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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 öffentliches 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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Climate Change and Public Law Dossier: Introduction

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«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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