to support such a movement directly, to acknowledge the action of such actors? Or should it rely, in a more traditional manner, on state obligations and leave states to pass these on to private and local stakeholders? These questions were discussed at length, but many states were reluctant, and the outcome of the COP 21 is therefore well beneath the expectations raised in this respect. The Agreement simply recognises, in its preamble, "*the importance of the engagements of all levels of government and various actors, in accordance with respective national legislations of Parties, in addressing climate change*". The preamble of the COP decision is more specific as it sets out the need *"to uphold and promote regional and international cooperation in order to mobilise stronger and more ambitious climate action by all Parties and non-Party stakeholders, including civil society, the private sector, financial institutions, cities and other subnational authorities, local communities and indigenous peoples*". The decision actually dedicates a whole section to "*Non-Party stakeholders*". In section V, it "*welcomes the efforts of all non-Party stakeholders to address and respond to climate change, including those of civil society, the private sector, financial institutions, cities and other subnational authorities*". Beyond that, it merely invites them to step up their efforts and to demonstrate them on the internet platform on climate action.

The reactions of U.S. sub-state and non-state stakeholders following the announcement of the U.S.' withdrawal from the Paris Agreement, continuing to commit to the Agreement even without the White House, have demonstrated the usefulness of this innovative process, which encourages, recognises and supports actions that are essential to the effectiveness of the commitments made by states and, moreover, to the mechanism as a whole.[30]

B. The added value of the Agreement: the top-(back-)down approach

As contributions are nationally determined, the question arises as to whether the Agreement retains its *raison d'être*. The answer is yes, for two reasons.

1) Creating a dynamic

The first *raison d'être* of the treaty is to create a dynamic by encouraging states first to commit, and then to gradually increase their level of commitment.

- **Encouraging states to commit**

Negotiators were well aware of the lack of ambition of States' climate policies and used the following image: the Agreement was like a bus. The key thing was that everyone should get on board. The rest would then be settled later. It seems that everybody feared that the agreement would suffer a fate similar to that of the Kyoto Protocol where the U.S.

Environmental Law 2018, vol. 7, issue 2, pp. 251-275.

30 See for instance the "We are still in initiative". Available at: https://www.wearestillin.com/ (accessed on 22 January 2022).

had not joined in the first place and Canada had left.

The Agreement hence aimed to pursue this objective by being quite soft and mostly incentivising in its substance. Commitments were based on nationally determined contributions respecting national sovereignty. It contains mostly procedural obligations and only few substantial ones. This is clearly the case for national contributions: their substance is to be determined by the states, but in terms of procedure the Agreement sets very specific standards as regards the communication and transparency of such contributions. Commitments – such as the commitment to limit global warming – are often collective rather than individual. Statements such as "*Support shall be provided to developing country Parties"* (Art. 4§5) do not have a specific addressee. They set out a vague obligation for all states and institutions, but are not worded as an individual obligation. No sanction can be imposed if a state does not comply with the Agreement. Instead, the Agreement merely provides that control will be "*facilitative in nature and function in a manner that is transparent, non-adversarial and non-punitive*" (Art. 15).

Furthermore, the Agreement relies on a very subtle differentiation of the states' obligations depending on factors such as their level of development or the country group they form part of. If the ambitious goals, specific obligations and strict monitoring mechanism of the Paris Agreement were to be applied to all states in the same way, they likely would not have been accepted by most developing countries. This is why the Agreement is firmly embedded in the principle of common but differentiated responsibilities and respective capabilities of the parties, which is enshrined in the Convention, but will henceforth be implemented "*in the light of different national circumstances"*.[31] A similar wording had already been included in the Lima decision in 2014 (aforementioned, §3) and was then inspired by the Chinese-American Agreement of 12 November 2014. It is again the outcome of a compromise. Southern countries were satisfied with the reference to the principle, and Northern countries considered that this addition allows for the possible evolution of differentiation in the future as this wording allowed for a dynamic interpretation in light of evolving national circumstances. This is also mentioned five times in the Paris Agreement (Preamble, Art. 2§2, 4§3, 4§4, 4§19).

Compared with the binary mechanism of the Kyoto Protocol, the Agreement actually adopts a much more nuanced form of differentiation in favour of developing countries. It also extends the financial, technological and capacity-building support that they may receive. The Agreement could not have become an acceptable compromise for all countries without this subtle balance between differentiation and ambition.

The Agreement operationalises differentiation in various ways, adapting to the specificities of each element of the Agreement (mitigation, adaptation, finance, technology, capacity-building and transparency). The forms of differentiation thus vary depending on the aspects involved. Differentiation also relies on a basis that is less ideological and more pragmatic than it used to be. With regard to mitigation for example, the provisions do not formally differentiate between Northern and Southern countries (except for Art. 4§4). In reality however, differentiation is taken to the extreme through the system of nationally determined contributions that constitutes a self-differentiation. In respect of finance however, differentiation is based on a more traditional consideration, distinguishing between developed and developing countries, even though article 9 reveals a third

31 The Agreement refers several times to the principle but also to equity or climate justice. Article 2 is the most significant provision in this respect.

category, the "other parties" category, in between developed and developing countries.

- **Encouraging the states to be more ambitious**

The collective effort is therefore the result of the aggregation of "*nationally determined*" contributions. With a view to the common goal of keeping global warming well below 2°C, it is for the parties themselves to determine how ambitious they want to be in their contribution. Until now, there has been no burden-sharing of the implementation of this collective objective. This was different under the Kyoto Protocol, where the burden was equally shared at the international level as well as between the fifteen (at the time) countries of the European Union, who had allocated between themselves a common objective of reducing their emissions by 8%.[32]

This is why everything is being done to encourage states to increase their contributions, to adjust them on the basis of scientific and technological knowledge and depending on the economic, political and social contexts. The parties are required to submit their updated contribution on a regular basis.[33]

In fact, each contribution must constitute a progress from the previous contribution, which goes above and beyond the principle of non-regression defended by some environmentalists (Art. 3).[34] This principle, which became known as the "no-backsliding" principle, goes back to the decision adopted in Lima.[35] Many developing countries defended it, to ensure that developed countries would not make less ambitious commitments in comparison with the ones they made under the Kyoto Protocol. This principle was also at the heart of the Brazilian proposal of "concentric differentiation", which envisaged a gradual evolution towards increasingly ambitious commitments for all parties.[36] But also under this proposal the parties are free to determine their respective progression, which may lie in the form and/or substance of their contributions.[37]

The contribution must amount for each party to "*its highest possible ambition*", while "*reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances*" (Art. 4§3). The objective is clearly differentiated between the Northern and Southern countries. Thus, it is provided that: "*[d]eveloped country Parties should continue taking the lead by undertaking economy-wide absolute emission reduction targets. Developing country Parties should continue enhancing their mitigation efforts, and are encouraged to move over time towards economy-wide emission reduction or limitation targets in the light of different national circumstances*" (Art. 4§4). The final two hours of the negotiations led to the replacement of the mandatory 'shall' by a recommended 'should' at the request of

32 This *burden sharing* was carried out by applying a basket of criteria established by the Utrecht University, based on the population, growth and energetic efficiency as well as opportunity or more political considerations. Phylipsen, G., Bode, J., Blok, K., Merkus, H. & Metz, B., A triptych sectoral approach to burden differentiation; GHG emissions in the European bubble, *Energy Policy* 1998, n° 26, pp. 929-943.

33 The Paris Agreement provides that the meeting of the Parties to the Paris Agreement will "*consider common time frames*" (Art. 4 §10, §23 of the Decision). National contributions should thus ultimately follow synchronised timeframes based on 5-year cycles; Decision -/CMA.3, *Common time frames for nationally determined contributions referred to in Article 4, paragraph 10, of the Paris Agreement*, adopted at the COP26 in Glasgow (2021).

34 Prieur, M. & Sozzo, G. (eds.), *La non-régression en droit de l'environnement*, 2012, Bruxelles, Bruylant.

35 Decision 1/CP.20, 2014, *Lima call for climate action*, §10.

36 UNFCCC, 6 November 2014, *Views of Brazil on the Elements of a New Agreement under the Convention Applicable to All Parties*.

37 Article 3 echoes this provision: "*The efforts of all Parties will represent a progression over time*". However, the progression, which is broader as it concerns all "*efforts*" (mitigation, adaptation, financing, etc.) is assessed collectively here.

the United States and some developing countries. This replacement significantly reduces the strength of this provision.[38]

Next to the obligation to submit a contribution that is as ambitious as possible, and that is more ambitious than the previous one, parties may "*at any time*" amend their contribution "*with a view to enhancing its level of ambition*" (Art. 4§11).

Moreover, in order to assess the adequacy of the efforts aggregated altogether against the envisaged global goal, and to increase the pressure on states, Article 14 lays out the principle of a global review, referred to as a "*global stocktake*", that is to take place every five years.

Unfortunately, even six years after its adoption, the temperature limitation target set in the Agreement based on our emissions' trajectories is still completely unrealistic. This is established annually by the United Nations Environment Programme in its report entitled *The Emissions Gap,* which is released before each COP.[39] The latest report, which was published in 2021, estimates that even if the parties' contributions are all taken together, they do not come close to 2C°, but rather 2.7°C. This is undoubtedly progress compared to the 4 or 5 °C expected by so-called "business-as-usual" scenarios, but we are still very far from the objective set out in the Paris Agreement and, perhaps even more importantly, from the safe operating range of our planet.[40]

2) Guaranteeing the transparency of actions and policies

The provisions ensuring transparency and control are all the more important in a flexible system where contributions are determined by states themselves. The enhanced transparency framework has been referred to as the "*beating heart*" of the Paris Agreement.[41] It reintroduces more or less top-down aspects to an approach that is predominantly bottom-up. Importantly, it also creates trust between the state parties, which has a positive impact on their willingness to increase their commitments. It equally enables the monitoring of parties' efforts, and to confront them accordingly to the target emissions trajectory. Negotiators were well aware of this, and special care was dedicated to this matter on which a great part of the robustness of the Agreement depended.[42]

The strength of the adopted provisions comes from the concerted efforts of an informal group of key negotiators, emanating both from developing and developed countries, including in particular South Africa, the European Union, the United States, Switzerland, New Zealand, Australia, and Singapore.[43] This informal group, which is referred to as "*Friends of Rules*" was formed after Lima, when its members realised that the rules of

38 This amendment was presented as a typographic correction in order to enable the adoption of the Agreement. It obviously went way beyond that.

39 UNEP, 2021, *Emissions Gap Report 2021, The heat is on. A world of climate promises not yet delivered*, Executive Summary, IV.

40 Steffen, W. et al., Planetary Boundaries: Guiding human development on a changing planet, *Science* 13 Feb. 2015, vol. 347, issue 6223, p. 1.

41 Rajamani, L. & Werksman, J., Climate Change, *Oxford Handbook of International Environmental Law,* 2021, Oxford, OUP, p. 505.

42 Voigt, C., The Compliance and Implementation Mechanism of the Paris Agreement, *RECIEL* 2016, vol. 25, issue 2, pp. 161-173.

43 Maljean-Dubois, S. & Rajamani, L. (2015), L'Accord de Paris sur les changements climatiques du 12 décembre 2015, op. cit., p. 615.

the game are of great significance for the integrity and effectiveness of the climate agreement, especially when political questions overshadow the negotiation process.

As regards transparency and control, the Paris Agreement merely lays down key principles in its articles 13 to 15. The Agreement provides a glimpse into a process that respects state sovereignty but equally ensures the accountability of states. This procedure takes the form of a triptych composed of three – more or less distinct – parts: the transparency framework (Art. 13), the global stocktake (Art. 14), and the control itself (Art. 15).

In article 13, the Agreement thus proceeds to establish an "*enhanced transparency framework for action and support*". However, while being referred to as "*enhanced*", this framework is equally characterised by "*built-in flexibility which takes into account Parties' different capacities*" (Art. 13§1 §2). It is specifically recognized that this framework must be implemented "*in a facilitative, non-intrusive, non-punitive manner, respectful of national sovereignty, and avoid placing an undue burden on Parties*". Apart from these assurances to reassure the parties, the transparency framework is based on an established system, i.e. the mechanisms, procedures, and obligations that exist under the Convention (Art. 13§4). Article 13§5 continues to give a "*clear understanding*" of the measures, "*including clarity and tracking of progress towards achieving Parties' individual nationally determined contributions*". This also applies to measures of financial support, both received and provided, which means that information can be cross-checked here as well to provide a "clear understanding" (Art. 13§6). The parties are required ("*shall*") to "*regularly*" provide a national inventory report on anthropogenic emissions by sources and removals by sinks of greenhouse gases, prepared in accordance with the methodologies adopted by the IPCC and the information necessary to monitor progress in the implementation of their nationally determined contribution pursuant to article 4. In contrast, the parties "should", rather than "shall", provide information on the support provided and received, especially as regards the question whether it is "*financial, technology transfer and capacity-building support*" (Art. 13§9-10).

What is interesting is that this information is subject to a "*technical expert review*". This technical phase is followed by a political phase of *"facilitative, multilateral consideration of progress"* (Art. 13§11). The technical review shall *"identify areas of improvement for the Party*" (Art. 13§12), which is in fact a paraphrase to refer to potential or actual infringements. The review assesses whether the information provided is in accordance with the modalities, procedures and guidelines that will be established by the meeting of the parties to the Agreement.[44] Support is provided to developing countries to assist them in the implementation of these provisions. Here the Northern countries have pushed through- especially against the preferences of China and of many Southern countries - that the transparency system is the same for all. Thus, even though this system is focused on facilitation, the outlined mechanism seems to be relatively intrusive for all. While it remains to be seen what operational details will be adopted by the meeting of the Parties, it currently seems that the system's individual nature, the large range of information it requires as well as the dual intervention of an independent and impartial technical committee and the subsequent passing of the baton to a political body, possibly the COP, for the purpose of a multilateral review, will not make the system less intrusive for the time being.

The transparency framework, which consists of the individual review of the implementation of the Agreement by the parties, is supplemented by the "*global stocktake*" con-

44 See Decision, §93.

templated in article 14. The aim of this global stocktake is to assess the "*collective progress*", "*in a comprehensive and facilitative manner, considering mitigation, adaptation and the means of implementation and support, and in the light of equity and the best available science*" (Art. 14§1). The first global stocktake will take place at the mid-cycle, without waiting for the end of the first cycle, in 2023, and, subsequently, every five years. Yet, the states have taken further precautions. The assessment of this achieved collective progress will be facilitative (i.e. non-binding); it will take into account "*equity and the best available science*". The reference to equity may leave the door open to a collective reflection as to the modalities of "*burden sharing*" in the light of the "*common but differentiated*" responsibilities of the states in this regard.

The global stocktake, which covers mitigation and adaptation efforts as well as support measures, will play a significant role as "*the outcome of the global stocktake shall inform Parties in updating and enhancing, in a nationally determined manner, their actions and support in accordance with the relevant provisions of this Agreement, as well as in enhancing international cooperation for climate action"* (Art. 14§3). This provision is evidently very carefully drafted. On the one hand, it clearly provides that the results of the stocktake will inform the determination of states' contributions. But on the other hand, it highlights that these are to be determined at national level. It should also be noted that the objectives as regards adaptation, finance or technology are, at least in the Agreement itself, qualitative rather than quantitative in nature which introduces a degree of uncertainty in the assessment of collective progress.

The third component to ensure transparency is the non-compliance mechanism. This kind of mechanism is very common in international environmental law, and its effectiveness has been demonstrated on numerous occasions in the past.[45] Apart from a number of common features, each procedure is ultimately unique. It will differ in terms of how it is initiated, the handling of presumed infringements or the reaction to a proven infringement. What is however common to all of these procedures, is that they aim to identify the challenges the states face as early as possible and to address them through gradual and adapted means (support, incentives, sanctions). They tend to be facilitative and rarely lead to sanctions, which are generally counterproductive anyways. The goal is rather to prevent non-compliance and when it occurs, to assist the state to comply. Pursuant to the Kyoto Protocol, a very intrusive procedure had been put in place that could lead to relatively hefty sanctions.[46] Praised as a remarkable innovation at the time, it also swiftly revealed its limits. In fact, Canada used its right to leave the Protocol in order to avoid its sanction under this procedure.

Since states apparently learned the lesson from this instance, and because the spirit of the Paris Agreement is very different from that of the Protocol, the procedure chosen here is much more traditional. All the precautions are taken to prevent the Committee from sanctioning a non-complying state. But also this approach is not without criticism. It has been condemned as one of the great weaknesses of the Agreement by several commentators.[47] In fact, this weakness goes beyond the Paris Agreement and is frequently observed in international law.

45 See for instance: Koskenniemi, M., Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol, *Yearbook of International Environmental Law* 1992, vol. 3, issue 1, pp. 123-162.
46 See Decision 27/CMP.1, 2005, *Procedures and mechanisms relating to compliance under the Kyoto protocol.*
47 For instance: Gros, D., The Paris Agreement Is the Shove the World Needs, *Slate,* 14 Dec. 2015.

The absence of sanctions in the Paris Agreement, at the end of the day, shows that lessons have been learned from the past. Since the spirit of the Paris Agreement is utterly different from the Kyoto Protocol, arguably sanctions would have been incompatible with the former. Even further, one may question whether the effectiveness of international law depends solely on the ability to sanction non-compliance. In fact, in this authors view, it generally does not depend thereon at all.

Conclusion

To conclude, I could not agree more with Serge Sur who argued that the positive analysis of international law shows that its foundations have not changed much. According to Sur both state actions and the international commitment of states still form the basis of international law.[48] International climate negotiations have proven this. Yet, at the same time, the Paris Agreement shows that the function assigned to an international treaty, or in other words, the way in which states commit themselves, evolves over time.[49] In this regard, the form and substance of the Agreement have been carefully crafted to enable a consensus that seemed unattainable just a few months before.

Despite the way in which the Paris Agreement was designed, and even though its provisions have no or little direct effect, the Agreement increases pressure on states, including – and perhaps most importantly – at the domestic level. In fact, scientists continue to warn about the race against time when it comes to climate change. Given that greenhouse gas emissions are cumulative, any delay in international action jeopardises the chances to actually hold the temperature increase well below 2°C and *a fortiori* below 1,5°C. In view of the findings of the IPPC-1,5°C-Report,[50] the first part of IPCC's Sixth Assessment Report (AR6),[51] and the growing mobilisation of civil society, it becomes ever more difficult politically speaking for states to stick to national contributions that, once aggregated, could not lead to a drastic reduction of emissions that would remain "*well below 2°C*" and as close as possible to 1,5°C. The Paris Agreement has decisively contributed to increase the number of domestic climate litigation thanks to the engagement of civil society. This has given national courts the opportunity to position themselves as important actors in climate governance. Even if the results are not yet satisfactory, this somewhat renewed form of international commitment by the states has in turn led to renewed forms of control that – hopefully – will lead to greater effectiveness.

48 Sur, S., *Les dynamiques du droit international*, 2012, Paris, Pedone, 316 p.
49 Chan, S., Brandi, C. & Bauer, S., Aligning Transnational Climate Action with International Climate Governance: The Road from Paris, *RECIEL* 2016, vol. 25, issue 2, pp. 238-247.
50 IPCC, 2018, *Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty.*
51 IPCC, 2021, *Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change.*

fypl french yearbook *of* public law
Issue 1, 2023

European Union law in times of climate crisis: change through continuity

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Abstract:

This paper examines the impact of climate change challenges on European administrative law. Despite the disruptive effects of climate change, the structure of Union law remains largely unchanged, suggesting the EU's commitment to addressing this challenge within its existing legal framework. While the EU relies on established mechanisms for its climate change policies, it also demonstrates adaptability and flexibility in pursuing its objectives, resulting in a dynamic regulatory environment. The paper discusses the use of existing legislative tools and the enrichment of regulatory mechanisms, especially in terms of governance and control. However, it raises questions about the suitability and adequacy of these mechanisms in the context of climate transition.

Keywords:

Climate change, European administrative law, European Union law, Regulation of climate transition

From the very beginning of the development of an international policy to combat climate change, through the adoption of the UN Framework Convention on Climate Change[1] and later the Kyoto Protocol,[2] the European Union played a leading role in the international arena. The Union's commitment was only reinforced following the failures of the Copenhagen Summit, given the former's continuing efforts to push for the conclusion and subsequent ratification of the Paris Agreement. The Union's unique legal nature was swiftly regarded as a strength in this context. Indeed, the effectiveness of EU law and its enforcement mechanisms are promising features to successfully set international standards.[3] Ratifying these conventions compels the EU to ensure the effectiveness of these international obligations, which introduces another layer of – perhaps more effective - accountability for Member States.

Combatting climate change has therefore altered the European Union's legal system, both on normative and institutional level. The European Union has long been a pioneer in this area. Its Emissions Trading Scheme for instance allocates emissions quotas to companies.[4] More recently, the launch of the Green Deal has strengthened the ground on which the Union develops action in this field. Whereas the Green Deal is not exclusively limited to environmental issues, combatting climate change nevertheless occupies a significant place therein. Aiming to make the Union "the first climate-neutral continent", reaching zero net GHG emissions in 2050 and decoupling economic growth from resource use, the EU's objectives are undisputedly ambitious. They are implemented in the context of the so-called 'Fit for *55* package', aiming to reduce emissions.[5] The European Union's commitment has been translated to an increasingly precise, thorough, and sophisticated body of legislation, illustrating the angles from which action can be taken to tackle this challenge.

However, the ultimate successes – provided they do exist – have not yet been fully materialised.[6] From a substantial point of view, the challenge of combating climate change implies profound systemic changes which the present political, economic and even philosophical system might ultimately not be able to tackle. The need for radical change in

1 United Nations Framework Convention on Climate Change, 9 May 1992, ratified by the EU by Council Decision 94/69/EC of 15 Dec. 1993 concerning the conclusion of the United Nations Framework Convention on Climate Change, OJ L 33, 7.2.1994, pp. 11–12.

2 Kyoto Protocol to the United Nations Framework Convention on Climate Change and the joint fulfilment of commitments thereunder, 11 Dec. 1997, ratified by the EU by Council Decision 2002/358/EC of 25 April 2002 concerning the approval, on behalf of the European Community, of the Kyoto Protocol to the United Nations Framework Convention on Climate Change and the joint fulfilment of commitments thereunder, OJ L 130, 15.5.2002, pp. 1–3.

3 Oberthür, S. & Pallemaerts, M. (eds.), *The New Climate Policies of the European Union: Internal Legislation and Climate Diplomacy*, 2010, Brussel, Asp/ Vubpress /Upa.

4 Dir. Nº 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, OJ L 275, 25.10.2003, pp. 32–46.

5 The Fit for 55 package is a set of proposals to revise and update EU legislation and to put in place new initiatives with the aim of ensuring that EU policies are into line with the climate goals, noticeably in the field of energy, transport, agriculture…

6 Since its introduction in 2005, the EU's emissions have decreased by 41%, see: https://www.consilium.europa.eu/en/policies/green-deal/fit-for-55-the-eu-plan-for-a-green-transition/.

managing this issue undeniably calls for a re-evaluation of potential approaches.

Generally speaking, climate change challenges have had a disruptive effect on legal systems, notably by altering modes of governance and enriching interactions between legal systems.[7] Yet, it does not seem as if the structure of Union law in general, or of European administrative law in particular, has been deeply altered or called into question. It seems that the Union envisaged to tackle the perhaps greatest challenges of the century on the basis of its legal system in its present shape. This paper aims to analyse the regulatory paths developed by the EU, showing that from a formal and procedural perspectives, innovation remains limited. The EU primarily relies on existing mechanisms. One may wonder whether such an approach is fully adequate to tackle the challenge of climate transition. However, one also has to admit that the Union shows a great potential to adapt itself, to be flexible enough to be resilient to achieve its objectives, while creating an interesting regulatory dynamic. The EU's climate change policy required the adoption and amendment of numerous pieces of legislation, using both classical and original tools, yet none which would be specific to the regulation of climate transition (I). The EU's regulatory mechanisms and governance have been enriched. Particular attention has been paid to control mechanisms, which have not changed significantly, and thus raise questions of adequacy (II).

I. Different paths of regulation

While the Paris Agreements[8] undoubtedly mark a turning point in the intensity of the Union's legislative output in the fight against climate change, post 2015 the Union made intensive use of its competencies in the field and increased its legislative activities (2.1). Beyond the obvious quantitative increase in legislation (2.2), it is worth pointing out the broad diversity of the approaches adopted. The challenge of fighting climate change has an impact on regulatory approaches. While these developments, such as the use of soft law or standards, are not necessarily specific to this field, they are characteristic features thereof, over and above the increasing density of legislation (2.3). At the same time questions might be raised to further amend existing legislation (2.4).

A. Extending the European regulatory framework: a matter of competences

Firstly, from a substantial perspective, the European Union's action to fight against climate change is long-standing and now covers a broad spectrum. Combating climate change is one of the EU's environmental policy objectives.[9] However, managing the climate emergency called for a multi-scale approach, relying on several different legal bases as provided for in the Treaty: environment, protection of human health,[10] transport,[11]

7 Fisher, E., Scotford, E., Barritt, E., "The Legally Disruptive Nature of Climate Change", *The Modern Law Review* 2017, vol. 80, issue 2, pp. 173-201.

8 Paris Agreement of 12 Dec. 2015, ratified by the EU by Council Decision (EU) 2016/590 of 11 April 2016 on the signing, on behalf of the European Union, of the Paris Agreement adopted under the United Nations Framework Convention on Climate Change, OJ L 103, 19.4.2016, pp. 1–2.

9 Art. 191 §1 TFEU.

10 Art. 168 TFEU.

11 Art. 90 TFEU.

energy,[12] international trade,[13] agriculture,[14] etc. The diversity of legal bases available makes allows for the adoption of a systemic approach, which is essential for managing the climate crisis. Whereas the environmental impact of the climate crisis seems evident, all areas of public policies are called upon to develop an effective response. Given that the cause of climate change is primarily anthropogenic, no field of human action should prima facie be excluded.

Given the specific features of the Union's legal system, several preconditions must be fulfilled before the Union may take action in the first place. Governed by the principle of conferral, the EU can only intervene to the extent and with the intensity provided for by the Treaties. This is a major constraint on potential Union action, and raises issues of consistency. Yet two features facilitate the development of a coherent approach. Firstly, as per Article 11 TFEU environmental protection should generally be taken into account in any European policy. Secondly, it should be pointed out that the European Union's action on climate change is now part of the overall framework of the Green Deal.[15] The latter represents a roadmap that will enable the EU to realise its ambitions in the field of environmental protection. It is based on the assumption that all measures and policies adopted by the EU must play a part in achieving climate neutrality.

Moreover, to fully understand the scope of EU action in the field one needs to pay attention to the very basics of European constitutional law - the conditions under which the EU may exercise its competences and the intensity thereof. European law knows three different kinds of competences – exclusive, shared and supporting/coordinating competences. Shared competences, to which environmental protection largely belongs,[16] is governed by the principles of subsidiarity and proportionality.[17] This means that EU action is to be limited to those cases in which the EU is better suited to act than the Member States which often translates into the Union limiting itself to govern the most essential aspects of the policy. Thus, by its very nature, the Union's action, even if significant, is often incomplete. To comprehend the full scope of the policy national implementation and/or the exercise of national competence, which complement the exercise of the EU competence, will have to be considered.[18] The fact remains, however, that the European Union has proven to be increasingly interventionist in this area.

B. Normative and regulatory techniques

Apart from the question of competences, various techniques are used in the regulation of the climate crisis and transition by the Union.

First of all, a normative, rather classical approach aims at defining rules of behavior, obligations and rights targeting primarily the Member States and economic operators.

12 Art. 194 TFEU.

13 Art. 206 TFEU.

14 Art. 38 TFEU.

15 Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions "The European Green Deal", com/2019/640 final.

16 Art. 4(2)(e) TFEU.

17 Art. 5 TEU.

18 The question will not be dealt with in this contribution, which limits itself to focus on the European Union's action.

Obviously, indirectly these rules may also have an impact on individuals, NGOs and sub-state authorities, all of which will be targeted at the stage of implementation of European law. It is interesting to note that recently texts which are emblematic of the Union's general approach have been adopted. For example, the European Union has adopted "its Climate Law", expressly referred to as such - even though formally this 'law' takes the form of a regulation.[19] The terminology used is clearly inspired by national law concepts. The *climate law* sets out the Union's commitments and objectives, and defines the areas in which they are to be implemented. Moreover, within the 2030 European Union climate and energy policy framework[20] a dedicated instrument concerning greenhouse gas emissions and removals from land use, land-use change and forestry (LULUCF) was adopted.[21] The latter proved necessary given that these activities are potentially high emitters of greenhouse gases,[22] and are hence decisive carbon sinks to achieve climate neutrality. The legislation is furthermore interesting because the question of soil use is a subject that is hardly addressed in European Union law, unlike the other components of the ecosystem.[23]

The just described normative approach is further supported by other techniques. First of all, a salient feature is the setting of targets in various pieces of legislation. The overall reduction target as set out in the Climate Law is divided according to each field of action (renewable energies, energy reduction, limiting air emissions, etc.). Climate transition legislation is thus largely dominated by numbers. This mode of governance by objectives is rooted in international law and particularly the fight against climate change.[24] Governance by numbers seems to be a general feature of today's societies,[25] using quantified targets seeking the effective achievement of quantified objectives. Mobilising numbers is thus conceived a means of reinforcing the effectiveness of policies. Whereas this mode of governance is evidently rather straight forward, leaving little room for concepts with an indeterminate content, it does raise questions in terms of the relationship with the norm. This, in turn, has consequences for the drafting of standards and their implementation.

Firstly, it means that scientific data must be closely considered, and experts must be

19 Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law'), PE/27/2021/REV/1, OJ L 243, 9.7.2021, pp. 1–17.

20 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions a policy framework for climate and energy in the period from 2020 to 2030, COM/2014/015 final.

21 Regulation (EU) 2018/841 of the European Parliament and of the Council of 30 May 2018 on the inclusion of greenhouse gas emissions and removals from land use, land use change and forestry in the 2030 climate and energy framework, and amending Regulation (EU) N° 525/2013 and Decision N° 529/2013/EU PE/68/2017/REV/1, OJ L 156, 19.6.2018, pp. 1–25.

22 The sector is responsible for more than 11% of the gas emissions. See also Savaresi, A., Perugini, L., Chiriaco, M.-V., "Making sense of the LULUCF Regulation: Much ado about nothing?", *RECIEL* 2020, vol. 29, pp. 212–220.

23 Proposal for a Directive of the European Parliament and of the Council establishing a framework for the protection of soil and amending Directive 2004/35/EC, COM/2006/0232 final - COD 2006/0086. A new proposal is pending since recently (Proposal for a Directive of the European Parliament and of the Council on Soil Monitoring and Resilience (Soil Monitoring Law), COM/2023/416 final.

24 See Kyoto Protocol.

25 Supiot, A., *La Gouvernance par les nombres*, 2015, Paris, Fayard.

involved in the decision-making process.[26] The drafting of legislation must have a dynamic dimension and must be able to evolve in line with scientific knowledge. Besides, implementation involves monitoring both the results and scientific developments, revising the objectives where necessary.

Secondly, the promotion of quantified targets allows for greater flexibility at the stage of national implementation. Member States are bound to achieve the set objectives, particularly in terms of reducing emissions or developing renewable energies but are given the freedom to determine the means and public policies to be implemented to achieve them. This also constitutes a form of solidarity between Member States. Indeed, regulating by figures allows for an individualisation of objectives, while at the same time promoting a global common approach. This becomes particularly evident in the Effort Sharing Regulation, initially adopted in 2018 and amended in 2023.[27] The Regulation provides for objectives of emission reduction adjusted to each Member State, in order to contribute to the European objective of *55%* by 2030. The Regulation recognises the different capacities of Member States to take action by differentiating targets according to Gross Domestic Product (GDP) per capita across Member States.[28] The latter seems relevant since the level of emissions is closely linked to the level of economic wealth.[29] Flexibility is further enhanced by the compensation mechanisms provided for in the Regulation, inspired by the Kyoto Protocol, particularly the possibility of borrowing, banking and transferring annual emission allocation.[30]

Regulating by objectives has significant consequences for the scope of the obligations imposed on the Member States. It appears that setting quantified targets at European level has ultimately hardened the obligations imposed on Member States, given that individuals, NGOs, and potentially others may bring actions before a national court enforcing the easily measurable objectives. In *l'Affaire du siècle* for instance[31] the French administrative judge followed a classical line of reasoning, pointing out that the Paris agreements could not be invoked since the provisions did not have direct effect under national law. Yet given that France had set a target which was evidently insufficient to reduce its energy budget, particularly in light of the objectives set by the European Union,

26 Art. 3 of Regulation 2021/1119 (Climate Law) set up the European Scientific Advisory Board on Climate Change, which "shall serve as a point of reference for the Union on scientific knowledge relating to climate change by virtue of its independence and scientific and technical expertise".

27 Regulation (EU) 2018/842 of the European Parliament and of the Council of 30 May 2018 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 amending Regulation (EU) No 525/2013 PE/3/2018/REV/2, OJ L 156, 19.6.2018, pp. 26–42; Regulation (EU) 2023/857 of the European Parliament and of the Council of 19 April 2023 amending Regulation (EU) 2018/842 and Regulation (EU) 2018/1999PE/72/2022/REV/1, OJ L 111, 26.4.2023, pp. 1–14.

28 It also includes Iceland and Norway which agreed to implement the Effort Sharing Regulation and commit to the binding 2030 emission reduction targets.

29 See the level of emissions per Member State: https://www.touteleurope.eu/environnement/les-emissions-de-gaz-a-effet-de-serre-dans-l-union-europeenne/.

30 See Art. 5 of Regulation (EU) 2018/842, id.

31 Administrative Tribunal of Paris, 3rd February 2021, n° 1904967-1904968-1904972-1904976.

the claim brought was ultimately successful.[32] Similarly, in *Commune de Grande-Synthe*,[33] the French Council of State found that the French government had failed to take the necessary measures to achieve the objectives set out in Decision 406/2009 and Regulation 2018/842. The measurable European targets thus clearly limit the Member States' room for manoeuvre, reinforcing the scope of the obligation to reduce emissions. The more specific the targets are, the easier it is to argue that they have not been achieved.

Another feature of the European regulatory approach of climate transition is the use of soft law, such as guidance documents.[34] Here again, the development of soft law is not exclusively specific to this field or to the European Union's legal system in general. Soft law fulfils different functions, ranging from agenda-setting to policy-steering. The use of soft law is "highly valuable in the technically, scientifically and politically complex field of environmental law at large or climate change law in particular", soft law instruments offer "efficient and adaptative policy solutions".[35] Despite a missing normative dimension in the traditional sense of the term,[36] soft law instruments are standards that are followed and regulate the field of climate change, particularly at the stage of implementation at national level.[37] Indeed, because of the wording of soft law norms, they provide a framework for national authorities,[38] inviting national judges to "take into consideration soft law whenever deciding on cases".[39]

In addition to blurring the boundaries between hard law and soft law, the regulation of the fight against climate change also has the effect of blurring the homogeneous dimension of sources of law in general. Indeed, it is a privileged field for the development of standards and labels, as a regulatory technique. Initially used to reinforce the effectiveness of the internal market, the use of standards in the EU has generally increased

32 The applicants invoked Decision No 406/2009/EC of the European Parliament and of the Council of 23 April 2009 on the effort of Member States to reduce their greenhouse gas emissions to meet the Community's greenhouse gas emission reduction commitments up to 2020, OJ L 140, 5.6.2009, pp. 136–148 and Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC, OJ L 315, 14.11.2012, pp. 1–56.

33 Council of State, 19 Nov. 2020, N° 427301, *Commune de Grande-Synthe*, ECLI:FR:CECHR:2020:427301.20201119.

34 For an overview of the soft law instruments used in the field of climate transition, see Petropoulou Ionescu, D., Eliantonio, M., "Soft Law Behind the Scenes: Transparency, Participation and the European Union's Soft Law Making Process in the Field of Climate Change", *European Journal of Risk Regulation*, 2023, pp. 292-312.

35 Petropoulou Ionescu, D., Eliantonio, M. (2023), "Soft Law Behind the Scenes: Transparency, Participation and the European Union's Soft Law Making Process in the Field of Climate Change", op. cit. p. 292.

36 Senden, L., "Soft Law in European Community Law", London, Bloomsbury Publishing, 2004. Soft law instruments are a form of hard obligation/soft enforcement, see Terpan, F., "Soft Law in the European Union", European Law Journal 2015, vol. 21, pp. 68-96.

37 Korkea-Aho, E., "EU Soft Law in Domestic Legal Systems: Flexibility and Diversity Guaranteed?", *Maastricht Journal of European and Comparative Law* 2009, vol. 16, issue 3, pp. 271–290; Láncos, P. L., The Many Facets of EU Soft Law, 2022, Budapest, Pázmány Press.

38 Petropoulou Ionescu, D., Eliantonio, M., "Words Are Stones: Constructing Bindingness Through Language in EU Environmental Soft Law", in Lancós, P., Xanthoulis, N. & Arroyo Jiménez, L. (eds.), *The Legal Effects of EU Soft Law: Theory, Language and Sectoral Insights into EU Multi-level Governance,* 2023, London, Edward Elgar Publishing, pp. 76-111.

39 Stefan, O., "European Union Soft Law", Modern Law Review 2012, vol. 75, pp. 879-893.

over the recent years.[40] In this respect, standards have, at least, two objectives. Firstly, they harmonise the technical specifications applicable to certain products, goods or substances. Second, they contribute to building confidence in the internal market for civil society and ensure legal certainty and its adequate functioning for economic operators. Standards are however peculiar as they are elaborated by private actors, under the supervision of the Commission.[41] Yet economic operators, if they wish to enter the European market will have to comply with the specification's requirements applicable to each good. Environmental law might even be regarded as one of the central fields for standardisation.

Environmental standards setting technical specifications applicable to goods and services can however be seen as obstacles to free trade.[42] The European Community initially only had limited competences in environmental matters. Particular attention was then paid to define specifications aiming at safeguarding environmental interest. These environmental standards have been adopted to strengthen environmental protection or to limit the impact on the environment in the context of the liberalisation of the movement of goods and have developed on the basis of a large amount of secondary legislation. These standards embody a balancing exercise between the effectiveness of the free movement of goods and a high level of environmental protection, involving private actors in designing of norms. Standards, therefore, play a role in regulating climate change issues within the Union.[43] However, the hybrid nature of standards may rise questions of legitimacy. Due to their private nature, are they reviewable?[44] And since they are often protected by copyright, do they fall within the scope of access to information, recognizing that it is very important for consumers to know what could be expected when buying a good complying with the standards.

C. Evolution of EU law: Amending the Charter of Fundamental rights?

Even if the body of European legislation is ever increasing, effectiveness might also be improved by means of amendments or by developing new norms.

40 See the 1985 'New Approach to technical harmonization and standards' (Council Resolution of 7 May 1985 on a new approach to technical harmonization and standards, OJ C 136, 4.6.1985, pp. 1–9) which marked a radical shift in the EU market harmonisation policy.

41 Regulation (EU) 1025/2012 of the European Parliament and of the Council of 25 October 2012 on European standardisation, amending Council Directives 89/686/EEC and 93/15/EEC and Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 98/34/EC, 2004/22/EC, 2007/23/EC, 2009/23/EC and 2009/105/EC of the European Parliament and of the Council and repealing Council Decision 87/95/EEC and Decision No 1673/2006/EC of the European Parliament and of the Council, OJ L 316, 14.11.2012, pp. 12–33.

42 Cuccuru, P., "Regulating by Request: On the Role and Status of the Standardisation Mandate under the New Approach", in Eliantonio, M. & Cauffman, C. (eds.), *The Legitimacy of Standardisation as a Regulatory Technique: A Cross-disciplinary and Multi-level Analysis,* 2020, London, Edward Elgar, pp. 48-63.

43 See for example Regulation (EC) No 66/2010 of the European Parliament and of the Council of 25 November 2009 on the EU Ecolabel, OJ L 27, 30.1.2010, pp. 1–19; Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (recast), PE/48/2018/REV/1, OJ L 328, 21.12.2018, pp. 82–209.

44 Volpato, A., Eliantonio, M., "The contradictory approach of the CJEU to the judicial review of standards: a love-hate relationship?", in Eliantonio, M. & Cauffman, C. (Eds.), *The Legitimacy of Standardisation as a Regulatory Technique: A Cross-disciplinary and Multi-level Analysis,* 2020, London, Edward Elgar, pp. 91-110.

One of the avenues being considered here is the amendment of the Charter of Fundamental Rights. In his speech in the European Parliament in Strasbourg at the beginning the French Presidency of the Council, Emmanuel Macron proposed to give greater prominence to environmental protection in the EU's catalogue of fundamental rights, by including the objective to fight against climate change into the Charter. [45] This idea is part of several more general movements, one of which has been underway for several decades now, to link fundamental rights and environmental protection.[46] Another such movement aims to constitutionalise rights directly linked to environmental protection, such as the right to a healthy environment, which is known to most EU Member States. Constitutionalising environmental law is seen as a means to strengthen the latter's effectiveness and, ultimately, environmental protection in general.

The added value of such an evolution of the Charter of Fundamental Rights shall still be assessed. Environment is not absent from the text. Drafted at the end of the 90s, the text incorporated the so-called third-generation rights. Article 37 of the Charter of Fundamental Rights is entitled "Protection of the environment". Article 37 refers to "[a] high level of protection of the environment and the improvement of its quality must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development". It is, therefore, a "principle" within the meaning of Article 51 of the Charter of Fundamental Rights, which makes its invocation conditional on its prior implementation by the legislator. It is important to stress that such an approach is not exceptional in environmental law.[47] The distinction between rights and principles undoubtedly impacts the use of Article 37. This is also why amending the Charter might not be the perfect solution either. If the Charter were to be amended as to set out the objective of combating climate change, this would have only reinforced Article 37 but would not have upgraded environmental protection to an enforceable right. Hence, the added value of such an amendment would appear to be minimal and merely symbolic. The question of feasibility is equally open to question, as the process of revising the Charter is complex and has never yet been taken.[48]

Furthermore, in the light of the development of environmental law in the European Union, the problem is not so much the fundamental nature of environmental norms, but their enforcement and effectiveness. Indeed, EU environmental law is dense and developed. The more problematic issue is that of access to and the use of legal remedies. Amending the Charter would thus have only very minor impact since EU law already

45 See: https://www.elysee.fr/emmanuel-macron/2022/01/19/discours-du-president-emmanuel-macron-devant-le-parlement-europeen.

46 Prieur, M., « Vers un droit de l'environnement renouvelé », Cahiers du Conseil constitutionnel, 2004, n° 15. Macron's proposal also echoes the proposal of the Citizens' Climate Convention, which was organized to make proposals for fighting against climate change. The Convention had proposed an amendment to Article 1 of the French Constitution, inserting a reference to the fight against climate change, stipulating that France "guarantees the preservation of the environment and biological diversity and combats climate change", see: https://propositions.conventioncitoyennepourleclimat.fr/.

47 See for example the wording of the French Charter for Environment, Chevalier, E., Makowiak, J., « Dix ans de QPC en matière d'environnement : quelle (r)évolution ? », Titre VII – Les Cahiers du Conseil constitutionnel, 2020, pp. 392-418.

48 Racho, T., « Du Green Deal dans la Charte des droits fondamentaux de l'Union européenne ? », Observatoire du Green Deal. Available at: https://www.observatoire-greendeal.eu/le-pacte-vert/du-green-deal-dans-la-charte-des-droits-fondamentaux-de-lunion-europeenne/.

includes principles that can be used to provide a framework for legislative action at the level of primary law. Article 191 TFEU forms the basis of the Union's environmental policy, and the principles set out therein are to guide the Union legislator. In the context of the fight against climate change, the polluter-pays and the precautionary principle play a major role. The latter might prove particularly relevant where there is continuing doubt as to the extent of climate change or its effects.

Of course, the weight of symbols should not be underestimated, particularly in terms of generating greater public support and therefore greater incentives for public authorities. But, given the nature of what is at stake, one should use the law with caution. One should not amend EU primary law without seriously reflecting on the effectiveness of such an amendment.

The European Union's legal system thus knows multiple means to address the issue of climate change. Obviously, the EU's response to the climate challenge has been significant, and the diversity of its actions enables it to tackle the issue in a systemic way. However, the body of legislation is dense and complex. For example, regulating by means of explicit targets allows for a definition of Member States' obligations, so as to create a form of solidarity. However, despite the apparent clarity of the figures, the system is difficult to understand. Determining the thresholds is based on a scientific process; the reference years are not always the same, often 1990, sometimes 2005 but also others. Moreover, the normative scope of European rules cannot be assessed as monolithically as in a unified legal order. The binding nature of European Union law is not called into question, nor is its authority. Nevertheless, certain features stand out which confirm the enrichment of the approach to normativity, and which reflect a desire to guarantee a certain form of flexibility at the stage of implementation of the rules drawn up by the Union. Such complexity and density do not rule out the legitimacy of the European Union's action in this area. Here again, a study of existing or developed administrative mechanisms enables us to assess the extent to which this issue is sufficiently taken into account.

II. Establishing legitimacy for EU climate action

Establishing legitimacy for the Union's action is a central issue. The objectives set by the European Union are ambitious, and the constraints on both Member States and economic systems are considerable. To achieve the necessary changeover, it is vital that the measures are accepted and acceptable. It is therefore essential to consider the legitimacy and acceptance of the measures adopted. The legitimacy of an action or an institution can be assessed in different ways. Firstly, it is essentially based on compliance with the law. Max Weber adds respect for tradition (traditional legitimacy) and respect for the leader (charismatic legitimacy). While the legitimacy of the Union's action could be based on a charismatic approach, relying on the reputation and influence of the European Union, this might ultimately be insufficient. Similarly, limiting the quest of legitimacy to evaluating the implementation of classic democratic processes would necessarily be limited.

The Union has long been accused of a democratic deficit. However, in the context of an international organisation, one may wonder whether the EU's decision-making procedures can be evaluated by the same yardsticks as national systems. The European Union is not exclusively based on representative democracy. Instead, its democratic foundation is further complemented by instruments of participatory democracy, as well as administrative law mechanisms which allow for the action of political decision-makers to be monitored, notably via the right of access to information and participation, as well as the right of access to the courts.

A. Access to information and participation

Over the last few decades, the European Union has developed and deepened the mechanisms of good governance, following the example of the Member States. As the issue of combating climate change falls within the scope of environmental policy, those developments have been widely grounded on Aarhus Convention[49] and on the secondary EU law implementing the latter.

Firstly, public participation in the field of environmental protection has been largely developed on the basis of the second pillar of the Aarhus Convention. Generally speaking, citizens are given multiple means to participate in climate change issues, which are central to the definition of new modes of governance of climate transition.[50]

Regulation 1367/2006 grants a right to participation to the public, which has been interpreted to include "one or more natural or legal persons, and associations, organisations or groups of such persons".[51] Notably however, participation is limited to the adoption of administrative decisions. At the same time, despite the fact that the personal scope of the Regulation – covering the aforesaid public – in reality participation is limited to those concerned and not the average citizen. These interested parties are mainly economic operators, industrialists and stakeholders.[52] Admittedly, NGOs have been playing an increasingly significant role. However, participation seems too limited to overturn the very technocratic nature of the decision-making process on climate change. Decision-making in this area is largely controlled by both decision-makers and experts.[53] However, in the fight against climate change allowing for participation is one of the essential mechanisms to establish and ensure legitimacy of the decisions adopted and the choices made in public policy.

The right of access to information is a fundamental right[54] which seems particularly crucial in environmental matters. The EU`s ratification of the Aarhus Convention reinforced the originality of the legal regime of access to information in relation to EU rules on access to documents.[55] The first notable distinction between access to information and access to documents concerns the personal. Whereas access to information is granted to any individual "without discrimination as to citizenship, nationality or residence and, in

49 Convention on access to information, public participation in decision-making and access to justice in environmental matters, signed in Aarhus on 25 June 1998, ratified by the EU by the Council Decision 2005/370/EC of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters, OJ L 124, 17.5.2005, pp. 1–3.

50 Armeni, C., Lee, M., "Participation in a time of climate crisis", *J Law Soc.* 2021, vol. 48, pp. 549– 572.

51 Article 2 of Regulation 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, OJ L 264, 25.9.2006, pp. 13–19.

52 Armeni, C., Lee, M. (2021), "Participation in a time of climate crisis", op. cit.

53 See for example the creation of the European Scientific Advisory Board on Climate Change. On access to participation in EU administrative law, see Mendes, J., Participation in EU Rule-Making: A Rights-Based Approach, 2011, Oxford, Oxford University Press; Chevalier, E., "La procédure administrative non contentieuse", in Auby, J.-B., Dutheil de la Rochère, J. (eds.), Traité de Droit Administratif Européen, 2022, 3e ed., Bruxelles, Bruylant-Larcier, pp. 117-139.

54 Article 42 of the Charter of Fundamental Rights.

55 Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145, 31.5.2001, pp. 43–48.

the case of a legal person, without discrimination as to where it has its registered office or a real centre of its activities",[56] access to documents is limited to Union citizens and natural and legal persons residing or having their registered office in a Member States.[57]

Furthermore, since EU rules, based on the Aarhus Convention, aim to guarantee the widest possible access, the exceptions to access to environmental information has been interpreted strictly.[58] Information held by public authorities, especially in environmental matters, is often considered sensitive, not only because of the knowledge it provides about the impact of activities on the environment, but also because it may relate to private activities and potentially include industrial and commercial secrets or personal data. The access to information depends therefore largely on the definition of the exceptions to access.

Exceptions to both the right of access to documents and to information in general are formed by the need to reconcile this fundamental right with other fundamental rights guaranteed by Union law, such as the right to protection of personal data, the right to respect for professional secrecy, etc. At the same time in granting access to documents or information [59] the right to privacy,[60] and interests, such as respect for public order or State security need to be respected. Article 6 of Regulation 1367/2006 refers to Regulation 1049/2001 in order to define the exceptions that may be invoked to requests for access to environmental information.[61] Due to the fundamental nature of the right of access, any exception must be interpreted strictly and be proportionate to the objective pursued. However, Article 6 of Regulation 1367/2006 emphasizes the specific nature of the interpretation of exceptions in environmental matters. Not all the exceptions provided for in Article 4 of Regulation 1049/2001 are treated in the same manner. Thus, exceptions aiming to protect commercial interests or the conduction of inspection, investigation and audit activities (Article 4(2) first and third indents), can hardly be successfully invoked when it comes to the disclosure of information relating to emissions as such information will often be considered to be in the public interest. Moreover, the other grounds for refusal "shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and whether the information requested relates to emissions into the environment".[62]

The European Court of Justice has been sympathetic to taking into account the specific nature of environmental information, particularly in the context of climate change. However, in practice the European administration often seems to struggle to grant access to information. The Court in turn lacks the power to issue injunctions in actions for annulment or even actions for failure to act. [63] Yet it seems that the Court has been largely ignoring the impact of this lack of power on the effectiveness of access to environmental information, which should be understood as giving individuals the possibility to exercise

56 Article 3 of Regulation n°1367/2006, id.

57 Article 42 of the Charter of Fundamental Rights.

58 T-189/14, 2017, *Deza v Agence européenne des produits chimiques*, ECLI:EU:T:2017:4 ; C-673/13P, 2016, *Commission v Stichting Greenpeace Nederland et PAN Europe*, ECLI:EU:C:2016:889.

59 Art. 339 TFEU.

60 Art. 7 of the Charter of Fundamental Rights.

61 Art. 4 of Regulation 1049/2001.

62 Art. 6 §1 of Regulation 1367/2006.

63 Art. 265 TFEU.

control over the decision-making process.[64]

The case law concerning access to documents relating to European policy on the development of biofuels illustrate the administrative imbroglio applicants might face when seeking access.[65] Environmental NGOs sought access to a series of documents dealing in particular with the impact of the development of biofuels on soil and the preparatory reports from the Commission. As the Commission did not act upon the request, the applicants appealed to the General Court against the refusal of access. While the judgement was pending, the Commission issued a decision granting partial access to the documents requested and refusing access to the other documents on the basis of the exception relating to the protection of commercial interests. This new decision led to the withdrawal of the implied refusal, and therefore rendered the action for annulment inadmissible. In the meantime, the European Ombudsman considered that the Commission had been guilty of maladministration by not giving access to the documents requested within the time limits laid down.[66] Equally the European Parliament's Committee on Civil Liberties, Justice and Home Affairs urged the Commission to publish "scientific studies, for example, on the repercussions of biofuels".[67] In retrospect it might hence be obvious that the information should have been made available not only to the applicant NGOs, but also to the public at large. Yet the pressure of multiple institutions was needed for the Commission to comply.

A similar case illustrates the complexity of implementing the right of access procedure when the Commission does not actually wish to communicate the information. In another *ClientEarth* case,[68] a group of NGOs had requested access to information relating to a certification aimed at guaranteeing the sustainability of biofuels. Once again, the Commission did not respond to the request within the time limit prescribed. With no response, the NGOs exchanged numerous letters with the Commission, which suggested that the NGOs would not have access to the information requested. This information concerned the competence of the experts in charge of the certification process. The NGOs lodged an action for annulment before the General Court. However, the two-month time limit to start an action[69] had expired, so their application was deemed inadmissible. The applicants then invoked the Commission's failure to respond, which was equally considered inadmissible, as compliance with the time limits for appeals is considered a ground ex officio. The NGOs finally received the requested information in September 2011, eleven months after their initial request (October 2010), but especially after the Commission had adopted a decision on voluntary certification. The Commission's failure to act clearly affects the practical enforcement of the right of access to information. The latter is thereby largely confined to a power of knowledge, preventing NGOs from exercising their control function during the decision-making process, even though the involvement of NGOs is all the more necessary given that climate policy is a delicate

64 See Recital 2 of Regulation 1367/2006.

65 T-120/10, 2011, ClientEarth e.a. v European Commission, ECLI:EU:T:2011:646.

66 Decision of the European Ombudsman closing his inquiry into complaint 339/2011/AN against the European Commission.

67 Report of the European Parliament– Commission of civil liberties, justice and internal affairs of 24 June 2011 on access to public to documents, 2010/2294(INI).

68 T-278/11, 2012, *ClientEarth e.a. v European Commission,* ECLI:EU:T:2012:593.

69 Art. 263 §6 TFEU.

issue, involving political choices, and therefore greater control at the decision-making stage in an area that is highly sensitive and of great public interest.[70]

B. Access to court

It is now widely recognised that courts play a vital role in the fight against climate change. They are called upon by citizens to monitor the actions of public authorities in this area. Courts at any level of the hierarchy are most often the watchdogs of government's inaction reinforcing the latter's obligations.[71]

Access to courts and the right to an effective judicial protection are fundamental rights under Union law.[72] In a Union based on the rule of law every individual subject to Union law should have access to court to challenge a Union act or an act adopted by a national authority implementing Union law. According to settled case law, the Union is based on 'a complete system of legal remedies and procedures designed to ensure judicial review of the legality of European Union acts.'[73] That is to say that an individual will not automatically be granted standing in front of the CJEU, but remedies in this sense might also be granted by national courts. This line of reasoning allows the Court of Justice to take a restrictive approach in assessing the legal interest in bringing an action for annulment.[74] However, this restrictive approach is not compatible with the 3rd pillar requirements of the Aarhus Convention,[75] and the amendment of Regulation 1367/2006 does not really change that.[76] The latter amendment is mainly concerned with the internal review stage and aims to strengthen NGOs' legal standing, without calling into question the previous

70 Peeters, M., Nóbrega, S., "Climate change-related Aarhus conflicts: how successful are procedural rights in EU climate law?", *Review of European Community and International Environmental Law* 2014, vol. 23, issue 3, pp. 354-366: *«Without proper and timely access to information, civil society will be prevented from checking and commenting upon the quality of climate policies»*.

71 Torre-Schaub, M., (dir.), *Les dynamiques du contentieux climatique, Rapport final de recherche,* 2019. Available at: http://www.gip-recherche-justice.fr/wp-content/uploads/2020/01/17.05-RF-contentieux-climatiques.pdf.

72 Article 47 of the Charter of Fundamental Rights, see also Article 6 ECHR.

73 C-583/11P, 2013, *Inuit Tapiriit Kanatami and Others v European Parliament and Council of the European Union,* ECLI:EU:C:2013:625.

74 Art. 263 TFEU; 25/62, 1963, *Plauman & Co. v Commission of the European Economic Community,* ECLI:EU:C:1963:17.

75 Betaille, J., « Accès à la justice de l'Union européenne, le Comité d'examen du respect des dispositions de la Convention d'Aarhus s'immisce dans le dialogue des juges européens : à propos de la décision n° ACCC/C/2008/32 du 14 avril 2011 », *Revue juridique de l'environnement* 2011, pp. 547-562. See also Economic Commission for the UN in Europe, "Findings and recommendations of the Compliance committee with regard to communication ACC/C/2008/32 (Part II) concerning compliance by the European Union", 17 March 2017. This issue has been widely debated by the academics: see de Sadeleer, N., Poncelet, C., "La contestation des actes des institutions de l'Union à incidences environnementales à l'épreuve de la Convention d'Aarhus", R.T.D.eur. 2014, pp. 7-34; Schoukens, H., "Access to Justice in Environmental Cases after the Rulings of the Court of Justice of 13 January 2015: Kafka Revisited?", *Utrecht Journal of International and European Law* 2015, vol. 31, issue 81, pp. 46–67; van Wolferen, M., Eliantonio, M., "Access to Justice in Environmental Matters: The EU's Difficult Road Towards Non-Compliance With the Aarhus Convention", in Peeters, M. & Eliantonio, M. (eds.), *Research Handbook on EU Environmental Law,* 2020, London, Edward Elgar, pp. 148-163.

76 Brosset, E., « Enfin ! le règlement Aarhus est révisé : un nouveau pas l'accès à la justice en matière environnementale ? », *Revue des Droits et Libertés Fondamentaux* 2022, chron. n° 5. Available at: https://revuedlf.com/droit-ue/enfin-le-reglement-aarhus-est-revise-un-nouveau-pas-lacces-a-la-justice-en-matiere-environnementale/.

case law in this respect.[77] Consequently, there are fewer opportunities to challenge and discuss the choices made at European Union level, choices which are decisive for national public policies. As a result, applicants even though active in climate litigation have been refused standing for lack of interest in bringing an action.

Next to NGOs, sub-national authorities, particularly cities, have been able to lodge appeals to challenge climate legislation.[78] The interest of cities in taking action, which is not the same as that of Member States which are privileged applicants, is assessed by reference to of direct concern, according to which "a regional or local entity is affected by an act of the Union when it is vested with competences which are exercised autonomously within the limits of the national constitutional system of the Member State concerned and the act of the Union prevents it from exercising those competences as it sees fit".[79] The local authority is therefore considered to be directly concerned if the Union act interferes with the exercise of one of its competences, for example if measures adopted by the local authority would be limited by the requirements of a Union norm.[80] However, such a conception remains restrictive for access to the Union's courts. In its judgment of 13 December 2018, the General Court ruled on an action for annulment brought by the City of Paris, the City of Brussels and the Ayuntamiento de Madrid against Commission Regulation (EU) 2016/646 of 20 April 2016,[81] which is intended to "supplement" the requirements for tests under real driving conditions designed to measure the polluting emissions of passenger cars and light commercial vehicles as part of the authorisation procedures to place new vehicles on the market. The Court held that "the fact that an act of the Union prevents a public legal person from exercising its own powers as it sees fit directly affects its legal position and that, consequently, that act is of direct concern to it" (paragraph 50). Thus, direct concern is to be assessed in relation to the normative competences of the local authority. Since the adoption of the Regulation, the local authorities couldn't restrict, in the context of a measure which takes into account the levels of pollutant emissions from vehicles, the movement of vehicles even if they don't comply, during the RDE tests, with the limits for emissions of nitrogen oxides laid down in the Euro 6 standard. And this could be regarded as preventing them from protecting the environment and health, which are of their competencies, in particular to combat air pollution, including the power to restrict motor traffic for that purpose. Cities' competences are thus directly affected by Union legislation in this policy area. However, this favourable interpretation of standing requirements for cities was not upheld by the ECJ on appeal. The latter set aside the GC's judgment and confirmed a more restrictive interpretation of admissibil-

77 See Regulation (EU) 2021/1767 of the European Parliament and of the Council of 6 October 2021 amending Regulation (EC) No 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (PE/63/2021/REV/1), OJ L 356, 8.10.2021, pp. 1–7.

78 Alogna, I., Clifford, E., *Climate Change Litigation: Comparative and International Perspectives, British Institute of International and Comparative Law,* 2021. Available at: https://www.biicl.org/documents/88_climate_change_litigation_comparative_and_international_report.pdf.

79 T214/95, 1998, *Vlaamse Gewest v Commission*, ECLI:EU:T:1998:77.

80 Joined Cases T-339/16, T-352/16 and T-391/16, 2018, *Ville de Paris, Ville de Bruxelles and Ayuntamiento de Madrid v Commission,* ECLI:EU:T:2018:927, §50.

81 Commission Regulation (EU) 2016/646 of 20 April 2016 amending Regulation (EC) No 692/2008 as regards emissions from light passenger and commercial vehicles (Euro 6) C/2016/1792, OJ L 109, 26.4.2016, pp. 1–22.

ity criteria.[82]

The same approach is taken in cases of claims brought by individuals. As mentioned above, the assessment of an individual's interest in bringing an action is rather strict, which undeniably limits the scope of bringing climate actions in front of the Court of Justice of the European Union. That being said, it can of course not be ruled out that occasionally the mere fact of bringing a case to Court, well aware of the former's inadmissibility, might serve a strategic purpose by itself (eg media coverage).[83] The two climate-related actions brought by individuals before the Court of Justice are worth pointing out here. The applicants had challenged the legality of EU standards and specific policy choices directly related to the management of climate transition.

In *Sabo*,[84] the applicants sought the annulment of several provisions of Directive 2018/2001 on the promotion of the use of energy from renewable sources, which allows energy from forest biomass to be considered a renewable energy source. According to the applicant such inclusion could lead to an increase in the production of greenhouse gas emissions. In *Armando Carvalho* [85] numerous Union citizens, from Germany, France, Italy, Portugal and Romania, together with third-country nationals (Kenya, Fiji) and an NGO representing Samis young people, argued that the Union's objective of reducing emissions by at least 40% by 2030 was insufficient, in breach of the Paris Agreement and several fundamental rights as set out in the Charter, such as the right to life, the right to health and the right to property. They eventually sought the annulment of several provisions of the Energy and Climate Package,[86] and sought damages in the form of an injunction, even though the CJEU does not even hold the competence to grant such a remedy. They asked the ECJ to order the EU to adopt and implement more stringent measures to reduce GHG emissions. They also considered that the no-debit rule enshrined in the LULUCF Regulation fails to create an incentive for the EU to increase its sink. They also specifically criticised the flexibility arrangements, maintaining that they had an effect of 'diluting' the targets set by the CAR. In the action for damages, instead of monetary compensation for their individual losses, they sought compensation in the form of an injunction ordering the EU to adopt measures to put an end to its unlawful and damaging conduct, i.e. to order the Council and the European Parliament to adopt measures to impose a reduction in greenhouse gas emissions of between 50% and 60% of

82 Joined cases C-177/19P to C-179/19P, 2022, *Federal Republic of Germany v. European Commission,* ECLI:EU:C:2022:10.

83 Boyer-Capelle, C., Chevalier, E. (eds.), *Contentieux stratégique – Analyses sectorielles,* 2021, Paris, LexisNexis.

84 C-297/20P, 2021, *Peter Sabo and Others v European Parliament and Council of the European Union,* ECLI:EU:C:2021:24.

85 C-565/19P, 2021, *Armando Carvalho and Others v European Parliament and Council of the European Union,* ECLI:EU:C:2021:252.

86 Directive (EU) 2018/410 of the European Parliament and of the Council of 14 March 2018 amending Directive 2003/87/EC to enhance cost-effective emission reductions and low-carbon investments, and Decision (EU) 2015/1814, OJ L 76, 19.3.2018, pp. 3–27; Regulation (EU) 2018/842 of the European Parliament and of the Council of 30 May 2018 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 amending Regulation (EU) No 525/2013, OJ L 156, 19.6.2018, pp. 26–42; Regulation (EU) 2018/841 of the European Parliament and of the Council of 30 May 2018 on the inclusion of greenhouse gas emissions and removals from land use, land use change and forestry in the 2030 climate and energy framework, and amending Regulation (EU) n° 525/2013 and Decision No 529/2013/EU, OJ L 156, 19.6.2018, pp. 1–25.

1990 levels. The Court did not consider the applicants to be individually concerned in the sense of Article 263 TFEU and thus dismissed both actions as inadmissible. Given the aforementioned settled line of case law these rulings are hardly surprising. Yet they once again illustrate the incompatibility of the strict interpretation of standing requirements with the challenges raised by the climate crisis.

In the context of the EU, which continues to struggle with allegations of a democratic deficit, direct access to EU judges would be crucial to review EU action. The ECJ justifies its stance with reference to the indirect means to challenge Union acts – eg preliminary rulings on validity.[87] This argument is of course open to debate given that preliminary rulings are quantitatively limited and depend on the national court's willingness to refer to the question to the CJEU. Even when the question is referred, it is quite exceptional that the Court of Justice declares an EU norm invalid in this context. Consequently, it may be difficult to consider the indirect review as a way to compensate the strictness of the conditions of access to court.

Conclusion

The climate emergency has forced the European Union to trigger a pro-active normative movement, guided by international commitments some might even say legislative inflation at the EU level. While some of the Union's solutions and mechanisms mirror national solutions, the specific context in which they are deployed creates certain particularities. The European Union is governed by the principle of conferral, which evidently limits its scope for actions. Given the lack of Union competence, the latter will hardly be able to address one major challenge of the climate transition: the management of vulnerabilities. At the same time, the climate crisis operates like a mirror that imposes reflexivity on the mechanisms of the European Union's legal order. This is a special time for public action.[88] The Union's legal order seems to be based on a solid procedural basis, which can provide a basis for individuals to develop ways of monitoring the actions of public authorities. However, the adequacy of these mechanisms to the challenges of the climate crisis remains a central issue. The example of the European Union shows above all is that there are no magic solutions, but effectively addressing the climate crisis calls for the development of certain paths, mobilizing different actors at different times.

At the same time the European approach illustrates the importance of a systemic approach. One line of action, one measure in itself, is not enough. Individual measures form part of a global movement, and their effectiveness will widely depend on the context in which they are implemented. While the European Union was set up to preserve peace between European states, and the initial objective of the Union was the creation of a single market, the Union underwent a major transition and nowadays also faces problems such as the climate transition, which evidently goes beyond mere economic integration. The European Union's action illustrates the challenges faced by public authorities in general while dealing with climate transition. Any public entity is facing problems

87 C-50/00P, 2002, *Unión de Pequeños Agricultores v Council of the European Union*, ECLI:EU:C:2002:462.

88 Armeni, C., Lee, M. (2021), "Participation in a time of climate crisis", op. cit., p. 549; Jodoin, S., Duyck, S., Lofts, K., "Public Participation and Climate Governance: An Introduction", *Review of European, Comparative & International Environmental Law* 2015, vol. 24, pp. 117-122; Lindsay, B., 'Climate of Exception: What Might a "Climate Emergency" Mean in Law?', *Federal Law Review* 2010, vol. 38, pp. 256-281.

of time and to some extent of creativity. It is then the responsibility of legislator, judges, and also academics to give the necessary impulses to facilitate the realization of at least certain aspects of the global solution.

fypl french yearbook *of* public law
Issue 1, 2023

"Transnational" Climate Change Law. A case for reimagining legal reasoning?

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Abstract:

This contribution focuses on the concept of "transnational climate change law" in situations involving interactions between distinct legal systems. The discussion highlights the practical dimension of law as a means to address complex global challenges. It also underscores the need for transnational climate change law to consider non-legal processes and sources of normativity, including social practices, to effectively deal with the issue. The contribution explores the legal, regulatory, and ethical considerations involved in addressing transnational climate change challenges, by assembling case studies from both transnational infrastructure projects and climate change litigation.

Keywords:

Transnational climate change law, Transnational infrastructure projects, Climate change litigation, Transnational justice

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I. Introduction

In July 2021, the most severe rainfalls in a century affected the German regions of North Rhine-Westphalia, Rhineland-Palatinate and Saarland and the Belgian regions of Wallonia, with Luxembourg and the Netherlands also being touched.[1] More than 50 people perished. This transnational disaster was most probably caused by climate change. It is well possible that it could have been prevented – or at least mitigated – if there would have been stronger transnational cooperation on climate change related matters. Yet, a Walloon parliamentary inquiry into this event remains silent on this aspect apart from emphasising the need to better implement EU legislation and to communicate with European databases.[2] Climate change is by its very nature transnational in its causes and effects, and this is only reinforced by globalization. Decisions and choices regarding how to produce goods are taken in one country and are implemented in another country, possibly on a different continent. Due to these global supply chains, goods are transported all the way to a different country, where they are consumed. Notably waste is also processed in yet a different country with a risk of pollution for air, ground, or water due both to the waste being dispatched abroad and the waste processing itself in countries where health and environment regulations may be patchy or poorly enforced. People located in different legal orders are affected by this process directly (for instance when they come in contact with polluted components) and indirectly (for instance when their land and crops are affected by this pollution sometimes years later after the cause of pollution arose). In addition, energy supports this cycle with its own global networks; gas emissions travel around without any tangible borders.[3] Under these circumstances, what, if anything, can the word 'transnational' add to the diagnosis of climate change? Is it a mere description of a factual situation? Does it encapsulate a legal and technical way 'beyond state actors' to address the practical and concrete situations affected by climate change? Or does it add a qualitatively different dimension to the approaches available to address climate change? The ambiguity of the expression 'transnational climate change law' can point towards a descriptive or a normative dimension, an interstice between international and national laws or a link between them, a way to focus on norms or on behavioural change or to stress the need to articulate the two with appropriate institutions and processes, helping individual private and corporate units to plan and imagine their life with climate change at the forefront of their concerns.

In this contribution, the adjective 'ibid transnational' is primarily used to identify

1 * This contribution is a preliminary attempt by the author to make sense of the many transnational aspects of climate change. Any comments would be more than welcome to make her thinking develop in this area. Contact details: ymarique@essex.ac.uk. See: https://edition.cnn.com/2021/07/15/europe/germany-deaths-severe-flooding-intl/index.html.

2 Parlement wallon, "Rapport de la Commission d'enquête parlementaire chargée d'examiner les causes et d'évaluer la gestion des inondations de juillet 2021 en Wallonie", 24 mars 2022, 894 (2021-2022), nº 1. Transnational cooperation is only mentioned once in passing, p. 36.

3 For an overview of the spatial and temporal interdependence and disruptive effects of required geopolitical preferences, see: Minas, S., "Climate Change Governance, International Relations and Politics: A Transnational Law Perspective", in Zumbansen, P. (ed.), *Oxford Handbook of Transnational Law,* 2021, Oxford, Oxford University Press, 931–951, pp. 933–934.

problems involving cross-border situations, or situations where at least two distinct legal orders are interacting with each other. In those situations, traditional legal reasoning does not provide an immediate solution (such as the hierarchy, specificity, or anteriority of one legal rule, principle or norm setting aside the application of another rule, principle or norm). By doing so, 'transnational climate change law' is delimited by a specific legal feature justifying the use of 'transnational'. Not all measures associated with climate change will thus fall within the ambit of the present contribution,[4] although drawing watertight distinctions can prove challenging. This contribution builds on an on-going project on transnational administrative law[5] which suggests that the adjective 'transnational' can provide analytical tools and methods to reimagine legal reasoning where disrupted by issues of a transnational nature. This builds on the theory of transnational law pioneered by Jessup.[6] For him, transnational law has a practical dimension of seeing law as a way to address the problems applicable to the complex 'interrelated world community'.[7] This leads primarily to a functional and not a critical or normative perspective on climate change. However, an investigation of the available responses to address transnational climate change quickly suggests that social behaviours are not aligned with formal and state sources of law and norms; transnational climate change law needs to factor in its understanding of problems and possible solutions non-legal processes and sources of normativity, including practice. Transnational climate change law needs to address this pluralism to make sense of it.

Starting with two illustrations of transnational climate change (section II), this contribution explores different interpretations of 'transnational climate change law' (section III) and points to the need to clarify various legal, regulatory, and ethical concerns when seeking to develop a narrative that maps the legal imagination required in the face of transnational climate change (section IV).

II. Two case studies

Climate change is part of many administrative situations – i.e. situations involving at least one public entity – with transnational dimensions. Technology transfer, technology funding and the legal issues triggered thereby would provide fruitful illustrations of transnational situations and issues.[8] Transnational legal dimensions of climate change

4 It would also be possible to define transnational climate change law with reference to the transnational dimension of solutions suggested to address it. For such an approach pertaining to environment in general see Heyvaert, V., "Transnational networks", in Lees, E. & Viñuales, J.E. (eds.), *Oxford Handbook of Comparative Environmental Law,* 2019, Oxford, Oxford University Press, pp. 769–789.

5 Auby, J.-B., Chevalier, E., Dubos, O. & Marique, Y. (eds.), *Traité de droit administratif transnational,* forthcoming, Brussels, Bruylant.

6 Jessup, P., *Transnational Law*, 1956. See Mai, L., "(Transnational) law for the Anthropocene: Revisiting Jessup's move from 'what?' to 'how?" *Transnational Legal Theory* 2020, vol. 11, nº 1–2, pp. 105–120.

7 Jessup, P. (1956), *Transnational Law*, op. cit., p. 1.

8 Shabalala, D., "Technology Transfer for Climate Change and Developing Country Viewpoints on Historical Responsibility and Common but Differentiated Responsibilities", in Sarnoff, J.D. (ed.), *Research Handbook on Intellectual Property and Climate Change*, 2016, Cheltenham, Edward Elgar, pp. 172–199; Sarnoff, J.D., "Intellectual Property and Climate Change, with an Emphasis on Patents and Technology Transfer", in Gray, K.R., Tarasofsky, R. & Carlarne, C. (eds.), *Oxford Handbook of International Climate Change Law*, 2016, Oxford, Oxford University Press, pp. 392–414.

also appear in (A.) transnational infrastructure projects and (B.) climate change litigation. The latter two will be discussed in the following. They illustrate the diversity of legal issues with a transnational dimension arising when administrative legal techniques meet climate change considerations: complexity, extra-territorial effect, and fragmentation.

A. Transnational infrastructure projects

Transnational infrastructure projects, such as dams at the border between two countries, transnational European networks (in particular for transport and energy) and the Chinese transnational infrastructure network, the so-called *Belt and Road Initiative*, give rise to specific legal issues with regards to climate change. These projects require the coordination of international, regional, and national norms pertaining to environmental law, planning, security, sectoral legislation (such as transport and energy), environmental impact assessment and contract law for their financing, building, operation and maintenance. They also bring together private actors drawn from the construction industry and financing world and mobilise the local population against them. Often, these complex projects change course over their lifetime, run into trouble and are delayed, making their budget skyrocket.

A first illustration is provided by transeuropean networks, either in transport[9] or in energy. On the one hand, the European Commission carried out an impact assessment of the transeuropean transport network in 2021 to identify the targets for completing the network connecting the most distant parts of the EU to support the material freedom of movement of goods as well as military across Europe.[10] In the said impact assessment it was also found that an improved transport infrastructure would contribute to the Union's climate change targets.[11] Transeuropean transport networks are also vulnerable to specific risks – such as increased flooding – induced by climate change.[12] The practical implementation of these projects often necessitates transnational cooperation between Member States.[13] In addition, a European agency is now in charge of their funding and climate change funding: the European Climate, Infrastructure and Environment Execu-

9 Reg. (EU) nº 1315/2013, 11 Dec. 2013, of the European Parliament and of the Council on Union guidelines for the development of the trans-European transport network, *OJ L* 348, 20.12.2013, pp. 1-128, last revised by Commission Delegated Reg. (EU) nº 2019/254, 9 Nov. 2018, on the adaptation of Annex III to Reg. (EU) nº 1315/2013 of the European Parliament and of the Council on Union guidelines for the development of the trans-European transport network, C/2018/7375, *OJ L* 43, 14.2.2019, pp. 1-14.

10 Commission Staff Working Document Impact Assessment Report accompanying the document Proposal for a Regulation of the European Parliament and of the Council on Union guidelines for the development of the trans-European transport network, amending Reg. (EU) nº 2021/1153 and Reg. (EU) nº 913/2010 and repealing Reg. (EU) nº 1315/2013, SWD/2021/472 final.

11 European Parliamentary Research Service, *Briefing EU Legislation in Progress - Revision of the trans-European transport network guidelines,* p. 4.

12 Bubeck, P., Dillenardt, L., Alfieri, L., Feyen, L., Thieken, A.H. & Kellermann, P., "Global warming to increase flood risk on European railways" *Climatic Change* 2019, vol. 155, pp. 19–36.

13 See for instance the Lyon-Turin railway link: Racca, G.M. & Ponzio, S., "Contrats publics transnationaux: Une perspective complexe" *Jus Publicum* 2021. Available at: http://www.ius-publicum.com/pagina.php?lang=en&pag=fascicolo.

tive Agency.[14] This agency operates alongside different data hubs and there is no clear coordination between these hubs. The transnational and multi-level dimensions of transport and climate change co-exist, but their actual administrative coordination is unclear.

On the other hand, transeuropean energy networks have been included in the Union's strategy to contribute to an energy transition. This has led to a new EU regulation,[15] which seeks to achieve energy neutrality by 2050, security of supply and affordability of energy.[16] In addition, the regulation reaches beyond EU territory, in that it declares that the

> *'Union should facilitate infrastructure projects linking the Union's networks with third-country networks that are mutually beneficial and necessary for the energy transition and the achievement of the climate targets, and which also meet the specific criteria of the relevant infrastructure categories pursuant to this Regulation, in particular with neighbouring countries and with countries with which the Union has established specific energy cooperation.'*[17]

Provided that conditions are met, the so-called projects of mutual interest (with non-EU members)[18] should be treated in the same way as projects of common interest (between EU members)[19]. The Union's territorial borders are thereby undeniably stretched.

However, also outside the EU, transnational infrastructure projects face challenges due to their complexity and the tensions between competing interests.[20] The Belt and Road Initiative (BRI), which builds on global connectivity in the same way as transeuropean networks do,[21] has been portrayed as developing towards green infrastructure projects. The BRI represents multi-trillion dollars in investments and loans for the construction of high-speed train lines, bridges, highways, ports, and overland pipelines, linking China to Europe, and including African cities such as Nairobi. Next to being an infrastructure project, the BRI is also understood as a governance project 'aiming to create a Eurasian economic and political space under Chinese dominance'.[22] BRI documents mention that 'efforts should be made to promote green and low carbon infrastructure

14 Commission Implementing Dec. (EU) nº 2021/173, 12 Feb. 2021, establishing the European Climate, Infrastructure and Environment Executive Agency, the European Health and Digital Executive Agency, the European Research Executive Agency, the European Innovation Council and SMEs Executive Agency, the European Research Council Executive Agency, and the European Education and Culture Executive Agency, OJ L 50, 15.2.2021, pp. 9–28.

15 Reg. (EU) nº 2022/869, 30 May 2022, of the European Parliament and of the Council on guidelines for trans-European energy infrastructure, *OJ L* 152, 3.6.2022, pp. 45–102.

16 Ibid, Art. 1 (1).

17 Ibid, Recital 20.

18 Ibid, Art. 2 (6).

19 Ibid, Art. 2 (5).

20 For an illustration of legal issues arising from projects at the outer limits of the EU, see a Project between Budapest and Belgrade: Broude, T., "Belt, Road and (Legal) Suspenders Entangled Legalities on the 'New Silk Road'" in Krisch, N. (ed.), *Entangled Legalities Beyond the State,* 2021, Cambridge, Cambridge University Press, 107–129, pp. 124–127.

21 For the interactions between the two: Dunmore, D., Preti, A. & Routaboul, C., "The "Belt and Road Initiative": Impacts on TEN-T and on the European transport system", *Journal of Shipping and Trade* 2019, vol. 4, issue 10.

22 Broude, T. (2021) Belt, Road and (Legal) Suspenders, op. cit., p. 114. For a comparison between the wordings of the mission statement of the BRI with that of the European Economic Community: Ibid, pp. 116-117.

construction and operation management, taking into full account the impact of climate change on the construction'.[23] Commitments to the Paris Agreement and the United Nations (UN) 2030 Agenda for Sustainable Development are also promised. Yet, a review of the projects financed through the Silk Road Fund shows that most Chinese energy and transportation investments and projects financed in BRI countries have been tied to carbon-intensive sectors, such as coal power.[24] This can lead to tensions when the host countries have made commitments under the Paris Agreement. It can also lead to tensions in some geographic areas such as the Balkans[25] where European and Chinese energy standards in respect of financing energy projects are competing.[26] In an effort to discuss the differences in these standards an International Platform on Sustainable Finance has been set up which gathers amongst others the EU, China and India and hence covers around 50 % of the world population and 55 % of the world's GDP. Notably though, the US is not represented.[27] Co-chaired by the EU and China, the platform issued a report comparing the taxonomies used by the EU and China for financing climate change mitigation projects, without seeking to provide one harmonised standard.[28]

The push and pull between countries have been described by S. Bogojević and M. Zou. They find that countries such as Pakistan are attracted to coal in order to address their shortage in energy production and exploit their own coal resources. China seeks to alleviate its over-capacity in coal power generation equipment. Chinese companies in coal-related sectors are encouraged to find new markets abroad. This apparent win-win situation between countries, however, leads to tensions with local communities which are burdened with the infrastructures being built in their backyard.[29] Furthermore, in 2021, China announced to the UN its decision to stop financing coal projects overseas.[30]

Litigations around the BRI have surfaced. In Kenya, the environmental court high-

23 State Council of the PRC, Vision and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road', 30 March 2015. Available at: https://eng.yidaiyilu.gov.cn/qwyw/qwfb/1084.htm, quoted in Bogojevič, S. & Zou, M., "Making Infrastructure "Visible", in Environmental Law: The Belt and Road Initiative and Climate Change Friction", *Transnational Environmental Law* 2021, vol. 10, issue 1, 35–56, p. 43.

24 Zhou, L.et al., "Moving the Green Belt and Road: From Words to Action" *World Resource Institute*, Nov. 2018. Available at: https://www.wri.org/research/moving-green-belt-and-road-initiative-words-actions.

25 Manolkidis, S., "Geopolitical Challenges and Cooperation in the European Energy Sector: The Case of SE Europe and the Western Balkan Six Initiative" in Aspects of the Energy Union, 2021, Palgrave, pp. 101–114. For the application of the *acquis* in the Energy Community and the need to ensure that all members of the Energy Community establish the same regulatory rules, see Ibid, p. 111.

26 Minas, S., "EU Climate Law sans frontières: The Extension of the 2030 Framework to the Energy Community Contracting Parties", *RECIEL* 2020, vol. 29, pp. 177–190.

27 See: https://ec.europa.eu/info/business-economy-euro/banking-and-finance/sustainable-finance/international-platform-sustainable-finance_en. My thanks to S. Minas for providing this reference.

28 International Platform on Sustainable Finance, *Common Ground Taxonomy – Climate Change Mitigation, Instruction report*, 2021 p. 6. Available at: https://ec.europa.eu/info/business-economy-euro/banking-and-finance/sustainable-finance/international-platform-sustainable-finance_en.

29 Bogojevič, S. & Zou, M. (2021), Making Infrastructure "Visible", op. cit., pp. 35–56.

30 Ma, Z., "China Committed to Phase Out Overseas Coal Investment. New Database Tracks Progress", *World Resources Institute*, Feb. 2022. Available at: https://www.wri.org/insights/china-phasing-out-overseas-coal-investment-track-progress.

lighted the need to carry out an environmental impact assessment as a means to provide public participation in a major project.[31] This approach to environmental impact assessments for infrastructure projects may be challenged in two ways. Some courts suggest that other processes are equivalent to impact assessments in terms of facilitating public participation.[32] Impact assessments may not be primarily used to facilitate public participation, but as a management tool in regard to the many risks that may arise during the construction and management of the infrastructure.[33] In Pakistan for instance a petition was filed in 2016 in the constitutional court. The case is still pending but already draws attention to the politics of litigation surrounding large infrastructure projects – a familiar development in which the global impacts of a project are fought by a local community. Although scholarship has emphasized a stabilizing effect of the law in these cases,[34] it is by no means spontaneous. There are inherent tensions between the need to build infrastructure projects and their environmental impacts. The law is seeking to balance concerns about efficient investment in the economy, infrastructure built according to the legal norms, the protection of property rights and the health of the local population. This can lead to external tensions between private developers and local communities as well as internal tensions between legal certainty and legality.[35] Climate change is a new concern within these competing factors, complicating already challenging balancing exercises.

B. Climate change litigation[36]

Climate change litigation is seen as a 'critical forum' in which climate change, as a legal conflict, can be voiced, settled and thereby stabilized.[37] Climate change has led to a number of high-profile cases in tort law and constitutional law in countries such as Germany, the Netherlands, Belgium, Sweden and France, to name only a few.[38] These cases have manifold features that can present a transnational component: (1) they can be brought against public authorities or private actors for harm caused in a different jurisdiction;[39] (2) they can rely on legal arguments developed in another jurisdiction;[40] (3) they can draw the attention to the transgenerational effect of climate

31 Bogojevič, S. & Zou, M. (2021), Making Infrastructure "Visible", op. cit., pp. 35–56.

32 Eg., UKSC 3, 2014, *R (on the application of HS2 Action Alliance Limited) v The Secretary of State for Transport.*

33 Liu, Z.-J., Ghandour, A. & Kurilova, A., "Espoo Convention and its role in construction industry as an element of an environmental impact assessment mechanism", *Int. Environ. Agreements,* 2021.

34 Bogojevič, S. & Zou, M. (2021), Making Infrastructure "Visible", op. cit., p. 42.

35 Backes, C., Eliantonio, M. & Jansen, S. (eds.), *Quality and Speed in Administrative Decision-making: Tension or Balance?,* 2017, Intersentia.

36 See this special issue, the contributions by Ivano Alogna, Christian Huglo, Corinne Lepage and Marta Torre-Schaub.

37 Bogojevič, S. & Zou, M. (2021), Making Infrastructure "Visible", op. cit., p. 47 referring to Osofsky, H., "The Continuing Importance of Climate Change Litigation", *Climate Law* 2010, vol. 1, issue 1, pp. 3–29.

38 Sindico, F. & Mbengue, M. (eds.), *Comparative Climate Change Litigation: Beyond the Usual Suspects,* 2021, Springer; Alogna, I. (ed.), *Climate Change Litigation – Global Perspectives,* 2021, BIICL; Kahl W. & Weller, M.P. (eds.), *Climate Change Litigation - A Handbook*, 2021, Bloomsbury.

39 See for instance: *Luciano Lliuya v RWE AG.* Available at: http://climatecasechart.com/non-us-case/lliuya-v-rwe-ag/; Semmelmayer, P., "Climate Change and the German Law of Torts", *German Law Journal* 2021, vol. 22, issue 8, pp. 1569-1582.

40 Thanks to legal entrepreneurs, such as in the Belgian climate case Lefebvre, V., "Urgence climatique, quel rôle pour

change;[41] or (4) they can flag the need for international cooperation and the intertemporal dimension of human rights.[42] The abundance, but also the diversity, of this case law gives rise to three observations on transnational climate change law.

First, climate change litigation does not have a single substantive content. Despite the fact that these cases all target climate change and seek to achieve climate justice, the actual legal outcomes and legal reasoning emanating from them are different. As the Advocate General in *Cne de Grande Synthe* – a French case – put it extra-judicially, comparative law arguments need to be relied upon carefully in climate change litigation.[43] Moreover, businesses resort to international arbitration – outside national judicial systems – to challenge climate change legislation.[44] At this stage, it is therefore hardly possible to identify a single 'transnational' legal content across climate change cases.

Secondly, differences across national systems are significant. Interestingly, some legal systems do not recognise liability in the field of climate change at all.[45] These systems often provide for either constitutional litigation[46] or action against a breach of environmental regulations[47] as an alternative.[48] However, the transnational dimension of climate

les juges et la justice", *La Revue nouvelle* 2019, n° 8, pp. 66–72; *Les @nalyses du CRISP en ligne*, 21 Dec. 2019, writing that the Belgian case has been « cloned » from the Netherlands, in particular the Urganda case law (*Stichting Urgenda v Government of the Netherlands* (Ministry of Infrastructure and the Environment), NL: HR:2019:2006, Hoge Raad [Supreme Court], C/09/456689/HA ZA 13-1396; van Zeben, J., "Establishing a Governmental Duty of Care for Climate Change Mitigation: Will Urgenda Turn the Tide?", *Transnational Environmental Law* 2015, vol. 4, issue 2, pp. 339–57; Mayer, B., "*The State of the Netherlands v Urgenda Foundation*: Ruling of the Court of Appeal of The Hague (9 October 2018)", *Transnational Environmental Law* 2019, vol. 8, issue 1, pp. 167–92; Barritt, E., "Consciously transnational: Urgenda and the shape of climate change litigation", *Environmental Law Review* 2021, vol. 22, issue 4, pp. 296–305.

41 As in the case of young Australians: *Minister for the Environment v Sharma* [2022] FCAFC 35 (Sharma).

42 Krämer-Hoppe, R., "The Climate Protection Order of the Federal Constitutional Court of Germany and the North-South Divide", *German Law Journal* 2021, vol. 22, pp. 1393–1408.

43 Hoynck, S., "Le juge administratif et le dérèglement climatique - Libres propos", *AJDA* 2022, p. 147: « *l'argument de droit comparé ne peut à l'évidence ni « servir de repoussoir », ni « tenir pour vérité d'évangile » ni encore nourrir une « autosatisfaction naïve » (v. F. Melleray, L'argument de droit comparé en droit administratif français, Bruylant, 2008). Chaque système juridictionnel intègre le contentieux climatique à sa tradition juridique, parfois en la bousculant pour tenir compte des spécificités de ce contentieux mais rarement en la remettant profondément en cause*". In his conclusions in *Grande Scynthe*, he discusses the Urganda case law from the Netherlands (Available at: http://www.conseil-etat.fr/fr/arianeweb/CRP/conclusion/2020-11-19/427301, pp. 7-9) to distinguish the Dutch judicial reasoning to the one he is proposing to the French Supreme Administrative Court.

44 Fermeglia, M., Higham, C., Silverman-Roati, K. & Setzer, J., "Investor-State Dispute Settlement' as a new avenue for climate change litigation". Available at: https://www.lse.ac.uk/granthaminstitute/news/investor-state-dispute-settlement-as-a-new-avenue-for-climate-change-litigation/.

45 *Eg* the English system: Ohdedar, B. & McNab, S., "Climate change litigation in the United Kingdom", in Kahl, W. & Weller, M.P. (eds.), *Climate Change Litigation - A Handbook*, 2021, Bloomsbury, pp. 304–323.

46 BVerfG, Order of 24 March 2021, - 1 BvR 2656/18, DE:BVerfG:2021:rs20210324.1bvr265618.

47 Howarth, D., "Environmental Law and Private Law", in Lees, E. & Viñuales, J.E. (eds.), *Oxford Handbook of Comparative Environmental Law*, 2019, Oxford, Oxford University Press, 1092-1118, p. 1095. For illustrations elsewhere, see Hoynck, S. (2022), "Le juge administratif et le dérèglement climatique - Libres propos", op. cit., p. 147.

48 He, X., "Mitigation and Adaptation through Environmental Impact Assessment Litigation: Rethinking the Prospect of Climate Change Litigation in China", *Transnational Environmental Law* 2021, vol. 10, issue 3, 413–439, p. 414. For problems and the need to adapt administrative law in those cases: Bell, J. & Fisher, E., "The Heathrow Case in the Supreme

change litigation leads to fragmentation, not only in terms of the fora in which cases are brought but also in terms of the actual legal reasoning that can be relied upon in climate change cases. The transnational character continues to constitute a barrier for proving causation in tort law for instance. A difference is often made between applicants residing within the country where litigation is sought, and those residing elsewhere.[49] Equally, the enforcement of judgements in another jurisdiction can prove challenging.

Thirdly, decentralisation is very much at play in climate change litigation – not only because litigation happens in a relatively uncoordinated way but also because local governments have come together across borders to challenge both action and inaction of higher public bodies[50]. Local governments appear more like transnational actors, seeking ways to enforce international standards related to climate change[51]. Moreover, national climate change litigation also fails to provide an appropriate response to climate change. This is best illustrated in a Portuguese case where a number of children have lodged a complaint directly to the European Court of Human Rights against 31 Member States, stating that 'Member States share the alleged responsibility for climate change' even though 'Member States' contributions to global warming materialise outside their territory'.[52] Interestingly, the Court, recognized that

> *'in a particularly complex case such as this, to oblige the applicants, who come from modest families and reside in Portugal, to exhaust the remedies before the national courts of each defendant State, would be tantamount to imposing an excessive and disproportionate burden on them, whereas an effective response from the courts of all the Member States would appear to be necessary, since the national courts can only issue injunctions against their own States'.*[53]

The Committee on the Rights of the Child has however dismissed actions brought by children from a range of countries on the basis that national remedies have not been exhausted.[54]

Court: Climate Change Legislation and Administrative Adjudication", *MLR* 2022, vol. 86, issue 1, pp. 1–12.

49 Krämer-Hoppe, R. (2021), "The Climate Protection Order of the Federal Constitutional Court of Germany and the North-South Divide", op. cit., pp. 1393–1408.

50 *Eg*: GCEU, T-339/16, 13 Dec. 2018, *Ville de Paris, Ville de Bruxelles and Ayuntamiento de Madrid v European Commission*, EU:T:2018:927 (set aside by CJEU, C-177/19 P, 13 Jan. 2022, *Germany v European Commission*, ECLI:EU:C:2022:10). *Eg*: CE [Fr], 6th and 5th chambers, 19 Nov. 2020, n° 427301, *Commune de Grande-Synthe*. See conclusions Advocate General Hoynck regarding the standing of the local government and the link between what is being challenged and its impact on the territory of the local government. Available at: http://www.conseil-etat.fr/fr/arianeweb/CRP/conclusion/2020-11-19/427301, pp. 4–5. See also this special issue, the contributions by Delphine Misonne, Daniel Esty and Camille Mialot.

51 Richardson, B., "Local Climate Change Law", in Richardson, B. (ed.), *Local Climate Change Law – Environmental Regulation in Cities and Other Localities*, 2012, Cheltenham, Edward Elgar, 3-28, p. 18.

52 *Duarte Agostinho and Others v Portugal and 32 Other States*, Application 39371/20.

53 Ibid.

54 Eicke, T., "Climate Change and the Convention: Beyond Admissibility", *European Convention on Human Rights Law Review* 2022, vol. 3, pp. 8–16, 9–10.

III. Competing interpretative frameworks

Beyond the obvious local-international dichotomy, three main features can be identified across these two examples: first, the interactions between hard and soft law, secondly, the interactions between public and private action, and thirdly, interactions between the production of norms and their enforcement. Several grey zones also result from these examples. In territorial terms one might want to mention the Balkans, which is outside the EU and at the very edge of Chinese reach. In terms of jurisdiction, hybrid entities co-chaired by the EU and China such as the ISPF, parallel funding streams whose coordination in one single Agency such as the European Climate, Infrastructure and Environmental Executive Agency stick out. Legal, geographic, or institutional spaces, distances, and territories are in competition with each other or do not have the usual legally relevant connections to aggrieved persons and entities in several respects. They are being disaggregated, reconfigured and provisionally redesigned under the pressure of climate change and the need to meaningfully implement potential solutions to prevent entities from externalising their climate change impacts without taking responsibility for their own actions. Currently, no consensus exists on the technical solutions to this; there are competing views on how to interpret and address these grey zones. This section provides an overview of some of the available interpretations of these grey zones, with a focus on the territorial aspects.

A. Starting point: a territorial disruption

Climate change and the Anthropocene disrupt the categories that have been the basis for legal categories since the Enlightenment.[55] The neat distinction between human and nature, and the relationship between private action and legislation governing this power in terms of scope, functions, limits, etc. are challenged. While Western legal traditions are closely associated with the exploitation of nature and human control over it, climate change highlights the reality of interdependency between humans and nature, and perhaps even human impotence in the face of natural events. Techno-solutionism may disagree with this approach but addressing climate change with innovative technologies exacerbates the territorial disparities between places where these new technologies may be developed and protected, places in need of being protected against rising waters, droughts and fires and places where large-scale manipulation of the environment may be implemented.

In short, climate change is a disruptive factor in that addressing the resulting legal issues requires a discontinuity in the legal solutions, reasoning, and practices that previously existed. It disrupts the legal order, its stability, coherence, and relative predictability.[56] Climate change represents intellectual challenges when compared to the usual situations the law is equipped to deal with: in theory, most often, the parties and interests at stake are identifiable, most often thanks to applying national law categories; the relationships between parties are reasonably defined; facts can be ascertained, and rights

55 Affolder, N., "Transnational Climate Law", in Zumbansen, P. (ed.), *Oxford Handbook of Transnational Law,* 2021, Oxford, Oxford University Press, 247–268, p. 249.

56 Fisher, E., Scotford, E. & Barritt, E., "The Legally Disruptive Nature of Climate Change", *MLR* 2017, vol. 80, issue 2, pp. 173–201.

and responsibilities can be allocated to the existing categories. With climate change, this is not the case – and one of the reasons for this is the transnational nature of climate change, its transnational and transtemporal impacts, and the transnational dimension of any solution to climate change. Classifying these elements with their unknown components and causal direct and indirect, differential, and multiscale implications, into legal categories creates legal and political disruption and controversy.

The traditional links between territory, authority, and rights[57] are disrupted due to the development of numerous legal regimes at multiple levels, resulting in a fragmented legal and regulatory architecture.[58] One possible way to rethink this could be to understand territory in its smaller aspect under the concept of terrain, to transform state authority into localised authority and to understand rights as duties.[59] Acknowledging this disruption at the intellectual and practical levels does not in itself provide solutions but is the first step towards finding new approaches to address coordination and competition issues over contested areas.

B. International perspective: fragmentation and extraterritoriality

As a topic of international law,[60] climate change instruments are much discussed for their common but differentiated responsibilities and the weakness of state commitments. An important recurring issue is how climate change fits into the fragmented international regimes that have developed to address, among others, a series of thematic, sectorial, and geographic, issues.[61] Climate change seems to be at the crossroads of various regimes[62] such as trade law,[63] international transportation,[64] intellectual property,[65] biodiversity,[66] etc.[67] This means that the interactions between the international organisations in charge of these issues need to be navigated, leading to synergies and tensions. Climate change may conflict with other priorities such as human rights. Along the same

57 Sassen, S., *Territory, Authority, Rights: From Medieval to Global Assemblages,* 2008, Princeton University Press.

58 Fisher, E., Scotford, E. & Barritt, E. (2017), "The Legally Disruptive Nature of Climate Change", op. cit., pp. 173–201.

59 Matthews, D., "From Global to Anthropocenic Assemblages: Re-Thinking Territory, Authority and Rights in the New Climatic Regime", *MLR* 2019, vol. 82, issue 4, pp. 665–691.

60 See this special issue, the contribution by Sandrine Maljean-Dubois. Add. Baber W.F. & Bartlett, R.V., "The Role of International Law in Global Governance", in Dryzek, J.S., Norgaard, R.B. & Schlosberg, D. (eds.), *Oxford Handbook of Climate Change and Society,* 2011, Oxford, Oxford University Press, pp. 653–667.

61 Young, M., "Fragmentation, Regime Interaction and Sovereignty", in *Sovereignty, Statehood and State Responsibility – Essays in Honour of James Crawford,* 2015, Cambridge, Cambridge University Press.

62 Young, M. (ed.), *Regime Interaction in International Law – Facing Fragmentation,* 2012, Cambridge, Cambridge University Press; Carlarne, C., "International Treaty Fragmentation and Climate Change", in Faber, D. & Peeters, M. (eds.), *Climate Change Law,* 2016, Cheltenham, Edward Elgar, pp. 261–272.

63 Delimatsis, P. (ed.), *Research Handbook on Climate Change and Trade Law,* 2016, Cheltenham, Edward Elgar.

64 Mayer, B., *International Law of Climate Change,* 2021, Cambridge, Cambridge University Press, pp. 55–59.

65 Brown, A.E.L. (ed.), *Intellectual Property, Climate Change and Technology – Managing National Legal Intersections, Relationships and Conflicts,* 2019, Cheltenham, Edward Elgar.

66 Verschuuren, J., "Regime Interlinkages: Examining the Connections between Transnational Climate Change and Biodiversity Law", in Heyvaert, V. & Duvic-Paoli, L.-A. (eds.), *Research Handbook on Transnational Environmental Law,* 2020, Cheltenham, Edward Elgar, p. 178.

67 Rayfuse, R. & Scott, S. (eds.), *International Law in the Era of Climate Change,* 2012, Cheltenham, Edward Elgar.

lines as the infrastructure projects case study discussed above, Mayer gives the example of 'proponents of a hydroelectricity project supported by a flexibility mechanism, for instance, [who] may be more interested in cutting costs than in offering proper compensation to the populations resettled by the project'.[68]

However, one specific principle of international law can make a particular contribution with regard to the territorial dimension of climate change: the no-harm-principle. This principle requires states to prevent activities within their territory or control which would cause serious transboundary harm.[69] It applies to both small scale and large scale harm, such as climate change.[70] However, since responsibility under international law is only triggered where the action in question takes place on the state's territory, or under its control, attempts to regulate activities outside the state territory – notably by the EU with respect to emissions in the aviation industry for flights bound to the EU – prove difficult under international law and are considered controversial.[71]

The sources (e.g. unilateral commitments), actors (especially non-state actors) and implementation processes (e.g. facilitation towards compliance) of international law are tested in respect of climate change, although the connection to state territory remains.[72] Furthermore, the importance of international cooperation may lead states to delve into internal affairs of other states, with states pledging to cooperate in addressing local impacts of climate change.[73] This has led the scholarship to pay more attention to 'climate clubs', or small coalitions of actors who are willing to cooperate in a less than institutionalised way,[74] and to reshape the relevant geographic areas in this way.

C. Contractual perspective: linkages and networks

Given the fragmented landscape offered by international law, one possible approach is to focus on legally binding instruments that link different parts of the world: contractual networks and supply chains. From this perspective, the legal issues to be considered are not primarily climate change issues, but how global supply chains and contractual networks can provide legal solutions to externalities such as climate change, i.e. how they can internalise these externalities, and reach territories and jurisdictions beyond those of the main contracting parties.

Transnational public and private contracts are organised in the form of large networks spanning continents, linking contractors who each take on a fragmented share of the contractual obligations under the supply contracts. Transnational infrastructure projects are a great illustration in this respect. Private law theories and practitioners are striving to find appropriate ways to reconnect the components of supply chains and to identify the contractual and extra-contractual obligations arising from these net-

68 Mayer, B. (2021), *International Law of Climate Change,* op. cit., p. 264.
69 Ibid, p. 66.
70 Ibid, p. 267.
71 See references provided by Ibid, p. 269, fn. 54.
72 Ibid, p. 271–73.
73 Ibid, p. 273–74.
74 Leal-Arcas, R. & Filis, A., "International Cooperation on Climate Change Mitigation: The Role of Climate Clubs", *European Energy and Environmental Law Review* 2021, vol. 30, issue 5, 195–218, p. 200, fn. 30 for the definition.

works.[75] In public law, these extended supply chains, which reach outside the jurisdiction of the public authority awarding them, have been seen as an opportunity loaded with legal uncertainty. Contractual links have long been used by public authorities to pursue policy objectives such as equality in employment or environmental standards.[76] Article 18(2) of Directive 2014/24[77] and article 36(2) of Directive 2014/25[78] provide that Member States are to take necessary measures to ensure that economic actors comply 'with applicable obligations in the fields of environmental, social and labour law established by Union law'. These contractual ties raise doubts about the realization of freedom of movement for goods and services procured under these conditions, as the chosen ties may be used towards protectionist purposes. At the same time, the actual use of 'green procurement' seems to be consistently low in the EU,[79] highlighting its complexity and/or unsuitability to meet the practical and policy needs of public contractors.

This contractual perspective provides a starting point for analysing legal issues when there is a contract. Even then, determining concrete obligations remains problematic. In the case of procurement, monitoring and enforcing the respect of environmental standards remains practically challenging[80] and the inclusion of green linkages in procurement – even though this may be a theoretical avenue – remains hardly used.

D. Looking for alternatives

The possible perspectives on the transnational dimensions of climate change dis-

75 Teubner, G., *Networks as Connected Contracts,* 2011, Oxford, Hart; Amstutz, M. & Teuber, G. (eds.), *Networks – Legal Issues of Multilateral Co-operation,* 2009, Oxford, Hart. In relation to human rights, international efforts have been devoted to developing a binding treaty regulating this aspect. Available at: https://www.business-humanrights.org/en/big-issues/binding-treaty/. Climate change and environmental concerns are now considered for inclusion in these efforts (see below Section IV.A).

76 McCrudden, C., *Buying Social Justice,* 2007, Oxford, Oxford University Press. *EVN* – a case brought to the CJEU – is a classic illustration thereof (C-448/01, 4 Dec. 2003, *EVN and Wienstrom,* EU:C:2003:651). In this case renewable energy was one of the adjudication criteria for an energy supply contract. The Court accepted the inclusion of environmental criteria as long as they were linked to the subject matter of the contract, public, complied with the principles of transparency, equality and competition, were specific to the contract and objectively quantifiable. CJCE, C-513/99, 17 Sept. 2002, *Concordia Bus Finland,* EU:C:2002:495, where the Court also accepted criteria which would now fall within the category of climate change mitigation. Kunzlik, P., "The procurement of 'green' energy", in Arrowsmith, S. & Kunzlik, P. (eds.), *Social and Environmental Policies in EC Procurement Law – New Directives and New Directions,* 2009, Cambridge, Cambridge University Press, pp. 369–407.

77 Dir. nº 2014/24/EU, 26 Feb. 2014, of the European Parliament and of the Council on public procurement, *OJ L* 94, 28.3.2014, pp. 65–242.

78 Dir. nº 2014/25/EU, 26 Feb. 2014, of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal services sectors, *OJ L* 94, 28.3.2014, pp. 243–374.

79 Sapir, A., Schraepen, T. & Tagliapietra, S., "Green Public Procurement: A Neglected Tool in the European Green Deal Toolbox?", *Intereconomics - Review of European Economic Policy* 2022, vol. 57, nº 3, pp. 175–178.

80 See for labour standards where labour inspectorates are more comprehensively resources than might be the case of environmental inspectorates where they exist, including problems of administrative cooperation between Member States: Marique, Y. & Wauters, K., "La lutte contre le dumping social dans la sous-traitance de marchés publics", *Marchés & contrats publics* 2018, pp. 57–88.

cussed above point in the direction of many fora where experiments are taking place,[81] with multiple interactions between legal processes, actors and norms. To make sense of these territorial interactions, three alternatives might be envisaged: (1) polycentricity, (2) legal pluralism, and (3) transnational legal order – each explained in turn in the following paragraphs.

Given the lack of binding commitments and fragmentation of international environmental law, one approach to make sense of climate change issues is to understand 'climate clubs' under the umbrella concept of *polycentric governance*. In Ostrom's work,[82] polycentricity is understood as a strategy for institutional design to address a complex issue such as climate change, based on the capacity of various local, national, regional, and global governance units to solve the issue.[83] The emphasis is put on the governance structure. The main actors in this structure are on different levels - international, regional, national and [very] local. Ostrom argues for a non-hierarchical type of governance in which governing units are largely independent, yet linked together and not isolated from each other. The actual effectiveness of polycentricity in practice has been questioned.[84] It does not provide a legal – or alternative – way to organise the various independent units, to coordinate them or to solve legal issues that can arise from their actions.

Legal pluralism[85] recognises multiple forms of differentiation in the normative order and the limits of law in addressing issues.[86] It acknowledges the interlegality existing in the initiatives to address climate change.[87] For instance, in the Belt and Road Initiative, legal pluralism emphasizes the various interdependencies between the actors, who end up being closely entangled in legal terms.[88] Legal pluralism also recognises conflicts and resistance and horizontal and vertical competition between legal norms as well as between legal and non-legal norms.

Although legal pluralism recognises and analyses the role of non-law – or various normative registers and their potential interactions – it does not provide solutions as to how law and non-law registers have to interact. Scholarship developed the concept of a *transnational legal order* by which it suggests that we should understand the dynamics at play as a repetitive process of norm creation, implementation and monitoring, involv-

81 Voß, J.P. & Schroth, F., "The Politics of Innovation and Learning in Polycentric Governance", in Jordan, A., Huitema, D., van Asselt, H. & Forster, J. (eds.), *Governing Climate Change: Polycentricity in Action?,* 2018, Cambridge, Cambridge University Press, pp. 359–383.

82 Ostrom, E., *A Polycentric Approach for Coping with Climate Change,* Background Paper to the 2010 World Development Report, Policy Research Working Paper 5095.

83 Stewart, R.B., Oppenheimer, M. & Rudyk, B., "Building a More Effective Global Climate Regime Through a Bottom-Up Approach", *Theoretical Inquiries in Law* 2013, vol. 14, p. 273.

84 Jordan, A.J. et al., "Emergence of Polycentric Climate Governance and Its Future Prospects", *Nature Climate Change* 2015, vol. 5, issue 11, pp. 977–82.

85 Buzan, B. & Falkner, R., "Great Powers and Environmental Responsibilities: A Conceptual Framework", in Falkner, R. & Buzan, B. (eds.), *Great Powers, Climate Change, and Global Environmental Responsibilities,* 2022, Oxford, Oxford University Press, pp. 14–48.

86 Cfr. Delmas-Marty, M., *Ordering Pluralism – A Conceptual Framework for Understanding the Transnational Legal World,* 2009, Bloomsbury, in particular p. 139.

87 Capar, G., "From Conflictual to Coordinated Interlegality: The Green New Deals within the Global Climate Change Regime", *Italian Law Journal* 2021, vol. 7, pp. 1003–1039.

88 Broude, T. (2021) Belt, Road and (Legal) Suspenders, op. cit., p. 111.

ing both public and private actors. This is a dynamic process of conflicts and competition between norms but ultimately a process of settlement and institutionalisation.[89] While scholarship identifies various types of transnational legal orders that are more or less regulated and institutionalised (such as carriages for goods by sea or double taxation mechanisms),[90] climate change appears to be less regulated and institutionalised. Climate change seems to be an issue for which micro solutions are easier to identify than broader arrangements.[91] This strategy encompasses a variety of approaches, some of which address the production of goods, such as through private standard setting,[92] indicators,[93] or climate change litigation.[94]

IV. Legal coherence and alternative narratives:[95] transnational as a legal reasoning process

According to Liz Fisher,

> *'[a]ddressing climate change requires changing present patterns of behaviour in quite radical ways. This is economically and socially disruptive. It requires transforming infrastructure, ways of doing business, and how people go about living their lives. For communities that are feeling in an already precarious position, action in regards to climate change can make them feel even more precarious.'*[96]

Climate change in particular calls for a revised inclusion of (extra-)territorial dimensions in our normative processes, decision-making processes and behaviour. The available interpretation frames do not provide satisfying answers. This requires the imagination[97] of everybody involved – national and international legislators, central and local

89 Halliday, T. & Shaffer, G., "Transnational Legal Orders", in Halliday, T. & Shaffer, G. (eds.), *Transnational Legal Orders,* 2015, Cambridge, Cambridge University Press, pp. 3–72.

90 Ibid., p. 52.

91 Bodansky, D., "Climate Change: Transnational Legal Order or Disorder?", in Halliday, T. & Shaffer, G. (eds.), *Transnational Legal Orders,* 2015, Cambridge, Cambridge University Press, pp. 287–308.

92 Delimatsis, P., "Sustainable standard-setting, climate change and the TBT Agreement", in Delimatsis, P. (ed.), *Research Handbook on Climate Change and Trade Law,* 2016, Cheltenham, Edward Elgar, pp. 148–180.

93 For a balanced assessment of the usefulness and limits of indicators: Prieur, M., Bastin, C. & Mekouar, A., *Measuring the Effectivity of Environmental Law – Legal Indicators for Sustainable Development,* 2021, Peter Lang.

94 See above section II.B.

95 On narrative and normative coherence: MacCormick, N., *Rhetoric and The Rule of Law – A Theory of Legal Reasoning,* 2005, Oxford, Oxford University Press, pp. 229–236.

96 Fisher, L., "Challenges for the EU Climate Change Regime", *German Law Journal* 2020, vol. 21, 5–9, p. 7.

97 Sir David Attenborough reminded states in his address to the UN Security Council on 23 Feb. 2021, 31 '*[c]limate change is a threat to global security that can only be dealt with by unparalleled levels of global co-operation. It will compel us to: question our economic models and where we place value; invent entirely new industries; recognise the moral responsibility that wealthy nations have to the rest of the world; and put a value on nature that goes far beyond money*' (quoted in Eicke, T. (2022), "Climate Change and the Convention: Beyond Admissibility", op. cit., p. 15). For another call to rethink the modern legal paradigms, see Lignères, P., "Pour un droit moteur de la transition climatique", 10th June 2022.

government, regulators, and judges.[98]

New legal principles might have to be established or adapted to account for the extra-territorial dimensions of climate change which require a balancing act of spatial, temporal and sectorial concerns. In this respect, using something like a justificatory frame[99], which might be inspired by the precautionary principle[100] or the principle of proportionality[101], might help guide this legal imagination, preventing it from being purely opportunistic. The competing concerns are of a different nature than in the case of proportionality: climate change may heuristically resist discussions and debates framed in terms of individual rights as it is evidently a problem of the community as a whole. Solidarity (in the sense of relationality, interdependence, and connectedness), subsidiarity[102] and integrity (understood as a holistic and integrative approach[103] of the ecosystem[104]) might provide a more appropriate rational framework for mutual commitments across time and space as well as an approach that enables communication with other sectors of society.[105] A justifiability framework would allow decisions to be made on the basis of an objective examination of the facts and circumstances of the case and allow the parties concerned to provide information and arguments and to justify the decision taken.[106] This could be a modernised discursive approach to the principles of good administra-

Available at: https://paul-lignieres.medium.com/pour-un-droit-moteur-de-la-transition-climatique-c74cf66ccf76.

98 Fisher, E., Scotford, E. & Barritt, E., "The Legally Disruptive Nature of Climate Change", op. cit., pp. 173-201.

99 Slaughter, A., *A New World Order,* 2005, Princeton University Press, pp. 203-208.

100 Donati, A., *Le principe de précaution en droit de l'Union européenne,* 2021, Brussels, Larcier.

101 Cohen-Eliya, M. & Porat, I., "Proportionality and the Culture of Justification", American Journal of Comparative Law 2011. vol. 59, issue 2, pp. 463–490.

102 The EU Climate Law [Reg. (EU) nº 2021/1119, 30 June 2021, of the European Parliament and of the Council establishing the framework for achieving climate neutrality and amending Reg. (EC) nº 401/2009 and (EU) nº 2018/1999] is justified by the subsidiarity principle [see recital 40].

103 The need for a holistic approach is recognised: see Committee on Social Affairs, Health and Sustainable Development, Anchoring the right to a healthy environment: need for enhanced action by the Council of Europe, 1st September 2021, Explanatory memorandum by Mr Simon Moutquin, rapporteur, § 41. It is phrased in the following way: '*By preventing and prosecuting violations of the right to a safe, clean, healthy and sustainable environment, and protecting the victims, the contracting States would adopt and implement state-wide "integrated policies" that are effective and offer a comprehensive response to environmental threats and technological hazards, involving Parliaments in holding governments to account on the effective implementation of environment-friendly pro-human rights policies"* Strikingly, the transnational dimension of climate change is not included, so that mechanisms to ensure coordination and resolution of conflicts between various normative orders are not provided for. This transnational dimension needs to be given more thought and some form of solution.

104 *Eg*: Futhazar, G., "The Normative Nature of the Ecosystem Approach: A Mediterranean Case Study", *Transnational Environmental Law* 2021, vol. 10, issue 1, pp. 109–133.

105 Hence going beyond the trilemmas Teubner highlights (Teubner, G., *Law as an Autopoietic System,* 1993, Blackwell). In this sense, the 'trans-'adjective might have an added value in the case of climate change.

106 This starting point is not new at all, but a pan-European principle of good administration since the end of the 1970s for the Member States of the Council of Europe (see Res. nº (77) 31 on the protection of the individual in relation to acts of administrative authorities and Recomm. nº R (80) 2 concerning the exercising of discretionary powers by administrative authorities). What is more challenging is transforming these ideas and applying them to the complexity of climate change, including its territorial dimensions and defining 'affected' parties as everybody is affected, even future generations.

tion developed over time in many countries, especially by the Council of Europe. This approach might also allow for a more systematic integration of the transnational dimensions of rights, obligations, duties and interests with regulation aiming to change behaviour and ethical concerns for others' well-being (close others or distant others[107]) in legal norms. In the following, a preliminary account of the components of this justificatory framework is offered, focusing on the territorial dimensions of climate change.

A. Subjective perspective and human agency

Individual interests, rights and duties are often framed by specific national laws. However, the competing frames of interpretation mentioned in section III above, only pay limited attention to the difficulties for individuals to find a narrative that is coherent in terms of the intertwining of norms, rules and principles across the various legal orders generating legal and non-legal norms to address climate change issues and to find a means to navigate this ever-changing normative web. Human agency is the key to changing patterns of behaviour and thought when individuals must organise and plan their lives, assuming that they want to comply with the applicable legal and social norms in order to ensure that the Earth remains a liveable place in the future. This is the realm of practical reasoning.[108]

Efforts to realize rights – to make them justiciable – are presented as if we can assume that there is a coherent way to combine a variety of (putative) rights, and that it is just a matter of ingenuity to find a combination of commands and prohibitions, incentives and restrictions that works. The result is a flood of complex and detailed laws, regulations, guidelines, and codes of conduct that seeks to establish myriad obligations and align them in sophisticated ways. The hope has been that these interlocking requirements will somehow always secure and materialize the full range of rights – or putative rights – for everyone.[109]

A number of international bodies have recently adopted non-binding instruments recognising the right to a healthy environment, linking this right to a series of threats, including climate change. This is the case for the UN,[110] the EU,[111] and the Council of Europe[112]. Importantly, these instruments do not recognise legally enforceable individual

107 O'Neil, O., *Bounds of Justice,* 2009, Cambridge, Cambridge University Press, chapter 10.

108 Raz, J., *The Roots of Normativity,* 2022, Oxford, Oxford University Press, pp. 84–88, where he discusses the role of practical reasoning in normativity. '*Reasoning is a reason-guided mental activity of finding out how we should orient ourselves towards the world. Practical reasoning consists of those reasoning activities that aim to determine how we or others should act in the world.*' (Ibid, p. 93).

109 O'Neill, O., "Social Justice and Sustainability: Elastic Terms of Debate", in *The Governance of Climate Change,* 2011, Polity, p. 141.

110 UN General Assembly, *The Human Right to a Clean, Healthy, and Sustainable Environment,* 26 July 2022, A/76/L.75; Human Rights Council, *The Human Right to a Safe, Clean, Healthy and Sustainable Environment*, 5 Oct. 2021, A/HRC/48/L.23/Rev.1.

111 Res. nº 2020/2273(INI), 9 June 2021, of the European Parliament on the EU Biodiversity Strategy for 2030: Bringing nature back into our lives.

112 Parliamentary Assembly of the Council of Europe, "Anchoring the Right to a Healthy Environment: Need for Enhanced Action by the Council of Europe", 2021; Parliamentary Assembly of the Council of Europe, "Anchoring the Right to a Healthy Environment: Need for Enhanced Action by the Council of Europe", 2021.

rights but instead impose an obligation on their members to mitigate climate change, which in turn enables the enjoyment of individual rights of both the first and second generations. Limiting oneself to this classic state paradigm clearly lacks legal imagination and creativity[113], even though there is hope that these non-binding soft law instruments will improve accountability and enforcement by courts.[114] However, scholarship questions the suitability of merely extending existing rights to the right to a healthy environment.

> *'Indeed, many lawyers agree that certain principles are essential to enshrining the right to a healthy environment through new legal instruments: eco-centrism, subjectivism, collective and transgenerational rights, as well as the precautionary principle, non-regressiveness and the inversion of the burden of proof.'*[115]

Legal imagination is needed to reconcile these ambitions with the different territorial dimension of norms and to address climate change with legal categories other than individual rights.

B. Effectiveness: Providing procedural and institutional solutions in order to change behaviour?

A key feature of the competing interpretative frameworks discussed in section III is that they focus on evaluating the norms and systems created to address climate change in terms of their effectiveness in achieving behavioural changes. Behavioural changes are evidently important in light of the severe consequences of climate change. However, if norms and systems are only – or mainly – judged in terms of their consequences, there is a risk that important features of any normative system will be disregarded, such as their coercive character and the power relations they involve. Law is no stranger to these coercion and power relations, but law is also a factor that can mitigate them. In her analysis of disaggregated world orders, Annemarie Slaughter highlights key features that law can bring to transnational governance, such as legitimate difference, dialogue (positive comity), accountability, and subsidiarity.[116] The transnational interactions between norms and actual behaviour can contribute to output legitimacy, where state institutions play a role in implementing, evaluating, enforcing, and facilitating norms towards actual behaviour (change).

113 The UN General Assembly, *The Human Right to a Clean, Healthy, and Sustainable Environment*, 26 July 2022, A/76/L.75, is ambiguous about the role of states, alongside other international organisations, business actors and relevant stakeholders. But it merely proceeds to juxtapose these actors without allocating clearly duties and responsibilities to each of them, making concerns of imputability and accountability arise.

114 European Parliament, *A Universal Right to a Healthy Environment*, Dec. 2021, European Parliamentary Research Service, 2.

115 Committee on Social Affairs, Health and Sustainable Development, Anchoring the right to a healthy environment: need for enhanced action by the Council of Europe, 1st Sep. 2021, Explanatory memorandum by Mr Simon Moutquin, rapporteur, § 24.

116 Slaughter, A. (2005), *A New World Order*, op. cit., chapter 6.

Institutions and procedures are necessary links between the production of norms and their enforcement – and hence to bring about behavioural change.[117] The sheer number of polycentric sites and their diverse public, private, international, and local character seem to frustrate any attempt to articulate their mandates. It seems however that the processes of coordination, cooperation, competition, monitoring, evaluation, and learning that operate vertically and horizontally, transversally and sectorally, would benefit from mapping their legal mandates, powers, independence, resourcing, and accountability so that gaps and overlaps could be eliminated.[118] The transnational dimensions of these processes and institutions could then be more clearly analysed.

C. Transnational justice: not posthuman

In reshaping legal reasoning, concepts such as justice and democracy provide input legitimacy, although these are essentially contested concepts.[119] Protecting the ecosystem for future generations and for its own sake needs to be reconciled with the reality of the spatial differentiation on the ground between communities, problems and options. The interconnectedness and interdependence do not erase the distinction between nature and culture in analytical terms.

Transnational climate change law, as a subjective dimension suggested above, takes the perspective of the legal subject and attempts to organise the objective legal order. In this sense, it remains anthropocentric. If some jurisdictions provide rights for nature in some form,[120] transnational climate change law incorporates this into its considerations, but its primary goal is not to propose the conferral, creation or recognition of rights for nature to protect it against climate change.[121] This may possibly be a desirable political objective, but transnational climate change law instead focuses on the existing normative orders to provide techniques to map the possible interactions between these orders for the legal subjects. The legal subjects are the subjects participating in the legal life, the primary addressees, beneficiaries of rights and obligations. A clearer coordination of these rights and duties across legal orders might already promote the protection of the environment, facilitate behavioural change and prevent actors from failing to comply with their obligations due to the opacity of the applicable norms. Changing the entire system

117 See in this special issue the contribution by Emmanuel Slautsky arguing that democratic public institutions can be designed in such a way as to address democratic short-termism and include the interests of future generations in public decisions.

118 Research on transnational governance does exist but the interactions between transnational actors and state-based governance remain uncertain (Hale, T., "Transnational Actors and Transnational Governance in Global Environmental Politics", *Annu. Rev. Political Sci.* 2020, vol. 23, 203–20, pp, 209–11.

119 Gallie, W.B., "Essentially Contest Concepts", *Proc. Aristotelian Soc'y* 1955, vol. 56, p. 156 referred by Fisher, L., "Challenges for the EU Climate Change Regime", *German Law Journal* 2020, vol. 21, 5–9, p. 7.

