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French Yearbook *of* Public Law

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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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Contents

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.