fypl

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.

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

Steering Committee

Editorial Board and Secretariat

International Scientific Council

fypl french yearbook of public law

Contents

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

Climate change litigation: efficiency

Christian Huglo[1]
Lawyer, Doctor of Law

Abstract:

Climate change presents a critical challenge to humanity's future and survival, disrupting established legal concepts due to its global nature, invisibility, limited predictability and the inability to fully repair its impacts. Scientific analysis has shed light on the causes and evolution of climate change, offering the potential for mitigation and adaptation strategies. However, the implementation of these strategies faces significant political, economic, ethical, and legal hurdles. This overview briefly outlines these challenges in three key categories: policy, economy, and ethics.
This analysis sets the stage for a more in-depth exploration of these complex issues and the legal responses they require.

Keywords:

Climate law, Climate change litigation, Environmental law

1 The author thanks Margaux Berthelard for proofreading this article.

Climate change is a phenomenon of fundamental importance for the future and survival of humanity. It also challenges our main legal concepts, whose characteristics are: globality, invisibility, lack of effective prevention or prediction, non-reversibility and non-repairability.

Fortunately, climate change has been analysed many times by science, both in terms of its causes and its evolution. The work carried out by scientists over the years is normally likely to outline a policy to mitigate the effects of climate change and enable the human race to adapt to it. However, the implementation of this mitigation strategy faces many political, economic, ethical and, of course, legal obstacles.

These first three categories of phenomena will not be discussed in detail. We will therefore limit ourselves to indicating the broader outlines.

- In terms of policy, it entails moving from a short-term to a long-term vision.

- As far as the economy is concerned, the question is thorny because the climate catastrophe that is increasingly apparent obviously calls into question the growth model of society, which implies an uncontrolled use of resources. These resources are limited and some of them are non-renewable, hence the importance of moving towards a new economic model. It is undeniable that the multiplication of pollution of all kinds is the result of this model, which is why it is necessary to act in the direction of greater sustainability and ecological transition.

- On the ethical level, there is obviously the question of defining rights for people who have not yet appeared. This is all the more true since there are already problems in regulating the relationships between people who already exist.

As you can see, we are mainly interested in the legal aspect. From a legal point of view, it can be argued that the law has been caught unprepared at both national and international level.

I. Climate law at the international level

First of all, the binding force of international law is questioned, even though it seems to be the most appropriate level to deal with a global problem.

Unfortunately, there are no mandatory sanctions in international law, except for the possible consent of the legal subject.

Furthermore, we note a steady deterioration in the multilateralism that allows for the institutionalisation of this right.

International law is also in competition with other legal systems. The most telling example is probably Article 3(5) of the Climate Convention, which states that developments in climate law should not impede the smooth functioning of international trade.

How then can climate law evolve at the trans-state level when there is such direct competition with norms that aim, on the contrary, to roll back the progress of this law?

It is also important to stress the importance of the way in which climate law is developed at the COPs. At the meeting of the parties, decisions are taken by unanimity, which is an obstacle to the development of positive and binding international law. If we take the case of the Paris Agreement, no one denies its legal consistency, both in terms of the climate objectives to be achieved, i.e. limiting global warming to 1.5°C by the end of the century, and in terms of the means to be used to achieve them. However, as the last COP in Glasgow revealed, the transparency of the States concerning their actual contribution to this objective is very low.

II. Climate law at national level

National law also has a considerable role to play, even if it is necessary to put an end to a commonly accepted idea: the climate imperative is not taken into account by the Charter of the Environment, so it has no direct effect!

On the other hand, some states, such as Bolivia, Côte d'Ivoire, Dominican Republic, Ecuador, Nepal, Thailand, Tunisia and Venezuela, have incorporated climate into their constitutions. Article 20 of the German Basic Law refers to the state's responsibility towards future generations.

Secondly, the protection of biodiversity has not been effectively taken into account in the evolution of classical environmental law. The latter has preferred to focus on the fight against pollution rather than on a right to protect our environment as a whole. This is illogical when one considers that the maintenance of biodiversity is precisely the primary concern of climate law.

Unfortunately, there is a constant temptation to regress in environmental law. The current context also works against it, between the exceptional circumstances caused by the war in Europe and an economy damaged by the health crisis.

As a result, it is currently extremely complex for national judicial systems to provide a satisfactory, or even complete, response to the challenge of global warming. In its conception, especially in the West, the judicial system is limited to the interpretation of existing positive law. Law-making is reserved to the executive and legislative branches. However, the crisis calls on judges to play a new creative role on all continents and in all areas of litigation.

The current development of climate litigation, both quantitatively and qualitatively, is taking place solely at the national level. We could thus define it as "litigation in principle" that would make it possible to explore the content of a possible future global environmental code adapted to the Anthropocene.

A prior examination of the lack of climate litigation at the international level is essential to better understand its strengths and weaknesses, including those of its content.

III. Incompetence of the International Judge

At the outset, it is important to bear in mind that no international court established under a membership agreement, such as the Hague Court of Justice, has ruled on the issue of the 1.5°C 2100 target. None has ruled on the failure of states to account for their national contributions under the mechanisms of the Paris agreement.