120 On earth jurisprudence: Bourdon, P. (ed.), *Exploring Wild Law: The Philosophy of Earth Jurisprudence,* 2011, Wakefield Press; Schillmoller, A. & Pelizzon, A., "Mapping the Terrain of Earth Jurisprudence: Landscape, Thresholds and Horizons", *Environmental Law and Earth Law Journal* 2013, vol. 3, issue 1; Bourdon, P. D., *Earth Jurisprudence: Private Property and the Environment,* 2015, Routledge.

121 *Eg:* Fox, N.J. & Alldred, P., "Re-assembling Climate Change Policy: Materialism, Posthumanism, and the Policy Assemblage", *British Journal of Sociology* 2020, pp. 269-283; Cielemęcka, O. & Daigle, C., "Posthuman Sustainability: An Ethos for our Anthropocenic Future", *Theory, Culture & Society* 2019, vol. 36, issue 7-8, pp. 67–87.

to radically different foundations could prove idealistic, utopian, and even counterproductive – if not undemocratic. Steady incrementalism[122] – albeit disappointing for its apparent conservatism – seems in and of itself an ambitious task to find concrete solutions to very concrete (legal) problems, if taken seriously. The problem is not the incrementalism in itself, but the so-called 'ticking box mentality' issue,[123] poor implementation, vague commitments, and a tunnel vision which limits thinking to specific areas without considering the larger implications of actions, omissions, decisions, and behaviours. It is the people who must be empowered to be the main agents of change, despite their helplessness and powerlessness.

V. Conclusion

Highlighting explicitly the transnational dimension of climate change is not merely stating the obvious. It also puts in the spotlight one of the major challenges of climate change, namely how interconnected individuals are across spaces and how institutions embedded in specific territories find it difficult to overcome their spatial limitations. It also draws attention on the need for the law to ensure institutional, legal, and interpretative connections across territories. It is not sufficient to proclaim universal rights, pretending that these proclamations will erase local particularities. Climate change requires effective measures so that its root causes – such as individual patterns of consumption choices – can be tackled. However, effective transnational legal institutions stumble on the limits of state coercion on the national territory. They would require new forms of governance, persuasion, and cooperation. Space, distance and territories, as key dimensions of climate change, need to be incorporated into legal reasoning and the legal imagination so that distant others and distant spaces are internalised in local and particular norms, decisions and behaviour. This means a profound shift in the legal reasoning. Let us begin to imagine it.

122 For a critique of "incremental managerialism and proceduralism" in the face of the urgency and magnitude of the threat posed by climate change. See Alston, P. *Climate Change and Poverty: Report of the Rapporteur on Extreme Poverty and Human Rights*, UNHRC, 41st session, UN Doc. A/HRC/41/39, 25 June 2019, § 87.

123 Ibid, condemned by Alston, P.

fypl french yearbook *of* public law
Issue 1, 2023

Analysis of constitutional provisions concerning climate change

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Abstract:

Whilst action against climate change requires undoubtedly internationally coordinated efforts, treaties often suffer from a lack of concrete justiciability and immediate effects. Thus, constitutional law presents – by its place in the legal hierarchy and its jurisdictional protection – several qualities that have favoured its use to back up efforts to fight climate change and adapt to the latter's consequences. The present article aims to give a comprehensive overview of the different ways environmental constitutionalism has developed in different legal systems worldwide – from explicit legal provisions to judges' efforts to recognize implicit constitutional values to environmental rights. It also mentions the challenges environmental constitutionalism faces, especially in regards to an often-times insufficiently precise legal framework and in regards to the dependency on bold judgements, which requires reliance on strong constitutional courts capable of imposing clear obligations for public policy and a meaningful liability for failure to adopt those.

Keywords:

Environmental constitutionalism, Climate change, Environmental rights, Climate litigation, Climate liability

I. Introduction

It has not escaped anyone's notice that legal concerns about climate change thrive better in the international sphere. The atmosphere superbly ignores boundaries, which is why international law continues to be the most natural fora to address climate change. Yet, also regional legal systems (such as European Union law) are increasingly creating space for climate topics due to the classic technique of 'law concretization by degrees'. Furthermore, given the structural and cyclical weaknesses of international law and diplomacy, it is not surprising that most climate change litigations have taken place in the national context. Institutionally speaking, these are, for now, the most binding for the actors of this field, even though the States' international commitments may well back these litigations.

All this is to say, that irrespective of the predominantly international focus on the matter, there have also been national constitutional concerns about the climate for some time now. This coincides, more or less successfully, with the increasing power of 'environmental constitutionalism', which can be defined as 'the constitutional incorporation, implementation, and jurisprudence of rights, duties, procedures, policies and other provisions to promote environmental protection'.[1]

Before understanding the place of the climate in environmental constitutionalism, it is useful to offer some introductory considerations on the legitimacy of the environmental field's entry into the highest legal order - as a new mutation of constitutionalism.

Firstly, it should be recalled that the constitution is not only the legal object at the top of the legal hierarchy, but also the political instrument that reflects the values that form the foundation of any society. The constitution is part of the social contract and constitutes the framework for the relationship between citizens and public authorities. Thus, it is a synthesis, a marriage between a political and a legal instrument.[2]

Jacques Chevallier observes that the 'post-modern State' must face challenges which profoundly question the State's institutions and law.[3] It seems that the ecological crisis, which is becoming increasingly apparent in the 21st century, is the cause of many of the challenges he mentions. In the legal systems of states, the necessary protection of the environment is being enshrined as a new value of the social contract. This is quite logical, as it is clear that the consequences of climate change will significantly impact individuals and property security, which is at the heart of liberal constitutions. However, according to Hobbes, it is initially the safety need that gives birth to the social contract. Today's constitutions, without doing away with Locke's liberal philosophy, obviously include provisions aimed at ensuring security for each member of society. If climate makes human societies vulnerable, the constitution becomes a coherent benchmark to address this problem, notwithstanding the diffuse causalities and the impact of decoupling between actions, legal provisions (according to their origin) and the results of policies implemented at national level, on a situation that, by construction, still exceeds this framework.

For instance, in 2005, a Charter of the Environment was incorporated in the French Constitution. Thus, these issues have regained importance in legal doctrine: enshrining

1 May, J. R., Daly, E., "Six trends in Global Environmental Constitutionalism", in Sohnle, J. (dir.), *Environmental Constitutionalism. What Impact on Legal Systems?*, 2019, PIE Peter Lang, p. 46.

2 Ponthoreau, M.-C., *Droit(s) constitutionnel(s) comparé(s)*, 2010, Economica, p. 297.

3 Chevallier, J., *L'Etat post-moderne*, 2017, LGDJ, p. 326..

the right to a healthy environment implies the duty of 'every person' to protect and even improve the environment (Article 2). This can be seen as a reinterpretation of the social contract, which becomes an 'ecological pact'.[4]

As of today, approximately 78% of constitutions, which amounts to roughly 170 constitutions, have incorporated at least one environmental provision. This is unquestionably logical: it is a new fundamental value that rightly finds its place at the highest level of every State, as set out above. Moreover, although environmental issues can be local, at the end of the day the entire planet will be impacted by climate change. No region in the world can count on immunity.[5] In addition, the doctrine also stresses the influence of the international system on environmental constitutionalism. Suppose international and constitutional law are two sides of the same coin (sovereignty). In that case, one can observe an emulation of constitutional provisions following great international summits. They give substance to international environmental law, which then fuels national law, which may fuel international law. The 'environmental constitutionalisations' is indeed a stimulus for the organization of international meetings. A 'snowball effect' between constitutional and international law[6] contributes to a certain harmonization of legal systems.

In their contribution to Jochen Sohnle's book on the impact of environmental constitutionalism,[7] James R. May and Erin Daly identify six possible trends that characterize this "greening or rather ecologizing" of constitutions: (1) climate constitutionalism, (2) sustainability, (3) environmental rights divided into procedural rights and dignity rights, (4) rights of nature, (5) subnational environmental constitutionalism, and (6) procedural environmental rights.[8]

This overview of the constitutional protection of the environment, its impetus and its legitimacy within the constitutional framework lead us to focus on the real topic of this contribution: the nexus between climate and the constitution.

Constitutional protection of the climate can occur at several levels. First, one can look at the plain constitutional text to see whether it explicitly mentions climate issues or whether environmental and fundamental rights provisions can be interpreted to substantially cover climate issues (section II). This will be the beginning of the jurisprudential issue, through which climate litigations have spawned the idea of a 'constitutional value' beyond the constitutional text, thus branching out the constitutional concern with climate operations.

II. The explicit and implicit presence of climate within constitutional provisions

This section will start by focusing on some of the plain provisions on climate protection (A), before seeking climate constitutional protection through a classic means: the

4 Fonbaustier, L., « Environnement et pacte écologique – Remarques sur la philosophie d'un nouveau "*droit à*" », *Cahiers du Conseil constitutionnel* 2004, vol. 15, pp. 140-144.

5 From rising water causing loss of territory for coastal States, to the future hostility of some areas preventing agricultural production and population safety, to hosting 'climate refugees' in every spared region, there is no state that is protected from the current climate change.

6 Cohendet, M.-A., Fleury, M., op. cit., p. 279.

7 Sohnle, J. (dir.), Environmental Constitutionalism. What Impact on Legal Systems?, 2019, PIE Peter Lang.

8 May, J. R., Daly, E., op. cit., p. 50-63.

constitutional protection of fundamental rights (B).

A. Plain constitutional provisions explicitly referring to climate protection

Some States, due to their geographic position, feel more threatened by the current and future climatic disturbance. However, compared to the importance of the issue in the 21st century, the number of climate devotees remains surprisingly small. In fact, only a dozen countries have climate provisions in their constitutions.[9] Some of these, enshrined in the preambles, appear merely symbolic (1); while other constitutional provisions aim to be somewhat effective (2).

1. The symbolic constitutional protection of climate

The Preamble of the 2016 Ivory Coast Constitution provides that the people commit to 'contribute to the preservation of the climate and a healthy environment for future generations'. While the 'healthy environment' is reinforced by further articles of the Constitution as binding law,[10] the same cannot be said for the climate which seems to be a symbolic commitment of the people of the Ivory Coast. The same is true for the Algerian Constitution, which mentions a climate concern only in the Preamble through a relatively weak formulation.[11]

The Tunisian Constitution of 2014 seems to repeat its climate protection ambition mentioned in the Preamble[12] in Article 45 in a clearer manner: '[t]he State shall guarantee the right to a healthy and balanced environment and contribute to climate security'. It thus seems as if climate protection in Tunisia goes beyond a symbolic character. However, while the State shall *guarantee* the right to a healthy environment, it only needs to *contribute to* climate security, which makes it difficult to consider it as a right that belongs solely to the State (this is a controversy that was recently discussed in France).[13] This formulation implies that the State could not be singled out as the sole responsible party. It owes only one *contribution* amongst others which, moreover, are not further listed or specified in the remainder of the constitution. This provision, therefore, does not impose an effective obligation upon the State to fight against climate change, meaning its justiciability for plaintiffs who wish to hold the Tunisian State accountable is far from guar-

9 Bolivia, art. 407. – Dominican Republic, art. 194. – Tunisia, art. 45 – Ecuador, art. 414. – Venezuela, art. 127. – Vietnam, art. 63. – Nepal, art. 51. – Ivory Coast, Preamble. – Thailand, sect. 258 of the Constitution of 2017. – Zambia, art. 257, g) of the Constitution of 2016, v. Cournil, C., « Du prochain "verdissement" de la Constitution française à sa mise en perspective au regard de l'émergence des procès climatiques, in Colloque « La Constitution face aux changements climatiques » of 8 March 2018, Assemblée nationale, Paris, *Revue Energie - Environnement – Infrastructures* Dec. 2018, n° 12, p. 19.

10 Article 27.

11 Constitution of 28 Nov. 1996, Preamble, paragraph 18: 'The people also remain concerned about the degradation of the environment and the negative consequences of climate change and are anxious to guarantee the protection of the natural environment, the rational use of natural resources and their preservation for the benefit of future generations'.

12 Constitution of 27 Jan. 2014: 'Conscious of the need to participate in the security of the climate and the safeguarding of a healthy environment'.

13 After the work of the 'Climate Convention', a potential modification of the first article of the French Constitution of 4 Oct. 1958 has been questioned.

anteed. Thus, if the government were to pass a law that is clearly insufficient to respect the necessary climate trajectory, but that nevertheless addresses climate change, it would probably be accepted by judges as the State's *contribution* to climate security, in accordance with its obligations.

These provisions, although enshrined in constitutional text, do not seem sufficiently binding as to consider that the climate is, within these States, a constitutional object to be protected over other interests. In contrast, some constitutions, also few in number, seem to take the constitutional protection of the climate more seriously, as will be seen in the next section.

2. The effort towards binding climate protection

Article 127 of the Venezuelan Constitution states that it is

"a fundamental duty of the State, with the active participation of the society, to ensure that the population develops in a pollution-free environment in which air, water, soil, coasts, climate, the ozone layer and living species receive special protection, in accordance with the law".

Although climate is not presented as an overriding concern, it is nonetheless a *fundamental* duty of the State that cannot be avoided. This stands in stark contrast to the aforementioned Tunisian Constitution: In the latter, the notion of fundamental duty has a much more tangible normative power than that of *contribution*. It acts as a guiding principle for public policies.

With a different formulation, the Dominican Republic Constitution states in Article 194:

"[t]he formulation and execution, through law, of a territorial ordering plan that ensures the efficient and sustainable use of the natural resources of the Nation, in accordance with the need for adaptation to climate change, is a priority of the State".

Under the notion of *priority,* one might think that this article is as non-binding as the Venezuelan provision. Yet, also a different interpretation is possible given that the notion of *priority* can allow constitutional conciliation in favor of this rule rather than others. Another advantage of this provision compared to the Venezuelan Constitution is that it is more precise. Even though it requires further specification via legislation, the Constitution requires the state to set up a territorial regulatory plan that takes into account 'the need for adaptation to climate change'. Thus, although the constitutional judges must respect the law's competence on the matter, they could evaluate the adaptation of the territorial regulatory plan to climate change, despite the well-known dialectic in 'climatic law': fight against... or adapt to.

Another example in this respect is Article 414 of the constitution of Ecuador.

'The State must adopt adequate and transversal measures to mitigate climate change, by limiting greenhouse gas emissions, deforestation and air pollution; it must take measures in favor of the conservation of forests and vegetation; and it must protect the population at risk.'

By putting climate change inclusiveness at the highest level of the legal hierarchy, this Constitution avoids making climate an isolated issue, separate from all other public policies. The provisions' accuracy limits the legislator within a defined range of possibilities, so that effective constitutional review by the Ecuadorian constitutional judges can be expected.

B. The 'climatization' of other constitutional provisions: working towards the inclusiveness of fundamental and environmental rights

The starting point is simple: even if the climate is not explicitly mentioned in constitutions, there are still ways to protect it. Firstly, climate protection can be achieved by protecting the right to a healthy environment, as a 'meta-constitutional' component (1). Second, this possibility can be expanded to all fundamental rights, as most have a 'climate absorption' capacity (2). In the following, this section will show that climate litigation has already considered this issue.

1. The right to a healthy environment: axiological center of environmental rights, including the constitutional climate protection

In 1998, Étienne Picard claimed that the law is not made by the State, but the State is made by the law as an instrument for legal implementation.[14] To this end, fundamental rights are guaranteed at the highest level of the legal system, where they are enshrined in the universally recognized value of human dignity. Picard's theory continues by defending the idea that a value can be at the origin of the law, despite the uneasiness of the positivist doctrine on this matter. He reconciles two contradictory concepts: law and value. Thus by observing the values the essential meaning of the rule can be understood. The rule will then materialize within the formal legal hierarchy. However, Étienne Picard emphasizes that all this starts from a substantial hierarchy of values, in which human dignity, as the axiological center of fundamental rights, takes precedence.

Similar to human dignity as the axiological center of fundamental rights and highest value that can be objectified and accepted by all, the right to a healthy environment can take this place among environmental rights. In other words, if all fundamental rights are the direct consequence of the guarantee of human dignity by the State, environmental rights, including climate, are the consequence of the guarantee of the right to a healthy environment.

Such a hypothesis seems to offer two possibilities: while the right to a healthy environment would remain enforceable in and of itself as a subjective right, it would also be an inclusive right from which would other environmental rights would derive, such as the 'right to a stable climatic system' that can sustain human life and that so many organizations and associations have sought to recognize in climate litigations in recent years.[15]

This hypothesis can already be observed in courts, as claimants have no choice but to invoke the right to a healthy environment, which is enshrined in several constitutions. As

14 Picard, É., « L'émergence des droits fondamentaux », *AJDA* 1998, n° spécial, p. 6-42.

15 Cournil, C., « Les convergences des actions climatiques contre l'État. Étude comparée du contentieux national », *Revue juridique de l'environnement* 2017, vol. spécial, n° HS17, p. 255.

its 'fundamentality' is still disputed in doctrine,[16] claimants are eager to link climate protection to all relevant constitutional rights.

2. Constitutional rights: possible implications for constitutional protection of the climate

Between May 2018 and December 2020, the French government proposed three bills to modify the French Constitution in order to add the term 'climate'. A 2018 bill proposed to include a legislative competence in order to combat climate change although Article 34 of the Constitution already provides a general competence to preserve the environment.[17] Another constitutional project suggested adding a paragraph about France's action for the preservation of biodiversity and climate change to Article 1 of the Constitution twice, in 2019,[18] and in 2020.[19]

Some scholars sharply criticized this effort to include 'climate' in the constitution, arguing that it was pointless to reinforce something that was already included in the constitutional provisions under the broad term 'environment'.[20] Aside from the question of utility, splitting environmental protection in this way may result in examining only one part of the effort rather than the ecosystems as a whole. One could well imagine then those public policies that adequately protect climate, successfully achieve carbon neutrality, but at the same time have devastating effects on biodiversity,[21] and set back global environmental protection. To draw an analogy with liberty in France: it is a constitutional right enshrined in Article 4 of the Declaration of the Rights of Man and of the Citizen (1789). It has an open definition, in that it only describes what liberty is not: liberty cannot include harming others. This constitutional right is then concretized in legislation, for instance by the guaranteeing of pluralism, explaining in detail some freedoms and suppressing those who, whilst believing they enjoy their rights, actually harm others[22]. For example, the freedom of expression does not permit defamation.

How then can one legally justify acting differently on an issue as inclusive as the ecological crisis?

The most protective interpretation for the environment is, therefore, that any State

16 da Silva, V. P., « Portugal. Le vert est aussi couleur de Constitution », *Annuaire international de justice constitutionnelle,* vol. 35, n° 2019, p. 455-469.

17 Projet de loi constitutionnelle n° 911 du 9 mai 2018, pour une démocratie plus représentative, responsable et efficace.

18 Projet de loi constitutionnelle n° 2203 du 29 août 2019, pour un renouveau de la vie démocratique.

19 Projet de loi constitutionnelle n° 3787 du 20 janv. 2021, complétant l'article 1er de la Constitution et relatif à la préservation de l'environnement.

20 Bétaille, J., « Inscrire le climat dans la Constitution : une fausse bonne idée pour de vrais problèmes », *Droit de l'environnement* 2018, n° 266, p. 130-131.

21 In this respect, nuclear energy can be taken as an example: considering that it does not emit any greenhouse gases (which requires accepting that the extraction of uranium and its transport to the power plants are not counted as emissions attributable to it) compared to fossil fuels, nuclear power plants require very large quantities of water to cool the reactors, which heats up natural basins in which an entire ecosystem loses the balance of its survival. Hydroelectric dams follow the same logic, interrupting ecological continuities that are sometimes crucial for an unsuspected number of species.

22 We can understand by this the damage in civil law, but also all the criminal laws.

that protects 'the environment' includes climate protection as a part of the environment. Moreover, it is known that the climate issue jeopardizes fundamental constitutional rights. Constitutional courts have already begun recognizing this interconnection and use it to require more serious climate public policies, such as the Pakistani[23] and South African judges.[24] Since the success in the *Urgenda* case, invoking constitutional rights protection has become a litigation strategy for plaintiffs.[25] It is quite efficient as constitutional courts influence each other around the world to recognize this climate protection from constitutional rights through a sort of domino effect.

This last point prompts us to focus on climate litigation because it shifts the question from 'constitution' to 'constitutional value' and makes our case: climate can have a praetorian constitutional value without being explicitly enshrined in constitutional provisions.

III. The implicit constitutional tool: the 'constitutional value' of praetorian climate provisions, driven by the climate litigation impulse

Many constitutional judges have elevated climate protection to the constitutional rank by giving climate protection a certain value over other interests. Laurence Gay and Marthe Fatin-Rouge Stefanini conceptualized this by differentiating three kinds of climate litigation concerning constitutions.[26] Their taxonomy will be retained here: constitutional review (A), the indirect method of constitutional protection through fundamental rights,[27] and another strategy which seeks State responsibility through constitutional principles (B). These litigations have allowed national judges from every legal tradition to raise the climate issue to the constitutional level.

A. Constitutional review and climate policies

Constitutional review, which is an objective review of a rule, has enabled several constitutional judges to make a choice as to whether climate is to be a constitutional matter or not. The reviewed norms can relate to climate (2), but it is not a prerequisite for bold jurisprudential decisions (1).

1. The diversity of the reviewed rules

To give climate protection constitutional status does not necessarily require climate change legislation to be constitutional reviewed. In 2016, the Colombian Constitutional Court took advantage of a 2015 bill on the Paramos ecosystem to make climate protec-

23 Lahore High Court Green Bench, 7 and 14 Sept. 2015, *Asghar Leghari v. Federation of Pakistan*.

24 North Gauteng High Court, 8 March 2017, n° 65662//16, *EarthLife Africa Johannesburg (ELA) c. Ministry of Environmental Affairs and others*.

25 Cournil, C., « Étude comparée sur l'invocation des droits constitutionnels dans les contentieux climatiques nationaux », in Cournil, C., Varison, L. (dir.), *Les procès climatiques : entre le national et l'international*, 2018, p. 90-94.

26 Gay, L., Fatin-Rouge Stefanini, M., « L'utilisation de la Constitution dans les contentieux climatiques en Europe et en Amérique du Sud », in Colloque « La Constitution face aux changements climatiques », op. cit., p. 27-33.

27 We will not return to this point, which has just been analyzed in the first part, but in fact each case mobilizes several arguments at once, which does not exclude reviewing the same cases in other parts of the analysis.

tion a constitutional interest,[28] and was hence able to prohibit deforestation. The Court makes a clear causal link between the ecosystem that is being jeopardized by the law in question, and the climate issue, as the Paramos region supplies water for roughly 70% of the Colombian people and is a carbon sink. The Court adds new words to the Constitution so as to protect an ecosystem. This led the Court to "ensure a real control of the laws that affect the country's climate policy".[29]

The controlled legal object may also be an administrative act.[30] For instance, the German Constitutional Court curbed judicial activism,[31] and prevented the recognition of climate as an overriding public interest, as in Colombia, despite a promising decision by the Court of Appeal. The federal government of Lower Austria had authorized the construction of a third runway at Vienna airport and the relocation of a freeway. The Constitutional Court found that there was no justification to put the environmental, and therefore climatic, interest over other constitutional interests.

The Irish High Court, less shy about the constitutional importance to be given to climate, came to a similar conclusion.[32] Even if the violation of the right to a healthy environment cannot be said to be disproportionate, there is a link to climate, which implies a constitutional value for the climate issue. Once again, the litigation involved a normative act that was not about climate change, but it gave the Constitutional Court an opportunity to derive a constitutional value for climate.

2. The climatic nature of the reviewed norms

It is worth mentioning the resounding ruling of the German Federal Constitutional Court in spring 2021.[33] By censoring the law and its insufficient goals, in the name of fundamental rights, the Court provided a quantified and more binding climate goal, as the law was declared unconstitutional. This time, a constitutional review of a climate law is an opportunity to constitutionalize something even more binding than before.

However, the German Constitutional Court is well-known for its bold decisions, notably by considering itself in a position to give the legislator instructions, especially when there is a link with fundamental rights. The Bundesverfassungsgericht presents itself as a game referee, based on a supposedly clear separation between law and politics. The members of the Court are expected to focus exclusively on legal technicalities. However, in reality, the Court assumes that some axiological postulates,[34] which predate the 1949 Constitution, must guide its interpretation. Thus, when it needs to justify its law-making

28 Sent. C-035/16, 8 Feb. 2016.

29 Cournil, C., « Étude comparée sur l'invocation des droits constitutionnels dans les contentieux climatiques nationaux », op. cit., p. 96.

30 The jurisprudence can also justify the control, v. Gay, L., Fatin-Rouge Stefanini, M., op. cit.

31 Bundesverwaltungsgericht (BVwG), 2 Feb. 2017, W109 2000179-1/291E. See the two-part commentary by Émilie Gaillard and Laurent Fonbaustier, and in particular (but not only) Fonbaustier, L., « Le tribunal de Karlsruhe et la décision du 24 mars 2021 : quelques réflexions sur ce que signifie être juge constitutionnel par gros temps », *EEI* July 2021, n° 7, p. 39-40.

32 High Court, 21 Nov. 2017, n° 201 JR, *Friends of the Irish Environment CLG v. Fingal County Council.*

33 BverfG, 24 March 2021, published on 29 April 2021, 1 BvR 2656/18, 1 BvR 96/20, 1 BvR 78/20, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20.

34 i. e. a set of values.

interpretations, it claims to apply the values that are imposed upon the Court, the Constitution and on each institution and individual. In doing so, the Bundesverfassungsgericht has created strength out of an initially fragile position, between law and politics.[35]

However, few constitutional judges are as bold as the Karlsruhe Court's members. The French Constitutional Council, which is frequently pointed out for its shy interpretation of the Charter of the Environment,[36] also had the opportunity to review the recent French law about climate.[37] While the Council's members highlighted with ease several irrelevant provisions, the same could not be said when the claimants requested it to declare the law unconstitutional because of its general economy, without pointing to a particular provision:

> *'In the present case, the applicants develop a general criticism of the legislator's ambitions and of the inadequacy of the law as a whole. They do not therefore challenge any particular provision of the law in question in order to request its censorship. The complaint against the law as a whole can therefore only be dismissed'.*[38]

By refusing to review the law in a more generally in light of the fight against climate change, without focusing on a specific provision (although this legal reasoning could be considered well founded), the Constitutional Council retreats to its classic fall-back position. It does not turn the 'climate' into a clear constitutional interest and does not indicate whether it could be part of the right to a balanced and healthy environment protected by the first article of the Charter. Its position on the protection of the environment is profoundly different from that of other European judges in Germany or the Netherlands,[39] or even Latin American judges from Colombia[40] or Costa Rica.[41]

B. The States' climate liability based on constitutional grounds: the emergence of climate duties and obligations

Marta Torre-Schaub points out an interesting fact: quantitatively, climate litigation

35 Basset, A., « Droits fondamentaux et droit constitutionnel : une confusion allemande », in Bottini E. et al. (dir.), *Nouveaux regards sur des modèles classiques de démocratie constitutionnelle : États-Unis, Europe*, 2018, Mare & Martin, p. 173-177.

36 Gay, L., Vidal-Naquet, A., « France », *Annuaire international de justice constitutionnelle* 2020, vol. 35, n° 2019, p. 301-331: the authors believe that it has led to the undermining of the rights originally provided for in the Charter of the Environment.

37 CC, 13 Aug. 2021, n° 2021-825 DC, *Loi portant lutte contre le dérèglement climatique et renforcement de la résilience face à ses effets*.

38 Cons. 4.

39 Petrinko, E., « De la décision d'Urgenda aux perspectives d'un nouveau contentieux climatique », in Cournil, C., op. cit., p. 113-128.

40 Lafaille, F., « Constitution éco-centrique et État social de droit. À propos du constitutionnalisme andin », *Revue française de droit constitutionnel* 2019, vol. 118, n° 2, p. 333-355.

41 Cerda-Guzman, C., « Chili et Costa Rica », *Annuaire international de justice constitutionnelle* 2020, vol. 35, n° 2019, p. 197-213.

aimed at establishing state liability is minoritarian worldwide, but it accounts for almost a quarter of European climate litigation.[42] These cases demonstrate that the judge is sometimes receptive to the use of constitutional arguments for climate protection to supervise the public authorities (1), and / or establish climate obligations attributable to the States (2).

1. The control of public authorities based on constitutional grounds

Public authorities act within the powers conferred upon them by the constitutions and cannot go beyond them. This analysis is thus related to the above analysis of constitutional review, since one could reuse some of the judgments already mentioned, such as the Colombian one, which simply frames the authorities' actions by asserting that the law infringing upon the Paramos ecosystem is unconstitutional. In general, decisions about major construction projects, such as the cases before the Irish High Court and Austrian Constitutional Court, reflect the need to assess the public policies in the light of climate change. These cases[43] allow us to see how similar arguments used by plaintiffs around the world have led judges from every continent to render decisions on the same topics: the review of rules or projects, in light of fundamental rights, showing the need to frame politicians and public powers, and, consequently, private activities that require official authorizations.

The South African case is another example: Article 24 of the Constitution calls for the recognition of environmental rights in order to protect climate. The judge in this case was to decide about a coal-fired power plant.[44] The Court said:

> *"Climate change poses a substantial risk to sustainable development in South Africa. The effects of climate change, in the form of rising temperatures, greater water scarcity, and the increasing frequency of natural disasters pose substantial risks. Sustainable development is at the same time integrally linked with the principle of intergenerational justice requiring the State to take reasonable measures to protect the environment "for the benefit of present and future generations" and hence adequate consideration of climate change. Short-term needs must be evaluated and weighed against long-term consequences".*[45]

From this last decision it is clear that the need to evaluate public policies is accompanied by a more global climate obligation expressed in emblematic litigations.

2. Constitutionally grounded State obligations regarding climate

One cannot talk about the successes of the liability litigations without mentioning the

42 Torre-Schaub, M., « L'émergence d'un contentieux climatique comme réponse à l'urgence climatique : dynamiques, usages et mobilisations du droit », in Torre-Schaub, M. (dir.), *Les dynamiques du contentieux climatique : usages et mobilisations du droit*, 2021, Mare & Martin, p. 27.

43 See above, II-A-1.

44 North Gauteng High Court, 8 March 2017, n° 65662//16, *EarthLife Africa Johannesburg (ELA) c. Ministry of Environmental Affairs and others.*

45 Cons. para 82.

Urgenda case, which inspired the claimants' activism, and even possibly the judges' activism. Based on Article 21 of the Dutch Constitution,[46] judges have found a diligence duty attributed to the Netherlands regarding climate, allowing the judges to justify reviewing climate policy.

Scholars have argued that this Dutch case inspired subsequent climate litigation and ushered a new "era" of climate litigation once the main obstacles to these lawsuits (admissibility, causal link, etc.) were overcome.[47] Indeed,

> *"[w]hile Urgenda marked the emergence of climate litigation, it has now grown and diversified considerably, making the courts the new frontline of climate action. Despite the specificities of each claim and each national jurisdiction, a common language and jurisprudence are emerging, recognizing similar obligations for all actors – States and companies – in the name of global climate justice".*[48]

Pakistani judges,[49] seemingly inspired by the *Urgenda* case, found climate obligations based on constitutional fundamental rights, in particular the right to life (Article 9 of the Pakistani Constitution), the right to human dignity (Article 14) and environmental rights. They also relied on constitutional principles such as democracy, equity, social justice, etc. Therefore, the Court condemned the immobility of public policies and imposed obligations upon public authorities to adapt to climate change.

IV. Conclusion

In conclusion, constitutional provisions on climate – whether to combat climate change or, more rarely, to adapt to its consequences – appear in constitutional instruments only hesitantly and in a multilayered fashion. However, as is often the case when faced with new questions fraught with conflicting rationales and legitimate tensions, much is expected of judges, especially at the constitutional level. Let us not be fooled: when judges are involved, this means that the need for protection, which must be at the heart of the environmental protection goals, has been violated in one way or another. However, constitutional jurisprudence cannot be reduced to a 'last resort' function. It is, in turn, a melting pot that feeds on the texts when it can relate to them, but also from the Zeitgeist (dare we write on this subject). Through feedback and ripple effect, climate jurisprudence can in turn influence national legal orders and spread to all continents as a new source of inspiration, contribution to the development of the new climatic, and, above all, ecological framework that we urgently need.

46 'It shall be the concern of the authorities to keep the country habitable and to protect and improve the environment'.

47 Torre-Schaub, M., « L'émergence d'un contentieux climatique comme réponse à l'urgence climatique : dynamiques, usages et mobilisations du droit », in Torre-Schaub, M. (dir.), op. cit., p. 31-32.

48 Petrinko, E., « De la décision d'Urgenda aux perspectives d'un nouveau contentieux climatique », in Cournil, C., op. cit., p. 128.

49 Lahore High Court Green Bench, 7 and 14 Sept. 2015, *Asghar Leghari v. Federation of Pakistan.*

fypl french yearbook *of* public law
Issue 1, 2023

Increasing Climate Litigation: A Global Inventory

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Abstract:

Climate change, often described as a "super-wicked" problem, has led to an increasing number of legal actions against governments and corporations worldwide. These cases, stemming from the failure of national and international policymakers to address climate change adequately, are expanding in scale and ambition. This article explores climate litigation as a response to the urgent climate change crisis. It provides a global overview of climate-related litigation by examining prominent domestic cases, underscoring the collective nature of climate governance and the crucial role of the judicial system in addressing this global challenge.

Keywords:

Climate change litigation, Environmental case law, Climate governance

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I. Introduction

As a response to the gravity of the climate change crisis, climate litigation has been on the rise in recent decades despite being a "fairly new phenomenon".[1] Climate change has been referred to as a "super-wicked" problem[2] due to its effects and anthropogenic nature,[3] as well as the inability of States to keep up with its exponential growth and its unique challenges: time is running out, there is no central authority to tackle it, and those attempting to solve the problem are also causing it. Consequently, despite the complex international climate regime,[4] the failure of national and international policy-makers to act promptly and decisively has necessitated that the "judicial arena"[5] take the lead in combating climate change. Legal actions against governments and corporations relating to climate change are increasing in number, scope, and ambition, snowballing across all continents and paving the way for a greater judicial focus on climate issues. In this chapter, we will attempt to provide a (necessarily incomplete) global inventory of climate-related litigation[6] by examining some of the most prominent climate-related domestic cases. The global scope of this inventory is essential for highlighting the collective nature of climate governance, also in the form of climate litigation, as a result of lessons learned from other legal systems, cooperation with and among scientists, and an increasingly vital dialogue between judges, legal scholars, and practitioners involved in this type of litigation all over the world.[7]

A. Definition(s)

For a preliminary understanding of the contours of climate litigation, it is necessary to examine its definition(s). Two main approaches dominate the definition of climate change litigation in the legal literature. On the one hand, there is a "narrow definition"

1 Preston, B.J., "Climate Change Litigation", *Carbon & Climate Law Review* 2011, vol. 5, issue 1, pp. 3-14. According to part of the literature, "Climate litigation is generally recognized to have started in the United States in the late 1980s but has since emerged as a growing global phenomenon". See Setzer, J. & Higham, C., "Global trends in climate change litigation: 2021 snapshot", *Grantham Research Institute on Climate Change and the Environment*, 2021, Policy report, 8.

2 See Lazarus, R., "Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future", *Cornell Law Review* 2009, vol. 94, pp. 1153–1234.

3 See the latest assessment report by the Intergovernmental Panel on Climate Change: IPCC, Climate Change 2021: the Physical Science Basis, Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, Cambridge, Cambridge University Press, 2021.

4 Including the 1992 United Nations Framework Convention on Climate Change, the 1997 Kyoto Protocol and the 2015 Paris Agreement.

5 Cf. Rochfeld, J., Justice pour le climat ! Les nouvelles formes de mobilisation citoyenne, 2019, Paris, Odile Jacob, p. 8.

6 Cf. the perspectives considered in our latest edited volume: Alogna, I., Bakker, Ch. & Gauci, J.-P. (eds.), *Climate Change Litigation: Global Perspectives*, 2021, Leiden, Brill; see also Sindico, F. & Mbengue, M. (eds.), *Comparative Climate Change Litigation: Beyond the Usual Suspects,* 2021, Springer; Huglo, Ch., *Le contentieux climatique: un révolution judiciaire mondiale*, 2018, Bruxelles, Bruylant.

7 Maxwell, L., Mead, S. & van Berkel, D., "Standards for adjudicating the next generation of *Urgenda*-style climate cases", *Journal of Human Rights and the Environment* 2022, vol. 13, issue 1, pp. 35-63; see also Cournil Ch., "Les convergences des actions climatiques contre l'Etat. Étude compare du contentieux national", *Revue juridique de l'environnement* 2017/HS17, n° spécial, 252.

that limits climate change litigation to cases that directly and explicitly address an issue related to climate change or climate change policy. Markell and Ruhl's frequently cited definition provides an example:

"[A]ny piece of federal, state, tribal, or local administrative or judicial litigation in which the party filings or tribunal decisions directly and expressly raise an issue of fact or law regarding the substance or policy of climate change causes and impacts".[8]

On the other hand, broader definitions are increasingly being proposed, which, in addition to the explicit reference to climate change in proceedings or decisions, also consider the motivations of claimants, as well as cases in which climate change is not central but rather an "additional" or perhaps "secondary" concern, even if not explicitly mentioned. In this regard, Peel and Lin note that "there is a need for concepts of climate litigation that can capture lower-profile cases where climate change is more peripheral to arguments in, or the motivation for, the lawsuit".[9] In their view, a broader definition is particularly necessary when considering litigation in the Global South, where a significant number of cases reflect a "peripheral" focus on climate change rather than having the issue at the "centre" of the litigation. For the purposes of global analysis, it is preferable to adopt a broader perspective in order to account for more inclusive perspectives on its development on every continent.

B. Increase in climate litigation and categories of climate-related cases.

Both the domestic climate change law scene and the climate change litigation landscape have undergone significant transformations over the past few years. According to some authors,[10] the increase in climate litigation and adjudication is the result of three main factors: the proliferation of specialist environmental courts and tribunals and a generally increased judicial capacity in this field; a more solid basis for climate litigation provided by the constitutionalisation of environmental protection (with 148 countries enshrining human rights or other constitutional provisions); and the rise of transnational judicial – and more generally legal – networks, creating a fundamental bottom-up process to educate lawyers and courts about climate justice through dialogue and exchange among judges and legal experts.

In a similar vein, the emergence of global climate protests (such as those led by Extinction Rebellion or Fridays for Future) has highlighted the inadequacy of government action and compelled lawyers to consider how they can use the law to press for change and take litigation to the courts as new "battlefields in climate fights".[11] Among the cases

8 Markell, D. & Ruhl, J.B., "An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual?", *Florida Law Review* 2012, vol. 64, p. 27.

9 Peel, J. & Lin, J., "Transnational Climate Litigation: The Contribution of The Global South", *American Journal of International Law* 2019, vol. 113, p. 679.

10 Ganguly, G., Setzer, J. & Heyvaert, V., "If at First You Don't Succeed: Suing Corporations for Climate Change", *Oxford Journal of Legal Studies* 2018, vol. 38, issue 4, pp. 862-864.

11 Vanhala, L., "The comparative politics of courts and climate change", *Environmental Politics* 2013, vol. 22, issue 3, p. 447.

considered to have "flooded the courts",[12] particularly domestic ones, several types of climate change litigation can be distinguished: strategic cases, with a visionary approach, aiming to influence public and private climate accountability;[13] and routine cases, less visible ones, dealing with, for example, planning applications or allocation of emissions allowances under schemes such as the EU emissions trading scheme. The literature also makes an interesting distinction between "proactive" litigation, which is initiated to promote policy change (such as by requesting the adoption or reform of legislation), and "reactive" litigation, which is initiated to oppose such change (by challenging the adoption of new or reformed legislation).[14]

Intriguingly, scholarly and media attention on climate litigation tends to concentrate on cases that attempt to advance climate action, or "pro-regulatory" cases. Despite this, not all climate litigation pursues this objective. A number of cases have been documented in which litigants have contested the implementation of regulations or policies that would reduce greenhouse gas emissions. Literature refers to them as "anti-regulatory", "defensive", or simply "anti" litigation.[15] The majority of these lawsuits are filed by parties who have a financial or ideological interest in delaying or obstructing climate action.

C. Consistent growth in the literature and databases

Since its humble beginnings in the early 2000s, the legal and social science literature on climate litigation has grown consistently. This body of knowledge has developed predominantly with the exponential increase in climate-related cases. From a handful of cases in the 1990s, the "Climate Change Litigation Databases" developed by the Sabin Center for Climate Change Law at Columbia University now identify more than 2,000 cases,[16] covering over 55 countries (698 cases) and 10 regional or international jurisdictions. The US climate change litigation database exhaustively examines 1,578 cases (nearly three-quarters of the total) that have been identified in the United States. Australia has the second-highest number of climate cases worldwide, following the United States. The Centre for Resources, Energy and Environmental Law at the University of Melbourne created the "Australian Climate Change Litigation database"[17] in response to the filing of

12 Paraphrasing the terminology used by the economist Jeffrey Sachs, Director of the Earth Institute at Columbia University, during his lecture on "A Proposal for Climate Justice" at the London School of Economics and Political Science. Available at: www.lse.ac.uk/Events/2017/10/20171003t1830vOT/a-proposal-for-climate-justice.

13 However, as highlighted by a part of the scholarship, "not all cases challenging the design or application of climate policies and measures fit this description. Increasingly, cases have been filed that might not oppose climate action as their primary objective but will delay the finalisation or implementation of climate policy responses. For example, individuals bringing rights-based climate cases might not object to climate action but rather to how such action is carried out or its impacts on the enjoyment of human rights. These cases can be called 'just transition' cases". Setzer, J. & Higham, C., "Global trends in climate change litigation: 2022 snapshot", *Grantham Research Institute on Climate Change and the Environment*, 2022, Policy report, p. 7.

14 Setzer, J. and Byrnes, R., "Global Trends in Climate Change Litigation: 2019 Snapshot", *Grantham Research Institute on Climate Change and the Environment*, 2019, Policy report, p. 2.

15 Savaresi, A. (2021), "Inter-State Climate Change Litigation: 'Neither a Chimera nor a Panacea'", in Alogna, I. et al. (eds.), op. cit., pp. 366-367.

16 Precisely 2276 cases, as of March 2023. See: http://climatecasechart.com/about/.

17 See: https://law.app.unimelb.edu.au/climate-change/index.php#overview.

more than 200 cases, as well as those involving New Zealand and Pacific Island nations. The "Climate Change Laws of the World"[18] database from the Grantham Research Institute on Climate Change and the Environment at the London School of Economics and Political Science (LSE) is an additional crucial worldwide database. It includes national-level climate change laws and policies and climate litigation cases from around the world.

D. Plan

In this way, climate change litigation can be viewed as "an important component of the governance framework that has emerged to regulate how states respond to climate change at the global, regional, and local levels",[19] thanks to lawsuits in which citizens and NGOs challenge the actions or inactions of local authorities and national governments, putting pressure on the executive and legislative branches of government to address climate change issues.[20] At the same time, climate change-related lawsuits have been filed against private actors,[21] primarily fossil fuel and cement companies, also referred to as "Carbon Majors" because they are significant greenhouse gas emitters.[22] This contribution will examine this dual perspective – climate change litigation involving governments (II) and corporations (III) – by synthesising some notable cases worldwide and proposing a straightforward categorisation for this brief inventory. These categories frequently overlap, as each case involves multiple causes of action.

II. Climate litigation involving governments

In recent years, around three-quarters of climate-related cases have been against States, challenging the adequacy of governmental policies to reduce greenhouse gas (GHG) emissions or protect communities from climate change. In addition, public bodies licensing climate-changing infrastructure like coal mines, oil drilling, fracking, dams, and airports have been sued. While some countries are taking the appropriate steps, science demonstrates that we are far from the GHG emissions reductions needed to avert temperature rises of 1.5 °C or 2 °C, as per the Paris Agreement, and the disastrous climate change that will result. The newest UNEP Emissions Gap Reports examine various scenarios in order to compare projected annual GHG emissions reductions based on current policy with the reductions that are necessary.[23] The scientific data in these reports show that "[p]olicies currently in place with no additional action are projected to result in

18 See: https://climate-laws.org/litigation_cases.

19 Lin, J., "Climate Change and the Courts", *Legal Studies* 2012, vol. 32, issue 1, p. 36.

20 There has also been much debate in the literature as to institutional competence, including separation of powers and justiciability arguments. See e.g. Eckes. Ch., "Tackling the Climate Crisis with Counter-majoritarian Instruments: Judges Between Political Paralysis, Science, and International Law", *European Papers* 2021, vol. 6, nº 3, pp. 1307-1324.

21 See *ex multis* Weller, M-Ph. & Tran, M.-L., "Climate Litigation against companies", *Climate Action* 2022, vol. 1, article nº 14; cf. a critical analysis on the topic by Bouwer, K., "Lessons from a Distorted Metaphor: The Holy Grail of Climate Litigation", *Transnational Environmental Law* 2020, vol. 9, issue 2, pp. 347-378.

22 From a historical and scientifical perspective, see the contribution by Frumhoff, P.C., Heede, R. & Oreskes, N., "The climate responsibilities of industrial carbon producers", *Climatic Change* 2015, vol. 132, issue 2, pp. 157-171.

23 See the latest one: UNEP, *Emissions Gap Report 2022: The Closing Window. Climate crisis calls for rapid transformation of societies*, Oct. 2022. Available at: https://www.unep.org/resources/emissions-gap-report-2022.

global warming of 2.8 °C over the twenty-first century. Implementation of unconditional and conditional NDC scenarios reduce this to 2.6 °C and 2.4 °C, respectively."[24] States may not have made ambitious mitigation promises or taken enough action to achieve them. We will illustrate these issues through two fundamental categories of climate change litigation involving governments, based on the most frequently cited sources of climate obligations: constitutional law and human rights (A) and environmental legislation and regulation (B).

A. Constitutional law and human rights cases

This category includes cases that use constitutional rights (such as the right to a clean and/or healthy environment) in individual countries and those that claim climate inaction breaches human rights. It accounts for 122 of 698 of the climate litigation cases reported by the Global Climate Change Litigation database of the Sabin Center for Climate Change Law, as well as for 112 constitutional claims included in its US Climate Change Litigation database. The growing media attention and high-profile nature of the cases analysed below highlight the importance of this category of climate litigation, as well as the recent international recognition of the right to a clean, healthy, and sustainable environment as a human right (UN General Assembly in July 2022, following the Human Rights Council in October 2021)[25] and the establishment in March 2022 of a new UN Special Rapporteur on the promotion and protection of human rights in the context of climate change.[26]

The OHCHR Report on the Relationship between Human Rights and Climate Change[27] already showed in 2009 that climate change threatens the enjoyment and exercise of human rights, such as the rights to life, health, a healthy environment, food, water, property and housing, private and family life, and self-determination. In its Advisory Opinion on the Environment and Human Rights,[28] the Inter-American Court of Human Rights held that States under the American Convention on Human Rights must guarantee an obligation to prevent significant environmental damage that would interfere with other rights, and applied this obligation also to climate change. More recently, the UN Human Rights Committee found that Australia's failure to adequately protect Torres Strait indigenous people from rising sea levels violated their rights to enjoy their culture and be free from

24 Ibid, XVI.

25 UN General Assembly Resolution A/76/L.75, 28 July 2022. See "UN General Assembly declares access to clean and healthy environment a universal human right", 28 July 2022. Available at: https://news.un.org/en/story/2022/07/1123482.

26 Human Rights Council, "Mandate of the Special Rapporteur on the promotion and protection of human rights in the context of climate change", A/77/226, 8 Oct. 2021. Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/285/48/PDF/G2128548.pdf?OpenElement.

27 UN High Commissioner for Human Rights, "Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights", UN Doc. A/HRC/10/61 (15 January 2009). Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G09/103/44/PDF/G0910344.pdf?OpenElement.

28 Inter-American Court of Human Rights, Advisory Opinion OC-23/17, 15 Nov. 2017. Available at: https://www.corteidh.or.cr/docs/opiniones/seriea_23_ing.pdf.

arbitrary interferences with their private life, family, and home.[29]

At the domestic level, several cases have been decided on the basis of human rights and constitutional provisions, which has also attracted the attention of scholars from different parts of the world, through the emergence of a novel legal field: climate constitutionalism.[30] Most of this analysis has "focused on the way in which the phenomenon of climate change litigation has deployed existing constitutional structures, forcing judiciaries around the world to confront the novel fact-patterns of climate change and climate justice in their interpretation of constitutional provisions",[31] as we will see in the following cases.

1. *Leghari v. Pakistan Federation*[32]

The seminal case in this field is the successful case brought by a local farmer, Ashgar Leghari, against the Pakistani government for failing to implement sufficient adaptation measures through its 2012 National Climate Change Policy and 2013 Framework for Implementation of Climate Change Policy. The claimant argued that the government's failure to meet its climate adaptation target had negatively impacted Pakistan's water, food, and energy security, violating his fundamental right to life (Article 9) and right to dignity (Article 14).

The Lahore High Court ruled that the government must respond to climate change under these human rights. The court created a Climate Change Commission to supervise the climate policy and implementation framework and report on progress, including overseeing training and sensitising different government departments toward "climate-resilient development".[33] In its 2018 final report, the Commission highlighted that two-thirds of the key items in the Framework of Implementation of Climate Change Policy had been completed. The Court disbanded the Climate Change Commission at this point, yet created a Standing Committee on Climate Change, linking the Court and the Executive, and leaving the case open (under a so-called doctrine of "*continuous mandamus*", critical to overseeing the implementation of rights). The Standing Committee is empowered to petition the Court for enforcement of the Court's ruling.

As a part of the scholarship highlighted, although the *Leghari* case has been "noted for its 'symbolic value' as a leading case at a global level, the more important question from a domestic perspective is how climate change litigation will go from symbolic

29 Billy and others v. Australia (Torre Strait Islanders Petition), UN Human Rights Committee, CCPR/C/135/D/3624/2019, 23 Sept. 2022. Available at: http://climatecasechart.com/non-us-case/petition-of-torres-strait-islanders-to-the-united-nations-human-rights-committee-alleging-violations-stemming-from-australias-inaction-on-climate-change/.

30 See Jaria-Manzano, J. and Borrás, S. (eds.), *Research Handbook on Global Climate Constitutionalism*, 2019, Edward Elgar Publishing. Cf. notably the contribution in the aforementioned edited volume by May, J.M. and Daly, E., "Global Climate Constitutionalism and Justice in the Courts", pp. 235-245, which concludes by stressing that "[c]onstitutionalism's greatest attribute is that, while it concerns itself with similar and shared problems, it supports localized solutions tailored to each nation's particular circumstances".

31 Cf. Singh Ghaleigh, N., Setzer, J. & Welikala, A., "The Complexities of Comparative Climate Constitutionalism", *Journal of Environmental Law* 2022, vol. 34, issue 3, pp. 517-528.

32 Leghari v. Federation of Pakistan, PLD 2018 Lahore 364. Available at: http://climatecasechart.com/non-us-case/ashgar-leghari-v-federation-of-pakistan/.

33 Ibid, paragraph 19.

to transformational".[34] Therefore, the very welcome expansion of constitutional rights, through the incorporation in the domestic legal system of principles of international environmental law, climate change law and environmental rights, necessitates a clarification of the modalities for their implementation, notably by the judiciary.

2. *Urgenda v. Netherlands*[35]

In the landmark *Urgenda* case, initiated by the Urgenda Foundation, an NGO representing 886 individuals and developing plans and measures to prevent climate change, the Netherlands Supreme Court upheld the lower courts' 2015 and 2019 rulings that the Dutch government must reduce GHG emissions by at least 25% by 2020 compared to 1990 levels. The Supreme Court upheld the NGO's claims under Articles 2 and 8 of the European Convention on Human Rights (ECHR), as integrated into Dutch law, imposing enforceable obligations on the State to meet that reduction target due to climate change risk, in order to guarantee the enjoyment by everyone in its jurisdiction of the rights to life and to private and family life. This case established for the first time in any jurisdiction the legal duty of the State to increase its climate ambition and do "its part" through preventative measures even though climate change is a global problem. This is the judicial confirmation of the principle of "shared responsibility", already enshrined in climate change agreements, according to which the responsibility of a State is engaged even where it is only a minor contributor to global climate change. Legal academics thoroughly analysed the *Urgenda* case,[36] which ultimately influenced other legal systems.[37]

3. *Neubauer v. Germany*[38]

The *Neubauer* case involves German, Bangladeshi, and Nepalese youngsters who sued the German government, with assistance from environmental associations. They claimed that the German government breached their constitutional rights by failing to

34 Cf. Ohdedar, B. (2021), "Climate Change Litigation in India and Pakistan: Analyzing Opportunities and Challenges", in Alogna, I. et al. (eds.), op. cit., pp. 103-123. See also Barritt, E. and Sediti, B., "The Symbolic Value of Leghari v Federation of Pakistan: Climate Change Adjudication in the Global South", *King's Law Journal* 2019, vol. 30, issue 2, p. 203.

35 Supreme Court of the Netherlands, Case No. 19/00135, 20 Dec. 2019, *The State of the Netherlands v Urgenda Foundation*. English translation available at: http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2020/20200113_2015-HAZA-C0900456689_judgment.pdf.

36 *Ex multis*, see Bakker, Ch. (2021), "Climate Change Litigation in the Netherlands: the Urgenda Case and Beyond", in Alogna, I. et al. (eds.), *op.cit.*, pp. 199-224; Spier, J., "The 'Strongest' Climate Ruling Yet: The Dutch Supreme Court's *Urgenda* Judgment", *Netherlands International Law Review* 2020, vol. 67, issue 2, pp. 319-391.

37 Cf. Maxwell, L., Mead, S. & van Berkel, D. (2022), "Standards for adjudicating the next generation of *Urgenda*-style climate cases", *op.cit*; see also the conclusions by Nollkaemper, A. and Burgers, L., "A New Classic in Climate Change Litigation: The Dutch Supreme Court Decision in the Urgenda Case", *EJIL: Talk!*, 6 Jan. 2020. Available at: https://www.ejiltalk.org/a-new-classic-in-climate-change-litigation-the-dutch-supreme-court-decision-in-the-urgenda-case/; and the analysis by Misonne, D., "Pays-Bas c. Urgenda (2019)", in Cournil, Ch. (dir.), *Les grandes affaires climatiques*, Confluence des droits, Aix-en-Provence: Droits International, Comparé et Européen, 2020, pp. 207-221. Available at: http://dice.univ-amu.fr/fr/dice/dice/publications/confluence-droits.

38 *Bundesverfassungsgericht* (Federal Constitutional Court), 24 March 2021, Case No. BvR 2656/18/1, BvR 78/20/1, BvR 96/20/1, BvR 288/20, Neubauer et al. v. Germany. Available at: http://www.bverfg.de/e/rs20210324_1bvr265618en.html.

keep Germany's commitment to 1.5 °C. On 24 March 2021, the Federal Constitutional Court ruled that portions of the German Federal Climate Change Act were incompatible with fundamental rights[39] due to the lack of measures updating emission reduction targets after 2030 and ordered the lawmaker to introduce such provisions. On August 31, 2021, the Federal Climate Change Act was amended in line with the judgment. The amendments included a stricter 65% decrease from 1990 levels by 2030, 88% by 2040, climate neutrality by 2045, and negative emissions after 2050.[40] German youths challenged the statutory modification in *Steinmetz et al. v. Germany*, arguing that the revised targets were still inadequate in consideration of the new factual basis presented by the IPCC's Sixth Assessment Report.[41] These cases considered intertemporal guarantees of freedom as a fundamental right, which means opportunities should be distributed proportionally across generations. The Karlsruhe Court in the *Neubauer* case explained that: "one generation must not be allowed to consume large portions of the CO_2 budget while bearing a relatively minor share of the reduction effort, if this would involve leaving subsequent generations with a drastic reduction burden and expose their lives to serious losses of freedom".[42]

4. *Greenpeace Nordic Association and Nature & Youth v. Ministry of Petroleum and Energy*[43]

A significant climate lawsuit case in Norway indicates that, in certain countries, groups and individuals interested in a particular area or topic can initiate a case even if they are not personally harmed. *Greenpeace Nordic and Nature & Youth*, as an environmental organisation, was allowed to challenge an oil exploration licence on constitutional grounds. These Norwegian environmental groups contested the validity of 10 petroleum production licences on the Southeast Barents Sea. They challenged the licences issued by the Ministry of Petroleum and Energy on the grounds that they violate Norway's Constitution (Article 112), which states that Norwegians have a "right to an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained. Natural resources shall be managed on the basis of comprehensive long-term considerations which will safeguard this right for future generations as well.". The claimants argued that this required staying within a global emission budget consistent with the Paris Agreement's 1.5-2 °C temperature goal. The petition also referenced constitutional provisions requiring government action to comply with the precautionary

39 Article 2(2) of the German Constitution imposes on the State a general duty of protection of life and physical integrity, which encompasses protection against harm caused by environmental pollution and risks posed by increasingly severe climate change. This duty not only applies to existing violations but is also oriented towards the future. The State also has a duty of protection arising from the fundamental right to property in Article 14(1) of the German constitution, which includes the State's duty to protect property against the risks of climate change.

40 See the website of the German Federal Government: https://www.bundesregierung.de/breg-de/schwerpunkte/klimaschutz/climate-change-act-2021-1936846.

41 Available at: http://climatecasechart.com/non-us-case/steinmetz-et-al-v-germany/.

42 The official press release of the decision in English is available at: https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2021/bvg21-031.html.

43 Norwegian Supreme Court, 2020, Case nº 20-051052SIV-HRET, *Greenpeace Nordic Association v Ministry of Petroleum and Energy (People v Arctic Oil)*. Available at: http://climatecasechart.com/non-us-case/greenpeace-nordic-assn-and-nature-youth-v-norway-ministry-of-petroleum-and-energy/.

principle and human rights. On 4 January 2018, the Oslo District Court found in favour of the government, acknowledging that the Norwegian constitution imposed legal duties relevant to the case but that the government could fulfil those duties by following the Petroleum Act, which oversees production licences. The government fulfilled its legal obligations by assessing the licences' environmental impact. On 23 January 2020, the Court of Appeal upheld the District Court's decision, and, on 22 December 2020, the Supreme Court ruled that while the Norwegian constitution protects citizens from environmental and climate harms, the future emissions from exported oil are too uncertain to bar the granting of these petroleum exploration licences. Concerning the plaintiffs' claim that the awarded oil production licences violated the right to life and the right to respect for private and family life (Articles 2 and 8 of the ECHR), the Supreme Court considered that the link between the decisions to grant the licences and an increase of GHG emissions is too uncertain to create a "real and immediate" threat to human rights. This decision appears in "stark contrast" to the aforementioned one by the Federal Constitutional Court of Germany, considering that the Norwegian Supreme Court seemed to abdicate "its role in upholding the Constitution, marked by the motivation to align the law with the prevailing political preferences for unlimited petroleum exploration, extraction and export".[44]

5. Cases before the ECtHR

This Norwegian case is part of an increasing wave of climate cases brought before the European Court of Human Rights (ECtHR),[45] yet to be decided by the Strasbourg Court. An application, filed by six young Norwegians and the organisations Greenpeace Nordic and Nature & Youth, was received on 15 June 2021 by the ECtHR, based on Articles 2 and 8 of the ECHR, as well as on Articles 13 and 14 for an alleged failure by the Norwegian courts to assess their claims adequately and to provide them with access to an effective domestic remedy, and for possible violation of their right not to experience discrimination.[46] The case also raises the issue of State responsibility for extra-territorial emissions. This is an issue that will likely come up as a subsidiary matter in the *Duarte Agostinho and Others v. Portugal and 32 Other States*,[47] brought by six Portuguese youth against 33 countries (27 Member States of the Council of Europe, in addition to Norway, Russia, Switzerland, Turkey, Ukraine and the United Kingdom) for their alleged violations of Articles 2, 8 and 14 of the ECHR, as a consequence of their insufficient action to tackle climate change. The *Agostinho* case, brought directly before the Strasbourg Court, is currently being examined by the ECtHR's Grand Chamber as it raises a serious question affecting the interpretation of the ECHR, as provided by Article 30. Similarly, two other cases were relinquished to the Grand Chamber in 2022: *Union of Swiss Senior Women for Climate*

44 Voigt, Ch., "The First Climate Judgment before the Norwegian Supreme Court: Aligning Law with Politics", *Journal of Environmental Law* 2021, vol. 33, issue 3, p. 708.

45 Currently, there are 12 cases reported by the Sabin Center for Climate Change Law database: http://climatecasechart.com/non-us-jurisdiction/european-court-of-human-rights/.

46 Communicated in Dec. 2021 and available at: http://climatecasechart.com/non-us-case/greenpeace-nordic-assn-v-ministry-of-petroleum-and-energy-ecthr/.

47 Communicated in Dec. 2020 and available at: http://climatecasechart.com/non-us-case/youth-for-climate-justice-v-austria-et-al/.

Protection v. Swiss Federal Council and Others[48] and *Carême v. France*.[49] While the Swiss case, brought by an association of senior women whose health and human rights (Articles 2 and 8, as well as Article 6 – the right to a fair trial – and Article 13 of the ECHR) are threatened by climate-related heat waves, concerns insufficient domestic climate measures like the *Agostinho* case, it differs procedurally from the latter because it took the Swiss government to the Strasbourg Court after the unsuccessful exhaustion of all national remedies available. The French case, brought by Damien Carême, former mayor of the city of Grande-Synthe, which was considered at high risk of exposure to the consequences of climate change, unlike the Swiss case, comes from a successful domestic administrative law challenge.[50] However, the French Supreme Administrative Court (*Conseil d'État*) found that Mr Careme did not have a personal standing in the case, notwithstanding his home was situated in an area likely to be flooded by 2040, which, according to the applicant, gave rise to a violation of Article 8 of the ECHR.

B. Environmental Legislation and Regulation

Alleged breaches of environmental legislation and regulatory provisions are the most frequently cited causes of action for climate litigation, codifying climate change obligations for public and private actors and providing the basis for their legality, applicability, and implementation. Planning, environmental, and industry rules typically contain pertinent requirements. In fact, where planning, industry or environmental legislation requires the government to conduct an environmental impact assessment (EIA) before licensing infrastructure or energy projects, a licence may be challenged if an EIA was not done or did not assess the project's climate impact. A licence may also be challenged if the government fails to allow public participation in decision-making. Recent cases have challenged government implementation of a particular climate goal or policy using statutes and administrative law.

1. *R. (oao Friends of the Earth) v. Secretary of State for Business Energy and Industrial Strategy*[51]

On 18 July 2022, one of the hottest days in UK history, the High Court of England and Wales ruled on a landmark climate case.[52] The court declared that the UK Govern-

48 Communicated in March 2021 and available at: http://climatecasechart.com/non-us-case/union-of-swiss-senior-women-for-climate-protection-v-swiss-federal-council-and-others/.

49 Communicated in July 2022 and available at: http://climatecasechart.com/non-us-case/careme-v-france/.

50 Which will be analysed in the section below.

51 R. (oao Friends of the Earth) v. Secretary of State for Business Energy and Industrial Strategy [2022] EWHC 1841 (Admin), Case No: CO/126/2022, CO/163/2022, CO/199/2022. Available at: https://www.judiciary.uk/wp-content/uploads/2022/07/FoE-v-BEIS-judgment-180722.pdf.

52 Just a few days before, on 30 June 2022, another important case, widely expected to have far-reaching implications for environmental regulation, was decided on the other side of the Atlantic by the US Supreme Court. In West Virginia v. US EPA, the Supreme Court's "major questions doctrine" requires that "a clear statement is necessary for a court to conclude that Congress intended to delegate authority" for "major" laws, limiting EPA's greenhouse gas emission reduction alternatives. Therefore, this verdict limits EPA's jurisdiction to regulate power plant emissions using the major questions doctrine and could severely restrict other federal agencies' actions. The decision is available at: https://www.supremecourt.gov/opinions/21pdf/20-1530_n758.pdf.

ment's carbon emission reduction plans were inadequate and illegal. The Net Zero Strategy (NZS), established in October 2021 under Sections 13 and 14 of the Climate Change Act 2008 (CCA) – the first climate law worldwide – was challenged by Friends of the Earth, ClientEarth, and the Good Law Project. The CCA mandates carbon emission reduction targets for the UK government. The court case holds the UK Government to its climate pledges by upholding the CCA. The case strengthens a national law at a time when other countries have established domestic legislation to reduce carbon emissions. Moreover, transparency won with the ruling. This court lawsuit revealed a 5% quantified policy emission reduction gap, which the NZS did not indicate. In climate terms, 5% is essential, equating to 75 million tonnes of CO_2, or the UK's annual automobile emissions. The UK government decided not to pursue an appeal and published the Carbon Budget Delivery Plan (CBDP),[53] its formal response to comply with the High Court ruling by setting out the impact of the government's net zero policies on CO_2 emission reductions over the next 15 years.

2. *EarthLife Africa Johannesburg v Minister of Environmental Affairs*[54]

Another interesting example of climate litigation using environmental statutes is *EarthLife Africa Johannesburg v Minister of Environmental Affairs* (generally known as the *Thabametsi* case), where an environmental organisation successfully challenged the environmental review of plans for a new 1200 MW coal-fired Thabametsi Power Project in South Africa. The South African National Environmental Management Act (NEMA) requires public bodies to undertake an environmental impact assessment (EIA) before approving an energy project. Even though an EIA was carried out prior to the coal mine being granted a licence, it did not take into account its climatic impact. The applicant, EarthLife Africa Johannesburg, argued that the environmental damage caused by climate change and South Africa's international obligations under the Paris Agreement required the climate impact of the project to be considered. Therefore, even though neither the statute nor the implementing regulations[55] explicitly contemplate climate change, the applicant argued that EIAs had to include the climate impacts of projects. The Gauteng Division of the High Court of South Africa, sitting in Pretoria, ruled on EarthLife's appeal and suspended the original authorisation, awaiting the completion of another EIA taking climate change impact assessment reports into account. This decision also provided a significant precedent: that climate change was an essential factor to take into account when deciding whether or not to grant an environmental authorisation, and that a formal expert study on the implications of climate change would be the most effective evidentiary mechanism to take climate change effects into account in all of its myriad facets.[56]

53 Part of the Powering Up Britain package. Available at: https://www.gov.uk/government/publications/powering-up-britain.

54 Earthlife Africa Johannesburg v. Minister of Environmental Affairs and others, Case no. 65662/16 (2017). Available at: http://climatecasechart.com/non-us-case/4463/.

55 Department of Environmental Affairs, 'Environmental Impact Assessment Regulations 2014' GNR 982 *Government Gazette* 38282 of 4 December 2014.

56 See Field, T.L. (2021), "Climate Change Litigation in South Africa: Firmly Out of the Starting Block", in Alogna, I. et al. (eds.), *op.cit.*, p. 187.

3. *Commune de Grande-Synthe v. France*[57]

Two historic judgments were issued in France on 19 November 2020 and 1 July 2021 by the *Conseil d'État*, finding that the French government had failed to take adequate measures to mitigate climate change, and ordering it to take additional measures to remedy its failures. At the beginning, Grande-Synthe – a low-lying coastal municipality vulnerable to sea level rise and flooding – and its mayor wrote three letters to the President of the Republic, Prime Minister, Minister of State, and Minister of Ecological Transition and Solidarity, asking them to: take any useful measure to reduce the curve of GHG emissions produced on the national territory to respect France's climate obligation; take all legislative or regulatory initiatives to "make climate priority mandatory" and to prohibit any measure likely to increase GHG emissions; implement immediate measures to adapt to climate change in France. On 23 January 2019, they sued the French government and asked the *Conseil d'Etat* to declare the government's failure to take adequate action unlawful, breaching its obligation under French and international law. The *Conseil d'État* deemed the lawsuit admissible on 19 November 2020, partly because the city is a coastal community vulnerable to climate change, also using scientific evidence from IPCC and the National Observatory on the Effects of Global Warming (ONERC).[58] France agreed to a 40% reduction in GHG emissions by 2030, compared to 1990 levels, as provided by Article L100-4 of the French Energy Code in accordance with international law, and the Court instructed the government to demonstrate within three months its capacity to meet its 2030 climate goals. On 1 July 2021, the *Conseil d'État* issued its final ruling, finding that the government must take all necessary measures by March 2022 to reduce GHG emissions by 40% by 2030 to satisfy climate goals. The Court invalidated the government's implied reluctance to adopt necessary actions, finding that the emissions decline in 2019 and 2020 was inadequate to satisfy climate goals and that present climate legislation was insufficient.[59] As well highlighted by part of the French scholarship, the originality of this kind of cases relies in the consideration of a "trajectory review" by the judge, which "accepts to project himself into the future, without waiting for the end of the reference period, to verify that the State's action is sufficient to achieve the objectives it has set itself".[60]

57 *Conseil d'État*, 19 November 2020 and 1 July 2021, n° 427301, *Municipality of Grande-Synthe*. Available at: http://climatecasechart.com/non-us-case/commune-de-grande-synthe-v-france/.

58 *Observatoire national sur les effets du réchauffement climatique*. See its annual reports at: https://www.ecologie.gouv.fr/observatoire-national-sur-effets-du-rechauffement-climatique-onerc.

59 See *ex multis* the analysis by: Torre-Schaub, M., "Climate Change Risk and Climate Justice in France: The High Administrative Court as Janus or Prometheus?", *European Journal of Risk Regulation* 2023, vol. 14, issue 1, pp. 213-227; Hoynk, S., "Le contentieux climatique devant le juge administrative", *RFDA* 2021, p. 777; Huglo, Ch. (2021), "Commune de Grande-Synthe et Carême c. l'État français (2019)", in Cournil, Ch. (dir.), *Les grandes affaires climatiques, op.cit.*, pp. 183-191.

60 Bétaille, J., "Climate litigation in France, a reflection of trends in environmental litigation", *elni review* 2022, Vol. 22, p. 70.

III. Climate litigation involving corporations

Strategic litigation and petitions/requests continue influencing corporate climate-related conduct and raising public awareness about fossil fuel companies.[61] Scholars have identified two "waves" of corporate climate lawsuits. The first one was not very successful and it took place in the early-to-mid-2000s. A second wave of corporate cases has emerged, appearing to be more resilient than the first, and bringing more chance of success than the first one. Ganguly, Setzer, and Heyvart attribute this to increased scientific odds, changing legal rhetoric, and changing institutional, constitutional, and political-economic contexts.[62] First, attribution science and Richard Heede's 2014 Carbon Majors Study[63] have allowed litigants to target corporate actors and demonstrate their contribution to global GHG emissions. However, attributing climate events to greenhouse gas emissions or emitters remains challenging. Carbon majors claims hold corporations with excessive GHG emissions directly accountable, creating "precedents" in common law countries and trying to cause widespread industry change, while raising awareness of corporations' role in climate change. Therefore, even unsuccessful cases can pressure corporations, and the "liability risk" of climate cases can foster change in business activity. However, if corporations are allowed to conduct business by law, it can be difficult to hold them liable (so-called "defence of lawful justification"), and some corporations can use aggressive tactics to intimidate and retaliate against those who try to hold them accountable (e.g. SLAPP suits).[64] Considering the vast variety of corporate climate litigation cases and their legal grounds,[65] we will simply introduce them through their climate-related goal: mitigation (A) or adaptation and/or compensation (B).

61 A part of the scholarship distinguishes "strategic private climate litigation" and "strategic public climate litigation", to differentiate climate-related cases initiated to exert bottom-up pressure on corporations or governments. See Ganguly, G., Setzer, J. & Heyvaert, V., 'If at First You Don't Succeed: Suing Corporations for Climate Change', p. 843.

62 Ibid.

63 Heede, R., "Tracing anthropogenic carbon dioxide and methane emissions to fossil fuel and cement producers, 1854–2010", *Climatic Change* 2014, vol. 122, issue 1–2, p. 229.

64 Acronym for "Strategic lawsuits against public participation". See Kaminski, I., "SLAPP attack: The clap-back against lawsuits that threaten climate activism. Plus news…", 5 Oct. 2022. Available at: https://www.the-wave.net/slapp-attack/; and the work of the Business & Human Rights Resource Centre which has recorded 413 SLAPPS around the world, notably its SLAPPs database. Available at: https://www.business-humanrights.org/en/from-us/slapps-database/.

65 Among the many possible legal grounds for corporate climate litigation, its heterogeneity includes: liability suits seeking damages triggered by climate change, claims that companies have defrauded shareholders and misrepresented the impacts of climate change on their business, greenwashing claims (e.g. misleading advertisement), claims related to the inadequate environmental assessment of projects, claims dealing with the violation of human rights obligations, claims based on fraud laws, company and financial laws, consumer protection law, etc. The British Institute of International and Comparative Law (BIICL) is currently exploring this variety of possible causes of action as part of its comparative research project "Global Perspectives on Corporate Climate Legal Tactics", to create a global toolbox on corporate climate litigation. See this research project at: https://www.biicl.org/projects/global-perspectives-on-corporate-climate-legal-tactics.

A. Mitigation cases

1. *Milieudefensie et al. v. Royal Dutch Shell plc.*[66]

After the Urgenda case, another unprecedented climate ruling has taken place in the Netherlands, this time holding a fossil-fuel company accountable for its contribution to climate change. In April 2019, Friends of the Earth Netherlands (*Milieudefensie*), six other NGOs, and more than 17,000 Dutch citizens sued Royal Dutch Shell – Europe's largest oil and gas company by revenue, operating in over 70 countries – for violating its duty of care under Dutch law and its human rights obligations as a business. In May 2021, The Hague District Court ordered Shell to cut its Scope 1, 2, and 3 emissions by 45% by 2030 compared to 2019 levels.[67] Shell appealed in March 2022, yet the Court has issued provisionally enforceable orders, so Shell must meet its reduction requirements while the case is pending. This landmark judgment holds corporations accountable for failing to address climate change and requires them to meet global climate objectives. It may also lead to additional climate lawsuits against corporations, asking if a private firm can be held accountable for failing to mitigate climate change. This lawsuit follows the *Urgenda* judgment (already seen above), which concluded that the Dutch government's climate change inaction breached a duty of care to its citizens. In this complaint against Shell, claimants expanded this argument to private firms, saying that Shell had a duty of care to reduce its greenhouse gas emissions given the Paris Agreement's goals and the always more precise scientific evidence concerning climate change. They showed how Shell's long knowledge of climate change dangers, its deceptive representations, and its insufficient GHG emissions reduction supported a verdict of unlawful endangerment of Dutch citizens through hazardous negligence by its actions. The Court interpreted the unwritten standard of care contained in Book 6, Section 162 of the Dutch Civil Code as an obligation for Shell, which makes its violation illegal. Furthermore, its content is further informed by Articles 2 and 8 of the ECHR. The Court's interpretation is based on the relevant facts and circumstances, the best available scientific findings on dangerous climate change and how to manage it, and "the widespread international consensus that human rights offer protection against the impacts of dangerous climate change and that companies must respect human rights".[68] Milieudefensie's attorney, Roger Cox and his colleague Mieke Reij, recently wrote a legal manual describing the legal basis and approach used in the case against Shell,[69] a clear example of the important international dialogue that is fostered by practitioners to replicate successful climate cases around the world.[70]

66 Hague District Court C/09/571932/HA ZA 19-379, 2021, Friends of the Earth Netherlands et al v Royal Dutch Shell PLC. Available at: http://climatecasechart.com/non-us-case/milieudefensie-et-al-v-royal-dutch-shell-plc/. See also the website of Milieudefensie: https://en.milieudefensie.nl/climate-case-shell. See the analysis by Hösli, A., "Milieudefensie et al. v. Shell: A Tipping Point in Climate Change Litigation against Corporations?", *Climate Law* 2022, vol. 11, issue 2, pp. 195-209.

67 The Court gave Shell flexibility in allocating emissions cuts between Scope 1, 2, and 3 emissions, so long as in aggregate, the total emissions were reduced by 45%.

68 Hague District Court, 2021, Friends of the Earth Netherlands et al v Royal Dutch Shell PLC, op. cit., para 4. 1. 3.

69 Cox, R. & Reij, M., *Defending the Danger Line: A manual for climate litigators*, Paulussen Advocaten and Milieudefensie, 2022. Available at: https://en.milieudefensie.nl/news/defending_the_danger_line.pdf.

70 Another case against Shell which became an interesting early climate lawsuit is *Gbemre v. Shell Petroleum Development Company of Nigeria Ltd. and Others*. Available at: http://climatecasechart.com/non-us-case/gbemre-v-

2. *Notre Affaire à Tous et al. v. Total*[71]

In France, a less successful lawsuit against another fossil-fuel corporation has participated in this wave of corporate climate litigation cases. Oil company Total was sued by a coalition of French NGOs and local governments. The initiative seeks a court order to compel Total to develop a corporate strategy to: 1) identify the risk of greenhouse gas emissions from Total's goods and services; 2) identify the risk of more severe climate-related damage in the 2018 IPCC Special Report; and 3) take steps to ensure the company meets the Paris Agreement's climate goals. Claimants argues that Article L225-102-4-I of the Commercial Code (*Loi 27 Mars 2017 sur le devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*, hereinafter «Duty of Vigilance Law») imposes these duties. Companies must create "vigilance plans" to detect and mitigate human rights, civil liberties, and environmental and public health risks from their operations and those of their subsidiaries. After a formal meeting with Total on 18 June 2019, legal procedures were declared and a formal letter of notification ("*mise en demeure*") was delivered to Total. Total had three months to incorporate realistic greenhouse gas reduction objectives in its newest "vigilance plan" before bringing a lawsuit to force the corporation to comply with the law and the Paris Agreement. On 28 January 2020, plaintiffs filed a complaint requesting the Nanterre court to require Total to acknowledge its activities' hazards and coordinate its actions with decreasing global warming to 1.5° to limit climate change. The plaintiffs based their lawsuit on the Duty of Vigilance Law and the French Environmental Charter's ("*Charte de l'environnement*")[72] environmental monitoring requirements. Total's emissions vigilance plan was too vague, according to the claims, and the firm is still violating international climate commitments. Total requested a commercial court hearing after failing to react to the merits. The pre-trial judge rejected Total's jurisdiction objection on 11 February 2021, confirming the ordinary courts' jurisdiction. The Versailles Court of Appeal confirmed Nanterre's jurisdiction to settle the case on 18 November 2021. The decision was based on the exclusive authority of particular courts over ecological damage cessation and compensation. A fresh Paris court hearing on 21 September 2022 formalised additional interventions by Paris and New York City, yet on 6 July 2023, the Paris first instance court dismissed the lawsuit on procedural grounds, such as lack of strict identity between the demands in the formal notice and the summons, and the lack of standing for the plaintiffs (associations and local authorities), in clear contradiction with the position by the *Conseil d'État* in the *Grande-Synthe* decision.[73]

shell-petroleum-development-company-of-nigeria-ltd-et-al/#:~:text=The%20federal%20Judge%20ruled%20that,a%20clean%20and%20healthy%20environment). In the Gbemre case, a Nigerian federal court deemed Shell's gas flaring practice – and the law that permitted it – unconstitutional. The lawsuit filed by Jonah Gbemre, a Niger Delta Iwherekan, was directed both against Shell and the Nigerian government. The action claimed that Shell's flaring of methane from gas production in the Niger Delta infringed on the human rights to a clean and healthy environment. Gbemre's assertion that gas flaring released CO_2 and methane into the atmosphere was upheld. Gas flaring violated the Constitution of the Federal Republic of Nigeria's right to a "pollution-free and healthy environment" and the African Charter on Human and People's Rights.

71 Available at: http://climatecasechart.com/non-us-case/notre-affaire-a- tous-and-others-v-total/.

72 The English translation of the Environmental Charter is available at: https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/anglais/charter_environnement.pdf.

73 CE, 19 Nov. 2020 and 1 July 2021, n° 427301, *Commune de Grande-Synthe,* op. cit. Two American cases, also dismissed on procedural grounds, might be used as a comparison with the French case. In *American Electric Power v.*

3. *ClientEarth v. Enea.*[74]

Another landmark corporate climate litigation case is a shareholder lawsuit that took place in Poland. ClientEarth, a non-profit environmental law charity, sued Polish utility Enea S.A. in October 2018 for building a new coal-fired power plant. ClientEarth, purchasing some shares in the defendant company[75] and suing it in its capacity as a minority shareholder, sought to annul the shareholder resolution approving the Ostrołęka C project of a 1 GW coal-fired power plant in northeast Poland. It was a Warsaw Stock Exchange-listed joint venture between Polish State-controlled energy corporations Enea and Energa. The facility was to open in 2023, and it would have released 6 million tonnes of CO2 annually. ClientEarth argued that the proposal to build the plant would pose an "indefensible" financial risk to shareholders due to its failure to account for climate change, thus becoming a "stranded asset".[76] Article 425 §1 of the Polish Commercial Companies Code was invoked, providing that a resolution of the shareholders' meeting of a joint-stock company contrary to the law may be declared invalid. Given climate-related financial risks, the resolution granting consent to build a coal-fired power plant "risk[ed] breaching board members' fiduciary duties of due diligence and to act in the best interests of the company and its shareholders".[77] ClientEarth argued that rising carbon prices, renewable energy competition, and industry regulation would make the plant unprofitable and risky to finance, harming the company and, therefore, the shareholders. ClientEarth won in court, and the District Court in Poznań declared null and void the

Connecticut (2011), a consortium of states, cities, and NGOs sued four private power companies and the Tennessee Valley Authority over CO2 emissions. The plaintiffs argued that the emissions constituted a public nuisance under US federal common law because they contributed to global warming. The plaintiffs sought orders requiring the power companies to reduce their emissions. The US Supreme Court dismissed the lawsuit on the grounds that federal common law claims in this area have been displaced by the Clean Air Act, a federal law that authorises the Environmental Protection Agency (EPA) to regulate GHG emissions from power plants and other sources. The court reasoned that Congress had granted EPA the power to determine how GHG should be regulated, and it was inappropriate for the judiciary to issue its own rules. Similarly, in *Native Village of Kivalina v. ExxonMobil Corp.* (2009), a federal appellate court held that a public nuisance claim against some fossil fuel companies – including ExxonMobil, BP, and Chevron – was also displaced by the Clean Air Act. The plaintiffs – Inupiat, indigenous peoples from Kivalina, Alaska – alleged that direct emissions associated with the energy companies' operations contributed to climate change and resulted in the Arctic sea ice erosion that protected the Kivalina coast from storms. The plaintiffs sought damages for relocating residents. However, the court concluded that the Clean Air Act had displaced federal common law claims seeking damages as well as injunctions.

74 Available at: http://climatecasechart.com/non-us-case/clientearth-v-enea/.

75 Exactly €20 for ten shares. See "Lawsuits aimed at green-house gas emissions are a growing trend", *The Economist*, April 23rd 2022. Available at: https://www.economist.com/international/2022/04/23/lawsuits-aimed-at-greenhouse-gas-emissions-are-a-growing-trend.

76 This problem was highlighted in 2015 by Mark Carney, then governor of the Bank of England, in his speech at Lloyds in London, where he argued that assets tied to carbon might be in trouble as markets began to turn toward clean energy due to climate change. See Carney, M., "Breaking the Tragedy of the Horizon: Climate change and financial stability", 29 Sept. 2015, Bank of England. Available at: https://www.bankofengland.co.uk/-/media/boe/files/speech/2015/breaking-the-tragedy-of-the-horizon-climate-change-and-financial-stability.pdf.

77 "Major energy firms exposed to shareholder action over coal power plant Ostrołęka C", ClientEarth Communication, 24 Sept. 2018. Available at: https://www.clientearth.org/latest/latest-updates/news/major-energy-firms-exposed-to-shareholder-action-over-coal-power-plant-ostroleka-c/.

construction permission resolution on August 1, 2019. Enea unsuccessfully appealed the judgment before the Appellate Court in Poznań. In mid-2020, Energa and Enea declared the project's economic cancellation. The case is the first NGO-led shareholder action in the climate context and the first legal challenge to corporate decision-making based on failing to consider climate-related financial risk adequately. Its success shows the possibility of a new trend of climate lawsuits targeting private fossil fuel investment and moves also boards of directors and financial sector actors to understand better and manage climate-related financial risks and opportunities.[78]

B. Adaptation/compensation cases

1. *Lliuya v. RWE AG*[79]

Filed in November 2015 by a Peruvian farmer in German courts against the German energy company RWE for its climate change contributions, it is already considered a landmark case concerning corporate liability for adaptation to climate change. The claimant, backed up by the NGO Germanwatch, claims that climate change is melting glaciers near his farm in Huaraz, flooding his hamlet. RWE's climate change and flood risk contributions violate Lliuya's property rights. Therefore, he asked the court to order RWE to pay US$21,000 to build defences against glacial lake flooding, landslides, and a possible inundation of his village and property. In November 2017, the Civil High Court in Hamm, the appeals court, found his lawsuit admissible since it was based on the Carbon Major research,[80] which linked back to RWE the precise amount of 0,47% of the total CO2 emitted over the industrial age. Thus, the $21,000 requested contribution represents 0.47% of the engineering project costs needed to mitigate flooding. The Hamm Court has provisionally accepted the claimant's causation arguments and declared that "while RWE's emissions are not wholly responsible for the flood risk to Huaraz, it is enough that its emissions are partially responsible for the actual, present risk. There is

78 Many corporate shares are held by investment funds, pension funds, and other entities that administer assets, including corporate shares, for the beneficiaries or members of the funds. Typically, these are individuals with pension plans or those who want their investments managed by others. If investment managers or pension fund managers fail to recognise the financial risks associated with climate change and the associated risks of investing in carbon-intensive industries, they may be in breach of their duties to the fund's beneficiaries or the individuals they advise. A comparable case from Australia, filed a few weeks before the Polish case, is *McVeigh v Retail Employees Superannuation Trust*, in which a member of an Australian pension fund filed a lawsuit against the Retail Employees Superannuation Trust (REST), alleging that the fund violated the Corporations Act 2001 by failing to provide information about climate change business risks, including plans to tackle those risks. The complaint asserted that the pension fund trustees owed "fiduciary" duties to the fund's members in order to protect them from the financial hazards associated with carbon-intensive investments. It was asserted that these duties were owed under national laws governing corporations (including REST) and the duties of pension fund fiduciaries. In 2020, REST agreed that its trustees must manage the financial hazards associated with climate change and the dispute was resolved outside of court with a settlement reached by REST and the plaintiff. The press release of the settlement agreement and the other case documents are available at: http://climatecasechart.com/non-us-case/mcveigh-v-retail-employees-superannuation-trust/.

79 Higher Regional Court of Essen (Germany), Case No. 2 O 285/15, On Appeal, May 2022, Luciano Lliuya v. RWE AG. Available at: http://climatecasechart.com/non-us-case/lliuya-v-rwe-ag/.

80 Heede, R. (2014), "Tracing anthropogenic carbon dioxide and methane emissions to fossil fuel and cement producers, op. cit., pp. 1854–2010.

no basis in the law to argue that partial causation does not exist in this case".[81] Therefore, one of the novelties of this case concerns the recognition of a causal link between the emissions from a specific company and an individual damaging event.[82] Moreover, progress in attribution science and its link with law and litigation,[83] in the last decade, seems a positive signal for the outcome of this case. Similarly to *Milieudefensie v. Shell* based on Article 6:162 of the Dutch Civil Code, the Lluya v. RWE case is based on a general provision of the German Civil Code, Article 1004 of the BGB on "nuisance" or "property infringement", which states: "1. If the ownership is interfered with by means other than removal or retention of possession, the owner may require the disturber to remove the interference. If further interferences are to be feared, the owner may seek a prohibitory injunction. 2. The claim is excluded if the owner is obliged to tolerate the interference".[84] Finally, another important aspect of this case, concerns the transnational responsibility for climate harm, related to a company headquartered in the Global North for damages (allegedly) produced in Global South countries. *Lluya v. RWE* seems to be the first of a coming wave of transnational cases.[85]

81 Germanwatch, 'General Ruling of the Civil High Court in Hamm' (Germanwatch.org, 14 Nov. 2017). Available at: https://germanwatch.org/sites/default/files/announcement/20810.pdf.

82 This link was denied in the well-known case of *Comer v. Murphy Oil USA*, where the plaintiffs asked for damages to the oil company, allegedly liable to have contributed to climate change-related extreme weather events, notably Hurricane Katrina. See Ned Comer v. Murphy Oil USA, 2012 WL 933670. Available at: http://climatecasechart.com/case/comer-v-murphy-oil-usa-inc/. In the comparison between Lluya v RWE and the already analysed *Urgenda v. the Netherlands*, *Neubauer v. Germany* and *Milieudefensie v. Shell*, Weller and Tran highlights that in the latter ones "it was not necessary to consider the last stage of causation because each of these decisions focused on the question of future emissions. Consequently, there was no need to trace an individual violation of legal interests back to a defendant's concrete emissions. It was enough that the courts, by referring to the IPCC reports, affirmed the causal link between greenhouse gas emissions and climate damage in general." Weller, M-Ph. & Tran, M.-L. (2022), "Climate Litigation against companies", op. cit., p. 8.

83 Burger, M., Wentz, J. & Horton, R., "The Law and Science of Climate Change Attribution", *Envtl. L. Rep* 2021, vol. 51, p. 10646; Stuart-Smith, R.F., Otto, F.E.L. & Saad, A.I. et al., "Filling the evidentiary gap in climate litigation", *Nat. Clim. Chang.* 2021, vol. 11, pp. 651-655.

84 The English translation from the original German text of the BGB is available at: https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html.

85 A similar claim has already been brought, in July 2022, by four residents of the Indonesian island of Pari (supported by three NGOs: HEKS/EPER, the European Center for Constitutional and European Rights, and WALHI) who sued the Swiss-based major building materials company Holcim before the Cantonal Court of Zug, in Switzerland, based on Article 28 of the Swiss Civil Code (infringement of personal rights) and Article 41 of the Code of Obligations (redress for unjust harm). The plaintiffs want proportional compensation for climate change-related damages on Pari, a 43% reduction in CO2 emissions by 2030 compared to 2019 levels (or according to climate science to limit global warming to 1.5°C), and financial support for adaptation measures. Reducing GHGs and compensating for them make the claim unique. The case *Asmania et al. v. Holcim* is available at: http://climatecasechart.com/non-us-case/four-islanders-of-pari-v-holcim/.

2. *Friends of the Earth et al. v. Total*[86]

This transnational trend seems to resonate and take advantage of the legal possibilities coming from the new "due diligence laws", which in some countries allow individuals to directly sue businesses for failing to prevent human rights abuse in their operations, supporting the horizontal application of human rights obligations, including in relation to their foreign subsidiaries and subcontractors. In this sense, in France, six NGOs filed a complaint in 2019, under the Duty of Vigilance Law, demanding that Total change its vigilance plan for the "Tilenga" Project, a new oil project in Uganda and Tanzania that allegedly ignored social and environmental implications. These impacts also included the 1445 km pipeline (East African Crude Oil Pipeline, EACOP) designed to export fossil fuel from Uganda and Tanzania to the port of Tanga on the Indian Ocean, the 100,000 people displaced by the project, and the hundreds of boreholes drilled in the Murchison Falls National Park, home to many endangered species. Total's failure to comply with its due diligence obligations caused an unlawful disturbance, so the claimants sought an order to establish, publish, and implement a set of measures in its due diligence plan to prevent serious violations of human rights and fundamental freedoms, human health and safety, and severe environmental damage. Notably, the claimants also said Total's vigilance plan didn't account for the project's life cycle greenhouse gas emissions. On 15 December 2021, the *Court of Cassation* overturned the Versailles Court of Appeal's ruling that the Nanterre Commercial Court had jurisdiction to hear the case because the due diligence plan was "an act of management of a commercial company" (according to Article L 723-3 2° of the French Commercial Code). The *Cour de Cassation* stated that the Nanterre civil court will decide the case because the companies' duty of vigilance is not a commercial act, and a natural person (non-commercial claimant) has a right to choose ("*droit d'option*") and can bring a claim against a legal entity before a commercial court or a civil court.[87] However, after several rulings on the objection of lack of jurisdiction raised by Total, the Paris Court – ruling in summary proceedings ("*jugement rendu en état de référé*") – on 28 February 2023 ruled for the inadmissibility of the claims, "*substantially different from the claims* made in the initial formal notice sent to the defendant", considering that the claims should be "examined in depth" by a civil judge following a regular procedure on the merits.[88]

3. *The Philippines' Climate Change and Human Rights Inquiry*[89]

Another interesting climate change and human rights-related case involving companies is the "Climate Change and Human Rights Inquiry" in the Philippines, the world's

86 Nanterre High Court, *Friends of the Earth et al. v. Total*, pending. Available at: http://climatecasechart.com/non-us-case/friends-of-the-earth-et-al-v-total/. See also the plaintiffs' website: https://www.amisdelaterre.org/campagne/total-rendez-vous-au-tribunal/.

87 Traditionally less sympathetic to corporate interests than the former, where judges are elected by their corporate peers.

88 Les Amis de la Terre France, "Total's Tilenga and EACOP Projects: the Paris Civil Court dodges the issue", 28 Feb. 2021. Available at: https://www.amisdelaterre.org/communique-presse/totals-tilenga-eacop-projects-paris-civil-court-dodges-issue/. See also the decision by the Paris Court (in French). Available at: https://www.amisdelaterre.org/wp-content/uploads/2023/02/decisiontj-paris-totalouganda-28fev2023.pdf.

89 Commission on Human Rights of the Philippines, *National Inquiry on Climate Change – Report*, 2022. Available at: https://www.ciel.org/wp-content/uploads/2023/02/CHRP-NICC-Report-2022.pdf.

first investigation into corporate responsibility for the climate crisis. In 2015, Typhoon survivors and civil society groups petitioned the Philippines Commission on Human Rights (CHR) to examine the relationship between human rights, climate change, and the responsibilities of Carbon Majors. They demanded an investigation into climate change-related human rights breaches by the 47 largest fossil fuel and cement firms, including loss of life, livelihood, and property in the Philippines. On 6 May 2022, the long-awaited report concluded that climate change is a human rights issue, affecting individual rights to life, food, water, sanitation, and health, and collective rights to food security, development, self-determination, preservation of culture, equality, and non-discrimination, while also affecting vulnerable populations, including children. The inquiry showed that 47 of the world's largest coal, oil, mining, and cement companies engaged in willful obfuscation of climate science and obstructed a renewable energy transition, creating prejudice to the right of the public to make informed decisions about their products and their damage to the environment and the climate system. The CHR also highlighted the Carbon Majors' corporate responsibility to undertake human rights due diligence, including through their value chains, and to provide remedies when violations occur. According to the CHR, the inquiry and its findings concern any activity by the Carbon Majors for which they can be held accountable for human rights violations resulting from climate change, even outside of the Philippines territory.[90]

Conclusions

The majority of the total climate litigation cases filed around the world have been directed against governments, on the basis of constitutional provisions and human rights, as well as environmental, climate change and administrative law and regulation. As reported in July 2023 by the Grantham Research Institute on Climate Change and the Environment, "significant development in government framework cases have taken place over the past 12 months and these cases continue to grow in number", with new cases filed for the first time in Russia, Indonesia, Sweden and Finland.[91] Framework cases (or "systemic climate litigation" or "Urgenda-style cases") are those challenging the government implementation of climate law and policy[92] and they have been successful examples of judicial dialogue, circulation of legal arguments and tactics among practitioners and NGOs across different legal systems, as it has been the case for the landmark *Urgenda* case in the Netherlands with its diffusion worldwide.[93] The majority (70%) of these kinds

90 Savaresi, A. & Wewerinke-Singh, M., "Historic inquiry holds the Carbon Majors accountable for the impacts of climate change in the Philippines", *The Global Network for Human Rights and the Environment*, 10 May 2022. Available at: https://gnhre.org/2022/05/historic-inquiry-holds-the-carbon-majors-accountable-for-the-impacts-of-climate-change-in-the-philippines/.

91 Setzer, J. & Higham, C., *Global trends in climate change litigation: 2023 snapshot*, 2023, London: Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science, p. 32.

92 See Higham, C., Setzer, J. & Bradeen, E., *Challenging government responses to climate change through framework litigation*, 2022, London: Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science.

93 Cf. Maxwell, L., Mead, S. & van Berkel, D. (2022), "Standards for adjudicating the next generation of *Urgenda*-style climate cases", op. cit.

of cases have included human rights and constitutional arguments, referring as already seen above to international and human rights treaties, such as the ECHR. However, climate framework laws constitute a statutory basis for new cases and some interesting success in court, as shown above by the examples of the UK, France and South Africa. The complex interaction between climate legislation and litigation, as two complementary and mutually influencing aspects of climate governance, contributes to their global increase. As the human right to a healthy environment has spread in more than 80% of jurisdictions worldwide,[94] "forming the basis for an increasingly large number of [climate-related] cases"[95] in Latin America,[96] Africa,[97] the US[98] and Europe,[99] also the "extraordinary surge in legislative activity over the past two decades"[100] highlighted in the climate field around the world has driven the augmentation of climate litigation. At the same time, the quality and quantity of climate legislation and policy are directly influenced by the outcome of climate litigation. On the other side, important growth has been seen in the last few years for those cases involving private parties, both in terms of corporate duty to mitigate emissions, such as *Milieudefensie v. Shell* or *Notre Affaire à Tous v. Total*, exploiting always more creative and diverse causes of action, based on civil code-based corporate duty of care, human rights due diligence covering both human rights and the environment, also related to their supply chain and subsidiaries, or shareholder actions, as in *ClientEarth v. Enea*. At the moment, corporate liability for adaptation and compensation seems more limited in terms of the number of cases, but, as shown *Lluya v. RWE* and *Friends of the Earth v. Total,* there are compelling perspectives, in terms of the transnational dimension of this kind of litigation, the causation, related to the evidentiary phase, and the legal grounds to hold companies to account for their contribution to global climate change, including the critical role of human rights, highlighted by the Philippines Inquiry.

94 As reported by Professor David Boyd, UN Special Rapporteur on Human Rights and the Environment: UNHRC [United Nations High Commissioner for Refugees] (2020), *Right to a healthy environment: good practices*, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, United Nations General Assembly Human Rights Council. Available at: https://undocs.org/Home/Mobile?FinalSymbol=A%2FHRC%2F43%2F53&Language=E&DeviceType=Desktop&LangRequested=False.

95 Setzer, J. & Higham, C. (2023), Global trends in climate change litigation: 2023 snapshot, op. cit., p. 33.

96 De Vilchez, P. & Savaresi, A., "The Right to a Healthy Environment and Climate Litigation: A Game Changer?", *Yearbook of International Environmental Law* 2023, vol. 32, issue 1, pp. 3-19.

97 Bouwer, K., "The Influences of Human Rights on Climate Litigation in Africa", *Journal of Human Rights and the Environment* 2022, vol. 13, issue 1, pp. 157-177.

98 Gerrard, M.B., "Environmental rights in state constitutions", *Columbia Climate Change Blog*, 31 August 2021, Available at: https://blogs.law.columbia.edu/climatechange/2021/08/31/environmental-rights-in-state-constitutions/.

99 Setzer, J., Narulla, H., Higham, C. & Bradeen, E., *Climate Litigation in Europe: A summary report for the European Union Forum of Judges for the Environment*, 2022, London and Brussels: Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science and the European Union Forum of Judges for the Environment.

100 Clare, A., Fankhauser, S. & Gennaioli, C., "The national and international drivers of climate change legislation", in Averchenkova A., Fankhauser, S. & M. Nachmany (eds.), *Trends in Climate Change Legislation*, 2017, Cheltenham-Northampton: Edward Elgar, p. 19.

Climate change litigation is clearly increasing, both in terms of the number of cases around the world, both before domestic and international fora, and as an attractive legal laboratory for new and more advanced causes of action, procedures and remedies. To conclude this overview of some of the most notable global cases in the field, it might be interesting to review some of the foreseeable future trends, which seem likely to gain momentum in Europe and other legal environments. Setzer and Higham predicted that criminal actions, cases on directors, officers, and trustees' duties to manage climate risk, and shareholder rights will increase actors' individual responsibility for climate harm.[101] The concept of "ecocide" and its legal developments[102] may offer new perspectives, and while no climate cases have been brought on this ground, a recent communication before the International Criminal Court under Article 15 of the Rome Statute in *The Planet v. Bolsonaro* has begun linking environmental destruction to other international crimes.[103] Another intriguing new avenue is the role of "negative emissions" technologies, which are essential to achieving "net zero" through GHG removals. Unfortunately, this brings the risk of encouraging over-reliance of states and companies on the "net" part of the concept and insufficient attention to the "zero" part and continued investment in high-emitting activities.[104] Moreover, last year, a group of Italian NGOs and environmental movements filed a "climate-washing" case against the energy company Eni, accusing it of violating the OECD Guidelines for Multi-National Enterprises by over-relying on GHG removal technologies.[105] This seems a promising new avenue with an apparent "explosion" of this kind of cases associated with "misinformation associated with climate change".[106] Furthermore, the urgent need to eliminate short-lived climatic pollutants like methane and black carbon may soon be the subject of new climate litigation suits.[107] In the coming years, cases preventing illegal deforestation or seeking compensation for loss of "ecosystem services" like carbon sequestration will likely become increasingly important at the nexus of climate and biodiversity.[108] Finally, the creation of a new Commission of Small Island States on Climate Change and International Law[109] and the requests for advisory opinions currently filed before the International Tribunal

101 Setzer, J. & Higham, C., 'Global trends in climate change litigation: 2022 snapshot', p. 18.

102 See the definition provided by an Independent Expert Panel, co-chaired by Philippe Sands and Jojo Mehta, in June 2021. Available at: https://www.stopecocide.earth/expert-drafting-panel. Or the criminalization of ecocide in at least 15 countries. Available at: https://una.org.uk/magazine/2021-1/ecocide-international-crime.

103 See: https://climate-laws.org/geographies/international/litigation_cases/the-planet-v-bolsonaro.

104 Setzer, J. & Higham, C., 'Global trends in climate change litigation: 2022 snapshot', p. 42; see also Dyke, J., Watson, R. & Knorr, W., 'Climate scientists: concept of net zero is a dangerous trap', The Conversation, 22 April 2021. Available at: https://theconversation.com/climate-scientists-concept-of-net-zero-is-a-dangerous-trap-157368.

105 *Rete Legalità per il Clima (Legality for Climate Network) and others v. ENI*. Available at: https://climate-laws.org/geographies/italy/litigation_cases/rete-legalita-per-il-clima-legality-for-climate-network-and-others-v-eni.

106 Setzer, J. & Higham, C. (2023), Global trends in climate change litigation: 2023 snapshot, op. cit., p. 39.

107 For an early case of this kind, see *In re Court on its own motion v. State of Himachal Pradesh & Others*: https://climate-laws.org/geographies/india/litigation_cases/in-re-court-on-its-own-motion-v-state-of-himachal-pradesh-others.

108 Setzer, J. & Higham, C. (2022), 'Global trends in climate change litigation: 2022 snapshot', op. cit., p. 43.

109 Agreement for the establishment of the Commission of Small Island States on Climate Change and International Law, Edinburgh, 31 Oct. 2021, I-56940. Available at: https://treaties.un.org/doc/Publication/UNTS/No%20Volume/56940/Part/I-56940-08000002805c2ace.pdf.

on the Law of the Sea (ITLOS), the Inter-American Court of Human Rights and the International Court of Justice might offer the potential for improved collaboration in this field, as well as clarification on climate obligations. These initiatives are part of a growing trend to use international adjudicatory bodies like the UN Human Rights Council, the Human Rights Committee,[110] the Committee on the Rights of the Child,[111] and the European Court of Human Rights, along with UN Special Rapporteurs, to foster the ambition of national governments' climate change responses.[112]

110 See e.g. *Billy and others v. Australia* (Torre Strait Islanders Petition), UN Human Rights Committee, CCPR/C/135/D/3624/2019. Available at: http://climatecasechart.com/non-us-case/petition-of-torres-strait-islanders-to-the-united-nations-human-rights-committee-alleging-violations-stemming-from-australias-inaction-on-climate-change/

111 See e.g. *Sacchi et al. v. Argentina*, UN Committee on the Rights of the Child, CRC/C/88/D/104/2019. Available at: http://climatecasechart.com/non-us-case/sacchi-et-al-v-argentina-et-al/.

112 UNEP, Global Climate Litigation Report: 2020 Status Review (Nairobi 2020) 31.

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Issue 1, 2023

Climate change litigation: efficiency

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Abstract:

Climate change presents a critical challenge to humanity's future and survival, disrupting established legal concepts due to its global nature, invisibility, limited predictability and the inability to fully repair its impacts. Scientific analysis has shed light on the causes and evolution of climate change, offering the potential for mitigation and adaptation strategies. However, the implementation of these strategies faces significant political, economic, ethical, and legal hurdles. This overview briefly outlines these challenges in three key categories: policy, economy, and ethics.
This analysis sets the stage for a more in-depth exploration of these complex issues and the legal responses they require.

Keywords:

Climate law, Climate change litigation, Environmental law

1 The author thanks Margaux Berthelard for proofreading this article.

Climate change is a phenomenon of fundamental importance for the future and survival of humanity. It also challenges our main legal concepts, whose characteristics are: globality, invisibility, lack of effective prevention or prediction, non-reversibility and non-repairability.

Fortunately, climate change has been analysed many times by science, both in terms of its causes and its evolution. The work carried out by scientists over the years is normally likely to outline a policy to mitigate the effects of climate change and enable the human race to adapt to it. However, the implementation of this mitigation strategy faces many political, economic, ethical and, of course, legal obstacles.

These first three categories of phenomena will not be discussed in detail. We will therefore limit ourselves to indicating the broader outlines.

- In terms of policy, it entails moving from a short-term to a long-term vision.

- As far as the economy is concerned, the question is thorny because the climate catastrophe that is increasingly apparent obviously calls into question the growth model of society, which implies an uncontrolled use of resources. These resources are limited and some of them are non-renewable, hence the importance of moving towards a new economic model. It is undeniable that the multiplication of pollution of all kinds is the result of this model, which is why it is necessary to act in the direction of greater sustainability and ecological transition.

- On the ethical level, there is obviously the question of defining rights for people who have not yet appeared. This is all the more true since there are already problems in regulating the relationships between people who already exist.

As you can see, we are mainly interested in the legal aspect. From a legal point of view, it can be argued that the law has been caught unprepared at both national and international level.

I. Climate law at the international level

First of all, the binding force of international law is questioned, even though it seems to be the most appropriate level to deal with a global problem.

Unfortunately, there are no mandatory sanctions in international law, except for the possible consent of the legal subject.

Furthermore, we note a steady deterioration in the multilateralism that allows for the institutionalisation of this right.

International law is also in competition with other legal systems. The most telling example is probably Article 3(5) of the Climate Convention, which states that developments in climate law should not impede the smooth functioning of international trade.

How then can climate law evolve at the trans-state level when there is such direct competition with norms that aim, on the contrary, to roll back the progress of this law?

It is also important to stress the importance of the way in which climate law is developed at the COPs. At the meeting of the parties, decisions are taken by unanimity, which is an obstacle to the development of positive and binding international law. If we take the case of the Paris Agreement, no one denies its legal consistency, both in terms of the climate objectives to be achieved, i.e. limiting global warming to 1.5°C by the end of the century, and in terms of the means to be used to achieve them. However, as the last COP in Glasgow revealed, the transparency of the States concerning their actual contribution to this objective is very low.

II. Climate law at national level

National law also has a considerable role to play, even if it is necessary to put an end to a commonly accepted idea: the climate imperative is not taken into account by the Charter of the Environment, so it has no direct effect!

On the other hand, some states, such as Bolivia, Côte d'Ivoire, Dominican Republic, Ecuador, Nepal, Thailand, Tunisia and Venezuela, have incorporated climate into their constitutions. Article 20 of the German Basic Law refers to the state's responsibility towards future generations.

Secondly, the protection of biodiversity has not been effectively taken into account in the evolution of classical environmental law. The latter has preferred to focus on the fight against pollution rather than on a right to protect our environment as a whole. This is illogical when one considers that the maintenance of biodiversity is precisely the primary concern of climate law.

Unfortunately, there is a constant temptation to regress in environmental law. The current context also works against it, between the exceptional circumstances caused by the war in Europe and an economy damaged by the health crisis.

As a result, it is currently extremely complex for national judicial systems to provide a satisfactory, or even complete, response to the challenge of global warming. In its conception, especially in the West, the judicial system is limited to the interpretation of existing positive law. Law-making is reserved to the executive and legislative branches. However, the crisis calls on judges to play a new creative role on all continents and in all areas of litigation.

The current development of climate litigation, both quantitatively and qualitatively, is taking place solely at the national level. We could thus define it as "litigation in principle" that would make it possible to explore the content of a possible future global environmental code adapted to the Anthropocene.

A prior examination of the lack of climate litigation at the international level is essential to better understand its strengths and weaknesses, including those of its content.

III. Incompetence of the International Judge

At the outset, it is important to bear in mind that no international court established under a membership agreement, such as the Hague Court of Justice, has ruled on the issue of the 1.5°C 2100 target. None has ruled on the failure of states to account for their national contributions under the mechanisms of the Paris agreement.

For its part, although the International Criminal Court has taken an interest in the issue of ecocide and the environment, no proceedings have ever been opened before it on this subject.

Thus, one observation must be made: faced with this global problem, there is currently no globally competent jurisdiction. The international judge has never pronounced on the question of the control of contributions before an international judge.[2]

2 See on this subject: Hellio, H. & Cournil, C., *«Les procès climatiques»*, Ed. Pedone, p. 217 et seq. See also by the same author: *«Les contributions déterminées au niveau national, instrument au statut juridique en devenir»*, Revue juridique de l'environnement n° spécial 2017, pp. 35-48.

The situation with the International Court of Justice is much the same, although there have been attempts to bring cases before it. However, no one doubts the interest of the International Court of Justice in the protection of the environment as it ruled on 2 February 2018 on a case concerning Nicaragua's activities in the border region.[3]

The International Court of Justice has been able to make a significant contribution to the development of international law through the mechanism of requesting advisory opinions established by Articles 65 to 68 of the Statute, as well as Articles 102 to 109 of the ICJ Rules of Procedure.

For example, we can cite the case of the advisory opinions given in the cases of the legality of nuclear weapons[4] or that of Kosovo.[5] This request has apparently still not been addressed by the UN General Assembly on the provisional agenda.

A request for an advisory opinion was also made in 2011 by the President of the Republic of Palau to the International Court of Justice to rule on the responsibility of States to limit greenhouse gas emissions.

It is not inconceivable that the ICJ is likely to play a role in international climate law.[6]

Various attempts to appeal to the UN Committee on the Rights of the Child have been made, but have been declared inadmissible for failure to exhaust domestic remedies. Nevertheless, the Committee's principled competence in this area has been recognised.[7]

One may also recall the decision of the Human Rights Committee in Teitiota v. New Zealand.[8] This case concerned an asylum application that did not receive approval.[9]

The same applies to regional courts. Indeed, the European Court of Human Rights dealt with an inquiry by young Portuguese applicants under Articles 2, 8 and 14 of the Convention. The application was directed against 33 Member States. The applicants argued that in most of the disputes involving States, emissions generated outside their territories were not taken into account.

In a decision of 20 November 2020, the Strasbourg Court accepted the admissibility of this claim and ordered its urgent investigation[10], which in no way prejudges the recognition of the merits of its referral.

The position and action of the Court of Justice of the European Union is not to be questioned, given the abundance and exemplary case law in environmental litigation.

However, we cannot ignore the fact that Europe, and more specifically the European Union, is in the lead on the issue of global warming and biodiversity protection. The

3 ICJ, 16 Dec. 2015 & 2 Feb. 2018, General List No. 150, *Case of Costa Rica v Nicaragua*.

4 ICJ, Legality of the Use of Nuclear Weapons by a State in Armed Conflict, Advisory Opinion of 8 July 1996, p. 226.

5 ICJ, Advisory Opinion of 22 July 2010, Conformity with International Law of the Unilateral Declaration of Independence of Kosovo. See on these different points our book *«Le contentieux climatique, une révolution judiciaire mondiale»*, Ed. Bruylant, 2018, p. 57 et seq.

6 Strauss, A., 2009, New-York, Cambridge University Press, p. 334; Voigt, *The potential role of the International Court of Justice*, in "Climate change", Elgar encyclopedia, 2016, vol. 1, Chentenham, Edward Elgar, p. 52166.

7 See on all these points our developments in "Panorama du contentieux climatique 2020-2021", *Journal spécial des Sociétés* special issue of 15 Dec. 2021, p. 13 et seq.

8 Human Rights Committee, 24 Oct. 2019, Communication No. 2728/2016, '*Teitiota v. New Zealand*'.

9 See on this subject, same references, previous note, Special Society Journal, p. 14.

10 See in this respect: Cournil, C., & Perruso, C., *«Le climat s'installe à Strasbourg, les enseignements des premières requêtes portées devant la Cour européenne des droits de l'homme»*, l'observateur de Bruxelles 2021, nouveaux enjeux du droit européen du droit de l'environnement, n° 124, p. 24-29.

Green Deal programme contains a real law on global warming, as well as an ambitious programme to fight pollution and encourage green investment.[11]

However, in terms of litigation, the Court of Justice of the European Union has always rejected direct actions brought by citizens, whether or not they are members of the Union, on the issue of global warming.

This questioning also found its final conclusion in the judgment of the Court of Justice No. 5 of 25 March 2021 (press release 5121, Luxembourg 25 March 2021)[12], which confirmed the inadmissibility of the appeal lodged by families from the European Union, Kenya and Fiji against the 2018 EU climate package.

The Court of First Instance had, by decision of 8 May 2019[13], already ruled that this action was inadmissible on the grounds that it did not comply with Article 263 of the Treaty on European Union. According to the Court of First Instance, this action did not meet any of the criteria for standing.

In its 2021 judgment, the Court emphasised that the allegation that an act of the Union violates fundamental rights is not in itself sufficient to render individual claims admissible.

Fortunately, this situation is likely to change.[14]

Under these conditions, it is not possible to ignore the appeal of civil society, which includes large cities, citizens and environmental NGOs. National judges were the only ones able to respond to a call for distress due to the lack of effectiveness of international law, the sanctioning of which was not assured.

IV. Limitations on the powers of the national judge: strengths and weaknesses of national climate litigation

Climate litigation at the national level is very broad, both in terms of the number of cases (nearly 2,000 according to the projections of the January 2021 United Nations Communication) and in terms of the objectives mobilised. It concerns both emission reduction targets and global warming adaptation targets, also known as "*tackling climate change projects and activities*".

This litigation is therefore considerable. It has developed at the level of public law, and even constitutional law in certain cases, and targets both public and private persons who are guilty of anti-climatic behaviour or behaviour reflecting deficiencies.

To date, few legal systems ignore climate litigation data, except in large nations such as Russia, where environmental litigation is fought almost physically, or China, which limits its climate litigation to questions of the technical performance of certain devices designed to combat global warming.

Criminal litigation, on the other hand, remains totally limited. This is easily dem-

11 See our Communication and *"The Green Deal, a sustainable investment for all of us"*, Brussels Observer, No. 2021/2, No. 124, p. 36 et seq.

12 CJEU, 25 March 2021, Press Release 5121, No. 5, Luxembourg.

13 Order of the Court of First Instance (Second Chamber), 8 May 2019, Case T-330/18.

14 See European Parliament legislative resolution of 5 Oct. 2021 on the proposal for a regulation of the European Parliament and of the Council amending Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 Sept. 2006 on the involvement of the institutions and bodies of the Community in the provisions of the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters in Official Journal of 24 March 2022, C.132-212.

onstrated if we take into account the attempts linked to citizen initiatives of demonstrations, the removal of portraits of the President of the Republic or the occupation of banking establishments.

The idea of invoking texts relating to the obligation to prevent the occurrence of a disaster is still purely theoretical. The theme of ecocide, as it has been interpreted by French law, cannot be used to characterise an offence. However, it is required for the offence to be constituted.

In this context, it is therefore necessary to assess both the conditions of the contribution of national climate litigation to the law of the Anthropocene and its limits.

As soon as the question of the national judge and his powers is raised, two ideas come to mind:

- The legitimacy of the judge in relation to the executive and legislative powers, even though they are elected.
- The competence of this judge.

We can already point out how paradoxical it is to ask the judge to rule on issues as important as global biodiversity, the climate or the health of humanity at the level he or she is at. Moreover, such a judicial system does not exist everywhere. The national judge does not have independent power in all states. It is therefore not possible to compare the Chinese, American, Russian or European judicial systems.

The main merit of national climate litigation is to give efficiency to international law, and in particular to the climate convention. Indeed, and this is all the more valid for international law, the law only exists if it is effective.

The US Supreme Court recognised a climate obligation on the part of the federal government in the so-called Massachusetts case in 2007.

However, in Europe, three court decisions have intervened in quick succession to give substance to the obligation to respect the commitments contained in the Paris Agreement, i.e. a limit on global warming of +1.5°C. The recently published IPCC report also reminds us that this objective is no longer achievable.

But the rules had to be set.

The Urgenda decision of the Dutch Supreme Court in December 2019 enshrined the right to the environment, the right to life and the right to privacy. It recognises the right to be free from environmental harm in one's lifetime, based on Articles 2 and 8 of the European Convention on Human Rights.

It granted the collective request of the Dutch.

Then the French Council of State followed and issued two major decisions, the so-called Grande Synthe decisions[15] of 20 November 2020 and 2 July 2021. It gives direct effect to the +1.5°C objective. It emphasises that the legality of the Government's refusal to accelerate its action should be assessed in relation to the insufficient efforts made. The obligation of means must therefore be enshrined in an efficient obligation of result.

The Karlsruhe Court[16] has also broken new ground. It considers that the climate obligation obliges us towards future generations who have the right to live in a viable environment.

The landscape of private law will also be changed by the landmark decision of the District Court of The Hague in the Shell case.[17] The judge obliged the multinational, as well

15 CE, 20 Nov. 2020 and 2 July 2021, *Commune de Grande-Synthe*.

16 Constitutional Court of Karlsruhe, 27 March 2021.

17 District Court of The Hague, 26 May 2021, *Royal Dutch Shell*.

as all its subsidiaries, to give substance to the objectives of the Paris Agreement. This decision reminds us that the relevant elements are not subject to external state coercion.

This is the effectiveness of climate litigation.

The most difficult part is the implementation of this obligation because, beyond the affirmation of fundamental objectives, these must be concrete and rooted in reality.

The fundamental institutions of environmental law as well as the principles of prevention, recovery and public participation must be mobilised.

The principle of prevention applies to all projects and is reflected in the obligation to carry out an environmental impact assessment whenever environmental damage is possible.

The institution comes to us from the United States in the 1961 Act. It has been transposed in Europe by a series of directives and is currently integrated into the French Environmental Code.

The obligation is fairly general, since it is a matter of taking into account the transboundary effects of a project or plan through the Escazu Convention[18] for South America or Europe, and the AARHUS Convention.[19]

The Court of Justice itself is involved in giving substance to this impact assessment requirement in two important cases: the Gabcikovo Nagymaros case[20] and the paper mills case.[21]

The difficulty is not to confine the scope of the impact study to the immediate environmental issue alone, but also to the climate dimension, which is what is known as the analysis of the indirect effects of the project on the climate.

There are considerable technical difficulties. For example, the production of fuel from palm oil involves the deforestation of entire forest areas.

Similarly, the realisation of a classified biomass installation implies massive deforestation.

The current tendency of the courts is to consider that the issue of deforestation and an authorisation under a special legislation, that of classified installations, are two different models that do not have to be connected.

But this is not the view of foreign courts, and in particular of Australian decisions.[22]

There is no specific doctrine in French law to encourage the administration to study the indirect effects and the climate balance of a project.

This was the reasoning behind a decision by the Council of State on 30 December 2021 at the request of the City of Geneva. The latter contested the creation of a motorway segment that was to be built on the southern shore of Lake Geneva, whereas the city had invested considerably in a railway line intended to attract the cross-border population.

The real question is the cost/benefit ratio between a motorway link that emits greenhouse gases and transport by rail, with no comparison in terms of carbon footprint.

The second difficulty is that of the application of the polluter-pays principle, from which emerges the obligation to repair the ecological damage.

This question of compensation for ecological damage is the result of a very long evo-

18 Escazu Agreement, 4 March 2018.

19 AARHUS Convention, 25 June 1998.

20 ICJ, 25 Sept. 1997, *Gabcikovo Nagymaros*.

21 ICJ, 20 April 2010, *Paper Mills Case*.

22 See note by Thuillier, T., IEE Review, February 2018.

lution of case law, up to the ruling given in France in the "Erika" case.[23] This case concerned the sinking of the oil tanker Erika, which caused a huge oil slick along more than 400 km of coastline.

The Court of Cassation ruled that public authorities were entitled to compensation for the damage caused to the environment itself.

This case led to the creation in France of a provision in the Civil Code on compensation for ecological damage. The principle of compensation was recognised but limited to reparation in kind and not in money.

The difficulty of this compensation has not escaped us. Indeed, how can we compensate for climate damage since it is global and climate change is irreversible? Nor is it possible to compensate for damage caused to the high seas as a result of global warming.

French courts, such as the Administrative Court of Paris, have attempted to engage in this area by recognising the responsibility of the state for failure to act. However, it did not consider that anything more than a purely symbolic sum could be demanded in compensation.

Therefore, the principle is there and the way in which the efforts to be made will be implemented remains a delicate issue.

This question is also being considered in the litigation concerning the obligation of vigilance, which was recently reinforced for large European companies by a draft directive. Efforts remain to be made to achieve real judicial control, as the attempts made in the Total case have not yet borne fruit.

National climate litigation is, by definition, imperfect for classic and simple reasons. Climate litigation is limited to the contentious legal avenues offered by civil, criminal and administrative proceedings, which poses problems for the assessment of interest and standing, for proof and causation. This will evolve as a result of the expertise objectively provided by the work of the IPCC.

It is clear that the work of the IPCC, particularly the latest report, constitutes a series of recommendations in the same way as those of advisory bodies such as the High Committee on Climate Change. They are guidelines to be followed and implemented. They are rules of ecological transition for which the judge can be the guardian.

This is the position of the Council of State which, in the Grande Synthe ruling of the 2nd of July, gave the government a specific deadline to review its policy.

French administrative law and the Code of Administrative Justice allow for the use of coercive measures such as formal notices and penalty payments, which have already been recognised and used by the case law, notably on the issue of litigation concerning the application of the Air Directives in France.

Finally, the climate dispute can be credited with having paved the way for the obligation to guarantee a civilisation acceptable to all and under all conditions.

However, the law of the Anthropocene deserves to be translated into implementation measures that are only in their infancy.

The international situation, the weakening of multilateralism and the emergence of nationalism cannot help the situation to evolve, except for the efforts by the internal judge and European institutions. The European Union is exemplary in this respect thanks to the implementation of the Green Deal and all the other means it uses. But the support of the citizens could make it possible to change things outside the strict frame-

23 Cass. Crim., 25 Sep. 2012, Nº 10-82.938.

work of litigation.

This is probably the merit of declarations that can point the way forward, as in the case of the Declaration of the Rights of Mankind, which provides four principles, six rights and six duties for the future.

No one can doubt the usefulness of such a perspective. When we look back at history, we can only see that the great declarations of the American constitution, the 1789 Declaration of the Rights of Man and of the Citizen, and the 1948 Declaration are ways of creating and making new rights effective.

fypl french yearbook *of* public law
Issue 1, 2023

Climate Change Litigation and Legitimacy of Judges towards a 'wicked problem': Empowerment, Discretion and Prudence

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Abstract:

For the past ten years climate litigation has received growing attention from academics, lawyers and civil society.[1] Although the first climate trials emerged twenty years ago, they have recently increased and nowadays constitute a new trend in international, administrative and civil law.[2] While climate litigation has acquired interest as a rela-

1 United Nations Environment Program, *The Status of Climate Change Litigation: A Global Review,* 2017; Markell, D. & Ruhl, J.B., "An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual?", *FLA. L. Rev.* 2012, vol. 64, p. 15; Fisher, E., "Climate Change Litigation, Obsession and Expertise: Reflecting on the Scholarly Response to Massachusetts v. EPA", *Law & Policy* 2013, vol. 35, issue 3, pp. 236-260; Varvaštian, S., "Climate Change Litigation, Liability and Global Climate Governance – Can Judicial Policy-making Become a Game-changer?", Berlin Conference "Transformative Global Climate Governance after Paris", 2016; Fournier, L., *The cost of inaction. The role of Courts in Climate Change Litigation,* LLM Thesis, 2017, University of Edinburgh.

2 Smith, J. & Shearman, D., *Climate Change Litigation,* 2006, Adelaide, Australia, Presidian Legal Publications; Torre-Schaub, M., "Justice et justiciabilité climatique : état de lieux et apports de l'Accord de Paris" in Torre-Schaub, M. (dir.), *Bilan et perspectives de l'Accord de Paris, Regards croisés,* t. 8, 2017, éd. IRJS, coll. Institut André Tunc, pp. 107-124; Torre-Schaub, M. (dir.), *Les dynamiques du contentieux climatique. Usages et mobilisations du droit,* 2021, Paris, mare & martin; Hautereau-Boutonnet, M., "Les procès climatiques par la « doctrine du procès climatique »", in Courril, C. & Varisson, L. (dir.), *Les procès climatiques. Entre le national et l'international,* 2018, Paris, Pedone, p. 46; Kahl, W. & Weller, M.-P. (ed.), *Climate Change litigation. A Handbook,* 2021, Oxford, Hart, München, Beck, Somon, Oxford U.

tively new procedural and judicial phenomenon, the contribution that judges make to the construction and implementation of ecological transition in the context of the climate crisis has become an object of studies in itself. This article belongs to the latter category of studies in that it explores the role of the judge in the context of climate litigation and presents both its possibilities and limits, while also highlighting the progress that has been made in this area.

Keywords:

Climate change litigation, Environmental constitutionalism, Ecological transition, Environmental justice

Introduction

Climate litigation emerged as a new kind of environmental litigation in the early 2000s in the United States and Australia. This type of litigation has however multiplied in a spectacular way, mostly in Europe, since 2015. This trend can be explained mainly by two factors: Firstly, the Paris Agreement was negotiated around that time and constituted an opportunity for civil society to mobilize. Secondly, next to the Paris Agreement several NGOs called for further possibilities to bring the matter of climate change before judges.

Several definitions of climate litigation coexist. The broadest definition includes any action in which its object, in fact or in law, is linked to climate change.[3] For the purpose of this article however, we will limit ourselves to a more restricted definition according to which climate change is either the object of litigation in a direct way or is used as central argument. Climate trials occur above all in the domestic context and can be directed against the State or private actors. The plaintiffs on the other hand are most often NGOs, individuals, cities or foundations. Our study will focus in particular on trials demanding new commitments and more ambitious actions from the public administration and the recognition of more effective climate laws as well.

In public planning and public policy making, a 'wicked problem'[4] is a problem that is difficult or impossible to solve because of incomplete, contradictory, and changing requirements that are often difficult to recognize. It refers to a problem that cannot be fixed, where there is no single solution; and the adjective 'wicked' implies resistance to solutions. Climate change has exemplified for decades this kind of problem, 'whose social complexity means that it has no determinable stopping point'.[5] Moreover, because of

Press; Alogna, I., Bakker, C. & Gucci, J.-P., *Climate Change litigation: Global perspectives*, 2021, London, BICCL.

3 Thail, K. & Lord, R., "What is climate change litigation?", Practice Note. Available at: https://www.lexisnexis.co.uk/legal/guidance/what-is-climate-change-litigation (consulted in April 2022).

4 Lazarus, R. J., Super wicked problems and climate change: Restraining the present to liberate the future, *Cornell L. Rev.* 2009, vol. 94, pp. 1153-1160, in *The Status of Global Climate Change Litigation: a Global Review*, 2017, UN Environment Report, Sabin Center for Climate Change Law, Columbia University, p.7.

5 Ibid, p. 8.

complex interdependencies, the effort to solve one aspect of a 'wicked problem' may reveal or create other problems, for example a cascade effect in litigation.

Because of the complexity and difficulties States and public policies have to face, climate change litigation testifies a trend towards a new polycentric climate governance that is no longer limited to the framework of UN negotiations, which never had found efficient solutions to tackle climate change.[6] Indeed, the fight against climate change is no longer conducted exclusively in the international arena. Domestic and local levels are becoming an increasingly favorable and effective framework for fighting climate change with legal tools. In this evolving context, domestic courts cannot be an exception to the broadening of the venues for climate discussion and governance.

This model of governance involves new alliances between different actors (NGOs, citizens, local authorities) but it shows a 'pathological' side of climate law and of the 'wicked' difficulties public administrations have to address. Climate change litigation is a reflection of either the absence of climate change laws and/or public policies, their inadequacy, or, more in general, their unsuitability for accommodating climate phenomena. In order to fill these gaps or to respond to the growing demands of civil society, a paradigm shift is taking place throughout the courts in order to ensure the right to access to justice in climate matters. Judges are increasingly called upon to fix climate change issues, but their role is still not comfortable nor free from difficulties and limitations. This article aims to show how judges face this challenge which places courts somewhere between empowerment, discretion and prudence. Several questions arise here. The one that immediately comes to mind is the legitimacy of judges to decide or rule on climate issues. Is the court the place to address climate issues? Can – and should – judges do something to "compensate" for the slowness and lack of ambition of climate texts in international law?[7] It should be recalled that climate litigation is mostly brought before national judges and that its primary purpose is to call upon domestic laws. But, in practice, climate lawsuits present elements that refer not only to domestic law, but also to international law.[8] Are domestic judges entitled to undertake such an approach consisting of applying both international and domestic laws? Are they entitled to make such an extensive application of an embryonic and hybrid emerging climate law?[9] By the same token, at least in the European law systems, judges should interpret the law without creating it. Also, in the face of this kind of limitation, it seems appropriate to ask what role can judges play in the fight against

6 Van Asselt, H. & Zelli, F., "International Governance: Polycentric Governing by and beyond the UNFCCC", in Jordan, A., Huitema, D., Asselt, H.V. & Forster, J. (eds.), *Governing Climate Change. Polycentricity in Action?*, 2018, Cambridge, UK, Cambridge University Press, pp. 29-46; Hirschl, R., "The judicialization of politics", in Goodin, R.E. (ed.), *The Oxford Handbook of Political Science*, 2008, Oxford, UK, Oxford University Press, pp. 253–274.

7 Torre-Schaub, M., "Les procès climatiques à l'étranger", in Dossier spécial : *Le juge administratif et le changement climatique, RFDA* July-Aug. 2019; Torre-Schaub, M. et Lormeteau, B. (dir.), Dossier : *Les recours climatiques en France, Revue Energie, Environnement, Infrastructures* May 2019, n° 5, pp. 12-45.

8 Sabin Center for Climate Change Law, Columbia University. Available at: https://climate.law.columbia.edu/; and Grantham Institute –Law and Environment, Imperial College of London. Available at: https://www.imperial.ac.uk/grantham/. See also Voigt, C., "Climate Change as challenge for Global governance", in Kahl, W. & Wellers, M. (eds.), *Climate Change litigation –Liability and Damages from a comparative perspective*, 2021, München, CH. Beck / Oxford, Hart, pp. 1-19, p. 15, §72.

9 Torre-Schaub, M., "Decision Making Process at the Courts Level: The example of Climate Change Litigation", *Revista de la Universidad de Granada, Special Issue Derecho y Cambio Climático* 2008, n° 12, pp. 57-72.

global warming. What can they do? What should they do? With what kind of means? What limits and obstacles do they face? At the end of the day, what is then their contribution?

First of all, this article aims to analyze the role of judges in climate change litigation and the enforcement of climate law (I). Secondly, this article will study the contribution of judges to tackle climate change. In doing so, it traces what limits and difficulties judges face, but also which opportunities are open to them (II). My aim is to present, through the analysis of several decisions, what is the actual contribution of administrative jurisdictions in the implementation of climate laws. From this perspective, this article has the ambition to shed some light on the role played by judges in pursuing the ultimate target of the Paris Agreement and of European legislation on climate change, i.e. to reach carbon neutrality by 2050.

I. Shall judges play a role in Climate Change?

Portalis wrote that 'the law does not have all the power and cannot say everything'.[10] The primary function of law 'is to fix, through essential lines, the general principles of law, to establish fruitful principles and not to descend to the details of questions that may arise in different matters. And, it is the judge, inspired by the general essence of the laws, who must direct the application'. The judge, who refuses to address a case, alleging insufficiency or non-existence of the law, would be denying justice to those who deserve or need it. However, the judge is not allowed to create law by recurring to existing regulation or general provisions, while drafting his decision. Jurisprudence is recognized by the law but not as a *source* that creates it, at least in the Romano-Germanic legal system.[11] Likewise, in the Kelsenian pyramidal model, the jurisdictional act appears at the bottom of the pyramid. The judge applies the law and, according to Kelsen, it is an act subordinate to legal norms with general effect.[12]

Increasingly, however, judges are producing general provisions in certain cases, under the guise of an interpretative act of the law in force. The supreme courts of several countries of civil law go even further and the French *Cour de cassation*, for example, enjoys great freedom in this respect, as it is able, on occasion, to lay down certain general and abstract rules. To this must be added the aforementioned rule prohibiting the denial of justice on the basis of silence, obscurity or insufficiency of the law. This provision obviously allows the judge to create law. The law thus created must be standardized (become the standard of application). This operation allows the judge to rule again in the same sense as he did in the first place.

In common law systems, case law can be regarded as a genuine source of law. However, the British legal culture refers to case law as the *judge creating law* rather than only *deciding the case* Whatever the appropriate term, common law systems are based on the principle of stare decisis, according to which the answer to a question of law and the answer given in a particular case should also be given in similar cases raising the same legal question. Moreover, this principle also implies that lower courts are always bound by the

10 Portalis, Preliminary Address - Civil Code, "La loi ne peut tout pouvoir et ne peut tout dire".

11 Also called "Civil Law". Available at: https://www.britannica.com/topic/civil-law-Romano-Germanic (consulted in March 2022).

12 Ost, F. & Van de Kerchove, M., *De la pyramide au réseau ? Pour une théorie dialectique du droit*, 2002, Brussels, Univ. Saint-Louis.

legal interpretation given by a higher court. Even the judge who ruled in the first place has to comply with his decision, according to the stare decisis principle. The future legal force given to the decision entails – when judging identical or similar questions – a work of casuistry[13] that often requires a high dose of creativity.[14] Thus, both in the Romano-Germanic legal system (civil law) – in order to not deny justice when statutory law is silent – or in the common law system – because judges have more creative freedom – judicial decisions can effectively produce law. The question that this article raises in the first place is, therefore, whether the opposition between law and jurisprudence as sources of law is really still a current issue or whether we should not revise the existing position on the matter and apply some flexibility to the traditional assertion (A). This question must however be asked with regards to environmental law and, more specifically, to climate change (B).

A. The legitimacy of the judge to enforce the law

It is often the case that in new branches of law, such as environmental law, new problems and issues arise to which the law does not provide a direct answer (yet). It also happens, as in the case of climate change, that positive law does not yet have all the solutions or answers, given its novelty and the scientific uncertainties surrounding its subject. In these cases, the judge can play a determining and creative role.[15] Thus, it must emphasized that the judge can be a producer of law in relatively new legal scenarios that have not yet been regulated by the law, such as those opened by climate change. The issue to be examined here is to what extent the judge participates in the *governance* of climate change law.

The answer to the question: "what precise role the judge can play in climate change issues"? requires some preliminary remarks. Using the dichotomy that divides law into its procedural and substantive aspects, the question of the judge's involvement in tackling climate change falls somewhat between the two. The procedural aspect is essential, as it determines who is entitled to go to court to settle a dispute concerning climate change. But substantive law is also relevant, because without its analysis, it would not be possible to answer the question of what could be claimed. In short: what is the core of a climate change lawsuit? The two questions will therefore be analysed together, as they seem to be inseparable in this particular context.

Likewise, environmental law is made up of new elements, but also makes use of more traditional legal concepts. Thus, legal principles such as the principle of participation or the right to (environmental) information are new legal concepts. The parties and the judge will have to use them in a trial involving an environmental issue. The precautionary principle also seems to be particularly well suited to questions relating to climate change, mostly because it is a matter of great scientific uncertainty.[16]

13 Casuistry, the moral theology devoted to resolving problematic cases, offered general rules to swearing lawfully. Available at: https://dictionary.cambridge.org/fr/dictionnaire/anglais/casuistry (consulted in June 2022).

14 Foyer, J., "Allocution d'ouverture", in *La création du droit par le juge, Archives de Philosophie du droit*, t. 50, p. 5.

15 467 U.S. 837, 1984, *Chevron U.S.A., Inc. v. NRDC*, in *Les grands arrêts de la Cour Suprême*, p. 1017.

16 Bodanski, O. & Haigh, N., *Interpreting the precautionary principle*, in O'Riodan, T. & Cameron, J., Earthcan, 1994, London, 220 p.; Martin, G., "Principe de précaution, mesures provisoires et protection de l'environnement, Aménagement-Environnement", 1994, nº 4, Kluwer Éditions Juridiques Bélgique, p. 215; Laudon, A., "Le droit face à l"incertitude scientifique : risques, responsabilité et principe de précaution", *Colloque international, Quel*

Environmental law also makes use of existing legal tools from fields such as contract law, liability law or property law. Thus, the second question addressed by this article is the extent to which new mechanisms and principles of law are used to solve issues related to climate change, or to what extent the judge can interpret already existing instruments to solve legal issues related to this global crisis.[17]

The judge plays a central role in environmental law, as litigation in this area has increased dramatically since the end of the 1970s.[18] Jurisdictions at international, regional (European Union, Inter-American Commission on Human Rights, Merco-Sud) and national level have seen numerous trials that opened up new paths in the development of environmental law.[19] Several international conventions encourage and follow this trend, such as the Lugano Convention of 1993, the Aarhus Convention, or the Strasbourg Convention of 1998 on criminal law. This seems to create what we could call a 'community of judges' who collaborate at international, regional and national level, each using principles and concepts that emerge in other jurisdictions at their own level of competence.[20] Thus, principles such as precaution, sustainable development, or prevention appear in decisions in the international, regional and national arenas. As some authors have claimed, we are moving towards a 'common law' on the environment.[21] The question that emerges here is whether going to court to settle issues not clearly regulated by the law gives judges the ability to offer solution to this legal vacuum.

If this question was indeed often asked in the early 2000s, when climate change litigation timidly started in the US and Australia, it seems that it is no longer pertinent today. As the European Union's impulse is felt greatly in domestic climate legislation, and the Paris Agreement has had a similar effect, the question to be asked now should be whether the judges (civil and administrative) can assist the implementation of existing laws by interpreting them in such a way that their 'normative' content (or lack thereof) is no longer an excuse for the government's inaction in climate change policies.[22]

B. Judges' role in climate change litigation

This section will firstly examine the actual contribution of judges to the improvement of

environnement pour le XXI siècle ?, 1996; Rémond-Gouilloud, M., "Le risque de l'incertain : la responsabilité face aux avancées de la science", *La vie des sciences, CR.* série Générale 1993, vol. 4, t. 10, p. 341; Boy, L., "La nature juridique du principe de précaution", *Nature, Sciences et Société* 1999, vol. 7, nº 3, pp. 5-11.

17 Torre-Schaub, M., "Le droit des changements climatiques : vieux instruments pour nouveaux problèmes", in Torre-Schaub, M. (dir.), *Dossier Droit et climat, Cahiers de Droit Science et Technologies* 2009, nº spécial; Torre-Schaub, M., "Le rôle des incertitudes dans la prise de décision aux Etats-Unis. Le réchauffement climatique au prétoire", *Revue internationale de droit comparé* 2007, nº 3, pp. 685-713.

18 Maljean-Dubois, S. (dir.), *Le rôle du juge dans le développement du droit de l'environnement*, 2008, Bruylant.

19 Canivet, G., "Les influences croisées entre juridictions nationales et internationales : éloge de la bénévolence des juges", in *Les influences croisées entre juridictions nationales et internationales.* Available at: http://www.ahjucaf.org.

20 Maljean-Dubois, S. (dir.), Le rôle du juge dans le développement du droit de l'environnement (2008), op. cit., p. 195.

21 Delmas-Marty, M., *Vers un droit commun de l'humanité*, Interview with Petit, P., coll. textuel, 2004, Paris.

22 SCOTUS, 05-1120, 549 U.S, 4 Feb. 2007, *Massachusetts v. EPA & al., Connecticut v. Electric Power co.*; SDNY, NO 04-CV-05669, 21 July 2004; Torre-Schaub, M. (2007), Le rôle des incertitudes dans la prise de décision aux Etats-Unis, op. cit., pp. 685-713.

climate law (1). In a second step, this section analyses the incipient stage of climate change litigation (2).

1. The contribution of judges to the improvement of Climate Law

Calling on the judge to solve a question not previously regulated by the law occurs frequently, especially in common law countries, as discussed above.[23] It is not, however, a general rule, nor is it as obvious as it may appear at first glance. We will take the United States as an example here, as some cases have shed light on this issue since the early '00s.[24] A debate has been raging in the United States for more than twenty years. This debate has been settled to some extent in favor of the judiciary, empowering it to make decisions on issues on which the law is somewhat silent.

We know that the separation between the executive, legislative and judiciary powers is the basis of the rule of law. It is equally evident that, even in the United States, the judge does not have the power to substitute himself to the Congress (in legislative matters) or to a Governmental Agency (in regulatory matters). There is, however, also an obligation for Governmental Agencies to act in a *reasonable* manner.[25] It is often in the interpretation of this 'reasonableness' that judges have been able to slip their ability to make decisions in the face of regulatory 'inaction' from an Agency. In other words, faced with a specific, unregulated problem, the executive branch, through its regulatory capacity, and the legislative branch, are required 'to do something about it', so that the situation is sorted

23 In the *Massachusetts v. EPA* climate case quoted above, the Supreme Court found that 'With respect to the injury element of standing ... Massachusetts adequately demonstrated that rising global sea levels have already swallowed some of the state's coastal land and that if sea levels continue to rise as predicted, the state's injury will become more severe over time. As an owner of significant coastal property'. The Court found that Massachusetts' injury was 'actual' and 'imminent.'. See too, Michaut, F., "Le rôle créateur du juge selon l'école de la « sociologie américaine ». Le juge et la règle de droit", *RIDC* 1987, vol. 39, nº 2, pp. 343-371.

24 According to the analysis of the evolution of scientific evidence in Environmental Law cases in the US for the last decades, the American Bar Association explained that: 'in the 1990s, the Supreme Court more fully elaborated Article III standing requirements as applied to an environmental case'. In *Lujan v. Defenders of Wildlife* (1992), environmental plaintiffs challenged a new rule by the U.S. Department of Interior, which interpreted a section of the Endangered Species Act as not applicable to actions in foreign nations. Plaintiffs included individuals who had visited Egypt in order to view the Nile crocodile and Sri Lanka to view the Asian elephant and Asian leopard. Plaintiffs alleged that the Department of Interior's rule would negatively affect their future ability to view these species in their natural habitat. The *Lujan* Court delineated three elements that must be met to demonstrate the constitutional minimum of standing to sue. First, a plaintiff must show an 'injury-in-fact.' The 'injury-in-fact' must be 'concrete and particularized' and 'actual or imminent',' not conjectural or hypothetical. The Court has noted that 'particularized' means that the injury must affect the plaintiff in a personal and individual way. Second, the plaintiff must demonstrate a 'causal connection between the injury and the conduct complained of.' The injury must be 'fairly traceable' to the defendant's challenged actions. Third, the plaintiff's injury must be one that is likely to be redressed by a favourable decision in the case. Available at: https://www.americanbar.org/groups/public_education/publications/insights-on-law-and-society/volume-19/insights-vol--19---issue-1/standing--who-can-sue-to-protect-the-environment-/.

25 The Court found in *Massachusetts v. EPA*, op. cit., that 'EPA held the authority to regulate greenhouse gases from new motor vehicles under Section 202(a)(1) of the Clean Air Act'. The Court found that 'the EPA provided no reasoned explanation for its refusal to determine whether greenhouse gases contributed to global warming and remanded the case for further proceedings'. Available at: https://www.supremecourt.gov/opinions/06pdf/05-1120.pdf.

out. This is the recent interpretation of the 'reasonableness' obligation. It is thus an obligation to do.

On the other hand, in the very first climate decision ruled by the US Supreme Court – *Massachusetts v. EPA*[26] – the judges enabled their participation in decision making because:

> *'Nor can EPA avoid its statutory obligation by noting the uncertainty surrounding various features of climate change and concluding that it would therefore be better not to regulate at this time. See 68 Fed. Reg. 52930–52931. If the scientific uncertainty is so profound that it precludes EPA from making a reasoned judgment as to whether green-house gases contribute to global warming, EPA must say so'.*[27]

In this context, the next question to ask is how the issue of climate change was solved by the judges in the very first landmark climate change case.[28]

2. The incipient stage of the development of climate change litigation

In 2006, numerous scientists have concluded that the increase in GHG emissions from fossil fuels such as C02 was a major contributor to global warming. The legal instruments regarding climate change were at the time already a complex patchwork of legal and scientific issues. The legal issues surrounding this problem were only partly solved by international law- especially by the Kyoto Protocol (1997). As far as Europe was concerned, the

26 According to the American Bar Association, 'EPA found that six greenhouse gases "in the atmosphere may reasonably be anticipated both to endanger public health and to endanger public welfare."' The EPA also introduced regulations of certain greenhouse gases as a result. In February 2010, the states of Alabama, Texas, and Virginia and several other parties sought judicial review of the EPA's determination in the U.S. Court of Appeals, District of Columbia Circuit. On June 26, 2012, the court issued an opinion, which dismissed the states' and other parties' challenges to the EPA's endangerment finding and the related regulations. The three-judge panel unanimously upheld the EPA's central finding that greenhouse gases, such as carbon dioxide, endanger public health and were likely responsible for the global warming experienced over the past half century. The U.S. Supreme Court's 2007 decision in *Massachusetts v. EPA* had an impact on subsequent climate change lawsuits as well as on environmental standing and standing in general. The Court's finding that carbon dioxide is considered a 'pollutant' under the Clean Air Act has been used to support separate litigation challenging the EPA's failure to regulate greenhouse gases from stationary sources and other sources covered by the Clean Air Act. Also, the Court's recognition of the injuries caused by global warming, the causation between increased greenhouse gases and global warming, and the EPA's ability to mitigate harmful impacts of climate change will likely be used to demonstrate standing in other global warming-related cases'. Available at: https://www.americanbar.org/groups/public_education/publications/insights-on-law-and-society/volume-19/insights-vol--19---issue-1/standing--who-can-sue-to-protect-the-environment-/.

27 *Massachusetts v. EPA*, op. cit., p. 31. Available at: https://www.supremecourt.gov/opinions/06pdf/05-1120.pdf (consulted in July 2022).

28 *Massachusetts v. EPA*, op. cit. See also the previous decisions about this topic: SDNY, 21 July 2004, NO 04-CV-05669, *Connecticut v. Electric Power co.* Available at: http://www.ag.ca.gov; For a deep analysis of this decision see: Torre-Schaub, M. (2007), Le rôle des incertitudes dans la prise de décision aux Etats-Unis, op. cit., pp. 685-713.

2004 GHG Emissions Trading Directive triggered the creation of GHG regulations and legislation at the domestic level.[29] But no special climate laws were really enacted at that time in the member states, nor any universal treaty concerning climate change.

The climate change crisis, as described by the scientists of the Intergovernmental Panel on Climate Change (IPCC), was originally fraught with uncertainty. This uncertainty led to a great deal of institutional inertia on the part of many industrialized countries who, driven by the lack of specific and irrefutable data, exploited these deficiencies to avoid any legal initiative on global warming. Countries such as the United States had no specific legal instruments, neither at federal nor at state level, to regulate or limit greenhouse gas emissions at that time. They were not yet under any international obligation to legislate. In countries without specific emission regulations, what legal instruments could citizens wield in courts? Would citizens be entitled to be parties in lawsuits concerning the damage caused by GHG emissions? The main question emerging from the very first cases on the matter was the qualification of "climate harm" as a specific damage, thus ascribable to a specific behavior and, ultimately, to global climate change phenomena.[30]

Global warming and its consequence on the climate were treated by judges as a phenomenon that went beyond isolated scientific predictions. It became therefore a 'danger' or 'risk' that affected different populations, cultures, communities and countries. For this reason, climate has been considered a 'global good' in more than one occasion, since climate damages have global dimensions. Global damage harms the general public. Furthermore, this kind of damage was and still is considered to be a problem of general interest. Lastly, the damage caused by global warming affects at the same time individuals, collectivities and, above all, common goods such as the atmosphere. Climate change has been considered global damage since the first declarations of the United Nations on the environment (especially after the Rio Declaration of 1992). But with that being said, the question that arose before the courts was how could a 'global damage' be assessed. Is it repairable? Or is it insubstantial, undermined by the lack of sufficient specificity and individualization of the victims? Given the aforementioned practical difficulties, is it considered as a damage caused 'to no one in particular but to everyone in general'? In short, how did the judge position himself with regards to this kind of damage and how did he qualify both the damaged good (the atmosphere) and the victims of the damage (the population as a whole)?

This raised the problem of the definition, qualification and evaluation of the damage caused by climate change. Although the judge had the last word on these three questions, at the end of the day it was the scientific experts who informed the judges in their decision. (a) It is therefore necessary to consider the importance of the assistance of scientific experts in such cases as the *Massachusetts v. EPA*. Close collaboration between judges and experts revealed to be crucial for the decision.[31]

Another point discussed in these first cases was related to the nature of the damage caused by climate change. Such an inquiry leads to the establishment of different respon-

29 Dir. (EU) nº2003/87/EC, 13 Oct. 2003, of the European Parliament and of the Council establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC. Available at: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2003L0087:20041113:EN:PDF.

30 Smith, J. & Shearman, D. (2006), *Climate Change Litigation*, op. cit., *pp.* 14 f.

31 Jasanoff, S., "Making order: law and science in action", in Hacket, E. J., Amsterdamska, O., Lynch, M. & J. Wajcman, J. (eds.), *The handbook of sciences and technology studies*, 2008, Cambridge, MIT Press, p. 779.

sibilities, which were not individual, but considered as collective, shared and multiple.[32] Proof as a procedural, but also substantial, element was therefore essential in these cases. (b) This issue raised the problem of state action or inaction related to climate change policies and legislation. (c) At the same time, the first climate change decisions referred to broader legal principles that allowed the recognition of the damage caused by GHG emissions, whatever its degree of certainty.

a) Scientific expertise and the judge: the co-construction of the decision

The question related to the qualification of global environmental damage in the United States dates back to the 1990s. In 1990, the *City of Los Angeles Florida Audubon* case raised the issue of whether certain kinds of damage to agriculture, natural resources and coastal populations was caused by global warming as a global phenomenon, thus causing a harm 'to all'.[33] In this case, the judges stated that in order to establish this type of damage it was necessary to demonstrate that certain conditions be fulfilled, such as the fact that the damage was 'specific' and not 'merely general'. To carry out this demonstration, the judges required a sufficient and necessary causal connection relating specific damage (agriculture, coastal population, etc.) to a global phenomenon (climate change). The establishment of this causal link and its evidence could not be proved without resorting to scientific experts. Although the parties in court produced the requested scientific reports, the judges decided that evidence of global damage due to climate change was not sufficiently clear and did not accept the claim for global damage to a common good.

While this case proved to be a great disappointment to environmental groups and to a large part of the American public in general, it should not be dismissed as such. On the contrary, it is important to point out that this decision marked a hopeful beginning in the history of American litigation on climate change. Although the judges did not admit the existence of 'harm to all', they laid the foundations of a specific reasoning and a specific vocabulary for environmental matters. It is also important to point out that this decision imposed the requirement of a causal link for the first time, which remains today an important condition to establish the existence of damage, its extent and especially its qualification (global or individual). It is therefore necessary, in order to establish the existence of a global damage caused 'to all', to be able to provide the necessary evidence and link it to the causes and consequences of the damage.[34] This is the only way to find satisfactory legal solutions for the eventual victims of climate change. Therefore, the study of these claims leads us to examine the legal instruments employed in the first cases related to climate change.

b) The first steps to build causality

Since the victims of climate change cannot always be precisely identified, the damage caused by climate change can be minimized or overlooked. The authorities of many industrialized countries have always exhibited a certain inertia towards climate litigation,

32 Smith, J. & Shearman, D. (2006), *Climate change litigation*, op. cit.

33 D.C. Cir., 1990, 912 F.2d 478; D.C. Cir., 1996, 94 F. 3d 658.

34 Mank, B.C., "Standing and Global warming: is injury to all, injury to none?", *Lewis & Clark Law School Environmental Law Review* 2005, p. 35.

so that the damage to an imprecise community could not be easily repaired. Examples of this kind of environmental damage are those caused over time by accidents such as oil spills, acid rain or nuclear incidents or by substances such as asbestos. Climate change is also an imprecise ecological phenomenon, both in space and time, making it difficult to identify the victims. However, environmental law has drastically improved these gaps, so that litigation on these issues has become increasingly successful over time and victims can be compensated in some way.

Bringing our attention back to the first cases about climate change, the main issue raised in the *Massachusetts* decision was the federal administration's responsibility, since it did not fulfill its role as a regulator of environmental risks such as climate change. This claim had to be proven before the court, since the link between GHG emissions and the damage caused did not constitute an easily provable damage and the connection to global warming was not easy to prove as well. Thus, the fact that a state refused to regulate GHG emissions did not automatically imply that the plaintiff could prove the state's fault and that the excess emissions were directly associated with global warming. The issue was far from being obvious.

Both points of view converged. The elements required to establish the state's inadequacy and lack of regulation and the elements required to establish the responsibilities of the GHG emitters had to be provided as evidence. These elements were necessary to establish the aforementioned causal link and to determine the connection between the specific damage to individuals or a community, the GHG emissions and the global damage or climate change.

Whereas the burden of proof lies usually with environmental associations or other entitled plaintiffs, in environmental law, the burden of proof can be reversed and it is the damaging party (e.g. a polluting industry) who has to prove that it has done everything necessary to avoid the harm. Since climate change would still not rank among 'major environmental risks', there was no presumption of negligence on the part of industry. Therefore, the burden of proof was not reversed: it was up to the plaintiff to prove the existence of the causal link. In the US, evidence is governed by specific rules that give the parties considerable latitude to call upon experts. This flexibility often results in a race between who will be able to pay more expensive and better renowned experts, so that their scientific reports have more weight in the process. Notwithstanding this danger, it is clear that the judge has sufficient power to set certain limits to this competition between the parties. The Federal Rules of Evidence (FRE) have put order in this game. Rule 702 states that 'if scientific or technical knowledge will assist the judge in better understanding the evidence or issues presented, a witness, as an expert qualified by knowledge, experience, education, or training, may testify by giving his opinion or making his knowledge available to the judge, provided that the knowledge is the result of reliable methods and that the expert has applied such methods to acquire his knowledge.'

Rule 706 allows the expert to be appointed by the parties, by the judge or by both. In climate change litigation in the US, it has been common for the parties to choose their own expert witnesses. Although the criteria of method and standardized knowledge recognized by the scientific community are respected, the parties appoint the experts whose reports best demonstrate the arguments invoked by each party, leading to a better chance of winning the case.[35] Expert reports have served several purposes in climate

35 See 509 U.S 579, 1993, *Daubert y Frye, Daubert c/ Dow Chemical.*

change litigation. They have for instance established the causal link between CO2 emissions and the caused damage. They also highlighted the consequences of climate change and global warming. It was therefore essential that the reports of scientific experts could be based on sufficiently reliable methods so that the judge could clearly establish the damage and its connection to an excessive number of GHG emissions. Supported by this knowledge, the judge in the Massachusetts climate case pronounced a very interesting and pioneering decision.

Nevertheless, the establishment of direct and individual causal connections between CO2 emissions and climate change remains today one of the biggest obstacles for the judge. Very few climate change decisions have clearly recognized a direct causal relation between a public or private actor and climate change.[36] Exceptions to this general trend appeared very recently only in France and the Netherlands.[37]

c) The judge and the uncertainties of climate change litigation: a flexible application of state responsibility

Few scientists today would deny the fact that the science of global warming is subject to numerous uncertainties. This argument has long been the basis for authorities of some industrialized countries not to regulate this problem and not to set legal limits on GHG emissions. However, judges, relying on the theory of public nuisance, have been able to find a satisfactory solution to this problem. This theory has developed strongly in the United States to such an extent that it allowed the Supreme Court, in *Massachusetts v. EPA* (3 April 2007), to find a causal link between GHG emissions from electricity industries and certain damages due to climate warming. In general terms, this theory was based on the fact that 'GHG emissions from human activities are more likely than not to produce an excess of carbon associated with climate warming impacts'.[38]

Plaintiffs in global warming lawsuits clearly face the question of the extent to which scientific evidence and expert testimony can establish causation with the flexibility required for this specific matter. We are faced here with an objective question regarding the content of the reports and their scientific reliability but also with a subjective one as it is the judge and the judge alone, at the end of the day, who must demonstrate a certain interpretative flexibility. Everything will depend on his willingness to 'believe' in certainties, but also to give appropriate space and importance to uncertainties. The causes of damage are examined differently in different cases. In some cases, there might be clear evidence of a root cause of the damage.[39] With regards to the damages caused by climate change, evidence might be lacking. The judge will mostly assume causes that are – as some authors have stated – 'weak but highly significant'.[40] This means that while it is

36 564 U.S. at 415, *Connecticut*; 696 F.3d at 856, *Kivalina*; High Court of New Zealand, 12 Oct. 2006, CIV 2006-404-004617, [2007] NZRMA 87, *Greenpeace New Zealand v. Northland Regional Council*; No. 14-2-25295-1 SEA, *Zoe and Stella Foster et al v. Washington Department of Ecology*.

37 TA Paris, 3 Feb. 2021 & 14 Oct. 2021, *Oxfam, Greenpeace & others v. Ministère de l'Ecologie & others*; Rechtbank Den Haag, 26 May 2021, C/09/571932 / HA ZA 19-379, *Millieudefensie & al. v. Royal Dutch Shell Plc.*

38 *Amicus brief, Brief petitioners Friends of the earth amicus, Scientific NAS amicus, Scientific association amicus*, in *Massachusetts v. EPA*, op. cit.

39 Leclerc, O., *Le juge et l'expert*, 2005, Paris, LGDJ.

40 Penalver, E., "Acts of God or toxic torts? Applying tort law principles to the problem of climate change", *Natural*

difficult to say with certainty that GHG emissions are the defining cause of global warming, it is nevertheless true that GHG emissions have a decisive effect on global warming.

The applicability of the precautionary principle was an issue that arose in the first climate change decisions. This principle allows taking into account the existence of uncertainties, without these being an obstacle to the discovery of proof of damage. Also, the rules of evidence become more flexible, making it easier for victims of damage caused by climate change to prove that there is a "causality link" between emissions and global warming. While the burden of proof is not reversed, it is nonetheless clear that proof is greatly facilitated, so that the damaged party in the trial can more easily provide evidence. The precautionary principle also had the effect of changing the mentality of judges. Indeed, they no longer reason in the same way while employing the precautionary principle. Since the adoption of the aforementioned principle, judges must take into account a 'margin of uncertainty' that should be treated as such, i.e. as a possibility of damage, such as that caused by climate change. Once uncertainty is accepted as a 'driving' element and not as a generator of legal inertia, the judge can overcome the traditional relationship between evidence and the causal nexus, thus inducing a progressive relaxation of this rule. This new attitude of the judge started with the *Massachusetts* case, entailing changes towards a new vision of climate change responsibility and the role played by the judges in it.

In the *Massachusetts* case, scientific reports indicated that uncertainty was decreasing and that certainty was increasing correspondingly.[41] Scientific information, in turn, encouraged the evolution of administrative responsibility on climate change, shifting the balance in favor of its victims rather than in favor of those who 'create the risk' by emitting GHGs without precaution. In this particular case, judges interpreted the precautionary principle as if its respect was an obligation in 'decision making' to be fulfilled by executive and environmental administrations. In other words, despite the separation of legislative, judicial and executive powers,[42] in cases of major environmental danger or threat, judges should not hesitate to put the administration in front of its own responsibilities, so that it can regulate GHG emissions with regards to the precautionary principle.

This requires, of course, taking certain 'precautions' with the judges' power of decision.[43] It is not a question of justifying the creative powers of the judge, who is subject to the law, so that the democratic process can be respected. It is, however, a matter of emphasizing that the judge has an important role to play in the interpretation of climate change law. This role was little explored in legal scholarship until the *Urgenda climate case* in 2015, which completely changed climate change litigation and which can be considered the very first successful climate law case in Europe and in the world.[44] This case represents a starting point in both civil and administrative climate change litigation. It intro-

resources journal 1998, vol. 38, p. 563.

41 See IPCC Report 2008. Available at: http://www.ipcc.ch/.

42 504 U.S. 555, 1992, *Defenders*, pp. 476-77.

43 Scalia, A., "The Doctrine of Standing as an essential element of the Separation of Powers", 17 *Suffolk UL Rev.* 1983; See also Torre-Schaub, M., "Les contentieux climatiques à l'étranger", *RDFA* 2019, pp. 24-43.

44 Rechtbank Den Haag, 24 June 2015, Zaaknummer C/09/456689 / HA ZA 13-1396, *Urgenda v. Netherlands*, Rechtsgebieden Civiel recht Bijzondere kenmerken Bodemzaak. English translation available at: https://www.urgenda.nl/wp-content/uploads/VerdictDistrictCourt-UrgendavStaat-24.06.2015.pdf.

duced several new climate change litigation 'standards', allowing judges to follow similar pathways and to explore some others. However, the question of the real power of judges to address climate change is still a subject of legal conversation today, also in the US. The question, even if some progress has been made in this area, remains an open question to this date.[45]

II. New pathways and perspectives in climate change litigation

The 'first wave' of climate litigation – led by the *Massachusetts* case – allowed for a better understanding of the advances in environmental law and the role played by judges in climate change litigation. At the same time, this 'first wave' highlighted the difficulties these lawsuits were facing. Some progress has been made since.

The 'second wave' of climate litigation marked a considerable progress with the *Urgenda case* in the Netherlands (2015), in which the Dutch State was condemned for lack of 'climate diligence' and on the basis of a 'new State's responsibility on climate'.[46] However, while the outcome of this decision triggered an unprecedented euphoria and some obstacles – in particular in terms of proof and causality – appear to have been overcome, very few decisions since then have achieved a comparable success (A). As of recently, however, two cases in France, stemming from two suits filed before an administrative judge, have greatly contributed, in different but complementary aspects, to the global dynamic of climate change litigation. The first suit was filed by the *commune* of Grande-Synthe in January 2019 before the *Conseil d'Etat* to ask the annulment of the Government's decisions that refused to adapt and mitigate greenhouse gases' emissions. Later in the same year, four NGOs filed another suit asking for compensation of the damages caused by climate change before the Administrative Court of Paris (the *Affaire du siècle*). Both of them are original and unique decisions. Even though they can be considered as a continuity of the judicial dynamic created by the *Urgenda* case, these French cases open new paths for administrative jurisdictions that deserve to be presented separately. This can be considered a 'third wave of climate change litigation', opening to a new kind of 'interstate conversation' between judges (B).

45 No. 6:15-CV-01517-TC, 2016 WL 6661146, *Juliana v. United States*; Also in Belgium, Cour de Cassation, 20 April 2018 and 2021, *ABSL Klimaatzaak c. Royame de Belgique*.

46 Lin, J., "The First Successful Climate Negligence Case: A Comment on *Urgenda Foundation v. the State of the Netherlands*", *Climate Law* 2015, vol. 5, pp. 65-81; De Graaf, J. K. & Jans, J. H., "The Urgenda Decision: Netherlands Liable for Role in Causing Dangerous Global Climate Change", *J. Environmental Law* 2015, vol. 27, issue 3, pp. 517-527; Van Zeben, J., "Establishing a Governmental Duty of Care for Climate Change Mitigation: Will *Urgenda* Turn the Tide?", *Transnational Environmental Law* 2015, vol. 4, pp. 339-357; Cox, R., "A Climate Change Litigation Precedent: *Urgenda Foundation v. the State of the Netherlands*", *Journal of Energy and Natural Resources Law* 2016, vol. 34, pp. 143-163; Torre-Schaub, M., "L'affirmation d'une justice climatique au prétoire (quelques propos sur le jugement de la cour du district de La Haye du 24 juin 2015)", *Revue québécoise de droit international* 2016, vol. 29, pp. 161-183.

A. The second wave of climate change litigation: the beginning of a 'conversation' about climate change between judges

The first *Urgenda* decision ruled by the District Court of The Hague on June 24th 2015 is considered the beginning of the 'second wave' of climate change litigation.[47] Although some other interesting cases followed, the *Urgenda* decision is still considered the more innovative one. In their ruling, the judges accepted most of the claims raised by the plaintiffs. The court provided an effective judicial framework for climate change. To this end, the decision constituted a major contribution to the justiciability of several legal concepts before a domestic court, such as the application of the duty of care standard to climate change, the precaution principle, – enshrined in environmental administrative Dutch law – and the United Nations Framework Convention on Climate Change of 1992. The *Urgenda* decision of 2015 is considered the very first climate change judicial decision in Europe.

The Commercial Chamber of the District Court of The Hague – which has a mixed function on both civil and administrative law – handed down a groundbreaking judgment by virtue of which the Dutch government was forced to change and adopt more restrictive regulations on climate change. Thanks to this judgment, the Netherlands had to ensure that its greenhouse gas emissions were at least 25% lower than in 1990. Urgenda, an association whose aim is to promote the transition to a sustainable society, and nine hundred other plaintiffs, had emerged victorious from a lawsuit in which they asked the Dutch government to take stronger measures in the fight against global warming.

This ruling is pioneering on the issue of the duty of care standard as applied to climate change. This standard of care, included in the Dutch civil code, had never been applied to global warming before in any other European country. This decision can be thus considered innovative and enriching for several reasons. Firstly, it overcame difficulties that had previously discouraged other judges in similar climate cases. We are referring here to the aforementioned questions of the temporality of climate change as well as to its global nature and the uncertainties that they entail. The judges overcame these obstacles by employing concepts and legal texts that have existed for a long time but that had not been used successfully until then. Secondly, the Court renewed the notion of the duty of care, before then only used in the context of international law by giving it very precise features, and inscribing it in climate change law as an obligation of the state towards its citizens. The redefinition of this concept, which is increasingly used in cases concerning health and the environment, confirms public responsibility and, above all, the state's obligation to act in the face of a documented but uncertain threat. The intensity of this definition can be seen here, since it moves from an obligation of an international nature to an obligation of national law – in this case Dutch civil law – in order to apply it to a new, threatening global problem.

The Hague District Court's reasoning can be summarized in two stages: first, it overcame a series of difficulties that could have prevented it from administering climate justice effectively (1), and then it ruled on the legal obligation of the state and the exact content of the duty of care (2).

47 Rechtbank Den Haag, 24 June 2015, *Urgenda Fondation v. Netherlands*, op. cit.; See also, Lahore High Court, 4 Sept. 2015 & 14 Sept. 2015, W P No. 25501, *Leghari v. Federation of Pakistan*; Supreme Court, App n° 205/19, 31 July 2020, *Friends of the Irish Environment CLG v. Government of Ireland*.

1. Overtaking difficulties with progressive decisions

Although the *Urgenda* case presented a series of obstacles for decision-making, the judges overcame those. This is why it is considered a unique decision and has since then been used as a benchmark for other judgments all over the world, especially in Europe. Those difficulties can be classified into three categories: (a) space-time difficulties, (b) the 'global' damage obstacle and (c) the 'common good' vision obstacle (d).

a) Space-time difficulties

While the question of Urgenda's legitimacy to act in the name of present generations did not raise any particular concern before the judges, the Dutch state contested its capacity to act on behalf of future generations. The Court based its reasoning on two texts: section 303a, book 3 of the Dutch Civil Code – which allows an NGO to undertake legal action to protect the environment – and the statute of the NGO Urgenda, which enshrines its commitment to a more sustainable society. The judges considered that the term 'sustainable society' a priority that was not limited to the present generations, nor to the Dutch territory, but went beyond geographical and temporal borders.

The notion of intergenerational justice was thus at the heart of the problem, and the judges were right to raise the issue. They also had the courage to face this conceptual challenge, relying on the notion of sustainability, by employing the term 'sustainable society' on several occasions. In this respect, the judges recalled the vast literature on sustainability, establishing the term 'sustainable society' in this case by invoking the Bruntland Report[48] and the United Nations Framework Convention on Climate Change. These references – in point 4.8 of the judgment – enabled the affirmation of Urgenda's legitimacy to act on behalf of future generations.

The Court indeed recognized that the NGO had the necessary legitimacy to represent future generations and their rights. These rights are stated in texts of international law which contain an obligation for the present generations not to compromise the possibilities of future generations. In other words, sustainability is the actual basis of the rights of future generations. It was, therefore, the principle of sustainable development, rarely used by national jurisdictions, which served as a theoretical and legal support for the Hague judges.

The Court used the term 'sustainable society' on several occasions, which implied an intergenerational dimension, as clearly formulated in the Brundtland Report.[49] Thus, 'by defending the right…of future generations to have access to natural resources and to live in a healthy environment, Urgenda worked for the interests of a sustainable society'.[50] The concept of sustainable society was also formulated in the legal instruments invoked by the NGO against the activities that, from its point of view, were not sustainable and seriously endangered ecosystems and human societies as a whole.

48 Brundtland, G.-H., "Our Common Future", World Environmental and Development Commission of the UN "Brundtland Report", 1987. Available at: https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf.

49 Rechtbank Den Haag, 24 June 2015, *Urgenda Fondation v. Netherlands*, op. cit., point 4.7, p. 27.

50 Ibid, point 4.8, p. 27.

Thus, the judges did not hesitate to rely on Article 2 of the United Nations Framework Convention on Climate Change, which states that

> *'The ultimate objective of this Convention and any related legal instruments that the Conference of the Parties may adopt is to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner '.*[51]

b) The 'global' problem and the response of judges

While not going into the details of Dutch emissions and their contribution to the global phenomenon of climate change, the judges concluded that the Netherlands had collectively contributed to the damage. They emphasized that the Netherlands' greenhouse gas emissions had contributed to global climate change and will continue to do so, which justified a reduction in emissions insofar as this concerned the collective responsibility as well as the individual responsibility of the parties to the Convention, in the name of equity.[52]

The judges explained that using the formula that: 'it is a well-established fact that climate change is a global problem that requires global accounting'.[53] Thus, there is a considerable difference between the desired level of emissions and the actual level of emissions, which, if not reduced, would have dangerously increased by 2030. Thus, the Court concluded, the reduction must be made jointly and at the international level by obliging all states, including the Netherlands, to reduce their emission levels. In the Court's view, the Netherlands must pledge to do its best to fulfill its duty of care to reduce emissions. Therefore, just because the Netherlands' level of emissions was not very high, this did not exclude it from being responsible for the increasing rate of global emissions.

c) The praetorian 'bypassing' of causality

The judges therefore found that 'it follows from the considerations set out that there is a sufficient causal link to connect Dutch GHG emissions to global climate change and its effects (present and future) under the present climate of the Netherlands'.[54] The fact, according to the judges, 'that current Dutch GHG emissions are limited on a global scale, does not alter the fact that these emissions contribute to global climate change'.[55] In the

51 Ibid, point 4.9.

52 Ibid, point 3.1.

53 Ibid, points 3 and 4.

54 Ibid, point 4.90; See also abouat State responsibility the interesting observations of Voigt, C., "State Responsibility for Climate Change Damages", *Nordic journal of International Law* 2008, vol. 77, n° 1-2, p. 10.

55 Rechtbank Den Haag, 24 June 2015, *Urgenda Fondation v. Netherlands,* op. cit., point 4.90.

end, the judges justified the existence of a causal link by placing the Netherlands on the ground of its collective and individual responsibility as a developed country. By going even further in their reasoning, they went so far as to affirm that in order to achieve a 'fair distribution' of global emissions, the Netherlands, as well as the other states of Annex I of the Framework Convention, shall take the lead in reducing emissions.

The causal link, as we can see, was actually 'bypassed' through the acceptance of the global nature of climate change and the affirmation of the climate as a common good of humanity.[56]

d) Can the Climate Earth system be considered a 'common good'?

With regards to the atmosphere as a 'common good', it is useful to recall that the atmosphere is a space between the surface of the Earth and outer space, divided vertically into four spheres based on different temperature levels. Greenhouse gases are naturally present in the atmosphere. However, if the amount of gas emitted due to human activities increases, their accumulation in the atmosphere significantly raises temperatures, causing climate change related problems. Compared to traditional pollution, the effects of climate change are more diffuse and difficult to identify. It is also difficult to attribute them to a specific state. The nuisances associated with the increase of greenhouse gases in the atmosphere are the result of a complex and synergistic accumulation involving different polluters and pollutants.

Things also become more complicated when one confronts the traditional notion of nuisance with that caused by climate change. However, the notion of territory under the jurisdiction of a state commonly used in transboundary nuisance issues can be interpreted quite broadly to include not only the high seas, but also 'areas' – to use UNCAC terms - that include outer space, the atmosphere and the Arctic and Antarctic. It was also advised that the harm caused by climate change should be interpreted as harm to the global commons in areas beyond national jurisdictions. The status of the atmosphere (as a common good, to be inherited by future generations) has not, to date, been fully determined from a legal perspective.[57] The atmosphere is not a defined space but rather a fluid that can not be divided into units of air across well-established national boundaries. It is rather a matter of different layers of gasses through which different currents circulate, dispersing the substances that constitute them. The perception of climate damage seems to include negative impacts across different nations and not necessarily adjacent countries.[58] This is the inter-

56 Ibid, point 4.90, "*From the above considerations, it follows that a sufficient causal link can be assumed to exist between the Dutch greenhouse gas emissions, global climate change and the effects (now and in the future) on the Dutch climate change. The fact that the current Dutch greenhouse gas emissions are limited on a global scale does not alter the fact that the emission contribute to global climate change*".

57 Bakker, C., "Protecting the Atmosphere as a 'Global Common Good': Challenges and Constraints in Contemporary International Law", in Iovane, M. (ed.) et al., *The protection of General Interests in Contemporary International Law: A Theoretical and Empirical Inquiry*, 2021, Oxford, Oxford University Press, p. 163.

58 *"It's not disputed between the Parties that dangerous climate change has severe consequences on a global and local level…The Netherlands will also feel the consequences of climate change elsewhere in the world. Some import products will become more expensive…",* Rechtbank Den Haag, 24 June 2015, *Urgenda Fondation v. Netherlands,* op. cit., points 4.16 and 4.17; Also, points 4.11 to 4.30 and point 4.37 "*The realisation that climate change is an extra-territorial, global problem and fighting it requires a worldwide approach has prompted heads of state and government leaders to contribute to the development of legal instruments for combating climate change by means of mitigation*

pretation that the Court has adopted in the *Urgenda* decision in 2015.[59]

This argument is indeed surprising, considering its difference from the rules of evidence used in liability law. While it is certainly effective in overcoming the obstacle of proving emissions related to climate change, it does not take into account the intellectual rigor of the theory of liability. Nevertheless, the somewhat circular reasoning of the judges shows the influence of classical theories of causality, or at least of those that are currently emerging in the field of uncertain risks. One cannot help but make a comparison with certain pioneer European Union decisions in the area of risk,[60] which, based on the impossibility of 'guaranteeing an absence of risk', nevertheless oblige the state to 'take sufficient measures to reduce the risk', which in this case would mean affirming the existence of an obligation on the part of the state to honor its duty of care by taking precautionary measures. Thus, the judges in the *Urgenda* case did not hesitate to apply the precautionary principle, in order to affirm the state's obligation to reduce the level of emissions, as required by international commitments. While they did not answer the question of tangible proof of the connection between emissions and the rise in global temperatures, they asserted that it was 'precisely' because this risk 'might' exist, even if it is still uncertain, that the Dutch state had an obligation to take precautionary measures. The court presupposed the existence of an uncertain risk, relying on scientific reports, and did not hesitate to sweep aside any doubts about the existence of a causal connection. The judgment was innovative in this regard since it went beyond the requirement of evidence of a 'harmful risk' and limited itself to the existence of a 'hypothetical and uncertain risk', capable of establishing a liability with an anticipatory function on the part of the State.

2. The original and innovative interpretation of a climate obligation: the duty of care 'standard'

In order to affirm the effective existence of a state obligation, the court based its decision on international and national texts as well as (a) the no-harm principle, a principle that could become one day a standard of conduct (b). To hold the state accountable for that duty, the judges developed a very interesting vision of the precautionary principle (c).

a) The interpretation of the no-harm rule as a 'new climatic duty'

Article 21 of the Dutch Constitution states that the state shall be concerned with keeping the country habitable and protecting and improving the environment. In the *Urgenda* case, this article was translated into an obligation to mitigate greenhouse gas emissions. On the basis of this obligation, Urgenda accused the state of not acting enough to mitigate emission levels, even though it was imposed by multiple international agreements

greenhouse gas emissions as well as by making their countries « climate-proof » by means of taking mitigation measures...".

59 *"It is an established fact that climate change is a global problem and there for requires global accountability... emission reduction therefor concerns both a joint and individual responsibility of the signatories to the UN Climate Change Convention...",* Ibid, point 4.79.

60 CJEU, 5 May 1998, C-180/96, *United Kingdom and North Irish v. European Commission*. Available at: https://eur-lex.europa.eu/legal-content/FR/TXT/HTML/?uri=CELEX:61996CJ0180&from=FR.

signed by the Netherlands. In doing so, the Court explained that the state was acting against the interests it should protect.

According to the court, the legal obligation of the state should be defined in both a spatial and geographical context, insofar as the Netherlands had a dense population living in a geographical area sensitive to sea level variations, which the state had to take into account in order to manage the well-being of this population. This duty of care was not actually defined by law, and the manner in which it has to be applied is within the discretion of the state in the exercise of its government.[61]

b) The no-harm rule: a legal standard of behavior in light of climate change

The application of the no-harm principle to climate change is, still today, a matter of debate.[62] However, the District Court of The Hague in its *Urgenda* decision of 2015 affirmed that it was an actual "standard" of behavior.

Since 2011, after a statement before the United Nations General Assembly by the President of Palau in which he asked to 'urgently seek an informed opinion from the International Court of Justice on the responsibilities of States under international law to ensure that activities carried out under their jurisdiction or control that emit greenhouse gases do not cause damage to other countries', the principle of non-nuisance has been nurtured by doctrinal analyses and progressively integrated into the international legal corpus on climate change.[63] However, its application has always been delicate because the pollution caused by gas-emitting human activities poses the problem of the immediate and direct link between the cause and its effects. This question was solved by the Dutch court. The no-harm rule was linked to the concept of 'due diligence', a direct descendant of the principle of preventive action, as a 'standard' imposing a duty of care on governments. In the case in which, despite knowledge of the events, a state does not take appropriate measures, the question has been raised whether it could be considered negligent

61 The meaning of the duty of care is not fully stabilized. It generally refers to the care with which a person is obliged to carry out his mission in order to respect the provisions of the law. It may also refer to the efficiency that one is entitled to expect from a prudent person in the performance of a particular task or function. While it generally refers to not being negligent, the duty is often associated with prudence. In this case it is associated with the "duty of care" of the state and thus with its obligation to take care of its citizens in the face of a threat. See our developments on the evolution of the concept Torre-Schaub, M., "La justice climatique. A propos du jugement Urgenda de la Cour de District de La Haye du 25 Juin 2015", *RIDC* July-Sept. 2016, n° 3.

62 Robert-Cuendet, S., "L'invocabilité du droit international devant le juge administratif français", in Torre-Schaub, M. (dir.), *Les dynamiques du contentieux climatique*, 2020, Paris, Mare & Martin, pp. 147-167; Cassella, S., "L'effet indirect du droit international : l'arrêt commune de Grande-Synthe", *AJDA* 2021, p. 226.

63 This is a principle of political and moral philosophy enunciated by John Stuart Mill in his book "On Liberty" (1859) and taken up by John Feinberg in 1973. According to this principle, the only valid reason to compel an individual to do or not to do something is the harm caused to others by his or her behaviour; *Renforcer l'efficacité du droit international de l'environnement*, Rapport de la Commission environnement du Club de juristes, October 2015, pp. 58 & f.; *Renforcer l'efficacité du droit international de l'environnement*, Rapport de la Commission environnement du Club de juristes, October 2015; International Law Association, Legal principles related to climate change, Draft Committee report, June 2012. Available at: http://www.ilahq.org/en/committees/index.cfm/cid/1029; Murase, S., Protection of the Atmosphere, Annexe B, Rapport de la Commission de Droit International, 63 session, 2011, NU AG Resolution 66/10.

and potentially responsible for the harm resulting from its inaction.[64]

This point, which has never been fully clarified,[65] has been answered in this groundbreaking decision.[66] This very innovative interpretation opened interesting perspectives for the legal treatment of climate change. The judges, in this case, adopted the conclusions of contemporary international law, which advocates a broad interpretation of the rule of no-harm, by referring to its twin brother, the principle of prevention. Through these principles, the duty of the state to adopt a responsible behavior was enshrined by a domestic court in the Netherlands. The behavior of the Dutch state did not meet the standards of responsibility required by the duty of care approach, since by its inaction (or by its ineffective climate policy) it was harming or damaging other countries. What was also remarkable in this case is that the judges did not only hold the Dutch state responsible, but also considered that it acted illegally, insofar as it did not fulfill its duty of care towards its citizens.

In this case, the duties of the state were grouped under a single term: the duty of care.[67] This duty, the judges explained, had to be reasonable insofar as it involved dealing with a serious, but uncertain, threat. A first question that arose was whether the duty of care could be defined an obligation of means or an obligation of result. In order to better understand its meaning, it is interesting to split the notion: on the one hand, when the risk is known and identified, it is an obligation of vigilance and, on the other hand, in the face of scientific uncertainty, it is an obligation of prudence, or even of precaution. In this case, we think that the judges have indeed favoured this second interpretation.

c) A new turn in the interpretation and application of the precautionary principle

In order to make the state's duty of care effective, the Court explained that the state should apply the precautionary principle. The Court based its reasoning on the application of this principle, taking into account the danger of the phenomenon.[68] This characteristic resided in two essential elements: the proportionality of the precautionary measures and the cost-effectiveness of these measures. In essence, the judges held that there is less cost in taking precautionary measures now than at a later date, when the phenom-

64 Murase, S. (2011), Protection of the Atmosphere, op. cit.

65 Birnie, P., Boyle, A. & Redgwell, C., *International law and the Environnement,* 2009, Oxford, pp. 143-152.

66 Rechtbank Den Haag, 24 June 2015, *Urgenda Fondation v. Netherlands,* op. cit., points 3.3 and 4.74.

67 Ibid, points 4.64, "*...This factors lead the court to the opinion that, given the high risk of hazardous climate change, the State has a serious duty of care to take measures to prevent...the state should take precautionary measures for its citizens...* "; See for developments of a general duty of care: Pontier, J.-M., "La puissance publique et la prévention des risques", *AJDA* 2003, p. 1752; Deguergue, M., "Responsabilités et exposition aux risques de cancer", *RDSS* 2014, p. 137.

68 Rechtbank Den Haag, 24 June 2015, *Urgenda Fondation v. Netherlands,* op. cit., points 4.67 & 4.75 "to what extent the State has the obligation to take precautionary measures, it is also relevant to find out whether taking precautionary measures is onerous...it is important to know whether the measures to be taken are costly...If the current greenhouse gas emissions continue in the same manner, global warming will take such a form that the cost of adaptation will become disproportionately high"; See for some developments on this principle: Martin, G. J., "La mise en œuvre du principe de précaution et la renaissance de la responsabilité pour faute", *JCP* éd. E. 1999, n° 1 supl., p. 4; Rouyère, A., "L'exigence de précaution saisie par le juge", *RFDA* 2000, p. 266.

enon of climate change will worsen.

The decision describes the relevance of the precautionary principle based on its effectiveness and feasibility, taking into account existing technical possibilities.[69] The judges did not hesitate to raise the question of the usefulness of greenhouse gas mitigation measures based on the precautionary principle in terms of cost-effectiveness. This was indeed one of the main points of the Dutch government in relation to the reduction of emissions. The government had argued that the costs would be disproportionate if it were to reduce emissions to the extent requested by Urgenda. According to the Court, however, reducing the level of emission is not only perfectly proportionate, but it is also the right thing to do from a purely macro-economic perspective. Mitigation was considered by the judges the cheapest and most appropriate response. To this end, the Court set out the concrete measures to be adopted, all based on precaution, such as the tradable greenhouse gas emission permits, taxes on CO2 or the further introduction of renewable energies. The state, explained the Court, 'cannot delay taking precautionary measures on the sole grounds that there is not enough certainty...' and must therefore, on the basis of a cost-benefit analysis, take immediate action, because "prevention is always better than cure".

It therefore needs to be concluded that the trend that began with the *Massachusetts* case – taking the principles of precaution and prevention seriously – is still evolving in 'third wave of climate litigation'.

The *Urgenda* decision – the most emblematic case of the 'second wave' of climate change litigation – stated in its conclusions that, despite the 'principle of separation of powers', in a democratic society it is up to the judges to make the law effective and not a dead letter.[70] It is not a matter of encroaching on the competences of the executive or the legislative, but of defending the citizens and reorganizing the three powers so that each one does its job. Thus, the Court said, it is the judge's job to render effective the legislation enacted to protect the citizens from the government, which is the primary purpose of the law. In this decision, the judges gave meaning to the notion of 'sustainable society',[71] opening paths for a 'green transition'.

B. The role of judges in the 'green transition pathway': the 'third wave' of climate litigation

The role of judges is becoming increasingly prominent in the latest climate disputes.[72]

69 Principles of Oslo on Global Climate Change, 1 March 2015. Available at: http://globaljustice.macmillan.yale.edu/sites/default/files/files/OsloPrinciples.pdf; See also: Sands, P., "International Law in the field of Sustainable Development: emerging legal principles", in Lang, W. (ed.) *Sustainable Development and International Law*, 1995, Graham & Trotman, Martinus Grijhof, London, Boston, pp. 55.

70 Torre-Schaub, M. et al., *Les contentieux climatiques. Usages et mobilisations du droit pour la cause climatique.* Mission de Recherche Droit et Justice, 2019. Available at: http://www.gip-recherche-justice.fr/publication/les-dynamiques-du-contentieux-climatique-usages-et-mobilisation-du-droit-face-a-la-cause-climatique-2/.

71 *"The term 'sustainable society also has an intergenerational dimension', which is expressed in the definition of 'sustainability' in the Brundtland Report referred to under 2.3: Sustainable development is the development that meets the needs of the present without compromising the ability of future generations to meet their own need"* Rechtbank Den Haag, 24 June 2015, *Urgenda Fondation v. Netherlands,* op. cit., point 4.8, p. 27.

72 Fort, F.-X., "La « climatisation » du procès administrative", *JCP A* 2021, comm. 2206; Torre-Schaub, M., *Grande-*

Indeed, judges are taking an active role in the low-carbon transition, either to better accompany the administration on this path, or to compensate its inaction, reminding states to 'get on the right track' of decarbonization. It seems that especially in the French judicial system, the judge takes such an active role, as will be shown in the following.[73]

Climatic phenomena belong both to the past and to the future. French administrative judges place themselves between what has already happened and the future.[74] Following two different paths, on the one hand the legality control – '*recours pour excès de pouvoir*[75]' – and on the other hand the indemnity action for failure to act –'*recours en responsabilité*[76]' – , the judges of the *Conseil d'Etat* and those of the Administrative Court

Synthe I, EEI 2020, ét. 17; Huglo, C., *EEI* 2021, dossier 12; Radiguet, R., *JCP A* 2020, comm. 2337; Parance, B. & Rochfeld, J., *JCP G* 2020, p. 1334; Rotoullié, J.-C., *Dr. adm* 2021, n°3, comm. 14; Delzangles, H., *AJDA* 2021, p. 217; Cassella, S., *AJDA* 2021, p. 226. On the *Grande Synthe II* decision: Delzangles, H., "Le « contrôle de la trajectoire » et la carence de l'Etat français à lutter contre les changements climatiques. Retour sur les décisions *Grande-Synthe* en passant par *l'Affaire du siècle", AJDA* 2021, p. 2115; Van Lang, A., Perrin, A. & Deffairi, M., "Le contentieux climatique devant le juge administrative", *RFDA* 2021, p. 747; TA Paris, 3 Feb. 2021, l'*Affaire du siècle I, Ass. Oxfam France et a.* See Torre-Schaub, M., *EEI* 2021, n°3, étude 3; Torre-Schaub, M. & Bozo, P., "L'affaire du siècle, un jugement en clair-obscur", *JCP A* 19 March 2021, n° 12, comm. 2088, pp. 29-33; Torre-Schaub, M., *JCP G* 2021, n°10, act. 247; Mazeaud, D., *JCP G* 2021, n°6, comm. 139; Cournil, C. & Fleury, M., *La revue des droits de l'homme* 7 Feb. 2021; Pastor, J.-M., *D.* 2021, p. 239; Hautereau-Boutonnet, M., *D* 2021, p. 281; Gali, H., *D.*, 2021, p. 709; Brunie, J., *EEI* 2021, n°4; Deffairi, M., *Dr. adm.* 2021, n°6, comm. 28; Baldon, C. & Capdebos, C., "L'affaire du siècle, présentation, ambition, enjeux", *EEI* Oct. 2021, art. 26. On the jugment *ADS II*: Bétaille, J., "Le préjudice écologique à l'épreuve de l'affaire du siècle. Un succès théorique mais des difficultés pratiques", *AJDA* 8 Nov. 2021, p. 2228; Quick overview: Hautereau-Boutonnet, M., "Jugement de l'affaire du siècle. Une logique comptable et correctrice", *JCP éd G.* 15 Nov. 2021, p. 1195. Before the decisions, for an overview of the background: Cournil, C., Le Dylio, A. & Mougeolle, P., "L'affaire du siècle : entre continuité et innovations juridiques", *AJDA* 2019, pp. 1864.

73 CE, 19 Nov. 2020, n°427301, *Commune de Grande-Synthe*, Jurisdata : 2020-018732; CE, 1 July 2021, n°427301, *Commune de Grande-Synthe*; TA Paris, 3 Feb. 2021, n°1904967, 1904968, 1904972, 1904976/4-1, *Association Oxfam France et a.,* JurisData : 2021-000979; TA Paris, 14 Oct. 2021, n°1904967, 1904968, 1904972, 1904976/4-, *Association Oxfam France et a.,* 1 JurisData: 2021-016096 (Affaire du siècle).

74 Lasserre B., presentation at the w*ebinar organized by Yale* University and the Conseil d'Etat *Grande-Synthe,* 24 Feb. 2021. Available at: https://www.conseil-etat.fr/actualites/mercredi-24-fevrier-webinar-avec-l-universite-de-yale-autour-de-la-decision-grande-synthe.

75 A contentious appeal for annulment made before an administrative court by means of a request and directed against a unilateral administrative act (not a contract except for the hiring of a contractual public agent and except for a prefectural deferment); based on means of external legality and means of internal legality whose only purpose is to obtain the partial or total annulment of the decision challenged. It is often said that it is a lawsuit against an act as opposed to the full litigation appeal which is a lawsuit against a public person in order to obtain compensation based on its responsibility for fault or risk. The recourse for excess of power is defined as "the recourse which is open even without text against any administrative act and which has for effect to ensure, in accordance with the general principles of the law, the respect of the legality" (CE Ass., 17 Feb. 1950, *Dame Lamotte*) Maurin, A., *Droit administratif*, Collection Aide-mémoire - Ed. Sirey.

76 The administration is subject to the principle of responsibility, which obliges it to repair the damage caused by its act. This principle can take several forms. Contractual liability concerns the relations between the administration and the persons who have signed a contract with it (co-contractors). If the administration, or its co-contractor, does not execute the obligations provided for in the contract, the other party can refer to the judge in order to obtain compensation for these contractual failures. In other cases, the liability is said to be "extra-contractual", because it

of Paris come to the same conclusion: the lack of time before us to achieve the goal set by the Paris Agreement. This objective is to keep the global temperature increase below 2°C and, if possible, below 1.5°C. It is, therefore, an affirmation of the urgency of climate change that unites the judges in both cases.

In the first law case, *Grande Synthe affaire*,[77] the *Conseil d'Etat* was asked to rule on the legality of an administrative act. In Grande Synthe the applicants argued that the administration had exceeded its powers by not giving answer to the request made previously by the applicants, requiring the administration to react to the insufficiency of the existing regulation concerning the mitigation of climate change. They therefore raised an appeal for '*excès de pouvoir*'. The Mayor of the city of Grande Synthe, in his own name and on behalf of his municipality, presented before the Council of State a request for 'excess of power' requiring the said high jurisdiction to examine the 'legality' of the acts of the administration for not having responded to the requests of the applicant demanding a response concerning the measures taken by the administration to mitigate and reduce GHG emissions causing global warming.

In the second case discussed here – the *affaire du siècle*[78] – the administrative judge, this time of the administrative court of Paris, in first instance, had to hear an appeal for compensation, brought by several NGOs demanding to declare the faulty responsibility of the administration for having caused an ecological damage to the atmosphere, due to the failures and insufficiencies in the legislation and regulations concerning the mitigation of GHG emissions at the origin of the climate change. The judges had to assess whether the state was responsible for the damage caused to the atmosphere by the excessive GHG emissions.

The administrative judge relied on two central theories in the light of the dispute. He noted that the commitments made by France entailed real binding obligations. The judge had also affirmed that the principle of prevention is an essential tool in the fight against climate change. However, the judge was not able to go beyond his powers, both because he can only interpret existing legislation and because of the limited content of this legislation. The judge stressed that there is an obligation to act which is currently not lived up to. The confirmation of new and binding climatic commitments arises from these two cases, as does their scope. These commitments show the 'path' to the ultimate goal of carbon neutrality (1). On the one hand, the judges initiate this transition through the reaffirmation of the objectives to be achieved and by employing preventive measures. On the other hand, they indirectly identify what could become a new standard of behavior (2).

1. How the judges interpret the transition to a decarbonized society

Both the reinforcement of climate 'obligations' by the administrative judge (a) and the reaffirmed necessity for 'action' (b) can be observed in the latest French decisions.

is not based on a contract. The liability can then be: a liability for fault: the victim must then demonstrate a fault of the administration; a liability without fault: it is only necessary to prove that the damage is linked to an activity of the administration, which has not committed a fault. Available at: https://www.vie-publique.fr/fiches/20274-quelles-sont-les-formes-de-responsabilite-de-ladministration (consulted in July 2022).

77 CE, 19 Nov. 2020, n°427301, *Commune de Grande-Synthe*, op. cit.; CE, 1 July 2021, n°427301, *Commune de Grande-Synthe*, op. cit.

78 TA Paris, 3 Feb. 2021, *Ass. Oxfam France et a.*, op. cit.; TA Paris, 14 Oct. 2021, *Ass. Oxfam France et a.*, op. cit.

a) The reinforcement of climate 'obligations' by the administrative judge

The *Grande Synthe* (here GS) *commune* decision responds to an appeal against the excess of power of the President of the Republic, the Prime Minister and the Minister of Ecological Transition by omitting to take all measures necessary to respect international commitments for the reduction of greenhouse gas emissions on French territory. The court had considered the *commune*'s appeal and the interventions of other cities and associations admissible - by adopting an extensive conception of the legal interest in bringing proceeding. It had also recognized the normative scope of the objectives of reducing greenhouse gas emissions.

The two GS rulings deal with the question of inadequacy of public climate policies. To answer this question, the judges relied on three central arguments. First, they emphasize that the international legal texts binding France to contrast climate change (the 1992 United Nations Framework Convention on Climate Change and the 2015 Paris Agreement) must be taken into account as genuine commitments. Secondly, the November 2020 decision – confirmed by the July 1, 2021 decision – notes the binding character of the programmatic documents on carbon targets and trajectories, carbon budgets and the different periods to be respected (*Stratégie Nationale Bas Carbone* SNBC I and II). This aspect is one of the strong points of the two decisions because it puts an end to any ambiguity on the mandatory nature of France's climate commitments. Third, as a logical consequence, the decision underlines the lack of compliance with the reduction trajectories for the period 2015-2018, based on the binding nature of the documents.

In its decision of July 1st, 2021, the *Conseil d'Etat* confirmed the annulment of the implicit decision of rejection taken by the administration. It thus forced the government to 'take all necessary measures' to respect the GHG emission trajectories it set for itself. The *Conseil d'Etat* once again recognized the normative value of the commitments, and of the objective to be reached under Article 104 of the Energy Code. This was also the meaning of the conclusions of the public rapporteur. Still, the July 2021 SG decision, stated that the administration should present its measures to reduce emissions according to the national plan established (the Stratégie Nationale Bas Carbone SNBC) before March 31th 2022. This deadline has already passed and no specific measure has been taken, which will probably lead to a new decision anytime soon. The upcoming judgment could further legitimize judges to oblige the administration to adopt climate change mitigation measures. In doing so, the judges will not be 'trespassing' their role, but will be exercising their legitimate power to force the administration to act according to existing climate law.

b) The necessity of 'action' reaffirmed by the judge

In another case, entitled *Affaire du siècle*, the judge recalled the need to act as an obligation for the state. This was interpreted in the decision as the need to 'take all useful measures'. This was already clear in the conclusions of October 14, 2021, which were particularly enlightening on this subject: '*nous vous demandons, compte tenu de l'impossibilité d'identifier précisément, et donc de réparer, les effets de ces émissions sur l'atmosphère, de la compenser en ordonnant à l'État de déduire des futurs budgets carbone le surplus d'émissions produit*

sur la période 2015-2018'.[79] Despite the arguments of the defendants, the conclusions eventually affirmed that the compensatory nature of the SNBC was not the solution. The insufficient action on the part of the state was thus well established for the past and even for the current year, which led the judges to follow up with their decision of October 14, 2021 and to force the state to 'take all useful sectoral measures likely to repair the damage up to the uncompensated share of GHG emissions under the first carbon budget... it is necessary to order the measures within a sufficiently short period of time in order to prevent the worsening of the damage'.[80]

2. Towards the jurisprudential creation of a new 'prudential climate standard of behavior'?

By examining recent French climate change decisions, the administrative judge reveals two main trends: on the one hand, administrative justice designs the future of the carbon transition by controlling emission pathways, even if it takes a cautious stance (a). [81] This control of administrative activities could drive the judge, on the long run, to set a new standard of behavior for the state regarding climate change (b).

a) Designing the future: the control of low carbon trajectories

'The decision of *Grande Synthe* is a decision that puts the judge in the forefront.'[82] So he had to control what will happen in the future.[83] This jurisprudence will likely have a historical significance because it is 'turned towards the future.'[84] Because when it refers to the past, it also provides a 'roadmap' for the future.[85] The point is to consider that, if the state continues to follow the same trajectory of reduction that was followed until the year 2020, all the efforts to reach carbon neutrality by 2050 and to achieve a reasonable reduction by 2030 will be very difficult to achieve, even 'impossible'.[86]

Both French decisions expressed doubts about the reduction capacities, which seemed unrealistic given current climate policies. The conclusions of the first GS decision al-

79 "*they ask you, in view of the impossibility of identifying precisely, and therefore of repairing, the effects of these emissions on the atmosphere, to compensate for it by ordering the State to deduct from future carbon budgets the surplus of emissions produced over the period 2015-2018*" (Unofficial translation).

80 TA Paris, 14 Oct. 2021, *Ass. Oxfam France et a.*, op. cit.

81 Torre-Schaub, M., "Les contentieux climatiques, quelle efficacité en France ? Analyse des leviers et difficultés", in *REEI* May 2019, Dossier spé. cit., p. 30; Monnier, L., "Quel rôle pour la justice administrative dans la lutte contre les projets « climaticides » ? Le cas de Guyane Maritime", in *REEI* May 2019, Dossier spéc. cit., pp. 32-37; Torre-Schaub, M., « Les contentieux climatiques : du passé vers le futur », *RFDA* Jan.-Feb. 2022, n°1.

82 B. Lasserre presentation at the w*ebinar organized by Yale* University and the Conseil d'Etat *Grande-Synthe,* 24 Feb. 2021, op. cit.

83 Delzangles, H., Le « contrôle de la trajectoire » et la carence de l'Etat français à lutter contre les changements climatiques. (2021), op. cit., p. 2115; Torre-Schaub, M., Les contentieux climatiques : du passé vers le futur (2022), op. cit.

84 Torre-Schaub, M., Les contentieux climatiques : du passé vers le futur (2022), op. cit.

85 Delzangles, H., Le « contrôle de la trajectoire » et la carence de l'Etat français à lutter contre les changements climatiques. (2021), op. cit., p. 2115; Ibid.

86 Conclusions CE, 1 July 2021, *Commune de Grande Synthe*, op. cit., pp. 4 & f. and 12; TA Paris, *Ass. Oxfam France et a.*, 14 Oct. 2021, op. cit., pp. 8-10.

ready expressed this concern: 'it is a question here of taking a position on an essential trajectory for the future.'[87] The conclusions of the second decision also echo this. It is a matter of excessive future efforts on the citizens' part that would force them to radically change their way of life in a short time.

b. The ' prudential behavior ' as a new jurisprudential standard?

The latest *Affaire du siècle* decision clarified the way judges interpreted the standard of prudence, which could become a new standard of behavior for the public administration regarding some climate change-related activities. In this sense, the last decision of the *Affaire du siècle* pronounced a rather innovative decision on the way in which the compensation of the established damage caused to the atmosphere had to be carried out. In order to do so, and having ruled out monetary compensation in the first judgment of February 3, 2021, the judges opted for compensation in kind. This takes the form of compensation with the objective of 'preventing' and not 'aggravating' the damage. 'Under the terms of article 1252 of the Civil Code: Independently of the compensation of the ecological damage, the judge, seized of a request in this sense by a person mentioned in article 1248, can prescribe the reasonable measures suitable to prevent or make cease the damage'.[88]

With regards to the measures specifically designed to allow this compensation through the application of prevention principle, the court considered that:

> *'If the Minister...specifies that...the various measures appearing in the law of July 20, 2021 as well as the regulatory texts that will soon be taken for its application, are of a nature to allow for the reparation of the prejudice noted...she does not establish, as of the date of the present judgment, that it would have been fully compensated... In the circumstances of the case, it is appropriate to order the Prime Minister ...to take all appropriate sectorial measures to compensate for the uncompensated part of the loss ...and subject to adjustment ...it is appropriate to order the enactment of such measures within a sufficiently short period of time to prevent further damage'.*[89]

Once this path is mapped out and guided by prevention, judges will be able judges to set the ultimate goal of carbon neutrality in future decisions. The means to that end may well become the beginning of a standard of diligent preventive behavior. The assessment of this 'responsible' behavior is based on the definition of a prevention standard. This standard is manifested by various signals: first, by the effective obligation to 'take all measures' to achieve reparation of the ecological damage. Secondly, by the obligation for the state to 'submit itself to the control of the judge' in the months to come. Finally, the judges expressed this preventive new standard of behavior for the administration with the threat of a 'new injunction', possibly accompanied by a fine.[90] It is indeed through

87 Conclusions CE, 1 July 2021, *Commune de Grande Synthe*, op. cit., pp. 4 & 12.

88 Conclusions TA Paris, 14 Oct. 2021, *Ass. Oxfam France et a.*, op. cit., p. 5.

89 Ibid, p. 6.

90 TA Paris, 14 Oct. 2021, *Ass. Oxfam France et a.*, op. cit., point 7, p. 29.
Ibid, points 8, 9, 10 & 13.

'drawing a precise roadmap for carrying out low carbon transition' that the judges have sketched out the beginning of a climate prudential diligence standard.

This would mean that administrative authorizations granted to private actors, that might have a negative impact on the fight against climate change or that are not in line with the final objective of carbon neutrality by 2050, would be subject to an increased 'duty of vigilance' on activities carried out under the administration's responsibility. As a result, administrative authorizations granted to private operators that are not in line with the final objective of carbon neutrality would fall under the scope of possible liability actions. If this 'climate duty of care' '*à la française*' was finally accepted, 'it would commit the State beyond its own activity'. This could have unintended consequences.

However, this trend is not unique to France. Other countries witness a similar trend. In Australia, the *Sharma* case has recently illustrated the emergence of a new kind of 'climate duty of care' from the state.[91] In the Netherlands as well, in a surprising judgment concerning the fossil private company Shell.[92] If this new path is to be followed by other domestic judges, this could open new doors to the empowerment of climate change litigation.

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This article showed the way judges played a role in tackling climate change during the last twenty years. The role played by courts in contributing to the fight against climate change is, of course, partial and not homogenous, depending on many factors such as the legal system in which the decisions are made, the existence of climate change laws at domestic level, and the role played by international law in domestic courts. Despite these differences and the many difficulties mentioned (difficulties to interpret uncertainties, difficulties to establish a clear causality link, lack of ambition of many climate change laws and the principle of the separation of powers), the role of judges became timidly but surely more and more important. Through the different 'waves of climate litigation', a 'duty to ensure' that the low carbon transition trajectories are respected by the administration has emerged in French jurisprudence. This particular role of administrative judges in 'controlling' the action (or lack thereof) of the administration will be verified and renewed as climate change cases appear here and there. In France, more particularly this will arrive soon: first, at the end of March 2022, then at the end of December 2022, in order that the GHG reduction targets set for 2030 and 2050 could be achieved.

We are aware that today we are still at the stage of small-steps jurisprudence because the judge, by virtue of historical prudence and proximity to the administration limits himself. He limits himself too because of the respect for the principle of the separation of powers. And, last but not least, because of the margin of appreciation that must be left to the administration.

Nevertheless, a new path has been opened up by the administrative judges that might

91 Sister Marie Brigid Arthur v. Minister for the Environment *Sharma,* Federal Court of Australia, 27 May 2021; See also commenting a previous decision New South Wales Court of Appeal, 8 Feb. 2019, *Gloucester Resources Limited* (GRL) *v. Minister for Planning,* Thuilier, T., "Dialogues franco-australiens sur la justice climatique", *Revue Energie, Environnement, Infrastructures*, March-April 2019.

92 Court of District of The Hague, 26 May 2021, *Milieudefensie et al. v. Royal Dutch Shell plc,* NL:RBDHA:2021:5339. Available at: https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339.

lead in the near future to the establishment of a new 'standard' of diligent behavior for the administration. For the time being, this is still in a preliminary and even prospective stage. We can support such a hypothesis thanks to an unprecedented development of the 'duty of prevention' by the different decisions that we have covered so far.

fypl french yearbook *of* public law
Issue 1, 2023

Could national judges do more? State deficiencies in climate litigations and actions of judges

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Abstract:

The present article examines the complex relationship between the judicial power and the legislator in the context of climate change litigation. In this context, the ideal of a separation of powers is often advanced to promote judicial self-restraint or even judges' incompetence to rule in this matter.

By analysing various court decisions, in particular decisions of constitutional courts, the authors portray the interference of judges in the legislative function while insisting on its limits. By demanding sufficient measures of the legislator to fight climate change, courts do certainly assume a legislative role. However, it is clarified that judges are neither asked to draft laws, nor to act in place of the legislator but rather to initiate action of the legislator. The authors conclude that the decisions considered enforce the application of law and the respect of constitutional and international commitments as well as the respect of fundamental rights in accordance with the principles of the separation of powers.

Keywords:

Climate change, Climate litigation, Legislative powers, Separation of powers

One hundred years after the evocation of a 'government of judges',[1] the political actions of judges are still the subject of intense reflections,[2] which seek to clarify the obscurity that surrounds the role of the courts. The issue of climate change allows us to take a fresh look at the particular exercise of the judge's powers vis-à-vis the State. Old questions – such as the separation of powers – emerge in the context of these new litigations[3] in the face of urgent issues, which, perhaps, justify the question at the heart of the issue under consideration: "Could national judges do more?" In order to answer this question, this article will commence to outline in section one the methodological considerations, before examining the judge's room of manoeuvre and his legislative functions in section two. In a final section, we aim to provide some thoughts on the judges' jurisdictional role and argue that the latter leads to self-limitation.

I. Methodological considerations and selection of the cases to be studied

A. Purpose and scope of the study

There are many ways to approach climate change. Reducing the approach to the legal prism means viewing the law as a subject at least partially isolated from the social phenomena it is supposed to address. Such a view seems increasingly difficult to justify. Our approach, however, remains essentially juridical, in its way of examining things, but above all in its subject matter. We retain a contentious approach through the idea of a climate 'on trial'. This approach does not seek to create legal statements or rules of law. It aims to examine jurisdictional decisions rendered in the context of litigation. It is hence also irrelevant where one places jurisprudence among the sources of law. While there is a plethora of climate cases, we will not be interested in all litigation.[4] We will limit ourselves to focus on those cases in which the shortcomings and failures of States are most evident. This means that we will not consider disputes that concern specific projects, state responsibility (although threads can be tied) or certain actions that would be incompatible with the needs of the fight against climate change. In that respect, it proved helpful to turn to comparative legal studies, and particularly those which focus on national litigation in which States are charged for non-compliance with obligations or commitments to prevent and mitigate the effects of climate change. The nature of these obligations may be diverse in that they may stem from amongst others international and regional conventions, from fundamental rights derived from constitutional norms or framework laws.

There are several methods to classify litigation. A simple typology of these infringement actions makes it possible to distinguish between disputes according to their nature. One may distinguish between those cases in which it is the legislator, the government or even the State as a whole who is charged for failure to act and those in which it is private actors such as large companies like Shell or Total who are brought before Court. It

1 Lambert, E., *Le gouvernement des juges et la lutte contre la législation sociale aux États-Unis*, 1921, Paris, Marcel Giard & Cie., rééd. 2005, Paris, Dalloz.

2 Breyer, S., *The Authority of the Court and the Peril of Politics*, 2021, Cambridge, Harvard University Press.

3 The cases introduced here can be found online: http://climatecasechart.com/climate-change-litigation/ https://climate-laws.org/litigation_cases._

4 For a classification of all climate cases: Ruhl, J. B., Markell, D., "An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual ?", *Florida Law Review* 2012, pp. 30-32.

is also possible to classify litigation according to the type of failure to act: in some cases, the State will be ordered to make commitments, in others it might have to take measures to ensure compliance with existing commitments. Cases might also overlap in this respect. Sometimes, no action has been taken by the State, or it is necessary to ensure that the measures taken are consistent with the commitments or with other imperatives. The latter constitutes a separate typology, which presents disputes according to the judge's more or less imposing or pressing position towards the legislative power. The purpose, then, is not to provide a comprehensive overview of current litigation, but merely to describe and examine certain phenomena in the jurisprudence.

B. Interest in such a narrowing of the approach

As mentioned above we will limit ourselves to consider a few selected cases only. This essentially serves two purposes. First, it allows us to focus on a specific issue in a few pages and analyse a sufficient number of varied cases to establish some constructed assumptions. The analysis of different types of litigation, even in the field of climate change alone, would certainly have multiplied the biases, which are already numerous when one opts for a comparative and open approach. It seems to us, however, that the cases chosen allow us – more than others – to shed light on the relationship between law and politics. They particularly reveal, a certain vagueness in the distribution and division of legislative and judicial functions. Secondly, although some of the cases discussed here have been the subject of numerous comments, these often favour, and rightly so, the invocation of fundamental rights or responsibilities in that they do not insist on the profound and sometimes endless questions of imputability and causality.[5] Legislative measures, especially in terms of their content, procedural modalities, and translation into national, regional and international political commitments, seems to us to be rather discrete.

C. Some methodological remarks

Tackling the consequences of climate change, a rather broad and vague subject, requires overcoming a number of difficulties. Since it is often not possible to bring cases dealing with climate change before international judges, the disputes examined depend on national systems and laws which, admittedly, include levels that literally open them up to the international arena. However, each State has its own legal system, its own legal logic, and often a specific "litigation clock", which often results in great disparities on numerous points. It is therefore necessary, as far as possible, to try to neutralise these difficulties without seeking to draw universalistic conclusions. This is why it was necessary to limit the number of cases studied. However, a selection may also give rise to bias in terms of the importance of the cases chosen. One may think that there has been a significant movement in case law when, in reality, only a few daring cases have been rendered in the last ten years.

The French academic training suggests a classic methodological orientation of comparative law. The following considerations are based primarily on the particular mechanisms of French law, which, under the influence of Western philosophical and political theories, has difficulty in understanding, for example, common law. We have therefore

5 Even though, all those issues are interdependent with the object - the German case specifically.

tried, as far as possible, to take cases from several different geographical areas.

The aim here is not to summarize the analyses of the various disputes or to make a definitive assessment of them: some are ongoing, and others are just beginning to have an impact. Rather, the point is to analyse the conception of juridical action in these very peculiar disputes. We believe that, particularly in Western societies, a mythology has formed around legal action and the judge's ability to provide solutions and to contribute more or less directly to the inflection of public/legislative action. The aim of this article is to question this mythology and to highlight the assumption underlying some disappointment and perhaps too much focus on litigation alone.

D. Challenges and issues

It must be noted that there are many climate change disputes around the world,[6] but their impact is open to debate. The length of the proceedings, the difficulty of allocating and accepting responsibility – particularly on appeal, the rather moderate results even if successful and the lack of structural and real changes essentially show that up until now, the outcome of these actions is at best half-hearted. While climate change is underway, contentious solutions still appear to be in their infancy and carbon neutrality still seems largely chimerical.

We will therefore try to provide some answers to a few questions. First, we are interested in the relationship between the judge and the legislative power. In the face of the mixed successes of the litigation studied, what could be expected a priori but what should be established a posteriori? It is the role of the national judge who renders his decisions in a global context that we question.

What does the judge's action against the State reveal? We believe that if the various disputes concerning the State's failure to comply with its commitments illustrate the various possibilities for action by the judge, it is always at the risk of the separation of powers being raised and brandished, often wrongly, as we will try to show (at least in Western democracies). Inevitably this leads us to question how much leeway the judge should be given to integrate legislative functions when resolving disputes brought before him.

Even if judges (sometimes) do a lot in theory, they are far from being the central actor in climate policies in the light of our analytical framework. However, the political strategy of a number of activists suggests the opposite: in the absence of action by the political authorities, a solution is sought in judicial action. So where does the reluctance of judges come from, and how can it be characterised? If arguments concerning separation of powers are set aside for the moment, analysing the arguments of the judges themselves might allow for different hypotheses.

II. Legislative function and the judge's room for manoeuvre

We propose a step-by-step analysis of the judge's ability to take up legislative functions. Firstly, this allows us to understand that the judge, in the exercise of his prerogatives, is constantly positioning himself in relation to the legislative power. Secondly, we will thus be able to identify the legislative functions that the judge refuses to exercise, and those that he exercises only with caution.

6 More than 1.500 as of January 2023, UN, *Global Climate Litigation Report*, 2020, Status Review.

Our analysis starts with the least intrusive insertions and extends to those that can be considered inherently and directly specific to the legislative body. The legislative function is thereby understood as any participation in the process of creating or conceptualising general and abstract norms of legislative value.[7]

A. A traditionally limited review

First, judges may decline jurisdiction to rule on a petition that requires legislative intervention. They may agree that it is not for them to interfere in such matters, as the constitution does not confer such powers on them. In such cases, this power is reserved for the respective legislative bodies. In the *Commune de Grande-Synthe* case, for example, the French supreme administrative court chose to consider that 'the fact that the executive power refrains from submitting a bill to Parliament affects the relationship between the constitutional public powers and therefore falls outside the jurisdiction of the administrative court'.[8] The reasoning behind this decision will be further examined in the following section. We shall consider the grounds on which judges may refuse to rule, or may rule only minimally. Notably, this argument is not unique to cases brought against States.[9] The importance of the claims or their purely political nature may also be a reason for judges to withdraw: 'The plaintiffs' claim fails on the grounds that some issues are so political that the courts are unable or unsuitable to deal with them'.[10]

Another, less intrusive but more 'active' approach is for judges to propose the future framework of legality. Case law can thus provide a framework or initial bases for the legislator to draw upon.[11] There are two ways of looking at the matter: either the judge proposes what seems reasonable to him, taking into account climate legislation; or, what seems to us to be more often the case, he goes beyond the legislation in place. He then warns and pre-emptively indicates the legal framework that he will consider valid. The latter interpretation clearly has a strong impact on the way in which legislation is applied, which might in turn be taken into account by the legislator when legislating. This seems to have happened in Ireland, where the Supreme Court annulled a plan because it 'lacked specificity'. The Court specified that 'an identical plan cannot be adopted in the future'.[12] A similar case can be found in Nepal,[13] where, following the litigation, a law was passed to take into account the judge's 'prescriptions'.[14]

Furthermore, judges will also be able to intervene in the legislative function when reviewing the application of a law. This is frequently the case in climate litigation.[15] On the

7 The effects of the court's action must also be integrated thereupon.

8 State Council, 19 Nov. 2020, nº 427301, *Commune de Grande-Synthe*.

9 For example, Oslo District Court, 4 Jan. 2018, nº 16-166674TVI-OTIR/06, *Greenpeace Norway v. Norwegian State*.

10 Ottawa Federal Court, 27 Oct. 2020, *La Rose et al., c. Sa Majesté la Reine*, § 40.

11 Peel, J., "Issues in Climate Change Litigation", *Carbon and climate law review* 2011, vol. 5, p. 24.

12 Supreme Court of Ireland, 31 July 2020, nº 205/19, *Friends of the Irish Environment v. Irish Government*, § 9.3-9.4.

13 Supreme Court of Nepal, 12 Dec. 2019, nº 10210, *Shrestha c. Prime Minister's Office and al*, Order 074-WO-0283: 'Since the Environment Protection Act 1997 does not encompass climate adaptation and mitigation, therefore, a separate law dealing with issues related to climate change to be drafted and enacted.'.

14 Environment Protection Act, 2019 (2076).

15 For example: *Lahore High Court, 30 Aug. 2019, Sheikh Asim Farooq v. Federation of Pakistan; Supreme Court of Nepal, 25 Dec. 2019, Shrestha v. Office of the Prime Minister et al, mentioned above; Federal Supreme Court (Brazil),*

basis of a legislative or constitutional norm, the judge may also examine the necessity of actions of others.[16] In this regard, we refer to the very classic case of *Massachusetts v. EPA et al*,[17] which was the first important decision in this area. The obligation to act as requested by judges has even been described as a 'fundamental rule of constitutional democracy'.[18] A similar ruling can be found in Colombia.[19]

Similarly, judges can go so far as to condemn and hold the State accountable on the basis of the laws in place, [20] while remaining in a 'control of legality and not of opportunity".[21]

The interpretation of the law contributes to its transformation it, by attributing to it a meaning, a significance, and effects beyond or different from what the text may seem to say. This recourse to the legislative function usually occurs in more concrete legal disputes about the legality of certain projects or measures. It will be interesting – or disturbing – to observe how the Energy Charter Treaty[22] will be interpreted in five cases in which companies attack the state for adopting climate-related measures.[23]

B. The interference of judges in legislative activity

In addition to interpreting and applying the law, judges seem to have another, and arguably more creative power that must be analysed. In the first place, they may find that provisions that seemed to have no legislative or legal value have a real normative scope, or the other way around to set aside acts that appear to constrain the legislator.[24] In general, the interdependence and integration of international norms into national legal systems should be further analysed, but this is far beyond the scope of this article.

The solution will not be very different when the judge chooses to annul a law, which is most often based on a violation of a higher – constitutional or international – norm. Judges can compel the state in various ways (injunctions, fines, etc.) to complete or even amend the legal framework. The judge may thus conclude that, in view of the current legislation and according to the higher legal objectives pursued, there is an obligation to go further, to do better. This type of argument can partly be found in the jurisprudence of Urgenda,[25] the Netherlands and in Germany.[26]

PSB, et al., v. Brazil, in litigation ; 7th Federal Environmental and Agrarian Court of the Judiciary Section of Amazonas (Brazil), Laboratório do Observatório do Clima v. Minister of Environment and Brazil, in litigation.

16 However, the recipient of the obligation raises doubts: it is mainly governments, or States in general - which often makes it impossible to identify a single concrete person – to whom such requests are addressed.

17 Supreme Court of the United States, 2 April 2017, 05-1120, 549, *Massachusetts c. EPA et al.*

18 Supreme Court of the Netherlands, 20 Dec. 2019, nº 19/00135, *Pays-Bas c. Urgenda*, § 8.2.1

19 Supreme Court of Justice (Colombia), 5 April 2018, STC 4360-2018, *Claudia Andrea Lozano Barragán, et al. C. Presidency et al.*

20 For example, French State Council, 8 Feb. 2007, nº 279522, *M. Gardedieu.*

21 For example, the French-speaking Court of First Instance of Brussels, 17 June 2021, 2015/4585/1, p. 45.

22 *Energy Charter Treaty*, Lisbonne, 17 Dec. 1994.

23 In late 2022 (30 Nov. 2022) the District Court of The Hague seems to have ruled against the companies (claimants).

24 On all these questions, see in particular the arguments of the State Council, *Commune de Grande Synthe*, and the French-speaking Court of First Instance of Brussels, 17 June 2021, op. cit., § 2.3.2.

25 District Court of The Hague, 24 June 2015, C/09/456689, *Urgenda Foundation v. The State of the Netherlands*, § 4.83.

26 Federal Constitutional Court of Karlsruhe, 24 March 2021, 1 BvR 2656/18, *Federal Climate Change Act,* in this case

In *Leghari v. Pakistan*[27], a 'Climate Change' commission was set up. The judge went so far as to request the appointment of an adviser on the subject to each minister (in particular § 4). Noting that a certain number of necessary actions had finally been put in place, he dissolved this commission but set up a permanent committee, so that the effort would continue. It remains the responsibility of the competent actors to enact the concrete legislation, but the judge pushes for its adoption and for the participation of the competent authorities. This is an interesting intervention in the legislative function in this hypothesis where the judge, without substituting himself, makes it happen.

This case allows us to draw a link with the essence of the requests made when the State failed to fulfil its obligations. What is really requested of judges, even more than the various actions seen so far, is that they order the authorities to adopt a specific law. In fact, this is where what can be considered authentic legislative action by the judge for our purposes becomes apparent. The first observation is that the judge's injunction is generally binding, either because he demands that a law be adopted or because the constraint concerns the law to be adopted. Judges do not merely ask for any kind of legislation to be made. Indeed, we have already seen in the *Leghari* decision that the judge himself constructs the framework for the design of the future policy. But he may also – and above all – take an interest in the subject matter of the future law. This will often involve finding that an obligation has not been fulfilled, that a fundamental right has been violated, or that there is a gap in the legislation, as we have already seen in the Nepal case.[28]

Traditionally, the court will rely on the violation of quantified greenhouse gas emissions reduction targets, as seen in French litigation, for example. The court may then refer to international commitments. However, it will first have to consider the normativity and binding nature of these commitments.[29]

In the sequence of justification for requiring a new law, the Hague District Court's reasoning in the *Urgenda* case is particularly interesting:

> *'The court has also established that the State has failed to argue that it does not have the possibility, at law or effectively, to take measures that go further than those in the current national climate policy'.*[30]

The requirements may be more or less binding: the judge may require that 'all appropriate measures'[31] must be taken, or specify that 'the claim discussed here is not intended

on the differences in efforts that need to be made before and after 2030 to conclude that too much effort in 2030 leads to better legislation for before, especially: § 115.

27 Lahore High Court, 25 Jan. 2018, W.P. n° 25501/2015, *Leghari v. Fédération du Pakistan*.

28 Supreme Court of Nepal, 12 Dec. 2019, *Shrestha c. Prime Minister's Office and al*, op. cit.: 'In order to combat climate change, mere enlistment of direct policies and plans is not enough, an effective structure to implement such plans is necessary, however, no such structure has been created [...]. Since the Environment Protection Act 1997 does not encompass climate adaptation and mitigation, therefore, a separate law dealing with issues related to climate change to be drafted and enacted'

29 French-speaking Court of First Instance of Brussels, 17 June 2021, op. cit., § 2.3.2.

30 The Hague District Court, 24 June 2015, *Urgenda Foundation v. The State of the Netherlands*, op. cit., § 4.99.

31 State Council, 19 Nov. 2020, *Commune de Grande-Synthe*, op. cit.

to order or prohibit the State from taking certain legislative measures or adopting a certain policy [...] to determine how to comply with the order concerned'.[32] In some cases, the extent to which elements would constitute sufficient legislation is specified. These might include:

> *'make special legal provision for promotion and development of low carbon emitting technology, technology that utilizes clean and renewable energy, reduce the consumption of fossil fuel consumption for the purpose of climate change mitigation, and includes provisions for forest conservation and expansion and addresses the usage of forest area the type of energy in vulnerable areas, [...] arrangements of legal and technological mechanisms should be made, [...] Make legal arrangements to ensure ecological justice and environmental justice to the future generation through the conservation of natural resources, heritages and environmental protection while mitigating the effects of climate change [...] for scientific and legal instruments to evaluate and compensate individual, society and others caused by pollution or environmental degradation, [...] make legal provisions and in policy highlighting the Climate Change Duties of public and private organizations'*[33].

C. The decision of the Karlsruhe Court: control of the future or future universal control?

Special attention should be given to the decision of the Karlsruhe Court in March 2021. From the German Constitutional Law, the court deduces the existence of a number of constraints for the legislator and thus decides that it is obliged to legislate in order to comply with these higher standards.

A duty of protection also exists towards future generations. The conditions of validity of the law are thus temporally extended. Article 20a of the Basic Law[34] creates a duty of climate protection for the state. The legislator has taken measures to meet this obligation, requiring that global warming remain below 2° C and preferably below 1.5° C as provided for in the Paris Agreement.

> *'[I]t is not ascertainable that the state has violated requirements incumbent upon it to avert existential threats of catastrophic or even apocalyptic proportions. Germany has ratified the Paris Agreement and the legislator has not remained inactive. In the Federal Climate Change Act, it has set down concrete specifications for the reduction of greenhouse gases [...]. These reduction targets, which have been specified until 2030, do not in themselves lead to climate neutrality but will be updated [...] in line with the long-term goal of achieving greenhouse gas neutrality by 2050'.*[35]

32 The Hague District Court, 24 June 2015, *Urgenda Foundation v. The State of the Netherlands*, op. cit., § 101.

33 Supreme Court of Nepal, 12 Dec. 2019, *Shrestha c. Prime Minister's Office and al*, op. cit., § 6.

34 [Protection of the natural foundations of life and animals] Mindful also of its responsibility towards future generations, the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order.'

35 Federal Constitutional Court of Karlsruhe, 24 March 2021, *Federal Climate Change Act*, op. cit., § 115.

However, the protection of the climate is not absolute. Instead, it must be balanced with other imperatives of equal legal value.[36] The Court considered that in the case at hand, these values have not been adequately balanced. It is not that the measures to protect the climate interfere too much with other freedoms as one might expect,[37] but it is the distribution of the effort between generations and the consequences of an intensification of the action postponed in which the court finds too great an infringement of rights and freedoms.

> *'Another question is whether the post-2030 burdens inherently built into the framework – burdens that will entail restrictions on freedom – can be justified under constitutional law or whether the Federal Climate Change Act has inadmissibly offloaded reduction burdens onto the future and onto whomever will then bear responsibility. [..] The legislator has violated fundamental rights by failing to take sufficient precautionary measures to manage the obligations to reduce emissions in ways that respect fundamental rights – obligations that could be substantial in later periods due to the emissions allowed by law until 2030.'*[38]

The decision is highly political in that '[e]very consumed part of the CO2 allowance reduces the remaining budget, narrows the possibilities for any other CO2-relevant exercise of freedom and shortens the time left for initiating and completing a socio-technological transformation.'[39] This is a binding guideline in any future planning. The legislator's manoeuvre is thus clearly limited. It is then up to Parliament to enable the reduction of GHGs, to plan the efforts without placing a greater burden on future generations that would have a very strong impact on their rights and freedoms. 'Given the extent of the requisite socio-technological transformation, long-term restructuring plans and phase-out trajectories are considered necessary.'[40] Thus, it is not the State that is targeted here in the abstract, but rather the legislature as a body since it is "[t]he legislative process [*that*] gives the required legitimacy to the necessary balancing of interests."[41]

D. Preserving the legislator's autonomy

Although there are examples of decisions ordering the adoption of new laws or the amendment of legislative provisions,[42] the actual scope of this function seems to be limited. In a number of cases, the judge refuses to request a new law, for example, when the objective of neutrality is at stake[43] or simply when '[t]here is no reason to presume that ...

36 This is an argument that forms the basis for all his reasoning.

37 Federal Constitutional Court of Karlsruhe, 24 March 2021, *Federal Climate Change Act*, op. cit., § 142 for example.

38 Ibid, § 115, 182.

39 Ibid, § 122.

40 Ibid, § 121.

41 Ibid, § 213.

42 A number of ongoing cases are also likely to lead to similar results: Civil Court of Rome, *A Sud et al. v. Italian Government*; New Zealand High Court *Lawyers for Climate Action NZ v. The Climate Change Commission.*

43 14th Federal Court of Sao Paulo, 28 May 2021, *Six Youths v. Minister of Environment and Others.*

international protocols are not reflected in the policies of the Government…',[44] which implicitly raises the often-thorny issue of the burden of proof.

A quantitative study would undoubtedly put the current litigation movement into perspective by recalling that the decisions of significance are ultimately, at least for the time being, few in number. Here, it is only possible to conclude that the judge is certainly taking a step into the legislative function, which is not contrary to the separation of powers. Judges limit their own jurisdiction, even if they grant themselves some prerogatives at times. The line between the legislative roles that can be assigned to them to block or restrict the legislature and the legislature's own domain is thus drawn with the last two parts of the function that we will now deal with.

In fact, there is a part of the legislative function that the courts refuse to encroach upon: the sovereign appreciation of the legislature. In the context of climate litigation, this will often entail the concrete means to mitigate climate change.

In order to reach the goals set, the political actors have to retain a great deal of freedom regarding the method or means:

> *'It is relevant to note that the claim discussed here is not intended to order or prohibit the State from taking certain legislative measures or adopting a certain policy. If the claim is allowed [increase reduction targets], the State will retain full freedom, which is pre-eminently vested in it, to determine how to comply with the order concerned.'*[45]

This is the very meaning of the expression 'all useful measures' that is regularly used in French litigation.[46] GHG reductions can only be achieved if multiple sectoral policies are altered. This implies that the legislator has to integrate this interdependence of sectors within the mechanism chosen in order to provide a successful holistic strategy.[47] Unlike the broad objectives that may have been agreed on by means of the lowest common denominator – carbon neutrality or compliance with the objectives of an international treaty – the method is a purely political choice. Any interference by the judge in this area would reveal a position on values that would all too easily reveal a lack of neutrality that would in turn be seen as illegitimate within the policy-making process.

There are many examples of such self-limitations. However, judges can define the scope of possibilities by relying, for example, on a consensual reasoning around respect for human rights. In this case, they are merely repeating a classic legal requirement for laws to be valid.

If judges refrain from giving concrete guidance to the legislature as to how to achieve those rather ambitious objectives,[48] they also refrain from adopting precise legislative

44 National Green Tribunal: 'There is no reason to presume that the Paris Agreement and other international protocols are not reflected in the policies of the Government of India'.

45 The Hague District Court, 24 June 2015, *Urgenda Foundation v. The State of the Netherlands*, op. cit. § 4.101.

46 State Council, 1 July 2021, *Commune de Grande-Synthe*, op. cit.

47 This has already been stated by the Administrative Court of Paris, 2 March 2021, nº 1904967, 1904968, 1904972, 1904976/4-1, *Oxfam France et al*: 'The concrete measures likely to allow for the reparation of the prejudice may take various forms and express, as a result, choices that are subject to the free assessment of the Government'.

48 Method and objectives may be linked in that an acceptable method that does not meet the minimum objectives

provisions by way of substitution. In *Juliana*, the Court of Appeal expressly lists all types of concrete guidance which the judges are prohibited to adopt: 'order, design, supervise, or implement the plans requested.'[49] Yet this would be the purest form of a creative legislative function. However, judges do not adopt texts, and even when they create law, when they annul provisions or render projects or behaviours legal or illegal, their decisions do not have the effect of establishing a text in the legal order.[50]

Moreover, the applicants do not ask the judge to produce law himself.[51] Even when posing the question as to whether judges should make climate change law, one does not really foresee the judge drafting a legal code. While courts might be tempted to do so, they do not have the infrastructure to carry out the conceptualization of the text. The process of drafting laws is a central element of the laws themselves: they are not only texts; they are also the result of a procedure. The Karlsruhe Court does not mean anything else when it states:

> *'If the legislator wanted to move climate change law in a fundamentally new direction, this fact would need to be recognisable as such and therefore open for political discussion. The reason behind the explicit emphasis on legislation in Art. 20a GG and the acknowledgment of the legislator's prerogative to specify the law is that the special importance of the interests protected under Art. 20a GG and their tensions with any conflicting interests must be reconciled in a democratically accountable manner, and legislation provides the appropriate framework to do this [...]. The legislative process gives the required legitimacy to the necessary balancing of interests. The parliamentary process – with its inherently public function and the essentially public nature of the deliberations – ensures through its transparency and the involvement of parliamentary opposition that decisions are also discussed in the broader public, thereby creating the conditions by which the legislative process is made accountable to the citizenry. With the help of media reporting, this process also offers the general public an opportunity to form and convey its own opinions.'*[52]

Judges do not pass laws and do not force the legislator to promulgate texts that they would have enacted.[53] As such, they are not the central actors in climate action since, at the end of the day, the rules will be established by the legislator. Even if judges also make

will be considered invalid: Federal Constitutional Court of Karlsruhe, 24 March 2021, *Federal Climate Change Act*, op. cit., § 155: 'A manifestly unsuitable protection strategy would be one that concerned itself with reducing greenhouse gas emissions without pursuing the goal of climate neutrality'.

49 US 9th Circuit Court of Appeals, 17 Jan. 2020, nº 18-36082, *Juliana v. US*.

50 The view that a court judgment completes a text or creates an applicable principle that must be considered as hard law follows a different logic, the subtleties of which will not be addressed here.

51 Supreme Court of the Netherlands, 20 Dec. 2019, *Pays-Bas c. Urgenda*, op. cit., § 8.2.3: 'This case law is based on [...] the consideration that the courts should not intervene in the political decision-making process involved in the creation of legislation'.

52 Federal Constitutional Court of Karlsruhe, 24 March 2021, *Federal Climate Change Act*, op. cit., § 213.

53 Supreme Court of the Netherlands, 20 Dec. 2019, *Pays-Bas c. Urgenda*, op. cit., § 8.2.4: 'The courts should not interfere in the political decision-making process regarding the expediency of creating legislation with a specific, concretely defined content by issuing an order to create legislation.'

political decisions that are, for us, based on (and reveal) conflicts of values, judges continue to hold a position,[54] that we would venture to describe as only modestly political, and that proceeds from a mechanical activity (irreducibility of interpretation aside): they simply apply the law in the continuity of their assigned roles. We acknowledge that this is merely our interpretation which is generally not met with praise.

The relationship between law and politics is clearly not an easy and straightforward one. Therefore, in order to better understand the real dynamics that operate in climate litigation, we seek to determine how to analyse the role that climate activists expect from the judge and the limits of his action.

III. Conception of the jurisdictional function: the self-limitation of judges

The conception of the judicial function can be observed both in the requests of the plaintiffs and in the arguments of the judges themselves. Several self-limitations characterize the legal dispute.

A. The separation of powers: mobilisation of a classic ideal

Separation of powers as an ideal is a commonplace in climate litigation. Do judges undermine this principle when they adopt bold solutions in climate litigation? Indirectly, the question then becomes one of legitimacy of the legal process.[55] In their rulings, the courts will often set out the framework within which they can act based on the principle of the separation of powers.[56]

The theory of separation of powers states that there are to be three separate powers. In order to avoid tyranny, these powers should be entrusted to three different organs: one responsible for legislating, another for executing, and the last for adjudicating. Each is to fulfil its role by strictly remaining within its own area of competence.

This is a very cartoonish and simplified reading of the separation of powers. In reality, separation of power refers rather to a *division* of powers. Montesquieu only suggested that it should not be a single institute to hold all three powers.[57] He emphasised that the different organs of the State need to be able to prevent the other powers from acting if necessary. This misunderstanding of Montesquieu's theory was already denounced by J. Madison.[58]

To put it differently: separation of power requires three different functions[59] that different organs share, but the same organ often has a role in the exercise of several functions. What is important is that the powers should be able to prevent the others from acting unilaterally and entirely alone, while at the same time having the possibility of not

54 This undoubtedly depends on the legal cultures in the various countries: The Supreme Court of the Netherlands, for example, states that its decision that it '[d]oes not mean that courts cannot enter the field of political decision making at all'.

55 Peel, J., "Issues in Climate Change Litigation", *Carbon and climate law review* 2011, vol. 5, p. 15.

56 The Hague District Court, 24 June 2025, *Urgenda Foundation v. The State of the Netherlands*, op. cit., § 4.95.

57 Montesquieu, *De l'esprit des lois*, Chapter VI, Book XI, 1748.

58 Madison, J., *The Federalist*, nº 48, 1788.

59 Eisenmann, C., «L'Esprit des lois» et la séparation des pouvoirs», in Mélanges R. Carré de Malberg, 1933, Sirey, pp. 163-192; Althusser, L., *Montesquieu, la politique et l'histoire*, 1959, rééd. 1985, Paris, PUF.

blocking the machinery.

In practice, therefore, this is a prism, an ideal, which countries implement in different ways. The body designated as the executive will often have prerogatives in judicial or legislative matters – appointing judges or initiating laws – and the same is true for the other bodies that exercise different functions.

Therefore, under the theory of the separation of powers analysed in this way, there is no prior violation of the separation of powers if judges exercise a role related to the legislative function. In reality, as mentioned above, they do so all the time when they interpret the law, decide whether or not to apply it, etc.

The real question is: are judges asked to make laws, to act in place of the legislator?[60] Are they explicitly asked to take the place of the legislator? To us, it does not seem so. The applicants ask the legislator to act and rely on the judge to assert the validity of their request, but it is always the legislator that is recognized as the key actor in this respect. As we sought to demonstrate in this article, both the applicants and the judges seem to insist on this point.[61] Conversely, the states' argument often calls for a watertight and exaggerated separation of powers.[62]

With respect to the separation of powers, judges may restrict themselves for two reasons: in order not to give the impression of somehow violating the ideal of separation, which would undoubtedly delegitimize their entire authority; but also because they do not have the means of doing the work of the political power.

In fact, it would be counterproductive for judges to take the place of the legislator. In the cases outlined here, the judge is called to oblige the State to act and to respect its commitments. It is sometimes – rarely of course – simpler for the judge to avoid the difficulties linked to the separation of powers altogether and request a state response, whatever the form and content.[63] The judge then remains in his role as an authority who must rule on legal disputes: 'the role of the courts [...] is confined to identifying the true legal position and providing appropriate remedies in circumstances which the Constitution and the laws require.'[64] The Court hence only enforces the application of the law which in our case, entails respecting of the commitments and objectives to which the State has subscribed.

Paradoxically, the rule of law and the separation of powers seem to be respected more than ever thanks to the action of the judge rather than by his withdrawal in the face of the inaction of the legislator/government. By using his powers, the judge only initiates

60 Burgers, L., «Should Judges Make Climate Change Law?», 2020; Torre-Schaub, M., «Les dynamiques du contentieux climatique: anatomie d'un phénomène émergent», in Torre-Schaub, M. et al. (dir), *Quel(s) droit(s) pour les changements climatiques ?*, 2018, Mare & martin, p. 120.

61 I. C et I. D.

62 This was the case, for example, in the *Urgenda* case, or in the judgement of the Supreme Court of Ireland, 31 July 2020, *Friends of the Irish Environment v. Irish Government*, op. cit., § 5.21. At first instance, this argument was accepted (5.23). However, the Supreme Court shade this rigidity (§ 9.1).

63 Administrative Court of Paris, 2 March 2021, *Oxfam France et al*, op. cit., § 4: 'take all measures enabling to achieve the objectives' Administrative Court of Paris, 14 Oct. 2021, nº 1904967, 1904968, 1904972, 1904976/4-1, *Oxfam France et al*, 'all useful measures'. Formally (all measures) as well as materially (useful) the judge leaves the choice to the free appreciation of the government.

64 Supreme Court of Ireland, 31 July 2020, *Friends of the Irish Environment v. Irish Government*, op. cit., § 1.1.

actions: it is up to the States, governments or legislators to put them into practice.[65] Yet, judges can also take a back seat and declare themselves incompetent: 'the judge cannot determine the content of the obligations of a public authority and thus deprive it of its discretionary power'.[66] The importance and diversity of the measures to be considered, and their *holistic* character, may lead to this:

> *'the Plaintiffs' approach of alleging an overly broad and unquantifiable number of actions and inactions on the part of the Defendants does not meet this threshold requirement and effectively attempts to subject a holistic policy response to climate change to Charter review'.*[67]

B. Considerations based on opportunity

Further aspects may be analysed for the study of the judicial activism. First, judges will not have to be bolder than necessary. It is legitimate for them to refuse to rule on politically sensitive issues or to do prejudicial work where this is not necessary to resolve the dispute brought before them. This is nicely illustrated by the German court's refusal to consider the universality of claims:

> *'The situation is different with regard to the complainants in proceedings 1 BvR 78/20 who live in Bangladesh and in Nepal. They are not individually affected in this respect. In their case, it can be ruled out from the outset that a violation of their fundamental freedoms might arise from potentially being exposed some day to extremely onerous climate action measures because the German legislator is presently allowing excessive amounts of greenhouse gas emissions with the result that even stricter measures would then have to be taken in Germany in the future. The complainants live in Bangladesh and Nepal and are thus not subject to such measures.'*[68]

Secondly, and this is related, judges undoubtedly only incorporate such findings in their decisions they deem socially acceptable: that is, they act boldly only within the limits of what seems commonly tolerable. This rather intuitive finding has also been pointed out by Duguit, in a context where sociological positivism was in the spotlight.[69] According to him the judge and the legislator can be considered the *translators* of social facts,[70] of reality: they do not create rules of law, but merely note their prior existence within society.[71]

65 Montesquieu, *De l'esprit des lois* (1748), op. cit.

66 French-speaking Court of First Instance of Brussels, 17 June 2021, op. cit., § 2.3.2.

67 Ottawa Federal Court, 27 Oct. 2020, *La Rose et al., c. Sa Majesté la Reine*, op. cit., § 40.

68 Federal Constitutional Court of Karlsruhe, 24 March 2021, *Federal Climate Change Act*, op. cit., § 132.

69 For example Fonbaustier, L., «Une tentative de refondation du droit : l'apport ambigu de la sociologie à la pensée de Léon Duguit», *RFDA* 2004, nº 6, p. 1053 ; «Léon Duguit et la mission du juge administratif (à propos de la hiérarchie entre ordres et normes juridiques)», in Bigot, G., Bouvet, M. (dir.), *Regards sur l'histoire de la justice administrative*, 2006, Litec, p. 277.

70 Duguit, L., *L'État, le droit objectif et la loi positive*, 1901, Paris, Albert Fontemoing, p. 15.

71 Ibid.

If the judge shows some restraint in this regard, he may himself consider direct action of the legislator to be the best solution.[72] The climate crisis for instance would then require intervention of the legislator itself. These arguments are rather straight forward even if not always explicitly stated: major climate policy actions require the intervention of the legislative power as they need to be democratic, deliberative and sovereign in essence.

The governmental and legislative bodies, therefore, have at their disposal the state machinery that enables them to fulfil their roles. This is also why it seems to us impossible for the judge to answer with precision which means should be chosen. The fight against climate change is infinitely complex and cannot be resolved by measures put in place by the judge. This discretionary power is indeed vested in the legislative and governing bodies of the State. This is what is meant by the call to 'take all useful measures allowing to stabilise, on the whole national territory, the concentrations of greenhouse gases in the atmosphere':[73] the judge can examine the validity of the objectives, but the means to achieve them require a deeper level of insight and thus rather subjective choices:

> *'While there is significant scientific consensus both on the causes of climate change and on the likely consequences, there is much greater room for debate about the precise measures which will require to be taken to prevent the worst consequences of climate change materialising.'*[74]

The interdependence of issues and the difficulty of setting priorities may even prevent the judge from assessing with precision the insufficiency of the State's action by sector:

> *'If the investigation shows that the objectives set by the State to himself have not been achieved, the gap between the objectives and what has been achieved, since the policy in this area is itself only one of the sectoral policies that can be mobilized, cannot be considered to have contributed directly to the worsening of the ecological damage for which the applicant associations are seeking compensation.'*[75]

Judges are also limited by the claims raised. The procedural legal framework and the specific demands of the applicants logically limit their room for manoeuvre. The injunctions against the State are obtained in lawsuits against members of the government, and it seems to us that there is no procedure to attack the legislator directly, so these actions are the subject of the applications. Assessing the extent to which the judge took the claimants' claims into account is more complex. The Federal Court of Ottawa for instance argued for the dismissal of an application because of 'the inappropriate remedies sought by the Plaintiffs',[76] while the Quebec Court of Appeal describes the application by

72 Federal Constitutional Court of Karlsruhe, 24 March 2021, *Federal Climate Change Act*, op. cit., § 213.
73 Administrative Court of Paris, 2 March 2021, *Oxfam France et al*, op. cit., § 1.
74 Supreme Court of Ireland, 31 July 2020 *Friends of the Irish Environment v. Irish Government*, op. cit., § 4.5.
75 Administrative Court of Paris, 2 March 2021, *Oxfam France et al*, op. cit., § 28.
76 Ottawa Federal Court, 27 Oct. 2020, *La Rose et al., c. Sa Majesté la Reine*, op. cit., § 41.

pointing out that 'the appellant seeks to force the legislator to act, without however indicating to him what she considers to be the actions to be taken and, a fortiori, the enforceable court orders that would be appropriate.'[77] While French judges are happy to entertain claims asking for 'all useful measures', in Canada, on the other hand, the vagueness of the measures requested is a ground for refusal.

Finally, it can be assumed that the judge is also limited by his actual powers. The effective coercion of the State is in fact particularly complex. It seems to us to be more about a relationship of force, of legitimacy, of authority, of the imposition of arguments than of purely legal modes of action. The injunctions, even if accompanied by a fine imposed by the judge, can theoretically be completely ignored by the State.[78]

IV. Conclusion

This is the great question for future litigation: to what extent will the State comply with the reasoning and demands of judges? It is only when the state genuinely adheres to those rulings that we can contemplate the significance of litigation in shaping a legal and political response to climate change. The courts have already shown that they are ready to rule in favour of the climate. They do have the means to encourage, prevent, or even force the legislator to take certain action. But it is a classic dogma of legal ideology that ultimately does not allow for more. Challenging this dogma, adapting it in the light of new ideals – demanding and authentically progressive – requires re-politicisation of the issue and the re-politicisation of the process of all political actions. This is what the cases studied largely fail to do. The lessons of these disputes and their shortcomings must be learned quickly. The politicisation and involvement of political actors (state, social, popular) is influenced by the hope that climate litigation represents. No doubt this is too optimistic, no doubt it is vain, but it is necessary to realise and understand that political action is not limited to legal action. Quite the contrary. Climate change litigation still serves – among other things of course – as a mirage for the real efforts that need to be made in political, social and economic reorganisation.

77 Appeal Court of Quebec, 13 Dec. 21, 2021 QCCA 1871, *Environnement Jeunesse c. Procureur général du Canada*, § 25.

78 In both Germany and France, it will be possible to observe the governmental responses to the injunctions from December 2022 onwards.

fypl french yearbook *of* public law
Issue 1, 2023

Global climate governance turning translocal

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Abstract:

This contribution delves into the emerging trend of localization within climate governance in Europe, offering insights from both legal and institutional perspectives. Many initiatives are interconnected through networks and imitation dynamics that transcend national borders, influencing and even constraining the decisions of individual nations. Recent developments in climate law and litigation underscore the transformation of global climate governance into a trans-local phenomenon. The shift toward the local arena has facilitated the development of complementary strategies, enhancing cohesion in recent legal advancements, which, notably, were not explicitly outlined in the Paris Agreement.

Keywords:

Global climate governance, Translocal climate governance, International environmental law

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Introduction

With the adoption of the Paris Agreement on climate change in 2015, the world was at last, after years of procrastination, re-bound by common goals framing a long-term approach to global climate governance. The new treaty became an archetype of governance by goals,[1] with these goals taking centre stage and media attention, especially the reduction of temperature increase to 1.5°C that best meets the pressing demands of the scientific community.

Under the new international treaty, Parties decided to strengthen the common response to the threat of climate change by 'holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels',[2] by 'increasing the ability to adapt to the adverse impacts of climate change'[3] and by 'making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development'.[4] In order to achieve the long-term temperature goal, Parties also more concretely committed

> *'to reach global peaking of greenhouse gas emissions as soon as possible, recognizing that peaking will take longer for developing country Parties, and to undertake rapid reductions thereafter in accordance with best available science, so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century, on the basis of equity, and in the context of sustainable development and efforts to eradicate poverty'.*[5]

However, with regards to the methods used to reach these collective goals, the treaty leaves the choice entirely to the Parties, all now faced with the obligation to voluntarily position themselves via their nationally determined contributions.