For its part, although the International Criminal Court has taken an interest in the issue of ecocide and the environment, no proceedings have ever been opened before it on this subject.

Thus, one observation must be made: faced with this global problem, there is currently no globally competent jurisdiction. The international judge has never pronounced on the question of the control of contributions before an international judge.[2]

2 See on this subject: Hellio, H. & Cournil, C., *«Les procès climatiques»*, Ed. Pedone, p. 217 et seq. See also by the same author: *«Les contributions déterminées au niveau national, instrument au statut juridique en devenir»*, Revue juridique de l'environnement n° spécial 2017, pp. 35-48.

The situation with the International Court of Justice is much the same, although there have been attempts to bring cases before it. However, no one doubts the interest of the International Court of Justice in the protection of the environment as it ruled on 2 February 2018 on a case concerning Nicaragua's activities in the border region.[3]

The International Court of Justice has been able to make a significant contribution to the development of international law through the mechanism of requesting advisory opinions established by Articles 65 to 68 of the Statute, as well as Articles 102 to 109 of the ICJ Rules of Procedure.

For example, we can cite the case of the advisory opinions given in the cases of the legality of nuclear weapons[4] or that of Kosovo.[5] This request has apparently still not been addressed by the UN General Assembly on the provisional agenda.

A request for an advisory opinion was also made in 2011 by the President of the Republic of Palau to the International Court of Justice to rule on the responsibility of States to limit greenhouse gas emissions.

It is not inconceivable that the ICJ is likely to play a role in international climate law.[6]

Various attempts to appeal to the UN Committee on the Rights of the Child have been made, but have been declared inadmissible for failure to exhaust domestic remedies. Nevertheless, the Committee's principled competence in this area has been recognised.[7]

One may also recall the decision of the Human Rights Committee in Teitiota v. New Zealand.[8] This case concerned an asylum application that did not receive approval.[9]

The same applies to regional courts. Indeed, the European Court of Human Rights dealt with an inquiry by young Portuguese applicants under Articles 2, 8 and 14 of the Convention. The application was directed against 33 Member States. The applicants argued that in most of the disputes involving States, emissions generated outside their territories were not taken into account.

In a decision of 20 November 2020, the Strasbourg Court accepted the admissibility of this claim and ordered its urgent investigation[10], which in no way prejudges the recognition of the merits of its referral.

The position and action of the Court of Justice of the European Union is not to be questioned, given the abundance and exemplary case law in environmental litigation.

However, we cannot ignore the fact that Europe, and more specifically the European Union, is in the lead on the issue of global warming and biodiversity protection. The

3 ICJ, 16 Dec. 2015 & 2 Feb. 2018, General List No. 150, *Case of Costa Rica v Nicaragua*.

4 ICJ, Legality of the Use of Nuclear Weapons by a State in Armed Conflict, Advisory Opinion of 8 July 1996, p. 226.

5 ICJ, Advisory Opinion of 22 July 2010, Conformity with International Law of the Unilateral Declaration of Independence of Kosovo. See on these different points our book *«Le contentieux climatique, une révolution judiciaire mondiale»*, Ed. Bruylant, 2018, p. 57 et seq.

6 Strauss, A., 2009, New-York, Cambridge University Press, p. 334; Voigt, *The potential role of the International Court of Justice*, in "Climate change", Elgar encyclopedia, 2016, vol. 1, Chentenham, Edward Elgar, p. 52166.

7 See on all these points our developments in "Panorama du contentieux climatique 2020-2021", *Journal spécial des Sociétés* special issue of 15 Dec. 2021, p. 13 et seq.

8 Human Rights Committee, 24 Oct. 2019, Communication No. 2728/2016, '*Teitiota v. New Zealand*'.

9 See on this subject, same references, previous note, Special Society Journal, p. 14.

10 See in this respect: Cournil, C., & Perruso, C., *«Le climat s'installe à Strasbourg, les enseignements des premières requêtes portées devant la Cour européenne des droits de l'homme»*, l'observateur de Bruxelles 2021, nouveaux enjeux du droit européen du droit de l'environnement, n° 124, p. 24-29.

Green Deal programme contains a real law on global warming, as well as an ambitious programme to fight pollution and encourage green investment.[11]

However, in terms of litigation, the Court of Justice of the European Union has always rejected direct actions brought by citizens, whether or not they are members of the Union, on the issue of global warming.

This questioning also found its final conclusion in the judgment of the Court of Justice No. 5 of 25 March 2021 (press release 5121, Luxembourg 25 March 2021)[12], which confirmed the inadmissibility of the appeal lodged by families from the European Union, Kenya and Fiji against the 2018 EU climate package.

The Court of First Instance had, by decision of 8 May 2019[13], already ruled that this action was inadmissible on the grounds that it did not comply with Article 263 of the Treaty on European Union. According to the Court of First Instance, this action did not meet any of the criteria for standing.

In its 2021 judgment, the Court emphasised that the allegation that an act of the Union violates fundamental rights is not in itself sufficient to render individual claims admissible.