If such a renewed approach to climate governance at the global level was meant to displace the burden of choice from the global community to the individual Parties, it is because the bigger players wanted to be free to decide their own efforts, without any predetermined pressure or accountability for individualized efforts.[6] The rejection of the Kyoto Protocol-model, – characterized by numbers, deadlines and compliance mechanisms, taking into account the principle of common but differentiated responsibility –, by part of the global community, was among other reasons due to the absence of a global

1 Misonne, D. et al., "Governing by the goals. Do we need domestic climate laws?", Policy brief, 2020, Observatorio Ley de Cambio Climatico para Chile, pp. 1-6.

2 Paris Agreement, art. 2, §1, a).

3 Ibid, art. 2, §1, b). See also, with a focus on adaptation, art. 7.

4 Ibid, art. 2, §1, c).

5 Ibid, art. 4, §1.

6 Aykut, S. & Dahan, A., *Gouverner le climat? 20 ans de négociations internationales*, 2015, Paris, Les Presses de Sciences Po, 752 p.; Farber, D. & Peeters, M., *Climate Change Law*, 2016, Cheltenham, Edward Elgar.

level-playing field between the biggest competitors on the economic world stage.[7] Another driving force behind the new approach that characterizes Paris stemmed from the American political contingency and the need to make sure that the new global agreement would enter into force:[8] the content of the new text needed to appear weakly prescriptive, as a mere continuation of the original United Nations Framework Convention on Climate Change (UNFCCC) and to confirm that Parties remained in full control of their own commitments.

As a result, the pivotal centerpiece of climate governance shifted from a global and binary approach, under the previous UNFCCC and Kyoto Protocol, to a nationally determined approach under the Paris Agreement, with the paradox that the world has moved even further away from the creation of a true level playing field on the intensity of efforts to be pursued by each of the Parties. The discussions on the tenets of the revisited asymmetry keeps going and creates some confusion, as observed during the latest COP27 in Egypt.

The present contribution explores some of the implications of such a "localization" of the main determinants of climate governance, as far as it has started to materialize in Europe today, from a legal and institutional the point of view. It observes that the new scale is only relative. Most initiatives are embedded in dynamics of networking and mimetism that transcend borders and affect the inspiration, and even discretion of national decision-makers. Recent trends in climate law and climate litigation have shown how global climate governance has become trans-local. The shift to the local arena triggered the deployment of complementary scenarios, injecting cohesion into recent advances on the legal front, which were certainly not written in bold letters into the Paris Agreement.

I. Pledges made locally: the nationally determined contributions

With the Paris Agreement and by contrast to the Kyoto protocol, it is thus now up to each individual Party – either a State or a regional economic integration organization like the European Union[9] – to fix its own share in the global effort and to inform the international community thereabout. Such communication is made by registering the 'nationally determined contribution' the Party intends to achieve,[10] on a dedicated platform established by the secretariat of the Convention. Moreover, Parties should also strive to formulate and

7 Especially due to a difference in regimes between industrialized States (the so-called "Annex I" countries under the UNFCCC) and newly emerging economies (like China, India, Brazil), due to the way the principle of common but differentiated responsibility get operationalized. See among others: Lavallée, S. & Maljean-Dubois, S., "L'Accord de Paris : fin de la crise du multilatéralisme climatique ou évolution en clair-obscur ?", *Revue juridique de l'environnement* 2016, vol. 41, pp. 19-36; Misonne, D., "L'ambition de l'accord de Paris sur le changement climatique. Ou comment, par convention, réguler la température de l'atmosphère terrestre", *Aménagement-Environnement*, 2019, pp. 8-26.

8 Wirth, D., "Cracking down the American Climate Negotiators' Hidden Code: United States and the Paris Agreement", *Climate Law* 2016, nº 6, pp. 152-170; Wirth, D., "The International and Domestic Law of Climate Change: A Binding International Agreement Without the Senate or Congress?", Harvard Environmental Law Review 2015, vol. 39, nº 2, pp. 515-566; Esty, D., "Trumping Trump : Pourquoi l'Accord de Paris survivra", *Revue juridique de l'environnement* 2017, vol. 42, pp. 49-57.

9 Paris Agreement, art. 20.

10 Ibid, art. 4, §2 & §9.

communicate their own long-term low greenhouse gas emission development strategies.[11]

Besides the fact that it must be 'nationally determined' and that the exercise must be repeated every five years, the legal nature of the contribution is not explained in the Paris Agreement - such a contribution could be literally anything.[12] The only requisites that have been formulated so far are that the contribution must be expressed in written form and that each Party's successive nationally determined contribution will represent a progression (the jargon mobilized the notion of virtuous circles) and reflect its highest possible ambition.[13] From the observation of the interim registry maintained by the secretariat of the UNFCCC, where contributions are all made available online,[14] the party contributions often consist in pledges, with a focus on the notion of ambition in relation to mitigation efforts. Their substance is much about numbers and deadlines.[15]

Without any further elaboration or demonstration of the minimal necessary conditions that should be met for making this unusual bet successful, the game was first totally open – its main goal was to keep the international community together for a common project – but also very precarious, trusting the capacity of the world to spontaneously generate adequate responses to some of the biggest challenges of our time: decarbonize the economy and adapt to climate change.

Barely six years after the entry into force of the new treaty, the new 'bottom-up' paradigm is already showing its weaknesses and raising doubts regarding its capacity to deliver its own promises. At COP26 in November 2021, the Parties to the Paris Agreement had no other choice but to point out, 'with serious concern' (based upon a report on nationally determined contributions under the Paris Agreement, as prepared by the Secretariat of the Convention) that the aggregate greenhouse gas emission level, which takes into account the implementation of every submitted nationally determined contribution, is estimated at 13.7 per cent above the 2010 level in 2030,[16] thus not on track. At COP27 in 2022, Parties even felt the need to stress, in the preamble of the final cover decision, that

> *'the increasingly complex and challenging global geopolitical situation and its impact on the energy, food and economic situations, as well as the additional challenges associated with the socioeconomic recovery from the coronavirus pandemic, should not be used as a pretext for backtracking, backsliding or de-prioritizing climate action'.*[17]

11 Ibid, art. 4, §19.

12 The Parties could not reach an agreement in Paris, at COP21, on the minimal content or standardized format of such 'NDCs'. Further aspects were addressed during the first meeting of the Parties to the Paris Agreement, which extended formally on several years, in order to finalize a rulebook.

13 Paris Agreement, art. 4, §3: 'Each Party's successive nationally determined contribution will represent a progression beyond the Party's then current nationally determined contribution and reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances'.

14 Via: https://www4.unfccc.int/sites/NDCStaging.

15 See, for an independent aggregation of such pledges: https://climateactiontracker.org/climate-target-update-tracker/.

16 Glasgow Climate Pact, 13 Nov. 2021.

17 The Sharm el-Sheikh Implementation Plan, Nov. 2022.

At the time of writing,[18] Russia's war against Ukraine shows how, 30 years after the UNFCCC and despite the new Paris Agreement, the world economy is still fully cramped in its dependency on oil, gas and coal, with major geopolitical interests at stake. The Paris Agreement is not like any other multilateral treaty on the environment or on the economy: it embeds a truly formidable challenge, which requires a solid dose of foresight and innovation capacity, as far as institutions and legal aspects are concerned.

II. The loneliness of deciding on your own

In the post-Paris scenario, Parties look like children afraid of the dark. They find more comfortable to keep sitting around the fire and discussing together than doing their uneasy homework alone.

One can observe that the global community has become addicted to the 'COP'-moments and need to keep brainstorming together. With the consequence that national action seems to remain forever dependent upon the adoption of any new 'accord', whatever that legally means, as long as there is a new negotiation ongoing. The *Glasgow Pact* of November 2021 was very symptomatic in that regard; the *Faustian* notion of 'Pact' tries to build importance to a decision that does not even need to be formally endorsed at the domestic level, but acts as a barometer indicating the degree of global political commitment. Of course, the Paris Treaty was not perfectly fine-tuned and contained sensitive loopholes when it was adopted in 2015, like on Article 6. It needed decisive pieces beyond mere details, on the emergence or resurgence of carbon-market mechanisms, that were not even known at the moment of formal ratification procedures, questioning the depth of the adhesion to the whole project and explaining why Parties might want to have a better sight on the whole new global regime.

The crude reality anyway is that Parties must now act and move forward at their own Party level (with some latitude to do it jointly)[19] for achieving their own nationally determined contribution, whatever their content. 'Parties shall pursue domestic mitigation measures, with the aim of *achieving* the objectives of such contributions', reads article 4, §2, of the Paris Agreement. The formula imposes a best-efforts obligation, with regard to the unilateral pledge.

If these pledges are meant to deliver on their content, it is necessary, at the level of each Party, to truly embrace the new challenge and to assess the adequacy of existing laws and institutions, 'in their fundamental balances, in their essential principles, in their techniques but also in the way they apprehend the reality they intend to discipline',[20] both at the time of deciding on the content of the pledge ('the signal') and in order to guarantee its implementation ('the machinery').

Does a given State have the means to achieve its own ambitions, based upon its constitutional and institutional structures, with the tools that are already available? It might sound easy for Party Y to declare on the international scene that it shall exit coal, but does it truly have the power to materialize such pledge internally, based on its own constitutional and legislative acquis, even in the face of litigation and property rights claims?[21]

18 In April 2022, with a slight update in Nov. 2022.

19 Paris agreement, art. 4.

20 As inspired from the general orientation of the present climate change and public law dossier.

21 Misonne, D. et al. (2020), "Governing by the goals", op. cit.

There is no recipe on such key aspect in the Paris Agreement, not even in due regard of various legal traditions and kinds of political regimes. The transparency framework under article 13 of the Agreement only mentions the need to promote effective implementation, with no indication of any specific legal tool or guarantee whatsoever.

III. Is the lawmaker still in?

It can be argued that pledges become dead letter if domestic institutional frameworks are too weak to materialize them. In this kind of exercise, the activity of the domestic lawmaker is a necessity, for many reasons, both substantial and procedural, for guaranteeing the effectiveness of the new project. The mobilization of Parliaments engages with the fundamentals of our democracies. Parliaments are supposed to represent the people. Negotiations in Parliaments are observed, scrutinized. Parliaments have the power to create obligations but also to affirm new rights, with due respect to constitutional provisions. They also have the power to undo pre-existing legislation.

Under the European Convention of Human Rights and the Charter of the Fundamental Rights of the European Union,[22] any limitation on the exercise of fundamental rights and freedoms – the requirements of climate transition can bear on the rights of investors, of consumers, of individuals – must be provided for by the law and must respect the essence of those rights and freedoms. By virtue of the principle of proportionality, limitations can only be made if they are necessary and effectively meet objectives of general interest enshrined by the legislator or the need to protect the rights and freedoms of others. A mere pledge or program does not meet any of these requirements.

Law-making might also prove crucial in light of the risks of investor-state regulation under bilateral investment agreements. In its Opinion on the compatibility with the European Union constitutional framework of the Comprehensive Economic and Trade Agreement concluded between the EU and Canada, the European Court decided that the contentious arbitration mechanism was compatible with EU primary law, only because the new tribunal will not have jurisdiction to call into question 'the choices democratically made within the European Union' relating to, among others, the protection of the environment.[23] A mere pledge or strategy does not meet such requirements.

Law-making is also necessary to keep Constitutions alive and to confer concrete rights when, as in Belgium, constitutions have enshrined the protection of a healthy environment at the top of their hierarchy of norms. The actual justiciability of this constitutional guarantee however depends on what the legislature makes of it.

At last, the involvement of Parliaments in democratic countries brings all the obligations of public debate, transparency and public scrutiny, far away from closed-room discussions. They might not be open enough yet to welcome requests for stronger public participation and involvement, but proceeding without them undermines any serious intention to fight climate change. Interestingly, Parliaments have started to connect worldwide to help solving the climate crisis, share information and enhance political will.[24]

22 Charter, art. 52.

23 Opinion 1/17, ECLI:EU:C:2019:34.

24 See for instance: https://www.climateparl.net/about-us (consulted on 8 April 2022).

IV. Climate laws

In Europe, a noticeable trend after the Paris Agreement has been the adoption of 'climate laws', inspired by the UK Climate Act of 2008. The latter, conceived years before the adoption of the Paris Agreement, was admired for its novel concept: the statutory incorporation of a long-term transformation of society, trajectories based upon the notion of carbon budget, new accountability mechanisms benefiting from the support of a new independent Climate Change Committee with advisory and monitoring powers on climate governance at UK-economy wide level.[25]

The broader dissemination of the concept, as a suitable tool in the implementation of the Paris Agreement, has been one of the recurring demands of climate change activists or associations taking legal actions to advance climate protection.

The term climate law, in its new meaning, does not refer to all legislation dealing with greenhouse gases or adaptation to climate change, but specifically to legislative acts that endorse long-term objectives and set out the essential governance mechanisms needed to achieve them, like an independent scientific body and new structures that favour public participation and broad social dialogue, necessary in order to prevent the surge of new '*gilets jaunes*' uproar.[26]

The main purpose in adopting climate laws is to create a new legal narrative, a systemic approach promoting legal certainty (climate neutrality becomes a legitimate but also required expectation), to ease decision-making and planning processes, to guarantee an optimal coordination between competent authorities and to foster transparency and accountability, under the rule of law, in relation to climate governance at the national or devolved (in federal countries) level.

It might be naïve,[27] but it expresses the need to 'de-soft-alize' climate governance and make it more reliable. Even if the attempt to set a fixed goal in a changing world through mere legislation is a challenge to History.

In a recent report commissioned by the European Environmental Agency,[28] Evans and Duwe affirmed that the added value of climate laws is *evident* if they contain core good governance elements:

> *'at a bare minimum, well-formulated framework laws provide a normative foundation for climate action, facilitating the integration and mainstreaming of climate priorities across governmental agencies and ministries. Not only can they formally establish a coherent sys-*

25 Stallworthy, M., "Legislating Against Climate Change: A UK Perspective on a Sisyphean Challenge", *The Modern Law Review* 2009, vol. 72, issue 3, pp. 412-436; Averchenkova, A. et al., *Trends in climate change legislation,* 2017, Edward Elgar, 217 p.; Scotford E. et al., "Probing the hidden depths of climate law: Analysing national climate change legislation", *RECIEL* 2019, vol. 28, pp. 67–81; Nash, S. L. et al., "Taking stock of Climate Change Acts in Europe: living policy processes or symbolic gestures?", *Climate Policy* 2019, 1752-7457.

26 Misonne, D., "Lois climat", in Torre-Schaub M. et al., Dictionnaire du changement climatique, 2022, LGDJ.

27 Macrory, R., "Towards a Brave New Legal World?", in Backer, I., Fauchald, O. & Voigt, C., *Pro Natura*, 2012, Universitetsforlaget, Oslo, pp. 306-322; Stallworthy, M., "Legislating Against Climate Change: a UK Perspective on a Sisyphean Challenge", *Modern Law Review* 2009, vol. 72, nº 3, p. 412.

28 Evans, N. & Duwe, M., "Climate governance systems in Europe: the role of national advisory bodies", 2021, Ecologic Institute, Berlin; IDDRI, Paris.

tem of goals (targets) and means of achievement (cycles of action and planning), but they often lead to a professionalization of political structures by clearly assigning roles and responsibilities within government and creating new coordinating institutions or advisory bodies, composed of external scientific experts, stakeholders and public officials'.[29]

Climate laws of this kind have emerged at State level or even at decentralized levels, in countries like Finland, France, Denmark, Sweden, The Netherlands, Germany, the Walloon and Brussels Regions in Belgium, etc., all of different types but with similar features.

The European Union, as a Party to the Paris Agreement, did also recently adopt – as the cherry on the cake of an already very dense legislative package[30] – a 'European Climate Law', an official nickname given to Regulation 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality.[31] The Regulation establishes a framework for the *irreversible* and *gradual* reduction of anthropogenic greenhouse gas emissions by sources and enhancement of removals by sinks regulated in Union law.[32]

The legislative act is of the same vein; it mimicks, at the scale of 27 Member States, the same systemic approach: long-term (2050) and mid-term (2030) objectives at the Union level, identification of a dedicated scientific advisory board on climate change, provisions on public participation and multilevel dialogue on climate and energy, both at Commission and Member States level. The long-term climate neutrality objective imposes that Union-wide greenhouse gas emissions and removals regulated in Union law shall be balanced within the Union at the latest by 2050, thus reducing emissions to net zero by that date, and the Union shall aim to achieve negative emissions thereafter (article 2.1). The binding 2030 climate target at Union level 'shall be a domestic reduction of net greenhouse gas emissions (emissions after deduction of removals) by at least 55% compared to 1990 levels by 2030' (article 4, §1), imposing that the relevant Union institutions and Member States shall 'prioritise swift and predictable emission reductions and, at the same time, enhance removals by natural sinks'.

Another nickname given to the European climate law is "the law of laws", but it is abusive; the European Law does not have a special status. A law of laws on climate change should take the form of a revision of the Lisbon Treaty or of an alternative Treaty; the nuclear energy development project still benefits from a dedicated Treaty at the scale of the European Union, while the shift to carbon neutrality by 2050 at the latest, the requisites of energy efficiency and the pressing call for an industrial priority to renewable energies still only rely on secondary law. The long-term objectives ratified by the legislative assemblies can be easily modified by norms of the same level. The issue raises the question of the right scale at which to take on the challenge of climate neutrality. The adop-

29 Idem, p. 12.

30 Peeters, M. & Misonne, D., "The European Union and its rule creating force at the European continent for moving to climate neutrality by 2050 at the latest", in Reins, L. & Verschuuren J. (ed.), *Research Handbook on Climate Change Mitigation Law*, 2nd edition, 2022, Edward Elgar Publishing, pp. 58-101.

31 Reg. (EU) 2021/1119, 30 June 2021, of the European Parliament and of the Council establishing the framework for achieving climate neutrality and amending Reg. (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law'), OJ L 243, 9.7.2021, pp. 1–17.

32 Art. 1.1. Italics added.

tion of climate laws remains conditioned by the institutional and constitutional peculiarities of each legal order, in addition to political contingency.[33]

The existence of non-regression mechanisms can help avoid major drawbacks, at least not without an appropriate justification.[34] They could even arise in the near future from the progression clause contained in the Paris Agreement, as an element of interpretation of the laws applicable to climate matters. The recently adopted Sharm el-Sheikh Implementation Plan, as the consensually approved decision to conclude COP27 in 2022 is called, even admonishes its Parties that 'increasingly complex and challenging global geopolitical situation [...] should not be used as a pretext for backtracking, backsliding or de-prioritizing climate action.'

V. The fair share

Climate litigation[35] broke the traditional approach to climate governance which confined itself to a face-to-face discussion involving only States and the highest diplomatic relations. It is another way through which translocalism recently soaked in – showing how local action matter, especially when it is interconnected.

With the Urgenda case, the first success in a domestic Court in Europe, a non-profit organization forced the Dutch State to open its eyes and consider the people it must protect from climate change as a matter of civil liability and human rights protection for which the State is accountable by virtue of general, non-specialised law. The central argument of the action, which convinced the judges up to the Supreme Court,[36] relied first on a provision of the Dutch Civil Code and also on several provisions of the European Convention on Human Rights. The decision inspired a true wave of case-law across Europe,[37] for the analysis of which I refer to the dedicated chapters of the present yearbook. Most of them make sense together because they are somehow connected by various similarities, shaking up institutions and certainties.

In that context, important debates have occurred around the notion of 'fair share' and start being answered from the highest courts, that might help the local decision-maker in better appreciating the contours of its own responsibility.

In the aforementioned Urgenda case, the *Hoge Raad der Nederlanden* asserted that 'each country is responsible for its own share' of the global efforts expected from the international community; a State is obliged to reduce greenhouse gas emissions from its territory in proportion to its share of the responsibility. That responsibility is, according to

33 On that aspect, see in Belgium the difficulty to find an appropriate institutional 'space' to fix shared common goals, and discussions around a modification of the Constitution, as synthetized in Rolland, G. & Romainville, C., "Voyage au coeur de la notion de loi spéciale – Propositions de loi spéciale climat", 2020, Administration publique (APT), pp. 286-309; Davio, V., "La loi climat: une errance legislative face à l'urgence", *Aménagement-Environnement* 2021, pp. 6-20.

34 Prieur, M., & Sozzo, G., *La non régression en droit de l'environnement*, 2012, Bruylant, 547 p.

35 See the other contributions to the present yearbook.

36 Supreme Court of the Netherlands, 20 Dec. 2019, ecli:NL:HR:2019:2006, English translation ECLI:NL:HR:2019:2007.

37 See, among others, Torre-Schaub, M., Les dynamiques du contentieux climatiques, 2021, Mare-Martin, 462 p.; Cournil, C. (dir.), Les grandes affaires climatiques, 2020, éd. DICE, Confluences des droits. Available at : https://dice.univ-amu.fr/sites/dice.univ-amu.fr; Rochfeld, J., *Justice pour le climat ! : les nouvelles formes de mobilisation citoyenne*, 2019, Odile Jacob; Cournil, C. & Perruso, C., "Réflexions sur « l'humanisation » des changements climatiques et la « climatisation » des droits de l'Homme. Émergence et pertinence", La Revue des droits de l'Homme 2018, nº 14.

that highest Court, derived from the role model it accepted to endorse while ratifying the UNFCCC and from Articles 2 and 8 ECHR, because there is a grave risk that dangerous climate change will occur, endangering the livelihood of many people in the Netherlands.

The fair share must also be understood in an intergenerational perspective that puts the people of today and tomorrow – and not just the States - at the center of climate lawmaking.

The German Constitutional Court, in a judgement of March 2021, decided that even a Climate law can be wrong in its distribution of the share of a required effort in a given country, when there is imbalance across generations:[38]

> *'when Art. 20a GG obliges the state to protect the natural foundations of life – partly out of responsibility towards future generations – it is aimed first and foremost at preserving the natural foundations of life for future generations. But at the same time, it also concerns how environmental burdens are spread out between different generations'. [...] The objective protection mandate of Art. 20a GG encompasses the necessity to treat the natural foundations of life with such care and to leave them in such condition that future generations who wish to carry on preserving these foundations are not forced to engage in radical abstinence ([...]). It is thus imperative to prevent an overly short-sighted and thus one-sided distribution of freedom and reduction burdens to the detriment of the future'.*[39]

At last, the appropriate share of each sector or of each region, in countries like Belgium that do not yet approach their climate governance policy in a wider perspective, proves to become a difficult issue that tends to be passed to the lower possible level of decision-making, under the argument of subsidiarity or due to the specific allocation of competences, not yet updated in the light of the climate challenge. In Belgium, the Brussels Court of First Instance, a lower court, held in June 2021 that the Federal State and the three regions (detaining a full legislative power) breached their duty of care, precisely because they failed to optimally coordinate their climate policies (and also failed to adequately protect the human right to life and to housing).[40] It is true that the implementation of climate policies, which is necessarily transversal in nature, is a real challenge in the Belgian federal State, in which the distribution of competences functions according to a logic of enumeration of competences attributed to the federated entities or reserved to the federal authority, and not on the basis of a distribution of objectives between the different entities, as observed by the lower Court. However, the federal structure does not exempt the federal state or the federated entities from their obligations: climate policy

38 BVerfG [Federal Constitutional Court], 24 March 2021, Case No. BvR 2656/18/1, BvR 78/20/1, BvR 96/20/1, BvR 288/20, ECLI:DE:BVerfG:2021:rs20210324.1bvr265618 (Neubauer). Available at: http://www.bverfg.de/e/rs20210324_1bvr265618en.html; Kotzé, L., "Neubauer et al. versus Germany: Planetary Climate Litigation for the Anthropocene?", *German Law Journal* 2021, vol. 22, issue 8, pp. 1423-1444, doi:10.1017/glj.2021.87; Roller, G., "Les juges peuvent-ils sauver le climat ?, in Sambon, J. & Haumont, F., L'environnement, le droit et le magistrat, 2021, Larcier, pp. 275-300.

39 Para. 193 & 194, official translation.

40 Trib. Brussels, Klimaatzaak, 17 June 2021 (appeal is currently pending).

is a shared responsibility and should therefore be exercised in the context of loyal cooperation. The Court finds that climate emergency and international and European commitments, 'gives this natural obligation of cooperation between the different entities of the country a stronger normative scope in such a way that it can be integrated into the general duty of care imposed on each of the four defendants'.[41]

VI. The rise of cities and municipalities

While Parties – States and the European Union as a whole – struggle to specify and implement their own ambition, many other actors have also become essential key drivers in the expected social transformation. Among the so-called 'non-state' actors, cities gain influence for many reasons, related to power and personal stakes: their proximity to the territorial aspects, their possibility to grasp and show the concrete results of their own efforts on local aspects such as housing, mobility and public procurement conditions, not to mention the damage they have endured and will endure from climate change – floods, heating waves, water scarcity, etc.[42]

In France, it is the municipality of Grande Synthe, near Dunkerque, which obtained an important judgement from the French Conseil d'Etat, in two phases, on 19 November 2020[43] and July 1st, 2021,[44] in which the higher administrative court found that France had substantially exceeded the first carbon budget it set for itself, and ordered the French Government to adopt additional measures by the end of March 2022 (under the threat of a possible penalty, an *astreinte*). The carbon budget must thus be interpreted as an obligation to reach a result. The locus standi of the municipality was easy to demonstrate, being exposed to increased and high risks of flooding, to an amplification of episodes of severe drought with the effect not only of a reduction and degradation of freshwater resources but also of significant damage to built-up areas given the geological characteristics of the soil. The *Conseil d'Etat* decided that 'although these concrete consequences of climate change are only likely to have their full effect on the territory of the municipality by 2030 or 2040, their inevitability, in the absence of effective measures taken quickly to prevent their causes and in view of the time frame for action by public policies in this area, is such as to justify the need to act without delay to this end'.[45] Moreover, the Paris region and the Grenoble conurbation were identified by the National Observatory on the effects of global warming as having a very high exposure index to climate risks. In this respect, the City of Paris and the City of Grenoble argued that the phenomenon of global warming will lead to a significant increase in the intensity and duration of heat peaks observed on their territory, as well as a significant increase in winter rainfall, which will raise the risk of major flooding. In those circumstances, the *Conseil d'Etat* also ruled that those two local authorities had a sufficient interest in intervening in support of the annulment of contested governmental decisions.

41 Ibid, p. 75.

42 See Misonne, D. & Sikora, A., "Why Cities Do Become Vocal and is Law Ready to Hear them? Exploration through the lens of climate governance", in Chevalier, E., Cities and Climate Change, 2023, Springer, forthcoming.

43 CE, 19 Nov. 2020, req. nº 427301, *Commune de Grande-Synthe*.

44 CE, 1 July 2021, req. nº 427301, ECLI:FR:CECHR:2021:427301.20210701.

45 CE, 19 Nov. 2020, req. nº 427301, op. cit, §4.

Cities thus emerge into the limelight by provocation (they do not hesitate to defy the State) or/and by substitution, if the State *de facto* resigns from its responsibilities, as observed in the US under the Trump presidency, where cities and States drove alternative actions, to circumvent federal inertia. Due to their transnational capacity, already installed in relation to other fields,[46] such as energy, waste or water management, cities and municipalities discuss beyond borders. They even forge alliances, coalitions, global partnerships,[47] with the result that they have progressively become much stronger together and have developed their own standardized set of concrete duties. In its April 2022 report, the Intergovernmental Panel on Climate Change admits that transnational networks of city governments are leading to enhanced ambition and policy development and a growing exchange of experience and best practices.[48]

Conclusion

The Paris Agreement is meant to enhance the implementation of the original 1992 United Nations Framework Convention on Climate Change, which aims to stabilize greenhouse gases emissions at a level that would prevent dangerous anthropogenic interference with the climate system.[49] To meet its own goals, such as balancing anthropogenic emissions of greenhouse gases by sources and their removals by sinks in the second half of this century, the Paris Agreement has chosen to rely on the pledges of its own Parties, all made in good faith, and to discuss this collection of individual efforts in episodic moments of 'global stocktaking'.[50] The formula sounds overoptimistic. It has never been tested before, and it is not even based on a foundation in human and social sciences studies where the exact and ideal recipe could be found. It is, instead, the bitter result of international diplomacy and of decades of trial-and-error processes. Against such a difficult backdrop, the reinvented reliance upon nationally determined initiatives, and therefore upon the individualized level of Parties (local, by contrast to global), bounced back. It was rapidly strengthened by transversal dynamics showing that local does not *per se* mean isolate, a fortiori in the digital age where the information is shared instantly. Inspirational models and concepts transcending borders have indeed emerged – climate laws, climate litigation, climate networks and fair share. These do help guiding or even moulding 'local' decision-making as far as legal and institutional issues are concerned. Global climate governance is turning translocal. Whether it will truly help achieving the shared goals in due time remains to be seen.

46 Like Eurocities (1986), Energy Cities (1990), Local Governments for Sustainability (ICLEI) (1991), United Cities and Local Government (UCLG) (2004).

47 Like Climate Alliance (1990), C40 - Cities Climate Leadership Group (2006), the Covenant of Mayors (2008 – Europe), the Compact of Mayors (2014), the Global Covenant of mayors, etc.

48 Working Group III contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, April 2022, E.6.3, p. 64.

49 UNFCCC, art. 2.

50 Paris agreement, art. 14 : 'The Conference of the Parties serving as the meeting of the Parties to this Agreement shall periodically take stock of the implementation of this Agreement to assess the collective progress towards achieving the purpose of this Agreement and its long-term goals (referred to as the "global stocktake"). It shall do so in a comprehensive and facilitative manner, etc'.

fypl
french yearbook *of* public law
Issue 1, 2023

America's climate change policy: Federalism in action

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Abstract:

This article provides a survey of the diverse approaches adopted by various states and municipalities in the United States to address climate change, highlighting their role in driving progress despite federal gridlock. It also examines the challenges that arise due to the absence of national leadership, particularly the potential for regulatory competition among subnational jurisdictions to undermine the competitiveness of climate change leaders.
Part I outlines the American policymaking landscape, emphasizing the decentralized nature of the political system that empowers governors and mayors as climate change leaders and innovators. Part II catalogs the array of climate change policy tools employed by state and municipal governments, including greenhouse gas reduction targets, renewable energy standards, regional greenhouse gas pricing initiatives, public utility regulation, and state-level clean energy incentives. Part III delves into the political strategies underpinning these policymaking efforts, such as interstate agreements, private litigation, and state constitutional amendments.
Part IV raises concerns about the potential for multi-layer governance to impede policy progress, particularly in the context of deep national divisions on climate change.
Part V offers reflections on the advantages and disadvantages of the U.S. federalism model in addressing climate change, providing valuable insights into the intricate landscape of climate governance in the United States.

Keywords:

U.S. Environmental law, Climate governance, U.S. federalism

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Introduction

Climate change presents an especially challenging policy problem with global scope, a multi-generational timeframe, and an extensive array of greenhouse gas (GHG)-emitting activities that must be addressed including power generation; transportation; the manufacturing; production, packaging, and distribution of goods; the heating, cooling, and lighting of buildings; agriculture, and land use. This scope demands a comprehensive policy that cuts across all departments of national governments (thus *horizontally* broad) and from policymakers at all levels of government—from global to local (thus *vertically* deep).[1] The ambitions articulated in the 2015 Paris Climate Accord and reiterated in the 2021 Glasgow Climate Pact lay out the steps necessary to avert the worst impacts of climate change and to avoid transgressing other planetary boundaries.[2] Across the world, progress on these goals has proceeded unevenly and inconsistently—with some countries offering leading-edge strategies and real GHG emissions control commitment and others lagging in both climate change vision and execution.[3]

In the United States, the same pattern of leading and lagging jurisdictions emerges across the sub-national governments, including 50 states and thousands of local governments. This multi-layered governance structure (often described as *federalism*) is both a strength and a weakness in terms of governance in general and the nation's ability to respond to climate change in particular. The multiple actors and institutional power centers make unified action harder to achieve, but the diversity of political leaders in power at the federal, state, and local levels at any time – each with their own zone of authority – diversifies the nation's policymaking structure and can serve as a backstop against policy failure. Specifically, when one layer of government or set of officials falters in response to a critical challenge, others will be positioned to take up the slack and advance the policy agenda within their own jurisdictions.

Indeed, the U.S. federal government has been hampered in its ability to respond to climate change over the past several decades by deep political divisions that have been extensively documented. In particular, while the 2015 Paris Climate Change Agreement galvanized policy action many nations, the redoubling of the global commitment to reduce GHGs occurred at a challenging moment in American politics. Barack Obama was in the twilight of his presidency, and his party had fallen into a minority position in both houses of Congress. And just days after the Paris Accord came into effect, Donald Trump was elected President, having campaigned on a platform that called climate change a hoax. Trump wasted no time in announcing that the United States would withdraw from the 2015 Paris Agreement—and his Administration backed up that commitment by backtracking on the Obama administration's environmental regulatory program, including the *Clean Power Plan*, meant to ensure the emissions reductions to which the United States had committed under its Paris Agreement *nationally determined contri-*

1 Esty, D.C. & Geradin, D., "Regulatory Co-Opetition", *Journal of International Economic Law* 2000, vol. 3, issue 2, pp. 235- 255.

2 See Rockström, J. et al., "Planetary Boundaries: Exploring the Safe Operating Space for Humanity", *Ecology & Society* 2009, vol. 14, issue 2, 1-33, p. 32. See also Rockström, J., *Big World, Small Planet*, 2015, Yale University Press.

3 See "Environmental Performance Index 2020," Yale Center for Environmental Law & Society. Available at: https://envirocenter.yale.edu/2020-environmental-performance-index (last visited 10 november 2022).

bution to global climate change action.[4]

In many countries, the inauguration of a government hostile to any meaningful action to combat climate change would spell the end of forward-thinking environmental policymaking in that nation – at least for that election cycle. But policy progress in the United States is determined not only by the direction set by the president but also by the policy choices and political leadership of governors and mayors. While the federal government has an outsized role in establishing the contours of environmental policy, subnational governments—namely, states and municipalities—play a significant role in determining the direction and vigor of environmental protection efforts including GHG emissions control.

During the four years of the Trump administration, many states and municipalities pursued aggressive environmental policies and forward-leaning climate change policies—countering the weak commitment to action at the federal level. Ten states, as well as nearly three hundred cities and counties, joined the *We Are Still In Coalition* of entities committed to honoring the U.S. commitment to the 2015 Paris Accord. Many of those same states repeatedly sued the federal government to stop the rollback of environmental regulations and to protect their freedom to set standards higher than the federal government proposed. Many governors and mayors stepped up to the climate change challenge and undertook extensive efforts in their states and cities to expand renewable electricity generation, promote energy efficiency, develop adaptation plans, and invest in resiliency in the face of rising risk from climate change.

The election of Joe Biden as President in 2020 delivered not just a new President, but a new approach to environmental policymaking at the federal level. President Biden announced what he called an "all of government" approach to climate change, which sought to link together the different departments and policy tools of the federal government to develop a broad-gauge and cohesive response to climate change. While the new Administration was able to rally a bipartisan majority of the Congress to pass major infrastructure legislation – which includes investments in public transportation and infrastructure resilience –Congress remained deeply divided over the Biden Administration's "Build Back Better" agenda that proposed to spend half a trillion dollars to advance the U.S. transition to a clean energy future.

Recognizing the limited potential for climate change policy progress in Washington, many governors and mayors continued to chart their own course on climate change and blaze paths toward deep decarbonization. This article surveys the approaches taken by different states and municipalities across the United States and explores how these initiatives have helped to ensure a measure of climate change progress despite gridlock in Washington. But it also highlights the challenges that arise when national leadership is lacking – noting in particular that *regulatory competition* across the subnational jurisdictions may undermine the competitiveness of the states and cities that have staked out climate change leadership positions.

Part I offers an overview of the policymaking landscape in the United States, focusing specifically on the unique features of the American political system that encourage the diffusion of power across several different levels of government—positioning governors and mayors to be climate change leaders and policy innovators. In Part II catalogues the

4 Sourgens, F.G., "The Paris Paradigm", *University of Illinois Law Review* 2019, vol. 2019, issue 5, pp. 1637-1700; Davis Noll, B.A. & Revesz, R.L., "Regulation in Transition", *Minnesota Law Review* 2019, vol. 104, issue 1.

climate change policy tools used by state and municipal governments across the country, focusing primarily on greenhouse gas reduction targets, renewable energy standards, regional GHG pricing initiatives, and public utility regulation, as well as state government clean energy incentives and financing. Part III explores the broader political strategies behind different policymaking efforts—including interstate agreements and coalitions, private litigation, and state constitutional amendments. Part IV acknowledges the risk that multi-layer governance will slow – rather than advance – policy progress and may result in policy stasis when the nation is deeply divided on an issue as it has been for several decades with regard to climate change. Part V concludes with some reflections on the advantages and disadvantages of America's *federalism* in the climate change context.

I. America's *federalist* policymaking landscape

Before jumping into the specific policies enacted, and strategies pursued, by state and local governments in the United States in response to climate change, some notes about the American political system and policymaking structure are in order. Most notably, America's *federalism* distributes power among federal, state, and local governments in a unique and rather complex fashion that results in a policymaking process that is *highly diffuse*, *deeply democratic*, and in *constant flux* – as policy leadership ebbs and flows across these multiple levels of decision-making and authority.

America's policymaking structure is highly diffuse in that authority is distributed both vertically (among agencies and departments at the same level of government) and horizontally (among different governments at the federal, state, and local levels).[5] At the national level, environmental policy is shaped by a number of federal agencies, departments, and commissions—including the Environmental Protection Agency, the Department of the Interior, the Department of Energy, the National Oceanic and Atmospheric Administration, Federal Energy Regulatory Commission, and (perhaps surprisingly) the Department of Defense – not to mention the energy and environmental advisors within the White House. A similar horizontal distribution of power exists at the state and local levels with state-level departments of environmental protection, energy officials, natural resource management agencies, and public utility commissions jockeying for policy leadership and influence – under the direction of a governor and their political team.

Note, however, that at the state and local levels, there are considerably more divisions of government that make and set policy. Not only is there an overarching *state* government, but in most states, there are also *county* and *city* (collectively, *municipal*) governments. And some states have authorized *special districts* that transcend city and county boundaries and provide services and governance functions – such as schools, water supply, electricity, sewage treatment, or waste management – in a particular geographic area.[6] In some places, these special districts play a critical role in developing local responses to climate change—and are worth noting as key environmental policymakers.[7]

5 See, e.g., Esty, D.C. & Geradin, D. (2000), op. cit.; Esty, D.C. & Geradin, D., *Regulatory Competition and Economic Integration: Comparative Perspectives,* 2001, Oxford, Oxford University Press.

6 Mullin, M., Governing the Tap: Special District Governance and the New Local Politics of Water, 2009, MIT, MIT Press, pp. 191–93.

7 Ibid.

Relatedly, the vertical and horizontal distribution of policymaking authority in the United States is constantly in flux—as political leadership changes with each election cycle and dominant personalities come and go. This fluid leadership structure layers even more complexity onto an already-complicated system. On some issues (but not all) higher-level governments have the power to *pre-empt* lower-level government policymaking. The conditions under which the federal government can pre-empt state governments are complicated (and outside the scope of this article), but worth noting nonetheless.[8] At the state level, local governments like counties and cities are considered to be *creatures of the state*—that is, that they exist only by virtue of the state government that authorized their existence and delegated certain powers to them. The supremacy of state government over local government allows the state government (in most cases) to both invalidate locally determined policies and to ban localities from setting certain kinds of policies, including environmental policies.[9]

II. State and municipal climate change governance

In 1932, Supreme Court Justice Louis Brandeis coined the term "laboratory of democracy"—referring to the possibility that particular U.S. states might adopt "novel social and economic experiments without risk to the rest of the country."[10] The vision of fifty states trying out different policy approaches to a problem and providing a test bed for a range of strategies and technologies has had enduring impact – including on America's response to climate change.

Although the history of state-level environmental regulation goes back to the 1950s and 1960s, state-level climate change governance traces back to the early 2000s, when a number of states began adopting individual and collective policies to combat climate change in the face of perceived federal inaction. And in the past 15 years, states have begun to assert themselves in the realm of energy policy—an area previously understood to be in the domain of the federal government. Once again, this sub-national leadership can be traced to frustration with the perceived failures of the federal government to adequately promote the expansion of renewable power and energy efficiency. In recent years, sub-national climate change policies have grown more ambitious and encompassing—and have been adopted with enthusiasm by more states (and cities) around the country. Though many of the conversations taking place today in sub-national policy circles still center on direct ways to reduce GHG emissions, the initiatives have also begun to encompass indirect efforts to use state powers to drive climate change progress. For example, a number of states have started to put environmental/social/governance (ESG) screens on their pension fund investments—aiming to spur the private sector to-

8 See Weiland, P.S., "Federal and State Preemption of Environmental Law: A Critical Analysis", *Harvard Environmental Law Review* 2000, vol. 24, pp. 237-86. For an example of how federal environmental law can preempt state-level environmental regulations, see United States Court of Appeals for the Second Circuit, 1 Aug. 2003, F.3d 388, 82, Clean Air Markets Group v. Pataki (striking down New York's restriction on acid-rain cap-and-trade system under federal preemption).

9 Turner, A., "When State Preemption of Local Climate Laws Undermines Equity", Columbia Law School Sabin Center for Climate Change Law: Climate Law Blog, 5 March 2021. Available at: http://blogs.law.columbia.edu/climatechange/2021/03/05/when-state-preemption-of-local-climate-laws-undermines-equity/.

10 SCOTUS, 21 March 1932, U.S. 285, 262, *New State Ice Company v. Liebmann*.

ward more meaningful, climate-conscious business models. In this Part, we explore climate change governance, adaptation, and resilience policies in a series of distinct, but interrelated, areas: (a) greenhouse gas emissions regulations; (b) renewable energy standards; (c) use of various state government tools to align finance with sustainability goals; (d) the adoption of *green banks* by some states and cities to flow resources to energy efficiency and clean energy infrastructure; and (e) city-scale climate change programs.

A. State Efforts to Reduce Greenhouse Gas Emissions

In the early 2000s, with prospects for bold environmental policies at the federal level dimmed by the George W. Bush Administration's ongoing commitment to fossil fuel extraction, a coalition of states sued the federal government to force a more robust response to climate change. This litigation, which came to be known as *Massachusetts v. EPA*, culminated in 2007 with the U.S. Supreme Court ordering the EPA to reconsider its decision not to regulate GHGs.[11]

But the Bush Administration's reluctance to combat climate change and the trouble the Obama Administration had in the following years galvanizing congressional majorities for real climate change action, opened the door to subnational leadership. Indeed, as of 2022, 23 states and the District of Columbia have adopted GHG reduction targets as have more than 600 municipalities.[12] Two efforts are worth special mention: (a) the Regional Greenhouse Gas Initiative (RGGI) and (b) the California Global Warming Solutions Act.

In 2005, a group of Mid-Atlantic and New England states created RGGI, "the first mandatory cap-and-trade program for carbon dioxide in the U.S."[13] On the opposite side of the country, California adopted the Global Warming Solutions Act of 2006, which required an 80% reduction from 1990 levels in greenhouse gas (GHG) emissions by 2050—and empowered the California Air Resources Board to set up a cap-and-trade regime to deliver the mandated GHG reductions.[14]

1. Regional Greenhouse Gas Initiative (and Other Regional Efforts)

RGGI—which currently includes the states of Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, Vermont, and Virginia—is designed to reduce carbon emissions from the power sector by setting emissions-reduction targets and issuing carbon dioxide *allowances* based on those targets. Allowances are sold to power plants at quarterly regional auctions – and can be traded and

11 See SCOTUS, 2 April 2007, U.S. 549, 497, Massachusetts v. Environmental Protection Agency.

12 See, e.g., "U.S. State Greenhouse Gas Emissions Targets", Center for Climate Change & Energy Solutions, March 2021. Available at: https://www.c2es.org/document/greenhouse-gas-emissions-targets/; Pulver, D.V., Bowman, S. & Wilson, J., "Hundreds of Cities Have Adopted Climate Plans", USA Today, 10 Aug. 2021. Available at: https://eu.usatoday.com/story/news/investigations/2021/08/10/hundreds-u-s-cities-already-adopted-climate-plans-what-happened/5541049001/.

13 Thompson, V.E. & Arroyo, V., "Upside-Down Cooperative Federalism: Climate Change Policymaking and the States", *Virginia Environmental Law Review* 2011, vol. 29, issue 1.

14 Nichols, M.D., "California's Climate Change Program: Lessons for the Nation", *Journal of Environmental Law and Policy* 2009, vol. 27, issue 2, pp. 185-212.

resold on secondary markets. State proceeds from the allowances are, in turn, directed to improving energy efficiency and increasing the availability of renewable energy.[15] The allowances are also subject to some fluidity based on market forces. If the trading prices of allowances exceed a built-in maximum—which, in 2021, was set at 13 USD per allowance—then additional allowances will be released from the Cost Containment Reserve to avoid a dramatic increase in energy prices. Alternatively, if trading prices fall below a built-in *minimum*—set at 6 USD per allowance in 2021—then allowances will be removed from the market to the Emissions Containment Reserve – thus establishing a price floor.

Participation in RGGI has ebbed and flowed based on political developments in the current and prospective member states. Though New Jersey was one of the original members of RGGI, the defeat of Democratic Governor Jon Corzine for re-election in 2009 by Republican Chris Christie subsequently resulted in New Jersey's withdrawal from the Initiative.[16] Likewise, the election of Democrat Phil Murphy as Christie's successor in 2017 resulted in New Jersey's *re*-entrance.[17] In Virginia, Ralph Northam's election as Governor in 2017, followed by Democratic control of the state legislature in the 2019 elections, resulted in its joining RGGI, as well[18]—but Virginia's participation has been reversed by Republican Glenn Youngkin, who was elected Governor in 2021.[19] But participation does not always follow party lines. For example, the election of moderate Republicans Larry Hogan and Charlie Baker as governors of Maryland and Massachusetts, respectively, in 2014 did not meaningfully alter their states' participation in RGGI; both continued to push for further cuts in carbon emissions.[20]

Policy analyses have shown that RGGI has resulted in lower carbon emissions in member states without substantial increases in the energy prices enjoyed by consumers.[21] The

15 "Elements of RGGI", Regional Greenhouse Gas Initiative, 2022. Available at: https://www.rggi.org/program-overview-and-design/elements.

16 Navarro, M., "Christie Pulls New Jersey from 10-State Climate Initiative", New York Times, 26 May 2011. Available at: https://www.nytimes.com/2011/05/27/nyregion/christie-pulls-nj-from-greenhouse-gas-coalition.html.

17 Plumer, B., "New Jersey Embraces an Idea It Once Rejected: Make Utilities Pay to Emit Carbon", New York Times, 29 Jan. 2018. Available at: https://www.nytimes.com/2018/01/29/climate/new-jersey-cap-and-trade.html.

18 Vogelsong, S., "Virginia Lawmakers Agreed to Join a Regional Carbon Market. Here's What Happens Next", Virginia Mercury, 14 April 2020. Available at: https://www.virginiamercury.com/2020/04/14/virginia-lawmakers-agreed-to-join-a-regional-carbon-market-heres-what-happens-next/.

19 Larsen, P., "Governor Youngkin Faces Opposition, Legal Questions Over Order to Pull VA out of Carbon Market", Virginia Public Media, 26 Jan. 2022. Available at: https://vpm.org/news/articles/29219/governor-youngkin-faces-opposition-legal-questions-over-order-to-pull-va-out-of.

20 See, e.g., Abel, D., "In Landmark Agreement, Mass., Eight Other States Vow to Cut Transportation Emissions", Boston Globe, 18 Dec. 2018. Available at: https://www.bostonglobe.com/metro/2018/12/18/landmark-agreement-mass-eight-other-states-vow-cut-transportation-emissions/kzsX7xUw3l5R2x5AIC47UK/story.html; Wood, P., "Maryland Joins 8 Other States in Carbon Emission Cuts", Baltimore Sun, 23 Aug. 2017. Available at: https://www.baltimoresun.com/news/
environment/bs-md-hogan-carbon-emissions-20170823-story.html.

21 E.g., Murray, B.C. & Maniloff, P.T., "Why Have Greenhouse Gas Emissions in RGGI States Declined? An Economic Attribution to Economic, Energy Market, and Policy Factors", *Energy Economics* 2015, vol. 51, pp. 581-589; Hibbard, P.J., Tierney, S.F., Darling, P.G. & Cullinan, S., "The Economic Impacts of the Regional Greenhouse Gas Initiative on Nine Northeast and Mid-Atlantic States", Analysis Group, April 2018. Available at: https://www.analysisgroup.com/globalassets/uploadedfiles/content/insights/publishing/analysis_group_rggi_report_april_2018.pdf.

emissions allowance auctions have also generated billions of dollars in revenue for the RGGI state clean energy programs. However, as might be expected in a federal system like that of the United States, the creation of RGGI has resulted in some amount of *carbon leakage*[22] as GHG-emitting manufacturing activities shifted from states with stricter environmental rules—like RGGI member states—to those without climate change regulations in place. A 2018 study suggested that the greenhouse gas emission reductions brought about by RGGI have been "partially offset by increase[s] in emissions" in non-member states.[23] Although RGGI did result in some amount of leakage, "the policy motivated a reduction of emissions-intensive generation in the regulated region *and* an expansion of relatively cleaner generation in the unregulated region leading to an aggregate reduction of emissions across the regulated and neighboring unregulated regions."[24] The extent to which RGGI results in counterproductive carbon leakage, however, requires further study and highlights the risk of competitive disadvantage to jurisdictions that step out in front of their trade partners and competitors in terms of climate change policy commitments—a challenge the EU has also faced.[25]

Some observers feared that RGGI might face a challenge as to its constitutionality insofar as the U.S. Constitution prohibits states from "enter[ing] into any agreement or compact with another state" without congressional permission.[26] But given that RGGI is entering its third decade of operation, the likelihood of such a challenge now seem unlikely. Moreover, the U.S. Supreme Court's current test for evaluating the constitutionality of such compacts suggests that RGGI is permissible.[27]

Despite RGGI's success with regard to electric utilities, efforts to expand GHG pricing to other sectors across the RGGI states has faltered. In 2020, a coalition of states and municipalities tentatively agreed to form the Transportation and Climate Initiative (TCI), which would have created a similar cap-and-trade program for greenhouse gas emissions from cars.[28] But concerns about the effects of the initiative on fuel prices and competitiveness resulted in a number of states declining to join TCI. And in 2021, Connecticut withdrew from the Initiative,[29] in turn triggering withdrawals from other states and

22 Dominioni, G. & Esty, D.C., "Designing Effective Border-Carbon Adjustment Mechanisms: Aligning the Global Trade and Climate Change Regimes", *Arizona Law Review* forthcoming 2023, 53.

23 Ferll, H. & Maniloff, P., "Leakage in Regional Environmental Policy: The Case of the Regional Greenhouse Gas Initiative", *Journal of Environmental Economics and Management* 2018, vol. 87, issue C, pp. 1-23.

24 Ibid.

25 See, e.g., Bednar-Friedl, B., Schinko, T. & Steininger K.W., "The Relevance of Process Emissions for Carbon Leakage: A Comparison of Unilateral Climate Policy Options with and without Border Carbon Adjustment", *Energy Economics* 2012, vol. 34, issue S2, pp. S168-S180; Kama, K., "On the Borders of the Market: EU Emissions Trading, Energy Security, and the Technopolitics of 'Carbon Leakage'", *Geoforum* 2014, vol. 51, pp. 202-212.

26 Constitution of the United States of America, art. I, s 10, cl. 3; Ferrey, S., "Goblets of Fire: Potential Constitutional Impediments to the Regulation of Global Warming", *Ecology Law Quarterly* 2008, vol. 35, 835-905, pp. 900–03.

27 See, e.g., "The Compact Clause and the Regional Greenhouse Gas Initiative", *Harvard Law Review* 2007, vol. 120, 1958-1979, pp. 1960–68.

28 Storrow, B., "Northeast States Abandon Cap-and-Trade Plan for Cars", Energy and Environment News: ClimateWire, 22 Nov. 2021. Available at: https://www.eenews.net/articles/northeast-states-abandon-cap-and-trade-plan-for-cars/.

29 Altimari, D. & Keating, C., "Gov. Lamont Says He Will No Longer Push for Climate Change Legislation That Republicans Say Could Raise Gasoline Prices", Hartford Courant, 16 Nov. 2021. Available at: https://www.courant.com/politics/hc-pol-ned-lamont-tolls-tci-20211116-q2t7u2kp7bhm3bwhtakjgobsfm-story.html.

the death of the TCI program.[30] The unraveling of TCI shows that Governors remain very focused on the possibility that GHG pricing initiatives will be perceived as a tax increase and further worried that burdening business with higher costs than exist in other (less climate change-minded) states will result in competitive disadvantage.

2. California's Global Warming Solutions Act(s)

As states in the Northeast banded together to form the Regional Greenhouse Gas Initiative, California charted its own path. Under the leadership of then-Governor Arnold Schwarzenegger, a Republican, the state legislature passed the Global Warming Solutions Act in 2006, which required a reduction to 1990 levels of greenhouse gas emissions by 2020—and then an 80% reduction thereafter by 2050. The legislature further strengthened its reduction targets by passing the Global Warming Solutions Act of 2016, which accelerated the timeline and required a 40% reduction of emissions by 2030.

The 2006 Act faced stiff opposition from industry groups in the state – who took their case to the public. Notably, California gives voters a potentially significant role in the legislative process—by allowing citizens to petition (by gathering signatures to put a *proposition* before the voters in the next election) for repeal of legislative enactments and to propose their own statutes. In 2010, in a show of public support for stricter environmental rules, an industry-backed effort to weaken Proposition 23 was defeated by a wide margin.

The implementation of the Act—and its supplements—has been largely placed in the hands of the California Air Resources Board (CARB), the state's air pollution control authority. In the past several decades, CARB has moved aggressively to limit greenhouse gas emissions under the leadership of its longtime chairwoman, Mary Nichols.[31] In addition to overseeing the state's emission reduction targets generally, it has also set higher standards than the federal government for vehicle emissions. Though states are generally barred from setting emissions standards (including vehicle fuel economy requirements) more restrictive than the federal government's, the Clean Air Act expressly grants California the right to set higher standards,[32] which it has repeatedly done. And when the Trump Administration tried to block California from exercising this right, California pushed back aggressively with a series of lawsuits. The transition from the Trump to Biden administrations ultimately obviated the conflict, with the EPA continuing California's waiver in 2022.[33] In further advancing the California's climate change action agenda, CARB adopted in 2019 a Tropical Forest Standard, which requires that any GHG emissions credits (intended to offset carbon dioxide emissions) used in the state's allowance trading system must comply with strict environmental safeguards.[34]

30 Prevost, L., "Transportation Pact is Likely Totaled, But Equity Components Could Be Salvaged", Energy News Network, 23 Nov. 2021. Available at: https://energynews.us/2021/11/23/transportation-pact-is-likely-totaled-but-equity-components-could-be-salvaged/.

31 Purdum, T.S., "The 'Queen of Green's' Coming Bout with Trump", Atlantic, 2 Oct. 2018. Available at: https://www.theatlantic.com/politics/archive/2018/10/trumps-coming-showdown-with-californias-queen-of-green/571051/.

32 United States Code 42, s 7543.

33 Newburger, E., "Biden Restores California's Ability to Impose Stricter Auto Pollution Limits", CNBC News, 9 March 2022. Available at: https://www.cnbc.com/2022/03/09/biden-restores-california-ability-to-set-its-own-auto-pollution-rules.html.

34 Moench, M., "California Approves Controversial Tropical Forest Offsets Plan", San Francisco Chronicle, 19

3. Cumulative State-Level Clean Energy Regulatory Requirements

Given that 12% of Americans live in California and another 16% live in RGGI states, more than a quarter of all Americans face some form of GHG pricing. In addition, 38 states and the District of Columbia have adopted *renewable portfolio standards* (RPS), which require their power companies to ensure that an ever-increasing percentage of the electricity that they sell comes from clean-energy sources. Thus, while America's federal climate change policies lag behind many European nations, its actual on-the-ground GHG emissions reductions have been substantial with 2020 emissions down 20% from 2005.[35]

C. Aligning Finance with Sustainability Goals

Global progress on climate change requires not just on government action, but investments, innovation, and behavioral change from private parties as well. In recent years, a growing number of sustainability-minded investors, consumers, and community leaders have mounted efforts to spur GHG emissions reductions. As a result, corporate leaders come to see their role as requiring more than delivering maximal returns to their stockholders. They increasingly recognize that their *social license to operate* requires a commitment to stakeholder responsibility.[36] In 2019, for example, the Business Roundtable redefined its "Statement on the Purpose of a Corporation" to go beyond *shareholder primacy* to include corporate responsibilities to workers, suppliers, consumers, and society as a whole. In parallel, both consumers and investors have begun to demand more information on the Environmental, Social, and Governance (ESG) performance of the companies from which they purpose goods or in which they buy shares. This sea change in attitudes toward the corporate role in society has led to dramatically expanded ESG reporting—with investment advisors insisting on more complete voluntary disclosure of sustainability metrics for the companies in their portfolios and governments beginning to mandate ESG reporting frameworks for all publicly traded entities.[37]

In the United States, efforts to standardize ESG reporting have lagged at the federal level—though with the inauguration of the Biden Administration, the U.S. Securities and Exchange Commission appears likely to adopt some form of ESG requirements, particularly related to corporate climate change performance. Though state-level governments are not able to totally step into the void left by the federal government, they have taken significant steps in recent years to adjust their own conduct and practices to align with the goals of sustainable finance—not least with significant policy innovations relating to management of investment funds.

Sept. 2019. Available at: https://www.sfchronicle.com/business/article/California-approves-controversial-tropical-forest-14454158.php.

35 "U.S.A.", Climate Action Tracker, 16 Aug. 2022. Available at: https://climateactiontracker.org/countries/usa/.

36 Esty, D.C. & Cort, T., "Sustainable Investing at a Turning Point", in Esty, D.C. & Cort, E. (eds.), *Values at Work: Sustainable Investing and ESG Reporting*, 2020, Palgrave Macmillan, p.3.

37 Esty, D.C. & Cort, T., "Corporate Sustainability Metrics: What Investors Want and Don't Get", *Journal of Environmental Investing* 2017, vol. 47, pp. 11-53; Esty, D.C. & Arriba-Sellier, N., "Zeroing in on Net-Zero: Matching Hard Law to Soft Law Commitments", *Colorado Law Review* forthcoming 2023, 94; Esty, D.C. & Cort, T., "Toward Enhanced Corporate Sustainability Disclosure: Making ESG Reporting Serve Investor Needs", *Virginia Law & Business Review*, forthcoming 2022, 16.

Public employee pension funds and other state investments constitute a significant portion of the country's overall investments. As of 2021, public employee pension funds hold $4.5 trillion in assets,[38] and public university endowment funds comprise several hundred billion dollars.[39] The size of these assets, as well as the fact that many of them are invested in carbon-intensive industries, have spurred climate activists to call for fossil fuel divestment.[40]

In the past decade, state and municipal investment funds have started to divest from fossil fuel. Some of the most significant developments have taken place in the last year. In 2020, the New York State Comptroller announced that the state's pension fund, which controls $226 billion in assets, would shift away from fossil fuel-based investments.[41] And in 2021, Maine adopted legislation *requiring* divestment from fossil fuels by the state treasury and pension fund.[42]

But *divestment* is just one part of the equation. Many funds throughout the country have started integrating ESG-based considerations into the management of their funds, seeking to leverage their funds as levers for effecting change in the private sector. California's state-run pension funds—the Public Employees' Retirement System and the State Teachers' Retirement System—have long incorporated ESG considerations into their investment strategy.[43] The teachers' pension system developed a comprehensive set of "risk factors" to guide their investments,[44] which have become a benchmark for other funds.[45] Other states, including Colorado, Connecticut, the District of Columbia, Maine, Maryland, New York, and Oregon, have similarly adopted ESG-based considerations (which include climate change action elements) in the management of their pension funds.[46] Illinois adopted an even more ambitious requirement, effective in 2020, which requires that pension fund boards of trustees "adopt a written investment policy," which must "in-

38 "National Data", Public Plans Data. Available at: https://publicplansdata.org/quick-facts/national/ (last visited 10 November 2022).

39 "Fast Facts", National Center for Education Statistics. Available at: https://nces.ed.gov/fastfacts/display.asp?id=73 (last visited 10 November 2022).

40 See, e.g., Gillis, J., "To Stop Climate Change, Students Aim at College Portfolios", New York Times, 4 December 2012. Available at: https://www.nytimes.com/2012/12/05/business/energy-environment/to-fight-climate-change-college-students-take-aim-at-the-endowment-portfolio.html.

41 Barnard, A., "New York's $226 Billion Pension Fund Is Dropping Fossil Fuel *Stocks*", New York Times, 9 Dec. 2020. Available at: https://www.nytimes.com/2020/12/09/nyregion/new-york-pension-fossil-fuels.html.

42 Tuttle, R., "Maine Becomes First State to Order Public Fossil-Fuel Divestment", Bloomberg Green, 17 June 2021. Available at: https://www.bloomberg.com/news/articles/2021-06-17/maine-becomes-first-state-to-order-public-fossil-fuel-divestment.

43 See, e.g., Vizcarra, H.V., "Reasonable Investors' Growing Awareness of Climate Risk and Its Impact on U.S. Corporate Disclosure Law", in Esty, D.C. & Cort, T. (eds.), *Values at Work: Sustainable Investing and ESG Reporting*, 2020, Palgrave Macmillan, 181-193, pp. 184–85.

44 See "Attachment A: Investment Policy for Mitigating Environmental, Social, and Governance Risks (ESG)", California State Teachers' Retirement System. Available at: https://www.calstrs.com/files/b956aa967/calstrs_esg_policy.pdf (last visited 10 November 2022).

45 Zaidi, A., "States Take Lead on ESG Investment Regulations While Feds Stand Still", Bloomberg Law, 4 October 2019. Available at: https://news.bloomberglaw.com/banking-law/insight-14.

46 Fonseca, J., "The Rise of ESG Investing: How Aggressive Tax Avoidance Affects Corporate Governance & ESG Analysis", *Illinois Business Law Journal* 2020, vol. 25, nº 1:7.

clude a statement that material, relevant, and decision-useful sustainability factors have been or are regularly considered by the board," including "environmental factors."[47]

Although many states -- under the leadership of largely Democratic sustainability-minded governors, treasurers, and related officers -- have overseen significant reforms to pension management, many Republican-led states have not. Indeed, as the Biden Administration has pushed banks to remove investments in carbon-intensive processes, Republican state treasurers (and other asset managers in state governors) have threatened to divest from any bank or financial institution that divests from fossil fuels.[48]

D. Green Banks and Clean Energy Funding Mechanisms

Investment reforms in state pension funds and beyond represent just one avenue that states and municipalities have pursued in their *sustainable finance* efforts. A number of states have launched *green banks* to increase the flow of funds to renewable power projects and investments in energy efficiency at the residential, commercial, and industrial sectors. Led by Connecticut in 2011,[49] thirteen states (and a number of cities and counties) have now set up clean energy finance structures of one sort or another.[50] These Banks make investments in renewable energy projects that were usually too small to attract private capital on their own. Since its inception in 2011, the Connecticut Green Bank has leveraged its modest allocation of public funds by 7-fold to generate nearly $2 billion in clean energy projects.[51]

The Connecticut Green Bank's approach to funding renewable energy production has spurred similar efforts across the country—chief among them the New York Green Bank.[52] Separately, at the local level, Montgomery County, Maryland, and the cities of New Orleans and Cleveland have also established green banks with a goal of funding their transition to a clean energy future.[53] Collectively, green banks in the United States have generated tens of billions of dollars for energy efficiency, wind and solar power generation, and other aspects of clean energy infrastructure.

47 Illinois Compiled Statutes Annotated 40 s 5/1-113.6 (also known as the Sustainable Investing Act).

48 Markay, L., "Scoop: States Warn Banks – Drop Coal, and We Drop You", Axios, 25 May 2021. Available at: https://www.axios.com/states-banks-drop-coal-warning-biden-carbon-278bb3fb-2254-41b2-9b94-f986c1c9a3d2.html.

49 See, e.g., Esty, D.C. "Regulatory Transformation: Lessons from Connecticut's Department of Energy and Environmental Protection", *Public Administration Review* 2016, vol. 76, issue 3, pp. 403-412.

50 Leonard, W.A., "Clean Is the New Green: Clean Energy Finance and Deployment Through Green Banks", *Yale Law & Policy Review* 2014, vol. 33, issue 1, pp. 197-299; "Coalition for Green Capital", available at: https://coalitionforgreencapital.com (last visited 10 November 2022).

51 Nilsen, E., "The Smartest Way to Finance Clean Energy That You've Never Heard of", Vox, 1 June 2021. Available at: https://www.vox.com/2021/6/1/22454779/green-banks-biden-american-jobs-plan.

52 "Green Banks", National Renewable Energy Laboratory. Available at: https://www.nrel.gov/state-local-tribal/basics-green-banks.html (last visited 10 November 2022).

53 Gilleo, A. & Stickles, B., "Green Bank Accounting: Examining the Current Landscape and Tallying Progress on Energy Efficiency", American Council for an Energy-Efficient Economy, 2016. Available at: https://neo.ne.gov/info/pubs/pdf/ACEEE-Green_Bank_Accounting-DollarEnergy_Savings_Loans.pdf; "Cuyahoga County Green Bank Opportunity Report (Spring 2016)", Coalition for Green Capital, last visited 10 November 2022. http://coalitionforgreencapital.com/wp-content/uploads/2020/04/4420_CGC_Cuyahoga_Report_20_Web.pdf (last visited 10 November 2022).

E. State Subsidies for Clean Energy Projects

In the last several decades, state support for clean energy projects has grown markedly. From modest origins in 1975 (in the wake of the 1973 Arab Oil Embargo and ensuing energy crisis), when New York's state legislature established the New York State Energy Research and Development Authority (NYSERDA) to support renewable energy technologies and to lower the state's oil consumption to the present moment when nearly every state has some sort of funding or subsidies for business and residential investments in clean energy.[54] As the nation's longest-standing and one of the best-funded state energy agencies, NYSERDA runs over 75 programs, ranging from residential solar rebates and offshore wind procurement to a green bank. Its missions and direction has evolved over the decades. For example, it now has a special environmental justice-focused project, EmPower New York, which offers efficiency improvements (e.g., insulation and heat pump installations) to low-income New York residents at no cost.

Another prominent state level entity is the Massachusetts Clean Energy Center (MassCEC), established in 2009, it now supports forty different clean energy programs. MassCEC operates within the Executive Office of Energy and Environmental Affairs. MassCEC is funded primarily by the Massachusetts Renewable Energy Trust Fund (RETF), which levies a surcharge of 0.05¢ per kWh on electric utility ratepayers. This *system benefit charge* amounts to each household contributing about $0.29 per month – topped up in recent years with additional funding voted by the state legislature – to allow an aggregate of $44 million for renewable power and energy efficiency grants, operating expenses, and major capital expenditures.

Elsewhere across the country, most states have some form of financial support for renewable energy programs. 48 states have loan programs for renewable energy or efficiency programs, 45 states have tax incentives for renewable energy (most commonly credits or exemptions), and 17 have tax incentives for energy efficiency (usually in the form of a state income tax credit). 24 states have grant programs for renewable energy, 26 have grant programs for energy efficiency – with 31 states having at least one of the two.

F. Public Utility Commissions

In the United States, energy regulation is largely decentralized – with state-level public utility commissions (PUCs) setting the rates and terms on which electric utilities sell power to residential, commercial, and industrial customers. While the precise regulatory framework varies somewhat from state to state, a PUC's primary responsibility is to secure "just and reasonable" rates for their consumers – goals which have historically subordinated broader priorities such as GHG reductions and investments in clean energy. But in recent years, PUCs in many parts of the country have begun to incorporate climate change and clean energy goals in the incentive structures they establish for the utilities within their jurisdiction.

Some states, for example, have adopted *decoupling* rules to incentivize power compa-

54 Shurtz, N.E., "Eco-Friendly Building from the Ground Up: Environmental Initiatives and the Case of Portland, Oregon", *Journal of Environmental Law & Litigation* 2012, vol. 27, nº 1, 237-353, pp. 244–46; Sovacool, B.K., "The Best of Both Worlds: Environmental Federalism and the Need for Federal Action on Renewable Energy and Climate Change", *Stanford Environmental Law Review* 2008, vol. 27, 397-476, pp. 437–38.

ny efforts to promote energy efficiency. Others PUCs have implemented incentives for utilities to ensure that the companies promote the clean energy transition, such as performance bonuses for speedy interconnection for residential solar arrays on their customers' homes. Many PUCs have required that utilities create *demand response* programs that reduce peak electricity loads and avoid the need to fire up the dirtiest old fossil fuel burning power plants. Similar demand management programs are being developed to integrate variable renewable energy (notably wind and solar power) into the electric grid. When wind and solar production varies throughout the day, grid operators have flexibility to mobilize additional power plants to begin to generate electricity or call upon those enrolled in the demand response program to reduce their consumption.

PUCs across the nation have also begun to require the utilities that the regulate to invest in smart meters (and sometimes smart appliances as well) that can be used to modulate power supply/demand imbalances in a manner that avoids the traditional spikes in emissions as power companies turn call up their oldest and most inefficient coal-fired or diesel power plants to meet peak demand.

G. City-Level Climate Change Policies

Though most attention is focused on state-level climate change initiatives, cities and localities play a significant role in setting many of the environmental policies that affect Americans on a day-to-day basis. The sprawling nature of U.S. cities and suburbs has created a high level of dependence on individual automobile usage—which mayors across the country are now seeking to counteract with investments in better public transportation, bike lanes, as well as walking paths and pedestrian streets. The goal of many city and county officials is to make their communities more livable and climate-friendly.

Planning and zoning rules offer another local governance tool that is increasingly being used to change America's housing and transportation patterns. Zoning maps and development requirements – which designate some parts of a city or town as *residential* while other parts are established as *commercial* or *industrial* – frequently serve to separate residential neighborhoods from commercial areas. And it many places, some zones were set aside for single-family houses with a mandatory amount of land around each home (often an acre or two and times as much as 10 acres – four hectares). Historically seen as a way to keep homes away from polluting activities, today these restrictions are seen as hostile to sustainable lifestyles and municipal-scale GHG emissions reduction strategies.

Many mayors are therefore working with state officials to rewrite their Planning and Zoning rules to permit construction of higher-density housing, such as multifamily houses or apartment buildings, and mixed-use developments, where residential buildings and commercial establishments are blended – making it possible for more residents to walk or bike to work, stores, or restaurants. All of this is meant to combat the *sprawl*, that has long defined American housing patterns and translated into higher than necessary GHG emissions. Minneapolis has led the way in undoing restrictive zoning rules, moving in 2018 to allow taller buildings and denser housing (including triplexes on single lots).[55] In 2021, California's legislature voted to end single-family residential zoning—

55 "Minneapolis Upzones for Greater Density in Residential and Transit Areas", National League of Cities. Available at: https://www.nlc.org/resource/minneapolis-upzones-for-greater-density-in-residential-and-transit-areas/ (last visited 10 November 2022).

thereby allowing more homes to be built per unit of land.[56] Zoning reform has therefore emerged as a critical tool for shifting American housing and development patterns toward creating communities that are more walkable, bikeable, and accessible on public transit – and thus more compatible with efforts to advance deep decarbonization.[57]

Cities have also developed ambitious climate plans of their own, seeking to capitalize on the opportunity for policy innovation where their state governments have lagged behind. Prior to the inauguration of negotiations at the 2021 Conference of the Parties in Glasgow, over 130 U.S. cities joined the "Cities Race to ZERO," a United Nations initiative that organizes municipalities around net-zero greenhouse gas emissions goals.[58] Many examples of Mayors leading the charge on climate change can be found. In New York City, for example, beginning under the leadership of former Mayor Michael Bloomberg (who helped to found C-40, the coalition of major cities across the world working together on climate change), the city developed a sustainability strategy called "PlaNYC" – and launched efforts to switch to lower GHG fuels, promote energy conservation, improve air quality, and increase public spaces.[59]

Similarly, Pittsburgh has been out front on climate change action at the municipal scale. Mayor Bill Peduto's leadership has been seen as somewhat ironic insofar as President Trump infamously observed that he intended to withdraw from the Paris Agreement because: "I was elected to represent the citizens of Pittsburgh, not Paris."[60] In a clear demonstration of countervailing leadership, Mayor Peduto joined the *We Are Still In* coalition (that included more than 3000 mayors and governors committed to upholding the goals of the Paris Agreement even as the federal government backed away), set local GHG emissions targets, signed Pittsburgh up to report its emissions on the CDP website, rewrote building codes to promote energy efficiency, and changed the Pittsburgh's zoning rules to put the city on a path to a more sustainable future.[61]

56 "California Ends Single-Family Zoning", Economist, 23 Sept. 2021. Available at: https://www.economist.com/united-states/2021/09/23/california-ends-single-family-zoning; Hase, G., "New Law Signals Change in How California Legislators Are Attacking the Housing Crisis", Washington Post, 8 Oct. 2021. Available at: https://www.washingtonpost.com/national/new-law-signals-change-in-how-california-legislators-are-attacking-the-housing-crisis/2021/10/07/9a2d2056-2310-11ec-b3d6-8cdebe60d3e2_story.html.

57 Tomer, A., Kane, J.W., Schuetz, J. & George, C., "We Can't Beat the Climate Crisis Without Rethinking Land Use", Brookings Institute, 12 May 2021. Available at: https://www.brookings.edu/research/we-cant-beat-the-climate-crisis-without-rethinking-land-use/.

58 "Cities Race to Zero", C40 Cities. Available at: https://www.c40.org/what-we-do/building-a-movement/cities-race-to-zero/ (last visited 10 November 2022).

59 See Bagley, K. & Gallucci, M., Bloomberg's Hidden Legacy: Climate Change and the Future of New York City, 2013, InsideClimate News.

60 Merica, D., "Pittsburgh Over Paris: Trump's Nationalist Decision", CNN Politics, 1 June 2017. Available at: https://www.cnn.com/2017/06/01/politics/paris-pittsburgh-trump-nationalist-decision/index.html.

61 Goldstein, A., "A Year Ago Trump's 'Pittsburgh Not Paris' Comment 'Galvanized a Response,' Mayor Says", Pittsburgh Post-Gazette, 1 June 2018. Available at: https://www.post-gazette.com/news/environment/2018/06/01/Trump-Pittsburgh-comment-paris-accord-mayor-peduto/stories/201806010092; Ribeiro, D., "US Cities Adopt Stricter Building Energy Codes", American Council for an Energy-Efficient Economy, 9 Sept. 2019. Available at: https://www.aceee.org/blog/2019/09/us-cities-adopt-stricter-building.

III. Other mechanisms for sub-national climate change impact

The strategies identified in Part II represent a significant share of how states and municipalities are responding to the threat of climate change. But beyond these actions taken through formal policy processes, states and municipalities have banded together through alliances and coalitions to compare notes, share best practices, and present a unified climate change front against a lagging federal government. The more informal actions constitute a further dimension of American federalism and competing political leadership.

A. Coalitions of State Actors and Governments

Constitutions, statutes, and regulations form the basis of legal power in the United States, from which state and local governments—along with their constituent officials—derive their authority. The scope, exercise, and balance of this power is hotly contested, frequently requiring state and federal courts to intervene to resolve difficult questions. But beyond these *de jure* powers, governments and officials have a large measure of *de facto* power and leadership capacity.

Beginning primarily in the last century, states, counties, cities, and individual elected officials have banded together to develop shared practices—and to use their collective power to lobby the federal government to enact their preferred policies. One of the most prominent examples of this is the National Governors Association, a bipartisan group of every governor in the United States, which advocates for state interests.[62] Similar organizations, like the National Conference of State Legislatures and the United States Conference of Mayors, have also formed. Today, almost every statewide elected official is represented by some sort of national organization: the National Association of Attorneys General, the National Association of Secretaries of State, the National Association of State Treasurers, and so on.

While some statewide officials have little environmental policymaking authority, many others do—and have started developing best practices for their policymaking responsibilities through these associations. The National Association of Insurance Commissioners (NAIC), for example, assembled the Climate and Resiliency (EX) Task Force, which coordinates "discussion and engagement on climate-related risk and resiliency issues, including dialogue among state insurance regulators, industry, and other stakeholders."[63] Since 2010, the NAIC has published the Insurer Climate Risk Disclosure Data Survey to "provide regulators with information about the assessment of risks posed by climate change to insurers and the actions insurers are taking in response to their understanding of climate change risks."[64] Similarly, the National Association of State Departments of Agriculture (NASDA) has developed policy on climate resiliency,[65] and formed the Food

62 Jensen, J.M., *The Governors' Lobbyists*, 2016, University of Michigan Press, pp. 58–73.

63 "Climate and Resiliency (EX) Task Force", National Association of Insurance Commissioners. Available at: https://content.naic.org/cmte_ex_climate_resiliency_tf.htm (last visited 10 November 2022).

64 "NAIC Assesses, Provides Insight from Insurer Climate Risk Disclosure Survey Data", National Association of Insurance Commissioners, 23 Nov. 2020. Available at: https://content.naic.org/article/news_release_naic_assesses_provides_insight_insurer_climate_risk_disclosure_survey_data.htm.

65 "Climate Resiliency (2022 Priorities)", National Association of State Departments of Agriculture. Available at:

and Agriculture Climate Alliance with several industry groups to develop recommendations on the development of climate legislation at the federal level.[66]

Subsets of these organizations have formed to advance policy for ideologically sympathetic elected officials. State attorneys general frequently play a role in enforcing their states' environmental laws, representing their states in environmental litigation – and in some cases challenging the federal government where they disagree with the posture of authorities in Washington, including on climate change policies. A number of associations or supporting organizations have been formed to support environmental enforcement actions. A network of regional environmental enforcement associations exists— including the Northeast Environmental Enforcement Project, the Southern Environmental Enforcement Network, and the Western States Project—to provide training to the offices of state attorneys general on these issues. And the State Energy and Environmental Impact Center at the New York University School of Law provides support to attorneys general pursuing environmental actions – including climate change litigation -- as well.[67]

In addition, state treasurers, who play a significant role in the management of state funds, have organized to take actions that promise to address climate change – notably through requests for more information on the ESG performance of companies in which the state has investments. While the National Association of State Treasurers has not focused on ESG metrics in managing state investments as one of its primary policies, an association of primarily Democratic State Treasurers, has formed to provide best practices to its members about sustainable finance and other avenues for progressive policy changes.[68]

To some extent, organizations like these have attempted to use their collective power and influence to oppose rollbacks of environmental safeguards and commitments by the federal government. In the early 2000s, following the Bush Administration's opposition to ratifying the Kyoto Protocol, municipal leaders and members of the U.S. Conference of Mayors began organizing to implement the Protocol themselves. A handful of mayors drafted the Climate Protection Agreement in 2005,[69] which now has over 1,000 signatories today, and resulted in the creation of the Mayors Climate Protection Center to provide advice and support to cities across the country.[70]

As noted earlier, thousands of state and local political leaders joined the *We Are Still In* initiative, following the Trump Administration's withdrawal from the Paris Agreement,

https://www.nasda.org/climate-resiliency (last visited 10 November 2022).

66 See "Food and Agriculture Climate Alliance Presents Joint Policy Recommendations", Food and Agriculture Climate Alliance. Available at: https://agclimatealliance.com/files/2020/11/faca_recommendations.pdf (last visited 10 November 2022).

67 "About the Center", NYU School of Law State Energy & Environmental Impact. Available at: https://www.law.nyu.edu/centers/state-impact/about (last visited 10 November 2022).

68 See, e.g., "Thinking About the Long Term", For the Long Term. Available at: https://www.forthelongterm.org/home (last visited 10 November 2022). See also Connley, C., "17 State Treasurers Urge Congress to Include Federal Paid Family Leave in Biden's American Families Plan", CNBC News, 21 April 2021. Available at: https://www.cnbc.com/2021/04/21/17-state-treasurers-urge-congress-to-pass-federal-paid-family-leave.html (detailing role of For the Long Term in organizing state treasurers around issue of paid family leave).

69 Resnik, J., Civin, J. & Frueh, J., "Sovereigntism, Federalism, and Translocal Organizations of Government Actors (TOGAs)", *Arizona Law Review* 2008, vol. 50, 709-784, pp. 718–20.

70 "Mayors Climate Protection Center", The United States Conference of Mayors. Available at: https://www.usmayors.org/programs/mayors-climate-protection-center/ (last visited 10 November 2022).

to demonstrate their collective commitment to robust climate change action.[71] A similar organization, the United States Climate Alliance, organized a group of bipartisan governors to establish their states' commitments to the Paris Agreement's emissions-reduction targets.[72]

Though the constitutionality of states and municipalities actually signing onto international treaties remains contested,[73] the value of subnational commitments and the associated organizations designed to reinforce a unified policy stance cannot be doubted. These entities – dubbed *translocal organizations of government actors* (or TOGAs) by my Yale colleague Judith Resnik -- provide a powerful political signal with particular impact when their policy posture runs counter to that of the party in power in Washington. By working together to develop policy arguments, share best practices, gather data, and document results these officials highlight alternative paths forward, demonstrate the vitality of their competing vision for America's future, and mobilize opposition to the federal government's policy direction.

B. Voter- and Citizen-Initiated Action

Many states in the United States are notable for devolving a significant amount of policymaking authority to voters and citizens themselves. Drawn conceptually from Greece's direct democracy and with domestic origins in the tradition of New England town halls in which all citizens gather to debate, most U.S. states have procedures for voters to initiate constitutional amendments or statutes of their own drafting—or to repeal statutes enacted by their elected state legislatures. These tools have begun to be used in the climate change context – and might well expand if the federal government continues to be paralyzed by deep partisan divides.

Private litigation offers another avenue for opposition to federal policies – and can play a significant role in challenging the party in power and their policy agenda. Since the 1960s, citizens have frequently sued federal, state, and local governments over environmental issues, seeking to use the judicial branch to force compliance with environmental statutes and opposing rollbacks of environmental progress. In the last decade, however, these efforts have evolved in new and interesting ways, as citizens have sought to invoke judicial authority to protect them from federal and state inaction on climate change.

71 "About", We Are Still In. Available at: https://www.wearestillin.com/about, (last visited 10 November 2022).

72 "Alliance Principles", United States Climate Alliance. Available at: http://www.usclimatealliance.org/alliance-principles (last visited 10 November 2022).

73 See, e.g., McCarthy, K., "An American (State) in Paris: The Constitutionality of U.S. States' Commitments to the Paris Agreement", *Environmental Law Reporter* 2018, nº 48-11, pp. 10978- 10988; But Cf. Esty, D.C. & Adler, D.P., "Changing International Law for a Changing Climate", *American Journal of International Law* 2018, vol. 112, pp. 279-284.

1. At the Ballot Box

More than half of the states in the United States allow voters to initiate a state constitutional amendment or a state statute.[74] The rules and procedures vary from state to state—in terms of what sort of voter support is required, what subjects (and how many) can be proposed, and how the initiated statutes or constitutional amendments are insulated from state legislative modifications. Regardless of the differences in procedure, however, in the past several decades, voters have used their powers to force state governments to adopt their preferred environmental policies.

Though we do not endeavor to provide a comprehensive list of all environmental policies adopted as a result of voter initiatives, several are worth noting. In 1996, Colorado voters, with the support of then-Governor Roy Romer, formed "Citizens to Save Colorado's Public Lands," which put Amendment 16 on the ballot. The amendment proposed an overhaul of the state's management of its public lands, requiring a shift from extracting the greatest value possible from the land to preserving natural beauty and natural ecosystems, along with the creation of a 300,000-acre stewardship trust.[75] The amendment ultimately passed—and though challenged as unconstitutional in federal court,[76] came into effect.

Florida voters have been particularly active in amending their state constitution to protect the environment. In the 1990s, voters proposed a series of amendments intended to protect the Florida Everglades from pollution associated with the state's sugarcane industry. The proposed amendments levied taxes on the sugar industry and imposed a partial "polluter-pays" requirement—though these efforts were ultimately weakened by the state legislature's enactment of them and the state supreme court's narrow interpretation of their force.[77] In the 2010s, voters approved amendments to the state constitution ostensibly requiring that the state used dedicated revenue to purchase and preserve land[78] (though its ambit was narrowed by the state courts[79]) and banning offshore oil drilling.[80]

A growing area of interest has emerged around state constitutional protections of environmental rights. A handful of state constitutions recognize these rights, but their force has been weakened by restrictive interpretations by state courts. More recent decisions in Hawai'i and Pennsylvania, however, have breathed new life into these protections,[81] inspiring environmental advocates to pursue them in other states. In 2021, New York voters

74 "Initiative and Referendum States", National Conference of State Legislatures. Available at: https://www.ncsl.org/research/elections-and-campaigns/chart-of-the-initiative-states.aspx (last visited 10 November 2022).

75 Constitution of the State of Colorado, art. IX, ss 9-10; see also "Romer: Profit Should Not Be Primary Focus of Land Board", *Daily Sentinel* (Grand Junction, Colorado), 21 June 1996, at 3A.

76 See, e.g., United States Court of Appeals for the Tenth Circuit, 20 Nov. 1998, F.3d 161, 619, *Branson School District RE-82 et al. v. Romer* (upholding Amendment 16's constitutionality).

77 See, e.g., Supreme Court of Florida, 11 April 2002, So.2d 823, 73, p. 83, *Barley South Florida Water Management District*; Supreme Court of Florida, 26 November 1997, 706 So.2d 706, 278, p. 281, *Advisory Opinion to the Governor*.

78 Constitution of the State of Florida, art. X, s 28.

79 Florida First District Court of Appeal, 9 Sept. 2019, So.3d 281, 531, p. 535, *Oliva v. Florida Wildlife Federation*.

80 Constitution of the State of Florida, art. II, s 7(c).

81 Supreme Court of Hawai'i, 14 Dec. 2017, P.3d 408, 1, pp. 5–17, in *re Maui Electric Company*; Supreme Court of Pennsylvania, 19 Dec. 2013, A.3d 83, 901, pp. 951–52, *Robinson Township. v. Commonwealth*.

approved an expansive environmental rights amendment to their state constitution.[82] Although its effects will ultimately be determined by the scope of its interpretation by the state court system, this new provision could provide a platform for legal action to force both the state government and private companies operating in New York to take action in response to climate change.[83]

2. In the Courthouse

Private litigation has been a crucial part of the modern environmental movement—beginning in its contemporary form with litigation in the 1970s and 1980s around the "public trust" doctrine, an old common-law idea that the government had the responsibility to keep the water (and some land) in "trust" for its citizens.[84] But in recent years, this idea has taken on a new and interesting form, as youth climate activists have attempted to raise "public trust" claims against the federal and state governments for inaction on climate change.

Much attention has been focused on *Juliana v. United States*, a potentially landmark case involving youth climate plaintiffs. In *Juliana*, activists filed suit against the federal government, arguing that its failure to take action against climate change threatened them with extinction—thereby violating their federal constitutional rights and running afoul of the public trust doctrine. The plaintiffs saw initial success in the federal district court, but the Ninth Circuit Court of Appeals—which hears appeals of cases in the Western United States—ultimately concluded that the plaintiffs did not have standing to bring their claims.

Similar cases have been litigated in Alaska, Oregon, and Washington state, sometimes with the same plaintiffs. But the cases have been no more successful in state courts. In *Sagoonick v. Alaska*, decided by the Alaska Supreme Court in 2022; *Chernaik v. Brown*, decided by the Oregon Supreme Court in 2020; and *Aji P. v. State*, decided by the Washington Court of Appeals in 2021, plaintiffs argued that their state governments had violated their duty under the "public trust" by not taking decisive enough action against climate change. Both state courts rejected the claims.[85] Additional cases have been filed in other states—including Montana and Utah[86]—but it appears unlikely that they will yield different outcomes.

82 van Rossum, M., "How Green Amendments Protect Key Environmental Rights", Law360, 23 Nov. 2021. Available at: https://www.law360.com/articles/1442901/how-green-amendments-protect-key-environmental-rights.

83 See, e.g., Weniger, C., "What Could New York State's Proposed Environmental Rights Amendment Achieve?", Sabin Center for Climate Change Law: Climate Law Blog, 1 Sept. 2020. Available at: http://blogs.law.columbia.edu/climatechange/2020/09/01/what-could-new-york-states-proposed-environmental-rights-amendment-achieve/.

84 Frank, R.M., "The Public Trust Doctrine: Assessing Its Recent Past and Charting Its Future", *U.C. Davis Law Review* 2012, vol. 45, 665–91, pp. 667–70.

85 Supreme Court of Alaska, 28 Jan. 2022, P.3d 503, 777, *Sagoonick v. State*; Supreme Court of Oregon, 22 Oct. 2020, P.3d 475, 68, p. 71, *Chernaik v. Brown*; Court of Appeals of Washington (State), Division One, 8 Feb. 2021, No. 80007-8-I, P.3d 480, 438, p. 446, *Aji P. v. State*.

86 Bookbinder, D., "The Courts Begin to Act on Climate Change", Niskanan Center, 31 March 2022. Available at: https://www.niskanencenter.org/the-courts-begin-to-act-on-climate-change/; Dunphey, K., "'It's the Most Important Thing to Me': Inside the Youth-Led Lawsuit Alleging Utah's Complicity in Climate Change", Deseret News, 16 March 2022. Available at: https://www.deseret.com/utah/2022/3/16/22981083/utah-kids-sue-spencer-cox-climate-change-air-quality-activism-pollution-our-childrens-trust.

The decisions in *Juliana*, *Sagoonick*, *Chernaik*, and *Aji P.* occurred as landmark climate cases were being decided around the world—most notably, in France, the Netherlands, and the United Kingdom—and with more favorable outcomes for plaintiffs than in the United States.[87] The difference could be attributed to the unique system of separated powers in the United States, which frequently dissuades judges from usurping policy-making authority from the other branches, as well as the strict system of standing, which frequently results in the dismissal of environmental cases from court.

IV. Federalism as an obstacle to climate change action

While the discussion above chronicles ways that sub-national jurisdictions have provided climate change leadership in the United States and offered a critical policy counterpoint to dysfunction in Washington, there exists a concomitant downside to America's federalism. Just as Governors, Mayors, and Attorneys General can push for climate change action that exceeds federal ambitions, these same officials can slow down efforts to address the build-up of GHGs in the atmosphere. They have many of the same tools available to them as have been sketched out above: their own zone of regulatory authority, a capacity to organize like-minded officials, and opportunities to bring legal challenges to block policies to which they object.

A. Regulatory Competition and Competitive Disadvantage

Justice Brandeis's suggestion, noted earlier, that the prospect of divergent policies across the 50 states is "without risk to the rest of the country" turns out to be incorrect. In fact, in the environmental context, a sub-national jurisdiction that under-attends to the harm it causes to others by allowing pollution that spills across its territorial boundaries presents real risks to the rest of the country. Spillovers of harm are especially acute in the climate change context, where GHG emissions indivisibly blanket the Earth. Policy experimentation – or neglect -- in one state (or nation) that translates into a sub-par response to climate change therefore presents a very real *risk* to others as the build-up of emissions threatens to transgress planetary boundaries.

In the U.S. context, the refusal of a state to regulate the greenhouse gases being emitted within their border harms other states – as well as other nations. And the harm is multi-fold. First, the GHG emissions emanating from low-standard states translate directly into an increased threat of damaging climate change for all given that GHGs blanket the Earth. Second, the presence of low-standard states may also undermine the prospect of climate change policy success by others. Notably, if states are permitted to pursue climate strategies of differing ambitions, corporations may seek to avoid the costs of regulatory compliance in a climate-conscious state by moving their operations to one without a demanding climate change regulatory program. Such regulation-evading moves inflict both environmental and economic harms on the high-ambition jurisdictions. No-

87 Esty, D.C., "Should Humanity Have Standing? Securing Environmental Rights in the United States", *Southern California Law Review* forthcoming 2022, 94.

tably, corporate relocation to *pollution havens*[88] results in GHG *leakage*[89], as emissions simply shift from high-standard jurisdictions to low-standard ones, thereby undermining the efforts of the states committed to climate change action to control their emissions.[90] And the relocation of a factory means a loss of jobs, tax revenues, and economic opportunity in the high-standard state. Third, even the prospect of companies moving to low-standard jurisdictions may result in a *regulatory chill*,[91] which deters high-ambition states from adopting aggressive climate change policies for fear of imposing competitive disadvantages on the producers within their jurisdiction.

Thus, while the United States federal system allows states to experiment with different policies, as Justice Brandeis suggested, the adoption of a patchwork quilt of different policies can lead to *regulatory competition* that allows economic actors to play one state off against others—thereby achieving private gains at the expense of policy progress. This pattern of states competing for factories and production opportunities by promising light regulation – knowing that the burden of under-regulating will fall largely on others (as the GHG emissions spread across the globe and extend over time) with scarcely any noticeable impact on their citizens – represents a serious market failure that can only be fully addressed by a coordinated response across all jurisdictions (including all nations as well as all of the American states).

B. Legal Obstruction

Just as the attorneys general in America's *blue* states slowed down the Trump Administration's deregulatory efforts through a series of court challenges to the scientific validity, procedural appropriateness, and administrative legality of these policy initiatives, *red*-state attorneys-general have gone to court to block the Biden Administration's climate change policies (as they similarly did during the Obama Administration).[92] The deep political rifts in the United States when overlaid on the diffusion of power that is a hallmark of America's governance structure mean that are always officials from the opposite party positioned to bring legal attacks on federal policy proposals in general and climate change strategies in particular.

88 Esty, D.C., *Greening the GATT: Trade, Environment, and the Future*, 1994, Peterson Institute for International Economics.

89 Dominioni, G. & Esty, D.C., "Designing Effective Border-Carbon Adjustment Mechanisms: Aligning the Global Trade and Climate Change Regimes" (forthcoming 2023), op. cit.

90 See, e.g., Esty, D.C., "Revitalizing Environmental Federalism", *Michigan Law Review* 1996, vol. 95, issue 3, pp. 570-653; Revesz, R.L., "Rehabilitating Interstate Competition: Rethinking the 'Race to the Bottom' Rationale for Federal Environmental Regulation", *N.Y.U. Law Review* 1992, vol. 67, nº 6, p. 1210.

91 Esty, D.C., "Should Humanity Have Standing? Securing Environmental Rights in the United States", *Southern California Law Review* (forthcoming 2022), op. cit.

92 Hoshijima, Y., "Presidential Administration and the Durability of Climate-Consciousness", *Yale Law Journal* 2017, vol. 127, pp. 170-244; Castle, K.M. & Revesz, R.L., "Environmental Standards, Thresholds, and the Next Battleground of Climate Change Regulations", *Minnesota Law Review* 2019, vol. 103, pp. 1349- 1437; Joselow, M., "Court Ruling on Social Cost of Carbon Upends Biden's Climate Plans", Washington Post, 21 Feb. 2022. Available at: https://www.washingtonpost.com/climate-environment/2022/02/21/social-cost-of-carbon-biden/.

C. Separation of Powers and Political Stasis

America's federalism -- with its diffusion of authority across multiple layers of government; separation of powers across the legislative, executive, and judicial officials; and an electoral framework that often results in the executive and legislative branches being led by opposing parties -- makes blocking change much easier than delivering policy progress. This structure imposes significant legal and political challenges that must always be overcome before new policy initiatives can go into effect. And if the political divides are deep enough – as they have been with regard to climate change at the federal level over several decades – the result is a pattern of policy stasis. Proposals from one party are attacked by the opposing party – and then rejected by either a court or withdrawn as the political pendulum swings and the opposing party takes power. Thus fundamental policy change in America – such as the transformational change required to move the United States toward a clean energy future – can only be done on a bipartisan basis.[93]

V. Conclusion

Climate change policy in the United States is driven in part by federal authorities, but not entirely. State- and city-level leadership also plays a major role in determining what happens with regard to electricity generation choices, energy efficiency investments, transportation options, and other decisions that shape the GHG footprint of American society. To be clear, policies set at the federal level inform America's response to climate change, but they *do not dictate* what happens at the state and local levels. Whether the Biden Administration is able to launch the boldest national climate policy in the history of the United States or not, separate climate change action agendas will continue to be advanced in a number states.

The authority given to governors, mayors, and other sub-national officials under America's federalist structure thus provides a brake on policy change that makes it difficult for a party coming into power to undo entirely the prior administration's handiwork. This multi-layer governance structure provided a *safety net* against climate change policy inaction during the Trump Administration. But this same dynamic makes it very difficult to significantly redirect policies (especially at the politically riven federal level) – even on issues where circumstances demand bold new thinking and associated policy reform. Thus, America's fundamental legal framework stands as a bulwark against climate change policy failure, but at the very same time the horizontal and vertical distribution of power has become an obstacle to the adoption of deep decarbonization strategies and the transformative policies required to move the United States toward a clean energy economy and a sustainable future.

93 Esty, D.C., "Red Lights to Green Lights: From 20th Century Environmental Regulation to 21st Century Sustainability", *Environmental Law Review* 2017, vol. 47, pp. 1-80.

fypl french yearbook *of* public law
Issue 1, 2023

Local policies on climate change in a centralized State: The Example of France

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Abstract:

This article describes the efforts to implement local climate policies in France, Europe's most centralised state. Whilst the development of ambitious and effective local climate policies is essential to fight climate change and adapt to its consequences, experience from recent efforts to establish local policies to fight air pollution and land artificialisation draw a rather dark picture about the success of such initiatives, which has been to this date unable to break up the unadmitted consensus of joint inaction on both local and national levels. The complex relationship between the central state, local bodies and amongst the latter requires a rethinking of the law in its terrestrial dimensions to effectively address climate change locally, especially in consideration of climate justice. In fact, existing approaches have failed to implement comprehensive measures to share efforts equally between territories. Finally, the need to develop innovative legal instruments to ensure the compatibility of climate policy with urban and social issues is emphasized.

Keywords:

Climate change, Local authorities, Climate justice, Multi-level cooperation, French environmental law

France is undoubtedly one of the most centralised states in Europe. Thus, one might wonder about its institutional resilience if a major climatic event would affect its capital, Paris. What would happen if, for example, a heat dome covered the city of Paris – as has already happened in the north-western United States and in south-western Canada between June and July 2021[1] – causing the destruction of public buildings, ministries, the Élysée Palace, and – why not? – the Notre-Dame Cathedral (whose wooden frame was only recently rebuilt)? Would France have the resilience to face such an event and its lasting effects on crucial decision-making centres? This is not easy to ascertain, even if we realise that a good part of the government's offices are now virtual.

On a more serious note, on the one hand, the climate-related issues affecting sub-national public authorities (at the *local* level) do not differ with respect to the form of State: mitigation, adaptation and resilience are local issues in any case.[2] Adaptation depends on territorial factors, just as the mitigation of greenhouse gas emission is a local issue, since around 70% of CO2 emissions come from cities.[3] On the other hand – as the last IPCC assessment report on climate change mitigation underlines: multi-level governance implies that decision-making processes on climate change are no longer within the exclusive competence of central governments, but rather involve a wide range of non-state actors such as cities, businesses and civil society.[4]

The implementation of local climate policies in a centralised State raises the question of the structural factors affecting climate governance.

At first glance, it would seem that in a centralised state sub-state public authorities can pursue their own local climate policies to the extent that the central state's climate policy allows the local authority to do so. Many competences are centralised, thus depending on the central State to carry out an effective climate policy. For example, in terms of adaptation to climate change, risk management remains mainly of state competence through risk prevention plans. Equally the reduction of greenhouse gas emissions in essential sectors such as agriculture and energy is still of state competence, in which sub-state levels of government intervene only marginally. Finally, tax levers are mostly centralised. Interestingly, funding is identified by the latest IPCC report as one of the most critical aspects and one of the biggest barriers to climate mitigation, given the limited budgets of local and regional governments.[5]

At a second glance however, the issue is much more complex. This is illustrated by the

1 Garic, A., "Qu'est-ce que le dôme de chaleur qui étouffe les nord-ouest du continent américain", *Le Monde*, 1 July 2021.

2 Bader, D. A., Blake, R., Grimm, A., Hamdi, R., Kim, Y., Horton, R. & Rosenzweig, C., "Urban climate science", in Rosenzweig, C., Solecki, W., Romero-Lankao, P., Mehrotra S., Dhakal, S. & Ali Ibrahim, S., (eds.), Climate Change and Cities: *Second Assessment Report of the Urban Climate Change Research Network*, 2018, New York, Cambridge University Press, pp. 27-60.

3 Edenhofer, O., Pichs-Madruga, R., Sokona, Y., Farahani, E., Kadner, S., Seyboth, K., Adler, A., Baum, I., Brunner, S., Eickemeier, P., Kriemann, B., Savolainen, J., Schlömer, S., von Stechow, C., Zwickel, T. & Minx, J.C. (eds.), IPCC, 2014: Climate Change 2014: Mitigation of Climate Change. Contribution of Working Group III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change, Cambridge, United Kingdom and New York, NY, USA, Cambridge University Press, pp. 930; IPCC 2022 Mitigation of Climate change Contribution of Working Group III to the Sixth Assessment Report 8.3.3.

4 IPCC, 2022 Mitigation of Climate Change. Contribution of Working Group III to the sixth Assessment Report Draft 1.9.

5 IPCC, 2022 Mitigation of Climate Change. Contribution of Working Group III to the sixth Assessment Report Draft 8.5.4.

topical example of air quality and the fight against air pollution, which is closely linked to climate change[6] and on which there have been local and national public policies in France for more than forty years. In my opinion, this example illustrates quite well the logic at work here: the creation of increasingly sophisticated legal instruments by the central state does not necessarily guarantee the success of policies at the local level. Instead, additional local policies might prove to be necessary. Moreover, it seems that the difficulties ultimately lie outside the law (section I).

Climate change mitigation, i.e. the quantified reduction of greenhouse gas emissions, aiming at -55% of emissions in 2030 and carbon neutrality in 2050 in order to keep temperatures below 1.5-2°C, is based on an accounting logic: a principle of continuous progress[7] in the reduction of emissions. The principle of continuous progress is more binding than the principle of non-regression known in French environmental law. This accounting logic, established at the international and European level, is applied at the national level in many strategies, but it ultimately provides few elements to translate these figures into concrete action at the local level. It is indeed up to local governments to move from words to actions. In a way, at the local level, it is less about translating figures but more about creating integrated and coherent climate policies, since the principles of adaptation and mitigation can conflict locally. For instance the densification of cities as an objective to reduce GHG emissions may conflict with the fight against heat islands as a goal of adaptation. Local climate strategies do exist in France. However, such strategies are lacking an operational dimension, since classic instruments of urban planning, mobility and waste management, are mobilized to fulfil climate targets they are not designed for. Consequently, such mobilization can only be imperfect, one of the possible evolutions may be the integration, or merging, of classic instrument and local climate strategies (section II).

Finally, there is a question, which I believe is central to adaptation and mitigation processes at the local level and which has arisen in France even more than elsewhere because the government is centralized: the question of "climate justice" or climate equity. How can the burdens of adaptation and mitigation be shared equitably between territories, populations, etc.? In my opinion, it remains an overlooked issue at the national level, with solutions to be found at the local level (section III).

I. Local climate change policies in the context of air pollution control in a centralised state.

As the IPCC reminds us in its 2014 fifth assessment report on 'urban air quality co-benefits'[8] that '[t]he potential for realizing these co-benefits depends on institutional frameworks and policy agendas at both the local and national level, as well as the interplay between the two'. In this case, the difficulties in the design and implementation of a national policy and of coherent local policies against air pollution can serve as examples of the development of local climate policies.

6 Edenhofer, O., et. a. (eds.), IPCC, 2014, op. cit., p. 975, 12.8.1.

7 Mialot, C., "La Ville face au changement climatique, nouveaux instruments juridiques", 2020, Berger Levrault, p. 207.

8 Edenhofer, O., et. a. (eds.), IPCC, 2014, op. cit., p. 976, 12.8.1.

A. The fight against air pollution: the deployment of sophisticated state legislation that has not yet been fully implemented at local level

European air quality regulations have an exemplary value for the development of European climate policies in the last forty years, since they have implied both a quantitative (or accounting) logic and a territorialised strategy, as certain territories affected by air pollution are subject to specific obligations.

Since the early 1980s, European legislation has imposed emission limits and information requirements for air pollutants. Today, the arsenal of European regulatory instruments is quite comprehensive. In particular, Directive 2008/50/EC Clean Air for Europe has included 'territorialised' obligations with regards to the zones and agglomerations concerned by non-conformity with air quality standards. The Directive required the implementation of air quality plans and action plans in these zones and agglomerations, in order to effectively reduce emissions. Directive 2008/50, therefore, has a strong local dimension, even if, as we shall see, the failure to apply this Directive has never been attributed to sub-state authorities, at least in France.

First of all, it should be recalled that in France air pollution is covered by different kinds of competences, in the hands of the State, including the agricultural and industrial fields, as well as the levers of taxation. The intervention of local and regional authorities in these areas remains therefore marginal and limited.

If we focus on transport pollution, a critical aspect of air pollution in urban areas, certain competences are shared between the State and local authorities, but it was only with the law on air (30th December, 1996)[9] that the mayors' administrative competences were recognised. This law allows mayors to regulate and prohibit vehicle traffic to safeguard air quality, and also recognises an inter-municipal competence in transport planning, through the enactment of mobility plans. The Prefects – representing the State in the Department – have also been given specific traffic police powers to deal with pollution episodes, with measures based on the atmospheric protection plans (APP) adopted by the Prefect after consultation with local authorities.

These legal mechanisms would have been sufficient to drastically reduce the emissions of air pollutants from transportation, through the enactment of appropriate regulations and bans at the local level. However, local authorities never took up these provisions at least not to the extent they could have - to their full potential, nor did the Prefects. This led to the combined inertia of state and local levels, also due to a very low awareness of the public health issues at stake and a resistance from motorists.

Increasing the sophistication of legal tools at state level, the 2015 Law on Ecological Transition and Green Growth[10] created restricted traffic zones and coupled this device to the Atmosphere Protection Plans introduced by the aforementioned 1996 law. This law integrated local air policies with climate policies in a single document at the intermunicipal level, the Plan *Climat Air Energie Territorial*. However, like previous provisions, they have not been implemented or have been insufficiently implemented.

This failure to apply European air pollution regulation – which is the result of both local and national authorities' inaction – has paradoxically led to the condemnation by

9 L. n° 96-1236, 30 Dec. 1996, *sur l'air et l'utilisation rationnelle de l'énergie.*

10 L. n° 2015-992, 17 Aug. 2015, *relative à la transition énergétique pour la croissance verte.*

the Council of State in 2017[11] and a successful action for failure to act the European Court of Justice in 2019[12] for failure to comply with the aforementioned European Directive 2008/50.

As a reaction to the aforementioned judgments, Article 86 of the Law on Mobilities of 24 December 2019 was introduced and required local authorities, in which air quality standards are not regularly met, to introduce a low emission zone (LEZ) before 31 December 2020. In order to ensure compliance with the LEZs, an automatic vehicle number plate identification system may be set up with the authorisation of the Prefect. The law on mobility imposes a study of the local climate plan and of the atmospheric pollution plan to prioritise low emission mobility.

The law of 22 August 2021, known as the Climate and Resilience Act, extended the obligation to set up LEZs to all urban areas with more than 150,000 inhabitants, with the aim of not only preserving air quality, but also of reducing the use of personal mobility, thus mitigating greenhouse gas emissions.[13]

B. Lessons from the failures of local air pollution control policies

Since the Law on air of 1996, legal tools against traffic-related air pollution have been given to local police authorities by the state, with powers to restrict traffic on the grounds of poor air quality, and to Prefects, representatives of the state, with extensive police powers and planning competences through the enactment of atmospheric protection plans.

Successive legislation has only added more and more sophisticated legal tools (restricted traffic zones, low emission zones LEZ, automatic control of number plates, etc.), as these devices were imposed on local levels following the condemnation of the State by the Council of State in 2017 and the Court of Justice in 2019. But these same local levels, subject to precise obligations, have delayed the effective implementation of these devices, which have not been implemented to this date.

It is therefore not so much a problem of coordination between the state and local levels, as suggested by the aforementioned IPCC report or the French Court of Auditors' report on air quality,[14] which asserts that there is a "sometimes difficult and often disrupted articulation between the national and local levels, with local instruments struggling to constitute tools for experimentation adapted to the territories despite their numerous nature".

It is rather the lack of real political willingness, at both local and national levels, that explains the aforementioned ineffectiveness of local air pollution policies. The issue is, therefore, not a legal one, but a political one: until recently, there has been a political consensus on doing nothing about it. Nevertheless, the requirements of the Mobility Orientation Law, as extended by the Climate and Resilience Law, are not respected at the local level: local authorities are slow to adopt LEZs or to apply them, as in the case of the LEZ of Paris and the Greater Paris metropolis, whose application is suspended until

11 CE, 12 July 2017, req. 394254, *Association les Amis de la Terre*.

12 CJEU, 2019, C-636/18, *Commission C/ France*.

13 Moliner Dubost, M., "La police de la circulation envisagée sous le prisme d'une approche intégrée air-climat", in Kada, N., *Droit et Climat intervention publiques locales et mobilisations citoyennes*, 2022, Dalloz.

14 Available at: https://www.ccomptes.fr/fr/publications/les-politiques-de-lutte-contre-la-pollution-de-lair, p. 48.

the installation of radars that can read number plates, already authorised by the Law on Mobilities. One of the new arguments put forward to delay implementation is the discriminatory aspect of these low-emission zones, which restrict access for people who do not have sufficient income to change their vehicle.[15] This argument of social injustice, which seems to carry little weight in relation to the public health imperatives underlying air quality legislation, is not unrelated to the notion of 'climate justice' discussed below. However, the argument of 'climate justice' is precisely put forward, or rather hijacked, as an obstacle to the local implementation of air pollution control policies.

II. The articulation of local and national levels of climate action in a centralised state

The articulation of national and local climate policies has been relatively ambivalent to date, and it is only through the law that local levels are required to take binding climate action.

In my opinion, the excessively optimistic vision of France given in 2014 by the 5th IPCC assessment report does not reflect the implementation of local climate policies eight years later. According to this report:[16]

> *"In France, the EU objectives were adopted as national goals, and through national legislation, all urban areas over 50,000 are required to prepare "Climate and Energy Territorial Plans" to meet these goals and, additionally, to address adaptation needs (Assemblée Nationale, 2010). Since all other planning processes related to issues such as transport, building, urban planning, and energy have to conform to and support these objectives, this approach provides a powerful mechanism to mainstream climate change into local public planning. These plans also form a framework around which private voluntary action can be organized."*

The short-sightedness of the IPCC on the French case is abandoned in the 6th assessment report of 2022, which reflects the awareness of the existing distance between strategies and actions.

A. Instruments and developments of local climate policies in a centralised state

This is another paradox: while France is a centralised state from which one might expect significant streamlined action on climate change, national climate policies are essentially translated into scattered sectoral strategies that are rather weak in normative terms. At the regional and local level, however, there are integrated "comprehensive climate planning"[17] tools. These tools seem to be adequate legal instruments for public action, but they suffer from weak normativity and from articulation issues with other plans.

15 Mandard, S., Les zones à faibles émissions, illustration de l'inertie dans la lutte contre la pollution, *Le Monde,* 16 July 2022.

16 Edenhofer, O., et. a. (eds.), IPCC, 2014, op. cit., p. 1153.

17 For a definition of comprehensive planning see Juergensmeyer, J., *Land use planning* West academic, 2018, p. 28.

At the European level – excluding the legislation on energy, biodiversity, and the Kyoto protocol's objectives – the European climate legislation currently in force consists mainly of Regulations 2018/841, 2018/842 and 2018/1999, most recently amended by Regulation 2021/1119, which has established the framework for achieving climate neutrality and modified the 2030 target of -55% of CO2 emissions. For the moment, this legislation essentially reflects the aforementioned accounting logic, allocating and decreasing carbon budgets per State and determining the proper methods for accounting emissions and natural carbon sinks. The implementation of the European 'green deal' implies a significant reworking of this 'skeletal' legislation on strategic sectors such as land use, agriculture, biodiversity and energy and will include a substantial financial component. However, European climate legislation does not really identify the sub-state and local levels as levels of government bound by specific climate obligations.

At the central government level, as soon as the Paris Agreement was adopted, the 2015 law on ecological transition and green growth defined two new national climate plans: the national low-carbon strategy (SNBC) and the multi-annual energy program (PPE).[18] Adopted by a simple decree for a period of five years, these planning tools are fairly general catalogues of objectives and decreasing carbon budgets by emission sector (transport, building, agriculture, waste, etc.). Their effectiveness is rather low because they are imposed on other public authorities in their planning documents, simply as a matter of 'consistency' and not of full compliance. *Taking into account* as a normative relationship has been defined by the administrative judge as a weak obligation. This phrase has been interpreted as follows: it 'must not, in principle, deviate from the fundamental guidelines of the plan except, under the control of the judge, for a reason based on the interest of the operation envisaged and insofar as this reason justifies it'.[19] It should be noted that the SNBC adopted in April 2020 provides for an objective of zero net artificialisation of land in 2050; however, in the absence of any real binding force, this objective remained a dead letter until the adoption of the law of 22 August 2021 on climate and resilience, as we shall see in the following section (II. B).

In addition to these two general state plans, there are numerous sectoral plans which – without any exaggeration – are as abundant as they are not prescriptive. For example, the national plan for adaptation to climate change (PNACC), adopted in 2011, is a simple guideline with merely informative content; the national strategy for managing the coastline adopted in 2012 aims to adapt to coastal erosion and is now determined by decree since the law of 22 August 2021 on "Climate and resilience"; the national forest and wood programme, the national guidelines for preserving biodiversity, the national plan for reducing atmospheric pollutants, the national waste management plan, etc. Generally speaking, these different tools have been considered by the administrative judge insufficient to reach the objectives of reducing greenhouse gas emissions in 2030.

In a case initiated by the City of Grande Synthe against the central State, the Conseil d'Etat ruled in its decision of 1st July 2021 that the State, with its actual efforts to combat climate change, was not in a position to achieve the European objectives for 2030.[20]

18 Available at: https://www.ecologie.gouv.fr/strategie-nationale-bas-carbone-snbc.

19 CE, 28 July 2004, req. n° 256511, *Assoc. de défense de l'env. et a., Féd. nationale SOS env. et a.*

20 CE, 1 July 2021, req. n°427301, *Ville de Grande Synthe.* Abstract: "(...) *the need to step up efforts to achieve the objectives set for 2030 and the impossibility, with the measures adopted to date, of achieving them is not seriously contested by the Minister for Ecological Transition, who, in the briefs produced in the context of the supplemental*

In addition to their inadequacy, there is also the aforementioned difficulty of developing integrated and coherent local climate policies from these scattered national plans, with different purposes and adoption agendas, which are not coherent with each other or even simply coordinated.

Well before the adoption of these national plans, as indicated in the introduction, many local authorities had already tried to integrate the objectives of sustainable development at the end of the 1990s, in particular through the local Agenda 21 following the 1994 Aalborg Charter. This purely local approach, which did not fall within any legal framework but benefited from the support of national agencies such as ADEME (Environment and Energy Management Agency), gradually gained legal status with the territorial climate energy plans referred to by the IPCC, known as territorial climate air-energy plans (PCAET) under the aforementioned 2015 law, which became compulsory for all inter-municipal public bodies with more than 20,000 inhabitants.

The territorial climate air and energy plans are the materialization at the intermunicipal level of an integrated local climate, air and energy strategy. These plans are based on the "comprehensive planning" approach mentioned above and must address the reduction of CO2 emissions and the development and preservation of carbon sinks as well as adaptation to climate change and renewable energy. The local climate plan must contain a territorial climate strategy and an action plan.

However, this local climate plan is hardly effective: the urban planning and mobility plans must simply "be compatible with" the territorial climate air energy plan, and not fully "comply with" it ("full compliance"). In practice, the territorial climate and energy plans were adopted in a "forced march" after the aforementioned 2015 Act. Their content is fairly general and not very precise, particularly in terms of the operational tools to be mobilised to achieve their objectives. In their first generation since 2015, these plans seem to be a 'catch-all' local translation of the aforementioned national plans, whose general guidelines are simply repeated. In practice, these plans lack a truly local and operational dimension (see, for example, the plans of Paris,[21] Aix Marseille Provence Métropole[22] or Rennes Métropole[23]). Few local authorities have been able to turn these local climate plans into real tools for improving climatic conditions.

On the other hand, many local authorities have integrated climate policies into their urban plans and strategic local urban planning (SCOT territorial coherence schemes) and have adapted tools that are not specifically climate-related,[24] such as the territorial coherence scheme of the Caen metropolis adopted on 18 October 2019, which includes a strong climate component.[25] The local urban plans of the main French metropolises have integrated climate-related development and programming guidelines and the

investigation ordered on 19 November, highlights the various measures provided for in the bill [law of august 22 2021] to combat climate change and strengthen resilience to its effects, tabled last February and currently under discussion in Parliament, as well as in the regulatory measures that should be taken, in due course, for its application, in order to maintain that they will make it possible, in total, with the measures already in force, to achieve a reduction in emissions of the order of 38% in 2030".

21 Available at: https://www.apc-paris.com/Plan-climat.

22 Available at: https://www.registre-numerique.fr/Plan-Climat-AMP.

23 Available at: https://metropole.rennes.fr/le-plan-climat-de-rennes-metropole.

24 Mialot, C. (2020), *La Ville face au changement climatique, nouveaux instruments juridiques*, op. cit., p. 111.

25 Available at: http://www.caen-metropole.fr/content/scot-revise-executoire.

Rennes Métropole[26] defines the parameters of construction and climatic development in its local urban plan by using the existing legal framework for climatic purposes.

Taking up this integration logic experimented at the local level, a legislative order of June 2020[27] provided that the territorial climate and energy plan can be integrated into the territorial comprehensive plan (SCOT), the strategic urban planning at the inter-municipal level. This integration of the territorial climate, air, and energy plan into the inter-municipal "urban comprehensive plan" is likely to strengthen the role of both tools.

This integration of climate planning into the classic tools of strategic urban planning seems to be an interesting development: the creation of an ad hoc local climate plan, unrelated to other planning tools, seems to add an additional burden to local authorities, and consequently raises questions of temporal and material coordination of the various plans: urban planning, climate, mobility, housing, etc.[28]

Regional comprehensive climate planning seems to be fairly exemplary of an integrated approach to scattered planning: the Regional Plans for Sustainable Development and Territorial Equality were created by the Law of 7 August 2015 on the new territorial organisation of the Republic. These regional comprehensive climate plans constitute the integration of numerous regional plans: regional sustainable development plan, regional air climate energy plan, regional inter-modality plan, regional transport infrastructure plan, regional ecological coherence plan and the regional waste prevention and management plan, etc.

The various climate strategies, which remain separate at national level, have therefore been integrated at the regional level. The regional plan, based on a comprehensive planning approach, must determine a strategy to be translated into objectives and includes a set of rules. It therefore has, at least partially, a regulatory scope. For example, the *Schéma Régional de Développement Durable et d'Égalité des Territoires de la Région Grand Est* includes a rule of compensation for soil sealing in urban areas of 150% and in rural areas of 100%. This rule is imposed on the above mentioned strategic inter municipal plans SCOT in a compatibility relationship and, in their absence, on the local urban plans in a compatibility relationship.[29]

At this point it is probably necessary to explain why regional plans only require local plans - strategic plans and local urban plans – to be consistent with regional plans, rather than fully compliant. Article 72 § 5 of the French Constitution provides that no territorial authority may in principle exercise supervision over another. In France, the centralised nature of the State is combined with a principle of prohibiting the supervision of one territorial public authority over another, which has the effect of not establishing a hierarchy between the region and the inter-municipalities and the municipalities. This lack of hierarchy does not necessarily contribute to the articulation and effectiveness of local climate policies, and is certainly a reason for the state legislator to intervene when it seeks to impose the achievement of specific climate objectives on local authorities, as it did in the Climate and Resilience Act of 22 August 2021 with the zero net artificialisa-

26 Available at: https://metropole.rennes.fr/consulter-les-documents-du-plan-local-durbanisme-intercommunal-plui.

27 Ord., n° 2020-744, 17 June 2020, *relative à la modernisation des schémas de cohérence territoriale.*

28 See on this topic the research carried out by the "Ademe Ascens" program. Available at: https://www.ademe.fr/content/ascens-articulation-strategies-climat-energie-planification-spatiale.

29 Available at: https://www.grandest.fr/politiques-publiques/sraddet/.

tion (see below). Furthermore, in its decision of 18 December 2017,[30] the Council of State has given a definition of compatibility: "the compatibility relationship imposes a view of the whole territory covered, taking into account all the requirements of the higher level plan, if the plan does not contradict the objectives imposed by the higher level plan, taking into account the guidelines adopted and their degree of precision, without seeking the adequacy of the plan to each particular provision or objective". This normative relationship is far from the one of full compliance.

In short, the scattering of sectoral state climate plans is being countered by regional and local comprehensive climate planning. These local comprehensive climate plans can be strengthened by their integration into classic planning tools, but still their effectiveness is limited.

However, on certain issues, the state legislator may decide to intervene to impose certain climate principles.

B. The example of the implementation at local level of the zero net artificialisation principle and the management of coastline retreat

The Climate and Resilience Act of 22 August 2021 is the result of an unprecedented citizen consultation process. Following the Yellow Vests movement, a citizen's climate convention, composed of 150 citizens representative of the diversity of the French population, was brought together for almost a year in 2019 and 2020 to draft a climate law.

This very extensive law, important in its content and the principles it contains, did not enable France to reduce its greenhouse gas emissions in the proportions imposed by the aforementioned European legislation by 2030 and by the *Conseil d'Etat* in its aforementioned Grande Synthe decision.

It is worth addressing two important points of this law: (1) the implementation of the principle of zero net artificialisation and (2) the management of coastline retreat.

(1) The principle of zero net artificialisation contained in the law of 22 August 2021 is certainly new, but the 2000 law on solidarity and urban renewal had already established the principle of combating urban sprawl as one of the principles of urban planning contained in the urban planning code and imposed on urban plans (territorial coherence plans SCOT and local urban plans). Since the 2010s, some local authorities, such as Rennes Metropole for example, have significantly reduced the consumption of natural and agricultural areas. However, France continues to lead Europe in terms of land artificialisation, with 50% more natural areas consumed than in neighbouring countries.[31]

The law gives at least three definitions of zero net artificialisation: it is generally the sum of artificialised land, either because of their sealing or because of the loss of their ecological functions, minus the soils restored to their natural state. The law imposes a 50% reduction in the artificialisation of soils for the decade 2021-2031 compared to the decade 2011-2021, with the eventual goal of zero net artificialisation of soils, though the timeline is not determined by the law. As there were obvious difficulties in accounting for the artificialisation of land for past consumption, the legislator considered that only the actual consumption of natural and agricultural areas would be taken into account for

30 CE, 18 Dec. 2017, req. n°395216, *Regroupement des organismes de sauvegarde de l'Oise et Le petit rapporteur mesnilois.*

31 Mialot, C. (2020), *La Ville face au changement climatique, nouveaux instruments juridiques*, op. cit., p. 130.

the coming decade compared to the past decade, i.e. areas urbanised in local urban planning documents and territorial coherence plans SCOT. To implement this rather restrictive principle, the law foresees its application at regional level in the regional sustainable development and territorial equality plans, in the territorial strategic plans SCOT and in local town planning plans by 2026 and has imposed an inventory of wasteland, economical activities areas, etc., which constitute future land banking.

However, the Law has not envisaged any mechanism to ensure equity between territories that have consumed a lot of land over the past decade and territories that have been "sober" in their land consumption. In my opinion, this could call into question the application of the law, the implementation of which has just been postponed by the law on differentiation, decentralisation, deconcentration and simplification adopted on 9 February 2022.[32]

(2) With regard to the management of the retreat of the coastline, the Resilience Climate Law of 22 August 2021 seems to have organised the adaptation to the rise in sea level in a more coherent and pragmatic way. It is true that the legislator has been able to draw on local experiences, such as that of the inter-municipal body *Communauté Pays Basque*, which has been working in this direction since 2012 with the implementation of a Local Strategy for Coastal Risk Management, in conjunction with the adoption of the national strategy for managing the coastline.[33] At that time, the inter-municipal local urban plan included specific provisions anticipating the retreat of coastal line. The provisions of the aforementioned law of 2021 on climate and resilience have translated this strategy in the territorial coherence plans SCOT, which have identified the areas for relocating public facilities affected by the retreat, and in the local urban plan, which must integrate a local strategy for retreating the coastline with the design of a specific zone for the retreat within 30 years and a subsequent zone for the retreat within 30-100 years. In addition to those mechanisms, a specific right of priority for public acquisition is available to allow targeted land intervention, a mechanism that has not been provided for by the law in the case of zero net artificialisation. In a way, the legislator benefited from local experimentation, employing it in national legislation according to a bottom-up model of climate risk management.

III. Ensuring climate equity or justice in local climate policies in the context of a centralised state

A. General ideas on Climate justice

The issue of climate justice or climate equity is central to climate policies and the IPCC places it prominently in its reports since it occupies at least two specific chapters out of the 16 chapters of the 5th assessment report of 2014.[34] Climate justice also seems to have a legal content in that it is referred to in the treaty establishing the COPs:

32 L. n° 2022-217, 21 Feb. 2022, *relative à la différenciation, la décentralisation, la déconcentration et portant diverses mesures de simplification de l'action publique locale.*

33 Available at: https://www.communaute-paysbasque.fr/a-la-une-2/actualites/actualite/recul-du-trait-de-cote-un-dispositif-inedit-signe-a-saint-jean-de-luz.

34 Edenhofer, O., et. a. (eds.), IPCC, 2014, op. cit., pp. 207-350.

"Article 2 of the United Nations Framework Convention on Climate Change [...] indicates that an ultimate objective of the Convention is to avoid dangerous anthropogenic interference with the climate system. Two main issues confronting society and the IPCC are: what constitutes "dangerous interference" with the climate system and how to deal with that interference. Determining what is dangerous is not a matter for natural science alone; it also involves value judgements - a subject matter of the theory of value, which is treated in several disciplines, including ethics, economics, and other social sciences. Ethics involves questions of justice and value. Justice is concerned with equity and fairness, and, in general, with the rights to which people are entitled".

The last two reports of the IPCC on adaptation and mitigation continue to emphasize that no adaptation or mitigation policy can succeed in the long term without taking into account climate equity and they also cite the French example of the failure of the carbon tax and the yellow vest movement.[35]

According to the IPCC, the question of "climate justice" finally reveals the eminently *political* nature of climate policies, since the development of climate strategies and policies inevitably involves a dimension that falls within the realm of value judgment. Should "climate justice" – since it refers to the concept of justice, a concept that is far from being univocal – escape the law? Climate justice is one of these concepts (like the "right to the city", which is not unrelated to it, since they share the idea of the Just City[36]) which jurists seize upon with fear or delight, depending on their opinion. Its content is undoubtedly rather vague and ideologised, making it contestable or appealing, depending on one's tastes and positions, but it in either case it is a concept which will inevitably have to be dealt with in my view, as explained in III.B and in the conclusion.

There are several definitions and multiple dimensions of climate justice, including: a social and participatory dimension, undeniably present from the outset, as climate justice was carried at the end of the 1990s by environmental and social protest movements;[37] an environmental and spatial dimension; an ecological dimension; and a temporal dimension, the meaning of which can be perceived in the concept of *future generations*. It also has a double dimension, both in the burdens that climate change directly imposes on populations, environments and territories exposed to climate change, which is the dimension most often addressed in the IPCC reports and the burdens that climate policies impose in response to these changes. These indirect climate burdens must not be neglected, and it is from this angle that they are most noticeable in France (see III.B).

Climate justice also involves different scales: global, as is the case of the Paris Agreement, which has established a differentiated treatment of States based on their past contribution to greenhouse gas emissions and providing mechanisms to finance the transition of developing States. The local dimension of climate justice emerged more

35 IPCC, 2022, Mitigation of Climate Change. Contribution of Working Group III to the sixth Assessment Report Draft 1.3.3.

36 Steele, W., Hillier, J., Houston, D., Byrne, J. & MacCallum, D., "The Climate Just city" in *Routledge Handbook of climate justice,* 2020, Tahseen, J. (ed.), p. 280.

37 Jafry, T., Mikulewiczn, M. & Helwig, K., "Justice in the era of climate change" in *Routledge Handbook of climate justice,* 2020, Tahseen, J. (ed.), p. 2.

recently,[38] but it blends in with old and existing debates on the sustainable city, the just city, the right to the city.

It is in a rather unexpected dimension, i.e. a dimension of equity between territories and not between people – which does not necessarily imply a direct social dimension – that climate justice arose in France at local level in relation to the zero net artificialisation described above in II.B.

B. Elements for climate justice in local climate policies in France.

The French central state literally "broke its nose" on climate justice in 2018. When the government tried to impose a uniform additional carbon tax on fuels, it triggered the yellow vest movement: no fair mechanism for low-income people dependent on cars for their daily trips and commuting had really been put in place, and not even conceived.

Despite this failure, the Climate Resilience Act of 22 August 2021 does not really address the notion of climate justice and the mechanisms to be implemented. There is certainly a set of allowances envisaged for the energy renovation of housing and transport that can be supplemented at local level by local authorities. Nevertheless, it does not appear from the impact assessment of the law,[39] that the legislator has carried out a systemic analysis of the climate burdens weighing on individuals, companies and territories, before formulating the principle of zero net artificialisation.

As mentioned above, the Climate Resilience Act of 22 August 2021 imposes on local authorities a 50% reduction of the consumption of natural and agricultural areas for the decade 2021-2031 compared to the decade 2011-2021 in order to achieve neutrality by 2050. Each territorial level must translate this objective into its strategic and urban plans. However, even before implementation, a situation of injustice emerged: local authorities that had applied a real policy of 'land sobriety' over the decade preceding the Act – following national directives that were not very restrictive, but which existed nonetheless – saw their urbanisation possibilities severely restricted by the principle of 50% reduction. At the same time local authorities that had in some way ignored national directives and principles and had heavily consumed natural areas were in a way authorised to continue to consume, but in a more measured way. In the system set up by the Climate Resilience Act to reduce the artificialisation of land, it is therefore the "bad pupils" who were rewarded.

The law does provide for a local adaptation of the zero net artificialisation principle, but it does not lay down any principle allowing for a fair distribution of the climatic burdens, taking into account the past behaviour of local authorities in terms of land artificialisation and the nature of the artificialisation carried out in the past: economic, individual or collective housing, primary or secondary dwellings, the creation or absence of social housing in accordance with the quotas imposed by the Solidarity and Urban Renewal Act of 2000,[40] etc.

Moreover, in my opinion, there is a second gap in the implementation of the principle of zero net artificialisation. Containing urban expansion within the urban envelope

38 Moss, J. & Umbers, L., "Climate justice and non state actors" in *Climate Justice Beyond the State,* 2021, Routledge Environmental Ethics.

39 Available at: https://www.assemblee-nationale.fr/dyn/15/textes/l15b3875_etude-impact.pdf.

40 Mialot, C., "Affordable and Workforce Housing in France" in *Journal of Comparative Urban Law and Policy* 2020, vol. 4, issue 1, Art. 27, pp. 456-472. Available at: https://readingroom.law.gsu.edu/jculp/vol4/iss1/27.

means a scarcity of land resources and therefore, in the long term, an increase in land prices. This rise in land prices will not only be an obstacle to housing for low-income people, notably, this is the *social injustice* dimension of zero net artificialisation. It will also be an obstacle to the construction of the climate city, which is both dense and liveable, in which urban heat islands and the risks of massive rainfall events will be combated by restoring green corridors, which will require massive renaturation, etc. The climatic transformation of the city will require massive land intervention and the cost of this intervention could prove to be exorbitant in the absence of any measure to control land prices by means of either a dedicated tax system (based, for example, on the mechanism of land value capture,[41] which is unfortunately unknown in French law today), or pure and simple land prices control.

In a centralised state such as France, these measures of climate justice, which eminently affect property rights, fall within the domain of the law of the central state.

IV. Conclusion

In conclusion, we can see that the relationship between the central state and sub-state levels is much more complex than a simple analysis of the margins left to the local level to develop local climate policies. Instead, it has been shown that local authorities must find tools to effectively support the central state climate policies. This can be done either by recycling existing tools – such as urban planning – or by having the legislator formulate new tools, notably by taking into account local experiences.[42]

Local air policies that have been implemented over the past 40 years, however, paint a murky picture of how inaction can be combined with the development of increasingly complex and sophisticated legal and institutional tools that are unlikely to break the tacit political consensus on state and local inaction. This combined inaction in the field of air pollution, which is reminiscent of the combined urban logic of the state and sub-state authorities in the creation and maintenance of urban ghettos in France,[43] suggests that local climate policies will be difficult to put in place.

In a way, since climate change is multi-dimensional and forces us to think about public law differently, i.e. by rethinking law in its terrestrial dimensions, we should "ground" public law.[44] Considering it through this prism and its terrestrial stakes means focusing public law in the Anthropocene,[45] even if there are many realities: the city,[46] public spaces,[47] infrastructures, natural spaces, etc., which can respond to climate issues in a logic of action in the very short term, in order to achieve -55% of emissions by 2030 and carbon neutrality by 2050. In this respect, I believe that the public law of the Anthro-

41 Juergensmeyer, J., *Land use planning*, 2018, West academic, p. 9.

42 For example, the local Agenda 21, which became a territorial climate and energy plan, or the local treatment of the management of the retreat of the coastline, which became a national policy and was then incorporated into the Climate and Resilience Act.

43 Mialot, C. (2020), "Affordable and Workforce Housing in France", op. cit.

44 Mialot, C. (2020), "La Ville face au changement climatique, nouveaux instruments juridiques", op. cit., p. 19.

45 Auby, J-B., preface in Mialot, C. (2020), *La Ville face au changement climatique, nouveaux instruments juridiques*, op. cit.

46 Auby, J-B., "La Ville nouvelle frontière du droit administratif", AJDA 2017, p. 853.

47 Auby, J-B., "L'espace public comme notion émergente du droit administratif", AJDA 2021, p. 2565.

pocene is shifting to planned GHG emissions reduction and adaptation that can escape market-based approaches, as suggested by the zero net artificialisation principle that enacts a land-based approach. Climate change is indeed an event that takes place in the real world and which the law is obliged to take into account. Climate justice, however elusive and multi-dimensional it may be, is not a simple mechanism for adjusting climate policies, as it appears through social compensation mechanisms, in national and local climate policies in France. It is a constitutive element, a condition for the success or failure of these policies, as the IPCC has pointed out in its reports.

fypl french yearbook *of* public law
Issue 1, 2023

Subjective Rights in Relation to Climate Change

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Abstract:

This article tries to explore the compatibility of subjective rights with the social necessities imposed by the fight against climate change. Providing in-depth historical insights, the author retraces the evolutions of the concept of subjective rights and its adaptations to face different challenges where subjective rights have to be adapted to preserve the most vital interests of society. While considering a wide range of legal systems, this article especially focuses on the Italian case.

The author argues that different examples have shown that subjective rights are in fact compatible with the pursuit of social needs if they are adapted and sometimes tempered, and that such transformation is the key to a future-proof understanding of subjective rights. The Italian concept of legitimate interests could be especially useful to fuel a such transformation of subjective rights in the context of the fight against climate change.

Keywords:

Subjective rights, Climate change, Public interest, Emergency powers

fypl french yearbook of public law

I. Introduction

One of the questions we, as jurists, must ask ourselves when reflecting on the topicality of the traditional notions and principles of administrative law is the following: are the notions of subjective right and legitimate interest, this last one typical in the Italian tradition, able to face the challenges deriving from the natural phenomena related to climate change? The scientific community, unanimously, considers the progressive increase in temperature as a phenomenon which can put at risk the very survival of humanity. Science also agrees that this increase has mainly been caused by human actions which pay little attention to scarcity of resources and the negative externalities of most economic activities. The constant emission into the atmosphere of greenhouse gases, owing to many causes (deforestation, indiscriminate increase in agricultural and livestock activities, the use of fossil fuels, just to name the best known) is producing an increase in temperature which may become irreversible within a few years, with disastrous consequences on human and non-human habitats. Some of these effects are already evident today: melting ice caps, rising sea levels and extreme climatic phenomena, are producing enormous damage to populations all over the globe; there are no places spared from such phenomena. This is the scenario that modern societies must, quickly, face. All the decisions which must be taken to deal with these phenomena require adequate legal equipment. Since the traditional concepts of law may not be adequate, it is essential to verify their ability to adapt and respond to current needs.

Amongst the traditional legal concepts, subjective rights play a central role: whether they are articulated as patrimonial (property, economic freedoms) or personal (right to health, freedom of movement, etc.) people's rights risk suffering a compression because of measures to respond and adapt to climate change. Changes in the relations between people, and between them and nature, as they have accrued over the centuries, have always entailed adaptation of organizations, institutions and laws.

This chapter aims at expounding the capacity of subjective rights as a legal institution to adapt to the social challenges, especially those regarding issues of policymaking, posed by climate change. This is an especially pressing issue since subjective rights, with their individualistic character and an aura of inviolability often grounded in constitutional and international charters, may appear at first sight inadequate to confront the issue: where policy responses to climate change require swiftness and flexibility, subjective rights may be thought as bound to respond with the deontological rigidity of constitutional law; where they demand community based solutions, with individualism; where they appeal to intergenerational concerns, with presentism. In response to this potential concern, the chapter will explore two cases – that of land-use planning and that of emergency law – in which the compression of subjective rights as a result of the public pursuit of some social good is deemed to be acceptable and not at all incompatible with the preservation of a strong legal role for subjective rights. This is because, it will be argued, the very motivation of law has always existed in a twofold dimension: the individual one the one hand, and the social on the other, and it has always sought to strike a fragile yet necessary balance between the two. The pendulum of history has oscillated between moments in which the individual dimension prevailed and moments in which the social one did. The question of where the balance between the two currently lies is thus fundamental to defining the adequacy of subjective rights as a legal tool to fight the today's challenges. One of the most prominent legal instruments to know the position of the pendulum in each historical phase is the observation of constitutions. Since the eighteenth

century, constitutions have shaped the structure of societies by means of principles and norms aimed at regulating the relations between people and between these and objects (or 'goods' according to legal-economic terminology). But constitutions alone are not enough to understand social dynamics. Rather, it is also necessary to analyze and study the administrative institutions of society, that is, those which enable the actual protection and guarantee of rights.

The action of public administrations is one of the factors which have contributed to making economic development strong and stable over time, and technological progress too has occurred partly thanks to the rules which have guided and facilitated its course: the protection of property; the protection of inventions; the notions of a legal person that has enabled the development of companies in all their manifestations; market rules are all legal instruments that have accompanied and strengthened the development of economic activities.[1] In other and related ways, law has spurred the development of societies by protecting and guaranteeing the rights of freedom and civilization especially since the XIX Century: civil rights and political participation, ethical-social rights, economic rights, the protection of health, physical integrity, protection, and conservation of cultural heritage up to the right to a healthy environment.

Today there is a need for a new balance between law and the economy whereby the former does not play a servant role or acts as mere infrastructure but, as it has been from the beginning, a fundamental structure of complex contemporary societies. Before delving into the main sections, it is worth noting that while this chapter will engage mostly with material from the Italian legal tradition, it will not shy away from comparative analysis and it will attempt to present its findings in such a way as to emphasize their relevance to the international debate. It will thus try to speak to the generalist international audience as well as to those interested in the developments of the Italian legal system.

II. The Genealogy of Subjective Rights and its Developments in Philosophical and Legal Thought

Throughout history, subjective rights have played a fundamental role in pushing the pendulum one way or another. Typically, they have been understood as paying a twofold role. On the one hand, they have contributed to define and limit the scope of the exercise of powers and freedoms which each person is endowed with and which they can claim both vis-à-vis other private persons and public persons. On the other hand, they represented the limit to the exercise of the powers vested in the public authorities. To explore the genesis and the durability of the notion over time, given its deep roots in philosophical and juridical thought, this section will follow its evolution and its ability to adapt to the changes of human societies.

The notion of subjective right, before it came to be considered a legally relevant concept which helped to define the position of people in their relations to one another and with public authorities, has been the subject of study by philosophers and jurists as one of the possible configurations of the relationships between individual freedom and power. In fact, in the European culture, the problem of the relationship between the exercise of individual freedoms and the growing need for rules regulating personal relations

1 Sandulli, A., *Il ruolo del diritto in Europa: l'integrazione europea dalla prospettiva del diritto amministrativo*, 2018, Franco Angeli, p. 92 ff.

and relations with the public authorities of the time had arisen already during the first millennium; the strong influence of Christianity, within which the norms had to be observed as 'god's law', together with the enduring use of Roman law, laid the foundations for the construction of modern law, with a distinction already being envisaged between the subjective sphere of law and the objective one. In the long medieval period 'the conception of subjective rights – public or private – was based on a particularistic idea of freedom, for which they were configured as special faculties of group or class' guaranteed by particular statutes.[2]

In the fourteenth-century, respect for the norm was no longer linked to divine law, rather, a humanistic conception of law as a free creation of human power came of age. The idea of the subjectivity of law is present in Ockham's theory, for whom the subjective will meets a limit only in the natural law, that is, in morality. The problem of reconciling the subjectivist conception of freedom and the free expression of the will, the moral quality of every person, with the authority and will of the institutions, is beginning to arise. With Hobbes, individual agency is lost by virtue of the social contract. Subjective rights come to mean the freedom to use force to achieve one's goals. In order to prevent the unconstrained pursuit of such goals from giving rise to a continuous state of conflict, advised by reason, persons enter the civil state which, endowed with the supreme strength, forces them to renounce, or else temper, the freedoms instantiated by subjective rights.

We move, therefore, from the state of nature to the civil status that for Locke had taken over when, not being there enough land for everyone, everyone was tempted to take possession of the property of others by force. It was therefore necessary to create an organization of power, that is, the state, capable of preventing mutual oppression and of protecting the property, freedom and equality of individuals while at the same time limiting the freedoms of individuals. The state thus becomes the keystone of the so-called public subjective rights in liberal states and the question of the relationship between objective law (the rule set by the state) and subjective right (the freedom to satisfy one's own interests) opens.

In the natural law approach, rights are innate and pre-exist objective law; subjective right becomes an essential component of theoretical individualistic conception of natural law.[3] In 1776, the Virginia Declaration of Rights[4] defined both the powers of the political community and personal freedoms which were therein codified as rights.

For over a century-and-a-half after the French Revolution, the Roman Catholic Church repudiated the revolutionary assertion of human rights as the fruit of atheistic individualism.[5] Prominent, during the Age of Enlightenment, are the theories of Rousseau, who identifies in the social contract the source of the renunciation of rights and freedoms by the associated individuals that is made 'by all in favor of all'. Law becomes an expression of the general will and collective freedom is an expression of private autonomy. Traditional natural law conceptualizes freedom as a fundamental right and as

2 Cavanna, A., *Storia del diritto moderno in Europa*, I, 1982, Giuffrè, p. 221.

3 Supported by the Calvinist component in which 'the Puritan' feels totally responsible only before God and totally free before earthly authorities; So Cesarini Sforza, W., *Diritto soggettivo*, in *Enc.dir.*, XII, 1964, Giuffrè, p. 662.

4 Inspired by the English Bill of Rights and the works of John Locke and in turn inspiring the subsequent United States Declaration of Independence of the same year and the United States Bill of Rights of 1789.

5 Biggar, N., "What's wrong with subjective rights?", *History of European Ideas*, 2019, vol. 45, nº. 3, p. 399.

independence, understood as the power to want without hindrance – so that the state becomes the ultimate guarantor of independence. Both the American Declaration of Rights and the French Declaration of 1789 are inspired by traditional natural law although in the new draft of 1795 the Declaration of the Rights of Man and of the Citizen together with the rights also includes duties.

Echoes of Kant's thought are also found in these Declarations, according to whom in every legislation there are two elements, the law (objectively necessary) and the impulse of the subject to determine the will; the set of two conditions 'the arbitrariness of one can be accorded with the arbitrariness of the other according to a universal law of freedom'.[6] Kant considers the contract, the original pact, as the result of a rational model: individuals surrender part of individual freedoms but conquer external, public, social freedoms, guaranteed by the state to which a power of general coercibility is assigned. For Hegel, father of ethical subjectivism, the personification of the state is historically the ultimate consequence of the abstract process by which the actions of men are legalized. The state is constituted as the realization of freedoms, the determination of individual wills is brought through the state to an objective existence and come to realization (Hegelian idealism).

Besides its various conceptions in the philosophical debate, it is to Savigny that we owe the notion of subjective right as the sovereign will of the holder of the right; but it will be necessary to wait until the end of the nineteenth and the beginning of the twentieth century to witness the formation of the most strictly juridical conceptions of subjective right, which comes to be understood as either deriving from an attribution or delegation or concession which the supreme power of the State grants to individuals,[7] or as the interest of the private legally protected by the legal system.[8] The theory of subjective public rights developed by Jellinek (1890) emphasizes that they are an interest protected by the recognition of the power of individual agency on the part of the State which, in this way, gives rise to subjective public rights.[9] Finally, for Kelsen, the law constitutes a single objective reality valid both as a general norm and as an individual norm; 'a subjective right is therefore a juridical norm within its relationship with the individual'. Such a right is inserted in the normative pyramid that starts from the *Grundnorm* and reaches up to the individual norm.[10] The German philosophical and legal doctrine is central to the construction of the notion, of which it deepens the analysis and which can be summarized via a set of dialectical couples: on the one hand, the will of the private, on the other, the power of the state; on the one hand, the right, on the other, the duty (to refrain from violating the right); on the one hand, the list of rights, on the other, the protections provided by the legal system.

6 Frosini, V., *Diritto soggettivo, Novissimo Digesto Italiano* 1968, Utet, p. 1048.

7 Windsheid, B., *Diritto delle Pandette*, 1930, Utet, Italian translation, p. 585.

8 See Jhiering (1921) - for whom the power or lordship of the will is *lent* by the legal system – i.e., the will of the state – to the individual subject, quoted in Monateri, P.G., *Diritto soggettivo*, in *Digesto delle discipline Privatistiche* 1990, IV, Utet, p. 414.

9 A theory that will be taken up in Italy, among others, by Santi Romano (see footnote 14) who will move away from it in favor of a less authoritarian and more pluralist conception of subjective public law, 1897.

10 Cesarini Sforza, W. (1964), op. cit., p. 662.

A different approach is that of Common Law jurists - who prefer the perspective of remedies rather than that of rights; the English tradition is shaped to a great degree by the heritage of the 'forms of action' system which, despite having been abolished in the nineteenth century, still represent one of the reference models: subjective rights are not enshrined in statutory law as much as they are remedies of protection which are proposed to be asserted before the courts.[11] In fact, even in the countries of Common Law a mixed system is adopted today: in the United States, due to the fact that the Constitution includes a list of rights, these are familiar to jurists (and judges); in the United Kingdom, despite the abolition of the forms of actions system, 'in the nineteenth century it was restated in terms of a system of rights and duties'.[12]

III. Rights and Interests in Administrative Law

In France and Italy, subjective right takes different paths. Certainly, the influence of the German doctrine is strong, however both the French and the Italians elaborated their own and original theories that mitigate the scope of the notion of subjective right.[13] In Italy, more than on the rights, the doctrine focuses on the notion of interest which underlies them; above all, scholars of administrative law distinguish between the relation between two or more private subjects (individuals) on the one hand, and that between an individual and their subjective rights (also understood as the lordship of the will) and the public power, on the other. This strand of juridical scholarship is particularly relevant to the scope of this paper in that it explicitly recognizes the possibility that subjective rights and the underlying legitimate interests may come to be compressed as a result of the necessity for the public power to ensure that some public good is attained, and it may thus shed some interesting light on the problem of the adequacy of subjective right in dealing with the problems posed by climate change.

For Santi Romano 'subjective rights are only those interests which are protected by a juridical norm through the recognition of the individual will: only, that is, when for the satisfaction of an interest the individual will has decisive value, it is said that one has a right'.[14] For the author, in the field of administrative activity, the protection of individual interests may derive from the fact that, in order to look after public interests, it is necessary to reconcile the various private interests: that is why the notion of interest is relevant in administrative law. The public interest, assessed more or less at the discretion of the administration, affects the standing of the rights and interests of private individuals which can be attenuated or made to cease definitively or temporarily; these private interests 'have been designated by the name of legitimate: the concept as outlined and regardless of any application, seems exact. [...] We must not conceive of them as antithesis to subjective rights, but as a special category of the latter [...] legitimate interests fall within the class, to use the German expression, of so-called weakened rights.' The notion

11 Di Maio, A., *La tutela civile dei diritti*, 4°ed., 2003, Giuffrè, p. 14 ff.

12 Pound, R., Review Work(s): "A Text Book of Roman Law from Augustus to Justinian by W. W. Buckland", *Harvard Law Review* 1922, vol. 36, n° 1, p. 119.

13 There are those who, like Leon Duguit, who reject the notion as metaphysical, reported in Monateri, P.G. (1989), op. cit., p. 415; Frosini, V. (1968), op. cit., p. 1049, speaks of a radical negation of the notion by Duguit and Kelsen.

14 Romano, S., *Principi di Diritto amministrativo italiano*, 1901, Sel, p. 37.

of legitimate interest dates back to Ranelletti[15] but in addition to the doctrine it was the history of Italian statutory law which eventually characterized subjective rights and legitimate interests.

In fact, the Italian shift from rights to interests must be framed within the broader issue of the protection of legal situations. It has been said that the subjective right carries with it the problem of its protection. This does not pose problems when the relationship is between two subjects holding the same 'lordship of the will' since the protection will be ensured by the ordinary judges; but who, and how, protects the subjective right in the systems of administrative law? V.E. Orlando, by defining the subjective right as 'the faculty that in the individual derives from a given objective norm ensuring the achievement of his personal advantage' enhances the aspect of his protection since the legal protection of the right would be a necessary attribute 'the interest is not a right as it is defended but is defended as it is right.'[16]

Certainly, the birth and development of jurisdictional dualism are the result of ideological categories which today, if not completely overcome – because at the base of the relationship between administration and citizen there always is the use of a public power necessary to pursue a public interest –, are nonetheless understood in radically different terms. It would be impossible to present a complete reconstruction of the theories of legitimate interests, so we will only recall some notions pertinent to the scope of this chapter. De Tocqueville rejected the very idea of juridical and jurisdictional dualism because it was tainted with authoritarianism and far from his preferred guarantor model centered on impartiality, independence and contradiction 'between the State and the citizens there is the image of justice, not justice itself.'[17] The Italian events are well known: the law abolishing administrative litigation, in 1865, led to an outcome opposite to that hypothesized by the legislator. The assumption that citizens' rights can only be protected by the common courts is transformed, in fact, into an absolute power of the administration which, either because of the timidity of ordinary judges, or because of the lack of an administrative judge, forces the citizen to resignation and subjection. The abolition of the administrative court, much discussed and criticized, however, conceals a reasonable idea, which is that of the primacy of the law and its correct application by the administration. In fact, the emphasis on individual law and the creation of a legal situation of mere interest, combined with the institution of the single judge, leave persons in contact with the administration without protection.

No less ideological are the positions of those who, like Spaventa, contributed to the creation of a judicial section within the Council of State. Of Hegelian culture, Spaventa sees the State as a source of production not only of norms but also of values. The State has an ethical value, and for this reason it is not necessary to create a new, third and independent judge, but it is enough to add a judicial section to the Council of State.[18] What is obtained is justice in the administration, consisting of a sort of procedural review on legitimacy (or in limited cases on substance) but not of *judgments* in case of a dispute between administration and citizen. The recognition of the judicial nature of the Fourth

15 Ranelletti, A., "A proposito di una questione di competenza della IV Sez.", in *Foro it.*, 1893, p. 470.

16 Armanni, L., quoted in Orlando, V.E., *Principi di diritto amministrativo,* 1910, Barbera, p. 306.

17 De Tocqueville, A., *Democracy in America,* now in *Scritti politici,* II, 1969, Torino, p. 803.

18 Fioritto, A., *Gli interessi legittimi come fonte dell'ingiustizia amministrativa,* in Catelani, E., Fioritto, A., Massera, A. (eds.), *La riforma del processo amministrativo,* 2012, Es, p. 36.

Chamber by the Court of Cassation in 1893 did not solve the problem of independence and impartiality. The new section is differently interpreted as 'imperfect jurisdiction'[19] or as super-jurisdiction.[20] Even in recent times, for the centenary of its constitution, Alberto Romano considered the Council of State as 'pertinent to the administration as an institution'.[21]

Beyond the problem of the truly jurisdictional nature of the Fourth Chamber, a refined theoretical elaboration of the notion of legitimate interest comes to life beginning from the end of the nineteenth century: the same adjective 'legitimate' is not present in the bill restoring administrative jurisdiction. Practically all legal science in the twentieth century has engaged with the notion, which comes to be understood at once as a formalistic legal situation useful for the purposes of the division of jurisdiction, and a substantive legal situation. The theoretical starting point to pin down the notion of legitimate interests is often found in a comparison with that of rights. Indeed, for Borsi, legitimate interests are reflected rights or weakened rights.[22] For Miele it is a position of advantage which emerges only as a reflection of the rules which regulate the exercise of power; in this way 'the position of advantage is the result of the rules that require the holder of a power to observe certain methods and conditions in the exercise of it.'[23] From a substantialist perspective, Zanobini argues that the legitimate interest is 'a principle of a general order' usable not only in administrative law but also in private law.[24] Starting from this predication, the author concludes that 'the subtraction of rights from judicial action has not had the effect of transforming them into mere interests'. On the contrary, 'if some legitimate interests were attributed to the competence of the judicial authority, they should not be considered as many subjective rights.'[25] From whatever perspective one chooses, legitimate interest seems to remain the point on which the impossibility of the administrative process to be construed as a process of parties is based. Giannini himself argues that the legal position asserted in a judgment is that of a mere right to legitimacy and the judge's investigation is limited to verifying the correspondence between the act and the normative attribution of power.[26] From the same perspective, Capaccioli maintains that the will of the administration is not formed in a legal relation but originates from power.[27] The administration is not part of the legal transaction but exercises a power, albeit within the purview of juridical legitimacy, which entails, as Giannini also points out, the capacity to exercise administrative discretion.[28] In this sense, an administrative court would also be necessary because of its proximity to the administration and its direct knowledge of it.

19 Vacchelli, G., *Difesa giurisdizionale dei diritti dei cittadini verso l'Autorità amministrativo*, in Orlando, V. E., *Primo trattato completo di diritto amministrativo italiano*, III, 1901, Sel, pp. 223 ff.

20 In a declared parallelism with the Nichian superman: Romano, S., *Le giurisdizioni speciali amministrativi*, in Orlando, V. E. (1901), *Primo trattato completo di diritto amministrativo italiano*, op. cit., p. 507.

21 Romano, A., *Le caratteristiche originali della giustizia amministrativa e la sua evoluzione*, in *Cento anni di giurisdizione amministrativa*, 1996, Jovene, pp. 57 ff.

22 Borsi, U., *Giustizia amministrativa*, 1934, Cedam, pp. 120 ff.

23 Miele, G., *Principi di diritto amministrativo*, 1960, Cedam, p. 56.

24 Intuition subsequently developed by scholars of Civil Law such as Bigliazzi Geri (see footnote 31).

25 Zanobini, G., *Interessi legittimi e diritto privato*, in AA.VV., *Studi in memoria di F. Ferrara*, II, 1943, Giuffrè, pp. 707 ff.

26 Giannini, M.S., "Discorso generale sulla giustizia amministrativa", II, in *Riv. Dir. Processuale*, XIX, 1964, p. 18.

27 Capaccioli, E., *Manuale di diritto amministrativo*, 1980, Cedam, p. 267 f.

28 Giannini, M.S., *Il potere discrezionale della pubblica amministrazione. Concetto e problemi*, 1939, Giuffrè, p. 1939.

Fabio Merusi offers a particularly lucid rendition of the problem, free from prejudices and ideologies, where he clarifies that 'legitimate interest is a right different from others only in the object and not in the substance [...] if there is a need for a different judge, it is not because the subjective legal situations are different but because the power of the public administration is materially different from the private power.'[29] Fortunately, this non-ideological approach has become prevalent thanks to European law, so that even before the recent reform of the administrative process (Legislative Decree no. 104/2010) the possibility of compensating the legitimate interest had been recognized, the means of investigation and the adversarial procedure had been expanded and the cases of exclusive jurisdiction of Administrative Judges had increased.

In conclusion, the notion of legitimate interest seems to have conquered its own legal and theoretical space and has spread to other jurisdictions outside of Italy: understood not as a criterion for the distribution of jurisdiction but as one of the possible legal situations within the legal system, it is now used in France, Great Britain and the United States.[30]

Certainly, legitimate interest has lost one of its essential and original connotations: it is no longer the single criterion, essential for the division of jurisdiction between the ordinary and administrative courts. But if we set aside its procedural function for a moment, legitimate interest still seems to perform a useful function as a general category common to administrative law and private law in that it represents a useful alternative to subjective right: '[...] Even at the beginning of the sixties, nothing – if not the interim figure of expectation – was opposed in private law to that sort of monolith that was the category of subjective right: either an interest deserved such qualification or it ended up practically in the limbo of the interests of mere fact. Interests which were unable to assume the guise of subjective right for their being confronted with "powers" considered by definition totally free were thus excluded from the list of protected situations.'[31]

IV. Limits and Criticism to Subjective Rights

The concept of subjective right inevitably carries with it, besides its technical and juridical nature, an ethical and ideational quality which is not easily disentangled from the broader concept. All constitutions, starting from the first declarations of rights, accept the notion of subjective right sometimes quoting them directly (such as the Italian Constitution, arts. 24, 28, 113), some other times limiting themselves to their listing. In addition to rights, the duties of citizens are also mentioned and, in some cases, limits on the exercise and enjoyment of rights are explicitly provided. Exemplary, in this regard, is the Italian Constitution, which devotes its entire first part to the rights and duties of citizens (Articles 13 - 54) listing them directly and, for some, indicating their limits. It must also be said that the Constitution makes an explicit reference to the inviolable rights of individuals in Article 2, accepting the modern tendency (but already present in the first declarations) to assigning the nature of ethical values to rights, marking almost a return to the naturalistic jurisprudence conceptions which had fallen out of favor in the previous century.

29 Merusi, F., Sanviti, G., *L'ingiustizia amministrativa*, 1986, il Mulino, pp. 30 ff.

30 Massera, A., *Il contributo originale della dottrina italiana al diritto amministrativo*, in Aipda, *C'è una via italiana al diritto amministrativo?*, 2011, ES, pp. 41 ff.

31 Bigliazzi Geri, L., *Interessi legittimi: diritto privato*, in Digesto delle discipline privatistiche 1993, Utet, pp. 527 ff.

It is evident how the shock of the two world wars of the twentieth century influenced the constitutional and international norms of the time. In 1948, the United Nations General Assembly approved and proclaimed the Universal Declaration of Human Rights, which lists the fundamental rights and freedoms that must be guaranteed to all mankind. Even in European law, both the founding Treaty (Article 2) and the Charter of Fundamental Rights of the European Union (notably after the Treaty of Nice, 2001) contain a strong reference to values of universal humanity. In these declarations, both the individual and the Community orders of value are incorporated, even if a prevalence seems to be granted to individual rights; on this point it is useful to recall how, to justify China's abstention on the vote on the Universal Declaration, the philosopher Lo Chung-Shu argued that '[t]he basic ethical concept of Chinese social political relations is the fulfilment of the duty to one's neighbor, rather than the claiming of rights. The idea of mutual obligations is regarded as the fundamental teaching of Confucianism. [...] Instead of claiming rights, Chinese ethical teaching emphasized the sympathetic attitude of regarding all one's fellow men as having the same desires, and therefore the same rights, as one would like to enjoy oneself.'[32]

Around the mid-20th century, theories which assign moral and absolute values to rights reappear, especially in American philosophical and legal thought: individual rights must thus take precedence over other social purposes except in the case of a clear prevalence of the latter and the law must include in itself moral values.[33] To justify subjective rights, without recourse to natural law, one may refer to basic human rights, enshrined in international charters, but a relevant place has been assumed today by the school of economic analysis of law, which asks which legal instruments are the most suitable in order to find an optimal allocation of resources. This is an unquestionably pragmatic approach, although it crucially depends on the arbitrary adoption of either one of these points of view: whether the 'best' allocation of resources is that which is favorable to private subjects or that most favorable to the promotion of social.[34] The particular relationship between people and environment poses the problem of the so-called 'negative externalities': these can be defined as the result of the disinterest of private economic operators with regards to the environmental impact of their actions. From this point of view, the intervention of public powers can be framed in a broader perspective consisting in the need for the administration to take into consideration the handling of negative externalities. The result of this new necessity is that the administrative power must internalize an element that the market does not consider (at least initially) to be relevant.[35]

Whatever the legal basis of subjective right, a possible and useful definition of it could be that which describes it as 'a situation in which the legal system has wanted to ensure a person the freedom and power to behave, within certain limits, as he prefers for the protection of his own interests [...] this does not, of course, imply unlimited individu-

32 Chung-Shu, L., *Human Rights in the Chinese Tradition*. Available at: https://en.unesco.org/courier/2018-4.

33 Dworkin, R., *Taking Rights Seriously*, IX, 1977, Harvard University Press, quoted by Hyland, R., *Diritti soggettivi nei paesi di Common Law*, Digesto delle discipline privatistiche 1989, Utet, p. 437; on the same topics, Stewart, R., Sustein, C., *Public Programs and Private Rights*, 1982, Harvard Law Review, Vol. 95, p. 6.

34 Di Maio, A. (1993), op.cit., pp. 16 ff.

35 Some considerations about this perspective are developed in Napolitano, G., *La logica del Diritto amministrativo*, 2020, Il Mulino, pp. 207 ff., who refers to an administration which has to 'ensure that private activity does not generate negative externalities or that these are in any case contained within the limits set by the law'.

alism, nor is it in antithesis with the social character of all law. It means precisely that, in addition to taking into account the well-being of the community, it is well estimated that [...] the individual has the possibility to act freely.'[36] This realist conception seeks to find a balance between freedom and authority and between the individual and society, the calibration of which must however be carried out on a case-by-case basis and not in the abstract. Contemporary jurists have defined and catalogued many types of subjective rights, whether personal or patrimonial, absolute or relative, but all can be subject to limits: their social function (e.g. for property or economic freedoms) is directly recognized in constitutions, but this social function can take various forms and respond to different needs.

In any case, in all legal systems, limitations on rights which may lead to their suspension or cancellation are allowed. These limitations can be foreseen both in ordinary situations and, a fortiori, in emergency situations. The next two sections explore two such cases: land-use planning and emergency administrative acts.

A. Limits on Property Right imposed by planning

Many of the limits concerning property rights are enforced by plans which are used in all legal systems, even those where the protection of the right to property is greatest, and which consist in assigning different functions to the land, which thus becomes exploitable only towards the end expressed in the plan. Modern town planning equally includes the regulation of private and public constructions and environmental protection. Even though these are strictly connected, they are traditionally dealt with separately, for several reasons. They have a different historical origin and have had a different regulatory evolution: public works and private construction were the subject to specific regulations from the very beginning, whereas town planning and environmental protection are a relatively recent development.

The construction of buildings, regardless of their purpose – that is public or private usage – has historically been seen as one of the most direct and clearest signs of the state of advancement of a society. Along with the construction of buildings came the adoption rules aimed at regulating construction. In both Roman law and in the law of the Middle Ages, for instance, legal institutions and regulatory instruments were designed to allow for and regulate constructions. Some of them still exist today, such as the expropriation for public use and construction works regulations. A long while later, between the 19th and the 20th century, town planning and ecology developed as autonomous subject matters.

Three reasons led to the development of town planning: firstly, a high increase in population due to an improvement in hygienic-sanitary conditions and in agricultural and food production techniques; secondly, the shift from agricultural to industrial economy; thirdly, the gradual moving of vast populations from countries to towns and cities. The huge growth of towns and cities made it necessary to plan their development to ensure a rational usage of space and the harmonious coexistence of the various functions which inhabit the space of urban settlements (economic and productive functions, housing functions, social and political functions). From towns and cities, planning subsequently expended to the whole of States' territory and was rendered more specialized

36 ROSS, A., *Diritto e giustizia*, 1965, Einaudi, p. 167.

depending on the functions it was required to carry out.[37]

In the second half of the 20th century, town planning experienced a further evolution. This becomes particularly evident in Kenneth Boulding's 1966 essay 'The Economics of the Coming Spaceship Earth' in which he describes a shift 'from the cowboy to the astronaut' economy. The former refers to unspoiled plains, unlimited resources, and the tendency to exploitation and colonization. The latter symbolizes a closed system economy, wherein the earth is compared to a spaceship without unlimited resources.[38] The development of ecological and environmental sciences has set a new global agenda topped by issues concerning the shortage of resources and the sustainability of economic development strategies.

Even though, town planning and public works are both characterized by the same conflict between public power and private property, they differ in structure and nature. In the subject of public works, a conflict exists between public authorities and individual private proprietary rights, which can be superseded by means of expropriation to realize useful infrastructure for society. Administrations, which here acts as contracting authorities, do not act in a particularly different way to individuals who intend to realize a construction facility to satisfy their own interest: they express the need for public works, verify the capacity to fund them, introduce them into planning acts, select which contracting businesses will realize them, oversee their execution, and assess the outcomes.

Since public works are one of the methods whereby certain public functions (education, culture, health care, transports) are carried out, such works can be realized by all entities and bodies to which law assigns one or more public purposes. Furthermore, the execution of public works is a mandatory activity, so that it is required that administrations find adequate financial resources at their disposal and pinpoint a proper location for them.

Town planning is the expression of a wide discretionary power, which enables administrations to subject private property to functions and restrictions by assigning use destinations to soils, determining the relations between public and private spaces, singling out plots subject to special destinations, identifying the location of urbanization works.[39]

In Italy, for instance, such wide powers are said to be vested in administrations (especially municipalities) by the provisions contained in Article 42 of the Constitution, under which laws may establish restrictions to private property to ensure its social functions. Even the European Court of Justice, which does not always operate a distinction between personal and *res* related rights, agrees that property can be limited (Article 17 of the European Charter of Human Rights itself admits the possibility of its limitation and conformation in the name of the general interest); for the Court, the protection of property is a principle which 'must be taken into account in relation to its function in society'.[40] In the Italian legal system, however, legal provisions endowing administrations with the power to curtail private property already existed before the promulgation of the Constitution in 1948. In particular, the power to regulate the use of land through planning was stipulated – in a limited way – by the 1865 law on expropriations and – in a more systematic

37 As is the case, for example, with territorial supramunicipal plans, territorial landscape plans, natural parks plan.

38 Fioritto, A., *Introduzione al diritto delle costruzioni*, 2013, Giappichelli, pp. 2 ff.

39 Astengo, G., *Urbanistica*, in *Enc. univ. dell'Arte*, XIV, 1966, Sansoni, p. 541.

40 CJCE, 2008, C-402/05 P and C-415/05, *Kadi v Council* and *Commission*, ECLI:EU:C:2008:461. A commentary in Navarretta, E., *Costituzione, Europa e diritto privato*, 2017, Giappichelli, p. 81.

way – by the first Italian urban planning law (*Legge urbanistica nazionale*, No. 1150/1942), still in force, which establishes a system of land use and urban planning. In this subject, the Constitution restricts itself to acknowledging the existence of a phenomenon which was already under way, elevating it to the status of primary rule within the sources of law system.

However, the power to plan land use is characterized by such a broad discretion that can lead to arbitrary choices. Town planning techniques themselves are not grounded in scientific calculations, but on often questionable aesthetic and functional standards.

The topic of land use planning touches upon the power of public administrations to oversee the activity of real estate construction, which is itself one of the faculties contained within the landowner's property right. The landlord, be them of private or public nature, may not exercise such power without limits. Instead, they have to comply on the one hand with planning decisions made by administrations and, on the other, with the specific rules contained both in general administrative acts, such as technical implementation rules of planning acts and construction regulations, and the civil code. Indeed, the rules on construction are established to protect not only the general (public) interest but also the pertinent private interests: to realize a construction by virtue of a land proprietary right entails a modification in the former's relationship with the proprietary rights of neighboring landowners (including those not directly adjacent to the one executing the construction).

B. Emergency power and individual rights

Following the analysis of the limits on the exercise and enjoyment of rights, another useful example is the use of emergency powers. Even though those powers were originally reserved to face exceptional and extraordinary situations as wars, social and economic crisis, natural disasters and pandemics, the increasing frequency of those phenomena request an ordinary recourse to them.

A comparative analysis of constitutions highlights the existence of two different models in the regulation of emergency powers. The model of strong regulation (established in France, Germany, Spain and Canada, as well as in the post-Socialist constitutions of Central and Eastern European countries) grants wide and much-encompassing powers and, in the most recent constitutions, the attempt to typify and differentiate emergencies. The model of weak regulation (which is found, for example, in the Italian and US constitutions), is instead limited to the definition of some extreme cases of public emergency, such as the state of war, and to assigning generic powers to the executive in cases of necessity and urgency. History, especially recent history, shows that the explicit constitutional definition of 'emergency powers' is not, in practice, a precondition for the emanation of extraordinary rules in the face of extraordinary events, because an emergency imposes itself beyond the norm, and, indeed, it does not depend on it.

The science of administrative law has seldom addressed the specific case of emergency powers, rather, it has focused on the study of the ordinances of necessity and urgency which represent its most typical and consolidated expression.[41] In reality, emergency powers seem to have foundations, characteristics and ways of exercise so peculiar that they constitute a sui generis category within the broader landscape of administrative

41 A wide survey on the use of emergency powers in Fioritto, A., *L'amministrazione dell'emergenza*, 2009, il Mulino.

powers. While they are, of course, legal powers, their foundation lies not exclusively in the law but also in the state of affairs, i.e., the necessity itself, which sparks their activation and the production of the effects of their exercise. As for the means of such exercise, the legal system has identified the typical act of emergency powers: the ordinance of necessity and urgency. Such ordinances, although of administrative nature, affect subjective rights, whose discipline the law reserves instead to the law.

Although with obvious differences, scholars agree on some points: the necessity, a circumstance in which something is necessary and urgent, cannot be addressed with existing norms, either because they are missing or because they are not sufficient; there is a pressing need to preserve the stability of legal system from descending into disarray; necessity can become a source of law.[42] For what concerns the duration of emergency administrative powers, case-law has on several occasions stated that, precisely as a result of the inherent unpredictability of an emergency situation, it is not always possible to lay down exact time limits. In the case of a health emergency, for example, judges stated that 'the phenomenon [...] certainly could not be evaluated in advance in its temporal evolution, so that an intervention for an undetermined period could well be established.'[43]

As René Chapus recalls, 'the law does not exist for itself': its purpose is the organization of social life; accordingly, the predicament by which one is bound to its observance even when this ends up damaging the very interest it serves in the first place is not plausible. For this reason, both legislators and judges have acknowledged the need to unburden, in certain circumstances, public administrations from the strict observance of the rules which they are normally required to respect. The principle of legality must, therefore, be adapted to the circumstances.[44] In France, the Council of State proceeded with two judgments in 1914 and 1918, both linked to situations of war, to form a theory of exceptional circumstances which allows the administration to extend its powers '*autant qu'il le faut*' so that they can take all the necessary measures imposed by the circumstances, provided that judicial review is ensured. According to the French jurisprudence (applicable to most of the European legal systems), for the activation of these extraordinary powers, three conditions must exist: the real exceptionality of the event that can have various and different origins (such as, for example, insurrections, natural disasters, strikes and service blocks) but which allows such powers only for and in the times and places strictly necessary; the impossibility of acting through ordinary instruments in accordance with the principle of legality; the relevance of the interest to be protected by exceptional powers. Once these requirements have been verified and met, the administration may adopt the measures imposed by necessity even if these elude the rules of procedure, form and jurisdiction.

In essence, the principle of legality cannot be invoked in matters 'where urgency and necessity impose supplementary powers in respect of deficiencies or shortcomings in the legal system'.[45] As some scholars have acutely pointed out, the principle of legality 'has undergone an extension in correspondence with the expansion of the rules concerning the administration', so that the administration is also subject to the general principles of law, to Community law, to international law, as well as 'to the same rules imposed by

42 Ibid, p. 77.

43 C. Stato, sez. V, 29 May 2006, n. 3264/2006.

44 Chapus, R., *Droit Administratif général*, 1987, Montchrestien, pp. 758 ff.

45 Bartolomei, F., *Potere di ordinanza e ordinanze di necessità*, 1979, Giuffré, p. 141.

the public administration'.[46] This expansion must also be considered in the case of emergency powers where, on the contrary, there is a stronger need to delimit, both positively and negatively, the scope of action of the administration.

Through the principles, the system has the possibility of expressing a value judgment, which allows to ascertain the compatibility of the contents of the power of ordinance with positive law. The function of such general principles, which is normally to integrate and interpret the administrative powers as they are generally understood, is particularly relevant when compared to the power of ordinance, whose content is not predefined. Compliance with the general principles of the legal system represents, therefore, one of the main limits to emergency powers. On this proposition there is full agreement between scholars, jurisprudence and norms.[47]

It is thus fundamental to explore what such principles there are, starting with those which operate under the international and European legal orders and which are concerned with the guarantee of fundamental rights. At the international level, fundamental rights are protected by numerous conventions, one of which, the European Convention on Human Rights (ECHR), ratified in Italy by Law No 848 of 4 August 1955, is equipped with particularly effective administrative (The Council of Europe) and judicial instruments (the European Court of Human Rights).[48] The European legal order is supplemented by numerous rules on fundamental rights which have been incorporated into the Charter of Fundamental Rights of the European Union adopted in 2000 and transfused into Part II of the Constitutional Treaty of 29 October 2004. However, the same EU Treaty specifies, at Article 6, that '[t]he Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States'. The same article also refers to the respect for the fundamental rights which are guaranteed by the European Convention on Human Rights 'and as they result from the constitutional traditions common to the Member States, as general principles of Community law'. By virtue of the explicit normative reference, the rules of the ECHR must be considered, therefore, as akin to the principles of the European legal order.[49]

The general principles of the legal system are, then, principles derived from legislation and jurisprudence which are placed at the foundation of the European institutions' activity and which, due to the peculiarity whereby these acts mainly through the national institutions and administrations, have morphed into norms directly applicable at national level. These, in turn, have overlapped and integrated with national principles, constitutional and otherwise, resulting in the incremental creation of a complete and unitary *corpus* which regulates the organization and functioning of public administrations.

Amongst such general principles, the following few are of notable relevance: the principle of legality and conformity with the law (which also addresses issues relating to attri-

46 Cassese, S., *La costruzione del diritto amministrativo: Francia e Regno Unito,* in *Trattato di diritto amministrativo a cura di S. Cassese*, 2003, vol. 1, I, p. 50.

47 Fioritto, A. (2009), op. cit., pp. 240 ff.

48 Cassese, S., *Le basi costituzionali,* in Cassese, S. (2003), *Trattato di diritto amministrativo*, op. cit., p. 237.

49 Critical of the possibility of considering fundamental rights as a real limit in situations of risk and emergency is Stelzer, M. in his *The Positioning of Fundamental Right Within Governmental Policies of Risk Management*, EGPA, 2002 Conference, 8, wherein he argues that the verification of the fact that the restriction of rights is in the public interest would presuppose a precise knowledge of what is 'the best' for a society.

bution and competence); the principles of equality, impartiality and non-discrimination and judicial protection (which relate to the protection of rights and freedoms); the principles of good performance, reasonableness, proportionality, information and adversarial procedure (which relate to the activity of the administration).

Emergency administration is a unitary phenomenon, an expression of a corresponding power that finds in the rules its source of legitimacy, subject to controls and limits like any other form of administrative activity.

Its main characteristics are the great extension of the scope of possible interventions and the derogatory scope, with respect to the normal regulatory framework, of the acts through which it is exercised; it is precisely these characteristics which make it essential to define the controls and limitations set to guarantee their legitimacy.

The broadest and most thorough form of control is that carried out by the courts, that is, judicial review. In Italy, it is the jurisprudence of the Constitutional Court which has helped define boundaries with respect to the *contents* of emergency measures, beginning with case in which they engender the suspension or limitation of individual freedoms. According to the Court, these can be split into civil liberties on one hand and personal freedoms on the other. According to the Italian Parliament and the Judiciary, the core of these freedoms may never be suspended by the Executive Power. As for economic freedoms and social rights, their individualistic character allows for their suspension in the event of an emergency, aimed at the protection of collective interests. Personal freedoms and rights have been the subject of numerous judgments, all of which have addressed the issue of balancing their protection with the protection of the general interests in exceptional situations. It was considered, for example, that health risks (in particular the risk of infection) could give rise to a restriction of personal freedoms consisting in the imposition of compulsory medical treatment. One famous case is that of mandatory vaccinations as a measure to prevent health risks. For what concerns Italy, this case in point has been addressed in two judgments of the Constitutional Court, No 307/1990 and No 118/1996. Even recently, the Constitutional Court affirmed the legitimacy of mandatory vaccination:

> *"the jurisprudence of this Court on vaccinations is firm in affirming that Article 32 Cost. postulates the necessary balancing of the right to health of the individual ... with the coexisting and reciprocal right of others and with the interest of the community .... In particular, this Court has specified that the law imposing a health treatment is not incompatible with Article 32 Cost.: if the treatment is aimed not only at improving or preserving the state of health of those subject to it, but also at preserving the state of health of others".*[50]

Economic freedoms may also be subject to restrictions, as in the case of measures to deal with economic emergencies or to allow for the alignment of state budgets with the parameters required at the European level.

50 Court. Cost., n. 5/2018.

V. The Impacts of Climate Change on Subjective Rights

The Reports by the Intergovernmental Panel on Climate Change (IPCC) are one of the most salient scientific sources in order to understand the causes and effects of climate change. From the most recent Report,[51] it appears that climate change requires two discreet types of responses: the former can be framed in terms of adaptation, the latter in terms of resilience (former 'mitigation'). In short,

> *'adaptation plays a key role in reducing exposure and vulnerability to climate change [...]. In human systems, adaptation can be anticipatory or reactive, as well as incremental and/or transformational. [...] Resilience [...] describes not just the ability to maintain essential function, identity, and structure, but also the capacity for transformation.'*[52]

The Report also expounds the meaning of the term 'climate justice' which can be understood as including three principles:

> *'distributive justice, which refers to the allocation of burdens and benefits among individuals, nations and generations; procedural justice, which refers to who decides and participates in decision-making; and recognition, which entails basic respect and robust engagement with and fair consideration of diverse cultures and perspectives.'*[53]

It can be inferred from the consultation of scientific literatures on the topic[54] that adaptative and resilient responses will mostly affect three kinds of legal rights: property rights, economic liberties and personal liberties. All of them are subjective rights.

As a matter of fact, the range of possible policies to respond to climate change is very wide. Just in order to keep global warming within the acceptable targets of 1.5° or even 2°, global policy makers are urged to tighten rules on greenhouse gasses emission, increase clean energy production, curb private transport, partly by improving public energy efficient transportation, increase the energetic efficiency of private and public buildings. These policies can be legislated separately, as individual measures, or considered as complementary and included in comprehensive plans (town and district plans). Measures to mitigate the impact of climate change related emergencies, such as coastal and fluvial floods, soil erosion, desertification and fires, resulting in increasingly severe direct and indirect social losses and other unwanted effects such as forced migrations, also need to be taken into account.

The relevant questions are: can jurists propose adequate and up-to-date legal tools to face these phenomena? Given, their fundamental balances, essential principles, tech-

51 IPCC, *Climate Change 2022: Impacts, Adaptation, and Vulnerability*, Pörtner, H.-O., Roberts, D.C. et a. (eds.), Cambridge University Press. In Press.

52 ICCP (2022), op cit.

53 ICCP (2022), op cit.

54 ICCP (2022), op cit.

niques, and the way they apprehend the reality they intend to discipline, can European and other liberal-democratic systems of public laws be deemed capable of addressing the challenges of climate change? An optimistic answer would stress the long lasting civil and public legal tradition of liberal democracies, which has been capable to resist and adapt to many and diverse manmade disasters over the course of centuries.

Subjective rights are a substantive part of this history: as we have emphasized above, they were first promoted as a means to establish a legally protected scope for the free exercise of the individual will, thus enshrining the notion of individual autonomy, and to protect people from invasive and authoritative power. Over the centuries, such individualistic vision of subjective rights has been tempered, and their normative and legal standing has been rendered compatible with the pursuit of social needs. Limits to individual rights have a legal, *constitutional*, base; even expropriation is legal as long as it is accompanied by compensation, and so are, in times of emergency, limitations on personal liberties or personal obligations, as many of us have experimented fist hand during the recent pandemic, when measures as extreme as curfews and mandatory vaccinations were taken. Climate resilient development involves not only legal questions but also issues of 'equity and system transitions in land, ocean and ecosystems; urban and infrastructure; energy; industry; and society and includes adaptations for human, ecosystem and planetary health.'[55] Legal tools such as town and district plans can be used to mitigate the negative impact of climate change and to increase the resilience of cities; economic programs can be used to help private enterprises down the path towards more sustainable business models. All these measures have been adopted in the past – and will be adopted in the future – without infringing subjective rights, especially when these are understood via the Italian-style notion of legitimate interests.

Looking at subjective rights as a more technical tool, jurists should consider three connected issues: the notion of corresponding duty, that of accorded protection and that of duration. Each right produces a corresponding duty: in the case of property rights, it is widely accepted that the that law protects the owner by creating a corresponding duty which excludes all others from making use of the property. In the same way, a personal right creates the duty for anyone else to refrain from harming the good or faculty protected by the right.

From an individualistic point of view, it could be said that the relationship between right and duty concerns only the persons strictly affected by it at a specific moment in time. But if rights and duties are instead construed as a chain of continuous and multiples relationships, the purview of subjective rights is stretched in such a way as to produce protection and benefit for the entire society and gain collective value. In this view, even the protection accorded to subjective rights has a positive impact on society at large.

Some scholars have focused their attention on yet a different perspective, which can be represented as a switch in the vantage point from which the relation between humankind and the environment. The history of subjective rights suggests – as it was pointed out in this paper – that when they were strengthen, a corresponding concern toward the dimension of duties lacked. This state of affairs came to be in tandem with the pursuit of the 'emancipation' of the private sphere from administrative power. A different and new perspective is that which emphasizes the existence of a duty of protection towards the environment and nature.[56]

55 ICCP (2022), op cit.

56 See Fracchia, F. *Sulla configurazione giuridica unitaria dell'ambiente fondata sull'art. 2 Cost., on Il diritto*

The protection accorded to a person in a single case can be used every time a right is violated.

A more complex issue is that of the duration of a subjective right: in the classical definition, rights belong to the person throughout their life (and even longer, considering that property can be transferred to heirs for generations); but if we consider rights as social value and, consequently, posit that a right can belong to a collectivity, it should then be accepted that a right can belong, even, to the next generations. This rings particularly true after considering that the consequences of what we do today will be borne out by future generations.

In conclusion, the notion of subjective right is still current and useful for the future, especially if we view it through the prism of legitimate interests (which, by definition, allow for a compression of the subjective right on which they supervene). Subjective rights must however be construed as collective values and not only as individual legal positions: only by recalling that rights correspond to duties, that the protection granted by them may concern each member of the community and that rights belong not only to us but also to future generations, may subjective rights be still considered a strong pillar of modern democracies.

dell'economia, 2002, pp. 215 ss., spec. 258-259, who have pointed out that a duty of environmental solidarity precedes any other duty and right, since it is necessary first of all to preserve the human living environment.

fypl french yearbook *of* public law
Issue 1, 2023

Overcoming Short-Termism in Democratic Decision-Making in the Face of Climate Change: a Public Law Approach

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Abstract:

The paper addresses the capacity of democracies to tackle the challenge of climate change. Even though national democracies tend to short-termism and are not always able to deal with global, complicated, and intergenerational challenges such as climate change, institutional innovations present themselves as a better solution than more technocratic or authoritarian forms of climate governance.

Firstly, the contribution examines the tension between democracy and climate change and identifies short-termism as a central problem. Secondly, form a public law perspective, the article presents different institutional solutions driven by constitutional courts and posterity impact assessments that can help democracies to overcome said challenge. Lastly, the specific case of independent climate bodies is analysed. These diverse bodies can be conceived through a series of public law criteria. Public law offers a framework for these structures to thrive as an institutional solution to the challenge of climate change.

Keywords:
Institutional innovations, Independent climate bodies, Short-termism, Democracy, Climate governance

1 The author is also affiliated with the Leuven Center for Public Law of the KU Leuven. I am grateful to Chiara Armeni, Delphine Misonne, John Pitseys and the editorial team of the Yearbook for their comments on a previous version of this text. All views remain mine.

Climate change is one of the main challenges of our time. Under article 2 of the Paris Agreement, the increase in the global average temperature should be limited to well below 2, preferably 1.5, degrees Celsius, compared to pre-industrial levels in order to reduce the risks and adverse impacts of climate change. The importance of governance arrangements to achieve this goal has been highlighted by the Intergovernmental Panel on Climate Change.[2] Institutions and public law matter when it comes to reducing greenhouse gas emissions and mitigate climate change. Yet, there are vivid debates on the capacity of democracies to address the challenge of climate change effectively and reduce greenhouse gas emissions quickly and drastically enough. This is because climate change is a global and inter-generational challenge, requiring comprehensive action and a rapid overhaul of existing practices and ways of life, while democracies exist mostly at the national level, can be prone to short-termism, and tend to follow long and cumbersome decision-making procedures. In this paper, I will argue that, despite their flaws, democracies can rely on institutions that help them address some of these problems and, in particular, the problem of short-termism when it comes to the challenge of climate change. The focus of this article is thus the democratic tendency to short-termism and its institutional fixes, while other possible ways forward to further reconcile democracy and the fight against climate change are not examined here. I will outline how a public approach can help shed some light on the potential of these institutional fixes to democratic short-termism. Public law is here understood as the set of rules and principles regulating the use of public power and the relations between citizens and the State. I will also argue that envisaging the fight against climate change within the framework of existing public law principles may help avoiding falling into technocratic solutions to this challenge. This is because established public law principles in Western States encompass democratic and liberal values that the fight against climate change should not lead us to abandon lightly.

In the first part of the contribution, the tension between democracy and climate change is examined. Some possible institutional responses to the problem of short-termism in democratic decision-making are discussed in the second part from a public law perspective. Part III analyses in more detail one of such institutional response, namely the role played by national independent climate bodies in the contemporary governance of climate change and attempts to make sense of their variety through a series of criteria that help locate them within the broader structures of the state. In both Parts II and III, I examine the extent to which fundamental public law principles shape the design of institutional responses to the problem of short-termism to ensure that they remain within the realm of liberal and democratic values.[3] As far as independent climate bodies are concerned, public law principles eg guide the scope and the nature of the powers that can be granted to them. This will also allow me to highlight on several occasions the tension that can exist between institutional innovation to make democracies more resilient in the face of climate change and the public law foundations on which they rely.

2 Working Group III of the Intergovernmental Panel on Climate Change, "Working Group III contribution to the IPCC sixth assessment report (Ar6)", Climate Change 2022: Mitigation of Climate Change, 4 April 2022, pp. 1-31. Available at: https://www.ipcc.ch/report/ar6/wg3/.

3 Many, although not all, of the examples mentioned in this contribution are from either French or Belgian law. This is in line both with the editorial aim of the Yearbook and with my personal expertise. I do acknowledge though that many of the points made in this paper could be further illustrated by examples from other jurisdictions.

I. Climate change and democracy

The capacity of democracies to address the challenge of climate change is debated. Several reasons suggest a difficulty for democracies to rise to the challenge,[4] and give rise to calls for declaration of states of climate emergencies that would include a turn to more technocratic or authoritarian forms of climate governance.[5] Four of these reasons are examined hereafter.

A first reason why democracies struggle with climate change is that climate change is a complicated problem to address: it has been labelled in many ways, in particular as a 'wicked problem' or a 'super wicked problem'.[6] Climate change is a wicked problem firstly because the knowledge required to identify the measures needed to mitigate climate change is incomplete, sometimes contradictory, and often changing, even though reports such as those from the Intergovernmental Panel on Climate Change (IPCC) provide detailed assessments of the science related to climate change and identify scientific consensus on a significant number of topics.[7] Accordingly, there is no agreement on the best course of action for a state to adopt to prevent the worst effects of climate change from materialising. For example, the part that technological innovation should play remains disputed.[8] Furthermore, the actions to reduce greenhouse gases to be taken by individual citizens (reducing the use of cars, reducing plane travels, etc.) often challenge lifestyles and cultural and ideological beliefs of large segments of the population, so the cost of implementing these actions are high, both politically and economically, as well as personally for the people having to change their behaviour. At a more structural level, the changes that need to be undertaken are also significant, as they involve a drastic rethinking when it comes to the collective reliance on coal, oil, and gas, for energy purposes, reliance on intensive agriculture for food security, or on intensive production to satisfy consumers' needs and desires to name just a few. Resistance to implementing the actions needed to address climate change is therefore to be expected. In addition, climate change is also a problem connected to other environmental hazards, such as deforestation, loss of biodiversity or overpopulation, which means that the breadth of measures to be adopted is large and that interactions between these different problems and the measures taken to address them may well produce unexpected results. These characteristics of climate change make it difficult for politicians and social movements to convince citizens of the need to drastically and urgently change their behaviours or to follow a particular course of action in order to mitigate climate change.

4 Lindvall, D., "Democracy and the Challenge of Climate Change", International IDEA Discussion Paper 3/2021, 20 Oct. 2021, 77 p. Available at https://www.idea.int/sites/default/files/publications/democracy-and-the-challenge-of-the-climate-change.pdf.

5 For a critical discussion of these calls, see eg. Fischer, F., *Climate Crisis and the Democratic Prospect: Participatory Governance in Sustainable Communities*, 2017, Oxford, Oxford University press; Armeni, C. & Lee, M., "Participation in a time of climate crisis", *Journal of Law and Society* 2021, vol. 48, pp. 49-52.

6 Head, B., *Wicked Problems in Public Policy. Understanding and Responding to Complex Challenges*, 2022, Cham, Palgrave MacMillan, pp. 97-102; Levin, K. et al., "Overcoming the tragedy of super wicked problems: constraining our future selves to ameliorate global climate change", *Policy Sciences* 2012, vol. 45, pp. 123–152.

7 See: https://www.ipcc.ch/.

8 Miller, J., "Climate change solutions: The role of technology", House of Commons Library. Insight, 24 June 2020. Available at: https://commonslibrary.parliament.uk/climate-change-solutions-the-role-of-technology/.

A second reason why democracies struggle to effectively address climate change is that democratic decision-making tends to be slow and cumbersome. In principle, it seeks to include and give a voice to all affected parties which means that the necessary decisions may not be adopted quickly enough.[9] Participation, discussion, and deliberation take time, and time is lacking if the worst effects of climate change are to be averted. It could accordingly be argued that non-democratic forms of government might be better able to take effective measures to reduce greenhouse gas emissions quickly and drastically enough, as they do not rely on lengthy procedures, participation and popular consent to the same extent as democracies.[10]

A third reason why climate change is a challenge for democracies is that climate change is a global challenge and because democracies mostly exist at the national level. The reduction in greenhouse gas emissions must be addressed globally. Yet, democracies mostly exist at the state level and there is no world government that could decide and enforce a global reduction of the emission of greenhouse gases. Such reduction must therefore rely on international cooperation and agreements, and perhaps most importantly so does their enforcement.[11] Without suitable enforcement mechanisms of these international tools there remains the risk of non-compliance and free-riding by individual states. The risk for a state bearing the costs linked to the reduction of its greenhouse gases emissions, while other countries do not undertake similar efforts, is real and makes it difficult for committed governments to convince citizens and voters to accept such costs. Again, this seems to be more of a problem for democracies, in which elected officials are accountable to their (national) voters, than for other forms of government.[12]

A fourth reason why democracies could arguably have difficulties in addressing the challenge of climate change results from the short-termism that tends to affect democratic decision-making. Politicians can be tempted to envisage long-term challenges through short-term glasses, and to prioritize short-term benefits over the long term and future benefits when making decision in the hope to be reelected. This is the case either because citizens can themselves be prone to short-termism, reflecting this attitude in the voting ballots, because of the pressure from special interest groups, or because of an electoral dynamic which does not reward policies that have beneficial effects in the long term but bring costs in the short term.[13] In the case of climate change, this tendency to short-termism means that the current generation or its elected representatives might not be willing to undertake the sacrifices required to protect future generations from the adverse effects of climate change, since the interests of future generations are not given the same weight when making the decision.[14] Surely, climate change is no longer a problem only of the future and governments can for instance adopt measures to increase climate resilience of public infrastructures at limited costs demonstrating their benefit in the

9 Armeni, C. & Lee, M. (2021), "Participation in a time of climate crisis", op. cit., pp. 52-56.

10 Lindvall, D. (2021), "Democracy and the Challenge of Climate Change", op. cit., pp. 31-35.

11 In this special issue, see the contributions by Maljean-Dubois, S., Chevalier, E. & Marique, Y.

12 Lindvall, D. (2021), "Democracy and the Challenge of Climate Change", op. cit., pp. 36-37.

13 MacKenzie, M., "Institutional Design and Sources of Short-Termism", in González-Ricoy, I. & Gosseries, A. (eds.), *Institutions for Future Generations*, 2016, Oxford, Oxford University Press, pp. 26-29.

14 Pitseys, J. & El Berhoumi, M., "Constitution, conscience du long terme et justice intergénérationnelle, in A., Bailleux (ed.), *Le droit en transition. Les clés juridiques d'une prospérité sans croissance*, 2020, Brussels, Presses de l'Université Saint-Louis, pp. 447-448.

short term, when floodings occur regularly. Yet, climate change is a domain where costly actions are required just as quickly, with most benefits (or decreased damage) only visible in the longer run. As is the case with other problems of intergenerational justice, democracies might therefore not be well-equipped to tackle climate change.[15] Current generations might be tempted to let future generations bear most of the cost.

The bleak picture painted thus far should, however, be strongly nuanced. Despite their flaws, democracies also have major assets when it comes to the fight against climate change and, when the situation is assessed globally, democracies do not fare badly compared to authoritarian regimes. For example, civic engagement, local initiatives, free media and free academic research are all assets of democratic regimes that play a major and positive role in the fight against climate change.[16] Although citizens or companies may at times be reluctant to change their behaviours to address the challenge of climate change, civil society and social movements have also been vocal in calling for greater efforts from their governments to reduce greenhouse gas emissions, which shows that large segments of the population are ready to change their behaviour in order to reduce their environmental footprints. Many have also already done so without any legislation compelling to change their habits and ways of life. Furthermore, democracies are more inclined towards international cooperation than authoritarian regimes, which is essential in the context of climate change mitigation in the absence of a world government.[17] Finally, institutional innovation at the domestic level can also help democracies reduce the risks associated with the specific problem of short-termism in democratic decision-making, as I will now discuss in further detail.

II. Short-termism and institutional innovation

Institutions (i.e. structures, norms and procedures[18]) can help reduce the adverse effects of short-termism in democratic decision-making, as has been repeatedly suggested by political theorists,[19] economists,[20] as well as legal scholars.[21] This can be done through establishing 'future-oriented institutions'.[22] Future-oriented institutions are institutions

15 González-Ricoy, I. & Gosseries, A., "Designing Institutions for Future Generations. An Introduction", in González-Ricoy, I. & Gosseries, A. (eds.), *Institutions for Future Generations*, 2016, Oxford, Oxford University Press, p. 4.

16 Lindvall, D. (2021), "Democracy and the Challenge of Climate Change", op. cit., p. 9.

17 Ibid, pp. 37-38.

18 Dubash, N. et al. similarly define institutions as 'the formal or informal procedures, routines, norms and conventions embedded in the organisational structure of the polity or economy, including laws, organizations in government, and interdepartmental coordination processes' (Dubash, N. et al., "National climate institutions complement targets and policies", *Science* 2021, issue 6568, pp. 690-693, with a reference to Hall, P. & Taylor, R., "Political science and the three new institutionalisms", *Political Studies* 1996, vol. 44, p. 938).

19 Bourg, D. & Whiteside, K., *Vers une démocratie écologique. Le citoyen, le savant et le politique*, 2010, Paris, Seuil; González-Ricoy, I. & Gosseries, A. (eds.), *Institutions for Future Generations*, 2016, Oxford, Oxford University Press; Smith, G., *Can Democracy Safeguard the Future?*, 2021, Cambridge, Polity Press.

20 Helm, D. et al., "Credible Carbon Policy", *Oxford Review of Economic Policy* 2003, vol. 19, issue 3, pp. 438-450.

21 Pitseys, J. & El Berhoumi, M. (2020), "Constitution, conscience du long terme et justice intergénérationnelle, op. cit., pp. 441-462.

22 On the discrepancy between law and environmental timescales, see Richardson, B., *Time and Environmental Law. Telling Nature's Time*, 2018, Cambridge, Cambridge University Press.

that 'aim, in one way or another, to correct short-term biases in political systems and produce policy outcomes that achieve a better balance between the legitimate concerns of the present and the potential interests of the future'.[23] Eliminating different types of short-termism when those are detrimental to the public good requires different types of future-oriented institutions. This is because short-term benefits may be prioritised over future ones for a variety of reasons, ranging from the uncertainty or the ignorance of these future benefits, leading, for example, to citizens not sacrificing their current interests for uncertain future benefits, to favoring the short-term rather than the long-term or being less closely tied to future generations.[24] If short-termism is caused by ignorance or uncertainty over future benefits, addressing it may require decision-making processes to be better informed about these future benefits, so that they are not too easily discarded. If short-termism results from a preference for short-term gains over longer-term ones, however, then institutional solutions should require representation of future interests in decision-making processes rather than injecting more expertise in the process.[25]

Proposals for and existing future-oriented institutions within democratic states are numerous and their merits and weaknesses in relation to climate change cannot all be discussed extensively here. For the purpose of the present paper, I shall therefore limit myself to highlight some of such institutions and their merits and weaknesses from a public law perspective. I will first focus on constitutional provisions and constitutional courts; secondly, on electoral rules and deliberative assemblies; and, thirdly, on climate impact assessments. A fourth and last category of future-oriented institutions in the field of climate change – independent climate bodies – will be examined in more detail in the next section.

A first category of the said institutional answers to the problem of short-termism in the context of climate change relies on constitutional provisions and constitutional courts.[26] An increasing number of constitutions worldwide contain provisions on the environment, climate change or, more generally, the rights of future generations.[27] Examples include France and Belgium.[28] Such provisions may prevent legislatures and governments from too readily adopting measures that are prejudicial to climate change mitigation or adaptation or, in exceptional cases, may require the elected officials to develop policies aimed at reducing greenhouse gases emissions, for example. The aim of such constitutional provisions is to steer the outcome of the legislative and executive decision-mak-

23 MacKenzie, M. (2016), "Institutional Design and Sources of Short-Termism", op. cit., p. 24.

24 González-Ricoy, I. & Gosseries, A. (2016), "Designing Institutions for Future Generations. An Introduction", op. cit., p. 5. See also the related debate on discounting and climate change: Weisbach, D. & Sunstein, C. provide a useful introduction in Weisbach, D., and Sunstein, C., "Climate Change and Discounting the Future: A Guide for the Perplexed", *Yale Law & Policy Review* 2009, vol. 27, issue 2, pp. 433-45.

25 For a more systematic overview, see eg MacKenzie, M. (2016), "Institutional Design and Sources of Short-Termism", op. cit., table 2.1.

26 Ekeli, K., "Green Constitutionalism. The Constitutional Protection of Future Generations", *Ratio Juris* 2007, vol. 20, nº 3, pp. 378-401.

27 González-Rico, I., "Constitutionalizing Intergenerational Provisions", in González-Ricoy I. & Gosseries A. (eds.), *Institutions for Future Generations*, 2016, Oxford, Oxford University Press, pp. 170-182; Araújo, R. & Koessler, L., "The rise of the constitutional protection of future generations", *Legal Priorities Project Working Paper Series* No. 7-2021, 44 p. Available at: https://www.legalpriorities.org/research/constitutional-protection-future-generations.html.

28 2004 French Charter for the Environment; Art 7*bis* of the Belgian Constitution.

ing processes.[29] Constitutional provisions are typically drafted in general terms, but they could contain more concrete measures and objectives to be achieved by the elected representatives.[30] Courts would normally enforce those constitutional provisions against the legislative or executive bodies. Reliance on constitutional law and constitutional courts in the fight against climate change is discussed elsewhere in this special issue.[31] This kind of institutional answer has produced some remarkable results. The German Constitutional Court, for instance, held on 24 March 2021 that the provisions of the German Federal Climate Change Act of 12 December 2019 governing national climate targets and the annual emission amounts allowed until 2030 were incompatible with the German Constitution insofar as they lacked sufficient specifications for further emission reductions from 2031 onwards.[32] In this case, the Court held that greater weight should have been given by the German legislature to the rights and interests of future generations.

However, such constitutional provisions to mitigate climate change are not without criticism as they raise questions of legitimacy and separation of powers. Especially if they are worded vaguely, they effectively give immense power to the judge to indirectly determine what measures are in the best (climate) interests of future generations even though judges are neither necessarily in state of determining what such measures would look like, nor are they elected.[33]

Other proposals for institutional fixes to short-termism in democratic decision-making include amendments to electoral rules to ensure the representation of future generations in legislative processes. Suggestions have for instance been made to ensure such representation through reserved seats for the youth in Parliament.[34] Such proposals attempt to modify the input of the legislative and decision-making processes, but they often raise legitimacy and constitutional concerns as they challenge the equality between citizens.[35] Citizens' assemblies composed of randomly selected members are also presented by political theorists as a possible approach to limit the adverse effects of short-termism in democracies, because of the deliberative merits of such assemblies, their diverse composition, the lack of partisan cleavages therein, and the absence of elector-

29 Beckman, L. & Uggla, F., "An Ombudsman for Future Generations. Legitimate and Effective?", in González-Ricoy I. & Gosseries, A. (eds.), *Institutions for Future Generations*, 2016, Oxford, Oxford University Press, p. 122.

30 R., Levy, "Fixed Constitutional Commitments: Evaluating Environmental Constitutionalism's "New Frontier"", *Melbourne University Law Review* 2022, vol. 46, pp. 82-122. Available at: https://www.academia.edu/88302300/FIXED_CONSTITUTIONAL_COMMITMENTS_EVALUATING_ENVIRONMENTAL_CONSTITUTIONALISMS_NEW_FRONTIER.

31 See contribution by Laurent Fonbaustier.

32 BVerfG, 1 BvR 2656/18, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20 (translation borrowed from: https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2021/bvg21-031.html).

33 González-Ricoy, I. & Gosseries, A., (2016), "Designing Institutions for Future Generations. An Introduction", op. cit., p. 19; Beckman, L. & Uggla, F. (2016), "An Ombudsman for Future Generations. Legitimate and Effective?", op. cit., pp. 122-123. On institutional failure and the role of judges in climate cases, see eg Fisher, L., "Climate Change Litigation, Obsession and Expertise: Reflecting on the Scholarly Response to *Massachusetts v. EPA*", *Law and Policy* 2013, vol. 35, pp. 236-260.

34 Bidadanure, J., "Better Procedures for Fairer Outcomes. Youth Quotas in Parliaments", *Intergenerational Justice Review* 2015, vol. 1, pp. 4-10.

35 González-Ricoy, I. & Gosseries, A., (2016), "Designing Institutions for Future Generations. An Introduction", op. cit., p. 17.

al pressure.[36] These are all features that could arguably gear decision-making to giving greater weight to long-term interests, even though they do not control the substance of what results from the deliberations of the citizens' assembly. Climate change is a topic on which several citizens' assemblies have been convened, such as the French Citizens' Climate Convention active in 2019-2020.[37] The impact of the latter initiative is, however, disputed, and this has been attributed to the ambiguities in the role of this Convention and in the nature of its relations with the representative institutions (Parliament, President, and Government). These ambiguities result in part from the lack of a legal or constitutional framework regulating citizens' panels and other similar initiatives in France.[38] This concern is however not limited to the French legal system but can also be seen in systems where initiatives of deliberative and participative democracy sit uneasily in a constitutional context mostly concerned with representative democracy.[39]

Other institutional options to reduce the risk of short-termism in democratic decision-making include legal requirements for politicians or state authorities to declare whether and to what extent the measures that they defend or propose for adoption impact the (climate) interests of future generations.[40] Such 'posterity impact assessments' 'combat uncertainty about policy causation by requiring legislators to thoroughly research and publicize the long-term effects of their proposed policy for the opposing political party to scrutinize', while also holding 'legislators liable for the long-term effects of their decisions'.[41] There is a conceptual link between posterity impact assessments and the environmental impact assessments which are mandatory under European Union legislation for individual projects and for public plans or programmes which are likely to have significant effects on the environment.[42] The impact on climate change is included in the environmental assessments to be carried out under EU law.[43] The European Court of Justice has ruled that domestic legislators and executives fell under the duty to carry out environmental impact assessments whenever they enacted 'public plans or programmes' which are likely to have significant effects on the environment, even though

36 John, T. & MacAskill, W., "Longtermist Institutional Reform", GPI Working Paper No. 14-2020, pp. 11-12. Available at: https://globalprioritiesinstitute.org/wp-content/uploads/Tyler-M-John-and-William-MacAskill_Longtermist-institutional-reform.pdf.

37 See: https://www.conventioncitoyennepourleclimat.fr/.

38 Girard, C., "Lessons from the French Citizens' Climate Convention. On the role and legitimacy of citizens' assemblies", VerfBlog, 27 July 2021. Available at: https://verfassungsblog.de/lessons-from-the-french-citizens-climate-convention/.

39 On the Belgian case, see Clarenne, J. & Jadot, C., "Les outils délibératifs auprès des parlements sous l'angle du droit constitutionnel belge", *Courrier hebdomadaire du CRISP* 2021, nº 2517-2518, 58 p.

40 MacKenzie, M. (2016), "Institutional Design and Sources of Short-Termism", op. cit., p. 34.

41 John, T. & MacAskill, W. (2020), "Longtermist Institutional Reform", op. cit., p. 13.

42 John, T. & MacAskill, W. (2020), "Longtermist Institutional Reform", op. cit., p. 14.; Dir. nº 2011/92/EU, 13 Dec. 2011, of the European Parliament and of the Council on the assessment of the effects of certain public and private projects on the environment (codification); Dir. nº 2001/42/EC, 27 June 2001, of the European Parliament and of the Council on the assessment of the effects of certain plans and programmes on the environment. See the discussion of these directives by Garcia-Ureta, A., "Environmental Impact Assessment in the EU: More than Only a Procedure?", in Peeters, A. & Eliantonio, M. (eds.), *Research Handbook on EU Environmental Law*, 2020, Cheltenham, Edward Elgar, pp. 164-178.

43 Huglo, C., *Méthodologie de l'étude d'impact climatique*, 2020, Brussels, Bruylant, pp. 60-61. See Dir. nº 2014/52/EU, 16 April 2014, of the European Parliament and of the Council amending Dir. nº 2011/92/EU on the assessment of the effects of certain public and private projects on the environment.

such plans or programmes would take the form of a regulation or of a statute.[44] Not all statutes or regulations are concerned, however. Public plans or programmes are understood as

> *'any measure which establishes, by defining rules and procedures for scrutiny applicable to the sector concerned, a significant body of criteria and detailed rules for the grant and implementation of one or more projects likely to have significant effects on the environment'.*[45]

Environmental impact assessments must be taken into account in the final decision from the authority,[46] and reasons must be given to back up the decision.[47] Courts may review whether these duties are respected in specific cases. Another example of an existing 'climate assessment' is the climate impact assessment that should be included in executive decision-making in the Walloon Region in Belgium. However, it has yet to enter into force.[48]

III. The role of independent bodies in the fight against climate change

A final example of institutional innovation that can contribute to fighting short-termism in democratic decisions-making in the context of climate change - independent climate bodies – deserves to be discussed in more detail here. Such institutions have spread worldwide in recent years, and their role has been recently recognized by the IPCC.[49] While these independent bodies are increasingly part of the governance of climate change,[50] they deserve more detailed scrutiny by public law scholars in order to make sense of their diversity and clarify their potential in constitutional terms.

Institutional options for reducing the risk of short-termism in climate decision-making include involving expert bodies – agencies, councils, ombudspersons – that operate independently from both representative institutions and private interests.[51] As a result of this autonomy from representative institutions, independent climate bodies are less dependent on electoral cycles or voters' preferences in their activities and assessments. They can provide the 'necessary continuity and consistency over time, which is need-

44 CJEU, Second chamber, 27 Oct. 2016, nº C-290/15, *D'Oultremont*, ECLI:EU:C:2016:816; CJEU, Second Chamber, 7 June 2018, nº C-160/17, *Thybaut*, ECLI:EU:C:2018:401; CJEU, Second Chamber, 7 June 2018, nº C-671/16, *Inter-Environnement Bruxelles*, ECLI:EU:C:2018:403.

45 CJEU, 27 Oct. 2016, nº C-290/15, *D'Oultremont*, op. cit. § 49.

46 Art. 8 Dir. nº 2001/42/EC; Art. 8 Dir. nº 2011/92/EU.

47 Art. 9 Dir. nº 2001/42/EC; Art. 9 Dir. nº 2011/92/EU.

48 Art. 16/2 of the Walloon Climate Act of 20 February 2014.

49 Working Group III of the Intergovernmental Panel on Climate Change (2022), "Working Group III contribution to the IPCC sixth assessment report (Ar6)", op. cit., pp. 13-15 and 13-16.

50 See: https://www.eea.europa.eu/publications/the-contribution-of-national-advisory/.

51 Beckman, L. & Uggla, F. (2016), "An Ombudsman for Future Generations. Legitimate and Effective?", op. cit., pp. 118-133; Lockwood, M., "Routes to credible climate commitment: The UK and Denmark compared", *Climate Policy* 2021, vol. 9, pp. 1234-1247.

ed for truly effective and sound climate policy'.[52] Some of these bodies already exist and their number is increasing.[53]

An early and influential example of a dedicated independent climate body is the UK Climate Change Committee (CCC) created under the Climate Change Act 2008.[54] The CCC is an independent, statutory body whose purpose is 'to advise the UK and devolved governments on emissions targets and to report to Parliament on progress made in reducing greenhouse gas emissions and preparing for and adapting to the impacts of climate change'.[55] The UK example inspired other countries. In France, for example, the High Council on Climate (*Haut Conseil pour le Climat*) was created in 2018, as an 'independent body tasked with issuing advice and recommendations to the French government on the delivery of public measures and policies aimed at reducing France's greenhouse gas emissions'.[56] In Belgium, independent climate councils were recently created, but so far only at the regional level.[57] A similar development also occurred at European Union level, with European Climate Law, creating a European Scientific Advisory Board on Climate Change and inviting each Member State 'to establish a national climate advisory body, responsible for providing expert scientific advice on climate policy to the relevant national authorities as prescribed by the Member State concerned'.[58] Although explicit, this is an open-ended invitation and Member States retain substantial room for manoeuvre. It may nonetheless be an additional step in the establishment of independent climate bodies as a part of climate change governance.

Existing and proposed independent climate bodies can be very different based on their institutional structure, location and mandate. Some criteria for classifying the different options are offered hereafter. From a public law perspective, the legal responsibilities of independent climate bodies, their powers, their composition and their independence are relevant criteria to classify them and locate them within the broader structures of the State, while also highlighting their potential and limits as tools to address the challenge of climate change. Public law principles guiding the design of these independent climate bodies may limit the risk of democratic decline towards more technocratic forms of climate change governance.

52 Weaver, S., Lötjönen, S. & Ollikainen, M., "Overview of national climate change advisory councils", The Finnish Climate Change Panel Report 3/2019, p. 14. Available at: https://www.ilmastopaneeli.fi/wp-content/uploads/2019/05/Overview-of-national-CCCs.pdf.

53 Averchenkova, A., Fankhauser, S. & Finnegan, J., "The influence of climate change advisory bodies on political debates: evidence from the UK Committee on Climate Change", 2021, op. cit., p. 1219; Misonne, D., "Klimaatrechtspraak en wetenschap: jamais l'un sans l'autre", in *Liber Amicorum Luc Lavrysen*, 2022, forthcoming.

54 Part 2 of the Climate Change Act 2008.

55 See: https://www.theccc.org.uk/.

56 See: https://www.hautconseilclimat.fr/en/about/. The Council is formally established by art. D132-1 and followings of the French Code of the Environment.

57 Eg Art 1.5.1. of the Brussels Code on Air, Climate and Energy Control. For a more comprehensive overview of existing independent climate councils, see Evans, N. & Duwe, M. (2021), "Climate governance systems in Europe: the role of national advisory bodies", op. cit., 67 p.

58 Reg. (EU) nº 2021/1119, 30 June 2021, of the European Parliament and of the Council establishing the framework for achieving climate neutrality and amending Reg. (EC) nº 401/2009 and (EU) 2018/1999, Art. 3.4.

A. Composition and independence

A first subdivision that can be used to classify independent climate bodies would refer to differences in terms of their composition and independence. Their composition would have to include some degree of scientific expertise, but the extent to which they take account of other prespectives – such as politicians, stakeholders or civil society – may vary, and accordingly affect their legitimacy. Independent climate bodies are considered legitimate due to their expertise and the way they operate rather than by means of input legitimacy which is central for representative institutions. Which disciplines are represented within the board of an independent climate body should also be considered, as well as the procedure used to appoint or remove these board members. As an example, the appointment of the members of the French High Climate Council must be based on their scientific, technical and economic expertise in climate and ecosystems science, in greenhouse gas reductions and in relation to adaptation and resilience in the face of climate change.[59] The appointment of the members of the UK CCC must, for its part, secure that the Committee (taken as a whole) has experience in or knowledge of (a) business competitiveness; (b) climate change policy at national and international level, and in particular the social impacts of such policy; (c) climate science and other branches of environmental science; (d) differences in circumstances between England, Wales, Scotland and Northern Ireland and the capacity of national authorities to take action in relation to climate change; (e) economic analysis and forecasting; (f) emissions trading; (g) energy production and supply; (h) financial investment; and (i) technology development and diffusion.[60]

As for the independence of independent climate bodies, in general terms, the European Court of Justice has ruled that in 'relation to a public body, the term "independence" normally means a status which ensures that the body concerned can act completely freely, without taking any instructions or being put under any pressure'.[61] As put colourfully by A.G. Bobek, however,

> *"[i]ndependence can hardly be understood as a unitary notion, a sort of 'off-the-rack' single blueprint, that would provide for a set of guarantees universally applicable to all the independent bodies in exactly the same way. Independence is more like a ladder which one can climb up or down and stop at a specific rung, depending on the distance needed from given actor(s) in order to complete one's tasks independently".*[62]

59 Art. L.132-4 of the French Code for the Environment.

60 Climate Change Act 2008, Schedule 1.

61 CJEU, Grand Chamber, 9 March 2010, nº C-518/07, *Commission v Germany*, EU:C:2010:125, § 18. See also CJEU, Fourth Chamber, 13 June 2018, nº C-530/16, *European Commission v Republic of Poland*, EU:C:2018:430, § 67; CJEU, Fifth Chamber, 11 June 2020, nº C-378/19, *Prezident Slovenskej republiky*, EU:C:2020:462, § 32.

62 Conclusions delivered in CJEU, Fourth Chamber, 13 June 2018, nº C-530/16, *European Commission v Republic of Poland*, EU:C:2018:29, § 32.

Analytically, the independence of a particular body can be assessed on the basis of four dimensions: institutional, personnel, financial, and functional independence.[63] *Institutional independence* refers to whether a public body constitutes a separate institutional unit, so that it is not a part of or subordinate to a ministry or department, and whether its existence is formally guaranteed against eg executive action.[64] How the heads of the public body are appointed and removed determines its *personnel's independence*. *Financial independence* refers to whether the entity has a separate budget and autonomy in financial matters. Fourthly, *functional independence* means that an 'agency does whatever it wants'.[65] Different institutions 'score' differently on the four dimensions of independence. Independence can further be assessed *de iure* or *de facto*: both dimensions are interrelated, but they do not always coincide.[66] Furthermore, even 'independent' entities do not operate in a *vacuum*: they interact with public and private bodies and define their preferences accordingly, relying on information from other actors for their operations, etc. Independence is therefore always relative.[67] For example, as far as the French High Council for Climate is concerned, the enabling legislation provides that the Council falls under the responsibility of the Prime Minister, but affirms also its independence and states that its members may neither seek nor receive instructions from anyone when fulfilling their duties.[68]

B. Statutory functions

A second element that can be used to classify existing or suggested independent climate bodies relates to their statutory functions. For example, some can be tasked with formulating or recommending policy goals to be achieved in relation to climate change, such as carbon neutrality or a certain level of reduction of greenhouse gas emissions in a certain timeframe. It is the role of 'climate laws' to set long-term goals of reduction of greenhouse gas emissions.[69] In other cases, the independent body is rather active at the level of implementation of climate goals set by political representatives. Their task can then be to make decisions, monitor or give advice on how or whether general or specific measures contribute to achieving the goals set by the representative institutions, or whether additional or alternative measures should be adopted. At the implementation level, independent climate bodies contribute to avoiding politicians break long-term legal commitments when their immediate interest is to do so.[70] As such, their role is often to monitor whether the objectives of greenhouse gas emissions set in climate laws are likely to be achieved through assessments of existing and planned policies reported by the government.[71]

63 Scholten, M., "Independent, Hence Unaccountable? – The Need for a Broader Debate on Accountability of the Executive", *Review of European Administrative Law* 2011, vol. 4, p. 6.

64 Ibid, p. 10.

65 Ibid, p. 11.

66 Gilardi, F. & Maggetti, M., "The independence of regulatory authorities" in Levi-Faur, D. (ed.), *Handbook on the Politics of Regulation*, 2011, Cheltenam, Edward Elgar, pp. 203-204.

67 Ibid, p. 202.

68 Art. L.132-4 of the French Code for the Environment.

69 Nash, S., Torney, D. & Matti S., "Climate Change Acts: Origins, Dynamics, and Consequences", *Climate Policy* 2021, vol. 9, p. 1111.

70 Lockwood, M. (2021), "Routes to credible climate commitment: The UK and Denmark compared", op. cit., p. 1235.

71 McHarg, A., "Climate change constitutionalism ? Lessons from the United Kingdom", *Climate Law* 2011, vol. 2, p. 471.

Independent climate bodies may exercise their tasks with different degrees of effectiveness depending for instance on their expertise, their reputation, and the formal powers that are available to them. The latter are discussed hereafter. The responsibilities of independent climate bodies may also be more or less broad depending on the wording of the enabling legislation: some may for example have to focus on climate change mitigation while others may also have a role in adaptation.[72] The range of cases in which they must give advice or adopt decisions or recommendations and the conditions under which they can do so can also vary greatly. A key question here is whether they can make recommendations *ex officio* or whether they can only react to requests from the government. Moreover, independent climate bodies can also exist as separate and dedicated institutions or a climate role – however defined – can be taken up by other existing (independent) bodies or councils, such as environmental bodies or bodies competent for sustainable development.[73] A review of institutions in eight countries quoted in the Sixth Report of the Intergovernmental Panel on Climate Change suggests three broad processes through which climate institutions emerge: '"purpose-built" dedicated institutions, focused explicitly on mitigation; "layering" of mitigation objectives on existing institutions; and "latent" institutions created for other purposes that nonetheless have implications for mitigation outcomes.'[74] The British Committee on Climate Change is an example of a dedicated climate institution, while central banks and energy regulators are examples of non-dedicated structures that nonetheless have a role to play in addressing the challenge of climate change.[75]

C. Powers

Another distinction between different sorts of independent climate bodies relates to the powers conferred to these independent climate bodies. Some may have decision-making powers in the formal sense. In such cases, independent climate bodies would be able to make binding decisions on their addressees without their consent. For example, Helm et al. have suggested the creation of independent carbon agencies as a way to solve the time inconsistency problem in climate policies and the lack of credibility of these policies. Carbon agencies would either have advisory powers or could be empowered to, for instance, set carbon taxes or emissions-trading limits to achieve a CO_2 reduction target set out by the government.[76] However, most democracies struggle with granting decision-making powers to bodies that are not directly or indirectly accountable to voters.

72 Evans, N. & Duwe, M. (2021), "Climate governance systems in Europe: the role of national advisory bodies", op. cit., p. 12.

73 Weaver, S., Lötjönen, S. & Ollikainen, M. (2019), "Overview of national climate change advisory councils", op. cit., p. 4.

74 Working Group III of the Intergovernmental Panel on Climate Change (2022), "Working Group III contribution to the IPCC sixth assessment report (Ar6)", op. cit., pp. 13-15 (quoting Dubash, N. (2021), "Varieties of climate governance: the emergence and functioning of climate institutions", *Environmental Politics 30 Supplement 1*, pp. 1-25).

75 Zilioli, C. & Ioannidis, M., "Climate change and the mandate of the ECB: potential and limits of monetary contribution to European green policies", *Common Market Law Review* 2022, vol. 59, pp. 363-394; Art. 58 of Dir. (EU) n°2019/944, 5 June 2019, of the European Parliament and of the Council on common rules for the internal market for electricity and amending Dir. n° 2012/27/EU.

76 Helm, D. et al. (2003), "Credible Carbon Policy", op. cit., pp. 438-450.

Surely, independent bodies are now an integral part of the governance structures of Western states. For example, independent central banks are a common feature of contemporary monetary policy, while independent economic regulators have also spread worldwide over recent decades.[77] At the same time, however, a comparative study has shown that the need to maintain some form of political control over non-governmental public bodies is widely recognised in Europe,[78] and, in Germany, legal scholars have claimed that the European requirement to create independent regulators in the electricity sector was in breach of the German constitutional identity.[79] They argue that the creation of new independent bodies leads to a redefinition of the respective roles of politicians, experts and citizens, in ways which may be at odds with pre-existing domestic constitutional, political and economic arrangements.[80] De Somer also identifies, in general terms, conflicting approaches between EU requirements that oblige Member States to create autonomous public bodies and a counter-trend at national level to restrain the use of such public bodies because of democratic concerns.[81] Accordingly, the creation of independent climate bodies will have to take forms that are sound and rigorous in constitutional terms, particularly if these bodies are granted decision-making powers. Some parliamentary and judicial accountability is likely to remain necessary, and the discretion granted to the independent body is likely to be restricted by statute or under government regulations.

Furthermore, the proposal from Helm et al. to create a carbon agency having the power to set carbon taxes or emissions-trading limits to achieve a CO_2 reduction target set out by the government is likely to face additional constitutional hurdles in many legal systems. This is because such delegation of powers would lead the carbon agency to exercise fiscal powers, which historically is, in a comparative perspective, typically an area of competence which falls under the responsibility of parliaments and that can only be delegated to third parties under strict limits.[82] Overall, granting wide discretionary powers to bodies outside of the realm of the representative institutions is likely to be possible, but only under strict limits set by constitutional law provisions or principles. Turning to more technocratic forms of government in the fight against climate change is likely to face constitutional hurdles and will therefore have to consider the constitutional settings in which this would take place.

In other cases, independent climate bodies would have advisory powers only, without decision-making powers in the formal sense. In such cases, independent climate bodies only give advice or make non-binding recommendations to other actors, or challenge

77 Jordana, J., Levi-Faur, D. & Fernandez-i-Marin, X., "The Global Diffusion of Regulatory Agencies" *Comparative Political Studies* 2011, vol. 44, nº 10, p. 1344.

78 Jenart, C., "Uitbesteding van regelgevende bevoegdheid aan autonome agentschappen, private en hybride actoren", *Tijdschrift voor Bestuurswetenschappen en Publiekrecht* 2020, vol. 63, pp. 69-70.

79 See the references in Ruffert, M., "Public Law and the Economy: A Comparative View from the German Perspective", *International Journal of Constitutional Law* 2013, vol. 11, issue 4, p. 935.

80 I have tried to show this elsewhere in relation to the Belgian case and independent economic regulators. See Slautsky, E., "Independent economic regulators in Belgium: contextualising local resistance to a global trend in the light of the Belgian economic constitution", *REALaw* 2021, pp. 37-63.

81 De Somer, S., *Autonomous Public Bodies and the Law*, 2017, Cheltenham, Edward Elgar.

82 Jenart, C., *Outsourcing Rulemaking Powers. Constitutional Limits and National Safeguards*, 2022, Oxford, Oxford University Press, pp. 106-110.

governmental climate action or inaction. A 2021 study on climate governance systems in Europe and the role of climate advisory bodies further envisaged a combination of three key possible functions for independent climate bodies with an advisory and expert role (labeled 'independent scientific climate councils'): a combination of watchdog, information provider and convenor functions.[83] The possibility for independent climate bodies to bring cases to courts could also be envisaged, by legally recognizing their standing and capacity to do so. When independent climate bodies only have advisory functions, the legitimacy and accountability concerns that result from granting powers to unelected bodies are less obvious, and political resistance to the creation of such bodies is expected to be weaker,[84] for the decision-making scope of the representative institutions would remain formally untouched. There might, however, be a trade-off between legitimacy and effectiveness in such case, although the extent of this trade-off should not be exaggerated given the real impact advisory bodies can have in practice on policies and specific decisions. Two reasons for this are discussed hereafter.

On the one hand, climate advisory bodies increase the transparency of the climate decisions made by the representative institutions and they increase their accountability to the public for the flaws thereof. The threat of naming and shaming further gives an incentive to the government to follow the advice from the climate bodies. For instance, in 2019, when the UK updated its 2050 target of greenhouse gas reductions from 80% to 100% compared to 1990 (a decision related to the climate ambition for the UK, therefore – not its implementation), it did so at the recommendation of the Committee on Climate Change.[85] This is just one example of the practical impact of this committee on UK climate policies, as the Committee has proved influential over the years.[86]

On the other hand, the real impact of independent advisory climate bodies also results from the fact that they increase the tools available to claimants and to judges who review legislative or executive climate action. For example, one striking feature of the decision from the French Council of State (*Conseil d'État*) in the case *commune de Grande-Synthe* is its reliance on scientific expertise and on assessments and reports from the French High Council on Climate.[87] On three occasions in its decision, the French Council of State relied on assessments from the High Council to decide that the efforts from the French government were not sufficient in order to achieve the target of reducing greenhouse gas emissions by 40% by 2030, as required under French legislation and EU law.[88] In this decision, the Council of State ordered the French Government to take

83 Evans, N. & Duwe, M., "Climate governance systems in Europe: the role of national advisory bodies", 2021, Ecologic Institute, Berlin; IDDRI, Paris, p. 7. Available at: https://www.ecologic.eu/sites/default/files/publication/2021/Evans-Duwe-Climate-governance-in-Europe-the-role-of-national-advisory-bodies-2021-Ecologic-Institute.pdf.

84 Beckman, L. & Uggla, F. (2016), "An Ombudsman for Future Generations. Legitimate and Effective?", op. cit., p. 118.

85 Evans, N. & Duwe, M. (2021), "Climate governance systems in Europe: the role of national advisory bodies", op. cit., p. 43.

86 Averchenkova, A., Fankhauser, S. & Finnegan, J., "The influence of climate change advisory bodies on political debates: evidence from the UK Committee on Climate Change", *Climate Policy* 2021, vol. 21, issue 9, pp. 1218-1233; Working Group III of the Intergovernmental Panel on Climate Change (2022), "Working Group III contribution to the IPCC sixth assessment report (Ar6)", op. cit., pp. 13-15.

87 CE, 1 July 2021, nº 427301, ECLI:FR:CECHR:2021:427301.20210701.

88 Art. L.100-4 of the Energy Code; Annex 1 of Reg. nº 2018/842/EU, 30 May 2018, of the European Parliament and of the Council on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to

additional measures by 31 March 2022 to achieve the target of reducing greenhouse gas emissions by 40% by 2030.[89] Arguably, the repeated reliance of the Council of State on assessments from the High Council on Climate, next to reports from two other French environmental councils, can be understood both as a practical necessity, given the technical complexity of the case,[90] as well as a way for the administrative judge to increase the legitimacy of its decisions in a high-profile climate case, by grounding its assessments in institutionalised scientific advice. That references to scientific work increase the legitimacy of judicial decisions (and vice versa) is not surprising and has generally been recognised.[91] Nonetheless, as is the case with other forms of advisory boards, the institutionalised character of the French High Council on Climate makes it easier for the Council of State to rely on its expertise in its decisions.[92] There are several reasons for this.

Firstly, expert advice from a public authority such as the High Council on Climate fits well with a French tradition of creating expertise within state structures.[93] Secondly, expertise needs to be independent, competent, unbiased, impartial, transparent and pluralist to be legitimate.[94] The institutionalization of climate expertise through the creation of the High Council on Climate contributes to meeting these requirements by formalising them: the decree creating the High Council specifies its composition, affirms its independence, defines its powers, and ensures the transparency of it activities.[95] Procedures and transparency increase the legitimacy of expert bodies.[96] Finally, the control exercised by the French Council of State in the *commune de Grande-Synthe* case is specific and quite novel, as it consists in assessing the extent to which existing and projected governmental measures adopted to reduce greenhouse gas emissions are enough to achieve longer-term objectives. That kind of judicial control of the future 'trajectory' of greenhouse gas emissions reductions must rely on scientific assessments and projections. The existence of the French High Council of Climate contributes to

climate action to meet commitments under the Paris Agreement and amending Reg. (EU) nº 525/2013.

89 Conseil d'État, "Greenhouse gas emissions: the Conseil d'État annuls the Government's refusal to take additional measures and orders it to take these measures before 31 March 2022", 2 July 2021. Available at: https://www.conseil-etat.fr/en/news/greenhouse-gas-emissions-the-conseil-d-etat-annuls-the-government-s-refusal-to-take-additional-measures-and-orders-it-to-take-these-measures-befor.

90 Lasserre, B., "L'environnement: les citoyens, le droit, les juges", Discourse before the *Cour de cassation*, 21 May 2021. Available at: https://www.conseil-etat.fr/publications-colloques/discours-et-interventions/l-environnement-les-citoyens-le-droit-les-juges-introduction-de-bruno-lasserre-vice-president-du-conseil-d-etat.

91 Chevallier, J., "L'expertise au prisme du contrôle du juge", *Revue française d'administration publique* 2020, p. 16; Jacquemet-Gauché, A., "Le juge administratif face aux connaissances scientifiques", *Actualité juridique. Droit administratif* 2022, pp. 443-453. In the US context, see also Jasanoff, S., *Science at the Bar. Law, Science, and Technology in America*, 1997, Cambridge Mass., Harvard University Press.

92 Delzangles, H., "Le 'contrôle de la trajectoire' et la carence de l'État français à lutter contre les changements climatiques. Retour sur les décisions Grande-Synthe en passant par l'Affaire du siècle", *Actualité juridique. Droit administratif* 2021, p. 2127. See also Misonne, D., "Klimaatrechtspraak en wetenschap: jamais l'un sans l'autre", 2022, op. cit.

93 Chevallier, J. (2020), "L'expertise au prisme du contrôle du juge", op. cit., pp. 14-15.

94 Ibid, p. 14.

95 Arts. D.132-1 to D.132-7 of the French Code of the Environment.

96 Agacinsky, D., "Expertise et démocratie. Faire avec la défiance", France Stratégie, Dec. 2018. Available at: https://www.strategie.gouv.fr/sites/strategie.gouv.fr/files/atoms/files/fs-rapport-expertise-et-democratie-final-web-14-12-2018.pdf, 87.

making this kind of judicial assessments possible.[97]

Conclusion

The capacity of democracies to address the challenge of climate change is debated. Calls for more technocratic or authoritarian forms of climate governance have been made. This is because democracies are not always good at dealing with global, complicated and intergenerational challenges such as climate change, particularly when they require drastic measures to be taken quickly. Institutional innovations can, however, help democracies overcome this challenge. Institutions like constitutional courts and posterity impact assessments can help democracies overcome their tendency to short-termism and the problems that short-termism causes when costly measures need to be taken in the short term to prevent further damage in the longer term. This is the case for some of the measures needed to mitigate the effects of climate change.

Another institutional solution to the problem of short-termism in democratic decision-making in the context of climate change relies on independent climate bodies. These bodies can be conceived in different ways making generalisation across jurisdictions a complex exercise. However, it is possible to make sense of this diversity through a series of public law criteria: statutory functions, nature of the conferred powers, composition, and degree of independence are all criteria that can be used to classify existing or suggested independent climate bodies and locate them within the broader context of state structures. Public law further helps shed some light on the kind of powers and responsibilities that can be conferred on independent bodies such as independent climate bodies. For instance, constitutional principles in democratic states typically define the scope of action reserved to the representative institutions and, conversely, set limits to the kind of powers that can be granted to independent expert bodies. As a result, these principles also offer some counterweight to the pressure that climate change may put on democracies and in favour of less democratic forms of government.

97 Delzangles, H. (2021), "Le 'contrôle de la trajectoire' et la carence de l'État français à lutter contre les changements climatiques. Retour sur les décisions Grande-Synthe en passant par l'Affaire du siècle", op. cit., p. 2126.

fypl french yearbook *of* public law
Issue 1, 2023

The Citizens' Climate Convention: A new approach to participatory democracy, and its effectiveness on changing public policy

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Abstract:

This article examines the unique characteristics of the Citizens' Climate Convention (CCC) in France in comparison to other participatory democracy models in the field of environmental and sustainable development. It also seeks to evaluate the CCC's influence on climate change mitigation policies.

Keywords:

Citizens' assemblies, Participatory democracy, Citizens' climate convention, French environmental law, Environmental democracy

1 Delphine Hedary *was in charge of the legislative committee for the Citizens' Climate Convention in 2020-2021; in the past, she was responsible for preparing the Environment Charter in 2002-2003 and chaired the Estates General on the Modernisation of Environmental Law in 2013.*

The "yellow vests" movement began in autumn 2018 with protests against the increase on domestic consumption tax on energy products. Promoted as encouraging ecological transition, this tax increase primarily had an impact on the purchasing power of all those depended on their cars.

This movement, in turn, inspired the so-called "*gilets citoyens*" (or "yellow gilets/vests") movement[2] which called for a great national debate to be launched by the President of the Republic. The main aim of the movement is to combat global warming with the participation of citizens. Specifically, the group called for a citizens' assembly chosen by lot, tasked to debate the ecological transition.

The President of the Republic took up this request and mandated the government, with the support of the Economic, Social and Environmental Council (*Conseil économique, social et environnemental*, now CESE), to organise a Citizens' Climate Convention. Bringing together 150 citizens chosen by lot, the Convention was tasked to put forward proposals to reduce greenhouse gas emissions by at least 40% (compared with 1990 levels) by 2030 in a spirit of social justice. The French President strongly advocated to take up the resulting proposals without reservations and submit them either to a vote in parliament or to a referendum or implement them directly.[3]

The Citizens' Climate Convention (CCC) was a novelty in France. This article analyses its original features compared with other forms of participatory democracy in the field of the environment and sustainable development, and aims to assess its impact on public policies to combat climate change.

I. The CCC is not the first instrument of participatory democracy in the field of the environment and sustainable development

To the contrary, this policy area seems to be a pioneer in terms of instruments of participatory democracy. In the 1970s, procedures were introduced which sought to improve information on the environmental impact of certain works or structures (such as the law of 10 July 1976 on nature protection). Equally, public enquiries have long been a central tool to access information in this field. The law of 12 July 1983 on the democratisation of public enquiries and environmental protection, known as the Bouchardeau law, sets out the precise scope of application of these procedures and covers all those operations "likely to affect the environment".[4] The law aims to make information more accessible and thereby allow for broader participation *in local projects*. The procedures have since been diversified, and modified.

Ad hoc bodies have also been set up on to develop regulations. It seems to be primarily unfortunate industrial accidents that triggered developments in terms of participatory democracy. Those often occur in two steps – in a first step ad hoc consultations take place, which are in a second step implemented in a more systematic participatory process. For example, after the explosion at the AZF factory in Toulouse in September 2001,

2 The *gilets jaunes* movement, a popular protest movement that lasted several months, began on 17 November 2018 and was triggered by several causes, including rising fuel prices.

3 More specifically, President Macron originally pledged to adopt 146 of the 149 forthcoming proposals (https://www.elysee.fr/emmanuel-macron/2020/06/29/le-president-emmanuel-macron-repond-aux-150-citoyens-de-la-convention-citoyenne-pour-le-climat). The President's position will evolve significantly over time...

4 Law n° 83-630 of 12 July 1983 on the democratisation of public enquiries and environmental protection, article 1.

"round tables on industrial risks" were organised, bringing together local residents, elected representatives, representatives of employees and employers of the industry, as well as environmental protection associations. The recommendations that emerged from these roundtables inspired the law of 30 July 2003 which established plans to minimize technological risks related to dangerous industrial sites (commonly referred to as SEVESO, after the industrial disaster that inspired the first European directive on the major accident risks of certain industrial activities in 1982). These plans are developed in a participatory manner and aim to reduce the risks to people living close to industrial sites. Over the last twenty years, almost 400 plans have been drawn up, covering more than 800 municipalities.

Further instruments of participatory democracy have not necessarily resulted from *any* particular event or accident, but are rather a response to more general *concerns about the importance of the environment in the reconciliation of public interests*. When Jacques Chirac, then running for re-election in 2002, announced that he wished to propose to the French people an "environmental charter backed by the Constitution", his ambition was nothing less than to modify the nation's social pact, to raise the third pillar of sustainable development to the same level as the other two in the normative order, and to found a "humanist ecology" so that we would stop "looking the other way while the house burns".[5] The Charter of the Environment was prepared in a participatory manner as foreseen in the law of 2 February 1995 on the reinforcement of environmental protection as well as the EU treaties. With the inclusion of the Charter in the Constitution, the principle of participation became an enforceable right and thus acquired constitutional value. This meant that from then on, all projects, plans and programmes, and even regulatory texts which bring about effects on the environment, a notion understood quite broadly by the Council of State, must be open for public consultation.

Ten years later, the then elected President of the Republic largely considered the thus established processes too burdensome and harmful to the "productive recovery". He thus called for a reorganisation of the law – an "Estates General on the modernisation of environmental law". His predecessor, elected in 2007 in turn, who had ran under the slogan "Let's enter the next world" advocated for a "*Grenelle de l'environnement*". It was his politics that eventually led to the adoption of two laws containing measures relating to the protection of biodiversity, town planning, transport, energy and climate, the impact of the environment on health and governance.

The author of this article played an active part in these successive episodes of major national consultation since the AZF accident and has been responsible for the preparation of the Charter of the Environment, then for steering the Estates General on the modernisation of environmental law, and lastly for the legislative committee responsible for providing legal support for the Citizens' Climate Convention and for transposing citizens' proposals into legal standards. The following analysis is therefore based on this experience and focuses on tools of participatory democracy rather than the outcome of particular procedures.

5 To quote the famous opening words of his speech at the Johannesburg Summit on 2 September 2002.

II. The CCC is innovative in three respects

A. The CCC is innovative in terms of *choosing participants*. This is a fundamental difference from the predecessors mentioned above

Previously, participants in the various forms of consultation have primarily been "stakeholders" or "interested parties in the legal sense of the term, i.e. not those who might just be curious about the subject. For example, public enquiries and local consultations had often been limited to of local residents or people likely to be impacted by the project in question. Major initiatives such as the Charter of the Environment, the Grenelle Forum or the Estates General on the modernisation of environmental law, which had been subject to prior public consultation, essentially relied on consultations of those parts of the public likely to be affected – representatives of associations aiming to protect the environment, representatives of the industry, local or national elected representatives. Questionnaires were sent to legal entities so that they could respond in their capacity as experts and in view of their role (for example, the Academy of Medicine, public establishments with scientific or environmental competence, etc.). Participation was also open to all citizens wishing to make their opinions and proposals known.

While this might be a step in the right direction, participation could be even more representative if it were to combine reaching out to officials and private individuals, if it would combine several forms of consultation such as questionnaire, regional meetings, internet forum, symposiums and citizens' panels. For the preparation of the Charter of the Environment, more than 15,000 people responded to the questionnaire, each response being counted as a single response, even if it came from a legal entity that had made a collective decision to respond.

In contrast to the above, the Citizens' Convention is an assembly of 150 individuals without any prior knowledge of the subject on which they are consulted, who are not personally concerned by the subject matter of the consultation. Participants are selected randomly and contacted by telephone. The selection process aims to establish a panel that is representative of the French population, in terms of gender, age, socio-professional status, as well as geographic location (Paris province overseas). Citizens' panels had already been consulted in the past, notably on GMOs in June 1998, or during the preparation of the Charter of the Environment. But they only brought together around fifteen people who were asked for their input but not necessarily given the chance to formulate concrete proposals on the matter.

Whereas the selection procedure for consultations on the CCC is clearly innovative, it is not without critique.

Firstly, the people randomly chosen to participate in a citizens' convention are free to decide whether or not to participate, unlike those selected to take part in jury trials. Only those who interested in the subject and willing to participate will eventually be consulted. They must be available to attend all the sessions, which in the case of the CCC means seven three-day sessions in Paris, which for some people translates into logistic problems and possibly long absences from home. Transport and accommodation costs were covered, and compensation was paid for attendance as well as for loss of professional income.[6] Depending on the professional situation, this compensation does not represent

6 For further details, see : https://www.conventioncitoyennepourleclimat.fr/budget/ (consulted on July, 19, 2023).

the same proportion of lost income, and availability cannot be the same. So this method of selecting participants cannot be considered perfectly neutral.

Secondly, this means of participation creates a certain dynamic amongst participants which leads them to value certain subjects and to reject or marginalise others. It is not certain that surveys carried out on a larger scale, or a diversification of the methods used to gather opinions, would have produced the same results on certain proposals as the votes cast by the participants at the convention. The influence that certain expert hearings can have is not the only reason. Those who are used to collegial deliberations know that spirals of argumentation can be set in motion in which the participants support each other without considering alternatives. Of course, as in any group, some people will dominate the group, and will thus exercise more influence over the final decision. Such a phenomenon can hardly be remedied by making some of these sessions public.

This means that, while the panel is representative in terms of the population living in France, it is not necessarily representative of the concerns or majority opinions of the country as a whole. Instead, each participant can only speak on his or her own behalf, which means that effectively opinions of 150 people were gathered, who have not received any prior mandate. One may wonder whether this might not downplay the ambitions that inspired this setting up, following the Grenelle Environment Forum, of the National Council for Ecological Transition (CNTE), bringing together representatives of all stakeholders and meant to constitute a forum for "environmental democracy".

B. The CCC's second innovation is its *mode of governance*

Previous participatory processes relied on a steering committee made up of a small group under the supervision of the ministry responsible for environmental matters, supported by a small administrative team as well as a few external experts. The technical-administrative steering group, headed by an apolitical senior civil servant was tasked to oversee the organisation of the process. The external experts, such as Yves Coppens, and the seventeen other members of the commission he chaired for the preparation of the Charter of the Environment, ensured both representativeness and neutrality of the stakeholders.

For the Citizens' Climate Convention, two co-chairs, well-known public figures, were appointed to head a 15-member governance committee: a general rapporteur from the CESE, experts in the field of climate, participatory democracy and the economic and social field, and two people appointed by the Ministry for Ecological Transition for their expertise in climate and participatory processes. Two citizens, different from one session to the next, attended the meetings of the governance committee.

The meetings of the governance committee were also attended by the main facilitators of the sessions, the heads of each of the consultation consultancies selected to support the process. Their role was more important than is usually the case in such processes. They determined the time to be spent on particular topics, how and when external experts would be invited to the discussion, and how the citizens could interact with these experts and with the members of the legislative committee.

Three guarantors were appointed, one by the president of the CESE, the other two by the presidents of the National Assembly and the Senate. The impartiality and neutrality of one of the guarantors, who was heavily involved in the Citizens' Climate Convention project itself, was questioned and criticised at the end of the convention.

The governance mode chosen was thus more complex in the Citizens' Convention than in previous processes of participatory democracy, which eventually prolonged the consultation process.

C. The third difference concerns *the way in which legal standards are drawn up*

The mandate given to CCC is original in two respects. Firstly, the consultation posed a rather narrow question - "How can we reduce greenhouse gas emissions by 40% by 2030 in a spirit of social justice?" To answer this question, the precise impact of the proposed measures had to be determined. This was done with the help of experts who were members of the "support group" that accompanied the citizens throughout the convention and would rate proposals from one to three stars depending on the expected impact, or as the case may be as not assessable. But proposals were extremely diverse. Citizens proposed a total of 149 measures to reduce greenhouse gas emissions. These may be divided into five broad categories - "consumption", "production", "transportation", "housing" and "food". Furthermore proposals were made to revise the Constitution and to strengthen citizen participation.

Secondly, and this seems to be where the CCC is most innovative, citizens' group had been asked to propose measures which would be forwarded "unfiltered" to the adoption process. This, however, presupposes that these measures are formulated with sufficient precision so that they can be incorporated into the normative order, or even take the form of legislative or regulatory measures. In previous experiments, the aim of consultations was rather to identify problems, their causes and solutions, including legal solutions, but never extended to asking those consulted to draft a text that could be adopted as is. Instead, government would only subsequently draft legislation on the basis of the results of the consultations. The precedent that may seem closest to the CCC is that of the Charter of the Environment. Consultation on the latter was conducted under the slogan "participate in writing the Charter of the Environment", with a wooden pencil with buds serving as the emblem. The Coppens' Commission submitted a draft Charter to the President of the Republic, with explanations for each article and variants for some of them. Notably though, its work was the result of a combination of public consultations and legal and scientific expertise. It was also clear from the outset that if the Government were to take up this proposal to redraft the Constitution, it would not submit it "unfiltered" to the constitutional adoption process.

It may therefore seem paradoxical that only very few legal experts were involved in the process. It was equally unclear what exactly their role would be - on the one hand they seemed to have served as moderators in terms of providing expertise to the citizens, on the other it was their expertise that made the whole exercise more credible. There was hence a temptation to confine them to the role of translators, as if the law were a foreign language and one could simply give the "legal experts" proposals to be "translated" into legal standards. The Legislative Committee was not represented on the Governance Committee, nor was it consulted on methodology, despite the fact that some of its members had experience in this area that was commonly considered successful. This isolation seemed to be inspired by the fear that legal experts would have an influence on the content of the proposals which is somewhat surprising given that the legislative drafting committee was made up of academics and senior civil servants for whom impartiality is a professional duty and a personal honour. But at the end of the process, both the governance committee and the citizens themselves paid tribute to the perfect intellectual hon-

esty of the legislative drafting committee, which presented its working methodology in a transparent manner, both orally and in writing, in a note appended to the public report of the citizens' convention.

The following will shortly summarise the methods of the CCC's law making in a chronological order, leaving aside the content of the subjects on which the citizens worked.

At the first session, the Legislative Committee set out the general principles of constitutional law that all standards must respect (equality, freedom, legality, etc.) as well as the principles of environmental law (prevention of environmental harm, participation, etc.). It also explained the essentials for formulating legal standards, stressing though that citizens should try to answer these questions for each of their proposals, without worrying about drafting them in the form of an article of law or a decree, as legal experts are there to carry out this work of "formulating legislation".

Following the meetings, the members of the Legislative Committee were asked to carry out a legal analysis of certain proposals, such as possible measures to reduce the artificialisation of land, or to regulate advertising for products that emit greenhouse gases. Depending on the thematic groups (consumption; production and work; food; housing; transport) and the respective moderators, the proposals forwarded to the Legislative Committee varied in length. Some thematic grouped explicitly requested the Legislative Committee from taking recourse to sectoral experts.

Once the proposals had been approved by the citizens, the Governance Committee ordered the Legislative Committee to translate them into legal provisions -

> *"the Governance Committee wishes to give priority to complying as precisely as possible to the intention of the members of the convention...rather than to the strict legal rigour of the text. The support group and the facilitation team will be able to clarify the intentions of the members of the Convention".*[7]

This meant that the members of the Legislative Committee would not directly interact with citizens, even though their proposals were hardly formulated with legal requirements in mind. This might be partly because the experts that had supported the citizens in formulating those proposals were not lawyers but rather experts in the respective subject matter – transport, food, etc. In this context, giving priority to the members' intentions also meant that reformulating the proposals in a manner that would make them acceptable legal standards took second place. The Legislation Committee had to argue that it was not ethically possible for its members to present drafts in the form of articles of law or decree without pointing out the underlying legal difficulties (such as a contradiction with a higher-ranking standard or with general principles), in order to alter its mandate to at least highlight these issues as "attention points".

The Legislative Committee had a great deal of work in order to ensure that the legal transcription of the proposals was both faithful to the intention of the citizens and legally correct so that it could be taken up with as few "filters" as possible. Its members, who worked in a collegial manner, sought to create the greatest possible legal leeway in or-

7 See : https://www.conventioncitoyennepourleclimat.fr/wp-content/uploads/2020/03/Mandat-au-comit%C3%A9-l%C3%A9gistique.pdf (consulted on 19 July 2023).

der to implement the citizens' proposals as concretely as possible. To some extent they therefore had to fill gaps in the proposals given that the latter were often formulated in an imprecise manner. Other proposals, on the other hand, were drafted in great detail often due to the fact that they had adopted formulations presented by experts, which were not necessarily in line with what would have been necessary from a legal point of view. The Legislative Committee sometimes proposed two or three alternative drafts for the same proposal: endeavoured to create the greatest possible legal leeway in order to implement the citizens' proposals as concretely as possible, one close to the citizens', and when necessary, an alternative which that better met the objective by using different legal procedures than those envisaged by the citizens.

These transcripts were made available to the public, first through the moderators and then during webinar sessions with members of the Legislative Committee. Citizens would often ask for specific corrections when they felt that the transcripts did not reflect their proposals. In some cases, they chose to make minor changes to the reports to bring them into line with the drafting committee's transcripts. However, to the regret of some of them, they could not rework their proposals to take account of the points of attention raised by the Legislative Committee.

The transcripts were included in the CCC's public report, and even though they are distinguished from the proposals, particularly in terms of the layout, they are obviously very similar to the citizens' proposals. This is the first time that a citizens' consultation has resulted in proposals in the form of articles of law or decree.

III. The impact of the Citizens' Convention on public policy: Can one measure its effectiveness in the fight against climate change?

A. The CCC's proposals have directly inspired laws and decrees.

It was on the basis of the citizens' proposals that subsequent laws would be adopted. After the President of the Republic would take a position on these proposals, the administration started to draft concrete decrees such as amendments to the Finance Bill for 2021, elements for the recovery plan and what formed the core of the draft law of 22 August 2021 on combating climate change and strengthening resilience to its effects, known as the "climate resilience" law.

The government followed the usual procedure given that consultations are generally required by the Constitution – such as consultations of the Council of State on a bill or certain draft decrees –, or by law such as public consultation on certain decrees or consultation of the National Council for Ecological Transition. From a constitutional law point of view, it was not possible to disregard these procedures. As a result, the proposals put forward by the public underwent several changes, whether as a result of the decisions taken by the President of the Republic or the government, in particular to take account of the consultations or as a result of parliamentary amendments to the law.

A further innovation of the CCC was that citizens were brought together once again, several months after the submission of their report, for the government to present the action taken on their proposals and the support group and the legislative committee were asked to evaluate the proposals. The former assessed the impact of the measures. The latter carried out a strictly legal analysis, and to that effect produced a table showing, on the one hand, the citizens' proposals and their transcriptions and, on the other, the

corresponding articles of the subsequently adopted law. For every article, the table would indicate whether it had an "equivalent effect" (i.e. either identical or different wording but with the same legal scope) or whether there was a "difference". In case of a difference, the table provided further information as regards:

- The purpose of the measure (information would be provided as regards the outcome of the law's impact assessment, and whether the nature of the measure is substantially different from the underlying citizens' proposal);
- The nature of the effects (for example, the CCC wants a measure to be mandatory, but the law includes an optional, experimental or incentive measure, or an objective);
- The scope of application (for example, the CCC's proposal includes certain categories of products, while the law only refers to some of them);
- Thresholds (differences in percentages, durations, etc.)
- On the timetable (dates of entry into force).

At the end of the session, 120 of the 150 citizens voted to assess whether the government's decisions on their proposals would "bring us closer to the objective of reducing greenhouse gas emissions by at least 40% (since 1990) by 2030, in a spirit of social justice". Voting on each of the themes produced a score ranging from 3.4 out of 10 for "housing" to 4 for "consumption", with "food", "transport" and "production and work" scoring 3.7.

B. Has the Citizens' Climate Convention made the fight against climate change more effective?

Citizens have put forward proposals that might otherwise have never become law, either because they had ideas that might not have come up without public consultation, or because they set different priorities than experts or administrators would have done. It is hardly possible to determine whether these are the most effective measures to reduce greenhouse gases, but it is clear that the measures adopted at the very least could rely on a broad public support.

It is also certain that the measures contained in the "climate resilience" law[8] are amongst those identified by the government as contributing to achieving the reduction targets set out in Article L. 100-4 of the Energy Code and Annex I to Regulation (EU) 2018/842 of 30 May 2018, inspired by the Paris Agreements. This is what had been argued in a dispute initiated by the *Commune de Grande Synthe* before the *Conseil d'État*, which took this into account in its contentious decisions of 1st July 2021 and 10 May 2023. It is therefore clear that the Citizens' Convention, by influencing the content of the "climate and resilience" law through its proposals, has indirectly impacted the position of the judges and had an impact on the adoption of measures aimed at reducing greenhouse gas emissions, but in a way that cannot be quantified or assessed in detail.

In addition to its normative scope, the Citizens' Convention also attracted broad media attention and thereby raised awareness for the issue of climate change and the urgent

8 Act no. 2021-1104 of 22 August 2021 on combating climate change and building resilience to its effects.

need to change behaviour and rules.

Ultimately, regardless of the merits and constraints of participatory democracy initiatives, it is political will that proves most influential and crucial in driving change.

fypl french yearbook *of* public law
Issue 1, 2023

Conclusion

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Keywords:

Law and the Anthropocene, Climate change litigation, Comparative environmental law

I. Introductory remarks

The final question at the end of our dossier is the following: is public law capable of meeting the challenges of the Anthropocene?

We believe that the contributions to our dossier confirm the breadth and depth of the challenge that climate change poses to the law. The question whether public law as it stands – in terms of positive law, doctrine and institutions – is ready to stand those challenges is evidently one that equally applies to the remainder of the legal system, yet for the purpose of this Yearbook we will evidently limit ourselves to public law only.

We can hardly avoid placing these considerations under the heading of crisis. In a sense, the climate problem, combined with further traumatic aspects of this time – the health crisis, the war in Europe, the economic crisis, etc. – exposes the law, like all social and political realities, to a series of disruptive factors. To quote Michel Serres - this upheaval is so strong that there is no turning back.[1]

The truth, as is often the case, may lie somewhere in the middle. It appears that public law had to accommodate the Anthropocene, and perhaps even played a role in its development. Yet today public law is asked to respond to this new situation, to accompany it, to fight against it, to compensate for it and to help humanity live with it – if there is still time.

II. A two-layered response to the crisis:

A. The 'functional' solution: how can public law instruments and concepts be bent to support the fight against to climate change?

Underlying this solution is the idea that instruments and concepts of public law could be 'functionally' steered to, for instance, ensure that public decisions take account of their climatic consequences, that public procurement takes account of the climate dimension, that public officials are made aware of the climate issue, and so on. One could also imagine adapting public law concepts too, some of which could be influenced by a "functional crossing", as Laurent Millet explained.[2] This may require overthinking various institutions, concepts and mechanisms, but could then even be applied to, among others, fundamental freedoms.[3]

We may also discover that there is a need to modify institutional arrangements, particularly in terms of coordination: see for instance the French 'basin coordinating prefect' in the field of water as already mentioned in the introduction to this dossier. At the same time, institutional arrangements could equally be altered in terms of a change of direction, potentially rendering the old territorial, administrative and conceptual structures obsolete in certain respects.

1 Serres, M., "Le temps des crises", 2009, Le Pommier, coll. « Manifeste ».

2 *Contribution à l'étude des fonctions sociale et écologique du droit de propriété,* thèse Université Paris I Panthéon-Sorbonne, 2015.

3 See Honneth, A., «Le droit de la liberté. Esquisse d'une éthicité démocratique», 2015, Gallimard.

B. The 'conceptual' solution: to what extent do public law concepts and theoretical bases hinder the fight against climate change?

This approach is different from the previous one, although the two may very well be combined. This solution would require an examination of public law concepts in light of their historical origin and their resonance in both positive law and doctrine, in order to determine whether they might somehow hinder in one way or another the changes necessary to adequately address the climate issue. If a difficulty of this kind were to arise, one would have to envisage a 'functional' evolution as mentioned above.

III. The 'functional' adaptation of public law to climate change

Concretely, the functional approach envisaged here seeks to determine whether concepts, institutions and mechanisms of public law could possibly contribute to climate change mitigation. In doing so, one may consider three different routes: (1) public law as providing tools for public action, (2) public law as a normative system and (3) public law as an institutional architecture.

A. Public law as providing tools for public action

The question here is to what extent public law dictates that the urgency of climate change must be taken into account in public decisions, public choices and public budgets. This is currently done to some extent, but there certainly is room for improvement.

The first thing to consider is whether public law sufficiently instructs public authorities to take strategic standpoints and to assess the consequences of their action in the long run. In general, it can be said that public law is by its very nature capable of dealing with systemic issues, coordination and planning. Yet, nowadays public bodies quite frequently refrain from traditional supervisory models and instead contract out these tasks – thus take a 'neo-liberal' attitude. It is however questionable, whether the use of such soft law techniques, such as compliance and nudge, might not hamper coherent policies in the long run.

Scholars have raised serious concerns as regards to the efficiency of these instruments. They argue that compliance is the art of being accountable without actually being accountable. They are convinced that the deployment of corporate freedom is driven by dynamics that make it rather impossible for businesses to think about needs in an eminently political way.

One further might be critical about the institutions itself, given that public administration might have to introduce significant internal changes in order to take climate change sufficiently into account. The multiple layers of public law potentially relevant to address the issue, call for a thorough analysis of the underlying problem. The latter may differ depending on how the problem is to be addressed - through adaptation, mitigation or combating climate change, and whether it is approached in a coordination logic, potentially avoiding a simple disorderly juxtaposition of isolated responses.

Concerning the need for coordination, one particular flaw presented by public institutions is that they tend to be organized in "silos", i.e. divided in segments devoted to different functions and often indifferent to one another. Yet, the climate issue, like any environmental problem, must be tackled in a systemic way. This does not mean, of course, that individual policies cannot be successful, but considering each aspect of climate policy as separate from the others can do no good.

B. Public law as a normative system

Public law is not just a toolbox for public action; it is also a set of standards that frames these tools and limits their use. It constitutes a system within the State's normative apparatus, organised according to hierarchical modalities, usually culminating in the Constitution. The central question is, to what extent and how the various components of this normative system can be mobilised to address climate change.

i) Constitution

Since in most legal systems the Constitution is considered to be the ultimate standard, it is obviously desirable if the requirements to positively contribute to the fight against climate change are clearly and formally enshrined therein. As Laurent Fonbaustier and Juliette Charreire show in their contribution to the dossier – this seems to be increasingly the case. The Constitution should stand everywhere as the horizon of the ecological institution. Nevertheless, if the constitution is a space-time of values, bodies and procedures which might very well be useful, its efficiency has obvious limits.

The effectiveness of a Constitution in terms of supporting climate action is largely dependent on the sanction system provided by the state. We have seen in the dossier how climate change arose, and continues to arise before the courts responsible for challenging its constitutionality.

Notably though, it should not be forgotten that what equally matters is the wording of constitutional environmental protection standards. As we have seen, these may differ in terms of clarity and precision.

A central point is also the extent to which they take into account the revelation of contemporary ecological thinking – which might contradict our vision of the world that separates man from the environment, man from non-humans. Unfortunately, existing constitutions differ greatly from Italo Calvino's hero in "The Baron in the Trees", who devotes himself to drafting a Constitution "*for a Republican City with Declaration of the Rights of Man, Woman, Child, Domestic and Wild Animals, including Birds, Fish and Insects, as well as Plants, whether Large Trees or Vegetables and Aromatic Herbs*".

ii) EU Law

European Union law certainly takes an essential part in enforcing the desirable climatic politics: if only because it is situated at a particularly adequate level, between being too big and too small, and has a rather homogenous cultural base.

It is true that EU Law has its drawbacks, sometimes quite visible ones: the ambiguity of the Green Deal, the founding rationale being resolutely ecologically unsound, and for good reason, with the climate turnaround based on a shift or transition that merits some serious questioning. At the same time it is questionable whether the internal market, free movement and Union's international ecological commitments can be compatible, Equally the consequences of the Covid crisis, the energy crisis and inflation on the exceptions, exemptions and derogations and many more might be mentioned as potential setbacks to achieving the climate goals. One might recall Sicco Mansholdt's famous letter of February 1972 following his reading of the forthcoming online of the Meadows Report: the famous turn that was not taken...

Apart from that, we must keep an eye on the interactions between EU law and the in-

spiration of the European Convention on Human Rights, with some of the Strasbourg Court's case law seeming to serve as a framework for the Commission and the Luxembourg Court in some lateral aspects of our subject, like transparency, access to information, participation, etc. An indirect, yet substantive, contribution to combat climate change might emerge from EU law.

iii) International law

There is no doubt that a successful response to climate change requires international standards – climate change evidentially does not stop at national borders. When we call for an international law response, we not only mean public international law in its classic form, but also contemporary developments such as global administrative law – the subjection of global administrative entities to the law – and transnational administrative law – the regulation of 'horizontal' relationships between national administrations. All these components must be mobilized.

In fact, they have already been mobilized to a large extent, as shown by the contributions of Sandrine Maljean-Dubois and Yseult Marique.

Yet one cannot ignore the fact that international law continues to lack strong and efficient enforcement mechanisms which makes it inherently fragile. Enforcement continues to depend on national enforcement mechanisms.

iv) Fundamental rights: compatible with the climate emergency?

This is a somewhat transversal problem: to what extent can individualistic fundamental rights be reconciled with the principles related to the protection of the environment and the fight against/adaptation to climate change? From a domestic law perspective, but also from a European law perspective, a 'liberal' logic would argue in favour of conciliation, and rejects any explicit hierarchy between the types or categories of fundamental rights. This is to say that when a normative system simultaneously enshrines rights and freedoms that are likely to have an effect on the environment and, more specifically, a climate footprint (e.g., the judgment of the German Court of 24 March 2021, paragraph 254), there is no need to question the free movement of enterprise and the right to property.

Yet, that position can be challenged by elements which on the face of it are unrelated to climate, but might nevertheless be interlinked with climate in the long run - such as intergenerational equity or the right to live in a healthy environment, which is somewhat expanding towards a right to live on a habitable planet, in a viable, balanced climate, etc. One might equally want to consider the questions of time and urgency. On the one hand, the climate emergency is unfolding in a context that is doubly affected: the extreme urgency, hammered home by ever more insistent IPCC reports, means that in some respects we need to take action, without which there might be little left for us to do – keeping in mind though that evidently we are working 20 or 25 years ahead to achieve concrete results – again, provided that actions converge, of course.

On the other hand, there is little doubt that we are beginning to see, particularly from judges themselves, a tendency to grasp the seriousness of the issues at stake and to move

in a direction that could, ultimately introduce a hierarchy between rights.[4]

In any case, what we have to hope for is that the body of fundamental rights that we find in more or less the same configuration in democratic systems will eventually unfold in favour of the action against climate change. However, this may require changes to the national and international documents proclaiming these rights, so as to make it clear that they should give priority to the climate emergency.

C. Public law as an institutional architecture

Public law is not just a toolkit, or a normative system, since it forms the institutional foundation of the state by providing legal bases for a series of organs and institutions, which are entrusted to accomplish public functions. The question that should be raised here is how to mobilize these institutions in order to successfully combat climate change.

This, in turn, raises at least three further questions.

i. State/global

The climate is a global issue: it does not stop at national territorial borders, flooding, storms, and further natural disaster are a showcase thereof. But how can we tackle the problem on an international level when despite globalization the world continues to be organized according to the Westphalian model?

Of course, international cooperation is ever increasing (eg COPs). Yet there are periods of national withdrawal, associated with a wider phenomenon of re-strengthening of national powers in reaction to the economic crisis, the health crisis, war. So a kind of concertina logic prevails, and one has to admit that it is not necessarily illogical when several seemingly "opposing" movements overlap. Dominique Bourg suggested[5] that ecological issues, particularly climate issues, are also an opportunity to maintain a 'square peg' of vested interests, of which governments like Trump or Bolsonaro are in a way the guardians (fossilised, fossilised interests, wealth acquired through the logic of thermo-industrial growth).

That said, there is no other choice than to push this development forward and to force the state, from the inside, to adjust its policies for the sake of its citizens. This is then when one has to consider the notion of democracy.

ii. Pluralism, democracy, separation of powers, decentralization

The social and political balance of today's society is built on complex institutional arrangements meant to allow the development of effective public policies, in which divergent interests can be taken into account. Public policies should aim to ensure that certain parts of society do not exercise excessive power - a general concern for pluralism, and reflected in amongst others the principle of separation of powers, decentralization or independent administrative authorities. Evidently, society also provides for democratic tools such as the right to participation, or effective representation. In such a society, it

4 E.g., the judgment of the German Court, which is often and rightly commented on as a judgment that is truly foundational for European paradigms, even if, of course, the German Basic Law has certain irreducible particularities.

5 Bourg, D. in: Démocratie et écologie. Une pensée indisciplinée, 2022, Hermann.

is of course questionable whether the required consensus for what might be though to be the best response to climate change could ever be reached. Given the urgency of the matter, alternative routes should be considered where the required consensus cannot be reached (in time). Not less relevant is the question of how to align divergent interests between generations, classes and so on. Aligning these interests not only requires consensus on the possible solution, but equally on the underlying problem and execution of the solution.

Climate action calls for synthetical policies, which is rather complex to combine with the afore mentioned complex institutional structure through which societies are organized.

It might be argued, for example, that the old concept of separation of powers has to be rethought, in the light of conflicting interests or lobbying (in particular that of fossil fuels, but the question is broader). But also further notions should be considered such as space-time which should somewhat be reflected in the institutions and mechanisms, particularly considering the future and the representation of affected non-nationals.[6]

Obviously, democratic tools and pluralistic arrangements in our societies have to be revisited in order to make them more capable to take into account both the urgency and the long term, the protection of current citizens and of future generations, local and partial interests and the salvation of the whole community.

Some are convinced that it is only through an extreme development of direct participation of the people that this objective could be attained, while others rather think that only strong concentrated national powers will be able to impose the necessary policies.

iii. Judges (national, international)

Given the central role of climate disputes in front of constitutional and administrative courts, part four of this dossier has been devoted to this aspect.

Clearly, judges have become an important lever for those who believe that the political class is too fixated on short-termism and various conflicts of interest to act effectively. However, there are clear limits to the competences of judges in this respect, which particularly lawyers should further reflect upon. There is a fine line between supervising democratically elected parliamentary and/or government authorities and substituting the latter's decisions with its own assessment.

Secondly, the effectiveness of judicial intervention is seriously hampered where enforcement is poor. When the State – ordered by Court to take certain climate actions – refuses to act, serious rule of law questions emerge.

IV. The 'conceptual' adaptation of public law to climate change

Moving from a 'functional' reasoning to a 'conceptual" one, it must be determined whether the essential concepts on which these existing mechanisms of public law are based do not occasionally contain biases that would hinder effective climate action. This consideration, in turn, invites us to reflect on two aspects: 'climatic anthropology' of public law and 'climatic ethics'.

6 Fonbaustier, L., «Separation of powers, environment and health», Title VII, n º 3, Oct. 2019. Available at: https://www.conseil-constitutional.fr/publications/titre-vii/separation-des-pouvoirs-environment-et-sante.

A. The 'climatic anthropology' of public law

In questioning the 'climatic anthropology' of public law we wonder how public law concept envisages the relationship between mankind and its environment. Climatic anthropology is thus about determining to what extent these concepts capture public action in a naturalistic vision of this relationship, which encourages public authorities to act in favour of nature when using natural resources: i.e. which seems to be the opposite to what contemporary ecology suggests (e.g.,. Philippe Descola), which in turn consists of "landing" (Bruno Latour) and constantly perceiving human communities as immersed in territories that connect them to physical realities and non-humans.

i. Anthropomorphism: public spaces, territories, commons, social contract

How does public law understand the relationship between humans and their surrounding? One can easily make the case that it considers this relationship as one of exteriority rather than of coexistence and interrelation. This becomes evident in the way in which public law understands the notion of territory. Basically, this notion is linked to the seats of public authorities and the delimitation of their competences. It is only secondarily that it is associated with the definition of human communities, in the sense of decentralization. In any case, it remains at a distance from a vision that would include not only human communities but also their physical environment and surrounding non-humans. Only certain urban or environmental planning tools come close to this vision. Current reflections on the 'commons' could advance in this inclusive direction: they tend to be human-centered, however.

A similar bias can be seen in the way public law defines the notion of public good, and in particular public space. To guarantee the protection of both these notions from human encroachment and nevertheless allow their use as a matter of economic resource, they have been interpreted to allow for ownership of public persons over them. It is difficult to imagine a more anthropocentric approach to goods and spaces that are sometimes precious because of the physical elements and the biodiversity they shelter. The result is sometimes questionable given that the public authorities in charge of these goods and spaces are often trapped in contradictory interests. In response some legal systems decided to grant legal personality to certain natural areas, so as to organize their protection.

This highlights the importance to question the concept of classic conceptualization - that of public assets.

But also a more general concept should be called into question: the concept of social contract. The latter is a key notion of public law and considers the way in which society understands what makes us exist as a political society, the existence of certain institutions, in which the will of the citizens can be expressed. While the specificities of this concept may all seem to have in common that they believe in a pact made between humans – thus excluding the environment, plants or animals.

It is however conceivable to plead for the definition of social contracts – which would integrate the notion of environment: in a reflex of inclusion analogous to that which leads to the personification of certain natural spaces.

ii. Police and public services

In defining the functions performed by administrative institutions, public law em-

ploys concepts which seem to vary but generally boil down to a distinction between the functions relating to defending the public order and the service provision. French administrative law, for example highlights two concepts recognized in a number of its counterparts: that of police and that of public service. The central question is of course to distinguish between these theories particularly in light of the vision of the human-environment relationship that public law conceals.

Traditionally, the purpose of policing has always been to protect human communities. This is true even of the oldest environmental policies such as that of hazardous establishments. It is only in the contemporary era that one can witness the emergence of environmental policies whose purpose was to protect animals or plant species, natural resources, etc.

The concept of public service deserves to be questioned here in two ways. Firstly, there seems to be a natural temptation to constantly extend public intervention. It is sometimes used as justification for this extension in cases where climatic concerns could invite abstention: such a municipality will not resist the temptation to light up its beautiful monuments all night, to build a new swimming pool, and so on, while ecological concerns would suggest a restraint in such a case.

Conversely, the public service theory contains as one of its basic principles that of adaptation: public services must adapt as much as possible to the new techniques likely to make them more effective. One might admit that this principle implies an obligation for all public service managers to adapt them to the constraints of climate change.

B. The 'climatic ethics' of public law

The next question that needs to be raised is whether the way in which the values public authorities are to respect do not in themselves contain biases, or simply intrinsic limits, which would limit the pressure on these authorities to carry out the policies required by the climate emergency. This double *problematique* – so to say – calls into question the obligations and responsibilities of both States and individuals (officials, citizens).

i. State obligations and state liability

The multiple climate disputes discussed throughout this dossier show that, in principle, it is possible to hold public institutions accountable in tort when they fail to meet their commitments in terms of climate action. Nevertheless, these disputes equally show the limits of such guarantees. Apart from those which concern the effectiveness of jurisdictional mechanisms in general judges can only sanction states if they can clearly identify the obligations which might have been breached. Very often, this will be reduced to the obligations they have agreed to impose on themselves, in international instruments or in national texts of constitutional or legislative type.

One may then wonder whether it should not be admissible that the obligation to act in the face of the climate emergency constitutes a standard superior to others, one that would be binding on the state without the necessity to consent: this would then constitute a norm of "jus cogens", similar to the prohibition of genocide, slavery and torture.[7]

7 Auby, J. B., « La lutte contre le changement climatique comme impératif juridique catégorique », Chemins publics, 6 Feb. 2021. Available at: https://www.chemins-publics.org/articles/la-lutte-contre-le-changement-climatique-comme-

States' liability is also sometimes invokes in the face of climate change. Yet, many legal systems still find it difficult to invoked such a liability in the event of purely ecological damage - that is to say damage which is not embodied in specific natural or legal persons. A further limit of the public responsibility theory which should not be ignored results from the fact that its natural domain is the sanctioning of obligations to refrain from doing something – refraining from pollution, destruction of plants or animal species, etc. It often remains difficult to recognize and sanction such negative obligations.

ii. Personal liability: public servants and citizens

In light of the limits on public authorities' obligations and the sanctions of the latter, one may wonder whether public law contains any means of shifting parts of the burden onto politicians and civil servants, individually, or/and onto citizens.

All legal systems contain mechanisms through which personal liability of political leaders and civil servants might be called into question: under criminal or civil law, or even specific mechanisms. Could such mechanisms be effective in situations where political leaders or civil servants are blamed for their personal inertia in the face of climate change? This is rather unlikely, given the fact that this calls for general measures rather than specific actions, which would require broad policies rather than a single response or a particular accident.

As far as citizens are concerned, the idea that a significant part of the action against climate change is their responsibility is quite widespread, but it is hard to see which role public law mechanisms could play in this context given that liability of public institutions would be out of reach. At most, one could imagine sanctions against citizens who do not respect the regulations intended to fight against climate change – for example in the case of non-compliance with an insulation prescribed by a building permit –, but these sanctions would have little impact taken in isolation. Yet taken together they might give rise to a general movement in society, eventually forcing public authorities to act.

V. What's next? How to adapt public law?

The foregoing considerations lead us to pose a couple of final questions.

For example, would it be desirable to fix a hierarchy of objectives? If so, how would such a hierarchy look like? Where would one have to situate the issue of climate change? It might be worth highlighting here that the 'climate problem' consists of three components: climate, biodiversity, "resources". The current ineffectiveness of climatic policies highlights public law's inability to turn this trend around and to introduce a hierarchy.

Law is a social phenomenon, and the climate seems to confront us with multiple problems of social dimension, such as questions of social justice or equal access. Through climate change it becomes evident that the world is getting ever smaller.[8] In doing so, climate change evidently has to address social themes and the related different conceptions of justice. Climate refugees, the availability of food, collective and inter-individual relationships at different scales, all of those are central components which ultimately raises the central question: Where should politics take place? Dealing with climate change with-

imperatif-juridique-categorique.

8 Hartmut, R., Making the world unavailable, 2020, Discovery.

out embedding it in a more global and systemic whole equates to refusing intervention. Climate change can never, due to both its causes and effects, really be detached from either local or global situations, from social and technological issues, and more fundamentally perhaps, it might eventually occupy the world as a whole. It is not enough for the world to become cooler in terms of climate; it is also necessary that it does not become too cold for humans to survive.

Public law has promising days ahead in terms of its ability to touch politics very closely (as Hanna Arendt thought). But the problem is that it has not really coped so far. Wouldn't it have been better to just be the lazy/passive accomplice to a slow decay that has led to the issue we are concerned with, without of course having a monopoly? If this hypothesis were to hold, even if only partly, we would not even have to consider the centrality of public law, but would be able to address the matter through a three component solution: (1) hierarchy of values or norms and actors; (2) a map of territories and geographical and social spaces relevant for the law to be updated, without forgetting (3) the central relevance procedures, which build the bridge between a normative intention to the concrete final act. We remain fairly convinced, however, that public law, alone, even if deeply rethought, cannot do everything. Many meta-legal conditions must be met to accommodate any new positioning of public law: non-legal conditions to the fulfilment of which the law itself can only contribute under certain conditions...

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June 2023

fypl
french yearbook *of* public law
Issue 1, 2023

Comparative Section

This Section of our Yearbook aims at providing our readers with some information about the main constitutional, legislative and jurisprudential events occurred lately in some of the main administrative laws. This year, the French, Spanish, Italian, German and British ones have been selected.

fypl
french yearbook *of* public law
Issue 1, 2023

France

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Keywords:

French public law, Administrative case law, French legislation, Covid pandemic

I. Fundamental rights in the administrative context

1. Impact of the Covid crisis on fundamental rights and corresponding litigation

Like in many other countries, the Covid crisis has had unforeseen and remarkable implications for French public law. It has demonstrated the flexibility of French law in addressing the demands of the pandemic. In this discussion, we will not delve into the merits of the implemented measures. The Covid crisis has significantly amplified three of the structuring principles of French public law, pushing them to their limits: the administrative authority of the President of the Republic, the centralization of the State, and the delicate balance between the general interest and individual freedoms overseen by the Conseil d'Etat.

As widely acknowledged, the President of the French Republic holds significant powers. However, these powers are essentially of a political nature, both domestically (as the "arbiter" of institutions under Article 5 of the Constitution) and externally (national defence, foreign affairs). Over time, the President of the Republic has gradually acquired indirect administrative powers, overshadowing the Prime Minister and other ministers in their exercise. Although constitutionally prohibited from directly performing governmental functions, the President of the Republic does so indirectly through the appointment of the Prime Minister, other ministers and cabinet members. During the pandemic, for instance, the President of the Republic declared a state of 'war' against Covid. He convened a selected "Defence Council" and took critical decisions within this body, which neither the Constitution nor the law explicitly authorizes. This form of "hyper-presidentialisation" of the regime reached its pinnacle during this period.

Furthermore, the case law of the Conseil d'Etat has emphasized the highly centralized nature of the exercise of administrative police powers. Although mayors exert administrative police powers within their municipalities, these powers are superseded once the State asserts its jurisdiction. This rule of priority was particularly striking during the pandemic. In the early stages of the health crisis, the mandatory wearing of masks had not yet been enforced. The mayor of the municipality of Sceaux argued that the government should have mandated mask-wearing in public spaces and exercised its police powers accordingly. However, the Conseil d'Etat ruled that the exercise of police powers, as granted by the law on the health crisis, rested with the Prime Minister and the Health Minister, thereby depriving the mayor's authority in this matter.[1] The prioritization of more liberal measures over more restrictive ones was not motivated by the protection of individual freedoms, but rather by the preservation of State powers.

A third notable phenomenon has been the tendency of administrative courts to dismiss appeals challenging pandemic-related measures that restricted freedoms. While this trend is not exclusive to France, it has been particularly evident here. This strong pattern demonstrates the particular credit enjoyed by the public administration in the exercise of its powers as well as the criticized practice of sacrificing individual liberties in favor of broader public health and safety objectives.

1 Cossalter, P., « Port du masque et pouvoirs de police du maire : pour en finir avec la jurisprudence Films Lutetia », Note sous Conseil d'État Ord., 17 avril 2020, n° 440057, *Commune de Sceaux*, Revue générale du droit on line, 2020, numéro 51871. Available at : www.revuegeneraledudroit.eu/?p=51871.

2. Secularism (‘laïcité’)

The principle of the unity of the State is arguably the most central principle of French public law, permeating various aspects of the legal system. It finds expression in the highly centralized structure of the French state, which must accommodate the world’s most diverse territory, spanning five continents. Furthermore, the principle of the unity of the State is also embodied in the concept of “equality before the law”, wherein the law applies equally to all individuals, irrespective of whether it protects or punishes (Article 6 of the Declaration of the Rights of Man and the Citizen). The unity of the State is founded upon the unity of the nation and the unity of the French people. The consequent concerns for maintaining this unity prohibits the recognition of a distinct Corsican people within the broader French population (CC, decision n° 91-290 DC, 9th may 1991, Loi portant statut de la collectivité territoriale de Corse). This principle entails that the sole official language of the Republic is French, as has been the case since 10 August 1539 - Ordinance of Villers-Cotterêts.

The principle of secularism in France must be interpreted in the context of the principle of unity of the State, the nation and the French people.

The principle of freedom of conscience is enshrined in Article 10 of the Declaration of the Rights of Man and of the Citizen of 1789, which states that “No one shall be disquieted on account of his opinions, including his religious views, provided their manifestation does not disturb the public order established by law”. Article 1 of the French Constitution states that “France is an indivisible, secular, democratic and social Republic. It ensures the equality before the law of all citizens, without distinction of origin, race or religion. It respects all beliefs”.

The principle of secularism can be approached from two perspectives: either as an unrestricted acceptance of the expression of religious affiliations within the secular legal framework of the State, or as the suppression of the expression of religious affiliations. The French approach to secularism leans towards safeguarding freedom of conscience and expression in every matter unrelated to the State and the notion of public service.

However, in matters involving the state, strict neutrality must be upheld, as established by the renowned 1905 law on the separation of Church and State. Article 1 of this law declares that “The Republic guarantees freedom of conscience. It guarantees the free exercise of religious worship, subject only to the restrictions set out below in the interests of public order”.[2] Neutrality entails that public servants must refrain from displaying their religious affiliation, while users of public services are allowed to express their religious preferences. However, there is an exception in the field of public education, encompassing all levels up to university: both teachers and students are required to adhere to neutrality.

In recent years, an intense legal debate has taken place to define both the scope and the limitations of secularism.

Regarding the content of secularism, while it entails the neutrality of public service employees and buildings, it does not necessarily imply the neutrality of users. However, significant developments have occurred in recent years concerning this aspect. In line with its established case law, the Conseil d’Etat allowed primary and secondary school pupils to wear religious symbols, as long as they did not constitute proselytism or dis-

2 Loi du 9 décembre 1905 concernant la séparation des Eglises et de l’Etat.

rupt the functioning of the public education service.[3] In 2003, former French President Jacques Chirac commissioned a report on the principle of secularism,[4] which subsequently influenced legislative changes. A law passed on 15 March 2004 prohibits the wearing of ostentatious religious symbols in schools.[5] This legislative shift marks a transition by French state and local authorities from an acceptance-based approach to a prohibition-based approach. The questions raised by secularism in the public space and in public services exceed the scope of this discussion. We will examine three emblematic cases. The first case that garnered significant media attention was that of the Baby Loup day nursery. Fatima, a nursery worker, was dismissed for wearing the Islamic veil while at work. After a series of twists and turns, the Court of Cassation ultimately upheld the employee's dismissal, concurring with Court of Appeal's reasoning. The Court of Appeal had considered that "the principle of freedom of conscience and religion for each staff member cannot hinder compliance with the principles of secularism and neutrality that apply to all activities" of the day nursery.[6] Most notably, this case involved a private nursery, rather than one operated by public entities.

In a more recent decision, the Conseil d'Etat ruled that the internal regulations of a municipal swimming pool that permitted the wearing of the Burkini (a full-body swimsuit) were unlawful. This decision is noteworthy as it applies the principle of secularism to users of a public service in fairly new terms. Essentially, the Conseil d'Etat argues that there should be common rules of conduct, and it is illegal to create exceptions to these

3 Conseil d'Etat, 2 Nov. 1992, n° 130394: « the principle of the secular nature of public education, [...] which is one of the elements of the secular nature of the State and the neutrality of all public services, requires that education be provided in compliance, on the one hand, with this neutrality by curricula and teachers and, on the other hand, with the freedom of conscience of pupils ; that, in accordance with the principles set out in the same texts and France's international commitments, it prohibits any discrimination in access to education based on the religious convictions or beliefs of pupils; [...] that the freedom thus recognised for pupils includes the right to express and manifest their religious beliefs within schools, with due respect for pluralism and the freedom of others, and without prejudice to teaching activities, the content of the curriculum and the obligation to attend classes; in schools, the wearing by pupils of signs by which they intend to manifest their religious affiliation is not in itself incompatible with the principle of secularity, insofar as it constitutes the exercise of freedom of expression and manifestation of religious beliefs, but [...] this freedom cannot allow pupils to display signs of religious affiliation which, by their nature, by the conditions in which they would be worn individually or collectively, or by their ostentatious or demanding nature, would constitute an act of pressure, provocation, proselytising or propaganda, would undermine the dignity or freedom of the pupil or other members of the educational community, would compromise their health or safety, would disrupt the progress of teaching activities and the educational role of teachers, or would disrupt order in the establishment or the normal functioning of the public service ».

4 Commission for reflection on the application of the principle of secularism in the Republic: report to the President of the Republic (Commission de réflexion sur l'application du principe de laïcité dans la République: rapport au Président de la République), 1st Dec. 2003. Available at: https://medias.vie-publique.fr/data_storage_s3/rapport/pdf/034000725.pdf (Last consulted on 9 July 2023).

5 Loi n° 2004-228 du 15 mars 2004 *encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics* created the art. L. 141-5-1 of the Code de l'éducation: « Dans les écoles, les collèges et les lycées publics, le port de signes ou tenues par lesquels les élèves manifestent ostensiblement une appartenance religieuse est interdit ».

6 C. Cass., Ass. Plén., 25 June 2014, n° 13-28.369, *Baby Loup*. Hunter-Henin, M., « Religion, Children And Employment: The Baby Loup Case », *International & Comparative Law Quarterly* 2015, vol. 64, issue 3, pp. 717-731, doi:10.1017/S0020589315000305.

rules that could be excessively specific.[7]

Furthermore, in another recent development, the Conseil d'Etat declared that the regulations of the French Football Federation, which prohibited female members from playing with a hijab, were legal.[8] According to the Conseil d'Etat, sports federations have the authority to adopt regulations that may limit the freedom of license-holders, who are not legally obligated to adhere to the principle of neutrality of the public service in expressing their opinions and beliefs. This limitation is justified if it is necessary for the proper functioning of the public service or for protecting the rights and freedoms of others, and if it is appropriate and proportionate to these objectives. After establishing this principle, the Conseil d'Etat concluded that the ban on "wearing signs or clothing ostensibly expressing a political, philosophical, religious or trade union affiliation", restricted solely to the time and place of football matches, was necessary to ensure the smooth running of matches, particularly by preventing any confrontation or clashes unrelated to the sport.

II. Administrative institutions and Agencies

In the field of institutional administrative law, three noteworthy events deserve mention and brief commentary: the first pertains to civil service, the second to local government, and the third to independent agencies.

1. Civil Service Reform 2021

Civil service is an inherently sensitive issue, involving political influence on the State, ethical considerations, and its relationship with general employment, among other factors. Consequently, in many countries, the civil service system undergoes repeated reforms, as an ongoing effort to find a proper balance.

This is true for France as well, as new legislation on Civil Service is regularly adopted, driven by the ambition of aligning with the evolving challenges of contemporary administration. Since 2010, no fewer than six legislative reforms have been enacted, including

7 CE, 21 June 2022, n° 464648, « The public entity managing a public service is required, when defining or redefining the rules for the organization and operation of that service, to ensure compliance with the neutrality of the service and in particular the equal treatment of users. If it is at its discretion, in order to satisfy the general interest in ensuring that the greatest possible number of users have effective access to the public service, to take account, over and above the legal and regulatory provisions that are binding on it, of certain specific characteristics of the public concerned, and if the principles of secularism and neutrality of the public service do not in themselves constitute an obstacle, to the fact that these specific features correspond to religious convictions, in principle it is not obliged to take such convictions into account, and users have no right to do so, since the provisions of Article 1 of the Constitution prohibit anyone from taking advantage of their religious beliefs to free themselves from the common rules governing relations between public authorities and private individuals. However, when taking into account the religious beliefs of certain users in the organization of a public service, the manager of that service may not make adaptations that would undermine public order or the proper operation of the service, in particular in that, by virtue of the fact that they represent a major departure from the general rules and have no real justification, they would make it more difficult for users who do not benefit from the derogation to comply with these rules or would result in a clear breach in the equal treatment of users, and would therefore breach the obligation of neutrality of the public service ».

8 CE, 29 June 2023, n° 458088.

two in 2021, which we will discuss in further detail: the "ordonnances" (delegated legislation) of March 3rd and June.

The primary objective of these reforms was a comprehensive overhaul of the top Civil Service, encompassing approximately 3000 individuals holding high-level administrative positions in state institutions, such as ministries, governmental agencies, and public companies.

These reforms were prompted by a growing conviction that the top Civil Service suffered from various shortcomings. These included a lack of social representativeness, an excessive attachment to a certain kind of traditional general culture, a lack of mobility, among other frequently criticized aspects.

The 2021 reform (*Ordonnance n° 2021-702, 2 June 2021 portant réforme de l'encadrement supérieur de la fonction publique de l'Etat*) sought to address two key elements: on the one hand, the recruitment and training of top civil servants, and on the other hand, the organization of their careers.

Regarding recruitment, efforts were made to increase social inclusivity in competitions by modifying the required knowledge test formats. The most significant change, however, was the abolition of the National School of Administration – the "*Ecole Nationale d'Administration*", or "*ENA*" – and its replacement with the National Institute of Public Service –"*Institut National du Service Public*".

This change generated considerable attention, as ENA alumni have exerted a great deal of influence within the state apparatus and also in the private sector, with many members transitioning from administration to private businesses at various stages of their careers.

The true impact of this reform remains to be seen, and it largely depends on the training people will receive at the new National Institute of Public Service.

The second aspect of the reform, concerning the organization of careers, primarily focuses on the structure of the top Civil Service.

Traditionally, the French civil service has been divided into various "bodies" ("*corps*"), with each body comprising civil servants subject to the same legal framework and assigned a certain set of specialized functions. Historically, public employees would spend their entire careers within the same "*corps*".

Until recently, there were over 1.000 such "*corps*" solely within the state administration, along with similar structures in local government and hospitals.

This situation faced regular criticism due to the high degree of rigidity it imposed on human resources management in the State.

Reduction efforts were made, but, as of 2021, the top Civil Service still consisted of approximately 20 "*corps*". This organization increasingly hindered the corresponding levels of responsibility in conducting public affairs, demanding flexibility, adaptability, and the ability to synthesize.

The 2021 reform consolidated most of top civil servants in a single "*corps*", the administrators of the State ("*administrateurs de l'Etat*"). The members of the Council of State ("*Conseil d'Etat*") and of the Court of Accountings ("*Cour des Comptes*") were exempted from this structure due to their combination of judicial and administrative functions.

2. Local Government. State of the local autonomies system."3DS" Act

A series of reforms implemented in the 1980s, particularly thanks to the law of 2 March 1982, shaped the current structure of the French territorial system. Since then, the

system has undergone frequent adjustments, but these changes have not fundamentally transformed it. This observation remains applicable to the period since 2010.

1°. The reforms of the 1980s primarily aimed to enhance the autonomy of local institutions, which also benefited from the transfer of many competences previously held by the state. Application of the law in local autonomies was strengthened, as the adjudications of illegal actions committed by local authorities has been entrusted to administrative courts exclusively, whereas it was previously shared with state administrative bodies. Significant competences were transferred from the state to local governments: in particular, urban planning, which saw substantial decentralization to municipalities ("*communes*"), while social action was largely decentralized to provinces ("*départements*"). These transfers of competences were accompanied by financial compensation, including tax transfers.

These changes caused a shift in the traditionally centralized French territorial system. However, they did not result in a complete transformation. Although local institutions gained new functions and increased autonomy, there is still no field of public action entirely under the control of local institutions. When issues arise to a certain degree of gravity, the State can and often does intervene. The State still retains primary powers across many domains, either through legislation – local institutions in France, in fact, lack legislative powers, except for two overseas territories to a limited extent – or through governmental instruments and procedures.

2°. Since the 1980s, the territorial system has undergone numerous legislative changes, but the fundamental elements established during that period have remained largely unchanged.

The most significant transformation during this period has been the development of inter-municipality. A distinctive feature of the French territorial administration is the large number of basic local entities, with more than 35,000 municipalities ("*communes*") existing today! To overcome the drawbacks of this fragmentation, inter-municipal cooperation was continuously strengthened. A law enacted in 1999 greatly encouraged this endeavor, and today the entire national territory is covered by inter-municipal entities ("*intercommunalités*"), that possess significant competences, particularly in the field of urban planning and the management of basic public services such as water distribution and sanitation.

Since 2010, no less than 6 parliamentary statutes have amended the territorial system. The key changes introduced have included the reduction of the number of regions ("*regions*") to 13 (excluding the overseas regions) and the establishment of a special status for major cities, known as metropolitan cities ("métropoles", currently numbering 22).

The most recent piece of reform legislation is the 21 February 2022 Act. While it does not revolutionize the system, it demonstrates a willingness to allow for some degree of differentiation in terms of statuses and powers. This is a remarkable departure from the French tradition, that strongly favors territorial uniformity in the name of the principle of equality.

3. Independent agencies. The ongoing debate on their relationship with political and the powers. 2017 Act

It was not until 1978 that French law embraced the concept of national administrative authorities that would be exempt from the hierarchical power of the government. The term

"independent administrative authority" ("*autorité administrative indépendante*") was first used to describe the body responsible for safeguarding citizens' privacy and personal data against the advancements of digitalization ("*Commission Nationale Informatique et Libertés*").

Since then, a considerable number of these independent administrative authorities have been established, primarily in two directions. Some have been created to protect citizens' rights in specific fields. However, there is one authority, known as the "*Défenseur des Droits*", that assumes a broader ombudsman function across various domains. Other authorities are responsible for sector-specific regulations, such as finance, telecommunications, and so on.

Another distinction within this category of authorities is the presence of "*autorités publiques indépendantes*" that have been granted legal personality. This enables them to be held liable for damages resulting from their unlawful decisions, rather than the State itself.

Since the 2010s, concerns have been raised, notably in several parliamentary reports, regarding what has been described as the excessive and disorganized proliferation of independent authorities. In response, a statute was enacted on 20 January 2017, which, firstly, established a common status for these authorities, whereas previously each independent authority had its own distinct status. Secondly, it explicitly limited the recognized entities belonging to this category to 26, as designated in the law.

III. Administrative procedure/Decision-making processes

1. First Administrative Procedure Code

The rules of administrative procedure in France were primarily developed by the Council of State, which explains why the codification of the French administrative procedure occurred relatively late. However, it became increasingly problematic that such important rules were not clearly presented to citizens, relying instead on the often intricate knowledge of a vast body of case law.

The first partial codification of administrative procedure took place through the law of 12 April 2000. Nevertheless, it was necessary to supplement it with the case law of the Council of State in order to fully comprehend the system of administrative procedure.

In 2015, the Code of Relations between the Public and the Administration (Code des relations entre le public et l'administration) was adopted. This code repealed and replaced previous laws and codified administrative case law.

Since its enactment in 2016, administrative procedure has become clearer and more accessible. This codification has also provided a framework, albeit still imperfect, for the principles of digital administration law.

However, the most notable development in this code is the definition of the administrative act. Traditionally, the administrative act, as a legal act, had to produce legal effects. In France, the term "acte décisoire" (the act must carry a decision) was used to illustrate this necessity. Under the current framework, administrative acts no longer need to be decisions: it is sufficient that they have significant effects on third parties, even without altering the state of the law. This reflects the notable emergence of "soft law", in France as in other jurisdictions.

2. Soft law

The emergence of soft law is not a new phenomenon and is not unique to France. In

France, the institutional history of soft law began in 2013, marking its tenth anniversary. The Conseil d'Etat, in its annual study for 2013 (Conseil d'Etat, Etude annuelle, Le droit souple, 2013), presented its reflections on the subject and subsequently adopted several policy decisions. In its first policy decision in 2016, the Conseil d'Etat recognized that recommendations issued by economic regulation authorities, even if they do not affect any legal situation, can have effects on third parties and be subject to judicial review. For instance, when a banking regulator advises against investing in a financial product (CE, 21 mars 2016, *Société Fairvesta International GMBH et autres,* n° 368082). The Council of State further expanded its case law to include the opinions of the High Authority for the Transparency of Public Life, which can affect the reputation of a member of Parliament (CE, 19 July 2019, Madame L., n° 426389).

In 2000, the Council of State issued a landmark ruling intended to cover all cases of administrative acts that do not change the state of the law but have a significant effect and can therefore be subject to judicial review (Conseil d'État, 12 June 2020, GISTI, n° 418142). In this decision, the Council of State establishes the following principle: «Documents of general scope emanating from public authorities, whether formal or informal, such as circulars, instructions, recommendations, notes, presentations or interpretations of positive law, may be subject to judicial review when they are likely to have significant effects on the rights or situations of individuals other than the agents responsible for implementing them. Such effects may include, in particular, documents of a mandatory nature or those that act as guidelines».

In a more recent decision, the Council of State provides a clear example of the principles it established. Even a simple FAQ posted on the website of the Ministry of the Economy and Finance can be challenged, as long as the content of this FAQ (such as – in this particular case – an opinion on the granting of financial aid following the Covid-19 pandemic) can have significant effects (*des effets notables*) on its recipients (Conseil d'État, 3th February 2023, n° 451052).

The evolution of the concept of administrative act is not merely theoretical: it also affects the jurisdiction of the administrative judge to review such acts. French administrative law revolves around mechanisms of judicial review by the Conseil d'Etat. The shift in the approach to the concept of administrative acts allows for the modernization of administrative litigation.

IV. Judicial review

Historically, French administrative law has its roots in the separation of administrative courts from ordinary courts. The first of these was the '*Conseil d'Etat'*, followed by the '*tribunaux administratifs'*, which led to the development of a dual court system. In modern times, the addition of administrative courts of appeal – '*cours administratives d'appel'* – and various specialized administrative tribunals has expanded the administrative adjudication system beyond the '*Conseil d'Etat'* and the '*tribunaux administratifs'*.

Procedural rules governing proceedings before administrative courts are distinct and different from those governing civil and criminal jurisdictions. In the past, these rules were established by the administrative judges themselves. Nowadays, most procedural rules originate from statutory law and have been consolidated in a code, the '*code de justice administrative'*.

In recent years, the law governing contentious administrative procedure has under-

gone significant changes. The most notable developments include the following points (we will leave aside here what concerns the litigation related to administrative contracts, which will be discussed separately: see VI).

1. Access to courts: trend towards reduction?

1°. Traditionally, access to the French administrative courts has been very open, particularly in terms of the acts that may be challenged, standing requirements, and time limits for bringing proceedings. While this openness largely remains, there has been a discernible trend towards certain restrictions in recent years.

a) The range of administrative acts that can be challenged before the administrative courts remains extensive. In fact, it has even been recently expanded to include certain soft law acts that would traditionally have been exempt from litigation (as discussed above, in section III). The main limitation lies in the concept of *'actes de gouvernement'*, which refers to highly political decisions – such as dissolving the National Assembly or negotiating a treaty. Contentious appeals against these *'actes de gouvernement'* are not possible. While the number of such acts is relatively small, new scenarios may occasionally arise in case law (for example, a decision related to the export of war material to a foreign State: *Conseil d'Etat, 27 January 2023, Association Action des chrétiens pour l'abolition de la torture*).

b) Since the beginning of the last century, the rules on standing have been especially generous. It is worth highlighting that, unlike in some other administrative law systems, it is possible to challenge an administrative act without having to prove that the act infringes upon one's rights. It is sufficient to demonstrate that it affects one's 'interests'. By the same token, collective actions, especially those initiated by associations, have traditionally been quite accessible.

However, in the field of town planning litigation restrictive trends have emerged in recent years.

In an effort to reduce the number of appeals against planning permissions, the legislature has intervened – notably in 2013 – by imposing various limitations on standing. It has imposed certain restrictions on individual appeals, such as requiring the appellant to specify the precise impact that the construction, which is subject to the challenged planning permission, would have on his/her personal situation (*'code de l'urbanisme'*, article L.600-1-3).

Similarly, appeals filed by associations now require that the challenging association had already been in existence for at least one year before the granting of the planning permission (*'code de l'urbanisme'*, article L.600-1-1).

c) A similar restrictive trend has recently emerged regarding the time limit for initiating actions before administrative courts. Traditionally, the rule was that an appeal against an administrative act had to be filed within two months from the date on which the contested decision was made publicly available, as required by law. Consequently, if the act had not been adequately published, there was no time limit for challenging it. The 'Conseil d'Etat' amended these rules by recognizing, in a judgment in 2016 (*13 juillet 2016, Czabaj*), that the appeal must be filed within a 'reason-

able' time limit in any case. Although not explicitly defined, this 'reasonable' time limit generally seems to be one year.

2°. In contrast to the aforementioned restrictive trends, there have been some developments aimed at facilitating appeals, particularly in the context of class actions that may impact a large number of people.

In 2016, a law was enacted to allow for two types of class actions. The first type applies when the administration has taken the same illegal negative individual decision against a significant number of people: it is called '*action en reconnaissance de droits'* (*code de justice administrative, article L.77-12-1*).

The second type applies when the administration causes harm to a large number of people: it is known as '*action de groupe'* (*code de justice administrative, article L.77-10-*1).

2. Emergency procedures fostering

Emergency procedures before the administrative courts underwent significant reforms through the Act of 30 June 2000, and are now more frequently utilized.

Two of these procedures deserve special mention.

The first is the *'référé-suspension'*, which allows for obtaining a court order to suspend the execution of an administrative decision if that decision is likely to be unlawful and if its immediate enforcement could create an irreparable situation.

This procedure is commonly employed in various fields, such as disputes involving planning permissions.

The second procedure, called *'référé-liberté'*, can be invoked in cases of particular urgency where an administrative decision has infringed upon a fundamental right. In such cases, the judge renders a ruling within 48 hours and has the authority to order the administration to undertake all necessary measures to cease the violation.

This mechanism implies that the judge acknowledges the existence of a fundamental right at stake. Case law has emerged on this matter, including recent rulings that recognize the character of fundamental freedoms, such as the right of every individual to receive the most appropriate care for their health condition (*Conseil d'Etat, 14 February 2014, Ms Lambert)* and the right to live in a balanced environment that respects health (*Conseil d'Etat, 20 september 2022*).

3. Administrative judges' powers in legality review

Although the concepts and methods used by the administrative courts to determine the legality of administrative acts have remained relatively stable for decades, there have been regular developments on specific points, driven by the legislature or by the courts themselves. Here are a few recent examples of these evolutions.

Typically, the judge assesses the legality of an act based on the circumstances at the time it was issued. However, recent case law acknowledges that, in certain cases, the judge must take into account the time at which he/she decides on the case. This approach applies, for instance, when the court annuls a refusal decision and orders the administration to make a positive decision (Conseil d'Etat, 7 february 2020, Confédération paysanne: case concerning the Prime Minister's refusal to take precautionary measures to deal with the risks associated with the use of certain agricultural products).

Ordinarily, when the administrative judge identifies a ground for declaring the illegal-

ity of the act at hand, he/she annuls the act solely based on that reason and does not rule on the other arguments presented by the applicant. However, in town planning litigation, a legislative provision dating back to 2000 requires the judge to address all the legal arguments raised by the claimant (code de l'urbanisme, article L.600-4-1). Furthermore, a 2018 judgment (Conseil d'Etat, 21 december 2018, Société Eden) has allowed the applicant, who presents both a formal or procedural argument and a substantive argument, to prioritize them and thereby limit the judge's discretion.

In the past, case law tended to consider that any irregularity, even formal or procedural, affecting the contested act would likely result in its annulment. However, this trend has been reversed, in particular since a 2011 judgment that established the principle that a "vice affecting the conduct of an administrative procedure... is likely to taint the resulting decision with illegality...if it was likely to influence the decision or deprive interested parties of a guarantee" (Conseil d'Etat, 23 december 2011, Danthony).

More recently, case law has also recognized that procedural and formal illegalities cannot be invoked in the indirect challenge of a regulatory act (Conseil d'Etat, 18 mai 2018, Fédération des finances et affaires économiques de la CFDT).

4. Climate litigation

Several judicial challenges have been introduced against the French State due to the insufficient measures taken to address the climate emergency. The main case unfolds as follows.

In 2020, the Council of State determined that greenhouse gas emissions reduction targets set by the law were binding. In response to a legal action initiated by the municipality of Grande-Synthe in 2018, the Council of State granted the State a three-month period to demonstrate that it is implementing sufficient measures to achieve its goal of reducing emissions by 40% by 2030 (*Conseil d'Etat, 19 november 2020, Commune de Grande-Synthe*).

A few months later, on July 1, 2021, the Council of State ordered the State to take "all useful measures" to realign France with the right climate trajectory (*Conseil d'Etat, 1st July 2021, Commune de Grande-Synthe*).

On February 3, 2021, the Administrative Tribunal of Paris recognized the responsibility of the French State in the climate crisis, deeming its failure to comply with the commitments to reduce greenhouse gas emissions illegal and holding it accountable for ecological damage. On October 14, 2021, the same Tribunal ordered the French State to take "all useful measures" to repair the ecological damage caused by the unlawful exceedance of carbon budgets between 2015 and 2018, with a deadline of December 31, 2022.

On June 14, 2023, the same plaintiffs requested the Paris administrative court to impose a financial penalty of 1.1 billion euros on the State to compel action.

Meanwhile, the Council of State has issued an injunction to the Prime Minister, requiring the implementation of all necessary measures to achieve greenhouse gas reduction objectives and to provide, by June 30, 2024, all the elements justifying the adoption of these measures (*Conseil d'Etat, 10 mai 2023, Commune de Grande-Synthe).*

Unfortunately, this ongoing legal soap opera is likely to continue for some time.

V. Public liability

1. Reduction of the scope of the "faute lourde" requirement

Firstly, it should be underlined that French administrative law has always had a distinct system of liability for public authorities – separate from civil liability law – which is applied by the administrative courts.

This special regime does not apply to all disputes concerning the liability of public authorities, but it covers most of them. It is only set aside in situations where, by way of exception, the public authority is subject to ordinary law.

The system of administrative liability has several unique features. First of all, while the liability of public bodies typically requires proof of fault, there are circumstances in which liability can be incurred without fault ('*responsabilité sans faute*').

Conversely, there are cases in which the administration can only be held liable if it can be shown to have committed gross negligence ('*faute lourde*'). However, in modern times, there are fewer and fewer of these cases. Case law has abandoned the requirement of gross negligence in various fields, such as sanitary matters (*Conseil d'Etat, 10 april 1992, M. and. Ms V.*), taxation (*Conseil d'Etat, 21 march 2011, Krupa*), police (*Conseil d'Etat, 16 november 2020, Ms Karatepe)*. It remains applicable only to administrative control activities (*Conseil d'Etat, 29 march 1946, Caisse d'assurances de Meurthe-et-Moselle*), and in exceptional cases where the State may be held liable due to the behavior of administrative courts (*Conseil d'Etat, 29 december 1978, Darmon*).

2. Liability of the State for infringement of EU law

Another notable feature of French public liability law is that, for a long time, administrative courts have recognized that any illegality in an administrative decision, whether a purely formal or procedural one, would constitute a fault and then could give rise to administrative liability. However, establishing a causal link between formal or procedural illegality and the claimed damage has often been challenging.

Furthermore, it has been established in case law that any infringement of European law by the administration could make it liable.

This principle was affirmed after the ECJ ruled that any violation of EU law should be a basis for holding public authorities liable (*ECJ, 19 november 1991, Francovitch – 5 march 1996, Brasserie du Pêcheur*). Subsequently, cases emerged in which litigants argued that statutory law infringing EU law was the source of their claimed damages.

While liability based on parliamentary law was not unprecedented in case-law, it typically pertained to a different scenario – one involving a statute that imposed a significant burden on a particular individual or a small group of people (*Conseil d'Etat, 14 January 1938, Compagnie La Fleurette*).

In 2007 (case of *Gardedieu, 8 février 2007*), the *Conseil d'Etat* acknowledged that the State could be held liable for damages resulting from a piece of statutory law not in accordance with EU law. However, the recognition of such infringement of EU law as a fault was initially met with some reluctance. It was only in subsequent case law that it became clearer that administrative courts treated such infringements as faults. This distinction is important considering the significance of fault liability rules in determining compensable damages.

Additionally, in 2008, the Conseil d'Etat ruled that the State's liability could also arise from a clear departure from an EU law norm conferring rights on individuals in a judgment issued by an administrative court (*18 juin 2008, Gestas*).

3, Liability of the State for infringement of the Constitution by parliamentary law

Until recently, the notion of State liability for laws that did not conform to the Constitution was completely excluded. This was consistent with the specific organization of constitutional review, which was exercised in a priori manner, assuming that no law in violation of the Constitution would come into effect.

However, in 2009, a mechanism for a posteriori review of the constitutionality of laws was established: the '*question prioritaire de constitutionnalité*'.

Under this procedure, when a statute is declared unconstitutional, it means that it has been in force for a certain period and may have caused damage.

In light of this, in 2019, the Conseil d'Etat ruled that the State could be held liable when an unconstitutional law had resulted in damages (*24 december 2019, Société Paris Clichy*).

It should be noted that this liability is contingent upon the law being declared unconstitutional by the Constitutional Court through the '*question prioritaire de constitutionnalité*' procedure.

VI. Public contracts

It is widely known that EU law on public procurement has drawn significant inspiration by French law. The clear distinction between public contracts and concessions aligns well with the reality of French contractual practice. However, for a long time, French law suffered from a lack of clarity in this area. This lack of clarity stemmed from the accumulation of specific texts relating to public contracts (Code des marchés publics), State concessions, concessions by local authorities (art. L. 1411-1 of the Code général des collectivités territoriales), and contracts and concessions awarded by private entities qualified as bodies governed by public law under Community law.

This complexity was mainly the result of adding Community law to an already well-developed legislative and regulatory framework, supplemented by extensive case law from the Conseil d'Etat.

Recognizing the need for systematic organization, the legislative and regulatory framework required consolidation into a single code. This need for codification arose from a twofold program. Firstly, codification efforts began in France in the late 1980s leading to the codification of various areas of public law previously guided by case law and sector-specific texts, such as relations between the public and the administration, public entity ownership, and administrative procedure.

The "Public Procurement Code" was the latest major code lacking in French public law.

Secondly, the complexity of existing texts required the codification of public procurement law.

This codification took place in two stages. The first stage occurred in 2015 and 2016, with two texts governing public contracts[9] and two texts providing a framework for con-

9 Ordonnance n° 2015-899 du 23 juillet 2015 relative aux marchés publics; décret n° 2016-360 du 25 mars 2016 relatif aux marchés publics.

cessions.[10]

These initial texts served as an intermediate step towards the second stage, culminating in the adoption of the Public Procurement Code on 26 November 2018.[11]

The Code did not merely consolidate existing law but introduced specific changes to certain rules and principles while strictly adhering to EU law.

The preliminary part of the new code offers valuable insights into the main principles of administrative contract law established by the Conseil d'Etat since the twentieth century, particularly Article L. 6. These principles include unforeseeability (3°), unilateral modification (4°) and unilateral termination (5°).

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10 Ordonnance n° 2016-65 du 29 janvier 2016 relative aux contrats de concession; décret n° 2016-86 du 1er février 2016 relatif aux contrats de concession.

11 Ordonnance n° 2018-1074 du 26 novembre 2018 portant partie législative du code de la commande publique.

fypl french yearbook *of* public law
Issue 1, 2023

Germany

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Keywords:

German administrative procedural law, Civil servants, Public contracts, Public liability

I. General overview of German administrative law

Traditionally, German legal scholars have developed the concept of administration, which gradually became a key concept of German public law in the 19th and 20th centuries. According to German doctrine, administrative law includes all actions which do not affect the individual citizen, or in the event that they do, remain within the scope of individual rights established by the laws in force. In general, the administration is responsible for regulating concrete or individual legal relationships.[1]

Under the Basic Law for the Federal Republic of Germany, enacted on May 23, 1949, the Federal Act on Administrative Procedure occupies an indispensable position in German administrative procedure. The *Verwaltungsverfahrensgesetz* (commonly abbreviated as: *VwVfG*), implemented on January 1, 1977, adopts the "dual perspective of the administration and the administered"[2] and provides the legal framework for administrative procedural law. Despite its ambitious nature and the numerous commentaries dedicated to it, the *VwVfG* does not succeed in unifying all procedural rules. It rather serves as a common core of a complex normative system in which federal legislation and the legislation of the *Länder* (the federal states) coexist. The *VwVfG* is of subsidiary application: as stated in section 1 §1, it is only applicable "where no federal law or regulation contains similar or conflicting provisions."[3] Procedural rules in special administrative law will therefore be lex specialis and take precedence over the application of the *VwVfG*. Moreover, the exclusive jurisdiction over this matter does not lie with the federal government (the *Bund*). To that end section 1, paragraph 3 clarifies that the Act "shall not apply to the execution of federal law by the Länder where the administrative activity of the authorities under public law is regulated by a law on administrative procedure of the Länder."[4] Therefore, if a *Land* adopts its own Act on Administrative Procedure, the federal law will not be applicable to the authorities of that particular state, even if they are executing federal laws. Generally, most *Länder* have incorporated the federal law into their state law, thus converting it into a "law formally attributed to the *Land* that promulgated it", while four *Länder* have enacted laws that refer to the federal law and only regulate situations that diverge from federal provisions, and two *Länder* have incorporated the federal law into a broader legal framework.[5]

1 Meyer, G., *Lehrbuch des deutschen Verwaltungsrechts*, 2. Ed., 1893, Leipzig, Duncker und Humblot, p. 2; see in general the contribution of Jouanjan, O., "La *Belle époque* du droit administratif. Sur la formation de la science moderne du droit administratif en Europe", in von Bogdandy, A., Cassese, S., Huber, P. M. (eds.), *Ius Publicum Europaeum* 2011, vol. 4 (*Verwaltungsrecht in Europa: Wissenschaft*), C.F. Müller, pp. 425-459, and "Fragmentierungen im Öffentlichen Recht: Diskursvergleich im Verfassungs- und Verwaltungsrecht", in *Fragmentierungen*, *VVDStRL* 2018, nº 77, De Gruyter, pp. 353-405.

2 Jacquemet-Gauché, A., Stelkens, U., "Caractères essentiels du droit allemand de la procédure administrative", in Auby, J.-B. (ed.), *Droit comparé de la procédure administrative/Comparative Law of Administrative Procedure*, 2016, p. 17; see also Bundestag, Drucks. 7/910, p. 28; Stelkens, U., "Kodifikationssinn, Kodifikationseignung und Kodifikationsgefahren in Verwaltungsverfahrensrecht", in Hill, H., Sommermann, K.-P., Stelkens, U., Ziekow, J. (eds.), *35 Jahre Verwaltungsverfahrensgesetz - Bilanz und Perspektiven*, 2011, Duncker & Humblot, p. 273.

3 Dieses Gesetz gilt [...] soweit nicht Rechtsvorschriften des Bundes inhaltsgleiche oder entgegenstehende Bestimmungen enthalten.

4 Für die Ausführung von Bundesrecht durch die Länder gilt dieses Gesetz nicht, soweit die öffentlich-rechtliche Verwaltungstätigkeit der Behörden landesrechtlich durch ein Verwaltungsverfahrensgesetz geregelt ist.

5 Jacquemet-Gauché, A., Stelkens, U. (2016), "Caractères essentiels du droit allemand de la procédure administrative",

Prior to the entry into force of the Federal Act in 1977, administrative jurisprudence relied on unwritten general principles to supplement the rare written norms. These principles were established by way of analogy, inspired by special laws and Articles 1(3) and 20(3) GG, which require the administration to be bound by and subject to the law. However, attempts to establish a coherent set of procedural rules were unsuccessful and eventually required the adoption of federal legislation in the 1960s.[6] The law that was ultimately enacted on May 25, 1976[7] was only slightly amended until 1996 to streamline authorization procedures. In 2002, further amendments were made to include electronic administration, and in 2008 and 2009 it was revised again to ensure compliance with the German transposition of the 2006 EU Services Directive.[8]

Art. 1 (3) GG establishes a direct connection between executive and administrative powers and fundamental rights. Art. 19, (4) GG is an integral part of this normative framework as it guarantees the justiciability of fundamental rights. Nevertheless, this constitutional innovation does not replace administrative institutions and practices that were established prior to the enactment of the constitution. Rather, it requires a restructuring of the administrative institutions particularly by recognizing new citizens' rights in relation to the administration or by deducing them from directly enforceable fundamental rights. The democratic legitimacy of the administration is also reinforced by the jurisprudential construction of the theory of substantive decision-making, which allows for a closer alignment of administrative with parliamentary law[9] without changing the traditional concept of the reservation of the law, which goes back to the German "*konstitutionell*" monarchy. While it would be exaggerated to argue that German administrative law underwent a complete overhaul after 1949, one may point out that there was a clear movement for "subjectivization of administrative law" initiated by Art. 19(4) GG, involving the "systemic decision for the provision of subjective jurisdictional protection".[10] Administrative law has evolved from being an "executive (and governmental) law originally geared towards the administration (administration law) into a jurisdictionalized law focused on the individual" and thus into a real "science of administrative law".[11] This movement of subjectivization and jurisdictionalization of administrative law corresponds to a decrease in the intensity of objective principles such as the principle of legality (*Grundsatz der Gesetzesmäßigkeit der Verwaltung*).[12]

op. cit., p. 23, for further details relating to the composite set of rules for non-contentious administrative procedure.

6 See the discussions at the meeting of the Association of German Professors of Public Law (*Vereinigung der deutschen Staatsrechtslehrer*): Bettermann, K. A., "Das Verwaltungsverfahren", in *VVDStRL* 1967, nº 17, De Gruyter, pp. 118 ff.

7 Fromont, M., "La codification du droit administratif par la loi du 25 mai 1976", Revue du droit public 1977, pp. 1285 f.

8 Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market.

9 See e.g. Kremer, C. (ed.), *Die Verwaltungsrechtswissenschaft in der frühen Bundesrepublik (1949-1977)*, 2017, p. 287 f.; Schönberger, C., in Stoelleis, M. (ed.), *Das Bonner Grundgesetz*, 2006, p. 53 f.

10 Krebs, W., in *Festschrift für C.-F. Menger*, 1985, p. 191 and p. 197; Schmidt-Assmann, E., in *Festschrift für C.-F. Menger*, 1985, p. 107 ff. The application of Art. 19(4) FA as a "systemic decision for individual jurisdictional protection" is today a "common good" (*Allgemeingut*): Ziekow, J., in Kahl, W., Ludwigs, M. (eds.), *Handbuch des Verwaltungsrechts*, vol. 1, § 14, items 48 ff.

11 Wahl, R., Herausforderungen, 2006, p. 39 f.

12 Ziekow, J., in Kahl, W., Ludwigs, M. (eds.), *Handbuch des Verwaltungsrechts*, vol. 1, § 14 and § 25. Generally speaking, on the principle of legality, see the dossier in the *RFDA* 2022, nº 2.

The concept of "public power" (*öffentliche Gewalt*) referred to in Art. 1(3) and Art. 19(4) GG forms the foundation for the comprehensive application of fundamental rights to acts of public power. It was only with the decision of the German Federal Constitutional Court (*Bundesverfassungsgericht* or *BVerfG*) in *Fraport* in 2011[13] that all forms of administrative activity were comprehensively linked to fundamental rights, including those that do not constitute an exercise of public authority or acts comparable to private acts, such as profit-making and tax-related activity.[14] This results in a connection with the organization of competences, budgetary law, public law obligations imposed on state authorities, as well as on any administrative official regardless of the obligations imposed on them under private law.[15] However, the Federal Constitutional Court has so far not interpreted the concept of "public power" in Art. 19(4) GG as applying to any administrative act, even if it is a private law act.

II. German administrative law in front of the courts

A. Fundamental rights in the context of administrative law

1. Restrictions on the freedom of association for associations of public employers (BVerwG 8 C 8.19 of December 12, 2019)

Employers' associations are not entitled to the fundamental right protected by Art. 9(3) GG ("The right to form associations to safeguard and improve working and economic conditions shall be guaranteed to every individual and to every occupation or profession"). The State Ministry of Labor in North Rhine-Westphalia determines, via regulations (*Rechtsverordnung*), which collective agreements are to be considered compliant with the State's public procurement law. The claimant, an employers' association operating at the federal level as a private law association (*Verein*), has contested the application of this regulation asserting a violation of freedom of association as guaranteed by Art. 9(3) GG. The applicant pursued legal action, but the claims have been dismissed by both the Administrative Court of Düsseldorf (*Verwaltungsgericht* Düsseldorf VG 6 K 2894/13 of April 30, 2015) and the Higher Administrative Court of Münster (*Oberverwaltungsgericht* Münster OVG 13 A 1328/15 of September 17, 2018).

The Federal Administrative Court, in its decision of December 12, 2019, upheld the ruling of the lower courts: public employer associations do not enjoy the basic right protected by Art. 9(3) GG and hence have no standing.

The significance of Art. 9(3) GG lies not in protecting an employers' association from competitive collective agreements but in protecting such relationships from state influence. Private law entities that are exclusively owned by legal persons governed by public law and mixed economy companies under private law, in which legal persons governed by public law hold more than half of the shares, are not entitled to the basic right guaran-

13 BVerfGE 128, 226.

14 See the remarks by Stelkens, U., "§ 5 Verwaltung von der Besatzungszeit bis zur Wiedervereinigung", pp. 223-260, and "§ 6 Verwaltung im wiedervereinigten Deutschland", pp. 263-304, in Kahl, W., Ludwigs, M. (eds.), *Handbuch des Verwaltungsrechts*, 2021, vol. 1, C. F. Müller.

15 Burgi, M., in Hoffmann-Riem, W., Schmidt-Assmann, E., Voßkuhle, A. (eds.), *Grundsätze des Verwaltungsrechts*, 2. Ed., 2012, vol. 1, § 18, item 45 ff.

teed by Art. 9(3) GG, unlike legal entities under public law. Their exclusion is based solely on the formal condition that they are owned by legal persons governed by public law, who are bound, as public authorities, to the fundamental rights enshrined in Art. 1(3) GG ("The fundamental rights set forth below shall bind the legislature, the executive, and the judiciary as directly applicable law").

According to Art. 19(3) GG "The basic rights shall also apply to domestic legal persons to the extent that the nature of such rights permits.". This provision can apply to a legal person of private law, except if the majority or all of the shares are owned by legal persons governed by public law, as in the case of the public employer association that initiated the appeal. In dismissing the application and denying the association standing given the lack of an enforceable fundamental right, the Court relied on a longstanding argument advanced by constitutional judges. The Court's reasoning relies on the "confusion argument,"[16] a longstanding principle in the jurisprudence of the Federal Constitutional Court:[17] the State cannot simultaneously be both the debtor and creditor of fundamental rights. At the heart of this argument lies the question of the scope of the term "the state". The Court adopts a broad interpretation, which extends beyond traditional forms of statehood and public power to include indirect forms, such as associations of public employers. The Administrative Court follows the Federal Constitutional Court's reasoning as articulated in the "*Fraport*" decision, which affirmed that mixed economy companies which are predominantly in public ownership, as well as companies with full public ownership, existing in the private law order, are subject to fundamental rights.[18] The Federal Administrative Court leaves no room for ambiguity in its conclusion, stating that "publicly owned employers are directly bound to fundamental rights" and "cannot, as a component of the state that is bound to fundamental rights, simultaneously be the recipient and beneficiary of fundamental rights".[19]

Even if the regulation violates the substantive protection of the freedom of association under Art. 9(3) GG, the Federal Administrative Court cannot rule on personal protection because the claimant lacks standing in this case. This exclusion is based on the "overall responsibility of the state".[20] The plaintiff is an association primarily controlled by municipalities (*Gemeinden*), cities (*Städten*), and other communities (*Gebietskörperschaften*), which themselves do not enjoy fundamental rights[21] and, as such, cannot rely on

16 *Konfusionsargument*: the expression is attributed to Bettermann, K. A., "Juristische Personen des öffentlichen Rechts als Grundrechtsträger, *NJW* 1969, p. 1323 ff.

17 BVerfGE 15, 256, 262; see, critically, Merten, D., „Das konfuse Konfusionsargument", *DÖV* 2019, pp. 41-48, who does not hesitate to qualify it as a "dogmatic error of the Federal Constitutional Court" (*dogmatischer Irrtum des Bundesverfassungsgerichts*).

18 BVerfGE 128, 226, guideline 1; see, in French: Reinhardt, J., "Les conflits de droit entre personnes privées : de l'effet horizontal indirect à la protection des conditions d'exercice des droits fondamentaux", in Reinhardt, J., Hochmann, T. (dir.), *L'effet horizontal des droits fondamentaux*, 2018, preface by J. Masing, Éditions Pedone, p. 151 f., for whom the constitutional judge "tries to guarantee a material and conceptual continuity by making the traditional distinction between direct and indirect obligations".

19 § 26.

20 § 21 of the judgment, *Gesamtverantwortung des Staates*; references to the consistent case law of the Federal Constitutional Court: e.g., BVerfGE 147, 50; BVerfGE 143, 246.

21 Ludwigs, M., Friedmann, C., "Die Grundrechtsberechtigung staatlich beherrschter Unternehmen und juristischer Personen des öffentlichen Rechts. Kontinuität oder Wandel der verfassungsrechtlichen Dogmatik?", *NVwZ* 2018, p. 22 f.

the exceptional arrangements for radio and television institutions (which can rely on the freedom of opinion under Art. 5(1) GG), universities (which enjoy academic freedom under Art. 5(3) GG), and religious communities organized as public law institutions under Art. 140 read in conjunction with Art. 137 (5) of the Weimar Constitution (which exercise the freedom of belief, conscience, and profession of faith under Art. 4 (1-2) of the Constitution). As a freely constituted legal person under private law, the association's mission does not constitute an exercise of fundamental rights, nor does its activity serve the exercise of fundamental rights of other individuals.[22]

The critique of the "confusion argument"—the basis for the Federal Administrative Court's decision in this case—could potentially encourage Leipzig and Karlsruhe to adopt an alternative approach by cautiously departing from the exclusion of controlled legal persons from the ability to exercise the fundamental rights enshrined in the *Grundgesetz*.

2. Violation of fundamental rights by a foreign state and executive responsibility of the government (BVerwG, judgment of November 25, 2020 – 6 C 7.19).

The decision of the Federal Administrative Court on November 25, 2020, addresses widely known events - the civilian victims of the U.S. drone attacks in Yemen in 2012. The involvement of U.S. drones in German courts creates a "triangular constellation" (*Dreieckkonstellation*) that associates U.S. military actions in Yemen with the bilateral relationship between the United States and the Federal Republic of Germany, whose boundaries are not always transparent.[23]

The presence of American armed forces near Ramstein in Rhineland-Palatinate dates back to the 1950s when NATO decided to establish the Ramstein Air Base, which today plays a critical role in drone attacks in the Middle East. Command signals are transmitted directly by military personnel operating in the U.S. to the German base, serving as a relay station. With the approval of the German government, new constructions were set up in 2011. In 2014, Yemeni national residing in Yemen, Canada, and Qatar, filed a lawsuit against the Federal Republic of Germany in front of the Administrative Court of Cologne (*Verwaltungsgericht Köln*, 3 K 5625/14, judgment of May 27, 2015). They claimed that German authorities should have prevented the attacks which were facilitated by the presence of U.S. military forces in Ramstein and in their view violated international humanitarian law. The Administrative Court in Cologne dismissed the appeals, but the Higher Administrative Court of Münster (*Oberverwaltungsgericht Münster*, 4 A 1361/15, judgment of March 19, 2019) ruled that Germany must take appropriate steps to ensure that the use of the Ramstein base complies with international law. The Federal Administrative Court, however, did not see how this duty could give rise to an individual right for the applicants.

The central issue, in this case, is the violation of fundamental rights, specifically the right to life and physical integrity, by foreign states on the territory of another state. First and foremost, the extraterritorial nature of the violation and the different nation-

22 See to this effect Muckel, S., "Keine Grundrechtsträgerschaft eines Arbeitgeberverbandes öffentlicher Unternehmen", *JA* 2020, pp. 476-478, partly p. 477, see also Muckel, S., Schönberger, S., "Wandel des Verhältnisses von Staat und Gesellschaft - Folgen für Grundrechtstheorie und Grundrechtsdogmatik", *VVDStRL* 2020, vol. 79 (2019), pp. 245-346.

23 Payandeh, M., Sauer, H., "Staatliche Gewährleistungsverantwortung für den Schutz der Grundrechte und des Völkerrechts", *NJW* 2021, p. 1570 f.

ality of the perpetrators is objected to, although Germany—by ceding its territory— indirectly contributed to the violation of the right to life and physical integrity under Art. 2 (2) GG.[24]

According to the Federal Administrative Court, "the responsibility of public authority bound by the Basic Law, and therefore the scope of fundamental rights protection, generally ceases where an event is fundamentally shaped by a foreign power in accordance with its independent will, regardless of the actions of the Federal Republic of Germany".[25] The Court thereby follows the longstanding jurisprudence of the Federal Constitutional Court.[26] As a result, the Court rules out a constitutional responsibility of the Federal Republic for military operations on the territory of Yemen, as the requirements for an indirect infringement (*mittelbarer Grundrechtseingriff*) are not met in this case.[27]

The legal basis for the drone attacks in Yemen stems from the decision-making power of a foreign state, namely the United States. Therefore, the threat to the life and physical integrity claimed by the applicants cannot be attributed to the Federal Republic. From an argumentative standpoint, this solution appears to be satisfactory. However, this conclusion is not without difficulties, some of which are worth highlighting here. The provision of land for use by American forces is the result of several international treaties and agreements to which Germany is a party, including the Paris Agreements of October 23, 1954,[28] the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces of June 19, 1951, and the Additional Agreement of August 3, 1959, which was incorporated into domestic law by the NATO troop statute of August 18, 1961.[29] Despite the fact that the federal government is not involved in the decision-making of the United States or in the physical execution of the operation, it facilitates its implementation by permitting the use of German territory as a relay station, thereby enabling drone attacks, albeit only those that comply with German law.[30] The Court fails to address a significant aspect: German territory serves as an intermediary link between the American decision-making and operational process. Without the Ramstein air base these operations would have been impossible or the US would have been compelled to seek alternative solutions and territories. Germany's political decision-making authority in the international arena is consequently linked to fundamental rights in a "corollary" manner.[31]

To rule out the possibility of German responsibility for the American military opera-

24 "Jeder hat das Recht auf Leben und körperliche Unversehrtheit. Die Freiheit der Person ist unverletzlich. In diese Rechte darf nur auf Grund eines Gesetzes eingegriffen werden."

25 § 30 of the judgment: "Die verfassungsrechtliche Verantwortlichkeit der an das Grundgesetz gebundenen öffentlichen Gewalt, und damit auch der Schutzbereich der Grundrechte, enden daher grundsätzlich dort, wo ein Vorgang in seinem wesentlichen Verlauf von einer fremden Macht nach ihrem, von der Bundesrepublik Deutschland unabhängigen Willen gestaltet wird."

26 BVerfGE 66, 39, 62; BVerfGE 140, 317, 347, see on the latter decision, in French: Conseil d'Etat - Jurisprudence étrangère (Cour constitutionnelle fédérale, décision 2 BvR 2735/14 du 15 décembre 2015), *RIDC* 2016, pp. 547-550.

27 For a concise discussion of the concept of fundamental rights infringement (*Grundrechtseingriff*), see Voßkuhle, A., Kaiser, A.-B., "Grundwissen - Öffentliches Recht: Der Grundrechtseingriff", *JuS* 2009, pp. 313-315.

28 Federal Law Gazette, 1955 II, p. 253.

29 Federal Law Gazette, 1961 II, pp. 1183, 1190 f., 1218 f.

30 BVerwGE 154, 328, 6. April 2016.

31 Critically, Payandeh, M., Sauer, H., "Staatliche Gewährleistungsverantwortung für den Schutz der Grundrechte und des Völkerrechts", *NJW* 2021, p. 1571 f.

tions, the Court examines the use of buildings at Ramstein Air Base and determines that they exclude "threats to fundamental rights by drone operations that violate international law".[32] Even if the German government was aware of new constructions and modifications aimed at facilitating drone attacks, it is necessary to prove that American military personnel were aware of the "illegality under international law" of their actions.[33] The lack of this intangible element is exacerbated by the insufficiency of the tangible component. Despite the physical presence of military equipment on the territory, Germany cannot be held responsible for any violation of fundamental rights in this case, because protection obligations, arising from Art. 2(2) GG,[34] and consequently the obligation to act, only arises if the acts in question occurred on German soil and demonstrates a "relevant decision-making character" (*relevanten Entscheidungscharakter*) on the part of the German authorities.[35] This material limitation on fundamental rights protected by the Federal Constitution does not require a complex analysis. Despite the clear language of the Basic Law, it is not intended as a universal instrument of fundamental rights protection. If the violation does not stem from the actions or decision-making processes of the German government, the Federal Administrative Court cannot find an obligation to prevent such violations, which would be subject to judicial review. The Court's restrictive interpretation of the State's obligation to protect is further emphasized by the existence of a "practice of actions of the other State contrary to international law",[36] beyond "isolated cases",[37] thereby obliging Germany to intervene "on the basis of the duty to protect"[38] (§ 54 of the judgment). The Federal Government's margin of appreciation in international matters and the lack of assessment of drone operations under international law seem unconvincing (§§ 55 ff. of the judgment). The Court appears to be treading a fine line between legal and political matters, relying on the premise that the United States, as the authority overseeing the operations, bears exclusive responsibility for the decision-making process, and refraining from making a definitive statement regarding the German State's obligation to provide protection. However, this is not the end of the matter, as an individual constitutional appeal (*Verfassungsbeschwerde*) (2 BvR 508/2) was filed in March 2021 under Art. 93(1-4) of the Federal Law against the judgment of the Federal Administrative Court.

32 § 31: "Grundrechtsgefährdungen durch völkerrechtswidrige Drohneneinsätze".

33 Sachs, M., "Schutz gegen von Deutschland mitverursachte Grundrechtsverletzungen von Ausländern durch fremde Staaten im Ausland", *JuS* 2021, p. 805.

34 See generally Alexy, R., *Theorie der Grundrechte*, 1. Ed., 1985, Nomos, p. 414 f.; Klein, E., "Grundrechtliche Schutzpflicht des Staates", *NJW* 1989, p. 1633 f.

35 § 50 of the judgment.

36 "Praxis völkerrechtswidriger Handlungen des anderen Staates".

37 "isolierte Einzelfälle".

38 "aufgrund der Schutzpflicht".

B. Civil servants

1. Civil servants and the prohibition to strike (Federal Constitutional Court, decision of the Second Chamber of June 12, 2018, 2 BvR 1738/12).

In a ruling handed down on June 12, 2018[39] the Federal Constitutional Court conclusively settles the question of whether civil servants are allowed to exercise their right to strike. In line with settled case law, the Court's Second Chamber clarifies the restrictions and extent of the prohibition. This judgment does not come unexpectedly given that it is consistent with the German understanding of the civil service, notwithstanding some early reservations expressed by certain scholars.[40]

Four teachers each brought an individual constitutional complaint to the Court, challenging the disciplinary measures imposed on them after participating in various social movements, appealing unsatisfactory decisions of the lower administrative courts. Two central issues were raised: the constitutionality of the prohibition of the right to strike under Art. 9 GG on freedom of association,[41] and whether this prohibition was compatible with Art. 11 ECHR[42] and the case law of the European Court of Human Rights.[43] Without compromising Art. 9(3) GG or conflicting with European norms and case law, the Chamber relied on two justifications, an internal and an external, for the prohibition of the right to strike by civil servants.

Even during the Weimar era, the 1919 Constitution did not explicitly grant civil servants the right to strike. In 1922, President Friedrich Ebert enacted a regulation based on Article 48(2) of the Weimar Constitution, which prohibited civil servants of the *Reichsbahn* (Imperial Railway Company) from leaving their positions.[44] However, this provision remained isolated and neither the government nor the *Reichstag* took action to expressly prohibit strikes. It only emerged in case law as a principle derived from the systematic reading of civil service law.[45] The Basic Law does not explicitly recognize either the right or prohibition of strikes by civil servants. On state level, only one constitution, that of the

39 2 BvR 1738/12, points 1-191.

40 Already in the 1970s, voices were raised against this ban: see, in general, Isensee, J., *Beamtenstreik. Zur rechtlichen Zulässigkeit des Dienstkampfes*, 1971, Bonn, Godesberger Taschenbuch-Verlag, p. 11: "Das Streikverbot für Beamte [...] ist keine Selbstverständlichkeit mehr".

41 "All Germans have the right to form associations or societies. [...] The right to form associations for the preservation and improvement of working and economic conditions is guaranteed to all people and in all professions. Agreements which restrict or tend to restrict this right are null and void and measures taken to this end are illegal [...]".

42 "Everyone has the right to freedom of peaceful assembly and to freedom of association, including the right to form and join trade unions for the protection of his interests"; § 2: "No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security, public safety, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, the police or the administration of the State".

43 ECHR, 12. Nov. 2008, No. 34503/97, *Demir and Baykara v. Turkey*; ECHR, 21. April 2009, No. 68959/01, *Enerju Yapi-Yol Sen v. Turkey*.

44 "[...] die Einstellung oder Verweigerung der ihnen obliegenden Arbeit verboten."

45 BVerfGE (this decision), 147.

Saarland, explicitly prohibits civil servants from striking. According to Art. 115(5) of the Saarland Constitution of December 15, 1947, "the relationship between the civil servant and the state excludes the right to strike".[46] Neither the federal law on the civil service[47] nor the law on the status of civil servants explicitly prohibits the exercise of the right to strike. Given the ambiguity of the constitutional and legislative texts, the prohibition of civil servant strikes rather stems from a broad interpretation of Art. 33(4-5) GG, which states that "the exercise of sovereign authority on a regular basis shall, as a rule, be entrusted to members of the public service who stand in a relationship of service and loyalty defined by public law",[48] and that "the law governing the public service shall be regulated and developed with due regard to the traditional principles of the professional civil service".[49] When evaluating the constitutionality of the prohibition on the right to strike for civil servants, the Federal Constitutional Court differentiates between "particularly substantial"[50] principles and other principles that regulate public service: only the former should be taken into account by the legislature.[51] However, there is no entitlement to the retention of a particular configuration of civil service law. The legislature has the power to alter the contours of civil service law without affecting the guiding principles of public service.[52] There is no clear-cut answer to the question of which principles are traditional in nature, but there is a consensus on what could be considered the fundamental principles of public service. The adjective "traditional"[53] refers to the different regimes before the establishment of the Federal Republic of Germany. A principle is considered traditional not because of its normative form, but because of its substance. For a rule to be considered a traditional principle, it must satisfy two cumulative conditions: it must have been a stable part of the pre-constitutional background (before 1949), and its content must be compatible with the provisions of the Basic Law.[54] Some examples of traditional principles are the career system (*Laufbahnprinzip*), disciplinary law (*Disziplinarrecht*), the neutrality in the exercise of the function,[55] and the duty of loyalty (*Treuepflicht*).[56]

The prohibition of strikes found in Art. 33(4-5) GG and its categorization as a traditional autonomous principle of civil service do not fundamentally contradict the freedom of collective or individual association granted in Art. 9(3) GG. Pursuing better working conditions is part of wage agreements, and the right to strike is a necessary tool to balance parties' bargaining power. However, the conditions of public servants, including

46 "Die Stellung des Beamten zum Staat schließt das Streikrecht aus."

47 *Bundesbeamtengesetz* (*BBG*) of 1. Sept. 1953 and *Beamtenstatusgesetz* (*BeamtStG*) of 1. April 2009.

48 "Die Ausübung hoheitsrechtlicher Befugnisse ist als ständige Aufgabe in der Regel Angehörigen des öffentlichen Dienstes zu übertragen, die in einem öffentlich-rechtlichen Dienst- und Treueverhältnis stehen."

49 "Das Recht des öffentlichen Dienstes ist unter Berücksichtigung der hergebrachten Grundsätze des Berufsbeamtentums zu regeln und fortzuentwickeln."

50 "*besonders wesentlich*".

51 BVerfGE 8, 1, 16 f.; BVerfGE 71, 225, 268.

52 Lecheler, H., § 110 (*Der öffentliche Dienst*), in Isensee, J., Kirchhof, P. (eds.), *HStR*, 3. Ed., 2007, vol. 5, C.F. Müller, p. 561 f.

53 "Hergebracht".

54 For the Court, these "traditional" principles constitute the "core" (*Kernbestand*) of public service (this decision, § 118).

55 Battis, U., "Beamte", in Heun, M., Honecker, M., Morlok, M., Wieland, J. (eds.), *Evangelisches Staatslexikon*, 2006, Kohlhammer, p. 176.

56 Jellinek, W., *Verwaltungsrecht*, 2. Ed., 1929, Springer, p. 342, p. 344; BVerfGE 29, 334, 346 f.; BVerfGE 119, 247, 264.

their pay, are regulated by law. On the other hand, trade unions and professional associations participate in collective agreements on issues such as remuneration, benefits, and working conditions. Therefore, the legitimizing purpose of a strike is thus lacking in the case of civil servants, as the unilateral relationship they have with regard to their salary is not open to discussion between parties advocating opposing interests. The civil servant is an "agent" of public power, and as such, a strike could be seen as a violation of the legislature's freedom of decision and an attack on the principle of parliamentary democracy.

Art. 9(3) GG guarantees the fundamental right of association to all individuals, regardless of profession. This includes the right to establish an association to pursue specific aims, such as improving economic and professional conditions. The case law of the Federal Constitutional Court has consistently upheld this principle.[57] The scope of protection provided by Art. 9(3) GG is broad and applies to all professions, including civil service employees (*Angestellte*) and civil servants (*Beamte*), as has been confirmed by the Federal Constitutional Court.[58] The right of association is guaranteed without reservations, which does not mean that any restriction of its exercise cannot be "excluded in advance".[59] Fundamental rights may be restricted by the protection of the fundamental rights of third parties (the "collision of fundamental rights" hypothesis[60]) or by constitutional provisions containing rights that may limit them.[61]

In the Court's case law, there is no explicit account of the relationship between Art. 9(3) and Art. 33(5) GG.[62] A systemic and teleological interpretation leads to the conclusion that the traditional principles of public service constitute a constitutional norm that conflicts with the freedom of association and indirectly justifies its restriction, so that a balancing between the two constitutional provisions is not possible. To strike a balance between the two, the principle of practical concordance (*Prinzip der praktischen Konkordanz*)[63] should be applied. The latter requires taking account of the substance and scope of protection of both legal provisions, without undermining one in favour of the other.[64] The unity of the Constitution demands that constitutional norms be interpreted harmoniously. Therefore, the prohibition of strikes in Art. 33(4-5) GG and its characterization as a traditional autonomous principle of public service do not conflict with the freedom of collective or individual association in Art. 9(3) GG. The right to strike is necessary to ensure a balance of bargaining power between social parties. However, the professional conditions of civil servants, including the principle of compensation, are regulated by law, while trade unions and professional associations participate in collective agreements on remuneration, benefits, or working conditions. Therefore, the objective of a salary agreement,

57 BVerfGE 4, 96, 107; BVerfGE 17, 319, 333; BVerfGE 18, 18, 25 f.

58 BVerfGE 19, 303, 312, 322.

59 § 117: "Damit ist aber nicht jede Einschränkung von vornherein ausgeschlossen".

60 "Kollidierende Grundrechte Dritter".

61 § 117: "[…] [A]uch vorbehaltlos gewährleistete Grundrechte können durch kollidierende Grundrechte Dritter und andere mit Verfassungsrang ausgestattete Rechte begrenzt werden"; established case law: BVerfGE 28, 243, 261; BVerfGE 84, 212, 228; BVerfGE 92, 26, 41. The traditional principles guaranteed in article 33, paragraph 5 GG are likely to constitute such restrictions.

62 § 138: "[…] keine ausdrückliche Aussagen zum Verhältnis von Art. 9 Abs. 3 GG zu Art. 33 Abs. 5 GG".

63 Hesse, K., *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland*, 20. Ed., 1999, C.F. Müller, p. 28, for additional references: Alexy, R., *Theorie der Grundrechte*, 1. Ed., 1985, p. 75 f.

64 Morlok, M., Michael, L., *Staatsorganisationsrecht*, 4. Ed. 2019, Nomos, p. 62.

which legitimizes strikes, is missing in the case of civil servants.[65] Civil servants have a unilateral relationship with regard to their salary that is not subject to discussion between parties with opposing interests. The relationship between civil servants and their superiors is akin to the relationship of public authority (*besondere Gewaltverhältnisse*),[66] which deprives civil servants of their rights against the administration.[67]

Regarding the compatibility of the said prohibition with Article 11 of the European Convention on Human Rights (ECHR),[68] the BVerfG stresses that the Basic Law should be interpreted in a manner that is "favorable" to international law (*völkerrechtsfreundlich*), although the Convention holds an infra-constitutional status in the national legal system.[69]

The protection offered by Article 11 ECHR extends not only to workers, but also to public servants. Until 2008,[70] the Strasbourg Court's case law did not include the right to collective bargaining or the right to strike within the scope of the substantive protection[71] of freedom of association. However, the ECtHR has recently expanded the range of protection and established that trade unions operating within the public service have the right to strike. An absolute and general ban on this right thus violates the Convention.[72] Notably though, freedom of association and the right to strike under Article 11(2) ECHR may be limited, provided that the restrictions are imposed by law, if they are necessary in a democratic society and only for legitimate purposes such as national and public security, maintaining order, and protecting the rights and freedoms of others. In this regard, a restriction that satisfies the formal (law) and substantive (pursuit of legitimate aims) requirements of Article 11(2) does not constitute a violation of the Convention. Therefore, the "principle of freedom of association can be compatible with the prohibition of the right to strike of civil servants exercising functions of authority on behalf of the State", such as police officers and military personnel, as well as some diplomatic staff and persons with a ministerial mission.[73]

According to the definition provided by the Strasbourg Court, the German ban on the right to strike prima facie violates Article 11(1) ECHR, unless it has been laid down in a law, which states the legitimate aims of the measure. The BVerfG finds that the ban meets

65 § 140: "Da Beamte von der tariflichen Lohngestaltung ausgeschlossen sind".

66 Jesch, D., *Gesetz und Verwaltung. Eine Problemstudie zum Wandel des Gesetzmäßigkeitsbegriffs*, 1961, Tübingen, Mohr Siebeck, p. 175 f. and p. 206; Degenhart, C., *Staatsrecht I: Staatsorganisationsrecht*, 28. Ed., 2012, Heidelberg, C.F. Müller, p. 129: "Besondere Gewaltverhältnisse [...] sind Rechtsverhältnisse, in denen der Bürger in engeren Beziehung zur Verwaltung steht als im allgemeinen Staat-Bürger-Verhältnis [...]".

67 § 150.

68 "Everyone has the right to freedom of peaceful assembly and to freedom of association, including the right to form and join trade unions for the protection of his interests. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security, public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article does not prohibit the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, the police or the administration of the State".

69 § 163 f.

70 ECHR, *Demir and Baykara v. Turkey*, op. cit. § 85 f.

71 ECHR, 15 Sept. 2009, nº 30946/04, *Kaya and Seyhan v. Turkey*, § 5 f.

72 ECHR, 21 April 2009, nº 34503/97, *Enerji Yapi-Yol Sen v. Turkey*, § 32: "Legal restrictions on the right to strike should define as clearly and narrowly as possible the categories of civil servants concerned".

73 ECHR, *Enerji Yapi-Yol Sen v. Turkey*, op. cit., § 32f.

both these formal and substantive requirements of the justification. Although there is no express law to that effect, the restriction is provided for by national law within the meaning of Article 11(2) ECHR. Federal and *Länder* civil service laws provide the legal framework for unauthorized leaving of service and the obligation to follow the superiors' instructions. Regarding the necessity condition, the German Court argues that due to the unique characteristics of the German civil service, such a restriction of the freedom of association is indispensable in a democratic society.[74]

Therefore, civil servants cannot participate in a strike under domestic law, and disciplinary sanctions imposed on the plaintiffs pursue legitimate aims, particularly in the case at hand the sanction had been central in ensuring education and a functional school system.[75]

2. Appeal of the rejected applicant for the civil service (Federal Administrative Court, judgment of 17 March 2021; BVerwG 2 B 3.21)

The concept of public service[76] is generally associated with the provision of services that can only be provided by public entities (such as the *Länder*, the *Bund*, and special institutions and bodies under public law), given that private companies—even public ones—do not have the authority to do so. The notion of civil service is, however, not restricted to civil servants in a strict sense, but may also include employees and workers under private law, regardless of the fact that the latter are not entitled to the protections afforded to civil servants.

Art. 33 GG is also known as the "civil servant article" (*Beamtenartikel*)[77] as it forms the basis for German civil service law. The wording of this provision, and particularly paragraph 4 thereof, allows for the possibility of non-permanent civil service jobs. Private law relationships are therefore not excluded. However, in both cases, the public employer is bound by Art. 33(2) GG, which lays down the principle of equal access of Germans to "any public office according to his aptitude, qualifications and professional achievements", as well as by the norms regarding access to public jobs (e.g. the law on equal treatment) and the respect of fundamental rights.

The Federal Administrative Court's ruling on March 17, 2021 aims to clarify which legal remedy is available to an applicant for a position in the public service: a position open to both civil servants (*Beamter*) and employees (*Angestellte/Tarifbeschäftigte*)[78] who are bound to their employer by means of a private law contract. All candidates who applied for the job were classified as employees: therefore, both collective agreements of the civil service and common labour law are applicable to them.[79] One candidate brought a claim

74 § 183.

75 § 179.

76 On the concept of public service: Jellinek, W., *Verwaltungsrecht*, 2. Ed., 1929, Springer, § 16.

77 Badura, P., "Artikel 33", in Maunz, T., Dürig, G., *Grundgesetz Kommentar*, 2017, C.H. Beck; Kunig, P., "Das Recht des öffentlichen Dienstes", in Schmidt-Aßmann, E., Schoch, F., *Besonderes Verwaltungsrecht*, 14. Ed., 2008, De Gruyter, § 6. For a short account: Kordeva, M., "Le Personnel - Allemagne", in Abderemane, K., Clays, A., Langelier, É., Marique, Y., Perroud, T., *Manuel de droit comparé des administrations européennes*, 2019, Bruylant, pp. 307-314.

78 Hebeler, T., *Verwaltungspersonal. Eine rechts-und verwaltungswissenschaftliche Strukturierung*, 2008, Nomos, p. 110 f.; Battis, U., "Beamtenrecht", in Ehlers, E., Gehling, M., Pünder, H. (eds.), *Besonderes Verwaltungsrecht*, 3. Ed., 2013, vol. 3, points 19 f.

79 Schmidt, T.-I., *Beamtenrecht*, 2017, Mohr Siebeck, p. 30.

to the administrative court, whose jurisdiction was only recognized in cases where a tenured public employee was dismissed from a recruitment process, whereas disputes arising from the relationship between employees and the administration were traditionally dealt with by labour courts (*Arbeitsgerichte*). However, in a ruling on January 15, 2021, the Bremen Higher Administrative Court recognized that an applicant who asserted his right under Art. 33(2) GG could appeal to the administrative court, even if the job was meant for an employee rather than a tenured civil servant. The Bremen Court also allowed an appeal to the Federal Administrative Court under Section 17a, paragraph 4 sentence 4 of the Law on the Organization of Justice, taking into account the peculiarities of a claim for a provisional order in this type of dispute.

The Federal Administrative Court has ruled that the right to apply for a public job under a recruitment procedure, compliant with Art. 33(2) GG, does not fall under either public law or civil law. Therefore, labour courts still have jurisdiction over this matter. However, the Court's analysis suggests that the right to a selection process under Art. 33(2) GG has a uniform public law character under Section 40 of the Administrative Jurisdiction Act (*Verwaltungsgerichtsordnung*), which states that "The administrative litigation route is open for all public law disputes that are not of a constitutional nature, to the extent that the disputes are not expressly assigned to another court by federal law".[80] This provision has been interpreted as to allow both civil servants and public service employees to appeal against the selection procedure for a public position. This ruling appears to depart from the Federal Labour Court's (*Bundesarbeitsgericht*) settled case law, which generally treats disputes arising from selection procedures as civil law matters within the jurisdiction of labour courts, even if the selected candidate is a tenured civil servant.[81]

This discrepancy between the highest courts may have necessitated a joint senate meeting of the federal supreme courts[82] in the event of a divergence in case law among the supreme courts, under Section 17a, paragraph 4 of the Law on the Organization of Justice (*Gerichtsverfassungsgesetz*). In such a scenario, the Federal Labour Court could have decided not to adopt the interpretation of the Federal Administrative Court. Therefore, this ruling on the competent court in a dispute between a candidate for public employment and a non-tenured employee or civil servant does not actually conflict with previous case law.

C. Administrative Institutions or Agencies

1. The discretionary power of the administration and the regulatory competence of the Federal Network Agency (Federal Administrative Court, judgment of 28 November 2007, 6 C 42/06).

Under German administrative law, the exercise of bound competences by the administration is the rule, while discretionary powers are the exception.[83] The decision-

80 Der Verwaltungsrechtsweg ist in allen öffentlich-rechtlichen Streitigkeiten nichtverfassungsrechtlicher Art gegeben, soweit die Streitigkeiten nicht durch Bundesgesetz einem anderen Gericht ausdrücklich zugewiesen sind.

81 E.g. Federal Labour Court, judgment of 5 Nov. 2002, 9 AZR 451/01-, BAGE 103, 212-217.

82 "Gemeinsamer Senat der obersten Gerichtshöfe".

83 Autexier, C., *Introduction au droit public allemand*, 1997, PUF, pp. 214-215; Fromont, M., *Droit administratif des Etats européens*, 2006, PUF, pp. 238 f.

making powers of the administration (which are not bound) are typically classified into three categories: general administrative discretion (*allgemeines Verwaltungsermessen*), planning discretion (*Planungsermessen*), and discretion in the assessment of facts (*Beurteilungsspielraum*).[84] Judicial review of these types of discretion is very limited if not even non-existent. This traditional distinction of discretionary powers has been extended by the introduction of the notion of regulatory discretion, which is implemented in the field of network industries (such as energy, telecommunications, and postal services). In its decision dated November 28, 2007,[85] the Federal Administrative Court upheld the existence of regulatory discretion exercised by the Federal Network Agency (*Bundesnetzagentur*, *BNetzA*) in imposing obligations for access to telecommunication networks that promote free competition, as provided for under Section 21 of the Federal Telecommunications Act (*Telekommunikationsgesetz*, *TKG*). Decision-making under the Telecommunications Act relies on complex assessments which go beyond the classical discretionary powers and tripartite categorization. Interestingly, the same level of discretion is said to be held by companies with significant market power in a particular competitive market.[86] The Federal Administrative Court's decision to recognize discretionary power in the exercise of regulatory activity rests on two central considerations. Firstly, the nature of the norms at issue, which must be combined with other provisions, meaning that the examination of the facts cannot be separated from the exercise of discretionary power. Secondly, the Federal Network Agency is a specialized administrative body with specific legitimacy in the exercise of its decision-making powers.

Based on the aforementioned case law, it is clear that regulatory discretion has evolved or even transformed into a cross-sector legal concept (*sektorenübergreifende Figur*).[87] This new legal concept has also been recognized by the Federal Court of Justice since 2014. The Federal Network Agency has been given a margin of discretion "that in some respects resembles a margin of discretion and in other respects a regulatory discretion power".[88]

The proper dogmatic classification of this new legal figure remains uncertain. Some scholars argue that it should be classified as a subcategory of planning discretion, although it is not entirely clear whether it can be equated with regulatory discretion. Others acknowledge the challenges of using existing categories and suggest combining the three types of discretion to define this new legal figure. Some have also suggested a "return" to a single systemic category of administrative discretion in German administrative science.[89]

84 Ludwigs, M., "Kontrolldichte der Verwaltungsgerichte", *DÖV* 2020, p. 405 f.

85 BVerwG, judgment of 28 Nov. 2007, 6 C 42/06.

86 BVerwG, decision (Urteil) of 11 Dec. 2013, 6 C 24/12; BVerwG, judgment of 5 May 2014, 6 B 46/13.

87 Ludwigs, M. (2020), "Kontrolldichte der Verwaltungsgerichte" op. cit., p. 407; Ludwigs, M., "Konvergenz oder Divergenz der Regulierung in den Netzwirtschaften - Zur Herausbildung allgemeiner Grundsätze im Recht der Regulierungsverwaltung", in Ludwigs, M. (ed.), *Festschrift für Matthias Schmidt-Preuß*, 2018, p. 706 f.; Ludwigs, M., Rechtsprechungsanalyse Wirtschaftsverwaltungsrecht", *VERW* 2016, p. 276 f.

88 Established case law: see, e.g., BGH, judgment of 12 Dec. 2017, EnVR 2/17.

89 Ludwigs, M., "Das Regulierungsermessen als Herausforderung für die Letztentscheidungsdogmatik im Verwaltungsrecht", *JZ* 2009, p. 292 f.; Hwang, S.-P., Wirksamer Wettbewerb durch offene Normen – Zum Funktionswandel der unbestimmten Rechtsbegriffe im Telekommunikationsrecht, *AöR* 2011, p. 553 f.; Proelß, A., "Das Regulierungsermessen – eine Ausprägung des behördlichen Letztentscheidungsrechts?", *AöR* 2011, p. 411 f.

2. Inadmissible appeal of a Landkreis against a decision regarding delegated competences (Federal Administrative Court, judgment of December 9, 2021 - 4 C 3/20).

At the end of 2021, the Federal Administrative Court issued its ruling on the objection (*Widerspruchsbescheid*) which overturned an administrative decision charging a property € 94.347,30 for the immediate execution of a demolition measure. The contested decision ordered the *Landkreis* (the administration of a municipality association) to pay the costs for continuing the legal proceedings to[90] and called for the appointment of a representative in the preliminary proceedings (*Vorverfahren*). The Federal Administrative Court rejected the appeal and thereby followed the lower instances which had equally rejected the claim. However, behind the technical nature of this case lies the protection of the principle of self-government (*Selbstverwaltung*) of municipalities and associations of municipalities, whose competence can generally not be touched by the federal administration. This principle[91] can also be traced down in other jurisdictions. Art. 72 of the French Constitution of October 4, 1958, for instance, states that "these communities [municipalities, departments, overseas territories] are freely administered by councils elected under the conditions laid down by law".[92] According to Art. 28(1) GG, citizens get to vote for their representatives at the municipal level, which gives the municipalities a sort of "double democratic legitimacy" - their legitimacy not only derives from parliamentary elections, but also from their "communal-administrative"[93] functions. Municipalities and associations of municipalities exercise "state power" (*staatliche Gewalt*)[94] and are "integrated" into the "state organization".[95]

In a standard scenario, the appeal against an objection does not pose any particular procedural difficulties. According to Section 73 of the Administrative Jurisdiction Act (*Verwaltungsgerichtsordnung*, *VwGO*), the ruling on an objection is an act subject to judicial review, even if the administrative authority that issued the decision annuls it or if it is a decision that actually favors the person concerned. If the decision is not annulled, then it applies "in the form" (*in der Gestalt*) of the ruling on the objection in accordance with Section 73, paragraph 1, first sentence of the *VwGO*.[96] Both cases concern the annulment of

90 There are 295 *Landkreise* or associations of municipalities in Germany. The Basic Law grants them a certain degree of autonomy. Pielow, J.-Ch., Groneberg, S.-Th., "Die deutschen Landkreise", *JuS* 2014, pp. 794-799, esp. p. 796.

91 Hendler, R., "§ 143 Das Prinzip Selbstverwaltung", in Kirchhhof, P., Isensee, J., *HStR*, 3. Ed., 2008, vol. 6 (*Bundesstaat*), C.F. Müller, pp. 1103-1140, in particular p. 1120 f.; see also Burgi, M., "Selbstverwaltung angesichts von Europäisierung und Ökonomisierung", in *VVDStRL* 2003, nº 62, p. 405; Püttner, G., "§ 144 Kommunale Selbstverwaltung", in Kirchhhof, P., Isensee, J., *HStR*, 3. Ed., 2008, vol. 6 (*Bundesstaat*), C.F. Müller, p. 1149 f.

92 The principle of free administration of local authorities has been recognized as a fundamental freedom by the Council of State in the context of an emergency procedure: CE, 18 Jan. 2001, *Commune de Venelles*, Rec. p. 18, applying article L. 521-2 of the Code of Administrative Justice, the administrative judge declares that the principle of free administration "is among the fundamental freedoms to which the legislature has thus intended to grant special jurisdictional protection".

93 Grzeszick, B., "Artikel 20", in Dürig, G., Herzog, R., Scholz, R., *Grundgesetz Kommentar*, 97th actualization, 2022, C.H. Beck, points 174-175: "[...] eine duale demokratische Legitimation [...]".

94 BVerfGE 61, 82, 103; BVerfGE 73, 118, 191; BVerfGE 83, 37, 53 f.

95 BVerfGE 83, 37, 54; BVerfGE 107, 1, 11.

96 "If the authority does not remedy the objection, a ruling on the objection shall be handed down" - *Hilft die Behörde dem Widerspruch nicht ab, so ergeht ein Widerspruchsbescheid.*

an administrative act. According to the "addressee theory" (*Adressatentheorie*)[97] the applicant, as the recipient of the decision, has the right to file a claim. However, if an administrative act that would have been favorable to the recipient is rejected by a decision of the competent authority, the "addressee theory" no longer applies. In such cases, standing is based on the potential violation of a norm as defined in Section 42, paragraph 2 of the Administrative Jurisdiction Act.[98]

The situation becomes more complicated when a favorable administrative act is revoked by the competent administration. The addressee's claim in this situation is not an action for the issuance of an individual administrative act (*Verpflichtungsklage*). Rather, the applicant will request the annulment of the objection.[99] This would lead to the re-application of the favorable measure that was previously revoked. However, in the case at hand, the ruling on the objection is addressed to the administration of a *Landkreis*. If the latter, as the competent authority, has acted within the scope of its authority by exercising its right of self-government in accordance with Art. 28(2) GG ("Municipalities must be guaranteed the right to regulate all local affairs on their own responsibility within the limits prescribed by the laws"),[100] the annulment of the objection decision by another authority would violate the right of self-government of the district administration. Therefore, the initially competent authority has the possibility, as a public entity, to file an action for annulment and is entitled to do so under Art. 28(2) GG. Therefore, the addressee theory cannot be applied because this is not a violation of the general freedom of action protected by Article 2(1) GG ("Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law"), but a violation of the right of self-government under Art. 28(2) GG. On the other hand, if the administration acts within the framework of delegation, it is only implementing tasks delegated by the state. The decision then becomes an extraneous act, and an action for annulment can be declared admissible. This finding however only applies if the contested measure, taken within the framework of a delegation, also affects the autonomy of the appellant administration.

According to the Court, "a district, as an association of municipalities, is entitled, in the context of legal protection before the administrative court, to assert its right to self-government (Art. 28(2) GG) with regard to the district's municipal tasks".[101] Additionally, "the right to carry out tasks as one's own responsibility according to Article 28(2) GG concerns only those tasks assigned by law within the district's own sphere of action". This

97 Hüttenbrink, J., "Klagearten", in Kuhla, W., Hüttenbrink, J., *Verwaltungsprozess*, 3. Ed., 2002, C.H. Beck, points 59-60: addressee theory dictates that the addressee of an administrative act always has an interest in acting, because he is concerned by the act. However, in case of collective regulations (*Allgemeinverfügungen*) this theory does not automatically apply.

98 "Unless otherwise provided by law, the action shall only be admissible if the plaintiff claims that his/her rights have been violated by the administrative act or its refusal or omission" - Soweit gesetzlich nichts anderes bestimmt ist, ist die Klage nur zulässig, wenn der Kläger geltend macht, durch den Verwaltungsakt oder seine Ablehnung oder Unterlassung in seinen Rechten verletzt zu sein.

99 Hufen, F., *Verwaltungsprozessrecht*, 12. Ed., 2021, § 14, point 18.

100 See on article 28 GG: Schwarz, K.-A., "Artikel 28", in v. Mangoldt, H., Klein, F., Starck, C., Grundgesetz Kommentar, 7. Ed., 2018, vol. 2, C.H. Beck, pp. 580-651; Dreier, H., "Artikel 28", in Dreier, H., *Grundgesetz Kommentar*, 3. Ed., 2015, vol. 2, Mohr Siebeck, pp. 657-762.

101 § 11 of the decision.

sphere of action must be distinguished from the delegated sphere of action: "there can be no rights of the district resulting from the tasks delegated to it".[102] If the task falls within the scope of the Federation, it is no longer a matter of municipal or district self-government.

In the present case, the law of the *Land* of Saxony-Anhalt, provides that if a district, acting as a planning control authority, decides to demolish a building in danger of collapse through direct execution, the district effectively exercises delegated powers. Costs associated with such demolition accordingly also fall within the scope of delegated powers. Therefore, the annulment of a decision on costs can therefore not constitute a violation of the rights of the *Länder*, in particular the right of self-government. This case must be distinguished from a case arising from ordinary or constitutional law, which is protected from potential interference and thus represents a "right defendable against the State" (*abwehrfähig*).[103] A situation that enjoys legal protection would arise if delegated power would interfere with a competence that belongs to associations of municipalities, such as their right of ownership or right of self-government. However, if the directly enforced measure is unlawful, there is no such legal protection. In other words, the legality of the measure implies the right to reimbursement of the costs incurred.

The Federal Administrative Court eventually concluded that there is no constitutionally protected legal interest in this case. Art. 28 GG does not cover all municipal revenue and expenditure within the scope of the right to self-government. However, the Court acknowledges that associations of municipalities require adequate financial resources to carry out delegated tasks. Such associations may object to the execution of delegated tasks if the financial means provided are insufficient. However, in the present case, the resources were deemed adequate by the higher administrative court, and the financial burden of the objection was not disproportionate to the delegated power.

Although the facts of this case are not exceptional, they do provide an opportunity to address a problem of administrative procedural law that is not frequently discussed in case law: the admissibility of actions brought by local authorities against state authorities. Communities and associations operate outside the purview of the state, and therefore, an action for annulment is only admissible if there has been a violation of the right to self-government or other rights arising from ordinary law or the constitution. As for delegated power, standing will only be granted if the measure affects the administrative autonomy of the communities.

D. Public contracts

1. Qualification of a service contract to cover the accommodation and heating costs of refugees and asylum seekers (Federal Court of Justice, BGH [VIII. Zivilsenat], judgment of February 9, 2021 - Aktenzeichen VIII ZB 20/20).

In contrast to France, German public contracts are governed by civil law, which is based on the principle of equality between the contracting parties and the principle of

102 § 11 of the decision; BVerwGE 165, 33; BVerwGE 19, 121, 123.
103 § 13 of the decision.

"*pacta sunt servanda*".[104] Historically, the involvement of the administration in contractual relationships was considered unnatural and Otto Mayer's statement that "valid state contracts in the field of public law are absolutely inconceivable"[105] is often cited to explain the challenges encountered in incorporating the concept of contract in German public law.

The principle of the legality of public law contracts is enshrined in Section 54 of the VwVfG: "A legal relationship under public law may be constituted, amended or annulled by agreement (agreement under public law) in so far as this is not contrary to legal provision. In particular, the authority may, instead of issuing an administrative act, conclude an agreement under public law with the person to whom it would otherwise direct the administrative act."[106] However, it is important to note that this provision does not provide a comprehensive description of these contracts. According to Section 1(1) the provision applies only to the "administrative activities under public law of the official bodies".[107] Section 9 in turn further clarifies that "administrative procedure" includes those activities of the authorities "having an external effect and directed to the examination of basic requirements, the preparation and adoption of an administrative act or to the conclusion of an administrative agreement under public law."[108] Accordingly, only those contracts which are concluded by the administration have the quality of a public contract provided that they produce effects outside the administration.[109] Contracts that do not fall within the scope of public law are not considered by the administration as a means of action, but rather as instruments that illustrate the difficulties in defining the boundaries of public law.[110] In addition to this *summa divisio*, contracts related to social services are subject to a special regime that falls under the jurisdiction of the social court (Sections 53 to 61 of the Social Code, *Sozialgesetzbuch*, *SGB*). It is important to note, however, that there is a clear distinction between public law contracts (*öffentlich-rechtliche Verträge*) and

104 This Latin phrase is found in Article 1103 of the French Civil Code, "Contracts legally formed take the place of law to those who have made them", but also in German law of obligations (§§ 241 and 242 of the German Civil Code, *Bürgerliches Gesetzbuch*, *BGB*); Stelkens, U., "‚Pacta sunt servanda' im deutschen und französischen Verwaltungsvertragsrecht," *DVBl* 2012, pp. 609-615.

105 Mayer, O., "Zur Lehre vom öffentlichrechtlichen Verträge", *AöR* 1888, p. 42: "[…] wahre Verträge des Staates auf dem Gebiete des öffentlichen Rechtes überhaupt nicht denkbar".

106 „Ein Rechtsverhältnis auf dem Gebiet des öffentlichen Rechts kann durch Vertrag begründet, geändert oder aufgehoben werden (öffentlich-rechtlicher Vertrag), soweit Rechtsvorschriften nicht entgegenstehen. Insbesondere kann die Behörde, anstatt einen Verwaltungsakt zu erlassen, einen öffentlich-rechtlichen Vertrag mit demjenigen schließen, an den sie sonst den Verwaltungsakt richten würde". Critically on this provision: Jacquemet-Gauché, A., Stelkens, U., "Caractères essentiels des droits nationaux de la procédure administrative en Allemagne", in Auby, J.-B. (ed.), *Droit comparé de la procédure administrative*, 2016, Bruylant, p. 15 f.

107 „Gilt für die öffentlich-rechtliche Verwaltungstätigkeit der Behörden".

108 „Das Verwaltungsverfahren […] ist die nach außen wirkende Tätigkeit der Behörden, die auf […] den Erlass eines Verwaltungsaktes oder auf den Abschluss eines öffentlich-rechtlichen Vertrags gerichtet ist".

109 Jacquemet-Gauché, A., *Droit administratif allemand*, 2022, PUF, p. 187.

110 The literature on the subject is immense. To mention only a few examples: Hoffmann-Riem, Schmidt-Aßmann (eds.), *Öffentliches Recht und Privatrecht als wechselseitige Auffangordnungen*, 1996; and generally Bonk, Neumann, Siegel, "§ 54 Zulässigkeit des öffentlich-rechtlichen Vertrags", *in* Stelkens, Bonk, Sachs, *Verwaltungsverfahrensgesetz Kommentar*, 9. Ed., with bibliographic and case law references; see also the classic Mayer, O., "Zur Lehre vom öffentlichrechtlichen Verträge", *AöR* 1888, pp. 3-86.

administrative contracts (*Verwaltungsverträge*).[111] The term "administrative contracts" refers to all contracts concluded by the administration, not only those governed by public law.[112]

The facts of the case leading to the judgment of February 9, 2021 are as follows. The plaintiff runs six homeless shelters in Berlin. The available places are regularly updated and communicated to the *Land*, which then assigns the refugees and asylum seekers based on need. For four of the six shelters, the plaintiff concluded operating agreements (*Betreiberverträge*) with the defendant, which obliged him to provide and properly operate these shelters with a certain capacity for the temporary accommodation of refugees and asylum seekers. The defendant, in turn, undertook to compensate the plaintiff with a daily amount for each person placed during the period of the declaration of meeting the costs in settlement of the contractual services. On June 21, 2017, Berlin terminated all contracts. A statement of meeting the costs (*Kostenübernahme*) was issued to the refugees and asylum seekers in one of the centers by the employment agency. The plaintiff provided a place in one of the centers after verifying this certificate, which explicitly stated that it did not create "a contractual relationship between the State of Berlin [...] and the operator of the accommodation centers".

The applicant filed a claim against the *Land* for payment of €21.116,96 for the accommodation of refugees from September to December 2017. The question that thus arose was whether the case falls under the jurisdiction of the ordinary or social courts. After the district court (*Landgericht*) had initially affirmed the jurisdiction of the ordinary court, the *Land*'s appeal was rejected by the Higher Regional Court of Berlin. The *Land* was granted permission to appeal to the Supreme Court on the grounds of fundamental importance, which was eventually successful, and the case was referred to the Social Court of Berlin.

In the absence of a specific provision concerning jurisdiction, the decision of whether a dispute falls under public or civil law is to be made in light of the objective nature of the legal relationship from which the claim arises.[113] It should be noted that the administration may use private law means to perform public tasks, as long as there are no public law principles prohibiting such use. In disputes about the execution of the contract, it is not its legal but the manner of its execution that is decisive.[114]

Under Article 13 of the *Gerichtsverfassungsgesetz* (Law on the Organization of the Judiciary), the jurisdiction of the ordinary courts includes "civil law disputes, family matters, and matters of voluntary jurisdiction, as well as criminal cases for which the jurisdiction of administrative authorities or courts is not established or for which special courts authorized under provisions of federal law are not established". The present case concerns

111 On administrative contracts (*Verwaltungsverträge*), see generally Bauer, H., "Verwaltungsverträge", in Hoffmann-Riem, W., Schmidt-Aßmann, E., Voßkuhle, A., Grundlagen des Verwatlungsrechts, 2. Ed., 2012, vol. II (Informationsordnung, Verwaltungsverfahren, Handlungsformen), C.H. Beck, in particular on the diversity of contractual relations in administrative law (pp. 1283 f.); Imboden, M., Der verwaltungsrechtliche Vertrag, 1958, Helbing & Lichtenhahn.

112 Jacquemet-Gauché, A., *Droit administratif allemand*, 2022, PUF, p. 184 f.; Cossalter, P., "Les modèles de contractualisation", *RFDA* 2018, pp. 15-21; Schröder, H., *Le contrat de l'administration en droit européen. French and German law in interaction with European Union law*, 2022, Bruylant, forthcoming; Stelkens, U., Schröder, H., "Allemagne/ Germany", in Noguellou, R., Stelkens, U., (eds.), *Droit comparé des droits publics/ Comparative Law on Public Contracts*, 2010, Bruylant, pp. 307 f.

113 Established case law: GmS-OBG, BSGE 37, 292; BGHZ 97, 312 [313 f.]; GH, BGHZ 89, 250 [251]; BGHZ 204, 378.

114 BVerwGE 76, 71 [73 et seq.]

a dispute under public law regarding basic insurance for jobseekers.[115] A legally binding declaration by a public provider who assumes the housing costs of a person entitled to a benefit can be categorized as a declaration under either public or private law. Under public law, such a declaration of intent may form part of a public law contract, but it may equally stand alone and take the form of a unilateral promise to perform (a "commitment by the public authority to assume obligations" [*hoheitliche Selbstverpflichtung mit Bindungswillen*]).[116] Under private law, the declaration in dispute may be classified as a promise to provide security, a release from a debt, or a commitment to pay a debt.

The dispute at hand falls within the scope of public law, due to the involvement of the Berlin employment agency in the care of refugees and asylum seekers. As the Court emphasizes, the right to assistance for refugees or asylum seekers and the public body's obligation to provide such assistance are two distinct issues. The public entity could have carried out this task by itself, but chose to engage a third party, which does not imply a failure to fulfill its obligation. To the contrary: in this case, the *Land*, via the employment agency, made a declaration which constitutes a performance obligation under public law. There is no indication of a contractual relationship under private law.

In a decision dated 28 October 2008 (BSGE 102, 1, points 15 ff.), the Federal Social Court ruled that the financial assumption of assistance is provided for if the social welfare agency is unable to fulfill "the obligations incumbent upon it with regard to the person concerned",. The decision to grant such assistance is then treated as an "administrative act with private law effects".[117] The latter has legal effects that are essentially in the realm of private law.[118] This legal concept emerged shortly after World War I. While it is generally accepted that these administrative acts govern situations, rights, or relations of private law for reasons of public interest,[119] the concept remains rather under-studied. Either way, in the case at hand, the administrative court does not even consider this specific administrative act.[120] The *Land* of Berlin not only issued a decision to grant aid to refugees and notified the applicant, but also issued a certificate for the costs resulting from the aid granted to the refugees, which the latter was free to forward to the respective shelter.[121] By doing so, the public entity established a contractual relationship with the applicant as the provider of the services in question.

115 Specifically the coverage of housing and heating needs as provided in Sections 19, paragraph 1, third sentence, and 22 of the German Social Code.

116 This judgment, § 20; BVerwGE 96, 71 [75 f.].

117 „P*rivatrechtgestaltender Verwaltungsakt*"; Jacobi, E., *Grundlehren des Arbeitsrechts*, 1927, p. 27 f.; Kroeber, W., *Das Problem des privatrechtsgestaltenden Staatsakts*, 1931, p. 13 f. More recently: Tschentscher, A., "Der privatrechtsgestaltende Verwaltungsakt als Koordinationsinstrument zwischen öffentlichem Recht und Privatrecht", *DVBl* 2003, pp. 1424-1437.

118 Stelkens, U., "§ 35", in Stelkens, Bonk, Sachs, *Verwaltungsverfahrensgesetz Kommentar*, 10. Ed., 2023, C.H. Beck, point 217: "Privatrechtsgestaltende Verwaltungsakte sind gestaltende Verwaltungsakte mit einer Regelung, die auf dem Gebiet des Privatrechts Rechtswirkungen entfaltet"; Erichsen, H.-U., in Erichsen, H.-U. (ed.), *Allgemeines Verwaltungsrecht*, 11. Ed., 1998, § 12; Manssen, G., *Privatrechtsgestaltung durch Hoheitsakt. Verfassungsrechtliche und verwaltungsrechtliche Grundfragen*, 1994, Mohr Siebeck, p. 20 f.

119 Wertenbruch, W., Zum privatrechtsgestaltenden Verwaltungsakt, in Seidl, E., (ed.), *Aktuelle Fragen aus modernem Recht und Rechtsgeschichte. Gedächtnisschrift für Rudolf Smend*, 1966, p. 97.

120 §§ 34-35 of the judgment.

121 § 38 of the judgment.

To qualify the contract, the Court firstly sought to determine whether its object falls under public or private law and whether it is in "a close and insoluble relationship to the fulfillment of public tasks"[122] "according to its purpose".[123] The Court ultimately classified the contracts as public law contracts: first of all, their purpose is the collective accommodation of refugees and asylum seekers, and, secondly, the entity bearing the costs resulting from this task is public. Furthermore, the *Land* of Berlin has the right to unilaterally determine (*einseitig zu bestimmen*)[124] the conditions of operation of these centers. The Court goes on to find that "contracts in which the public service providers and the service recipients" define "the content, scope, and quality" of the services as well as the remuneration are "typically" (*regelmäßig*) classified as "public law contracts" (*öffentlich-rechtliche Verträge*).[125] In accordance with Section 53 paragraph 1, first sentence of the German Civil Code, an operating contract (*Betreibervertrag*) falls within the scope of public law contract: "a legal relationship in the field of public law can be established, modified or terminated by contract (public law contract) unless prohibited by law."[126]. Cases of public law dispute accordingly fall within the jurisdiction of the ordinary court, especially the courts of social affairs, unless the case has a constitutional law character. In the present case, the court hence referred the matter to the competent social court in Berlin.[127]

E. Public liability

1. State liability for unconstitutional law (Unrecht) (BVerfG, judgment of June 30, 2022, 2 BvR 737/20).

The issue of state responsibility is not dealt with extensively in the German legal literature, and the discrepancies with French law seem difficult to reconcile, unless a suitable basis for comparison can be found.[128]

In a decision recently issued by the BVerfG on June 30, 2022, the Court was given an opportunity to address the issue of state liability.[129] The case concerns an operator of a nuclear power plant who filed a tax return under the Nuclear Fuel Tax Act (*Kerbrennstoffsteuergesetz*), which resulted in a tax amount of approximately € 55.000. The Osnabrück tax authorities considered the tax calculation provisional given that the authorities had doubts concerning the lawfulness of the act and wished to initiate a normative review procedure (*Normenkontrollverfahren*) pursuant to Art. 100(1) GG. The latter provision allows a court to suspend the proceedings and refer a question regarding a violation of the

122 „Ob er nach seinem Zweck in enger, unlösbarer Beziehung zur Erfüllung öffentlicher Aufgaben steht".

123 § 41 of the judgment.

124 § 42 of the judgment.

125 § 43 of the judgment; BGH, judgments of 11 April l 2019 - III ZR 4/18, item 17; BGHZ 205, 260, item 23.

126 "E*in Rechtsverhältnis auf dem Gebiet des öffentlichen Rechts kann durch Vertrag begründet, geändert oder aufgehoben werden (öffentlich-rechtlicher Vertrag), soweit Rechtsvorschriften nicht entgegenstehen*".

127 § 45 of the judgment.

128 See, for example, in French, the thesis of Jacquemet-Gauché, A., La responsabilité de la puissance publique en France et en Allemagne, 2013, LGDJ, 614 p.; Cossalter, P., Schubert, F., "La responsabilité du fait des lois inconstitutionnelles ou inconventionnelles : Allemagne", *RFDA* 2019, n°3, pp. 404-420. In German, refer in general to Ossenbühl, F., Cornils, M., Staatshaftungsrecht, 6. Ed., 2013, Beck.

129 Referred to as "unlawfulness" or "*Unrecht*".

Basic Law to the *BVerfG*.[130] On July 25, 2016, the petitioner paid the tax debt and subsequently challenged (*Einspruch*) the setting of the nuclear fuel tax. However, in the absence of a response, the applicant did not appeal to the Hamburg Finance Court (*Finanzgericht*).

On April 13, 2017, the *BVerfG* declared the Nuclear Fuel Tax Act unconstitutional in its entirety, leading to the annulment of the tax decision made by the Osnabrück tax authorities and the reimbursement of the tax amount previously paid by the applicant. However, the plaintiff sought further compensation in the form of 0.5% interest per month for the ten months between the date of tax payment, and the date of refund by the tax authorities. While there is no legal basis for such a claim, the plaintiff appealed the tax authorities' decision not to grant the interest claim. The Hamburg Finance Court subsequently dismissed this appeal.

In an individual constitutional complaint filed under Art. 93(1- 4a) GG, alleging a violation of the applicant's rights under Articles 14(1)[131] and Art. 3(1)[132] in conjunction with Art. 19(4),[133] the applicant argues that the tax refund alone is not sufficient to compensate the violation of fundamental rights resulting from the collection of a tax that was declared unconstitutional. The question is thus whether there is a possible legal remedy against an unconstitutional law. The *BVerfG* declared the complaint admissible but ultimately rejected it as unfounded.[134]

The Second Chamber of the Karlsruhe Court considers the tax on nuclear fuel collected under an unconstitutional law to be a violation of the general freedom of action under Art. 2(1) GG,[135] which includes the right of individuals to be subject only to taxes in accordance with normative provisions that are materially and formally compatible with the Basic Law. In this analysis, the reimbursement of the unconstitutional tax satisfies the applicant's right under Art. 2(1) GG. However, this does not exclude the possibility that other rights might arise from such violations.[136] State responsibility for an unlawful law (*Unrecht*) goes beyond the principle of legality and involves fundamental rights, which serve as the basis for the state's obligation to provide compensation for the violation. If it is not possible to stop or prohibit the violation, compensation can be granted in the form of damages (*Schadensersatz*), compensation (*Ausgleichsansprüche*) or reparation (*Entschädi-*

130 "Hält ein Gericht ein Gesetz, auf dessen Gültigkeit es bei der Entscheidung ankommt, für verfassungswidrig, so ist das Verfahren auszusetzen und, wenn es sich um die Verletzung der Verfassung eines Landes handelt, die Entscheidung des für Verfassungsstreitigkeiten zuständigen Gerichtes des Landes, wenn es sich um die Verletzung dieses Grundgesetzes handelt, die Entscheidung des Bundesverfassungsgerichtes einzuholen. Dies gilt auch, wenn es sich um die Verletzung dieses Grundgesetzes durch Landesrecht oder um die Unvereinbarkeit eines Landesgesetzes mit einem Bundesgesetze handelt..."

131 "Das Eigentum und das Erbrecht werden gewährleistet. Inhalt und Schranken werden durch die Gesetze bestimmt."

132 "Alle Menschen sind vor dem Gesetz gleich."

133 "Wird jemand durch die öffentliche Gewalt in seinen Rechten verletzt, so steht ihm der Rechtsweg offen. Soweit eine andere Zuständigkeit nicht begründet ist, ist der ordentliche Rechtsweg gegeben. Artikel 10 Abs. 2 Satz 2 bleibt unberührt."

134 BVerfG, judgment of 30 June 2022, 2 BvR 737/20, § 57 and § 68.

135 "Jeder hat das Recht auf die freie Entfaltung seiner Persönlichkeit, soweit er nicht die Rechte anderer verletzt und nicht gegen die verfassungsmäßige Ordnung oder das Sittengesetz verstößt." § 82: "Art. 2 Abs. 1 GG gewährleistet die allgemeine Handlungsfreiheit in einem umfassenden Sinne"; established case law: BVerfGE 6, 32, 36; BVerfGE 80, 137, 152; BVerfG 97, 332, 340.

136 §§ 72 f. of the judgment.

gungsansprüche). However, a specific secondary right (*Sekundäranspruch*), such as the right to interest, cannot be derived. The legislature needs to further define and concretize the nature and extent of the derived rights related to fundamental rights: "The nature and scope of derived rights directly related to fundamental rights require further configuration and concretization by the legislature."[137]

For the first time, the Court thus examined whether the absence of a right to compensation on the basis of an unconstitutional provision constitutes a violation of fundamental rights. The guarantee of derived fundamental rights does not oblige the legislature to retroactively eliminate the effects of constitutional violations, but allows a margin of discretion and assessment that requires classifications to operationalize such derived rights. The legislature may decide whether the right to interest should be included in a financial compensation scheme that effectively remedies the consequences of taxes collected under a law which is subsequently declared unconstitutional. However, the legislature does not have to provide a right to interests for the period in which the unconstitutional law was enforced against potential claimants.

Art. 19(4) GG cannot serve as the basis for such a request, as it does not provide a substantive guarantee for legally protected situations, but presupposes their existence prior to judicial proceedings. The Court furthermore stressed that the refusal to grant a comprehensive compensation including financial interests calculated over the period of unconstitutionality of the norm violating fundamental rights is not contrary to the European Convention on Human Rights. The Court refers to the ECHR to support its interpretation of the national fundamental right, highlighting that even under the ECHR violations are not automatically compensated given that a case-by-case examination is required to determine the appropriate amount.

According to the constitutional judge, denying the applicant the right to receive interest does not violate the general principle of equality under Art. 3(1) GG.[138] The principle of equal treatment does not require identical treatment, but rather demands that substantially identical situations be treated equally, while substantially different situations be treated differently.

In the present case, the principle of equality does not require the legislature to treat differently refund cases resulting from the annulment of an unconstitutional law (*Nichtigerklärung eines verfassungswidrigen Gesetzes*), and those resulting from a "mere" (*bloßen*) declaration of incompatibility of an unconstitutional law (*Unvereinbarkeitserklärung eines verfassungswidrigen Gesetzes*), according to the logic that interest on the amounts paid on the basis of the law should be granted to all persons concerned without distinction.[139] The annulment of the unconstitutional law is not linked to a particularly serious and manifest violation of the law. The declaration of incompatibility, on the other hand, does not

137 § 88: "Art und Umfang grundrechtlicher Sekundäransprüche bedürfen vielmehr der Ausgestaltung und Konkretisierung durch den einfachen Gesetzgeber"; see also BVerfGE 91, 93, 111 f.; BVerfGE 125, 175, 224; BVerfG, judgement of 18 November 2020, 2 BvR 477/17, point 30.

138 On the principle of equality: Nußberger, A., "GG Art. 3 [Gleichheit vor dem Gesetz]", in Sachs, M., (ed.), Grundgesetz Kommentar, 9. Ed., 2021, C.H. Beck; Boysen, S., "GG Art. 3 [Gleichheit vor dem Gesetz]", in von Münch, I., Kunig, P., Grundgesetz Kommentar, 7. Ed., 2021, C.H. Beck; Heun, M., "GG Art. 3 [Gleichheit]", in Dreier, H., Grundgesetz Kommentar, 3. Ed., vol. 1, Mohr Siebeck. Generally on the principle of equality before the law in German law: Jouanjan, O., *Le principe d'égalité devant la loi en droit allemand*, 1992, Economica.

139 § 46 of this judgment.

characterize an insignificant violation of constitutional provisions. The Court found that there was nothing related to the intensity of the constitutional violation that could justify a difference in treatment between these two situations.

The Second Chamber, therefore, concludes that the absence of the possibility of collecting interest and the application of the law by the courts in this sense are merely a confirmation of the rule of law. According to the latter, the judge is bound by the law and must respect the choices made by the legislature, rather than substituting them with his "own conceptions of justice" (*eigene Gerichtigkeitsvorstellungen*).

State liability for unconstitutional law (*Haftung für staatliches Unrecht*)[140] is the consequence of the violation of fundamental rights. These rights guarantee derived rights proportionate to the infringement and are implemented by the legislature in the exercise of its margin of appreciation and assessment.

140 Guideline sentence 1 of the decision of 30 June 2022.

fypl french yearbook *of* public law
Issue 1, 2023

Italy

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Keywords:

Italian administrative system, Administrative adjudication, Administrative simplification, Administrative organization

1 Par. 1, par. 4 and focus 3.2 are written by Elena D'Orlando. Par. 2, par. 3 and focus 1, focus 2 and focus 3.1 are written by Francesca Di Lascio. Special thanks go to Federico Nassuato and Giulia Giusy Cusenza for their research assistance.

I. Historical background

The Italian administrative system emerged in the years following the political unification of the country (1861), through the extension of the law of the Kingdom of Sardinia – which had been the main actor of Italian unification – over the other Italian territories.[2] Sardinia's administrative system was deeply influenced by the French-Napoleonic model of *droit administratif*, under which administrative law constituted an autonomous and special branch of the law, separated from private law, and endowed public administration with a privileged status over citizens: *e.g.*, disputes between citizens and administrative authorities were mostly settled within the administration itself or by special judges, while the jurisdiction of ordinary courts was extremely limited.[3]

However, the transplant of the French model into the new-born Italian legal system was "neither immediate nor comprehensive".[4] The 1865 laws[5] unified public administration and generally emulated the French organizational model (ministries, prefects, Council of State), although to a lesser effect. For at least twenty years following unification, "administrative functions and public apparatuses continued to have limited size and sphere of influence":[6] public bodies were characterised by few civil servants and rudimentary structures, and they lacked both general coordination and enforcement powers.[7] Statutory law too was very limited and did not constitute a special and autonomous body of law, provided with distinct legal principles and concepts. Consequently, in these first decades "private law and especially contract law prevailed, while public law elements remained fragmented and secondary".[8] The activity of public bodies was not perceived as different from that of private citizens: administrative bodies had full private autonomy, public and private property were on an equal footing, civil servants were hired with private law contracts, expropriation was described as a purchase, and there were no statutory rules concerning administrative procedures (except for those established by public bodies through their internal self-organizational powers).[9]

The "private-law approach"[10] prevailed also with regards to administrative adjudication. The 1865 Law[11] opted for the Belgian model of an integrated judiciary, which in

2 Mattarella, B.G., "Evolution and *Gestalt* of the Italian State", in von Bogdandy, A., Huber, P.M. & Cassese, S. (eds.), *The Max Planck Handbooks in European Public Law*, 2017, vol. I, *The Administrative State*, Oxford, Oxford University Press, p. 329.

3 Cassese, S., "The Administrative State in Europe", in von Bogdandy, A., Huber, P.M. & Cassese, S. (eds.), *The Max Planck Handbooks*, 2017, op. cit., p. 62. See also D'Alberti, M., "Transformations of administrative law: Italy from a comparative perspective", in Rose-Ackerman, S., Lindseth, P.L. & Emerson, B. (eds.), *Comparative Administrative Law*, 2017, Cheltenham-Northampton, Elgar, p. 102 ff.

4 Cassese, S. (2017), "The Administrative State in Europe", op. cit., p. 66.

5 Law No. 2248/1865, Annex A-F.

6 Mattarella, B.G. (2017), "Evolution and Gestalt of the Italian State", op. cit., p. 332.

7 Cassese, S. (2017), "The Administrative State in Europe" (2017), op. cit., p. 66-67.

8 Ibid.

9 Mattarella, B.G. (2017), "Evolution and Gestalt of the Italian State", op. cit., p. 332-333, and D'Alberti, M. (2017), "Transformations of administrative law: Italy from a comparative perspective", op. cit., p. 104.

10 D'Alberti, M., *Diritto amministrativo comparato. Mutamenti dei sistemi nazionali e contesto globale*, 2019, Bologna, Il Mulino, p. 158.

11 Law No. 2248/1865, Annex E.

turn was influenced by the English common law system. All disputes between public administrations and citizens concerning civil or political rights were transferred to ordinary courts, whereas other cases involving public authorities were to be decided by the public administration itself, through internal administrative appeals (*ricorsi amministrativi*). Moreover, judicial review of administrative action was extremely limited: ordinary courts were not entitled to quash or modify administrative acts, but they could only disapply unlawful acts in single cases, in accordance with the principle of separation of powers;[12] the Italian Council of State (*Consiglio di Stato*), divided in three sections, had a purely advisory function, unlike its French counterpart. Thus, the early Italian administrative system appeared – in some respects – to be closer to the English common law system, but many changes soon occurred.[13]

At the end of 19th century, the need for more public intervention to promote economic and social development "prompted an increase in administrative tasks and a greater complexity in public administration's organization and policy making".[14] In the rising welfare state model, administrative duties expanded, public apparatuses grew exponentially and administrative legislation flourished. Administrative law finally emerged as an autonomous branch, freed from private law rules and institutions. It was based purely on public law and centred round the concept of the discretionary and authoritative 'administrative act', which expressed the supremacy of public bodies over citizens.[15] Italian legal scholarship, deeply influenced by the German legal science of public law, played a crucial role in the construction of the administrative legal system.[16]

As far as administrative adjudication is concerned, the case law demonstrated that the integrated model had failed to protect individual rights, due to the judicial deference towards administrative authoritative action.[17] In 1889, an Act of Parliament[18] instituted the Fourth Section of the Council of State and endowed it with jurisdiction over appeals against administrative acts, *i.e.* over all the disputes concerning 'legitimate expectations' (*interessi legittimi*), distinct from those concerning 'civil and political rights', which had already been attributed to ordinary courts since 1865. Thus, the 1889 Law established a new administrative court, separated from ordinary ones, and provided it with full powers of judicial review, such as the power to overturn unlawful administrative decisions.[19] Consequently, the Italian legal system "abandoned the path of unity in jurisdiction"[20] and established the so-called 'dualistic system'.

After the Fascist period, the 1948 Constitution of the Republic included a Bill of Rights and imposed limits on administrative action: in particular, the Constitution established

12 Mattarella, B.G. (2017), "Evolution and *Gestalt* of the Italian State", op. cit., p. 334, and D'Alberti, M. (2017), "Transformations of administrative law: Italy from a comparative perspective", op. cit., p. 104.

13 D'Alberti, M. (2017), "Transformations of administrative law: Italy from a comparative perspective", op. cit., p. 105.

14 Mattarella, B.G. (2017), "Evolution and *Gestalt* of the Italian State", op. cit., p. 333.

15 Ibid., p. 336 ff. See also D'Alberti, M. (2017), "Transformations of administrative law: Italy from a comparative perspective", op. cit., p. 105, and Napolitano, G., "I grandi sistemi del diritto amministrativo", in Napolitano, G. (ed.), *Diritto amministrativo comparato*, 2007, Milano, Giuffrè, p. 12 ff.

16 D'Alberti, M. (2017), "Transformations of administrative law: Italy from a comparative perspective", op. cit., p. 105.

17 Ibid., p. 104.

18 Law nº 5992/1889, also known as *Legge Crispi*.

19 Mattarella, B.G. (2017), "Evolution and *Gestalt* of the Italian State", op. cit., p. 337.

20 Ibid.

the principles of legality, efficiency and impartiality of the public administration (Article 97), and specifically provided for the civil, criminal and administrative liability of public bodies and civil servants (Article 28). Furthermore, the creation of Regions affected the distribution of administrative competences: since 2001, through a radical amendment of this allocation, Article 118 of the Constitution endows municipalities with all administrative tasks (according to the principle of subsidiarity), while higher levels of government can only act if the competence cannot be sufficiently accomplished by the municipality.[21]

Regarding administrative adjudication, the Constitution reaffirmed the dualistic system, establishing the full justiciability of both rights and legitimate expectations affected by administrative action (Articles 24 and 113). It also introduced regional-based administrative courts of first instance (*Tribunali amministrativi regionali* or *TAR*), whereas the judicial sections of the Council of State were converted into an administrative court of appeal (Article 125). Furthermore, the Constitution provided administrative courts with the same guarantees of impartiality and independence as the ordinary courts (Article 108) and established the principle of fair trial (Article 111, as amended in 1999).

In the new Constitutional framework, Italian administrative law became more egalitarian by being more oriented to the protection of individual rights and open to citizens' participation in administrative action, according to "the idea of service on behalf of citizens rather than the notion of the administration's supremacy".[22] The case law of administrative courts has also played a key role in implementing legal safeguards both in administrative procedure and in administrative litigation, and those achievements have subsequently been incorporated in major legislative acts, such as the 1990 General Administrative Procedure Act (APA)[23] and the 2010 Code of Administrative Trial (CAT).[24]

Finally, the development of the Italian administrative system has been strongly influenced by supra-national legal systems such as the European Union (EU) and the European Convention on Human Rights (ECHR). Indeed, today many fields of administrative law are now entirely regulated by EU law[25] and, as a result, this has encouraged the privatisation, liberalisation and simplification of administrative activities. Moreover, supra-national law has significantly affected administrative protection of individual expectations: under the influence of the EU Charter of Fundamental Rights, which provides for the right to good administration (Article 41), Italy has strengthened many legal safeguards related to due process, such as the right to be heard, the duty to state the reasons for taking certain administrative decisions, and the right of access to administrative documents.[26] Furthermore, following the case-law of the EU Court of Justice, national courts have increasingly applied new legal principles and criteria to review administrative decisions, such as proportionality, reasonableness, and the precautionary principle.[27]

The ECHR and the case law of the Strasbourg Court have also affected national ad-

21 Ibid., p. 346.

22 Ibid., p. 356. See also D'Alberti, M. (2017), "Transformations of administrative law: Italy from a comparative perspective", op. cit., p. 116.

23 Law nº 241/1990.

24 Legislative Decree nº 104/2010.

25 *E.g.*, public procurement, environment, telecommunications, energy, transportations, postal services, etc. On this point, see D'Alberti, M. (2017), "Transformations of administrative law: Italy from a comparative perspective", op. cit., p. 114.

26 Ibid., p. 115.

27 Ibid., p. 110-11.

ministrative law, especially Article 6 on the right to a fair trial, which has pushed the safeguards of administrative court proceedings towards a more intense judicial review of administrative action, according to the concept of 'full jurisdiction'.[28] Furthermore, the safeguards for a fair trial established in Article 6 have also been applied to administrative procedures, particularly to those concerning administrative sanctions and penalties.

II. Administrative action: administrative proceedings, unilateral acts and agreements

There are many sectoral laws on administrative activities carried out in the form of proceedings (e.g., on tax, expropriation, or town planning), but only the APA provides for a general discipline in the Italian system.[29] Therefore, according to the general principle that *lex specialis derogat generali*, the APA supplements the content of sectoral laws in case of compatibility while, in case of conflict with sectoral laws, it cannot prevail.

Through the procedure, the administration adopts acts of a unilateral nature in which the content is not to be defined in an adversarial manner with the addressee. According to an established literature, procedure means a sequence of acts and facts, divided into typical stages, and aimed at the adoption of a single main act (*provvedimento amministrativo),* which expresses the decision taken by the administrative body.

The conduct of the procedure is the responsibility of the procedure officer (*responsabile del procedimento*). This officer, present in each organizational unit, has the task of taking care of all the steps leading to the adoption of the final decision and must ensure the effective and smooth conduct of administrative action, to the point of coordinating several offices when the procedure is of a complex type.[30]

There are three stages of the procedure: initiative stage, inquiry stage, and decision stage.

The initiative phase can be introduced by the administration (e.g., for a control procedure) or by the interested party (e.g., to obtain a business license).[31] In all cases, the procedure officer must give notice of the instatement of the activity to those who are obliged to intervene in the proceedings (the interested parties) but also to those who might be directly affected by the decision (the counter interested parties).[32] The initiation notice is an element of guarantee for the exercise of participation rights and can only be deferred in cases of urgency or be omitted for measures that have an unidentifiable number of addressees (in this case, it is replaced by the publication of the act in official venues).

During the preliminary stage, the procedure officer evaluates the admissibility of the application, the requirements of legitimacy and the relevant prerequisites for the issuance of the measure. If necessary, he requests supplementary documents and acquires

28 Comporti, G.D., "The Administrative Jurisdiction in Italy: The Path Toward a Speciality to Serve Full Protection of Rights Against Public Authority", in Sorace, D., Ferrara, L. & Piazza, I. (eds.), *The Changing Administrative Law of an EU Member State. The Italian Case*, 2021, Cham-Torino, Springer-Giappichelli, p. 100 ff.

29 della Cananea, G., "*Droit de la procédure administrative: le modèle italien*", in Auby, J.B. (ed.), *Droit comparé de la procédure administrative*, 2016, Bruxelles, Bruylant, p. 85 ff.

30 Article 4 and 5 APA.

31 Article 2 APA.

32 Article 7 and 8 APA.

opinions and technical assessments.[33] At this stage, therefore, the balancing of the different interests involved in the procedure takes place, and the administration exercises its discretion by identifying which interests are relevant.

The unilateral character of the administrative decision taken in the form of a measure is mitigated by the general principle of participation in the proceedings.[34] In concrete terms, participation can be exercised in two ways: through the submission of pleadings and documents by interested parties during the preliminary investigation[35] and through the exercise of the right of access to administrative records.[36] The administration is obliged to evaluate the documents submitted by private parties during the preliminary stage but not to accept their contents. However, the justification of the final decision must give an account of a rejection.

To ensure the proper exercise of discretion, all measures must be expressly formulated[37] and adequately motivated.[38] The statement of reasons indicates the legal reasons for the decision and shows the elements on which the discretionary assessment of the administration is based. Violation of the duty to state reasons may provide grounds for appeal and annulment of the measure before the administrative judge.[39]

Proceedings must be concluded within predetermined time limits. Beyond this interval, the APA qualifies the administration's silence as a failure to act, and the private party may challenge this inaction before the administrative judge. However, the APA also provides other meanings for silence, which can also count as denial and assent. In these cases, silence is seen rather as a means of simplifying administrative action and reducing the time of the procedure than as a means of protection.[40] In any case, silence is never allowed when the administrative decision concerns particularly important interests such as those of the environment, landscape, health or the protection of cultural heritage.[41]

As an alternative to administrative action, APA provides for the possibility of the administration and private parties to enter into agreements (*accordi*).[42] The idea behind this decision-making procedure is that prior consultation can reduce possible conflicts between administration and private parties. The provision of negotiated forms to replace unilateral acts is part of a broader evolutionary trend that affects the notion of *puissance*

33 Marzuoli, C., "*Evolution of the Principles and Rules on Administrative Activity*", in Sorace, D., Ferrara, L. & Piazza, I. (eds.), *The Changing Administrative Law of an EU Member State. The Italian Case*, 2021, Cham-Torino, Springer-Giappichelli, p. 27.

34 Article 9 APA.

35 Article 10 APA.

36 Article 22 ff. APA.

37 Article 2 APA.

38 Article 3 APA.

39 Cassatella, A., "*La motivation des actes administratifs en Italie*", in *Cahiers de la Recherche sur les Droits Fondamentaux*, 2019, nº 17, p. 99 ff.

40 Mattarella, B.G., "*Treatment of the silence of the administration and administrative inertia to Italy*", in Auby, J.B. (ed.), *Droit comparé de la procédure administrative*, 2016, Bruxelles, Bruylant, p. 692 ff.

41 Marzuoli, C., "*Evolution of the Principles and Rules on Administrative Activity*", in Sorace, D., Ferrara, L. & Piazza, I. (eds.), *The Changing Administrative Law of an EU Member State. The Italian Case*, 2021, Cham-Torino, Springer-Giappichelli, p. 34.

42 De Donno, M., "*L'accord comme issue de la procédure administrative*", in Auby, J.B. (ed.), *Droit comparé de la procédure administrative*, 2016, Bruxelles, Bruylant, pp. 607-609.

publique as the sole foundation of administrative law.[43]

Agreements can only be concluded if the administration has discretionary power in making the decision and can negotiate the contents with the interested parties. Therefore, they do not apply in cases of measures that enact a binding power.

The signing of an agreement can be requested by the private party during the preliminary stage, using the instruments of participation. But the administration is not obliged to accept the proposal and can still choose to adopt a unilateral decision. The provision of the possibility of making agreements, therefore, offers an additional possibility but does not reduce the authoritative power of the administration.

With respect to the stages of the procedure, agreements can be of two types. In the first case they serve to agree on the content of the measure that will later be adopted by the administration (supplementary agreements). In the second case they replace the measure altogether and produce direct effects without the need to adopt other administrative acts although, to be valid, they must be first preceded by an expression of will by the administration that with holds unilateral power (substitute agreements).

Agreements must be in writing. Otherwise, they are null and void and have no effect. In addition, they must be substantiated.

The nature of these agreements has been much discussed, partly because of this closeness to administrative measures. In fact, the principles and rules typical of civil law contracts apply to these acts, when compatible (but the legislature may decide to exclude some agreements from this rule).[44] This provision has led administrative scholarship to rule out the possibility that agreements can be qualified as "contracts": if that were the case, the Civil code would automatically apply and the APA would not need to invoke them. Moreover, the APA specifies that agreements cannot harm the rights of third parties. This, too, distinguishes them from contracts, which, according to civil law principles, have effect (and effects) only on the parties.[45] The impossibility of comparing procedural agreements and contracts is also confirmed by the provision that conflicts arising in the stages of formation, conclusion and execution of the former shall be resolved before the administrative judge and not the ordinary judge.

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43 D'Alberti, M., "*Transformations of administrative law: Italy from a comparative perspective*", in Rose-Ackerman, S., Lindseth, P.L. & Emerson, B. (eds.), *Comparative Administrative Law*, 2017, Cheltenham-Northampton, Elgar, p. 108 ff.

44 Article 11 APA.

45 Article 11, par. 1, APA.

Focus 1. Administrative simplification and administrative procedure.

The APA devotes Chapter IV to regulating instruments of administrative simplification, which allows for the concrete implementation of the constitutional principle of good performance. Simplification tools are located within broader policies of complexity reduction that have been under discussion for years in the Italian system. 46 Now more than ever, they are linked to the development of digitization processes in the public system, designated as a fundamental objective by the National Recovery and Resilience Plan.

In addition to silence-consent, mentioned above, there are two main simplification instruments: the services conference and the Certified Notice of Commencement of Activity (CRSA) (Segnalazione Certificata di Inizio Attività, SCIA).

The services conference is envisaged as the main tool for coordinating and speeding up administrative decision-making in complex procedures, such as those for environmental interests or for the localization of infrastructure measures.47 Thanks to the services conference, representatives of different administrations involved in the same procedure may decide together, through a joint assessment of the public interest and may admit, in a collaborative perspective, the participation of private parties without voting rights. It has the legal nature of an organizational form and not a collegial body as one might initially think. Indeed, the acts adopted in the conference remain charged to the relevant administration.

The use of the services conference has always posed the problem of how to reach a decision in case of disagreement. In the first version of APA, unanimous consent was required but this paralized decision-making. Through other amendments, some interests were expected to prevail over others (such as the environment or public health) but conflicts emerged nonetheless. Today, the APA requires the proceeding administration to adopt a motivated decision in order to conclude the conference on the basis of the "prevailing positions", expressed by the participating administrations through their respective representatives.The CRSA aims to promote the liberalization of private economic activities, also in accordance with EU Directive 2006/123.48 With this aim, the APA established that many activities, previously subject to an administrative authorization, can now be initiated with the submission of a report to the administration by the interested party, together with the certifications and other documents required by law for the specific activity. The administration has 60 days to verify the contents of the report and ascertain the presence and validity of the requirements presented by the private party. In case of deficiencies, it adopts a prohibition measure forbidding the continuation of the activity. If the prohibition measure is adopted after the 60 days prescribed by the APA, the measure is ineffective.

46 Lorenzoni, L., "*Complexity and Public Intervention in the Economy*", in De Donno, M. & Di Lascio, F. (eds.), *Public Authorities and Complexity. An Italian Overview*, 2022, Napoli, ESI, p. 165 ff.

47 Article 14 APA; Parisio, V., "*Italy: the nature of interests as a boundary to the simplification of the administrative procedure*", in Auby, J.B. (ed.), *Droit comparé de la procédure administrative*, 2016, Bruxelles, Bruylant, p. 406 ff.

48 Article 19 APA.

The SCIA encounters two constraints. It cannot be submitted if it relates to an activity that is permitted only for a limited number of operators or if it concerns activities for which there are environmental, cultural, or other constraints related to fundamental public interests, such as national defence.
One aspect of the SCIA that is hotly debated is the ways in which a person who wants to oppose the activity can be protected. It might happen, for example, that the initiation of the activity implies a damage to a third party.
The opposing party, in fact, cannot challenge a measure before the administrative court because there is no express authorization. The report, moreover, does not constitute a sort of a silent unilateral act. According to case law, the private party can therefore protect himself only by asking the administration to carry out the necessary checks and verifications and to adopt a prohibition measure if the checks result in a negative outcome. If the administration fails to respond, it can ask the court to compel it to act. When a private activity is prohibited after its beginning, there may be a damage to the legitimate expectations of the person who had filed the report.
The problem of third-party protection is thus not yet resolved.

III. Administrative organization

The Italian Constitution contains several provisions on the organization of the administrative system and its governance. Not all of them, however, are placed in Section II of Title III, which is explicitly dedicated to Public Administration and consists only of Articles 97 and 98.

The former states the constraints of budget balance, introduced by Constitutional Law No. 1/2012 to ensure that European objectives of public debt sustainability are met.[49] It then sets out the principles of legality, impartiality and good performance, the fundamental guiding criteria for the organization of public offices since the original formulation of the Constitution.[50] In particular, the rule of law, expressed indirectly in the formula "*public offices shall be organized according to provisions of law*", suggest a sort of "statutory reservation" on administrative organization, that is, requiring a regulation by law. This legal instrument must determine the number, functions and organizational structure of the ministries and offices of which the Presidency of the Council of Ministers is composed.[51] It must, in addition, ensure that the organization of offices is based on a clear identification of the spheres of competence of each administrative organ. Administrative bodies, when endowed with legal capacity and thus able to perform legally relevant acts towards third parties, are responsible only to the extent of their powers.[52]

The tight link that the Constitution imposes between the identification of functions, the definition of powers and the measure of the responsibility of administrative bodies

49 Article 97, par. 1, Constitution.
50 Article 97, par. 2, Constitution.
51 Article 95, par. 3, Constitution.
52 Article 97, par. 3, Constitution.

ensures legal certainty for the system as a whole and, at the same time, allows the organization to be characterized as instrumental to the action of public administrations. Instrumentality, in turn, has a twofold function: it enables the implementation of political direction by taking care of the interests that have been qualified as "public" at a given historical moment, but it is also a means of guaranteeing those private interests that are worthy of protection (think of fundamental rights), which can be affected (and damaged) by administrative action.

Over time, the principles of impartiality and good performance, which are in an instrumental relationship with each other and sometimes in dialectical tension (protecting impartiality does not always allow for good performance and vice versa), have been specified in various corollaries now referred to in Article 1 of the APA, according to which "Administrative activity shall pursue the ends determined by law and shall be governed by criteria of economy, effectiveness, impartiality, publicity and transparency". As a result of this provision, these criteria are applicable not only to the organization but also to administrative activity and contribute to the good administration referred to in Article 8 of the ECHR.[53]

Impartiality is linked to the principle of non-discrimination enshrined in the Treaty on the Functioning of the European Union (TFEU) but also to the principles of publicity and transparency that underlie Legislative Decree No. 33/2013 (the so-called Transparency Code). In the Constitution, impartiality is then implemented in the rule of access to public employment through comparative procedures (*concorsi pubblici*)[54] and in the subjection of public employees to a regime of exclusivity in relation to the nation that may even justify limitations on the exercise of the right to join political parties.[55] Good performance, on the other hand, requires the use of the criteria of economy and effectiveness in the management of public resources. Also requires that administrative action not be unjustifiably onerous, unless this is necessary for extraordinary and justified needs.[56]The constitutional framework contains two additional provisions that are worth noting because they outline Italian administrative organization along original lines compared to other European systems. The first relates to the relationship between political and administrative bodies (or, rather, between politics and administration) and the second concerns the pluralism of levels of government.

The principle of ministerial responsibility, of Anglo-Saxon descent, has been accepted in the Constitution and implies that ministers are directly accountable to Parliament for all acts performed in the exercise of their powers.[57] They are, therefore, administratively responsible for the management of the ministry entrusted to them, while they retain political responsibility when they adopt collegial acts within the Council of Ministers.[58]

The distinction between politics and administration has, moreover, been further implemented at the regulatory level with reference to the relationship between ministers

53 Di Lascio, F., "*La bonne administration européenne dans le droit italien*" in Ascensio, H. & Gonod, P. (dir.), *Les principes communs de la procédure administrative: essai d'identification*, 2019, Mare & Martin, Paris, p. 145 ff.

54 Article 97, par. 4, Constitution.

55 Article 98, Constitution.

56 In this regards see also Article 1 (2) APA.

57 Scarciglia, R., *Diritto amministrativo comparato*, 2020, Torino, Giappichelli, p. 72.

58 Article 95, Constitution.

(or, in general, between political leadership of different administrative bodies) and managers to reduce the influences of politics on the management of public processes and resources. This criterion, introduced with regard to the local system by Law No. 142/1990 and then extended to all administrations by Legislative Decree No. 29/1993 (now merged into Legislative Decree No. 165/2001, *Unified Text on the Civil Service*, UTCS), entailing the strengthening of managerial autonomy, fostered the evolution of organizational relations from a hierarchical model, based on the power of order, to a model of "direction" in which a motivated deviation from the policy direction is permitted without automatic sanction.[59] This independence also entails special rules for the assignment and removal of executives from their roles,[60] to which the spoil system – providing for the automatic forfeiture of the executive relationship at the end of the political relationship – applies only in part. The political bodies, in fact, cannot under any circumstances adopt, modify or revoke such acts and, in case of failure of managers to perform their duties, have only the power to warn them to comply and, if the failure to perform their duties persists, to appoint a substitute (commissario *ad acta*) to act in place of the manager.[61]

Therefore, even though on a first reading of Art. 95 the model outlined by the Constitution seems to admit the subordination of the administration to executive power, a deeper analysis leads to a different direction. The most reasonable interpretation of Article 97 and of the value that the principle of legality takes on with respect to administrative organization is that the instrument through which most appropriate exercise of administrative functions is guaranteed is the Law, and not political direction.[62]

As for the pluralism of the levels of government, the Constitution recognizes local autonomies and decentralization in services that depend on the State.[63] The constitutional reform that took place in 2001, by strengthening the role of municipalities, also accentuated the polycentrism of the Italian system.[64] Municipal administrations, in fact, were expressly qualified (on a par with provinces, metropolitan cities and regions) as autonomous entities with their own statutes, powers and functions and were identified as the territorial level to which, in implementation of the principle of subsidiarity, all administrative functions are charged because they represent the level that is closest to the citizen.[65]

This criterion, of overarching significance, knows its sole exception when the fulfilment of interests related to a specific function requires the intervention of a higher level of government.[66] Thus, a "dynamic" application of the principle of subsidiarity occurs, involving the removal of administrative functions from municipalities to allow them to be exercised by other entities. However, this departure from the distribution of competences must be agreed between the levels of government involved and must be formal-

59 Articles 4, 14 and 15 UTCS; Pastori, G., *Recent Trends in Italian Public Administration*, Italian Journal of Public Law 2009, vol. 1, p. 10 ff.

60 Article 19 UTCS.

61 Articles 14, par. 3, UTCS.

62 Police, A., *Unity and Fragmentation: the Italian Public Administration*, in Sorace, D., Ferrara, L. & Piazza, I. (eds.), *The Changing Administrative Law of an EU Member State. The Italian Case*, 2021, Cham-Torino, Springer-Giappichelli, p. 47.

63 Article 5, Constitution.

64 Pastori, G. (2009), *Recent Trends in Italian Public Administration*, op. cit., p. 6 ff.

65 Article 114, Constitution.

66 Article 118, par. 1, Constitution.

ized in an act of understanding that demonstrates respect for the principle of loyal co-operation between the parties. The understanding represents, in fact, an instrument of co-decision that goes beyond the mere participation of municipalities in the process of allocating administrative functions and allows direct participation in the deliberations on matters of common interest.[67]

In concrete terms, therefore, the role of municipalities, defined in general terms by the Constitution, can be limited both by the specific area of interest (think, for example, of the construction of mobility infrastructure of regional importance) and by the ways in which the state and the regions exercise their legislative competence.[68]

The constitutional framework has been implemented in numerous laws adopted by the state that regulate the structure of the main organizational models in the Italian public system: ministries, public bodies and independent authorities. These, in turn, are divided among the state, regional and local levels of government.

At the state level, we find ministries and ministerial agencies, national public bodies, independent authorities and national public corporations. Only the first two categories are governed by a single regulatory act.[69] On the other hand, non-ministerial national bodies each have their own statute providing for their establishment and describing their functions, powers and articulation. The case of independent authorities, which have developed in Italy since the 1990s, is exemplary. These are bodies removed from political control (but not always from political direction) that operate in areas (in particular within free markets) where there is a need to ensure the protection of constitutionally guaranteed rights through the exercise of highly technical powers with independence. Although the authorities are governed by their own founding statute, they share some common features in terms of their faculties (they have organizational and regulatory autonomy and powers of regulation and sanction) and their legal regime include a strict system of incompatibility and of parliamentary appointments.

Focus 2. The National Anticorruption Authority (ANAC).

Among the independent authorities, the National Anticorruption Authority (ANAC) is worth noting, and represents an original model compared to the European context. The ANAC is responsible for exercising the functions of implementing national policies for the prevention of administrative corruption according to Law No. 190/2012.[70] Its establishment has followed several scandals arisen in the implementation of infrastructure and major works. Among those that have received the most attention in national and international news, it is enough to refer to EXPO 2015 in Milan and the construction of the Mose in Venice. ANAC has assumed the regulatory powers already vested in the previous Public Contracts Authority, but it has also been endowed with important supervisory and sanctioning powers.

67 Constitutional court, decision nº 303/2003.

68 Article 117, par. 2-3, Constitution.

69 Decree nº 300/1999.

70 Carloni, E., *Fighting Corruption Through Administrative Measures. The Italian Anti-Corruption Policies*, Italian Journal of Public Law 2017, vol. 2, p. 261 ff.

Through its action it has imposed a major redefinition of the ways in which public resources are used, particularly in public contracts.[71] The idea of an independent authority in the procurement market has not been unchallenged. The question was raised whether there was a need for independent regulation of the sector, which presents very different characteristics from those of other regulated markets, and whether the functions assigned to ANAC were not too numerous to allow it to act effectively. The question was posed especially with regards to the controls on public procurement, considered the main deterrent instrument for preventing corruptive and maladministration phenomena. In fact, the controls carried out by ANAC were regulated, between 2012 and 2016, in many legislative and regulatory acts that often overlapped and created uncertainty in the applicable rules. Regulatory instability, however, is a stimulating factor for the occurrence of pathological events and increases corruption risks.[72]

At the regional and local levels, the main institutional actors are territorial public bodies, which, unlike the national public bodies with a specific function, are endowed with general administrative competence with respect to their territory. In other words, the extent of the powers of territorial public bodies is given by a physical element (the territory) and, within the same level of government, is almost identical for all bodies. However, a distinction must be made between regions and other local authorities (municipalities, "provinces" and metropolitan cities). Many aspects of the organization and functioning of regions are defined by the Constitution. The regulation of local authorities is, on the other hand, contained in Legislative Decree No. 267/2000 (*Unified Text on Local Government*).

Regions may adopt laws in matters that are not of state competence (criterion of division related to subject matter), according to a division of competences that is contained in Article 117 of the Constitution, as reformed after 2001.[73] This provision indicates the matters upon which state laws can be adopted (exclusive state competence[74]), the matters upon which the state adopts general guidelines, while the regions adopt detailed laws (shared competence[75]) and, lastly, all other matters are left to regional competence (regional residual competence[76]).

The state and the regions also have the power to adopt regulations in the subjects assigned to them by the Constitution. Other local authorities may adopt regulations to organize the performance of their administrative functions.[77]

71 Article 213 of decree nº 50/2016 (Publics Contracts Code); Brigante, V., *Law enforcement against corruption in Italian public procurement, between hetero-imposed measures and procedural solutions*, Italian Journal of Public Law 2019, vol. 1, p. 334 ff.

72 Parisi, N. & Clementucci, F., *Assessment of the effectiveness of anti-corruption measures for the public sector and for private entities*, Italian Journal of Public Law 2019, vol. 1, p. 268 ff.

73 Calzolaio, S., *State and Regional Legislation in Italy in the decade after the Constitutional Reform*, in Italian Journal of Public Law 2012, vol. 2, p. 399 ff.; Benvenuti, M., *The Constitutional Distribution of Legislative Powers in Italy: Recent Judgements of the Constitutional Court*, Italian Journal of Public Law 2015, vol. 2, p. 390 ff.

74 Article 117, par. 2.

75 Ibid, par. 3.

76 Ibid, par. 4.

77 Ibid, par. 6.

IV. Administrative adjudication

As mentioned above, judicial review of administrative action is based on the 'dualistic system', which provides for two different jurisdictions concerning disputes between public administrations and citizens. The distribution of jurisdiction between ordinary and administrative courts is based on the legal position of the claimant (*causa petendi*): ordinary courts have jurisdiction for the protection of subjective rights (*diritti soggettivi*), while administrative courts have jurisdiction on cases involving legitimate expectations (*interessi legittimi*). An exception to this rule is the so-called exclusive jurisdiction (*giurisdizione esclusiva*), according to which administrative courts have jurisdiction in cases involving subjective rights, in relation to subject matters specifically established by law (pursuant to Article 103, par. 1 of the Constitution).[78]

The distinction between subjective rights and legitimate expectations is not specified by statutory law, thus several criteria have succeeded over time to distinguish them.[79] The main criterion currently followed by administrative courts is based on the existence of authoritative administrative powers, especially discretionary ones, which implies that the public administration and citizens are not on an equal footing (and hence, not subject to private law). In cases where authoritative powers are lacking – for example, when the administration acts *sine titulo* or applying private law (*e.g.* entering into agreements) –, citizens have subjective rights, and consequently they have the right to file an action before the ordinary courts. On the contrary, when public bodies wrongfully exercise authoritative powers, citizens' legal position is a legitimate expectation, which comes under the jurisdiction of the administrative courts.[80]

As far as disputes on subjective rights are concerned, the powers of ordinary courts are still limited according to the 1865 laws mentioned above. As a result, ordinary judges cannot overturn or modify the challenged acts, but only disapply them *inter partes*.[81] Moreover, they are not entitled to issue mandatory or prohibiting orders, if their implementation affects the exercises of authoritative powers by the administration; however, they can order the public administration to pay compensation for damages.

Administrative trials are held before administrative courts (Regional Administrative Courts and Council of State), the jurisdiction of which encompasses legitimate expectations (general jurisdiction on the ground of legality: *giurisdizione generale di legittimità*) and, in certain specific matters, also subjective rights (exclusive jurisdiction). The proceeding is regulated by the 2010 CAT, which establishes the principle of full and effective judicial protection, as well as the principle of fair hearing, equal treatment and due process of law, and the right to a trial within a reasonable time.[82]

78 Comba, M. & Caranta, R., "Administrative Appeals in the Italian Law: On the Brink of Extinction or Might They Be Saved (and Are They Worth Saving)?", in Dragos, D.C. & Neamtu, B. (eds.), *Alternative Dispute Resolution in European Administrative Law*, 2014, Berlin, Springer, p. 85-86. Article 133 CAT establishes the list of subject matters devolved to the exclusive jurisdiction of administrative courts. This list is extensive and includes very significant fields of administrative law, such as damages caused by delay in issuing administrative decisions, tacit consent, access to documents and transparency, concessions, public services, public procurement, city planning and construction, expropriation, decisions issued by several independent agencies, etc.

79 Mattarella, B.G. (2017), "Evolution and *Gestalt* of the Italian State", op. cit., p. 361.

80 Comporti, G.D. (2021), "The Administrative Jurisdiction in Italy", op. cit., p. 92. See also Marchetti, B., *Searching for the Fundamental of Administrative Law*, 2019, Torino, Giappichelli, p. 160.

81 Articles 4-5 of Law nº 2248/1865.

82 Articles 1-2 CAT.

According to the principle of full protection, an administrative trial provides for a range of different actions in order to allow the claimant to choose the judicial remedy which appears the most adequate to protect and satisfy her/his substantive interest: a) annulment action (challenging voidable administrative acts on the grounds of violation of the law, lack of competence and abuse of power);[83] b) condemnatory action, including the claim for compensation for damage to legitimate expectations;[84] c) action against silence (aimed at obtaining an order for the administration to act, if it has failed to do so);[85] d) action for compliance (aimed at obtaining an order for the administration to specifically enact the requested favourable decision);[86] e) action for voidness (challenging administrative acts which are radically void, and not simply voidable).[87]

In accordance with the principle of fair trial, the CAT safeguards the chance of every interested party to access the process, to be heard in court, and to give evidence to support her/his claims.[88] During the administrative trial, a wide range of evidence can be acquired by the judge, upon request of a party or even *ex officio*, in order to achieve a comprehensive investigation.

In their judgments, administrative courts can issue quashing orders, mandatory and prohibiting orders, orders to pay compensation for damages, declarations and, more generally, all useful measures to protect the alleged right.[89] Overall, in their reviewing powers, administrative courts are subject to some limits, as "they cannot substitute discretionary administrative determinations with their evaluations, but only decide whether administrative decisions are invalid because adopted not in accordance with the law".[90] Thus, administrative action is generally reviewable only on grounds of legality (*giurisdizone generale di legittimità*) and is not subject to a merit review. Consequently, the court can overrule the unlawful act, but then only the administrative authority is allowed to issue a new decision, which shall take into account the reasoning of the judgment but will not necessarily have the outcome requested by the claimant.[91] However, in certain cases which are specifically determined by law, administrative courts are exceptionally entitled to review the appropriateness of discretionary decisions, and to directly issue new acts, or amend the ones challenged (jurisdiction on merits, *giurisdizione di merito*).[92]

One may appeal against the judgments of the Regional Administrative Courts before the Council of State, whose judgments, in turn, may be challenged before the Court of Cassation (*Corte di cassazione*, the supreme court on civil and criminal matters), but only on the ground of violation of the rules concerning the distribution of jurisdiction, *i.e.* when the claimant argues that the Council of State has overstepped the boundaries of

83 Article 29 CAT.

84 Article 30 CAT. Compensation for damage to legitimate expectations, derived from unlawful administrative acts, was first admitted by a milestone judgment issued by the Joint Sections of the Court of Cassation, nº 500/1999.

85 Article 31, par. 1-2.

86 Article 31, par. 3, and Article 31, par. 1, letter c) CAT. This particular claim is allowed only in the case of non-discretionary administrative powers and when the investigation conducted by the public administration has been completed.

87 Article 31, par. 4 CAT.

88 Comporti, G. D. (2021), "The Administrative Jurisdiction in Italy", op. cit., p. 97.

89 Article 34, par. 1 CAT.

90 Marchetti, B. (2019), *Searching for the Fundamental of Administrative Law*, op. cit., p. 163.

91 Ibid., p. 176-177.

92 The matters of jurisdiction on merits are enumerated by Article 134 CAT.

administrative jurisdiction.[93]

The principle of effective protection within the administrative trial is implemented by the rules concerning precautionary measures, which aim at provisionally safeguarding the substantive interest of the claimant, whenever the duration of the process may cause serious and irreparable damage.[94] The CAT has extended provisional measures to atypical remedies, which the courts can issue even before the claim for judicial review has been lodged, in cases of exceptional gravity and urgency.[95] The main *interim* relief issued by the courts still consists in the suspension of the executive effects of the challenged act;[96] however, the judges are allowed to issue any kind of *interim* measure which, under the circumstances, appears most likely to temporarily ensure the effects of the judgement.

The effectiveness of the administrative trial emerges in the enforcement phase too. The CAT provides for a specific enforcement procedure before administrative courts (*giudizio di ottemperanza*) in order to compel public authorities to fulfil the obligations arising from judgments issued by ordinary courts, administrative courts and arbitrators. This judicial remedy "is able to ensure, through the special substitutive powers attributed to the court, a replacement of the non-compliant administration",[97] also through the appointment of an *ad acta* commissioner: for this reason, the enforcement procedure represents the most relevant case of administrative jurisdiction on merits. The effectiveness of this remedy is increased also by the judge's power to inflict periodic penalty payments (*astreintes*) on the non-compliant administration for any violation or delay in fulfilling the obligations arising from the judgment.

All these features reflect the concept of administrative adjudication in a subjective sense, focused on the full and effective protection of rights and expectations of private individuals, rather than the pursuing of the mere public interest in restoring the lawfulness of administrative action.[98]

Focus 3. The National Recovery and Resilience Plan.

3.1. The Reform of Public Administration

The Report "Doing business in the European Union 2020: Italy" points out that in recent years several reforms have been adopted in order to improve regulations dedicated to business: modelling authorizations related to business activity have been introduced to facilitate the issuance of permits, and there have been advances in the digitization of the Public Administration, for example through the implementation of the Public Digital Identity System (SPID).[99] Yet the environment in

93 Comba, M. & Caranta, R. (2014), "Administrative Appeals in the Italian Law", op. cit., p. 85.
94 Article 55 CAT.
95 Article 61 CAT.
96 Marchetti, B. (2019), *Searching for the Fundamental of Administrative Law*, op. cit., p. 176.
97 Ibid., p. 177-178.
98 Comporti, G.D. (2021), "The Administrative Jurisdiction in Italy", op. cit., p. 110-111.
99 The report can be found here: https://subnational.doingbusiness.org/it/reports/subnational-reports/italy

which private businesses operate remains complex, and Italy ranks below the European average in terms of ease of doing business. For example, it occupies the second-to-last position among EU countries in relation to the responsive administration indicator, which, according to the European Commission, measures the efficiency with which the public administration responds to the needs of small and medium-sized enterprises.
The need for change in the Italian administrative system is one of the guidelines of the National Recovery and Resilience Plan (NRRP). This document presents a strategy of reforms that are fundamental to the implementation of the interventions funded by the EU Next Generation Plan. [100]
The reforms aim at the enhancement of Italy's equity, efficiency and competitiveness and are fundamental to the implementation of EU-funded interventions.
Among the planned reforms is the Public Administration reform that will take place between 2021 and 2026 and will focus on reorganizing the recruitment system. The aim is to simplify selection procedures and encourage generational turnover through simplification and digitization. It also envisages the hiring of temporary staff and the granting of collaboration assignments by public administrations that own projects envisaged in the NRRP. Special attention is paid to municipalities that provide for the implementation of the interventions envisaged in the NRRP and can now hire staff with technical expertise on fixed-term contracts to support the implementation of projects. New job profiles will also be redefined, together with public sector unions, with updated knowledge and skills needed at the present time and a new assessment of skills in many different areas (public sector staff in Italy are largely equipped only with legal skills). Finally, selection procedures will focus no longer on knowledge only, but also on the technical and managerial skills and abilities needed to fill the position.

3.2. A new path for Italian administrative adjudication?

In 2021 the Italian Government presented the National Recovery and Resilience Plan (in short, Recovery Plan or NRRP) to revive the economy after the COVID-19 pandemic. The NRRP provides several interventions in the field of justice and, in particular, of administrative adjudication, called to give a fundamental contribution to the national economic recovery.
The main impact on Italian administrative adjudication can be identified in the provisions aimed at "speeding up" the delivery of administrative decisions (from the procedure for granting interim measures to the introduction of new procedural time limits) and in the provisions set forth to reduce the backlog of cases. These provisions raise the question of the correct balance between these reforms and the procedural safeguards to preserve.
Let's start with the measures introduced to "speed up" the process: Law No. 108/2022 has modified CAT with the explicit aim of speeding up all proceedings related to the NRRP. More specifically, the new rules must be applied to all trials (either before the Regional Administrative Courts or the Council of State) in which

100 Di Lascio, F. & Lorenzoni, L., "*Obiettivi, struttura e governance dei piani di rilancio nei sistemi europei: un confronto fra cinque Paesi*" in Istituzioni del Federalismo 2022, nº 2, p. 325 ff.

the claim relates to any administrative proceeding concerning interventions financed in whole or in part with the resources provided for by the NRRP. The main amendments can be summarized as follows.
(a) The first innovation concerns the procedure for granting interim measures by the Regional Administrative Courts or by the Council of State. In such cases, in order to release an interim measure, administrative judges have to expressly justify the compatibility of the provisional remedy (usually a suspensive temporary order) with the NRRP targets and the consistency of the date of the scheduled hearing with the timeline for NRPP implementation.[101] Furthermore, in delivering the decision the judge is also required to take into account the potential consequences resulting from granting of a provisional remedy, with specific regard to the protection of the preeminent national interest which lies in the completion of the project financed by the NRRP. This specific provision was already included in Article 125 of the CAT for some specific cases, but now it is extended to all the administrative trials related with investments or projects financed by the NRRP.
To fully understand the aforementioned changes, one must consider that in the traditional Italian administrative adjudication system the claimant who wants to obtain an interim measure has the onus of demonstrating two elements: the risk of serious and irreparable damage that may occur due to the length of the process (periculum in mora) and the fact that the claim is based on reasonable grounds (fumus boni iuris). In this regard, the above-mentioned reform has therefore introduced additional parameters of assessment, basically linked to the preeminent national interest to achieve the NRRP targeted milestones, regardless of the potential presence of administrative misconducts. This new balance of interests could undermine the Courts' independence and autonomy while posing additional burdens on the claimants.
(b) The second and most interesting innovation involves the introduction of strict time limits to conclude trials when the Court has issued an interim measure. In these cases, the formal hearing for discussing the merits has to be set immediately during the first Court session after the expiry of the term of thirty days from the date on which the order was filed. In addition, the whole judgement has to be delivered within the following fifteen days.[102] However, the most significant aspect of this provision is the automatic expiry of the interim measure if the maximum time limit provided for the conclusion of the trial is not observed. In this circumstance, political targets and economic goals related to NRRP are considered more relevant than suspending potential illegal acts and protecting individuals. Consequently, the claimant could suffer a significant violation of the safeguards related to due process, such as the constitutional rights to defense and to effective judicial protection.
(c) The third change is linked to the roll-out of a new provision that shortens the term for challenging any administrative act involving public investments or projects financed under the NRRP. The Italian legal system already provided for this case, but it was limited to trials relating to the public procurement's field; instead,

101 Law Decree nº 68/2022, Article 12 *bis*, par. 2, as amended by Law nº 108/2022.
102 Ibid, par. 1.

now this provision applies to a much larger number of trials.[103] In short, in all these cases the claimant has only a thirty-days term to challenge unlawful administrative acts before an administrative judge, all procedural time limits are halved (i.e., for introducing evidences or setting a hearing date) and the Court has to deliver a simplified judgement (sentenza in forma semplificata) within the fifteen days following the hearing.

These provisions, taken together, show the intent to reduce trials' duration and limit the grant of interim measures before administrative courts as much as possible.

Furthermore, the above-mentioned reform sets other rules, which are aimed at boosting administrative justice and reducing the backlog of cases (arretrato giudiziario), as expressly required by the NRRP (Mission 1/Component 1).

In this regard, the Council of State's Presidential Decree No. 172/2021, which established the Council of State's 7th Section is of utmost importance. The new Section has already been operational since January 2022, with the specific purpose of reducing the backlog. In addition, Law Decree No. 80/2021 set forth urgent measures to strengthen efficiency, so as to ensure an effective implementation of NRRP.[104]

In particular, the Decree set out the scheduling of extraordinary court hearings, all conducted remotely so as to reduce the backlog. Therefore, remote hearings, which were exceptionally implemented during the pandemic emergency, have become the standard way of conducting this type of hearing.[105] In relation to this specific provision, one could question whether the sacrifice of the constitutional principle of a public trial (set out in ECHR Article 6) to reduce the backlog is justified. Undoubtedly, remote hearings were an unavoidable choice during the pandemic to ensure the functionality of administrative adjudication, without any health risk for judges or litigants. However, one may question whether, under normal circumstances, this lack of transparency is justifiable.

Drawing some conclusions, one of the main trends that emerges from this recent reform is a general shift towards an Italian administrative adjudication system centered mainly on swiftness. Furthermore, it seems that the Italian law maker is also attempting to limit judicial review on public administrations in order to avoid slowdowns related to the reaching of the NRRP milestones.

From a certain point of view, any solution aimed at speeding up and simplifying administrative trials should be warmly welcomed, because the length of the trials and the systemic incapacity to deliver the judgement within the set time frame risk jeopardizing the judicial remedies and the procedural rights of the claimants. Likewise, the introduction of special procedures for dealing with peculiar subjects (such as public procurement or NRRP) is certainly a positive innovation.

From another perspective, however, due process must be preserved, together with procedural fairness and the general effectiveness of the judicial system.

In a nutshell, the main goal of the reform should be the achievement of a proper balance between the following opposing interests: (i) settling disputes between the public administration and citizens in crucial sectors as fast as possible and (ii) en-

103 Ibid, par. 5.

104 Law Decree nº 80/2021 converted into Law nº 113/2021.

105 Article 87, par. 4 *bis* CAT.

suring the protection of the right to defense and the effectiveness and completeness of the adversarial proceedings.
The objective of reaching an appropriate balance with the public interest of achieving the NRRP milestones is appreciable; however, the automatic expiry of the interim measure due to the excessive duration of the trials, as well as the lack of time to properly examine the case and hand down acceptable judgements, are questionable.
In brief, the search for the right balance between upholding procedural safeguards and reaching the economic targets that have been set is, without any doubt, the new challenge the Italian administrative justice system is faced with.

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fypl
french yearbook *of* public law
Issue 1, 2023

Spain

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Spanish administrative law, Suspension and restriction of fundamental rights, Public contracts, Autonomous communities, Patrimonial liability

This chronicle aims to provide an overview of the main judicial developments in the areas of public procurement, procedure and administrative acts, fundamental rights, patrimonial liability, and judicial control. The present analysis displays the most relevant rulings from the Spanish Supreme Court and the Spanish Constitutional Court during the year 2021.

I. Public contracts

A. Case law of the spanish supreme court

1. Sts 1483/2021, appeal 1675/2020, of july 14, 2021

The purpose of this decision is to identify the concept of *reliable notification* in cases when the person who contracted with the Public Administration transfers his collection rights from the public contract so that a third person may receive the payment. Specifically, it answers whether the provision of the private assignment contract is a requirement for the effectiveness of the *reliable notification* to the contracting Administration or if, on the contrary, the mere communication by the assignor of the credit is sufficient. Secondly, the ruling explores the legal consequences derived from previous interpretations.

The Supreme Court has examined the Judgment of the National High Court that dismissed the administrative appeal filed against the denial of a payment request for the assigned work contract. The assignment was notified to the Administration before the payment was made, although it was done incompletely by not providing the contract or qualifying the assignor. The Administration paid the final certification to the contractor-assignor.

While resolving the appeal issue, the Supreme Court has recalled that a reliable notification is one that has documentary probative value and that allows the certification of an agreement. Furthermore, a reliable notification must record that the recipient has received the notification (a); its content (b); and the date of receipt (c). The Court has decided that it is not necessary to deliver the assignment contract because the Administration does not have control over the assignment contract. It is sufficient that the communication contains the correct identification of the assignor, the assignee and the assigned credit.

The Judgment includes the dissenting opinions of Judge Hon. Mr. D. José Manuel Bandrés Sánchez-Cruzat, joined by Judge Hon. Mr. José María del Riego Valledor, who claimed that the appeal should be dismissed on the grounds that the contract does not allow to check the content of the clauses. The aforementioned precept includes the transfer of collection rights, while excluding the assignment of future credits. In the case under review, the assignment was made before the Administration verified the correct execution of the work contract, highlighting the existence of a specific administrative procedure for the assignment of credits which differs from the civil one.

2. Sts 1419/2021, of december 1, appeal 7659/2020

In this judgment, the Supreme Court answered the question whether the ban on contracting in a resolution issued by the Council of the National Markets and Competition Commission must be immediately enforceable for the purposes of its possible precautionary suspension or, on the contrary, its enforceability occurs at a later moment, depending on the outcome of the corresponding procedure at the State Public Procurement Consultative Board.

The judgment appealed to the Supreme Court was a decision by the National High Court, which ordered the suspension of the execution of the Council, sanctioning the constitution of a cartel in the sector of assembly services and industrial maintenance.

This issue has been raised in almost identical terms in a previous appeal (No 3672/2020, Judgment 1115/2021, of September 14), with the Court reiterating its position, given the similarities in approach and allegations. In particular, the Supreme Court claims that the prohibition ban on contracting under article 71.1. b) of the LCSP is tied to a final sanction for a serious infraction in certain matters.

The effects of the ban on contracting only occur from the moment in which the scope and duration of the prohibition is specified, either in the decision itself or through the corresponding procedure. This does not prevent the courts, through precautionary measures, from suspending the referral to the State Public Procurement Consultative Board whenever it is deemed necessary to provisionally suspend the sanction.

3. Sts 1392/2021, of november 29, 2021, appeal 8291/2019

In this case, the judges clarified whether the exclusion of a bid from a procedure can be decided if it does not meet the requirements in the Technical Specifications Document.

With regards to the procedure, the appeal was filed against the judgment of the Superior Court of Justice of Madrid. In turn, the latter discussed an appeal against the decision of the Administrative Court of Public Procurement of the Community of Madrid over the agreement of the Local Government Board of the City Council. This agreement awarded a contract for cleaning services, based on the exclusion from competition for non-compliance with the provisions of the Technical Specifications Document.

The Supreme Court declared the admissibility of tenders, even when the bidder does not refer to the contents of the Technical Specifications Document, since there is a legal presumption that the bidder has unconditionally accepted its requirements by submitting the offer (art. 145.1. LCSP 2011, today 139.1 LCSP 2017).

Therefore, it will be necessary to decide on a case-by-case basis, since the apparent lack of references to the Technical Document does not imply its ignorance or a failure to comply with its requirements.

In this way, a restrictive interpretation of the assumptions upon which the contracting authority can exclude a proposal has been imposed.

Therefore, it reiterates the position already established in Appeal 5570/2019, which referred to the examination of the bidding proposal in its objective aspect, while complementing a different body of case law (Appeal 7906 /2018) on the subjective aspect of the competition. This trend follows the decisions of the Court of Justice of the European Union and favors the access to bidding while affirming the principle of proportionality in the interpretation of the requirements set up by the contracting authority.

4. Sts 1346/2021, of november 17, 2021, appeal 3772/2020

In this decision, the Supreme Court decided that a clause of submission to private law arbitration in a work contract does not by itself prevent the exercise of administrative power to review the adjudication acts *ex officio*. The effects on the Administration (not being the one who originally awarded the contract, but having subsequently occupied the legal position of a non-Public Administration contracting authority) will depend on the circumstances of the specific case.

Likewise, the Supreme Court explains that the preference for *ex officio* review or arbitration, as well as the relevance of the temporal criterion between these procedures, will depend on the circumstances of each specific case, such as the content of the arbitration clause or the nature of the discussed act.

5. Sts 1254/2021, of october 22, 2021, appeal 2130/2020

Supreme Court Judgment 1254/2021 addresses the question of whether the act of receiving works, in which the contracting authority shows its agreement with the result of the contract, is liable to be declared null and void (applying the review procedure of article 102 of the LRJPAC), or if it can only be reviewed *ex officio*, in the public procurement file, the preparatory acts and the award acts (according to articles 34 and 35 of the LCSP 2007).

The Supreme Court has determined that article 34 of the LCSP 2007, in relation to the provisions of article 102 of the LRJPAC, does not preclude the acts of receiving public works from being declared null and void through the procedure of *ex officio* review in the cases of nullity provided for in article 62.1 of the LRJPAC.

6. Sts 952/2021, of july 1, 2021, appeal 337/2020

This decision clarified whether an administrative act, according to which a contract is not extended further and the Administration assumes direct control, can be assessed for its economic repercussions by virtue of article 7.3 of the Organic Law 2/2012, of April 27, on Budgetary Stability.

The Supreme Court declared that when the Administration assumes direct management, the administrative act must be accompanied by an assessment of its economic effects in accordance with article 7.3 of Organic Law 2/2012, of April 27 on Budgetary Stability and Financial Sustainability, taking into account the nature and scope of the act and the circumstances.

7. Sts 398/2021, of march 22, 2021, appeal 4883/2019

The Supreme Court addressed the issue of discerning if specific administrative clauses of an administrative contract can be challenged: more specifically, if these clauses can be challenged indirectly by contesting the adjudication act; or if they can only be challenged for the violation of the principles of equality, publicity and transparency.

According to the Supreme Court, it is possible (in exceptional cases) to indirectly challenge the specific administrative clauses, even when they have not been directly contested. The Court argued that the indirect challenge is possible whenever a "reasonably informed and diligent bidder could not understand the auction conditions until the mo-

ment in which the contracting authority reports the reasons for its decision, after evaluating the offers", or in case of nullity.

8. Sts 154/2021, of february 8, 2021, appeal 1889/2019

This decision has determined the parameters of legality of mixed contracts, which provide services of a different nature.

The appeal was filed against the decision of the Superior Court of Justice concerning a contract for the supply of materials for hemodialysis services provided by the municipal company and the completion for a new nephrology care unit.

The Supreme Court held that, pursuant to the combined previsions of articles 12 and 25.2 of the Public Sector Contracts Law and Directive 201/24/EU: 1) mixed contracts require «that the benefits are rational, "directly linked to each other" and complementary, as a functional unit aimed at contractual fulfillment, coherent with the institutional purpose of the contracting Administration»; 2) must justify the use of a single contract and clarify the priority interest; 3) the requisite of relevance must be indicated with rationality as per article 25.2 of the Public Sector Contracts Law, pursuing both technical and economic objectives; 4) the use of a mixed contract must "be consistent with the public interest pursued by the contract, depending on the suitability of the contractor to provide services of a different nature", and 5) it will be necessary to weigh its impact on the basic principles of public contracting: freedom of access to tenders, transparency of the procedure and non-discrimination and equal treatment between of candidates.

B. Constitutional decisions on public contracts

1. Stc 68/2021, of march 18

The Constitutional Court discussed the exclusive state competence over the bases of the legal system of Public Administration, including administrative contracts, as per article 149.1.18 of the Spanish Constitution (hereinafter, CE), and whether its exercise has been detrimental to the competences of Autonomous Communities.

The claim raised the following issues: the violation of the principle of neutrality in the transposition of European Law (a); the non-recognition of the foral character of the Autonomous Community of Aragón (b); the breach of the exclusive state competence over matters of public contracting (c); the constitutionality of articles 75.11 and 12 of the Statute of Autonomy of Aragón, which grant the autonomous community legislative competence, and (d) the constitutionality of articles 41.3, 44.6 and 128 of Public Sector Contracts Law.

The Constitutional Court has declared the unconstitutionality of the articles of Public Sector Contracts Law that exclude any extraterritorial effect of the decisions adopted by the competent bodies of the Autonomous Communities, and that introduce the obligation for local entities to publish their profiles in a specific contracting platform. This decision has also declared the unconstitutionality of: the specifications of particular administrative clauses; the definition of prescription or technical specification; the decision not to publish certain data on the conclusion of the contract; the subphases in the project contest; regulatory authorization regarding the use of electronic, computerized or telematic means. Likewise, the specific procedural time limits are deemed contrary to the constitutional order of competences. And, finally, it also declared it unconstitutional

to determine the competent body to resolve the special appeal in matters of contracting in the field of local entities.

C. Legislative developments in public contracts

1. Royal Decree-Law 24/2021, of November 2

This Royal Decree-Law modified articles 328.4 and 331.a) of the Public Sectors Contract Law. Article 328.4 has seen the introduction of the obligation of the State Public Procurement Consultative Board to send a report to the European Commission every three years, regarding all the state, regional and local contracting authorities with respect to public bidding and work contracts subject to harmonized regulation. Article 331.a) requires the inclusion of the information prescribed under Article 328.4.f) in the triennial report that the Autonomous Communities must send to the Cooperation Committee on public procurement.

2. Law 22/2021, of December 28, on General State Budgets for the year 2022

The General Budget Law of the Spanish State for 2022 modified articles 159.4, 226.1, 324.1 and 332.3 of the Public Sectors Contract Law.

Article 159 (simplified open procedure) is modified to allow bidders to participate in the contracting process before being registered in the Official Register, provided that they have submitted the registration application with its requirements, and that the application is prior to the final date for the submission of offers.

On the other hand, new wording is given to section 1 of article 226 (awarding of specific contracts within the framework of a dynamic procurement system), to add that in these cases the award will be based on the terms that have been provided in the specifications of particular administrative clauses and technical requirements of the dynamic acquisition system.

Likewise, article 324.1 letter c) is modified, to include dynamic acquisition systems, which require authorization from the Council of Ministers so that the contracting authorities of state public sector can enter into contracts worth more than twelve million euros.

Finally, article 332.3 is modified, eliminating the rules on the first renewal of the Independent Office for the Regulation and Supervision of Procurement. It is specified that the members of this Office will continue in their functions until their successor takes office.

II. Procedure and administrative acts

A. Case law of the supreme court

1. Sts 243/2021, appeal 2854/2019, of february 22, 2021

The appeal was filed in order to determine the maximum term to resolve disciplinary procedures over the exercise of regional and local public functions, in the absence of an explicit legal basis.

According to the Court, in the absence of a specific provision, a legal basis could be traced back to Royal Decree 33/1986, of January 10, containing the Disciplinary Regime

Regulations for State Administration Officials; under the terms of its article 3, the aforementioned Decree could also be applied to "*other officials at the service of the State and Public Administrations not included in its scope of application*".

2. Sts 234/2021, of february 19, 2021, appeal 3929/2020

The question resolved by the Supreme Court consists in determining whether the Administration is obliged to issue an express resolution declaring the termination of an administrative procedure for reimbursement of subsidies as a condition of validity of the initiation of a new refund procedure or if, on the contrary, such an omission should be considered an irregularity.

The appealed decision of the National High Court targeted the resolution of the Secretary of State for the Information Society which required the total reimbursement of the subsidy on the basis of article 37.1 sections a), f) and g) of Law 38/2003, of November 17, General Subsidies, and as a result of a new presentation.

The Supreme Court establishes the possibility of re-initiating a subsidy reimbursement procedure provided that the limitation period of the Administration's right to demand reimbursement has not elapsed.

3. Sts 197/2021, of february 15, 2021, appeal 7363/2019

The issues subject to the appeal are: to determine whether the suspension of the term provided for in article 37.1.a) LDC is reserved for the claim of necessary documents of the specific case, which could not be obtained in the ordinary term, or also mandatory actions (a); and to specify the calculation of the term of the suspension agreed in single procedures with multiple interested parties, for the purposes of its expiration (b).

The appeal was filed against the ruling of the National High Court in a proceeding challenging a resolution of the Competition Chamber of the National Markets and Competition Commission for which a fine was imposed.

The Supreme Court concludes, referring to its judgment 929/2020, of July 6 (Appeal n.372/2019), that the possibility of suspending the term to resolve the administrative procedure, provided for in art. 37.1.a) of the Competence Defense Law ("*When any interested party must be requested to rectify deficiencies, the provision of documents and other necessary evidence [...]*"), is applicable when the documents and other elements are needed in order to issue the resolution. What is decisive is not the possibility that the evidence could have been collected before, but that the requested information is necessary to issue the substantive resolution, and that the Administration has not caused this situation artificially in pursuit of a fraudulent purpose, an issue that must be referred to concurrent circumstances in any case.

Regarding the second question, it concludes that when a single procedure is processed with a plurality of parties involved, and a suspension is decided, both the start of the suspension period, its extension and the end of it operate for everyone equally, regardless of individual issues regarding compliance with the agreed requirement.

4. Sts 552/2021, of april 23, 2021, appeal 5177/2020

The Supreme Court has responded in this appeal to whether the rebuttable presumption of veracity of the administrative reports issued in the exercise of technical discretion, is applicable to the reasoned reports issued by the Ministry of Science and Technol-

ogy, the technical reports issued by an entity duly accredited by National Accreditation Entity, or none of the above.

The Supreme Court establishes that the technical report issued by an entity accredited by the National Accreditation Entity, which the party provides to obtain the qualification of the project for the purpose of tax deductions, does not enjoy a presumption of veracity.

The report is not imposed on the decision-making body, which may or may not follow its conclusions, while assessing the technical qualification of the experts who issue the report and the reasoning on which it is based.

5. Sts 114/2021, of february 1, 2021, appeal 3290/2019

This judgment analyzes whether or not it is necessary to follow the procedures for *ex officio* review in the event that there is the declaration of nullity of an act (a); and if the recognition of the aforementioned legal infringement has to produce future effects or retroactive effects (b).

The Supreme Court's response to the first question is that administrative acts, not subject to appeal within the established period and declared void, may only be repealed through the *ex officio* review procedure provided for in article 106 of Law 39/2015, of October 1, of the Common Administrative Procedure.

The answer to the second question is that the effects of the declaration of nullity will take place from the moment the resolution was issued, that is, with retroactive effects.

6. Sts 84/2021 of january 27, 2021, appeal 8313/2019

The question raised in this appeal presents an objective interest for clarifying, specifying or revising the existing jurisprudence on delegation of powers and substitution. The question was filed in order to determine if the same body that issued the contested resolution can decide over its appeal.

The Supreme Court has concluded that the appeal must be resolved by a different body than the one that issued the original resolution. When, by delegation, the appeal is resolved by the same official who issued the original resolution (by substitution), he must notify the delegating body that the appeal is entrusted to a different subject than the one that issued the appealed resolution.

7. Sts 680/2021, of may 13, 2021, appeal 5011/2019

The issues raised in this case were: if the principles and guarantees of the sanctioning administrative procedure are applicable to the revocation of a taxi car license (a); and, if it is possible to obtain as proof of charge the data of the taxpayers assigned by the Tax Administration for the processing of a sanctioning procedure (b).

The Supreme Court reiterates the doctrine established in Judgments 8040/2019 and 8288/2019, concluding that if an Administration, for the exercise of its own functions, requests the transfer of tax data from the Tax Agency, such transfer will be for tax purposes. However, if it is for the exercise of other powers and there is no legal provision that provides for it, it must obtain the prior authorization of the interested party. Therefore, the act will be in accordance with the Law if the assignment respects the rules of article 95.1 of the General Taxation Law. However, the first question is not answered, as it is considered unnecessary in this case since what is involved is not a sanction.

III. Fundamental rights

A. First judgment on the state of alarm: stc 148/2021, of july 14, 2021

This judgment has a crucial significance in the Spanish doctrine of fundamental rights. In the context of an epidemiological crisis, it deals with an issue that had previously sparked a prolific academic debate.[2] We are referring to the interpretation of the concepts of *suspension* and *restriction* of fundamental rights. The discussion stems from the fact that a state of alarm only allows *restricting* measures of fundamental rights. On the contrary, *suspension* of fundamental rights requires the declaration of a state of exception, or a state of siege.

In the process of clarifying these notions, the Constitutional Court gives an interpretation of constitutional provisions of little practical application until the pandemic crisis, such as article 116 of the Spanish Constitution, which reads as follows:

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1. *An organic law shall regulate the states of alarm, emergency and siege (martial law) and the corresponding competences and limitations.*
2. *A state of alarm shall be declared by the Government, by means of a decree decided upon by the Council of Ministers, for a maximum period of fifteen days. The Congress of Deputies shall be informed and must meet immediately for this purpose. Without their authorisation, the said period may not be extended. The decree shall specify the territorial area to which the effects of the proclamation shall apply.*
3. *A state of emergency shall be declared by the Government by means of a decree decided upon by the Council of Ministers, after prior authorisation by the Congress of Deputies. The authorisation for and declaration of a state of emergency must specifically state the effects thereof, the territorial area to which it is to apply and its duration, which may not exceed thirty days, subject to extension for a further thirty-day period, with the same requirements.*
4. *A state of siege (martial law) shall be declared by absolute majority of the Congress of Deputies, exclusively at the proposal of the Government. Congress shall determine its territorial extension, duration, and terms.*
5. *Congress may not be dissolved while any of the states referred to in the present article remain in operation, and if the Houses are not in session, they must automatically be convened. Their functioning, as well as that of the other constitutional State authorities, may not be interrupted while any of these states are in operation. In the event that Congress has been dissolved or its term has expired, if a situation giving rise to any of these states should occur, the powers of Congress shall be assumed by its Standing Committee.*
6. *Proclamation of states of alarm, emergency and siege shall not modify the principle of liability of the Government or its agents as recognised in the Constitution and the law.*

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2 On the difficulties of defining and elucidating between these two notions, see: Domenéch, G., "Dogmatism against pragmatism. Two ways of seeing the restrictions on fundamental rights imposed on the occasion of COVID-19", InDret, 29 Sept. 2021. Available at: https://indret.com/dogmatismo-contra-pragmatismo/.

The purpose of the ruling is to resolve an appeal of unconstitutionality filed against several articles contained in Royal Decree 463/2020, of March 14, according to which the state of alarm was declared; the different Royal Decrees modifying and extending the duration of the state of alarm; and Order from the Ministry of Health n. 298/2020, of March 29, which established exceptional measures in relation to funeral ceremonies to limit the spread of Covid-19.[3]

The judgement declares the unconstitutionality of two groups of rules: the first refers to the government measures adopted in the state of alarm. The second, to the attribution to the Ministry of Health of powers of 'modification, extension and restriction of certain measures limiting the freedom of enterprise.[4]

The first group requires special attention. It assesses the constitutionality of the containment measures adopted during the state of alarm. The Constitutional Court notes the existence of three limits applicable to this state of crisis; the state of alarm cannot encompass the *suspension* of fundamental rights; it is subject to the principle of legality and to the principle of proportionality.[5] The core argument of the decision lies in the first of the three limits.

According to the Constitutional Court, the generalized confinement measure did not *restrict*, but rather *suspend* the freedom of movement of citizens. This would have breached the first of the limits of the state of alarm. The s*uspension* of fundamental rights can occur in the framework of a state of emergency or siege, but not in a state of alarm. The state of alarm only allows for its *restriction*. In the words of the Court: «the declaration of a state of alarm does not admit the suspension of any of the fundamental rights».[6]

There is a straightforward reason behind the prohibition of the *suspension* of fundamental rights in the state of alarm. The Government declares this state of crisis independently from the Parliament.[7] In the other states of emergency, the previous intervention of the Parliament is required.

In other words, the constitutional framework allows the Government to *restrict* fundamental rights by its own will. However, it denies the Government the possibility to *suspend* them by itself. Accordingly, *suspending* rights by means of a state of alarm implies removing the matter from the parliamentary control contemplated by the Constitution as well as by Organic Law 4/1981, of June 1, on the states of alarm, exception and siege (hereinafter LOAES).

In order to discern between the terms of *suspension* and *restriction* of fundamental rights, the judgment delimits the specific scope of each of them. The Constitutional Court declares that: 'the concept of "limitation" (or "restriction") is broader than that of "suspension": every suspension is a limitation, but not every limitation implies a suspension. The suspension is, therefore, a specially qualified limitation (or restriction)'.[8]

In particular, suspension is defined as a cessation, albeit temporary, of the exercise of the rights constitutionally or conventionally recognized; this cessation can only be considered admissible in certain cases, and with respect to certain rights, under article 55.1 of

3 STC 148/2021 A1.
4 Ibid, judgement.
5 Ibid, FJ 3.
6 Ibid, FJ 3.
7 Article .116.2 CE and article 4 LOAES.
8 STC 148/2021, FJ 3.

the Constitution. Conversely, limitation of rights admits many more forms, apart from the *suspension*.[9] *Suspension* is, thus, a (particularly intense) form of *limitation.*

The decision then proceeds to the specific examination of the contested provisions.[10] In this regard, the judgment declares that article 7 of Royal Decree 463/2020 is in breach of the freedom of movement (article 19 CE), since it *alters the essential content* of the right.[11] Such a measure could only have been adopted under the figure of the *suspension* of rights. As already stated, *suspension* could only have been adopted under a declaration of a state of emergency or siege.[12]

Additionally, the resolution declares that the depletion of the freedom of movement entails the violation of the right of assembly, even in the domestic sphere (articles 21.1 and 18 CE),[13] and the right to freely choose one's residence (article 19.1 CE). The reason is that the limitation of the freedom of movement involves considering the place where the subject has been residing as an 'immovable residence'.[14]

Based on the above analysis, it becomes clear that the judgement does not declare the unconstitutionality of the provisions due to substantive reasons. Irrespective of these substantive considerations, the declaration of unconstitutionality is based on the non-compliance with the constitutional state of alarm framework.

The second block of provisions examined interprets the constitutionality of the attribution to the Ministry of Health of competences to 'modify, extend or restrict' measures limiting the freedom of enterprise during the state of alarm. The Constitutional Court declares that the possibility of limiting measures during the state of alarm is an exclusive competence of the Government. Therefore, these measures could only be modified by the Council of Ministers itself (and not by a ministerial department, such as the Ministry of Health).[15] As a result, the attribution to the Ministry of Health of competences to alter these limiting measures had gone beyond the constitutional limits, and thus, was unconstitutional.

B. Second judgment on the state of alarm: stc 183/2021, of october 27, 2021

In the formerly examined resolution, the Constitutional Court ruled on the scope of the *restriction* and *suspension* of fundamental rights. In this decision, the Court examines the constitutionality of the provisions designating *delegated competent authorities* and attributing them powers to *limit rights* and *modify the measures* adopted during the state of alarm. It also brings into question the constitutionality of the duration of the extension of the state of alarm and the possible breach by the Government of its duty to be accountable to Parliament for all of its actions.

The Court resolves an appeal of unconstitutionality filed against various provisions of Royal Decree 926/2020, of October 25, by which the second state of alarm was declared; and against the Resolution of the Congress of Deputies and the Royal Decree that con-

9 Ibid, FJ 3.
10 Ibid, FJ 4.
11 Ibid, FJ 4.
12 Ibid, FJ 4.
13 Ibid, FJ 4.
14 Ibid, FJ 4.
15 STC 148/2021, FJ 9.

templated its extension.[16]

The structure of the ruling goes as follows. The Constitutional Court first analyzes the allegations of breach of fundamental rights; it then examines the extension in duration of the state of alarm and the accountability of the Government to the Parliament; finally, it reviews the provisions that affect the designation of *delegated competent authorities* and their functions.

In relation to allegations of breach of fundamental rights by the Government measures,[17] the Court considers three aspects. Firstly, the existence of sufficient legal basis; secondly, whether the measures contained a *restriction* or *suspension* of rights (given that the *suspension* is prohibited in the state of alarm); lastly, compliance with the principle of proportionality according to its three elements (adequacy, necessity, and proportionality in the strict sense).

The adequacy test checks whether the measure is suitable to achieve its aim. The necessity test analyzes whether there are any other less restrictive measures that can achieve the same aim. For a measure to be necessary, it should be the least restrictive. Proportionality in the strict sense refers to the burden on the individual. If a measure is adequate and necessary, but it imposes an excessive burden to its addressee, it will not be proportionate.[18]

The first measure analyzed is the general ban on circulation at night.[19] According to the Court, the measure has sufficient legal basis, in the text of the LOAES.[20] It is a *restriction* and not a *suspension* of the right to freedom of movement.[21] In addition, the measure was adequate to deal with the pandemic situation and prevent its evolution,[22] deemed to be necessary to control the development of the pandemic crisis,[23] and proportionate to the constitutionally legitimate purpose of preserving life (article 15 CE) and public health (article 43.2 CE).[24] With all the above in mind, the Court argues that the measure is in accordance with the Constitution.

The second measure is the limitation of entry and exit of people from the territory of Autonomous Communities, autonomous cities or lower territorial areas.[25] The Court states that the content of this measure is typical of a *limitation* of the right to freedom of movement.[26] The measure is also adequate to reduce the incidence of the pandemic,[27] necessary,[28] and proportionate in relation to the right to life, and to public health.[29]

The third measure considered by the Court is the limitation of the permanence of groups

16 Specifically, we refer to the Resolution of October 29, 2020, of the Congress of Deputies, which orders the publication of the authorization agreement for the extension of the state of alarm declared by Royal Decree 926/2020; and Royal Decree 956/2020, of November 3, which extended the state of alarm declared by Royal Decree 926/2020.

17 STC 183/2021, FJ 3.

18 Ibid, FJ 3.e.ii. On the three elements of the 'proportionality test', see. Alexy, R., "Los derechos fundamentales y el principio de proporcionalidad", Revista española de derecho constitucional, Jan. - April 2011. Available at: https://dialnet.unirioja.es/servlet/articulo?codigo=3621584.

19 Ibid, FJ 4.

20 Ibid, FJ 4.

21 Ibid, FJ 4.

22 Ibid, FJ 4.

23 Ibid, FJ 4.

24 Ibid, FJ 4.

25 Ibid, FJ 5.

26 Ibid, FJ 5.

27 Ibid, FJ 5.

28 Ibid, FJ 5.

29 Ibid, FJ 5.

of people in public and private spaces.[30] The Court considers that such a measure is within the framework of the LOAES,[31] is both adequate and necessary,[32] and proportionate in the strict sense to the exceptional state of crisis it was facing.[33]

Lastly, the decision deals with the measure limiting the permanence of people in places of worship.[34] This measure is also declared constitutional.[35] Besides, the specific analysis on the compliance with the proportionality principle should not be made with respect to this measure, but with respect to the specific regional regulations that established the precise maximum capacity in religious acts.[36]

The second issue examined is the constitutionality of the extension in duration of the state of alarm,[37] and the possible breach of the Government's duty to be accountable to the Parliament.[38]

Some doubts arise with regard to the extension of the duration of the state of alarm authorized by Royal Decree 926/2020 (from 00:00 on November 9 2020, until 00:00 on May 9 2021).[39] In this context, the Court points out that there is no *concrete temporary constitutional limit* to the duration of a state of alarm. Neither the Constitution[40] nor the LOAES[41] refer to it. From this perspective, the duration of the state of alarm will vary depending on the type of *serious alteration of normality* taking place.[42] In short, there is no specific limit to the duration of the state of alarm, but rather a broader duty to define it in accordance with the circumstances. Hence, the constitutionality must be analyzed in accordance with the *reasonable adaptation to the circumstances*.[43]

Given that, the Court strives to clarify the notion of *suitability of the duration to the particular circumstances of the specific case*.[44]

Different criteria are followed.[45] Firstly, the *need* for the extension of the duration initially conceived, based on the concurrent circumstances and the arguments provided by the Government (a). Secondly, the establishment of an *indispensable minimum period of time* before the return to normality from the state of alarm (b). Then, the *nature of the measures* applicable during the extension period (c). Lastly, the *periodic control of the review of the Government's performance* (d).

The Court considers that what is relevant is not the duration *per se* of the extension, but rather the decision by which that period is set, and the grounds that support it.[46] To carry

30 Ibid, FJ 6.
31 Ibid, FJ 6.
32 Ibid, FJ 6.
33 Ibid, FJ 6.
34 Ibid, FJ 7.
35 Ibid, FJ 7.
36 Ibid, FJ 7.
37 Ibid, FJ 8.
38 Ibid, FJ 9.
39 Ibid, FJ 8.
40 Ibid, FJ 8.
41 Ibid, FJ 8.
42 Ibid, FJ 8.
43 Ibid, FJ 8.
44 Ibid, FJ 8.
45 Ibid, FJ 8.
46 Ibid, FJ 8.

out this legal-constitutional assessment, the decision addresses the aforementioned four elements. The conclusion is that the extension of the state of alarm failed to comply with the last three. From this perspective: The extension of the duration was *needed* in the context of a serious global pandemic crisis (a).[47] However, the extension period is considered excessive, rather than *indispensable* (b).[48] Besides, the requirement regarding the *nature of the measures adopted* is not met, since the extension period was set without prior certainty of the nature of the measures that were going to be applied and their temporal and territorial application (c).[49] Last, but not least, the requirement of periodic control over the Government's action is not satisfactorily fulfilled (d). Especially because the Congress, while authorizing the extension, did not examine the effectiveness of the measures to be put into practice. Furthermore, the delegated authorities were given the competence to freely modify the application of those measures. This competence could only have been carried out by the Congress.[50]

Correspondingly, the Court declares the nullity of the extension of the state of alarm.[51]

In connection to this matter, the Court also analyzes the possible breach of the Government's duty to report to the Congress of Deputies.[52]

The duty of accountability is a link between the Legislative Chamber and the Government, which translates into a right of the Parliament to be informed and a correlative duty of the Government to provide information.[53] The Government's duty of accountability to the Congress of Deputies is also applicable during a state of alarm and its extension (article 8 LOAES).[54]

During the extension of the state of alarm, the following monitoring mechanisms were foreseen:

-The President of the Government shall appear every two months before Congress, to account for the data and arrangements taken in relation to the management of the state of alarm.

-The Minister of Health shall appear monthly before Congress, to account for the data and arrangements taken in relation to the management of the state of alarm, and in the extent of its ministerial competences.[55]

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47 Ibid, FJ 8.
48 Ibid, FJ 9.
49 Ibid, FJ 9.
50 Ibid, FJ 9.
51 Ibid, FJ 9.
52 Ibid, FJ 9.
53 Ibid, FJ 9.
54 Ibid, FJ 9.
55 Ibid, FJ 9.

The Court states that the monitoring mechanisms meet the demands stemming from the rule of an effective control of the Government by the Congress. The reason is that the ambiguity and generality of the expressions of *data and arrangements* allow for a broad control, not limited to specific subjects.[56]

The third issue examined refers to the provisions that affect the designation of delegated authorities and their functions.[57] During the extension of the state of alarm, two types of authorities were envisaged: on the one hand, the Government of the Nation, the *competent authority*; and on the other, the presidents of the Autonomous Communities and autonomous cities, the *delegated competent authorities*.

The core of the Court's argument is the following: the state of alarm regime is essentially entrusted to the Government and the Congress of Deputies. The first is the *competent authority* for the declaration and management of the state of alarm. The second is in charge of the political control of the first.[58]

This system is outlined in article 7 LOAES, which refers to the following: 'the *competent authority* will be the Government or, by *delegation* of the latter, the president of the Autonomous Community when the declaration exclusively affects to all or part of the territory of a Community'. Meanwhile, article 6.2 LOAES attributes to the Congress the power to authorize the extension of the state of alarm, as well as the establishment of *the scope and conditions in force during the extension*.[59]

There are three reasons provided by the Court to point out the unconstitutionality of the delegation of powers to the presidents of the Autonomous Communities and autonomous cities.

In the first place, such a delegation is not foreseen by the LOAES.[60] The LOAES only allows the delegation to the Presidents of the Autonomous Communities of powers to manage the state of alarm when it *exclusively affects all or part of the territory of an Autonomous Community* (article 7.1 LOAES). This was not the case during the second state of alarm declared in Spain.

Secondly, the delegation was made without providing criteria or general instructions for the delegated authorities.[61] Lastly, the only means of control was entrusted to the Interterritorial Council of the National Health System (a multilateral coordination body made up of representatives of the Government and the Autonomous Communities) and not by the Government itself.[62]

In summary, the unconstitutionality of the delegation derives from three circumstances. First, it had no legal basis in the text of the LOAES. Then, the scope of the delegation was not well delimited, since the *delegated competent authorities* had no instructions or criteria to exercise the delegated powers. The final reason explaining the unconstitutionality of the delegation is that the Government (that is, the *competent authority*) was not in charge of the control over the *delegated authorities*. That control was entrusted to a different body, the Interterritorial Council of the National Health System.

56 Ibid, FJ 9.
57 Ibid, FJ 10.
58 Ibid, FJ 10.
59 Ibid, FJ 10.
60 Ibid, FJ 10.
61 Ibid, FJ 10.
62 Ibid, FJ 10.

C. Judgment on the expulsion of foreigners in irregular status, sts 1181/2021, of march 17, 2021

This judgment's importance is twofold. It establishes a precedent on the expulsion of foreigners in an irregular situation in Spain. It also reasserts the applicability of the right to a fair and transparent procedure, and the correlative duty of legal reasoning in the context of an order of expulsion.

The case law regarding the expulsion of foreigners in an irregular situation has undergone an important evolution:

At first, the Supreme Court interpreted that the main sanction for the irregular stay of third-country nationals was a fine. Only *additional aggravating circumstances* could justify the expulsion from national territory.[63]

Later on, the Court of Justice of the EU declared that the main sanction should be expulsion. This statement appears in the case *Government Subdelegation in Gipuzkoa – Immigration and Samir Zaizoune*.[64] In this ruling, the Court of Justice points out two obligations for the Member States: to issue return decisions against third-country nationals in an irregular situation;[65] and to adopt all the necessary measures for their expulsion.[66] Both obligations were based on Directive 2008/115.[67] According to the Court, national legislation setting out the sanctions of a fine and expulsion in alternative terms would frustrate the objectives of the Directive. Since Member States cannot apply regulations that jeopardize the achievement of the objectives pursued by a directive or deprive it of its useful effect,[68] the main sanction would have to be the expulsion from national territory.

The interpretation of the Court of Justice was altered in the *Mo case and the Government Subdelegation in Toledo*.[69] The Court declares that the authorities of the Member States could not rely exclusively on Directive 2008/115 to adopt a return decision. The authorities also had to comply with national regulations. If domestic regulations provided for both the sanction of a fine and expulsion, and if the sanction of expulsion could only occur when aggravating circumstances concurred, the expulsion would only take place when such circumstances existed.[70] The basis of the judgement is the principle according to which the directives do not create, by themselves, obligations in charge of individuals.[71] Therefore, the directive could be invoked directly by citizens against the State, but not by the State. Even more so if that application would harm the individuals and go beyond the provisions of the national legal system.

The Supreme Court analyzed whether, according to the latest ruling of the Court of Justice of the European Union, the priority sanction should be a fine instead of expulsion. In its judgment, the Supreme Court claims:

63 STS 268/2006, FJ 5.

64 STJUE, C-38/14, 2015, *Government Subdelegation in Gipuzkoa – Immigration and Samir Zaizoune*, ECLI:EU:C:2015:260.

65 Ibid, § 41.

66 Ibid, § 39.

67 Dir. nº 2008/115/EC, 16 Dec. 2008, of the European Parliament and of the Council on common rules and procedures in the Member States for the return of third-country nationals in an irregular situation.

68 STJUE, C-38/14, 2015, *Government Subdelegation in Gipuzkoa – Immigration and Samir Zaizoune*, op. cit., § 39.

69 STJUE, C-568/19, 2020, *Mo and Government Subdelegation in Toledo*, ECLI:EU:C:2020:807.

70 Ibid, § 71.

71 Ibid, § 35, and cited jurisprudence.

– That the expulsion decision is the priority sanction. The sanction of a fine is not an alternative to the expulsion from the national territory.[72]

– That the expulsion requires, in each case and on an individual basis, the evaluation and appreciation of aggravating circumstances that reveal and justify the proportionality of the measure, after a procedure with full guarantees of the rights of those affected.[73]

– That there is no contradiction between European and internal regulations, since neither of them contemplate the expulsion order as automatic, without considering the circumstances of the specific case.[74]

The argument of the Supreme Court goes as follows:

In the first place, the Court declares that expulsion must be the main sanction, in accordance with case law of the Court of Justice.[75] National courts must respect the obligation to issue a return decision in accordance with Article 6 of Directive 2008/115 and by virtue of the principle of consistent interpretation.[76]

However, return decisions must only take place after a fair and transparent procedure, with full respect of human rights and procedural guarantees. This interpretation allows overcoming the possible incompatibilities between European and national Law: neither the European regulation nor the national one provides for expulsion in each and every case. As confirmed by the European Court 'according to European Law, the mere irregular stay without the concurrence of other factors does not entail the need to adopt a return decision'.[77]

In essence, both the irregular stay in Spanish territory and the processing of a fair and transparent procedure for expulsion are *sine qua non* requirements for an expulsion decision.

Therefore, the main difference between our national regulation and the European Law is that, while illegal stay can be sanctioned according to national provisions (with the sanction of a fine), European Law requires the prior verification of aggravating circumstances and a procedure with all the guarantees.[78] Thus, our domestic law allows sanctioning situations not identified by European law (irregular stay without aggravation). In these cases, our domestic Law provides for a penalty in the form of a fine. However, if there are aggravating circumstances, the sanction will always be expulsion, as set in European Law.

According to the Supreme Court, in cases where the sanction is the expulsion, the proportionality of the penalty will be examined according to the arguments motivating the expulsion order.[79] Ultimately, the proportionality of the expulsion order will be measured through the duty to state sufficient reasons. Among other sufficient reasons, the Supreme Court foresees those indicated in instruction 11/2020, of October 23, 2020, of the Ministry of the Interior.[80]

72 STS 1181/2021, FJ 3.

73 Ibid, FJ 4.

74 Ibid, FJ 3.

75 Ibid, FJ 3.

76 Ibid, FJ 3.

77 Ibid, FJ 3.

78 Ibid, FJ 3.

79 Ibid, FJ 3.

80 Ministry of the Interior, Instruction 11/2020, Effects of the Judgment of the Court of Justice on sanctioning procedures for violation of article 53.1 a) of Organic Law 4/2000, of January 11. Available at: Instruccion-11-2020-CGEF-aplicacion-STJUE-08102020.pdf .

IV. Patrimonial liability

A. Patrimonial liability for breaches of urban agreements, sts 161/2021, of february 10, 2021

The value of this decision is twofold: on the one hand, it lays down the requirements for the exercise of a liability action; on the other hand, it discusses the sector of urbanism and urban planning. This field of study has been traditionally shroud by a veil of controversy, mainly because of the shared competences in the matter between the State and the Autonomous Communities.

The appeal had put forward the necessity of clarifying the effects of the coming into force of a new urban planning. In particular, the ruling questions whether the entry into force of a new urban agreement leads to the automatic extinction of the previous individual administrative licenses that were valid under the former urban agreement. The other possibility would be that of considering that the extinction of those licenses can only take place prior to an administrative procedure, regulated at the regional level by Autonomous Communities.[81]

The Court stands against the first interpretation. In that vein, it considers the entry into force of an urban planning as a premise for the damage compensation under article 35.c of Royal Legislative Decree 2/2008, of June 20, regarding the land and urban development regime. Thus, the normative modification in urban matters can generate patrimonial liability, but never an automatic extinction of the administrative licenses already into force.[82] Such modification or extinction of effectiveness requires a prior administrative procedure regulated by each Autonomous Community.[83]

This interpretation is an outcome of the distribution of powers between the State and the Autonomous Communities. While the latter are competent to regulate urban planning *stricto sensu*, the State can interfere with its competence to regulate the basic criteria for the exercise of the right to property. Nevertheless, this State competence could never go as far as to eliminate the procedural guarantees and procedures set up by the Autonomous Communities.

V. Judicial control

A. Appeal of unconstitutionality against the decree-law of the government of Catalonia on urgent measures to improve housing access, stc 16/2021, of january 28, 2021

This appeal of unconstitutionality puts emphasis on the legal limitations of the decree-laws, as well as on their judicial review regime. In addition, it examines the scope of property's social function and the distribution of competences in the field of housing.

There are a number of legal limits regarding the role of decree-laws. Article 86.1 of

81 STS 161/2021, FJ 9.
82 Ibid, FJ 4.
83 Ibid, FJ 1.

the Constitution foresees those limits, and its content is reproduced by article 64.1 of the Statute of Autonomy of Catalonia.

> *In cases of extraordinary and urgent need, the Government may issue temporary legislative provisions which shall take the form of decree-law and which may not affect the regulation of the basic State institutions, the rights, duties and liberties contained in Title 1, the system of the Autonomous Communities, or the General Electoral Law.*

The Constitutional Court partially accepts the claims. On the one hand, it considers that the enabling fact to dictate decree-laws, which is the one related to the existence of an *extraordinary and urgent need*, concurs. The ruling concludes that the extraordinary and urgent need is justified here by the generic and devastating implications of the 2008 economic crisis and the new social situation that arose from it. These facts made clear the need for a rapid regulatory adaptation to the new circumstances. In this context, the adoption of a decree-law is justified.[84]

On the contrary, the judgment declares the unconstitutionality of the articles that regulate the social function of property and the coercive measures for its fulfillment that were provided for in the Decree-Law of the Government of Catalonia, as well as those that regulated the obligations of homeowners in this regard. These provisions infringed the inherent limits of the decree-laws, by regulating matters beyond its faculties.[85] In this particular case, the provisions regulated the fundamental right to property (article 33 of the Constitution).

Lastly, the claims referring to the benchmark rental price index and the regional reserve of urbanized land for housing are dismissed. The Autonomous Community had not invaded the state powers granted by Article 149 of the Constitution in none of these cases.

In particular, the rental price reference index does not violate state jurisdiction over civil matters (149.1.8), as it is of a public nature and does not affect the lease contracts, nor the rights and obligations of the parts.[86] As for the regional reserve of land for housing, it is constitutional as long as it adjusts to the limits set by the State in exercise of its competences on regulation of the basic conditions of constitutional rights (149.1.1) and on the coordination of economic activity planning (149.1.13).[87] Within this limitation, the regional legislator can set the uses of land and buildings.[88]

B. Instructions and circulars, sts of 76/2021, of january 26, 2021

This judgment seeks to give some clarity to the effects on citizens of administrative internal regulations. Specifically, the decision tries to determine whether the challenge of a controversial circular requires the existence of a prior singular act of application. That is, if its challenge must be carried out directly, or if an indirect appeal against circulars is possible.

84 Ibid, FJ 3.
85 Ibid, FJ 5.
86 Ibid, FJ 7.
87 Ibid, FJ 8.
88 Ibid, FJ 8.

Circulars have no *external* legal effect. Hence, they neither create, nor modify, nor directly extinguish the rights of citizens. Therefore, generally, they cannot be challenged directly. However, a provision can have a normative nature, despite the fact that its *nomen iuris* is that of a circular. In these cases, the 'circular' may be challenged directly.

According to the Court, knowing the true nature of the circular requires unraveling its content.[89] This is coherent with the non-formalist nature of our legal system, according to which the *nomen iuris* is irrelevant to know the nature of rules and contracts. Therefore, beyond the *nomen iuris*, the content and purpose of the provisions must be considered.

In this decision, the content of Circular 1/2014-ET, of January 15, 2014, is examined. This circular addresses the visa requirement for professional bullfighting contracts in the authorization procedure for bullfighting shows. Its purpose is to put an end to the interpretative divergences of the Bullfighting Regulation. In other words, the objective of this circular is to 'establish the criteria of action to be followed with regard to the visa requirement of the contracts of bullfighting professionals'.[90]

The circular is structured in four sections, of which the first two are of prime interest:

The first of them indicates the scope of application of the circular: administrative authorization procedures for the celebration of bullfighting shows. The scope of application is hence merely administrative; it lacks direct effects for third parties. Therefore, it does not have the status of an administrative act or general provision, which can be challenged directly.

The second of the sections of the circular establishes the obligation to submit all the contracts signed by the professionals with the request for authorization of a bullfighting show. These contracts must be statutory, as requested by the circular. The circular asserts that the referred obligation is based on the content of the Andalusian Bullfighting Regulation. However, the circular seems to add an additional requirement, given that Bullfighting Regulations do not rule on the statutory nature of the contracts. The key point is that the specification of the circular, not expressly indicated in the Bullfighting Regulation, leads to the exclusion of non-statutory agreements.[91]

The Supreme Court's position is conclusive: the circular does not add an additional requirement, but rather interprets one of the already-established requirements. Concisely, the content of a circular only sets interpretive guidelines. There is therefore no excess in terms of its content as a proper circular,[92] and its effectiveness is merely internal. Consequently, it can only be controlled by challenging the specific acts that apply it.[93]

89 STS 76/2021, FJ 5.
90 Ibid, FJ 5.
91 Ibid, FJ 3.
92 Ibid, FJ 5.
93 Ibid, FJ 5.

List of abreviations

A Antecedente jurídico. Facts of the dispute.

CE Constitución Española de 1978. Spanish Constitution.

FJ Fundamento jurídico. Legal ground.

LCSP Ley 9/2017, de 8 de noviembre, de Contratos del Sector Público, por la que se transponen al ordenamiento jurídico español las Directivas del Parlamento Europeo y del Consejo 2014/23/UE y 2014/24/UE, de 26 de febrero de 2014. Public Sector Contract Law.

LCSP 2007 Ley 30/2007, de 30 de octubre, de Contratos del Sector Público. Public Sector Contract Law, (today repealed).

LOAES Ley Orgánica 4/1981, de los estados de alarma, excepción y sitio. Organic Law on states of alarm, exception, and siege.

LOEPSF Ley Orgánica 2/2012, de 27 de abril, de Estabilidad Presupuestaria y Sostenibilidad Financiera. Organic Law on Budgetary Stability and Financial Sustainability.

LRJPAC Ley 30/1992, de 26 de noviembre, de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común. Law on the Legal Regime of Public Administrations and Common Administrative Procedure, (today repealed).

STC Sentencia del Tribunal Constitucional. Supreme Constitutional Court Judgement.

STJUE Sentencia del Tribunal de Justicia de la Unión Europea. European Court of Justice Judgement.

STS Sentencia del Tribunal Supremo. Supreme Court Judgement.

TRLCSP Real Decreto Legislativo 3/2011, de 14 de noviembre, por el que se aprueba el texto refundido de la Ley de Contratos del Sector Público. Royal Legislative Decree approving the consolidated text of the Public Sector Contracts Law (today repealed).

fypl french yearbook *of* public law
Issue 1, 2023

UK

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Keywords:

British administrative law, British constitutional law, Emergency measures, Public contracts

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In 2022, there have been three major crises in the UK:

- An economic crisis precipitated by high inflation, high cost of living, a new trading arrangement with the EU post-Brexit and high levels of public spending during Covid-19 leading to massive public debt.
- A social crisis when it comes to socio-economic inequalities across the UK, which has prompted a political and constitutional focus on devolution and localism and redressing regional disparities.
- A political crisis in the governing party, the Conservatives, because they are torn about how to address the abovementioned two crises, leading to choices of leaders which have resulted into major political upheaval.

This survey illustrates how the UK navigated these three crises in 2022. In an introductory section, we will highlight some key constitutional and public law trends in the UK in 2022. We will then develop some specifics in more detail in later sections. The later sections will focus on the following: the fortunes of the three British Prime Ministers in 2022 and the connection between these fortunes and integrity, competence, and anti-corruption scandals (section II); political and constitutional challenges addressing the economic and financial aftermath of Covid-19 and Brexit (section III); major public law Bills pursued by the government this year (section IV); the government's multi-year judicial review reform (section V) and human rights reform plans (section VI); the civil service reforms and general tensions between the UK government and the civil service (section VII); an overview of the government's post-Brexit public procurement reforms (section VIII); and a look to the future, with the potential for a change in governing party in 2024-25 (section IX).

I. British constitutional developments in 2022: A return to instability

After the tumultuous Covid-19 pandemic years of executive rule by decree and curtailed parliamentary scrutiny of government,[2] the UK has to some extent experienced a constitutional 'return to normal'. The executive is no longer purely governing by decree, Parliament is operating as usual and able to scrutinise the government, and political debate is not focused only on how to get the country through the pandemic.

While this overview will focus on constitutional, legal and political upheaval, the international news will not have missed sad developments regarding the Royal Family. On 8 September 2022, Her Majesty Queen Elizabeth II passed away at her estate at Balmoral Castle in Scotland. Her late Majesty was the UK's longest reigning Monarch and was a popular figure domestically and internationally. Her son, Charles, previously the Prince of Wales, became King Charles III and Camilla, previously the Duchess of Cornwall, became Queen Consort.[3] On 10 September 2022, an Accession Council was held to make a formal proclamation of her late Majesty's death and the accession of Charles III as King.

2 Brown, J., Ferguson, D., Barber, S., Coronavirus: the lockdown laws, House of Commons Library Briefing, 2022. Available at: https://commonslibrary.parliament.uk/research-briefings/cbp-8875/.

3 Buckingham Palace, Announcement of the Death of the Queen, 8 Sept. 2022. Available at: https://www.royal.uk/announcement-death-queen.

For the first time, the Accession Council was recorded and broadcast live.[4]

A return to normal does not necessarily involve constitutional or political stability, a commitment to maintain and strengthen human rights protections, respect for the international rule of law, or good governance. In the UK, there remains significant political and legal upheaval. In 2022, the UK started the year with Boris Johnson as Prime Minister, who was appointed by Her Majesty the Queen after he succeeded Theresa May as Leader of the Conservative Party in July 2019. Following Mr Johnson's dramatic resignation – or rather removal – as Prime Minister in the summer of 2022, the keys to No. 10 Downing Street were handed to Liz Truss in September 2022. Following a disastrously received 'mini-Budget' involving radical tax cuts, the UK ended the year with a third Prime Minister, Rishi Sunak, who – at the time of writing, at least – remains Prime Minister and seems likely to be so until the next UK general election at the latest in January 2025.[5]

Under the government of Boris Johnson, there were a number of legislative proposals which either intentionally or incidentally strengthened the executive and reduced the political, institutional, legal and judicial accountability of government via both domestic and international law. As one of the authors – Lee Marsons – put it in 2021: 'There has been a string of legislative proposals that enhance executive power, reduce judicial scrutiny and have potentially detrimental consequences for the rule of law.'[6]

On executive power, an example is the Dissolution and Calling of Parliament Act 2022, which returns to the prime minister the prerogative power to dissolve Parliament and call a general election. On reducing judicial scrutiny, examples proposed – but not eventually enacted – include clause 3 of the Draft Fixed-term Parliaments Act 2011 (Repeal) Bill, which prevents judicial review of the 'exercise or purported exercise' of the prerogative as well as 'the limits or extent of those powers', and clause 45 of the then UK Internal Market Bill (as first introduced), which required a court to uphold subordinate legislation 'notwithstanding any relevant international or domestic law with which [it] may be incompatible'.[7] On the rule of law, examples include the Overseas Operations (Service Personnel and Veterans) Bill and the Covert Human Intelligence Sources (Criminal Conduct) Act 2021, both of which provide a degree of immunity from ordinary criminal liability for agents of the executive.

The government also showed a less than stellar commitment to abiding by its international commitments. For example, in 2020, the Secretary of State for Northern Ireland conceded that a government Bill would violate international law – specifically, the UK-EU Withdrawal Agreement – in a 'limited and specific way'.[8]

Though not uniformly, many government measures have related to strengthening

4 Accession Council, 10 Sept. 2022. Available at: https://www.youtube.com/watch?v=aKci6iKET2Q.

5 As will be noted in section IV, the UK Prime Minister has the power to initiate an early general election before 2025. See the *Dissolution and Recall of Parliament Act* 2022.

6 Marsons, L., Constitutional change in the UK: Joining the dots, Legal Action Group, March 2022. Available at: https://www.lag.org.uk/article/210365/constitutional-change-in-the-uk---joining-the-dots.

7 An ouster clause is the British phrase used to refer to a provision in legislation which excludes or "ousts" the High Court from judicially reviewing the exercise of a public power.

8 Lewis, B., "Northern Ireland Protocol: UK Legal Obligations", House of Commons Hansard, 8 Sept. 2020. Available at: https://hansard.parliament.uk/commons/2020-09-08/debates/2F32EBC3-6692-402C-93E6-76B4CF1BC6E3/NorthernIrelandProtocolUKLegalObligations.

immigration control post-Brexit. For example, in April 2022 the Johnson government announced the UK-Rwanda Asylum Partnership Agreement. This is a Memorandum of Understanding between the British and Rwandan governments which allows the UK to transfer asylum seekers to Rwanda to have their applications processed there and to remain in Rwanda if their applications are successful.[9] In light of human rights concerns about Rwanda, the European Court of Human Rights granted an interim measure preventing deportations prior to the British courts being able to determine the scheme's legality.[10] In response to this, the government added a clause to a draft Bill requiring British judges to ignore all interim measures issued by the Strasbourg Court.[11] In that respect a government backbencher later introduced a Private Members' Bill requiring the government to implement the Rwanda scheme in spite of any international court rulings. This Bill was subsequently defeated in the House of Commons,[12] and the government's Bill has yet to complete its parliamentary stages at the time of writing. On 19 December 2022, the High Court decided that the Rwanda scheme was lawful,[13] but it is expected that there will be an appeal in 2023.

The government also made major procedural and substantive changes to immigration and asylum law through the Nationality and Borders Act 2022. The latter reduced and expedited immigration appeals and introduced a requirement that an asylum seeker must apply for asylum in the first safe country that they arrive at after fleeing persecution. This is widely considered to be contrary to international asylum law, specifically the Refugee Convention 1951.[14]

However, none of these reforms could be described as radical, revolutionary or transformative. The proposals pushed constitutional boundaries, undermined political conventions, increased the power of government, reduced parliamentary and judicial scrutiny, relied on tendentious and contested interpretations of international law, and were highly problematic, but none of them on their own radically and systematically transformed the powers exercised by the executive. Taken together, the system was pushed in favour of the executive but the UK remains recognisably a liberal European democracy.

9 Home Secretary, "Memorandum of Understanding between the government of the United Kingdom of Great Britain and Northern Ireland and the government of the Republic of Rwanda for the provision of an asylum partnership arrangement", 14 April 2022. Available at: https://www.gov.uk/government/publications/memorandum-of-understanding-mou-between-the-uk-and-rwanda/memorandum-of-understanding-between-the-government-of-the-united-kingdom-of-great-britain-and-northern-ireland-and-the-government-of-the-republic-of-r.

10 Pobjoy, J., Bordell, W., Fakhoury, R., "European Court of Human Rights grants interim measures preventing removal of asylum seeker to Rwanda pending determination of judicial review of Rwanda removal policy", Blackstone Chambers, 15 June 2022. Available at: https://www.blackstonechambers.com/news/european-court-of-human-rights-grants-interim-measures-preventing-removal-of-asylum-seeker-to-rwanda-pending-determination-of-judicial-review-of-rwanda-removal-policy/.

11 Clause 24 of Bill of Rights Bill. Available at: https://publications.parliament.uk/pa/bills/cbill/58-03/0117/220117.pdf.

12 House of Commons, "Asylum Seekers (Removal to safe countries) – Leave to bring in a Bill", 14 Dec. 2022. Available at: https://votes.parliament.uk/Votes/Commons/Division/1437.

13 *R (AAA) v Secretary of State for the Home Department* [2022] EWHC 3230 (Admin).

14 Law Society of England and Wales, "Nationality and Borders Act and Rwanda Asylum Partnership", 26 Aug. 2022. Available at: https://www.lawsociety.org.uk/topics/immigration/nationality-and-borders-act-and-rwanda-asylum-partnership.

This gradual change has been called 'incrementalism'.[15] A government Minister referred to it as 'eating the elephant in chunks'.[16] As Marsons put it again in 2021:

> *Constitutional change is not occurring in a legislative big bang. There are proposals to test the waters, which may then be pursued, withdrawn depending on the pushback, pursued in a limited form or pursued by non-legislative means... There is an obvious interest in judicial review, principally remedies, grounds, judicial discretion, costs, procedure and ouster clauses. The reform strategy variously involves public rhetoric designed to influence courts, the exercise of existing statutory powers and new legislative proposals.*[17]

As McHarg and Young described it, these proposals represented a return to the 'old British constitution'. By this, they mean a focus on so-called 'political constitutionalism' as opposed to 'legal constitutionalism'. Historically, political constitutionalism emphasises the primacy of parliamentary sovereignty in law-making, a strong and decisive executive able to respond to shifting public opinion and changing events, and scepticism of courts making high-level and politically sensitive policy value judgements. By contrast, legal constitutionalism emphasises the need for a codified system of legally enforceable rules and checks on government and parliamentary power. McHarg and Young described: 'a growing trend towards a weakening of both legal and political checks on Governmental power.'[18]

Though this trend was paused for a brief period during the short tenure of Liz Truss who focused on economic policy, it has continued consistently in 2022. Under Prime Minister Rishi Sunak, for example, the government's Bill of Rights Bill intends to repeal the Human Rights Act 1998, which is the domestic Act of Parliament implementing the European Convention on Human Rights into British law.[19]

The political importance of immigration control also continues, particularly asylum-seeking following the successful Strasbourg interim measure and the rising number of small boats reaching British shores.[20] In December 2022, for example, the Prime Minister announced that the government would introduce legislation to raise the threshold for a person to be considered a 'modern slave' under the Modern Slavery Act 2015 to prevent

15 Harwood, R., "The rise of incrementalism", 39 Essex Chambers, 22 July 2021. Available at: https://www.39essex.com/information-hub/insight/rise-incrementalism.

16 Public Administration and Constitutional Affairs Committee, "Oral evidence: The work of the Cabinet Office", 10 Dec. 2020, Q601. Available at: https://committees.parliament.uk/oralevidence/1397/default/.

17 Marsons, L., "Eating the Elephant in Chunks: Mapping the Judicial Review Bill and other constitutional changes during the Boris Johnson era", Legal Action Group, Aug. 2021. Available at: https://www.lag.org.uk/article/211360/-eating-the-elephant-in-chunks---mapping-the-judicial-review-bill-and-other-constitutional-changes-during-the-boris-johnson-era.

18 McHarg, A., Young, A., "The resilience of the old British Constitution", UK Constitutional Law Association, 8 Sept. 2021. Available at: https://ukconstitutionallaw.org/2021/09/08/aileen-mcharg-and-alison-l-young-the-resilience-of-the-old-british-constitution/.

19 Bill of Rights Bill. Available at: https://bills.parliament.uk/bills/3227.

20 Home Office, "Factsheet: Small boat crossings since July 2022", 2 Nov. 2022. Available at: https://www.gov.uk/government/statistics/factsheet-small-boat-crossings-since-july-2022/factsheet-small-boat-crossings-since-july-2022.

asylum seekers from escaping deportation this way.[21]

In other contexts, the new government has taken a less radical approach than its predecessors. As Solon Solomon has put it in relation to the Northern Ireland Protocol Bill, which alters the way that the Northern Ireland Protocol to the UK-EU Withdrawal Agreement is implemented in the UK:

> *[T]he UK Government has returned to the issue which had in the meantime been frozen, by issuing though this time also a legal statement meant to embalm this initiative to the wider compliance of the UK with international law. Albeit the statement's reference to the doctrine of necessity in international law is not convincing, the issuing per se of such statement, must be heralded as good news. In 2020, when the UK announced that it was ready to revise the Northern Ireland Protocol, the Secretary of State for Northern Ireland stated that the Bill would indeed break international law in a limited way. This time, the Secretary of State has held that the proposed Bill is inside the ambit of international law. Along these lines, it is good that the UK has moved from a position of indifference vis a vis international law to one that tries to take it into account.*[22]

In sum, in 2022, the government seemed to do what it thought it could accomplish in the context – in effect, going as far as it could 'get away with' in the eyes of its international partners, domestic parliamentarians, international and domestic judges, and public opinion. Few, if any, of these increases in executive power are gratuitous or self-serving. These do not benefit the individual Ministers, they are primarily a means to a political end, such as making the immigration system operate in a way that the government believed represented public opinion or reducing post-Brexit tensions in Northern Ireland to prevent a breakdown in law and order.

II. Integrity matters

2022 and the preceding period of the Covid-19 pandemic, has been marked by the rise of political and constitutional strains regarding integrity, political competence, and the development of anti-corruption mechanisms. In a climate reminiscent of the mid-1990s when the then Prime Minister John Major adopted several integrity measures in light of political scandals, Covid-19 has featured a number of political, moral and business scandals. Those were in part due to the long tenure of the government; in part due to the major economic stimulus and government contracting for all kinds of equipment from personal protective equipment to tracing to vaccination; and in part due to the reduced parliamentary scrutiny in consequence of lockdowns and the need to respond quickly to the public health emergency. This all led to government handling money in

21 Prime Minister of the United Kingdom, "Prime Minister's Statement on Illegal Immigration", 13 Dec. 2022. Available at: https://www.gov.uk/government/speeches/pm-statement-on-illegal-migration-13-december-2022.

22 Solomon, S, "The Northern Ireland Protocol Bill: A comparative perspective on the parliamentary role in the amendment of major international agreements", *UK Constitutional Law Association*, 21 June 2022. Available at: https://ukconstitutionallaw.org/2022/06/21/solon-solomon-the-northern-ireland-protocol-bill-a-comparative-perspective-on-the-parliamentary-role-in-the-amendment-of-major-international-agreements%EF%BF%BC/.

ways that were not all formalised and in accordance with established rules and procedures.

This section will therefore focus on three aspects. First, the political developments related to personal integrity at the highest levels of government and how it precipitated the downfall of at least one Prime Minister, Mr Johnson. Second, the questions arising from close connections between money matters and politics. Thirdly, the financial issues arising at local level following long-lasting tensions with the central government.

A. Personal ministerial conduct and constitutional and political uncertainty[23]

Discontent had been growing against Boris Johnson in late 2021 and possibly earlier, following his decision to support his colleague, Owen Paterson, a Conservative politician who had been found guilty by a parliamentary ethics committee of improper lobbying. Johnson decided that the government would support a motion, which paused the decision on whether Paterson should be suspended until after the conclusion of a review of the parliamentary ethics system.[24] The government was forced by the media and political reaction to reverse this support only a week later.[25]

In 2022, matters quickly became worse for the Prime Minister. In January of this year, evidence emerged in the form of photographs demonstrating that several social events had been held in the garden of No.10 Downing Street – the Prime Minister's official grace-and-favour home – during a national lockdown in 2020. The government confirmed that there would be an investigation into Downing Street gatherings during the pandemic carried out by Sue Gray, a senior civil servant, who would establish the facts surrounding these events.[26]

On 31 January 2022, Mrs Gray subsequently found twelve gatherings and concluded that: '[a]t least some of the gatherings in question represent a serious failure to observe not just the high standards expected of those working at the heart of Government but also of the standards expected of the entire British population at the time.' Embarrassingly, she added that there was evidence of excessive use of alcohol in Downing Street at the time.[27] Following this, in April 2022, the Prime Minister and Chancellor of the Exchequer received a fixed-penalty notice – a fine – from the police for breaching Covid regu-

23 For more detailed developments on this, see Marique, Y., 'Ethical standards between law and politics' in Gromek-Broc, K. (ed.), *Liber Amicorum Patrick Birkinshaw,* 2023, Kluwer, forthcoming.

24 House of Commons, "Committee on Standards", 3 Nov. 2021. Available at: https://hansard.parliament.uk/commons/2021-11-03/debates/EA7E30B2-F0D0-4FC8-A608-9845CE43CF28/CommitteeOnStandards.

25 House of Commons, "Committee on Standards: Decision of the House", 8 Nov. 2021. Available at: https://hansard.parliament.uk/commons/2021-11-08/debates/6E81CD0D-33C6-4796-B224-5D88EFAC8F07/CommitteeOnStandardsDecisionOfTheHouse#main-content.

26 House of Commons, "Downing Street Garden Event", 11 Jan. 2022. Available at: https://hansard.parliament.uk/commons/2022-01-11/debates/DC167E69-D438-4958-A870-7386FE5DD07C/DowningStreetGardenEvent.

27 Gray, S., "Investigation into alleged gatherings on government premises during Covid restrictions – Update", Cabinet Office, 31 Jan 2022. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1051374/Investigation_into_alleged_gatherings_on_government_premises_during_Covid_restrictions_-_Update.pdf.

lations in Downing Street in 2020.[28]

On 25 May 2022, Mrs Gray released her full report, confirming her view that social gatherings had taken place in Downing Street during the pandemic lockdowns and criticising the government and civil service leaders.[29] The Prime Minister made a statement to the House of Commons, apologising for the event that led to his fixed penalty notice (a lunchtime gathering on 19 June 2020 in the Cabinet Room).[30] Almost immediately after, a string of prominent Conservative politicians called on the Prime Minister to resign, which intensified over the summer.[31] Eventually, Mr Johnson resigned as Prime Minister on 7 July 2022 after multiple resignations among the most senior government Ministers in the Cabinet, including the Chancellor of the Exchequer, the UK's finance minister.[32]

What is the takeaway from the investigation by Sue Gray into what was dubbed by the British media as 'Partygate'? These events highlight that the document regulating ministerial behaviour – the Ministerial Code – can be found inadequate at crucial times. The Prime Minister is the ultimate arbiter of potential breaches and their sanctions, even when he himself might be the offender. He is also the person authoring the Code and amending it as, indeed, he did on 27 May 2022,[33] two days after the release of the Gray report.[34] The Independent Adviser on Ministerial Interests, the official who advises the Prime Minister on whether the Ministerial Code has been violated,[35] and the Committee

28 Osborne, S., "Boris Johnson fined: Prime Minister apologises after receiving fixed penalty notice for lockdown-breaking party", *Sky News*, 13 April 2022. Available at: https://news.sky.com/story/boris-johnson-fined-prime-minister-apologises-after-receiving-fixed-penalty-notice-for-lockdown-breaking-party-12588712.

29 Gray, S., "Findings of the Second Permanent Secretary's Investigation into alleged gatherings on government premises during Covid restrictions", Cabinet Office, 25 May 2022. Available at: https://www.gov.uk/government/publications/findings-of-the-second-permanent-secretarys-investigation-into-alleged-gatherings-on-government-premises-during-covid-restrictions

30 Johnson, B., "Sue Gray Report", House of Commons Hansard, 25 May 2022. Available at: https://hansard.parliament.uk/commons/2022-05-25/debates/E888D0F8-37F7-48A5-8598-4449887A0935/SueGrayReport.

31 Wright, J., "The Prime Minister May 2022", 30 May 2022. Available at: https://www.jeremywright.org.uk/news/prime-minister-may-2022.

32 Mason, R., "Boris Johnson resigns as Conservative leader after Cabinet revolt", *The Guardian*, 7 July 2022. Available at: https://www.theguardian.com/politics/2022/jul/07/boris-johnson-resigns-as-conservative-leader-after-cabinet-revolt

33 Cabinet Office, Revisions to the Ministerial Code and the role of the Independent Adviser on Ministers' Interests, 27 May 2022. Available at: https://www.gov.uk/government/publications/revisions-to-the-ministerial-code-and-the-role-of-the-independent-adviser-on-ministers-interests.

34 Cabinet Office, *Findings of Second Permanent Secretary's Investigation into Alleged Gatherings on Government Premises during Covid Restrictions*, 25 May 2022. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1078404/2022-05-25_FINAL_FINDINGS_OF_SECOND_PERMANENT_SECRETARY_INTO_ALLEGED_GATHERINGS.pdf; Cabinet Office, *Investigation into alleged gatherings on government premises during Covid Restrictions – Update*, 31 Jan. 2022. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1051374/Investigation_into_alleged_gatherings_on_government_premises_during_Covid_restrictions_-_Update.pdf.

35 Independent Adviser on Ministers' Interests, *Annual Report 2021-2022*, May 2022. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1080213/independent-adviser-annual-report.pdf.

on Standards of Public Life[36] both believed that the amendments did not go far enough to ensure the highest standards of political integrity.

Having said this, at the moment that it mattered, Sue Gray's investigation did have decisive political implications. Integrity mattered without the need for a court or legal sanctions. The total sum of ways in which the Prime Minister behaved – amending the Ministerial Code, foundering during a liaison committee meeting,[37] and apologising for his behaviour for no longer than ten minutes – led to his resignation, an admission that he did not have the confidence of the House of Commons despite having survived a leadership challenge from within his Party a few days before.[38]

The biggest stumbling block was the allegation that the Prime Minister did not respect the expectation to tell the truth to Parliament. The Ministerial Code requires ministers 'who knowingly mislead Parliament' to resign. Intricate questions of interpretation about the meaning of this expression arose.[39] The House of Commons ordered an investigation into the Prime Minister's statements to Parliament[40] about the non-occurrence of parties in Downing Street to ascertain whether the Prime Minister had misled the House.[41] A positive finding would result in former Prime Minister Johnson being found in contempt of Parliament. The privilege committee, however, flagged that the threshold for this differs from the one set in the Ministerial Code.[42] In a way, this is effective political constitutionalism, if the standards used by Professor Alison Young are relied upon:[43] 'Political constitutionalism requires effective political controls, mutual institutional respect, and institutional self-restraint.'[44] The political controls worked, and when institutional re-

36 CSPL, "Lord Evans correspondence with Lord True on the Ministerial Code", 30 May 2022. Available at: https://www.gov.uk/government/publications/lord-evans-correspondence-with-lord-true-on-the-ministerial-code.

37 Heyward, F., "Boris Johnson's Liaison Committee appearance was a fittingly humiliating finale", *The New Statesman*, 6 July 2022. Available at: https://www.newstatesman.com/politics/conservatives/2022/07/boris-johnsons-liaison-committee-appearance-fittingly-humiliating-finale.

38 "Prime Minister Boris Johnson wins Tory confidence vote", *BBC*, 6 June 2022. Available at: https://www.bbc.co.uk/news/av/uk-politics-61713912.

39 Gordon, M., "The Prime Minister, the Parties, and the Ministerial Code", *U.K. Const. L. Blog*, 27 April 2022. Available at: https://ukconstitutionallaw.org/2022/04/27/mike-gordon-the-prime-minister-the-parties-and-the-ministerial-code/.

40 Committee of Privileges' resolutions. Available at: https://committees.parliament.uk/committee/289/committee-of-privileges/; "Privileges Committee publish report setting out processes and procedures for inquiry on Rt Hon Boris Johnson MP", 21 July 2022. Available at: https://committees.parliament.uk/committee/289/committee-of-privileges/news/172278/privileges-committee-publish-report-setting-out-processes-and-procedures-for-inquiry-on-rt-hon-boris-johnson-mp/.

41 "Boris Johnson to face probe over claims he misled Parliament about lockdown parties", *BBC*, 21 April 2022. Available at: https://www.bbc.co.uk/news/uk-politics-61177313.

42 Sir Ryder, E., "The Privileges Committee is the servant of the House of Commons, and will conduct its inquiry with a commitment to fairness and transparency throughout", 24 Aug. 2022. Available at: https://committees.parliament.uk/committee/289/committee-of-privileges/news/172837/sir-ernest-ryder-the-privileges-committee-is-the-servant-of-the-house-of-commons-and-will-conduct-its-inquiry-with-a-commitment-to-fairness-and-transparency-throughout/. For criticism of the procedure, see Bogdanor, V., "This inquiry into the PM is not consistent with natural justice", *Telegraph*, 11 Aug. 2022. Available at: https://www.telegraph.co.uk/news/2022/08/11/inquiry-pm-not-consistent-natural-justice/.

43 Young, A., 'Why 'Partygate' May Be the Beginning of the End", Verfassungsblog, 23 April 2022. Available at: https://verfassungsblog.de/why-partygate-may-be-the-beginning-of-the-end/.

44 Ibid.

spect (and personal self-respect) broke down, when a government did not practise institutional self-restraint, the political consequences had to be drawn by the Prime Minister.

B. Integrity and Money

The overall emergency linked to the Covid-19 pandemic, the uncertainty linked to the virus at first, the lack of masks and of personal protective equipment, as well as the need to limit freedom of movement to prevent the virus from spreading, created a political context where power, opportunities, boundaries, and risks were blurred. Transparency and accountability of executive action were limited and parliamentary control weakened, especially in the first year of the pandemic.[45] The aftermath of this situation started to unravel in 2022. It became known, for example, that a former Conservative Prime Minister, David Cameron, lobbied the Department for Business that subsequently demonstrated 'unusual interest' in the accreditation of a failing business to obtain financial support during the pandemic.[46] VIP procedures were set up to procure the much-needed material,[47] although some of this material ended up not being used.[48]

To help businesses survive, the government radically increased public spending, especially in the Summer 2020 when the then Chancellor, Rishi Sunak, launched the *Bounce Back* loan. The Department of Business, Energy and Industrial Strategy issued 1.5 million loans worth £47 billion to businesses across the UK.[49] Speed was prioritized over value for money,[50] with no robust mechanism in place to prevent fraud. Money could be delivered within 24 to 48 hours of the application. All of this led to abuses of the system in all quarters: fraud was so pervasive that the governmental anti-fraud team soared to more than 16,000 staff,[51] with Lord Agnew, a senior government member and Peer, resigning due to the government failing in handling fraudulent Covid-19 business loans.[52] Local councillors misused the system to their benefit.[53] Questions were raised as to how major procurement decisions were made – although the courts dismissed the case, the

45 Cormacain, R., Fox, R., Russell, M. & Tomlinson, J., The Marginalisation of the House of Commons under Covid Has Been Shocking; A Year on, Parliament's Role Must Urgently Be Restored, 2021, London: Hansard Society.

46 NAO, *Investigation into the British Business Bank's accreditation of Greensill Capital* (2021-22 HC 301), para. 12.

47 Conn, D., "Emails emerge of 'VIP route' for UK Covid test contracts", *The Guardian,* 23 Sept. 2021. Available at: https://www.theguardian.com/world/2021/sep/23/emails-emerge-of-vip-route-for-uk-covid-test-contracts.

48 Conn, D., "Half of PPE procured by UK using 'VIP' companies has not been used", *The Guardian,* 11 Feb. 2021. Available at: https://www.theguardian.com/world/2022/feb/11/half-of-ppe-procured-by-uk-using-vip-companies-has-not-been-used.

49 Committee of Public Accounts, *Bounce Back Loans Scheme: Follow-up* (2021-22 HC 951).

50 NAO, *The Bounce Back Loan Scheme: an update* (2021-22 HC 861).

51 Gov.UK, *Government Counter Fraud Function and Profession.* Available at: https://www.gov.uk/government/groups/counter-fraud-standards-and-profession; https://www.gov.uk/government/news/joint-taskforce-relaunched-to-protect-against-rise-in-fraud-crime; Cabinet Office, *Guidance. Fraud control in emergency management*, 26 March 2020.

52 "Conservative minister resigns in anger over Covid fraud", *BBC,* 24 Jan. 2021. Available at: https://www.bbc.co.uk/news/uk-politics-60117513.

53 "Wolverhampton councillor claimed Covid grant for shut takeaway", *BBC*, 17 Dec. 2021. Available at: https://www.bbc.com/news/uk-england-birmingham-59701935; CPS, "Ex councillor and wife convicted for trying to exploit Covid-19 bounce back loans", 17 Dec. 2021. Available at: https://www.cps.gov.uk/cps/news/ex-councillor-and-wife-convicted-trying-exploit-covid-19-bounce-back-loans.

usual rules were not followed due to the emergency circumstances.[54] Issues also arose in relation to the fraud and error involved in the delivery of employment support schemes in response to Covid-19.[55] Overall this leads the National Audit Office[56] and the Public Accounts Committee[57] to intensify their scrutiny of the mechanisms aiming to combat fraud in general.

During 2022, several parliamentary reports have been published in relation to investigations into the conduct of MPs and Lords for alleged breaches of the House's respective code of conduct.[58] Some of these investigations pertain to conflicts between public and private interests.[59] One prominent case related to Covid-19 procurement – that of Baroness Mone – has been publicised in the media and is serious enough to warrant a criminal investigation.[60] Although there is no official report from the House of Lords Commissioners pending the criminal investigation, this case is discussed here as it directly pertains to the public contracts awarded following the VIP lanes discussed under the heading public contracts below. It also illustrates the general climate of distrust at the highest political level, if nothing else of a more serious nature.

Awarded a peerage in 2015, Baroness Mone is known by the British public thanks to her appearances on the television show, *The Apprentice*. She epitomises business success for somebody without a degree. However, her participation and votes in the Lords have been low. Following past experience with media scrutiny into politico-financial scandals,[61] *The Guardian* investigated in 2020, whether Baroness Mone lobbied officials for public contracts for PPE and similar equipment through the VIP Lane.[62] There were some anomalies with PPE Medpro, a company she was associated with, as the company did not exist at the moment of the award,[63] a major part of the contract (£70 m out of the 100 m) land-

54 *R (on the application of Good Law Project Ltd and another) v Secretary of State for Health and Social Care* [2022] EWHC 46 (TCC).

55 National Audit Office, *Delivery of employment support schemes in response to the COVID-19 pandemic* (2022-23 HC 656).

56 National Audit Office, *Progress combatting fraud* (2022-23 HC 654).

57 Public Accounts Committee, *Inquiry - Progress combatting fraud, on-going*. Information available at: https://committees.parliament.uk/work/7020/progress-combatting-fraud/publications/.

58 For the House of Lords: https://www.parliament.uk/mps-lords-and-offices/standards-and-financial-interests/house-of-lords-commissioner-for-standards-/code-of-conduct-for-the-house-of-lords/.
For the House of Commons: https://www.parliament.uk/business/publications/commons/hoc-code-of-conduct/.

59 Eg., Conduct Committee, *The conduct of Baroness Goudie* (2022-23 HL 121) for facts dating back from 2016-2017.

60 See comments on the website of the House of Lords' Commissioners. Available at: https://www.parliament.uk/mps-lords-and-offices/standards-and-financial-interests/house-of-lords-commissioner-for-standards-/house-of-lords-commissioner-for-standards-/current-inquiries/.

61 The 'cash-for-questions' scandal was first investigated in 1994 by The Guardian: Hencke, D., "Tory MPs were paid to plant questions says Harrods chief", *The Guardian,* 20 Oct. 1994. Available at: https://www.theguardian.com/politics/1994/oct/20/conservatives.uk. In 2009, a parliamentary expenses scandal was exposed by the *Daily Telegraph*, leading to seven parliamentarians being jailed: vanHeerde-Hudson, J. (ed.), *The Political Costs of the 2009 British MPs' Expenses Scandal,* 2014, Basingstoke, Palgrave Macmillan.

62 Available at: https://www.theguardian.com/uk-news/2022/dec/09/revealed-the-full-inside-story-of-the-michelle-mone-ppe-scandal.

63 Available at: https://www.theguardian.com/uk-news/2022/nov/23/revealed-tory-peer-michelle-mone-secretly-received-29m-from-vip-lane-ppe-firm.

ed offshore, one of the main suppliers had no experience delivering the equipment, and Baroness Mone is said to have received payment from the firm although she did not register any interests with them. By the end of 2022, the National Crime Agency has started investigating the case and Baroness Mone took leave from the House of Lords.

C. Financial problems at local level

The relations between the central government and local government are framed by an ever-extending trend towards centralisation. After the financial crisis of 2007, the *Coalition Government* (2010-15) came in power with a rhetoric of granting more powers to local government to address the local democratic deficit. The reform led, on the one hand, to the *Localism Act* 2011 recognising explicitly that local government has the same powers as a private person. On the other hand, it led to a loosened system of local auditing and control over local finances.[64] Before the reforms, the Audit Commission had been tasked to investigate both the regularity and the value for money of local government's spending and the Standards Board for England was in charge of regulating conflicts of interests at local level.[65] The reforms in 2011 and 2014 put an end to these controls, with audit of the regularity of local finance having been reshuffled a number of times since 2014, and the National Audit Office being in charge of reporting on the value for money of local spendings. The major problem is that since the *Coalition Government* came into power, a sustained period of ever-increasing austerity has been heralded, with several National Audit Reports flagging problems with the financial sustainability of local finances (both the finances of local government[66] and the finances of local NHS trusts[67]) as well as parliamentary reports on the same issues.[68]

These financial constraints are compounded with less funding provided by central government and ever-increasing costs to be shouldered by local government, such as costs associated with fighting Covid-19,[69] social care and the cost-of-living explosion. This leads to numerous problems. The first nation-wide problem pertains to the inequality between local government and especially the North-South divide, with London being more economically advantaged compared to the North of England. To address this situation, a *Levelling Up* White Paper was published in early 2022.[70] Yet little progress had been made since its announcement. The second problem pertains to a number of local governments which sought to be 'creative' with local money. After a sustained period of austerity and little control over local spending, a disturbing pattern arises.

In Liverpool, a major UK city, a criminal investigation into the corruption of the Mayor led to the resignation of the Mayor, although the investigation eventually cleared

64 *Local Audit and Accountability* Act 2014.

65 *Part III of the Local Government* Act 2000.

66 Eg., National Audit Office, *The local government finance system in England: overview and challenges* (2021-22 HC 858).

67 Eg., National Audit Office, *NHS financial sustainability*, (2017-19 HC 1867); National Audit Office, *NHS financial management and sustainability* (2019-20 HC 44).

68 Eg., Committee of Public Accounts, *Local Government Finance System: Overview and Challenges* (2021-22 HC 646).

69 National Audit Office, *Local government finance in the pandemic* (2019-21 HC 1240).

70 HM Government, *Levelling Up*, CP 604, 2 Feb. 2022; Gove, M., Government unveils levelling up plan that will transform UK. Available at: https://www.gov.uk/government/news/government-unveils-levelling-up-plan-that-will-transform-uk.

him.[71] Yet the financial problems of Liverpool remained, and the local council has been placed under close investigation[72] and then supervision[73] by the central government.[74] In other local governments, the procedure of section 114 has been triggered. By this procedure, the chief financial officers (CFOs) of local government have a general power to stop a local authority from entering into new transactions and performing some of the existing ones. This power is granted by section 114(3) of the *Local Government Finance Act* 1988. CFOs issue such a notice if they believe that future expenses are out of control, to the point that the local authority to which they are appointed is likely to end the financial year with a budget deficit and that it is impossible to broker a solution without issuing a section 114 notice. Over the recent period, a number of local governments have been put under this procedure, namely the London Borough of Croydon in 2020-21, a local government that remains financially struggling despite the use of the notice; Nottingham in December 2021 following information emerging that the authority unlawfully used funding earmarked for its housing on revenue spending; Slough and Turrock due to failed commercial investments. Turrock was declared 'bankrupt' – as one can put it informally, as technically, UK local government cannot file for bankruptcy - with £500 m deficit in December 2022.[75]

III. Challenges to address the economic aftermath of the Covid-19 pandemic and Brexit

Over the summer of 2022, the Conservative Party held a leadership contest between Liz Truss and Rishi Sunak. The result of the contest was announced on 5 September 2022. The result was that Liz Truss had defeated Rishi Sunak by 57.4% to 42.6% of voting Conservative Party members. Accordingly, on 6 September 2022 Liz Truss became Leader of the Conservative Party and Prime Minister.[76]

This was not the start of a new period of stability. On 23 September 2022, the Chancellor of the Exchequer, Kwasi Kwarteng, delivered a 'mini-Budget'. Styled as the government's 'Growth Plan', the mini-Budget included abolishing the 45% rate of income tax, cutting the basic rate of income tax, freezing alcohol taxes, reversing the previous Chancellor's increase in social security taxes, cutting property taxes, and not implementing the previous government's planned increase in corporation tax.[77] Kwarteng and Truss had

71 Available at: https://www.egi.co.uk/news/police-drop-planning-corruption-probe-into-liverpool-mayor/.

72 Available at: https://www.gov.uk/government/collections/inspection-into-the-governance-of-liverpool-city-council.

73 Available at: https://www.gov.uk/government/publications/liverpool-city-council-updated-directions-8-november-2022. Add: including the appointment of a financial commissioner at Liverpool to oversee the council's dire financial situation (see https://www.publicfinance.co.uk/news/2022/11/finance-commissioner-appointed-liverpool?utm_source=Adestra&utm_medium=email&utm_term=) following a commissioners' report (see https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1099138/100622_LCC_Commissioners_SoS_Second_Report.pdf.))

74 In October 2021, the shortfall for the 2022-23 budget was estimated at £33m. By June 2022, this figure had increased to £98.5m to 2025-26, thus justifying the urgent appointment of a financial commissioner.

75 Available at: https://www.theguardian.com/society/2022/dec/19/thurrock-latest-council-declare-effective-bankruptcy.

76 Crerar, P., "Liz Truss wins Tory leadership race to become Britain's next PM", *The Guardian*, 5 Sept. 2022. Available at: https://www.theguardian.com/politics/2022/sep/05/liz-truss-wins-tory-leadership-race-to-become-britains-next-pm.

77 Kwarteng, K., "The Growth Plan", House of Commons Hansard, 23 Sept. 2022. Available at: https://hansard.

been developing these ideas for many years with the support of economic liberal think-tanks close to the Conservative Party, such as the Institute of Economic Affairs (IEA).[78]

However, following a political and public backlash, on 3 October 2022, the Chancellor of the Exchequer reversed his decision to abolish the 45% rate of income tax, arguing that this policy has become 'a distraction' to the government's overall economic agenda.[79] Interestingly, a major source of criticism of the Chancellor was that he had not consulted an independent expert arms-length body, known as the Office for Budget Responsibility. The Office's function is to analyse and report on the sustainability of the UK's public finances – including how specific government measures would affect that sustainability – and the Office was not asked to produce such a report for the mini-Budget.[80]

On 14 October 2022, Kwasi Kwarteng was dismissed as Chancellor of the Exchequer. The same day, the Prime Minister announced that the government was reversing its decision not to increase corporation tax. In place of Kwasi Kwarteng, Jeremy Hunt was appointed as Chancellor of the Exchequer. Moreover, on 17 October 2022, this new Chancellor of the Exchequer reversed much of the former Chancellor's mini-Budget.[81]

On 20 October 2022, Liz Truss resigned as Prime Minister and Leader of the Conservative Party. It was announced that the Conservative Party would hold a brief and expedited leadership contest to replace Liz Truss. Any Member of Parliament wishing to become leader would have to secure the nomination of at least one hundred Conservative Members of Parliament.[82] On 25 October 2022, Rishi Sunak became Prime Minister, the first person of British Indian origin to hold the office and the first holder of a United States' Green Card to hold the position.[83] At the time, there was also controversy in relation to Mr Sunak's wife – Akshata Murty – who is a multi-millionaire, regarding her tax status in the UK and her associations with firms connected to the Russian government.[84]

These factors, alongside global factors, have precipitated an economic crisis in the UK. Inflation is the highest it has been for decades (9.2% as of December 2022), there is a 'cost of living crisis' so far as energy prices and housing costs, and public finances are in a parlous state given the massive government intervention required as a result of Covid-19.[85]

parliament.uk/commons/2022-09-23/debates/6F82FA4B-DB6B-4E89-BA39-4ABEA1045ABF/TheGrowthPlan.

78 Dyer, H., "Kwarteng IEA fringe event hints at how deeply thinktank is embedded in No 10", *The Guardian*, 4 Oct. 2022. Available at: https://www.theguardian.com/politics/2022/oct/04/kwasi-kwarteng-appearance-iea-thinktank-fringe-event-embedded-no-10.

79 Kwarteng, K., "Chancellor defends income tax cut U-turn", *BBC News*, 3 Oct. 2022. Available at: https://www.bbc.co.uk/news/av/uk-63114409.

80 Office for Budget Responsibility. Available at: https://obr.uk/.

81 Hunt, J., "Economic Update", House of Commons Hansard, 17 Oct. 2022. Available at: https://hansard.parliament.uk/commons/2022-10-17/debates/68F2BACA-D0F2-4F1C-8A65-8D29D304B6BA/EconomicUpdate.

82 Walker, P., Crear, P., Elgot, J., "Liz Truss resigns as PM and triggers fresh leadership election", *The Guardian*, 20 Oct. 2022. Available at: https://www.theguardian.com/politics/2022/oct/20/liz-truss-to-quit-as-prime-minister.

83 Thomas, T., "Rishi Sunak to become PM after meeting the king – how the day will unfold", *The Guardian*, 25 Oct. 2022. Available at: https://www.theguardian.com/politics/2022/oct/25/rishi-sunak-to-become-pm-after-meeting-the-king-how-the-day-will-unfold.

84 Boffey, D., Roth, A., "Infosys still operating from Russia eight months after saying it will pull out", *The Guardian*, 4 Nov. 2022. Available at: https://www.theguardian.com/world/2022/nov/04/infosys-still-operating-russia-rishi-sunak-akshata-murty.

85 Office for National Statistics, "Consumer price inflation, UK: December 2022", 11 April 2023. Available at: https://

IV. Major government Bills in 2022

In 2022, the government pursued a number of important constitutional Bills, some of which were enacted into law by Parliament and some of which remain to be enacted. These include: the Northern Ireland Protocol Bill; the Public Order Bill; the Higher Education (Freedom of Speech) Bill; the Retained EU Law (Revocation and Reform) Bill; and the Bill of Rights Bill. Of those enacted, we wish to highlight the Judicial Review and Courts Act 2022; the Nationality and Borders Act 2022; the Police, Crime, Sentencing and Courts Act 2022; and the Dissolution and Calling of Parliament Act 2022. As described earlier, many of these Bills enhance executive power, reduce the protection of human rights, weaken independent scrutiny, and undermine the international rule of law. A number of them also position the government in relation to the so-called 'culture wars', between the 'woke left' and culturally conservative right.

The Judicial Review and Court Act 2022 and the Bill of Rights Bill will be considered below. For the other enacted bills, we will limit ourselves to the following brief overview.

The Northern Ireland Protocol Bill allows the government to amend the domestic operation of the Ireland-Northern Ireland Protocol to the EU-UK Withdrawal Agreement.[86] The government's legal position is that the Bill is compatible with international law under the doctrine of necessity, which is said to permit deviations from international obligations in exceptional circumstances. Article 16 of the Protocol itself permits unilateral deviation from the Protocol's obligations where 'serious economic, societal or environmental difficulties that are liable to persist, or to diversion of trade'.

> *It is the Government's assessment that the legislation is currently the only way to provide the means to alleviate the socio-political conditions, while continuing to support the Protocol's objectives, including supporting North-South trade and cooperation, and the interests of both the EU and the UK.*[87]

Notably though, many international law experts regard the government's legal case as incorrect and tendentious.[88]

www.ons.gov.uk/economy/inflationandpriceindices/bulletins/consumerpriceinflation/december2022.

86 Bill of Rights Bill. Available at: https://bills.parliament.uk/bills/3182.

87 Truss, L., "Northern Ireland Protocol Bill: UK government legal position", Foreign, Commonwealth and Development Office, 13 June 2022. Available at: https://www.gov.uk/government/publications/northern-ireland-protocol-bill-uk-government-legal-position.

88 See eg. Solomon, S., "The Northern Ireland Protocol Bill: A comparative perspective on the parliamentary role in the amendment of major international agreements", UK Constitutional Law Association, 21 June 2022. Available at: https://ukconstitutionallaw.org/2022/06/21/solon-solomon-the-northern-ireland-protocol-bill-a-comparative-perspective-on-the-parliamentary-role-in-the-amendment-of-major-international-agreements%EF%BF%BC/.

The Higher Education (Freedom of Speech) Bill imposes civil liabilities on universities and student unions for failure to uphold certain freedom of speech obligations. The Bill creates a new Director for Freedom of Speech and Academic Freedom to be based in a government body which promotes the interests of students.[89] This is a heavily contested Bill in that it reflects the so-called 'culture wars' which have arisen between academics, activists and commentators. They disagree on competing rights and interests of trans people and biological women.[90] The government's Bill, in effect, is hence an attempt to side with so-called 'gender critical' women who have been ostracised for expressing the view that biological sex is immutable and who believe that the self-identification of gender will threaten the protection of vulnerable biological women.

The Retained EU Law (Revocation and Reform) Bill significantly reforms so-called 'retained EU law'. Following Brexit, the UK integrated the entire corpus of EU law and case law into its domestic legal system to be able to revise, replace, or retain the former in due course.[91] This integration was to guarantee legal certainty and stability during the aftermath of Brexit. There are five types of retained EU law: *EU-derived domestic legislation*, where Parliament passed a law to implement an EU obligation; *retained direct EU legislation*, including EU Regulations; *retained directly effective provisions of EU law*, such as Directives; *retained EU case law*, such as cases from the Court of Justice of the European Union interpreting provisions of EU law; and *retained general principles of EU law*.[92]

The Retained EU Law (Revocation and Reform) Bill underscores the government's intention to make a decisive political and legal break with the EU, by making all EU-derived subordinate legislation and retained direct EU legislation legally ineffective by the end of 2023. The Bill further abolishes the supremacy of EU law in the UK. Any Act of Parliament which implemented EU law obligations, however, will need to be repealed expressly by Parliament and will not be affected by this Bill. This Bill only affects secondary, subordinate or delegated legislation – that is, legislation produced by Ministers.

The Public Order Bill creates new offences relating to public order. It increases stop and search powers used by the police to regulate disruptive protests, empowers the Secretary of State to bring legal proceedings to limit and regulate protest-related activities, and enables courts to make serious disruption prevention orders setting restrictions on an individual's ability to carry out disruptive protests.[93] This Bill again positions the government in the 'culture wars', specifically in opposition to the disruptive and sometimes criminal public protests carried out by organisations such as *Just Stop Oil*, *Extinction Rebellion* and *Black Lives Matter*, about which there has been considerable political and public disquiet and resentment.

89 Higher Education (Freedom of Speech) Bill. Available at: https://bills.parliament.uk/bills/2862.

90 Adams, R., "Kathleen Stock says she quit university post over medieval ostracism", *The Guardian*, 3 Nov. 2022. Available at: https://www.theguardian.com/education/2021/nov/03/kathleen-stock-says-she-quit-university-post-over-medieval-ostracism.

91 This was accomplished via the European Union (Withdrawal) Act 2018.

92 Cowie, G., Shalchi, A., "Retained EU Law (Revocation and Reform) Bill", House of Commons Library Briefing, 17 Oct. 2022. Available at: https://commonslibrary.parliament.uk/research-briefings/cbp-9638/.

93 Public Order Bill. Available at: https://bills.parliament.uk/bills/3153.

The Dissolution and Calling of Parliament Act 2022 repeals the Fixed-Term Parliaments Act 2011. It returns to the Prime Minister the royal prerogative power to advise the Monarch to dissolve Parliament and call a general election. This means that British general elections may be called earlier than every five years as the Prime Minister decides. This is seen to benefit the governing party as the Prime Minister can call an election whenever he regards political and public opinion to be in his party's favour. The Act further contains a clause that excludes the courts from reviewing the legality of decisions and 'purported' decisions as to the dissolution of Parliament by the Prime Minister.

The Police, Crime, Sentencing and Courts Act 2022 allows police forces to place restrictions on protests that they believe would constitute the offence of public nuisance, including imposing starting and finishing times and noise limits. This would include one-person protests. Protestors disobeying such instructions from the police would commit a criminal offence.

The Nationality and Borders Act 2022 contains a number of provisions which critics have argued violate international refugee law, including a requirement that a person must claim asylum at a 'designated place'; making inadmissible any asylum claim made by EU nationals or persons connected to a safe third country; imposing a requirement on courts to give little weight to evidence provided late by a claimant; increasing the potential term of imprisonment for assisting an unlawful entry to life imprisonment; empowering the Home Secretary to remove a person's British citizenship without notice where that person cannot be reasonably contacted; and expediting removal and appeals processes.

In 2022, at least two important constitutional government reform programmes either reached completion or made considerable progress – one related to the reform of judicial review and the second related to the reform of human rights law. In the two sections that follow, we provide an overview of the stage reached in 2022 and how this compares with earlier years.

V. Judicial review reform

In the UK, judicial review is the process by which the High Court, exercising its common law 'inherent jurisdiction', reviews the legality of the actions of a public authority.[94]

In July 2020, the Secretary of State for Justice announced that there should be an Independent Review of Administrative Law (IRAL). The Review was framed as an attempt to explore the balance 'between enabling citizens to challenge the lawfulness of government action and allowing the executive and local authorities to carry on the business of government.' The Review specifically addressed (i) the codification of the grounds of judicial review and the reviewability of public decisions; (ii) the justiciability of certain executive decisions; (iii) the grounds and remedies available and whether these should differ depending on the subject-matter; and (iv) any additional procedural reforms necessary, such as time limits, costs, and standing.[95]

94 The inherent jurisdiction means that no statute provides the courts with this power, it emerges from judge-made common law – from case law.

95 Ministry of Justice, "The Independent Review of Administrative Law", 2020. Available at: https://www.gov.uk/

The IRAL examined reforms to judicial review that had not been seriously considered by previous governments. Previous reforms had mainly been procedural or related to costs, whereas the focus of IRAL's questions was constitutional in character. The Review was asked to address fundamental issues concerning the appropriate constitutional place of the courts vis-à-vis the executive and Parliament, including: whether the courts interfered inappropriately with executive decisions and, if so, whether certain types of executive decisions should be immune from judicial review in the first place; whether appropriate tests of justiciability had been adopted; and perhaps most importantly whether judicial review should be based on a statute and whether the grounds for review should be codified.[96]

In March 2021, IRAL's full report was released.[97] The answers to the four main questions posed to the panel were: no statutory codification of grounds of judicial review; no statutory reform to justiciability; and no statutory reform to the approach of the courts to decision-making. The panel did, however, make two recommendations for legislative reform. The first was to allow judges to suspend the effect of quashing orders and the second was to abolish a specific form of judicial review known as *Cart* judicial reviews.[98] A quashing order is a judicial order which strikes down and invalidates an unlawful administrative act as though it had not occurred. *Cart* judicial reviews, as developed in *R (Cart) v Upper Tribunal*[99] involve a person challenging errors made by subordinate statutory tribunals, and usually related to immigration and social security matters. Though this ouster clause does not render executive decisions immune from judicial challenge, the significance of this ouster is that the then Lord Chancellor indicated that the language of the ouster clause would be used in the future to exclude other forms of judicial review where the Government would find it appropriate.[100] This has, in fact, already happened. In 2023, Clause 13 of the Government's Illegal Migration Bill – which in effect is a ban on seeking asylum in the UK unless an individual travelled through approved routes – uses the same language to exclude judicial review of executive decisions to detain asylum seekers for twenty-eight days.[101]

Concurrent with the release of the report, the Secretary of State for Justice launched a consultation in which he made a number of proposals that went beyond the findings in the IRAL report including: the introduction of legislation for presumptive or mandatory

government/groups/independent-review-of-administrative-law.

96 Konstadinides, T., Marsons, L., Sunkin, M., "Reviewing judicial review: The constitutional importance of the Independent Review of Administrative Law", *UK Constitutional Law Association*, 24 Sept. 2020. Available at: https://ukconstitutionallaw.org/2020/09/24/theodore-konstadinides-lee-marsons-and-maurice-sunkin-reviewing-judicial-review-the-constitutional-importance-of-the-independent-review-of-administrative-law-2020/.

97 Independent Review of Administrative Law, "Independent Review of Administrative Law: Final report", 2021. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/970797/IRAL-report.pdf.

98 Marsons, L., "The UK's Independent Review of Administrative Law: Findings, recommendations and pleas", *Admin Law Blog*, 24 March 2021. Available at https://adminlawblog.org/2021/03/24/the-uks-independent-review-of-administrative-law-report-findings-recommendations-and-pleas/.

99 [2011] UKSC 28.

100 Lord Chancellor, Sir Robert Buckland KC., "Lord Chancellor's keynote speech on judicial review", 2021. Available at: https://www.gov.uk/government/speeches/lord-chancellors-keynote-speech-on-judicial-review.

101 Illegal Migration Bill. Available at: https://publications.parliament.uk/pa/bills/cbill/58-03/0284/220284.pdf.

suspended quashing orders; legislation for presumptive or mandatory prospective-only remedies; and legislation for a so-called 'safety valve' designed to require the courts to give effect to ouster clauses that exclude judicial review.[102]

However, the initial version of the government's Bill published in July 2021 did not go as far as its consultation. It went beyond IRAL's recommendations but only modestly so. The initial Bill, for example, contained a 'presumption' in favour of suspended or prospective-only quashing orders. This would mean that judges had to suspend or give prospective-only effect to a quashing order unless there was a 'good reason'. After parliamentary pushbacks against this presumption in the House of Lords, the former was removed from the Bill. In its final version, the Bill hence provides that judges have the power to suspend or make prospective-only quashing orders. However, judges are not obliged to do so.[103]

In April 2022, the *Judicial Review and Courts Act 2022* was formally adopted. It allows courts to grant a suspended quashing order and/or to limit the retrospective effect of a quashing order, and abolishes Cart judicial reviews.

VI. Human rights reform

In December 2020, the Secretary of State for Justice, Robert Buckland, announced that an Independent Human Rights Act Review (IHRAR) would be conducted. The *Human Rights Act* 1998 is the Act of Parliament that implements many of the rights contained in the European Convention on Human Rights into British law. The IHRAR specifically focused on whether and how the *Human Rights Act* had affected the relationship between British judges and the European Court of Human Rights, and how the Human Rights Act had affected the constitutional relationship between the government, the judiciary, and Parliament.[104]

In December 2021, the Secretary of State released the IHRAR's report. The report recommended various changes to the *Human Rights Act*. The most notable changes for the purpose of this chronicle were amendments to sections two and three of the Act. On section 2 relating to the duty to take into account Strasbourg case law IHRAR recommended clarifying that fundamental rights as provided for in common law are the first port of call before Convention rights are considered. on section 3, relating to the duty to interpret legislation in conformity with the Convention, IHRAR recommended clarifying that courts should use normal rules of statutory interpretation before turning to the interpretive duty in section 3.[105]

102 Ministry of Justice, "Judicial Review Reform: The government response to the Independent Review of Administrative Law", March 2021. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/975301/judicial-review-reform-consultation-document.pdf.

103 Law Society of England and Wales, "Big win for rule of law as government restores judges' discretion in judicial review reform", 28 April 2022. Available at: https://www.lawsociety.org.uk/topics/human-rights/big-win-for-rule-of-law-government-restores-judges-discretion-in-judicial-review-reform.

104 Independent Human Rights Act Review. Available at: https://www.gov.uk/guidance/independent-human-rights-act-review.

105 Independent Human Rights Act Review, "Independent Human Rights Act Review: Full report", Dec. 2021. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040525/ihrar-final-report.pdf.

By this time, a new Secretary of State for Justice, Dominic Raab, had been appointed who was rather sceptical of the *Human Rights Act* and had even published a book against it in the past.[106] Upon becoming Secretary for Justice, Mr. Raab launched a consultation as regards the Human Rights Act in which he introduced proposals that went radically beyond the report's recommendations. Those included: a repeal of the interpretation duty for judges under section 3; the removal of section 2; the introduction of a 'permission stage' for human rights claims whereby an individual would have to prove a 'significant disadvantage' before bringing a human rights claim; and reforms regarding the application of the right to family life enshrined in Article 8 ECHR to foreign offenders.[107]

The government's Bill based on this consultation, known as the Bill of Rights Bill, repeals the *Human Rights Act* 1998 and replaces it with a new Bill of Rights. Next to the proposed repeal of section 3 and the removal of section 2, the Bill introduced a prohibition on judges recognising any new positive obligations on public authorities; a restriction on the extra-territorial application of the Bill of Rights; the duty to ignore interim measures issued by the European Court of Human Rights; and a prohibition on British judges to interpret ECHR rights in a more expansive way than the European Court of Human Rights.[108]

At the time of writing, the future of the Bill of Rights Bill remains uncertain. The Bill awaits its second reading in the House of Commons but no date has yet been fixed. Rishi Sunak has deprioritised the Bill for now but it is not officially been abandoned.[109]

VII. Civil service reforms and a general political malaise reflected in the relationships between the civil servants and their political superiors

The UK civil service is a major arena for political conflict between the government and civil servants. Over time, ministers have sought to exert greater direct control over the most senior civil servants. The last couple of years have seen a number of resignations by senior civil servants due to tensions with their political masters.[110] In 2022, the Independent Adviser on Ministerial Interests resigned from his role, publicly venting his frustration at the impossible position the Prime Minister had put him in when it came to the respect of the Ministerial Code during Partygate.[111]

This conflict at the top level is interlinked with a number of attempts to reform the civ-

106 Raab, D., *The Assault on Liberty: What went wrongs with rights*, 2009, Fourth Estate.

107 Ministry of Justice, "Human Rights Act reform: A Modern Bill of Rights – A consultation to reform the Human Rights Act 1998", Dec. 2021. Available at: https://consult.justice.gov.uk/human-rights/human-rights-act-reform/supporting_documents/humanrightsreformconsultation.pdf.

108 Bill of Rights Bill. Available at: https://bills.parliament.uk/bills/3227.

109 Allegretti, A., "Sunak's next U-turn may be to ditch Raab's bill of rights", *The Guardian*, 8 Dec. 2022. Available at: https://www.theguardian.com/law/2022/dec/08/rishi-sunak-next-u-turn-may-be-to-ditch-dominic-raab-bill-of-rights.

110 For a number of examples, see Marsons, L. and Marique, Y., "The politicisation of the UK civil service: causes, manifestations, and evolutions", *Revista Catalana de Dret Públic* 2022, vol. 65, pp. 93-111. Available at: https://doi.org/10.2436/rcdp.i65.2022.3879.

111 See the official resignation letter following a painful parliamentary quizzing: https://www.gov.uk/government/publications/correspondence-from-lord-geidt-and-the-prime-ministers-response.

il service over the years. The latest such attempt includes Boris Johnson's plans to reduce the home civil service by 91,000 positions, bringing numbers down to 2016 levels.[112] In July 2022, the government announced a review of civil service governance to be chaired by Lord Maude, a former Conservative Cabinet Office Minister.[113] In October 2022, the National Audit Office published a report on leadership development in the UK Civil Service.[114] The report outlined reforms which are currently implemented by the Cabinet Office, including the Government Skills and Curriculum Unit (GSCU) which has developed a single curriculum for civil servants based on five strands: public administration, working in government, leading and managing, specialist skills and domain knowledge.

VIII. Public contracts

In the area of public procurement and public contracts, 2022 was a very busy and eventful year in the UK. In particular, there were several important cases regarding the government's approach to procurement during the Covid-19 pandemic and crucial insights into the government's intended post-Brexit procurement regime.

One series of cases is that initiated by the Good Law Project, a non-profit-campaign group. Based on crowdfunding,[115] this group initiated a number of judicial challenges[116] against contracts awarded during the first wave of the Covid-19 pandemic. One of these challenges was directed against the VIP lane organised to outsource equipment during the Covid-19, as described in section II.B above. The case concerned the procurement of over thirty-two billion items of PPE, with a total value of £14 billion, purchased through more than one thousand directly negotiated and awarded contracts using the negotiated procedure without prior publication (as provided in the *Public Contract Regulations* 2015). This VIP lane triggered political concerns, but here we turn to the judicial challenges against this practice.

The High Court[117] held that the 'VIP Lane' established by the government to receive offers of personal protective equipment and medical devices from the onset of the pandemic in March 2020 breached the obligations of equal treatment and transparency on contracting authorities. The VIP lane relied on the negotiated procedure without prior negotiation, with special support granted to prospective contractors by government of-

112 Lee, J. and Rhoden-Paul, A., "Boris Johnson wants to cut up to 91,000 civil service jobs", *BBC*, 13 May 2022.

113 Cabinet Office, *Lord Maude to lead review into Civil Service governance and accountability*, 27 July 2022.

114 National Audit Office, *Leadership development in the civil service* (2022-23 HC 798).

115 This practice is used in the UK to address the problems of financial access to the courts: Guy, S., 'Mobilising the market: an empirical analysis of crowdfunding for judicial review litigation' *Modern Law Review* 2023, vol. 86, issue 2, pp. 331-363, first published: 3 Nov. 2022.

116 Eg.: *R (on the application of the Good Law Project) v Minister for the Cabinet Office [2022] EWCA Civ 21* and *R (on the application of the Good Law Project and another) v The Secretary of State for Health and Social Care [2022] EWHC 46 (TCC);* R. (on the application of Good Law Project Ltd) v Secretary of State for Health and Social Care [2021] EWHC 2595 (TCC); [2021] 9 WLUK 352 (QBD (TCC)).

117 R. (on the application of Good Law Project Ltd) v Secretary of State for Health and Social Care [2022] EWHC 46 (TCC); [2022] P.T.S.R. 644; [2022] 1 WLUK 41 (QBD (TCC)). Henty, P., "Application of the equal treatment and transparency principles to negotiated procedures without prior publication under the Public Contracts Regulations 2015: R. (Good Law Project and Every Doctor) v Secretary of State for Health and Social Care", *Public Procurement Law Review (PPLR)* NA92-NA100.

ficials and high-ranking individuals, such as MPs, government officials and senior officials. Regulation 18 of the *Public Contracts Regulations* 2015 imposes several obligations of equal treatment and transparency on contracting authorities. To that effect contracting authorities are to treat economic operators without discrimination, act in a transparent and proportionate manner and should not artificially narrow competition by designing procurement with the intention of unduly favouring or disadvantaging certain economic operators. This system is a remainder of European law in that it is based on the Treaty on the Functioning of the European Union (TFEU) and the EU procurement directives.

This VIP lane system – or the use of the negotiated procedure without prior notification – was not unlawful in itself,[118] as the circumstances linked to Covid-19 (emergency, need to supply quickly important lacking equipment) justified relying on this procedure. However, the operation of the VIP lane resulted in preferential treatment to suppliers who had been nominated by senior referrers. The VIP lane was better resourced and able to respond to offers more promptly than offers that were received by the regular procurement portal. Given the urgency of securing PPE, the speed with which an offer was considered and accepted improved the chances of securing a contract. This could have been objectively justified, but a senior referrer's endorsement was not one of the factors that constituted an objective justification. The operation of the VIP lane therefore constituted a breach of the principle of equal treatment. Campaigners also used the freedom of information request procedure in an attempt to infiltrate this opaque system. As no information was provided on commercial interests, it was challenged. It was found that in the absence of any evidence of wrongdoing, the balance between the reasons for withholding the information and the reasons for disclosing it was in favour of withholding it.[119]

Beyond these cases, the government has also initiated proposals to reform the procurement regulation following Brexit. Under the EU system – which follows the World Trade Organisation's Government Procurement Agreement (GPA) –, the UK had adopted a copy-paste approach[120] to the transposition of the EU procurement Directives 2014/23,[121] 2014/24[122] and 2014/25,[123] with only minor changes in the *Public Contracts Reg-*

118 It was also accepted that the procedure was 'strictly necessary' in *R (on the application of the Good Law Project) v Minister for the Cabinet Office* [2022] EWCA Civ 21. Gough, K., Gilbert J. & Milne, A., 'Procurement in times of extreme urgency: R. (Good Law Project) v Minister for the Cabinet Office', *PPLR* 2022, NA86-NA91.

119 *Greenwood v Information Commissioner [2022] UKFTT 333 (GRC); [2022] 9 WLUK 108 (FTT (GRC))*.

120 For this approach in the transposition of the 2014 Directives: Henty, P., 'Implementation of the EU Public Procurement Directives in the UK: the Public Contracts Regulations 2015', *PPLR* 2015, NA74–NA80; Sanchez-Graells, A., 'The copy-out of Directive 2014/24/EU in the UK and its limited revision despite the imminence of Brexit', *PPLR* 2019, pp. 186–200. This approach changed slightly in 2015 when the Public Contracts Regulations 2015 departed from the minimum transposition of the 2014 EU procurement directives to include a few additional obligations for contracting authorities: Arrowsmith, S. & Smith, S., 'The 'Lord Young' reforms on transparency of information and selection of firms to be invited to tender under the Public Contracts Regulations 2015: A practical analysis of the legal provisions', *PPLR* 2018, pp. 75–95.

121 Dir. (EU) nº 2014/23/EU, 26 Feb. 2014, of the European Parliament and of the Council on the award of concession contracts OJ L 94, 28.3.2014, pp. 1–64.

122 Dir. (EU) nº 2014/24/EU, 26 Feb. 2014, of the European Parliament and of the Council on public procurement and repealing Directive 2004/18/EC OJ L 94, 28.3.2014, pp. 65–242.

123 Dir. (EU) nº 2014/25/EU, 26 Feb. 2014, of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC OJ L 94,

ulations 2015, the *Utilities Contracts Regulations* 2016, the *Concession Contracts Regulations* 2016, and a part of procurement also regulated in the *Defence and Security Public Contracts Regulations* 2011. Upon leaving the EU,[124] the UK became an independent GPA member on 1st January 2021, which means that it needs to respect the obligations resulting from this international instrument, including the principles of non-discrimination, transparency and procedural fairness.[125] Within the limits of the GPA,126 the UK Government seeks to deliver its Brexit promises, especially in terms of cutting red-tape, unleashing innovation127 and 'Buy[ing] British'.[128]

In 2020, the Government launched a Green Paper *Transforming public procurement*[129] with the purpose of simplifying procurement. The latter relied on six central principles: public good; value for money; transparency; integrity; fair treatment of suppliers; and non-discrimination.[130] The results of this consultation[131] showed significant support for these principles. One point highlighted by commentators was that the Government intended the *Bill* to be extensively supplemented by guidance, models, templates, and case studies prepared by the executive to explain and interpret the statutes.[132] However, case law has repeatedly established that public bodies must adhere to guidance or provide good reasons for deviating from them,[133] making the quality of these soft law instruments extremely relevant for day to day practice.[134] In addition, there is a recurring issue as to which material needs to be included in primary legislation as 'disguised legislation' appears in tertiary legislation (such as guidance) too frequently according to the House of Lords.[135]

28.3.2014, pp. 243–374.

124 *The Public Procurement (Amendment etc) (EU Exit) Regulations 2020, SI 2020/1319* provides for an amended continuation of the EU regulation post-Brexit but the EU regulations for contracts below the thresholds did not continue to apply (*Adferiad Recovery Ltd v Aneurin Bevan University Health Board [2021] EWHC 3049 (TCC).*)

125 Specific Annexes apply to various GPA Members identifying the entities obligated, the scope of their obligations and the thresholds of the procurement they apply to – see here: https://www.wto.org/english/tratop_e/gproc_e/gp_app_agree_e.htm.

126 Telles P. & Sanchez-Graells, A., 'Examining Brexit Through the GPA's Lens: What Next for UK Public Procurement Reform?' *Public Contract Law Journal* 2017, vol. 47, issue 1, pp. 1–33; Sanchez-Graells, A., 'The growing thicket of multi-layered procurement liberalisation between WTO GPA parties, as evidenced in post-Brexit UK', *Legal Issues of Economic Integration* 2022, vol. 49, nº 3, pp. 247–268.

127 *Conservative Manifesto 2019*, p. 40. Available at: https://www.conservatives.com/our-plan/conservative-party-manifesto-2019.

128 Ibid, pp. 42-43.

129 Cabinet Office, 'Transforming public procurement', Dec. 2020, CP 353. Available at: https://www.gov.uk/government/consultations/green-paper-transforming-public-procurement.

130 Cabinet Office, 'Transforming public procurement', Dec. 2020, CP 353, para. 27.

131 Cabinet Office, 'Transforming public procurement: Government response to consultation', Dec. 2021, CP 556.

132 Arrowsmith, S., "Transforming public procurement law after Brexit: some reflections on the Government's Green Paper", *PPLR* 2021, pp. 103–123; Arrowsmith S., 'Reimagining public procurement law: proposals for post-Brexit reform' *Public Law* 2021, pp. 69-87.

133 *Good Law Project Ltd v Secretary of State for Health and Social Care* [2022] EWHC 2468 (TCC).

134 Arrowsmith, S., 'Extended editorial: transforming public procurement in the UK: analysis of the Government's response to its Green Paper consultation', *PPLR* 2022, pp. 45–75 & 47–48.

135 Secondary Legislation Scrutiny Committee, *Government by Diktat: A call to return power to Parliament* (2021-22 HL 105); Delegated Powers and Regulatory Reform Committee, *Democracy Denied? The urgent need to rebalance power*

A *Procurement Bill* was tabled in the House of Lords on 11 May 2022.[136] Following comments made during the consultation process,[137] a clear distinction is now made between 'principles' and 'objectives'. Key procurement principles such as non-discrimination and equal treatment – which are key principles in the EU system[138] – are included in the Bill. Rephrasing the objectives mentioned in the *Green Paper*, the Bill now lists four objectives: value for money; maximising public benefit; transparency;[139] and integrity. The government's main objectives are the following:

- to speed up and simplify public procurement processes
- to place value for money at the heart of procurement
- to create greater opportunities for small businesses and social enterprises to innovate public service delivery.[140]

According to the Government, this reform will remove 350 existing rules derived from the EU, hence promoting innovation through simplification. It will set up 'a single digital platform for suppliers to register their details that can be used for all bids, while a single central transparency platform will allow suppliers to see all opportunities in one place'. Such a platform will help SMEs get prompt payment 'on a much broader range of contracts'.[141] Other changes provide for public procurement to be restricted to UK suppliers below certain thresholds so that the government can continue to pursue its employment policies. In addition, the automatic suspension of the procurement and the debarment system are to be adapted.[142] The Bill applies to Wales, England, and Northern Ireland but not to Scotland.[143]

Some of the changes – such as the payment of procurement invoices within 30 days – are definitively good news for contractors, and the e-voicing system that is championed will bring more clarity and recording to the procurement.[144] Early payment has been a long-standing issue in procurement in the UK. However, the claim that the system will be SME-friendly needs to be taken with a pinch of salt. It depends whether SMEs will be the direct contractors of the public authorities, and thus on the overall success of the Bill once adopted. If the main contractor is a major enterprise, it will be paid within 30 days, but the sub-contractor will only be paid subsequently.

between Parliament and the Executive (2021-22 HL 106).

136 Available at: https://publications.parliament.uk/pa/bills/lbill/58-03/004/5803004en01.htm.

137 Arrowsmith, S. (2022), 'Extended editorial: transforming public procurement in the UK', op. cit., p. 49.

138 De la Rosa, S. & Valcarcel Fernandez, P. (eds.), *Les principes des contrats publics en Europe / Principles of public contracts in Europe*, 2022, Brussels, Bruylant.

139 For a detailed analysis of this principle under the existing system, see Butler, L., 'Transforming public procurement in the United Kingdom: regulating for open and transparent contracting', *PPLR* 2022, pp. 120–169.

140 Coleman, C., *Procurement Bill* [HL] HL Bill 4 of 2022–23, Library Briefings, 20 May 2022.

141 Ibid, p. 2.

142 See *Procurement Bill*, clauses 56-61; Hawley, S., 'What Makes a Good Debarment Regime? Keeping Corrupt and Fraudulent Companies Out of Post-Brexit Public Procurement' *PPLR* 2021, p. 124.

143 House of Commons Public Administration and Constitutional Affairs Committee, 'Oral evidence: Common frameworks', 22 March 2022 (2021-22 HC 1138), Q6 [Jacob Rees-Mogg].

144 Sanchez-Graells, A., Initial Comments on the UK's Procurement Bill: A Lukewarm Assessment, 19 May 2022. Available at: https://ssrn.com/abstract=4114141 or http://dx.doi.org/10.2139/ssrn.4114141.

Other aspects of the Bill were viewed with caution by commentators. First, it is not certain that with its more than hundred clauses and eleven schedules, and its sometimes uncertain application to utilities, concessions, defence, health care and local government,[145] it will be as easy as the government believes.[146] Secondly, the reforms were an opportunity to push for more digitalisation of the procurement system but this has not been done.[147] Thirdly, as previously discussed, obtaining the suspension of procurement has been problematic. While the consultation had suggested that the test used to award the suspension would be made more procurement specific, the Bill did not seem to have done so.[148] Fourthly, the remedy of 'ineffectiveness' was not included in the consultation process, and comments on the consultation indicated that pre-contractual remedies should take precedence over post-contractual remedies.[149] The Bill changed the name of the remedy of 'ineffectiveness' to 'setting aside' as well as the ground for this remedy. The Bill also provides that the remedy is to be available in case of unlawful contractual modifications. It should also be more accessible, although the Bill introduces discretion as a legitimate exception to the remedy. However, no ineffectiveness remedy had ever been granted in the UK,[150] meaning that some 'improvements' on the existing system will necessarily be 'unchartered territory'.[151] A major critique of the Bill relates to this last point, stating that the proposed system under the *Procurement Bill* will be unnecessarily more complicated than the existing system.[152]

IX. Looking to the future

According to consistent opinion polling, there is a strong chance that the Conservative Party, after twelve years in government, will lose the next general election, with the centre-left Labour Party likely to take office. Sir Keir Starmer, a former Director of Public Prosecutions and human rights lawyer, is the Labour Party leader and is likely to be the next British Prime Minister. In 2022, the Labour Party has announced or suggested a number of major constitutional reforms should they be elected into government.

Amongst others, the Party's programme would foresee a major reform the House of Lords. The appointed and partly hereditary second chamber of the Westminster Parliament would thereby be replaced with a Senate of Nations and Regions. Currently, the House of Commons – the elected chamber of Members of Parliament – has primacy in that the House of Lords cannot vote on money matters related to tax and spend-

145 Arrowsmith, S. (2022), 'Extended editorial: transforming public procurement in the UK', op. cit., p. 56.

146 Though it will probably be a bit simpler than the EU system according to Arrowsmith, S. (Ibid), but the author commented on the Consultation response, not the bill. *Add.* Sanchez-Graells, A., 'The UK's Green Paper on Post-Brexit Public Procurement Reform: Transformation or Overcomplication?', *EPPPL* 2021, pp. 4-18.

147 Sanchez-Graells, A. (2022), "Initial Comments on the UK's Procurement Bill", op. cit., p. 4.

148 Coleman, C. (2022), *Procurement Bill*, op. cit., pp. 27–28, reporting Eversheds Sutherland's comments on the Bill.

149 Christidis, A., 'What happened to the remedy of ineffectiveness? It was "set aside" - the reform of post-contractual remedies in public contracts in the United Kingdom', *PPLR* 2023, pp. 44–62.

150 A 2022 case dealt with the ineffectiveness remedy, but the judge decided not to grant it on public interest grounds: *Consultant Connect Ltd v NHS Bath and North East Somerset, Swindon and Wiltshire Integrated Care Board* [2022] EWHC 2037 (TCC); [2022] 7 WLUK 466 (QBD (TCC)).

151 Ibid, p. 49.

152 Ibid, p. 60.

ing. The Commons may in certain circumstances, insist that bills it approves become law without the consent of the Lords. This fundamental legal relationship would not change, but according to some commentators, the very fact that the Senate would be elected would give it a democratic legitimacy that the Lords do not possess and would alter the political and constitutional balance between the two chambers.[153]

It is interesting to note that former Labour Prime Minister, Gordon Brown, was asked to produce a report on constitutional change in the modern UK. Titled *A New Britain: Renewing Our Democracy and Rebuilding Our Economy*, the report recommends comprehensive new devolution to nations, regions and local authorities of the UK, as well as a constitutionalisation of social and economic rights.[154] None of these plans are certain and all depend on the outcome of the next British general election. However, they are legal entrenchments not normally seen in the UK, and hence worth keeping an eye on.

153 Sergeant, J., "Labour's proposals for a reformed House of Lords need more work", Institute for Government, 22 Nov. 2022. Available at: https://www.instituteforgovernment.org.uk/blog/labours-proposals-reformed-house-lords.

154 McHarg, A., "The future of the territorial constitution under Labour: The report of the Commission on the UK's Future", UK Constitutional Law Association, 8 Dec. 2022. Available at: https://ukconstitutionallaw.org/2022/12/08/aileen-mcharg-the-future-of-the-territorial-constitution-under-labour-the-report-of-the-commission-on-the-uks-future/.

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Miscellaneous

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Book review: Susan Rose-Ackerman, Democracy and Executive Power. Policymaking Accountability in the US, the UK, Germany and France[1].

Giacinto della Cananea
Full professor of Administrative Law, Bocconi University

1 New Haven, Yale University Press, 2021, p. 476.

In this monograph, Susan Rose-Ackerman, Professor at Yale University, undertakes the comparison of four established democracies – France, Germany, the United Kingdom, and the United States – with regard to their efforts in ensuring the accountability of executive policymaking.

From the outset, one should stress that Professor Rose-Ackerman is eminently suited to perform this task by both approach and experience. She has a strong background in political economy and shows full awareness of the limitations of certain strands in law and economics, which neglect the importance of collective interests such as environmental protection. She has taught administrative law in the US and has conducted research in the other three countries. She is also an editor of one of the most recent treatises of comparative administrative law. The legal systems selected for comparison, moreover, are well chosen and seem particularly promising to me. Not only are both common law – UK and US – and civil law jurisdictions – France and Germany – covered, but all four chosen systems have developed systems of judicial review designed to protect the individual whose rights or interests are susceptible to be adversely affected by executive decisions. At the same time, those systems differ not only from an institutional perspective, as they range from presidential systems to parliamentary democracies, but also from the viewpoint of the rules governing administrative procedure. Most of them have adopted some kind of administrative procedure legislation, while there is no such thing in the UK. Instead, the courts in the UK seem more willing to relax the requirements for standing than they seem to be in Germany, for example. This procedural differentiation has only partly resulted from traditions. When the US adopted the federal Administrative Procedure Act (APA) (1946), this was the result of a policy change. The vast powers exercised by administrative agencies during and after the New Deal period required a procedural framework which would ensure both accountability as well as the protection of the individual.

At the outset, Professor Rose-Ackerman observes that bureaucrats are more important than the traditional 'transmission-belt model' (to borrow Richard Stewart's well-known metaphor), according to which they mechanically grant benefits and impose costs, would suggest. She argues that policymaking 'necessarily requires discretion and judgment inside' the various public authorities, as legislation more often than not delegates authority through open-textured provisions and broad policy goals (p 2). However, the author adds, 'too often administrative law limits itself to the protection of individual rights and ignores the way in which the law can further democratic values in executive policymaking' (p 1). She is equally critical of the fact that too often bureaucracy is criticized by populist leaders in a generic manner. She stresses that the real challenge is, however, to establish a public law that enhances the democratic accountability of bureaucrats and political appointees.

The book is divided into eight chapters. Chapter one presents the traditional view according to which enforcing the rules of law is meant to hold the government to account, but also acknowledges the difficulties that arise in the real world. The chapter distinguishes three types of accountability: performance, right-based and policy-oriented. While the first two are well established in public law discourses, it is the last one that is emphasized, with a view to understanding the ways in which public law – as distinct from private law – can promote democratic legitimacy and effective policy design. It serves, for example, 'to inform citizens and interest groups that a policy choice is imminent and to give them an opportunity to express their opinions' (p 19). As a result, 'law has a role in constraining and managing government performance and policymaking'.

The second chapter discusses some constitutional paradoxes. It considers the relationship between constitutional structures and executive policymaking and criticizes the widely held view that there is a sharp distinction between presidential and parliamentary systems. Interestingly, the comparative horizon is broadened as the author expands the range of aspects to consider, particularly administrative procedure legislation, which focuses on the APA and judicial review of compliance with procedural rules in the US. This model differs from that of the UK and Germany, where the APA applies to individual administrative decisions rather than regulations. However, the German Constitutional Court has recognized that rulemaking can better protect fundamental rights than case-by-case adjudication. Similarly, French courts have required public input into regulatory policymaking, initially in the environmental field.

Chapter three examines policymaking within the executive from the twin angles of democratic accountability and competence. The comparative analysis shows that major public infrastructure projects, as well as local development plans are subject to public input, but in a variety of ways. For example, while in the US legislative requirements apply, in the English legal system there is governmental guidance to public authorities, and in France legislation requires public authorities to hold public debate with all interested parties ("*débat public*"). Interestingly, this has been considered as a model within other European legal systems. EU law as well as the Aarhus Convention are other important factors of diffusion of information and participation.

Chapter four takes an institutional perspective in that it considers the reasons why agencies charged with administrative functions and powers should be independent. Two types of bodies are examined: public agencies that regulate specific industries or sectors and quasi-public institutions that set standards or control access to an industry or profession. The US pioneered the development of agencies of the first type, but similar institutions have also been created in Europe, often in conjunction with liberalization determined by EU norms. Chapter five 'moves from process to substance' (p 13), in the sense that it examines the value and limits of cost-benefit analysis and impact assessment. Impact assessments often form a common basis for policy-making, but general principles, like precaution and proportionality, are equally important in this regard. Nevertheless, Professor Rose-Ackermann takes a critical stance towards the currently dominating role of cost-benefit analysis and impact assessment in government decision-making. She argues that, though cost-benefit analysis can be helpful, 'taken by itself it provides little guidance about how to make tradeoffs' (p 125). She convincingly adds that using money as a metric is questionable.

Similarly, chapter six considers critically recent efforts to involve citizens in public decision-making. Analytically, various forms of participation are considered, with and without deliberation, the former being the only one that deals with democratic accountability. The frequent critiques of public involvement are discussed, including costs and time, as well as the citizens' lack of knowledge and motivation. Chapter seven, in turn, focuses on the courts. Initially, it criticizes the traditional court-centered perspective that has dominated the debate on administrative law and analyses how the courts in different legal systems have been confronted with executive rulemaking. It then describes the varieties of judicial review and discusses the ways through which judges can provide oversight of the process without interfering with the policymakers' substantive choices. The final chapter serves to put the four national systems into a broader international context. It is argued that, though the analysis focuses on four legal systems, the outcome has relevance for representative democracies everywhere because 'all democracies face the same

basic challenges if they seek to institutionalize accountable executive policymaking processes'. Although each country needs its own diagnosis, there are several issues that recur and provide direction for reform, including, among other things, procedures for executive rulemaking, participation, balanced oversight of independent agencies, and judicial review.

Based on this brief description of the book, I would like to discuss three points of general interest. The first is descriptive. Professor Rose-Ackerman emphasizes a distinction in administrative procedures which we often blur. Administrative procedures exist in all the four legal systems, and more generally in modern administrative systems. Everywhere they are instruments of executive policymaking. However, while in the US policymaking, especially through rules and interpretative statements, is the dominant theme, as in the case of the Federal Communication Commission, we insist on adjudicatory procedures in Europe. Thus, for example, in both France and Germany judicial doctrines, legal scholarship and administrative procedure legislation focus on administrative acts, as distinct from rules. Professor Rose-Ackerman is well aware that the US model of notice and comment is criticized for being time-consuming and costly. However, she observes that empirical studies 'largely disconfirm the claim of excessive delay' (p 171). She suggests that delays are often driven by strategic considerations (p 174). She adds that business interests have a disproportionate influence on the outcome of administrative procedures. Given the heavy business involvement, openness and transparency are necessary. Comparatively, public participation has a lesser scope in Europe, though consultation is increasingly used to increase the public acceptance of major infrastructure project.

When we shift from administrative procedure to judicial review, another distinction arises. Standing requirements are interpreted more restrictively by US courts than by European ones. In the UK, for instance, one generation or two ago, some scholars were unhappy with the timidity of the English judges in limiting the possibility of judicial review of administrative action. However, the courts have now developed a broader notion of standing that explicitly covers third-party intervenors. Moreover, though there is no general common law duty to consult those who may be affected by a measure, several judicial decisions – including *Moseley* (2014) – have recognized the value of consultation (p 197). This is interesting in light of the author's remark that 'the British constitutional tradition is skeptical … of the democratic value of public participation in government' (p 7). This shows that traditions are not immutable, but can, and do, evolve. In Germany, though the focus is traditionally on the protection of rights, judicial review of executive rulemaking is not particularly frequent, except in the field of environmental law (p 216) which might be due to the Aarhus Convention. In France, judicial review of the administration is more open as the courts interpret the interest-based requirement generously. Thus, for example, a user of a public service was allowed to contest the organization of the agency entrusted with its delivery (*Syndicat des proprietaires et contribuables du quartier Croix de Seguey-Tivoli*). France also employs a rather favorable judicial policy as regards the admission of briefs from *amici curiae*. The seventh chapter, in particular, ends with an important remark; that is, while judicial review of administrative policymaking processes is linked to the country's constitutional structure, the courts often go beyond the protection of individual rights in fulfilling their oversight role. More generally, review of procedural requirements allows the courts to check the functioning of the regulatory state. One may be tempted, therefore, to argue that, while the three European legal systems have continued to focus on judicial review, the US took a partially different path

when it decided to adopt a general legislative framework governing administrative procedure, the same choice Austria had made earlier, in 1925.

The second point I wish to make here is normative in nature. The purpose of Professor Rose-Ackerman's book is to develop a regime-based, comparative approach not only for those systems, but on a global basis, as far as democracies are concerned. In this respect, it is important to ensure that the executive is accountable, especially in democracies where the legislature has few resources to check executive action. *A fortiori*, this is all the more important in countries that are making the transition to democracy out of an authoritarian tradition, as in the cases of Hungary and Poland after 1989. In both countries the absence of procedures for executive rulemaking 'left a loophole for unaccountable executive policymaking' (p 250), which has been worsened by political leadership. The lack of consultation may, however, have other explanations. For example, in Germany, there is a strong focus on the chain of legitimacy that is based on representative institutions, as well as on the courts. The problem with both Hungary and Poland is that, in addition to the gaps in their administrative procedure legislation, the role of the courts is undermined by the political attempts to undermine judicial independence. Moreover, the court's capacity to hold governmental bodies accountable becomes difficult if legislation provides no duty either to consult – as is the case in Hungary – or to give reasons. Professor Rose-Ackerman feels quite correctly that, while criticism of certain ideas and beliefs that have emerged in some countries of Eastern Europe – for example, the idea of 'illiberal democracy' – are traditionally regarded from the viewpoint of political processes, a combined analysis of constitutional and administrative law is both important and fruitful, because it sharpens our capacity to identify the loopholes of national systems of public law. These loopholes include the lack of consultation, the inadequacy of safeguards against vested interests in public decision-making, as well as parliamentary oversight. It is always difficult, of course, to determine the impact of any formal legal instrument in a given situation. One can plausibly argue, however, that if legislation requires public authorities to furnish reasons for the choices they made, this enables the courts to check whether agencies have correctly followed pre-established procedures and whether the result is coherent with the objectives set out by the legislative branch. In this respect, the last chapter of the book provides readers with an interesting and helpful repertoire of instruments (listed at p 266) that can enhance accountability.

The third point I would like to raise is methodological in nature in that it concerns comparative legal analysis. In the concluding chapter, Professor Rose-Ackerman explains that her approach differs from two 'excessively deterministic strands that currently dominate the literature'. A first strand, which can be exemplified by some work in the field of law and economics, underlines the role of inherited traditions in setting present conditions. An example of this is the World Bank's *Doing Business* reports which consider only the impact of legal rules on the business environment, while ignoring the value of regulations with regard to environmental protection, occupational health and protection for consumers (p 245 and 353). The other strand, in contrast, considers a worldwide convergence on a common package of accountability methods and points out that new legal regimes create standards on regional or global level. In Professor Rose-Ackerman's view, this strand overstates 'the degree and type of convergence' even in places like the EU. However, she does not hesitate to acknowledge the importance of regional legal regimes. Thus, for example, in spite of the different constitutional justifications for independent regulators in Europe, their functional justification is 'very strong' (p 120), in light of the attempts made by the EU to liberalize public utilities such as gas, electricity, elec-

tronic communications, and transports. As observed earlier, environmental regulation is another example. In conclusion, both scholarly trends 'operate at much too high a level of generality' (p 245), while instead it is necessary to 'unpack the law' and distinguish between substantive and procedural aspects (p 246). I think that particularly this last observation is one we can all agree with. We must not be content with observing that liberal democracies protect and promote the rule of law and thus have a healthy dislike of arbitrary power, but we must also examine whether administrative procedures are fundamentally sound and whether they are used to the satisfaction of the citizens with whom the governments do so much business nowadays.

In conclusion, this book is a valuable advance in specificity with respect to principles and instruments that are frequently discussed without too much thought being given to their precise content and underlying rationale. It combines an empirical analysis with a discussion of normative views. As a piece of research it will be of equal value to public lawyers and other social scientists interested in government.

fypl french yearbook *of* public law
Issue 1, 2023

A Comparative Research on the Common Core of Administrative Laws in Europe[1]

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Abstract:

Some decades ago, dissatisfaction with the state of comparative studies in the field of private law induced a group of scholars, in the context of the seminars organized by the Cornell Law School, to elaborate an innovative methodology – a 'factual analysis', based on hypothetical cases – in order to ascertain whether among some of the major legal systems of the world there were not only differences, but also some shared and connecting elements; that is, a common core. A research project of this kind, designed to analyse both common and distinctive traits between European administrative laws, was initiated by the author of this article some years ago. The present article, first, explains the purposes to be served by the new comparative research and its subject; that is, administrative procedure, as distinct from judicial review of administrative action. Second, it discusses some issues concerning both the methods employed and the choices made with regard to the legal systems selected. Third, it illustrates the main lines of research developed and their results, both expected and unexpected.

Keywords:

European administrative law, Comparative administrative procedure, History of administrative law

1 The comparative research that is presented here has been funded by the advanced grant awarded by the European Research Council (CoCEAL, n. 694697).

fypl french yearbook of public law

I. Introduction

It is self-evident that administrative law in Europe has been transformed over time and that it has become increasingly important outside of any particular legal system.[2] Understanding the nature of this transformation is more difficult, for various reasons. Some primary sources are not easily accessible, for example the archives of some national courts as regards 19th century cases. Moreover, there is variety of opinion about its nature and purpose. While some focus mainly on the legal control of government power,[3] others devote attention to the study of organizational aspects; that is, the types of public bodies and relations between them.[4]

Another difficulty is that, as has been argued elsewhere,[5] the comparative study of administrative law is in an unsatisfactory condition. First, to the extent to which traditional approaches focus either on analogies between legal systems or on their differences, their validity is questionable, descriptively and prescriptively. Second, there is a persistent tendency to juxtapose the solutions adopted by two or some legal systems, without really comparing them.[6] Thirdly, other scholarly works, often with the contribution of a plurality of authors, look at public law, broadly intended, and thus fail to devote attention to the more specific questions concerning administrative law; that is, how should administrative decision-making processes be regulated, whether public officers should be subject to the ordinary processes of law in the same manner as private bodies, and the like. Likewise, often comparative studies do not pay specific attention to the European area, either because they focus on another part of the world, for example the Commonwealth,[7] or because they adopt some type of broader or 'global' perspective.[8] There is, of course, nothing wrong in this choice, so long as it is clear and coherent. However, it can be argued that a focus on Europe is justified,[9] on the one hand, in light of the processes of cross-fertilization that have characterized this part of the globe and, on the other hand, of closer integration within the European Community (EC) and now the European Union (EU). The question that thus arises, on grounds of methodology, is whether the same methodology that can be used, for example, for comparing the US and Ethiopia is adequate and fruitful for Europe.[10]

2 P. Craig, 'Comparative Administrative Law and Political Structure', Oxford J. Leg. St., 2017 (37), 1.

3 See, for example, G. Vedel and P. Delvolvé, *Le système français de protection des administrés contre l'administration* (Sirey, 1991).

4 See, for example, D. Sorace, *Diritto delle pubbliche amministrazioni* (Il Mulino, 2009).

5 G della Cananea and M Bussani, 'The Common Core of European Administrative Laws: A Framework for Analysis', Maastricht J. Eur. & Comp. L. (23), 2017, 221.

6 See M Shapiro, *Courts. A Comparative and Political Analysis* (University of Chicago Press, 1981), vii (arguing that "comparative law has been a somewhat disappointing field") and M Shapiro and A Stone Sweet, *On Law, Politics, and Judicialization* (Oxford University Press, 2002). See also RB Schlesinger, 'Introduction', in Id. (ed.), *Formation of Contracts: A Study of the Common Core of Legal Systems* (Oceana, 1968), 3.

7 See S. Rose-Akermann and P. Lindseth (eds.), *Comparative Administrative Law* (Elgar, 2013).

8 See, for example, M Hertogh, R Kirkam, R Thomas and J Tomlinson (eds.), *The Oxford Handbook of Administrative Justice* (OUP, 2022).

9 See M. Fromont, *Droit administratif des Etats membres de l'Union européenne* (PUF, 2006) and R Caranta, 'Pleading for European Comparative Administrative Law', 2 Rev. of Eur. Administrative L. 155 (2009).

10 S Cassese, 'Beyond Legal Comparison', in M Bussani and L Heckendorn (eds.), *Comparisons in Legal*

Some decades ago, dissatisfaction with the state of comparative studies in the field of private law induced a group of scholars, in the context of the seminars organized by the Cornell Law School, to elaborate an innovative methodology – a 'factual analysis', based on hypothetical cases – in order to ascertain whether among some of the major legal systems of the world there were not only differences, but also some "shared and connecting elements"; that is, a common core.[11] A research project of this kind, designed to analyse both common and distinctive traits between European administrative laws, was initiated by the author of this article some years ago.[12] The intent of the article is precisely to examine some of the questions which arise when a comparative inquiry is undertaken, with a view to ascertaining, in an important area of administrative law, that of administrative procedures, whether and to what extent there exists a common ground or a "common core" of European administrative laws, which can be formulated in legal terms, in the guise of standards of conduct for public authorities and mechanisms for their application.

The paper is divided into four sections. The first illustrates the main choices facing the comparative study that is presented here. The second section discusses some issues in methodology. The last two section illustrate the research's results concerning methodology and the analysis of the common core, respectively.

II. The salient features of the new research

At the beginning of the new comparative inquiry, its main features have been illustrated.[13] There is no need, therefore, to do so again. Few words, however, can be helpful to shed light on three salient features: its purposes, subject, and methodology.

A. The purposes

The purposes of the new research, first, should be clarified. Some comparative studies assert that there is a fundamental difference between the theoretical and practical purposes. The former place considerable emphasis on the satisfaction of a "need for knowledge".[14] The latter point out the persistent interest of both foreign law and comparative law in view of the reform of national legal institutions.[15]

Two quick remarks are appropriate. First, there are good reasons for examining national legal institutions, with a view to defining higher standards of administrative con-

Development. The Impact of Foreign and International Law on National Systems (Schulthess, 2016), 227.

11 See RB Schlesinger, 'The Common Core of Legal Systems: An Emerging Subject of Comparative Study', in K Nadelmann, A von Mehren and J Hazard (eds.), *Twentieth Century Comparative and Conflicts Law-Legal Essays in Honor of Hessel E. Yntema* (Sijthoff, 1961), 65.

12 The research group, chaired with professor Mauro Bussani, includes professors Mads Andenas, Jean-Bernard Auby, Roberto Caranta, Martina Conticelli, Angela Ferrari Zumbini, and Marta Infantino. The contribution of three post-doc researchers - Laura Muzi, Paola Monaco, and Leonardo Parona – is gratefully acknowledged.

13 See della Cananea and Bussani, note 4, and G della Cananea, *Organiser la pluralité: le fonds commun des droits administratifs en Europe*, in Association française pour la recherche en droit administratif, *Les méthodes en droit administrative* (Dalloz, 2018), 135.

14 See R Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law I', Am J Comp L (39), 1991 1.

15 A. Watson, *Legal Transplants: An Approach to Comparative Law* (University of Georgia Press, 1993, 2nd edition) 9.

duct, because these are preferable to lower standards. There are, however, difficulties with this approach, because the descriptive validity of a comparative study aiming at selecting an "optimal" set of rules is itself dependent upon the "correctness" of a number of questionable claims.[16] Space precludes a thorough discussion of this issue.

Second, recent comparative projects have variably combined descriptive and normative elements. Clearly, if a project supports more or less directly the making of new rules, it will pay less attention to legal processes and doctrines. However, we are not assuming that practical considerations must be totally ruled out in favour of "pure" research. They can be considered in a sort of continuum. At one extreme is the view that a comparative research can be instrumental to defining or refining legal rules. At the other extreme is the view that a comparison serves to gather and check data in order to ensure the validity of legal analysis, similarly to other social sciences. There are also intermediate positions, which are legitimate and helpful depending on the main purposes of each researcher or group of researchers.

There is still another purpose, of more practical importance. It is well illustrated by the book written by Jean-Marie Auby and Michel Fromont on the judicial systems of the six founders of the EC.[17] As the authors observed in their *Preface*, and as an English reviewer of the book later confirmed, one reason of their comparative attempt was that firms and individuals doing business within the Six needed to know what were the possibilities of challenge: a practical concern, thus, though their study had a theoretical interest.[18] Thus, for example, they pointed out both the diversity of national institutions (for example, Germany's solution concerning actions brought against regulations) and their commonality (in particular, the principles underlying judicial review).

Delineating a continuum, instead of clear-cut boundaries, helps us to clarify that the goal of our research is to have more and better knowledge than it is presently available, though such research is susceptible to have some practical implications, among other things, for teaching administrative law.

B. Choice of subject

As regards the subject, two opposite risks had to be avoided. The first is the risk of over-inclusiveness. The opposite risk is that of under-inclusiveness, which was neatly pointed out by Schlesinger. He observed that often the topic chosen for comparative exploration was "too narrow to permit the discovery, within each of the legal systems selected, of the functional and systematic interrelationships among a large number of precepts and concepts".[19] The topic he chose, the legal framework concerning offer and acceptance, was relatively narrow. In the same years, in the field of administrative law, comparative studies still focused mainly, though not only, on judicial review of administration.[20] There was more than one reason why it was so. All legal systems have to decide

16 O Pfersmann, *Le droit comparé comme interpretation et comme théorie du droit*, 53 Rev. int. dr. comp. 275 (2001) (criticizing the idea of assembling the best practices).

17 J.M. Auby and M. Fromont, *Les recours* contre les actes administratifs dans les pays de la Communauté économique européenne (Dalloz, 1971).

18 See D.B. Mitchell, *Review of J.M. Auby and M. Fromont, Les recours* contre les actes administratifs dans les pays de la Communauté économique européenne, 21 Int. & Comp. L. Q 193 (1972).

19 Schlesinger, note 5, 3.

20 See Auby and M. Fromont, note 16 and A. Piras (ed.), *Il controllo giurisdizionale della pubblica amministrazione*

on the conceptual and institutional foundations of judicial review. Once actions involving public bodies are admitted, there are issues concerning reviewable acts and the intensity of judicial control. The importance of this (now diminishingly important) strand in public law must not be neglected, at least because of the appeal that a paradigm exerts.

The topic chosen here is, instead, administrative procedure. Various reasons support this choice. First, it is not too narrow to permit us to identify, within the legal systems selected, of a variety of "functional and systematic interrelationships" among some central structures of administrative law, including the range and typology of interests recognized and protected by the legal order, the interaction between the various units of the executive branch of government, and citizens' participation. Second, a focus on procedure allows us to understand what administrative authorities do and how they do it, including the interaction between the various units of government and citizens' participation. To the contrary, the traditional emphasis on judicial review of administration is affected by a sort of perspective distortion, because it implies the use of a sort of indirect vision of the organization and functioning of public authorities. As observed by Paul Craig, "public law is not solely concerned with judicial review".[21] The adoption of general procedural codes, which regulate process rights across a variety of subject matter areas, in several European countries is the third reason.[22] It is increasingly accepted, therefore, that – to borrow the words of Schmidt-Aßmann - the 'idea of procedure constitutes basic expression of a common European administrative law'.[23]

These remarks do not exclude, though, that an eye must be kept on judicial review of administration. On the one hand, the concepts of procedural impropriety and unfairness are helpful for understanding the relevance and significance of the principles and rules that an administrative agency must respect before issuing or refusing an authorization to the applicant and the techniques that must be used in order to set new tariffs for public utilities. On the other hand, it is interesting to confront the result of our inquiry with those of previous comparative studies, focusing on the structure of judicial systems.

C. History and legal comparison

As indicated initially, the conjecture that lies at the basis of the research is that be-

(UTET, 1971). See also B. Schwartz, French Administrative Law and the Common-Law World (NYU Press, 1954), which did not "consider administrative law in the broadest sense but [wa]s limited to a discussion of judicial control over administrative action", as observed by A. von Mehren in his *Review* of that book, 102 Un. Pennsylvania L. Rev. 698 (1954). The same remark can be made with regard to the comparative analysis coordinated by Aldo Piras in the early 1990s: *Administrative Law: The Problem of Justice – Western Democracies* (Giuffrè, 1995-1997, four volumes).

21 P. Craig, *Theory and Value in Public Law*, in P. Craig & R. Rawlings (eds.), *Law and Administration in Europe. Essays in Honour of Carol Harlow* (Oxford University Press, 2003), 27. See also E. Gellhorn & G.O. Robinson, *Perspectives on Administrative Law*, 75 Columbia L. Rev. 773 (1973) (arguing that "the subject of judicial review of administration ... has diminished somewhat in importance vis-à-vis the administrative process") and S. Cassese, *Le basi del diritto amministrativo* (Einaudi, 2003, 3rd ed.), 295 (same thesis).

22 See JB Auby (ed.), *The Codification of Administrative Procedure* (Bruylant, 2014).

23 E Schmidt-Aßmann 'Structures and Functions of Administrative Procedures in German, European and International Law' in J Barnes (ed), *Transforming Administrative Procedure* (Global Law Press 2008), 66. See also N Walker, '*Review of Dennis J. Galligan, Due Process and Fair Procedures: A Study of Administrative Procedures*' Modern L. Rev. (62), 1999, 962 (for the remark that administrative procedure is "a concept at the heart of administrative law").

tween European administrative laws, together with numerous and significant distinctive traits, there are some shared and connecting elements, which relate not only to generic idealities that can be found in every civilized legal system in one way or another to generic ideals, such as the pursuit of justice, but also to some precise requirements of administrative fairness and propriety. These are regarded as empirically testable hypotheses, which are subject to verification. This can be attempted in two ways. One of them is to attempt historical reconstruction that pays attention to validity of empirical evidence in relation to specified hypotheses. Another is to use legal comparison, which for this purpose can be viewed as a "substitute for the experimental method" used in other scientific domains.[24] Accordingly, two types of comparison will be used, synchronic and diachronic. Conventional as these terms are, they communicate something about the nature of the work to be done, in the sense that the diachronic comparison provides a retrospective while the synchronic comparison focuses on administrative systems of our epoch.

Both general and specific reasons support the choice of a diachronic comparison. From a general point of view, as Gino Gorla observed rephrasing Maitland's opinion that "history involves comparison",[25] "comparison involves history".[26] , it is impossible to understand the deep structures of administrative law with "only the vaguest idea of how its subject-matter has evolved".[27] History also shows that not only ideas and theories about public law have been largely transnational, but that often legal principles and institutions originating in one nation have been influential elsewhere. During the nineteenth century, French administrative courts and the underlying conception of separation of powers have been very influential in many corners of Europe.[28] During the last century, Austrian ideas about administrative procedure have spread within its neighbors and subsequently elsewhere. A dynamic approach, which takes several decades into account, is much to be preferred to a static one, because it permits a better understanding of the respective significance of commonality and diversity.[29]

D. A 'factual analysis'

As regards the synchronic comparison, the growth of administrative procedure legislation suggests that its study may provide interesting insights. However, this would not suffice for understanding the interplay between commonality and diversity between European laws. There are, again, both general and specific reasons why it would not do so. The main methodological novelty of Schlesinger's study of the common core is precisely this: instead of seeking to describe national institutions, an attempt was made to understand how, within the legal systems selected, a certain set of problems would be solved.

24 M Shapiro, *Courts*, cit., vii. For similar remarks, see O Kahn-Freund, 'Review of RB Schlesinger (ed.), Formation of Contracts. A Study of the Common Core of Legal Systems', Am. J. Comp. L. (18), 1970, 429, at 431.

25 FW Maitland, 'Why the History of English Law Was not Written', in R Livingston (ed.), *Frederic William Maitland Historian. Selection from his Writings* (Schuyler, 1960), 132 (affirming that "History involves comparison and the English lawyer who knew nothing and cared nothing for any system but his own hardly came in sight of legal history" and that "an isolated system cannot explain itself").

26 G Gorla, *Diritto comparato e diritto comune europeo* (Giuffrè, 1981), 39.

27 P. Craig, *Administrative Law* (Sweet and Maxwell, 2003, 5th ed.) 47.

28 See J Rivero, *Cours de droit administratif compare* (Les cours de droit 1956-57), 27.

29 Cassese, *note 5*, 19.

Concretely, this implied that, drawing on the materials concerning some legal systems, Schlesinger formulated hypothetical cases, in order to see how they would be solved in each of the legal systems selected. His method, therefore, must not be confounded with the mere consideration of judge-made law and it turned out that those cases were formulated in terms that were understandable in all such legal systems. The adequacy and fruitfulness of this methodology has subsequently been confirmed in the framework of the Trento project on the common core of European law.[30]

In the field of administrative law, this type of approach is particularly appealing for two reasons. First, administrative law has emerged and developed without any legislative framework that was comparable to the solid and wide-ranging architecture provided by civil codes. As a result of this, its principles are largely jurisprudential, not only in Britain, but also in France and elsewhere. Second, in addition to legislation and judicial decisions, governmental practices are very important.[31] Not surprisingly, as early as in the 1940s, some of the few scholars who devoted attention to the comparative study of European administrative laws showed awareness that for a better understanding of their common and distinctive traits it would be much better to build hypothetical cases and confront the solutions that would be given.[32]

This innovative suggestion for tackling the problem that concerns us here was not used, however. In the following decade, when a new legal journal launched a comparative research concerning administrative law, it elaborated a well-structured questionnaire, but it was based on legislative design.[33] After Schlesinger's research was published, it was found that the same methodology could be applied, among other things, to the control of the legality of administrative decisions.[34] However, there was no systematic use of such methodology.

Arguably, a factual analysis can provide interesting insights. Consider, for example, the following case, which will be familiar to French readers, because it was of the first cases in which the Conseil d'Etat expressly formulated the theory of general principles.[35] A public authority decides to withdraw the license for selling a certain type of products, such as journals or pharmaceuticals, on grounds that certain prescriptions specified by the

30 See M Bussani and U Mattei, 'The Common Core Approach to European Private Law' [1997-1998] 3 Colum J Eur L 339.

31 See J Bell, 'The Argumentative Status of Foreign Legal Arguments' [2012] 8 Utrecht L Rev 7, at 9 (pointing out the existence of competing versions of what the law is on a given matter).

32 F Morstein Marx, 'Comparative Administrative Law: a Note on Review of Discretion', Un. Pennsylvania L. Rev. (89), 1939, 955.

33 See the questionnaire published on the International and Comparative Law Quarterly. Three reports were published, those regarding Germany, Italy and the Nordic legal systems: see N Herlitz. 'Swedish Administrative Law', Int'l & Comp. L. Q. (2), 1953, 231; O Bachof, 'German Administrative Law with Special reference to the Latest Developments in the System of Legal Protection', ivi, 368; G Miele, 'Italian Administrative Law', Int'l & Comp. L.Q. (3), 1954, 421.

34 Kahn-Freund, note 23, 430.

35 Conseil d'Etat, 5 May 1944, *Dame veuve Trompier-Gravier*. For further remarks on general principles, see B. Jeanneau, *Les principes généraux du droit dans la jurisprudence administrative* (Sirey, 1954). In his *Review* of this book, Georges Langrod observed that it would have been surprising if such book would not have prompted discussion elsewhere. Interestingly, it did so in Italy, where Norberto Bobbio's entry on general principles extensively referred to it: *Principi generali di diritto*, in Novissimo Digesto Italiano (UTET, 1966), XIII, 945. It would be interesting to understand whether the book had any influence in other legal systems, such as those of Belgium and Germany.

license have not been respected. The licensee claims that the withdrawal of the license without a "hearing" on the facts that are alleged by the public authority constitutes a deprivation of benefits that is in contrast with due process of law. What matters is not simply whether the licensee's claim is likely to be successful before a court. It is also which arguments would be relevant, including constitutional provisions and those of general and particular statutes, and how they would be interpreted by the courts, for instance whether what is required is a hearing before the withdrawal is formally decided or at some stage after the decision. It is important to understand whether the principal gateway is that of natural justice or a set of beliefs about public law and, if so, whether it is partially common to various legal systems, and whether the courts admit similar process rights and justify them similarly even when statutes did not accord such rights.

III. Issues in methodology

The choices just illustrated are not without controversial issues. Some of them, which can be of general interest because they concern methodology, will be discussed within this section: first, the choice of legal systems; second, the focus on what can be regarded as "general administrative law"; last but least, the use of a factual analysis in the sense indicated earlier.

A. Choice of legal systems

For every comparative research, the choice of the legal systems to be considered is a crucial issue. While the choice of Europe was at the heart of the research project and was justified by various reasons, including the historical relationships between European legal systems and the establishment of regional organizations, such as the Council of Europe and the EU, three choices have been made. The first is to focus not only on the traditional two or three 'major' legal systems – Britain, France, and Germany – but to consider others, which a widespread but unfounded opinion would regard as 'minor' legal systems, such as Belgium and Austria.[36] Both have been involved in the processes of borrowing and legal transplants, as will be seen in the following section.

The second choice is to consider not only the legal systems which are included within the EU, but also others, in order to ascertain whether therein similar standards of administrative conduct exist. As a result, although no research project escapes from limits of budget and workforce, an effort has been made to cover a sufficiently large number of legal systems. There are, however, some exclusions which should be justified. They concern Belarus, Russia and Turkey. The reason is not their cultural specificity,[37] but the fact that, in the last ten years or so, all these countries have undergone deep political and legal changes in the direction of authoritarian governments.[38] As a consequence, it is uncertain whether researchers might find it difficult to tell the truth about the solutions given

36 The remarks made in the text only concern exclusions, while in other cases a legal system has been included in the comparative inquiry, but for various reasons the expert has been unable to deliver the national report.

37 Among historians, there has been discussion as to whether Russia should be not be regarded as part of the West: see A. Toynbee, *The World and the West* (Oxford UP, 1953) 15.

38 In the case of Russia, the unjustified invasion of Ukraine has led the Council of Europe to cease its membership: CoE, Council of Ministers, Resolution 2002(2) on the cessation of the membership of the Russian Federation to the Council of Europe, adopted on 16 March 2022. The ECHR has ceased to be binding in Russia six months later.

by their legal system to the problems selected for analysis or whether they might be exposed to risk, precisely because they tell the truth. If things change in the other way, further research might be possible.

A third choice concerns the EU. There are two sides of the coin. On the one hand, the EU regulates – through its treaties and other sources – the conduct of public authorities within its Member States. Consider, for example, the duties of notice and comment that EU directives on national regulators of electronic communications impose on national regulatory authorities.[39] On the other hand, there is the law that applies to the institutions and agencies of the EU, that is, the European administration narrowly intended.[40] Its existence is a powerful counterweight to the idea that nothing has changed since the advent of the positive State. It challenges the idea according to which administrative law is consubstantial to the State. It shows the difficulties which beset the traditional idea according to which administrative law simply reflects national legal traditions. It is important to bear in mind the particularity of the European administration, in the sense that implementation is often left to national authorities. However, it can be interesting to consider whether the standards that are defined are similar to those that are followed by domestic legal systems.

B. Choice of experts

What has just been said about experts does not exhaust the issues concerning them. Two other aspects, at least, must be considered; that is, the choice of national experts and what might be called the subjective factor in the elaboration of national reports.

There are two felt necessities for both the diachronic and synchronic analysis. First, it is self-evident that it is necessary to have at least one national expert for each legal system selected for our comparative experiment. However, this is a necessary condition, but not a sufficient one. Indeed, if it is true that a lawyer can really be an expert only of the legal system(s) of which he or she has a constant and direct experience, it is equally true that without any idea about how other legal systems work it might be very hard to engage in a fruitful comparative inquiry, as opposed to a mere juxtaposition of national reports. The importance of this issue cannot be neglected. But fortunately, while in the past comparative exchanges were limited to few scholars, in the last decades several formal and informal networks have emerged. Some of them are binational networks (for example, the Italian-Spanish seminars of administrative law, which begun in 1964, the German-Italian workshops of public law which begun in 1971, and the Franco-German workshops of administrative law), while other include three legal systems (such as the RDE, a network created ten years ago) and still others are multi-national networks, such as the European Group of Public Law (1991), the *Societas Iuris Publici Europaei* (2003), and ReNEUAL (2006). There are, therefore, increasingly public lawyers with an experience of comparative experiments. Concretely, roughly one hundred and twenty experts (mostly professors and researchers, but also judges and lawyers) from thirty-four countries have

39 See Article 24 of EU Directive n. 21/2002 ("framework directive"). For further discussion, see Caranta, note 8, 158 (noting that the same EU rules raise different legal issues within the Member States).

40 The first systematic work is J. Schwarze, *Europaisches Verwaltungsrecht* (Nomos, 1986), later translated into French and English. See also P. Craig, *EU Administrative Law* (Oxford University Press, 2012, 2nd ed.) and C. Harlow, P. Leino & G. della Cananea (eds.), *Research Handbook on EU Administrative Law* (Elgar, 2017).

been involved in the workshops organized in the course of seven years.

The involvement of numerous experts is important also for the 'subjectivity' issue. As observed initially, there is variety of views about the nature and purpose of administrative law. This is not surprising, because public law has a strong political dimension.[41] Several issues are technical in nature, but are not neutral. As a result, some experts believe that existing norms and uses point in favour of one solution, while other experts deem that an alternative solution is preferable. Although the subjectivity of human perception is inevitable, there are various ways to keep it within certain limits and thus avoid bias. One way is to ask experts to verify the solutions of hypothetical cases on the background of all legal formants, as well as to consider both the standard solution and that which is suggested by the minority of jurists and judges. Another way is to review findings with peers. For example, some hypothetical cases, concerning fundamental standards of administrative fairness and propriety such as the right to be heard and the duty to give reasons, have been examined in more than a workshop. And it has turned out that the solutions given by different experts are very similar, if not the same. Finally, the comparative essays elaborated on the basis of national reports have checked the solutions contained therein.

C. Level of analysis

The third issue of general relevance regards the level of analysis. Some European legal cultures have a consolidated distinction between what may be called "general" administrative law, which pertains to the fundamental principles and mechanisms of law in this field (how decision-making processes are shaped, how external controls are carried out, which type of responsibility follows from disregard of standards of conduct) and sector specific legal frameworks *(droit administratif spécial, Besonderes Verwaltungsrecht)*, including urban planning and the regulation of public utilities, and thus provide specialized courses for them.[42] Other cultures, whilst not having such a consolidated distinction, recognize the importance of the administrative law that applies to a variety of sectors. An instructive example is the Dutch "general administrative law act", adopted in 1994. In the UK, where there is no such thing as an APA, there is nevertheless a helpful distinction between horizontal or general rules, such as those governing judicial review of administration, and the vertical rules; that is, the legislative and regulatory provisions applicable to a particular area. Even where there is customary or written rule by virtue of which sector specific norms prevail on general ones, it is often the case that the former are either incomplete in some respects or deviate from the latter in some way that the courts deem undesirable.

From the perspective of administrative procedure, the distinction between the general and specific levels of analysis is particularly relevant. The reason is that, while legislative and judicial powers are exercised through a limited set of processes, administrative

41 See M. Loughlin, *Public Law and Political Theory* (Clarendon, 1992), and S Cassese, *Culture et politique du droit administratif* (Dalloz, 2018).

42 The distinction between general and specific courses is traditional, in particular, in France, Belgium and and Germany: see D Renders, *Droit administratif general* (Larcier, 2022, 4th ed.); E. Schmidt-Aßmann, *Besonderes Verwaltungsrecht* (de Gruyter, 2008). It is not completely unknown, though, to US lawyers: see S.A. Shapiro, *Reflections on Teaching Administrative Law*, 43 Admin. L. Rev. 501, at 505 (1991).

action must face "through its varied and commodious channels, the torrents of demand pressing against the dam of the State" and is, therefore, highly differentiated.[43] Accordingly, there are innumerable types of administrative procedures. It is precisely for this reason that some legal systems have defined general standards, while others have gone further, through the definition of general model or prototype of administrative procedure. Italy and Spain, among others, exemplify these patterns.

In light of this, it has been deemed appropriate to develop different lines of research. The first concerns the main forms of administrative action; that is, administrative action and rule-making. The second line of research concerns some particular manifestations of administrative power that have traditionally been both relevant and significant. They include, on the one hand, expropriation and other administrative limitations of private property and, on the other hand, urban planning. Thirdly, the relationship between general and sector specific has been examined.

D. Limits of factual analysis

Last but by no means least of all, the choice of a factual analysis raises the question whether the conclusions can be generalized outside the specific cases that are examined. This is a challenging question. To borrow De Smith's words, 'to prophesy the view that a court will take of the powers or duties of an administrative authority in a particular case must inevitably remain a hazardous undertaking'.[44] The question has thus been discussed in a series of seminars and workshops including, among others, one of the annual meetings of the French association of administrative lawyers *(Association pour la recherche en droit administratif)*,[45] one of the biannual meetings of the German-Italian group of public law,[46] a panel within the annual conference of the European Group of Public Law and two seminars organized by the Institute of Advanced Legal Studies of London.[47]

Two answers can be given. The first is that administrative procedure legislation is relevant in itself and must, therefore, be examined. Interestingly, many European legal systems have adopted one type or another of administrative procedure legislation, but not all. However, this does not imply that the solutions adopted by these legal systems inevitably differ from those chosen by the others, where such legislation exists. Comparing life with and without a code of administrative procedure or a legislative framework of another type is, therefore, both interesting and important.[48]

The second answer is that there are certain factors that may enhance the added value of a factual analysis. All hypothetical cases have been built with some factual circumstances. The underlying idea is that it is only by considering concrete circumstances that

43 L.J. Jaffe, *Administrative Procedure Re-Examined: the Benjamin Report*, 5 Harvard L. Rev. 704 (1943). See also R.B Stewart, 'The Reformation of American Administrative Law', 88. Harv. L. Rev. 1667, at 1669 (1974-75) and, for a comparative analysis, J.B. Auby (ed.), *Droit comparé de la procédure administrative* (Bruylant, 2015).

44 S. De Smith, 'The Right to a Hearing in English Administrative Law', (1955) 68 Harvard L. Rev. 570.

45 See della Cananea, note 12.

46 G. della Cananea, *Una ricerca sul "fondo comune" dei diritti amministrativi in Europa*, in L. De Lucia e F. Wollenschlager (eds.), *Sfide e innovazioni nel diritto pubblico. Herausforden und Innovationen im Offentlichen* Recht (Nomos Verlag, 2019), 101.

47 These seminars have been organized by Carol Harlow, to whom I owe full gratitude.

48 JB Auby, 'Introduction', in id. (ed.), *The Codification of Administrative Procedure* (Bruylant, 2014).

one can 'bring to consciousness the assumptions secreted within the structures' of each legal system.[49] Moreover, national experts have not been asked only to indicate the solution that is more likely to be provided by jurists in their respective legal orders, but have also been encouraged to reflect on the underlying institutional and cultural reasons, including the role played by legal formants, as theorized by Rodolfo Sacco. He usefully developed the concept of 'legal formants', in order to describe that many elements that are relevant in the living law, including legislative and regulatory provisions, judicial decisions, scholarly works and, in our case, governmental practice.[50] Even when legal requirements cannot be extracted from the cases or these constitute unsafe guides, discussing background theories can be helpful to understand how procedural values are balanced with other values.

IV. Research's results

Obviously, it is for the reader to judge the findings of the comparative inquiry on European administrative laws. However, it can be helpful to say few words about the lines of research that have been developed, and the positive and negative results gathered with respect to the conjecture illustrated initially.

A. Three main lines of research

As observed initially, at the basis of the new comparative research there was a twofold conjecture. First, it was conjectured that between European administrative laws there were not only the differences highlighted by numerous previous studies, but also some shared and connecting elements, which could be formulated not only in terms of values, such as justice or fairness, but also in terms of standards of administrative conduct. Second, it was conjectured that, precisely for this purpose, it was necessary to go beyond the traditional approach founded on *legislation comparée* in a twofold sense: to combine history and legal comparison and, with regard to the latter, to use a factual analysis.

Coherently with these choices, three main lines of research have been developed, involving a large group of researchers and including articles published in legal journals, monographs and edited books. Such lines of research include the diachronic comparison and the synchronic comparison, the latter viewed from two perspectives that are related but distinct: the examination of administrative procedure legislation and the factual analysis.

From a diachronic perspective, three areas of interest have been considered. The first is the development of judicial standards for reviewing administrative action in the years 1890-1910, which is under-studied but important, because it was characterized by the existence of both ordinary and administrative courts.[51] In all the legal systems included in our comparison (Belgium, England, France, Italy and the Habsburg and German empires), the courts defined and refined the standards of administrative action virtually in the absence of legislative rules. The second area is the Austrian codification of adminis-

49 Loughlin, note 40, 35.

50 R Sacco, note 13, 1.

51 G della Cananea and S Mannoni (eds.), *Administrative Justice: Fin de Siècle. Early Judicial Standards of Administrative Conduct in Europe* (1980-1910) (OUP, 2021).

trative procedure (1925), viewed both in itself and for its impact on the other countries of Central and Eastern Europe which adopted general legislation on administrative procedure in the following decade.[52] Similarly, the Spanish administrative procedure legislation of 1958 has been considered in its relationship with the previous framework, as well as in its connection with the laws that were adopted by several countries of Latin America in the following years.[53]

The emergence of administrative procedure legislation constitutes the object of another line of research. It has been considered both in its development[54] and in its current shape, with a focus on commonality and diversity.[55] This has showed the existence of a vast area of agreement between legal systems analyzed, as far as administrative adjudication is concerned. Since only few legal systems also define general norms on rule-making, the question that arises is whether the latter is characterized by an area of disagreement.

The third line of research, notably the factual analysis, serves precisely to seek to answer to this type of questions. For the reasons illustrated earlier, the sub-topics that have been selected seek to strike a balance between a general level of analysis and a sector specific one. As regards the former, included in our comparative enquiry there are both traditional topics, such as judicial review of administration and government liability,[56] and others that are less frequently examined, such as rule-making and planning.[57] A more specific analysis has concerned expropriation, including both its traditional form and what is increasingly called 'indirect' or 'regulatory' expropriation.[58]

Since the beginning of the comparative inquiry, it was clear that the diachronic and synchronic comparison have both common and distinctive aspects. The former differs from the latter, as it pays attention to the development of legal institutions and does not include hypothetical cases. However, this type of research, too, involves the testing of hypotheses. An empirical analysis has thus been conducted on judicial decisions concerning administrative action in the years 1890-1910. This analysis is different in nature from the usual analysis based on the works of eminent scholars and the data collected are indicated both in the book and on the research's website, which allows readers to assess the reliability of the research's findings.

52 G della Cananea, A Ferrari Zumbini and O Pfersmann (eds.), *The Austrian Codification of Administrative Procedure: Diffusion and Oblivion* (OUP, 2023, forthcoming). See also A Ferrari Zumbini, *Alle origini delle leggi sul procedimento amministrativo: il modello austriaco* (Editoriale scientifica, 2020).

53 In this respect, a first workshop has been convened in 2022 and the papers are being collected. They will be included in a book to be edited with professor Allan Brewer-Carias.

54 G della Cananea, *The Regulation of Administrative Procedure in Europe: A Historical and Comparative Perspective, European Review of Public Law* (32), 2020, n. 1, 223.

55 G della Cananea and L Parona, *Administrative Procedure Acts in Europe: An Emerging "Common Core"?, American Journal of Comparative Law*, 2023 (forthcoming).

56 G della Cananea and M Andenas (eds.), *Judicial Review of Administration in Europe. Procedural Fairness and Propriety* (OUP, 2021); G della Cananea and R Caranta (eds.), *Tort Liability of Public Authorities in European Laws* (OUP, 2020).

57 A workshop has been convened in 2021 and the papers are being collected for publication.

58 See M Conticelli and T Perroud (eds.), *Procedural Requirements for Administrative Limits to Property Rights* (OUP, 2022).

As regards the synchronic comparison, it required problems to be stated in factual terms, in order to discern the areas of agreement inductively rather than deductively. It has turned out, first, that those cases were formulated in terms that were understandable in all the legal systems included in our comparison. Sometimes, a hypothetical case has been adjusted because, for example, some legal systems use concessions or licenses for the use of public beaches while others only use these instruments for the waterfront. In other cases, the factual elements given initially have been reformulated in a more ambitious manner, in order to ascertain whether the area of agreement between legal systems could be said to exist not only at the level of general standards of conduct but also at that of operational rules. It was then possible to delineate the areas of agreement and disagreement with legal systems with a greater level of specificity. It is not unreasonable, therefore, to hope that the method employed in this comparative inquiry will be found useful in other attempts either of the same nature or of a similar one, though – as Schlesinger himself warned – the factual method is no panacea for the problems of comparative research.[59]

B. Positive results

In one way or another, the conjecture has been tested both diachronically and synchronically. As observed earlier, it is for the reader to assess the results, but it can be interesting to observe that, while some of them could be reasonably expected, others were unexpected.

In our diachronic comparison, it has been found that the area of agreement between legal systems was much wider than was expected. Within all the legal systems examined the courts defined and refined the standards of administrative action. Action that infringed such standards, for example with regard to the intervention of affected parties and the statement of reasons, was regarded as unlawful. From a common law viewpoint, of course, there is nothing odd about a set of variable and invariable standards elaborated by the courts. From a continental viewpoint, this marks a profound difference with private law and calls into question the existence of a divide between common and civil law systems. The problem with the idea of a 'great divide' is not, therefore, that it was still said to exist in the 1970's and even later, but that even a century earlier the area of disagreement was much less significant than it was believed. The fact that administrative law did not merely have an autochthone nature has been confirmed by the inquiry concerning the codification of administrative procedure in Austria. There was a diffusion of Austrian ideas and norms, within some of the nations that had been included in the old Habsburg Empire. Similarly, after the 1950's, most Latin America nations did not simply follow the model of Spain in the sense that they adopted general legislation on administrative procedure, but they also largely drew on its legislative framework. Incidentally, the research's findings have confirmed the legal relevance and significance of some legal systems that are, erroneously, regarded as less important that the alleged 'major' systems. As the Belgium system of administrative justice was regarded elsewhere, by both scholars and reformers, as a model or prototype, so the two codifications of administrative procedure – in Austria and Spain – were at the heart of legal transplants.

59 Schlesinger, note 5, 38.

Turning to the synchronic comparison, the research has found a vast area of agreement between European administrative laws where more or less all learned commentators would expect the existence of a common core; that is, in the area of administrative adjudication. In this area, there are not only common values, but also "shared and connecting elements", including general principles of law, such as legality, due process, and transparency and mid-level standards such as the right to be heard, the duty to gather all elements of fact that are relevant for the final decision, and the duty to give reasons. That those general principles were applied by supranational courts was already known. What was less known is that the "shared and connecting elements" also include some minimum standards of procedural fairness and propriety. These standards of administrative conduct, which are a truly significant factor in the distinguishing legal from illegal behavior, thus constitute a common core that is not made of mere idealities.

Whether similar findings could be reached in another area of administrative law which is of increasing importance, that of rule-making, was doubtful for two reasons. This is an area that, in Europe, is seldom governed by general legislation on administrative procedure, unlike the US, where since 1946 there is both legislation of this type governing federal administrative procedure and a Model State Administrative Procedure Act. It is, moreover, an area that is rarely examined comparatively, unlike adjudication. However, an unexpected areas of agreement has emerged. Included among the shared and connecting elements there are, again, standards of administrative conduct concerning fairness and openness, such as the duty to consult users before a policy change and that to publish rules that are not merely internal, but impinge on interests recognized and protected by modern legal systems.

C. Negative results

Thus far, the positive results of our comparative research considered, that is, those that support the initial hypothesis and verify it. But these are not the only ones that matter from the scholarly point of view for two reasons, one of a general nature and the other more specifically concerning our enquiry into the 'common core' of European administrative laws. The negative results, which do not support the initial conjecture and in some sense disprove it, provide a better understanding of the topic because they limit and qualify the relevance and significance of the positive results. Moreover, they provide a better understanding of common trends.

Administrative procedure legislation provides an instructive example. As observed earlier, the codification adopted by Austria was regarded as a model by some of its close neighbours, including Czechoslovakia, Yugoslavia and Poland. It was not so for another nation which had been included in the old Habsburg Empire; that is, Hungary. Nor was a codification adopted by the UK, coherently with its established tradition, and by the principal administrative systems of Continental Europe in the first half of the twentieth century; that is, those of France, Germany, and Italy. These legal systems thus provide an interesting contrast to the *Mitteleuropean* countries. The contrast is all the more interesting because their private law was codified at that time. Moreover, and more importantly, they have adopted general administrative procedure legislation at a later stage, though in different periods and in different ways. The diachronic comparison thus shows that the area of disagreement has been considerably narrowed throughout the years, though some differences persist.

Government tortuous liability furnishes another example. In the past, this area was regarded as the main substantive area of disagreement between the legal systems of Europe, because in England the liability of government officers was subject to the ordinary law of the land, while in France the courts excluded that the rules of the Civil Code could be applied to public authorities discharging administrative powers. With the passing of time and the better availability of information, there was increasing awareness that the criteria followed by the French administrative courts were very similar to those that were applied to disputes between individuals. The factual analysis has confirmed that the area of disagreement has been reduced by the greater similarity between the standards defined and refined by the courts, also in light of European integration, for example in the area of administrative contract. The existence of persisting differences is both interesting and important, first and foremost, because one of the distinctive features of this comparative inquiry is that commonality must not be emphasized more strongly than diversity and, secondly, because the latter can be explained by background theories about public law and the State, rather than by constitutional and legislative provisions.

D. The 'common core': concept and evolution

What are the consequences of our comparative enquiry for the hypothesis set out at the beginning of this essay, namely that there is a common core and that it is increasingly relevant and significant from a legal viewpoint? Obviously, it is not sufficient to intone the expression 'common core', as if it provided a self-evident answer. For some, the existence of the common core should be taken for granted, while others are skeptical about it. There may be agreement that there is indeed a legacy from the past, from *ius commune*, yet this does not necessarily imply that there is anything more than a set of shared general, if not generic, ideas, such as 'justice' and even due process of law.[60] There may be agreement that, after seven decades during which 'regional' organizations have defined standards of administrative conduct, the common core that initially existed has changed. However, national traditions persist and must be respected. Moreover, and more importantly, even if a common core exists, its contours must be fixed. Schlesinger, who provided a vital part of the methodological apparatus necessary to go beyond traditional juxtaposition of national reports, observed that while the existence of 'some kind of 'common core' [was] hardly challenged', there arose questions 'as to its *nature* and *extent*'.[61] Others added 'the extent to which the common core can be used as a working tool'.[62] Our comparative inquiry suggests some answers to those questions.

First and foremost, as regards the nature of the common core, it does not consist merely in ideals, such as justice, which can be said to exist in every legal system, including the non-liberal polities which John Rawls included within well-ordered polities.[63] Nor is its relevance and significance susceptible to be fully appreciated at the level of the 'values' upon which the Council of Europe is founded, including the respect for the rule of law and for

60 For a Kantian understanding of due process, see EL Pincoffs, 'Due Process, Fraternity, and a Kantian Injunction', in JR Pennock and JW Chapman (eds.), *Due Process*, Nomos XVIII (NYU Press, 1977) 172.J. Rawls, *The Law of Peoples* (Harvard UP, 1999) 5.

61 Schlesinger, note 10, 65 (emphasis in the original).

62 Kahn-Freund (n 23) 429.

63 J. Rawls, *The Law of Peoples* (Harvard UP, 1999) 5.

fundamental rights. At this very abstract level, virtually all legal systems can be said to respect certain background principles and many courses of action, though not all, may appear to be justified. However, as soon as we move away from such value and very general principles to mid-level but still general standards that serve to promote good governance as well as the respect for rule of law, such as judicial independence or equality of arms, certain action taken by certain national authorities finds little justification or none at all.

The use of the term 'standard' is not without issues. In legal theory, standards can be – as Hart puts it – both variable and invariable.[64] The former translate mid-level but still general principles into legal standards that decisionmakers apply to particular cases and facts, while the latter constrain exercises of power more rigidly. Thus, for example, it has been found that the maxim *audi alteram partem*, is respected by all legal systems in many of our hypothetical cases, including the issuing and withdrawal of licenses and the imposition of pecuniary sanctions. However, the hearing can take more than one form and may even be postponed if a public interest so requires, for example collective security. On the other hand, a requirement to give reasons for every decision that adversely affects an individual represents an invariable standard and at the same time a procedural requirement, as distinct from a requirement to give reasons that are adequate or even sound. For the sake of clarity, these principles and mid-level standards are those that are shared by some states with a certain understanding of the rule of law and fundamental rights, but do not necessarily apply beyond those states.[65]

What characterizes the common core of European administrative laws is precisely this: in addition to the commonality that exists at the level of values and very general principles of public law, there is a set of mid-level standards of administrative action. It is precisely because such standards are closely linked with those values and very general principles that they are included within the 'core' that is related to what the French call '*le fond du droit*' and that is common to a variety of legal systems, which differ in several other respects, such as the existence of general legislation on administrative procedure and the nature of internal appeals and judicial mechanisms. In brief, what forms part of the 'common core', thus intended, is what matters more for the fairness and propriety of administrative decision-making.[66]

Second, it is precisely because one of the distinctive traits of the comparative enquiry, whose results are discussed in this essay, is a strong awareness of history, an evolutionary view of the common core is necessary. If there is one thing that emerges from the literature on due process, it is that 'tradition evolves'.[67] However, an adequate understanding that history does not follow a linear and progressive path is equally necessary. Two consequences follow from this. On the one hand, it is clear that the 'common core' that ex-

64 For this distinction, see LA Hart, *The Concept of Law* (Clarendon 1964) 133.

65 Some of the principles and standards considered in the text have something in common with those that may be included in a theory of natural law of process such as that of Lon Fuller, *The Morality of Law* (Yale UP, 1969 2nd ed.), but here there is no attempt to argue that without such principles and standards a legal system may not be viewed as such.

66 For further remarks, see G. della Cananea, *The Common Core of European Administrative Laws: Retrospective and Prospective* (Brill 2023, forthcoming) 210.

67 For a similar remark, from a historical perspective, see J Le Goff, *L'Europe est-elle* née au *Moyen Age?* (Seuil 2003) 3 (arguing that the past does not dispose).

ists today, after seven decades of integration within the Council of Europe, the European Communities and now the EU, differs from that which existed during the *Belle époque* or after WW1. Treaties granting rights to individuals, who can enforce them in their own name before domestic courts, and creating supranational courts acting as guardians of those rights, have entailed a new form of social ordering.[68]

On the other hand, the growth of regional organizations and the jurisprudence of supranational courts has generated the expectation that the developments they have either caused or facilitated are 'here to stay', but it is not necessarily so. The UK case, with Brexit, is instructive, but so is the crisis of the rule of law in Hungary. The upshot of all this is that the concept of the common core provides us with a helpful vector for thinking about various issues concerning administrative law, but its contours cannot be regarded as fixed and immutable. They can, and will probably, change in the future.

V. Conclusion

The choice to combine history and comparison, as well as that to use a factual analysis for the latter has proven to be fertile. The inquiry has shown that, although most European legal systems have adopted one type or another of administrative procedure legislation, but not all, there is a vast area of agreement between legal systems as far as the standards of administrative adjudication are concerned. Moreover, although administrative procedure legislation governs rule-making only in few cases, there is an increasing area of agreement concerning consultation and transparency. The question that arises is whether the extent of the common core should be further tested in other areas. Both the use of coercion by public authorities, which touches on the less recent understanding of administrative law as related to the dimension of power, and the management of welfare benefits (such as, for example, those regarding unemployment), which emphasizes the bureaucratic or managerial character of administration,[69] could be targeted for such further testing.

68 See A Stone Sweet, *The Judicial Construction of Europe* (OUP 2004).

69 See J Mashaw, *Bureaucratic Justice. Managing Social Disability Claims* (Yale UP, 1983).

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