Fortunately, this situation is likely to change.[14]

Under these conditions, it is not possible to ignore the appeal of civil society, which includes large cities, citizens and environmental NGOs. National judges were the only ones able to respond to a call for distress due to the lack of effectiveness of international law, the sanctioning of which was not assured.

IV. Limitations on the powers of the national judge: strengths and weaknesses of national climate litigation

Climate litigation at the national level is very broad, both in terms of the number of cases (nearly 2,000 according to the projections of the January 2021 United Nations Communication) and in terms of the objectives mobilised. It concerns both emission reduction targets and global warming adaptation targets, also known as "*tackling climate change projects and activities*".

This litigation is therefore considerable. It has developed at the level of public law, and even constitutional law in certain cases, and targets both public and private persons who are guilty of anti-climatic behaviour or behaviour reflecting deficiencies.

To date, few legal systems ignore climate litigation data, except in large nations such as Russia, where environmental litigation is fought almost physically, or China, which limits its climate litigation to questions of the technical performance of certain devices designed to combat global warming.

Criminal litigation, on the other hand, remains totally limited. This is easily dem-

11 See our Communication and *"The Green Deal, a sustainable investment for all of us"*, Brussels Observer, No. 2021/2, No. 124, p. 36 et seq.

12 CJEU, 25 March 2021, Press Release 5121, No. 5, Luxembourg.

13 Order of the Court of First Instance (Second Chamber), 8 May 2019, Case T-330/18.

14 See European Parliament legislative resolution of 5 Oct. 2021 on the proposal for a regulation of the European Parliament and of the Council amending Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 Sept. 2006 on the involvement of the institutions and bodies of the Community in the provisions of the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters in Official Journal of 24 March 2022, C.132-212.

onstrated if we take into account the attempts linked to citizen initiatives of demonstrations, the removal of portraits of the President of the Republic or the occupation of banking establishments.

The idea of invoking texts relating to the obligation to prevent the occurrence of a disaster is still purely theoretical. The theme of ecocide, as it has been interpreted by French law, cannot be used to characterise an offence. However, it is required for the offence to be constituted.

In this context, it is therefore necessary to assess both the conditions of the contribution of national climate litigation to the law of the Anthropocene and its limits.

As soon as the question of the national judge and his powers is raised, two ideas come to mind:

- The legitimacy of the judge in relation to the executive and legislative powers, even though they are elected.
- The competence of this judge.

We can already point out how paradoxical it is to ask the judge to rule on issues as important as global biodiversity, the climate or the health of humanity at the level he or she is at. Moreover, such a judicial system does not exist everywhere. The national judge does not have independent power in all states. It is therefore not possible to compare the Chinese, American, Russian or European judicial systems.

The main merit of national climate litigation is to give efficiency to international law, and in particular to the climate convention. Indeed, and this is all the more valid for international law, the law only exists if it is effective.

The US Supreme Court recognised a climate obligation on the part of the federal government in the so-called Massachusetts case in 2007.

However, in Europe, three court decisions have intervened in quick succession to give substance to the obligation to respect the commitments contained in the Paris Agreement, i.e. a limit on global warming of +1.5°C. The recently published IPCC report also reminds us that this objective is no longer achievable.

But the rules had to be set.

The Urgenda decision of the Dutch Supreme Court in December 2019 enshrined the right to the environment, the right to life and the right to privacy. It recognises the right to be free from environmental harm in one's lifetime, based on Articles 2 and 8 of the European Convention on Human Rights.

It granted the collective request of the Dutch.

Then the French Council of State followed and issued two major decisions, the so-called Grande Synthe decisions[15] of 20 November 2020 and 2 July 2021. It gives direct effect to the +1.5°C objective. It emphasises that the legality of the Government's refusal to accelerate its action should be assessed in relation to the insufficient efforts made. The obligation of means must therefore be enshrined in an efficient obligation of result.

The Karlsruhe Court[16] has also broken new ground. It considers that the climate obligation obliges us towards future generations who have the right to live in a viable environment.

The landscape of private law will also be changed by the landmark decision of the District Court of The Hague in the Shell case.[17] The judge obliged the multinational, as well

15 CE, 20 Nov. 2020 and 2 July 2021, *Commune de Grande-Synthe*.

16 Constitutional Court of Karlsruhe, 27 March 2021.

17 District Court of The Hague, 26 May 2021, *Royal Dutch Shell*.

as all its subsidiaries, to give substance to the objectives of the Paris Agreement. This decision reminds us that the relevant elements are not subject to external state coercion.

This is the effectiveness of climate litigation.

The most difficult part is the implementation of this obligation because, beyond the affirmation of fundamental objectives, these must be concrete and rooted in reality.

The fundamental institutions of environmental law as well as the principles of prevention, recovery and public participation must be mobilised.

The principle of prevention applies to all projects and is reflected in the obligation to carry out an environmental impact assessment whenever environmental damage is possible.

The institution comes to us from the United States in the 1961 Act. It has been transposed in Europe by a series of directives and is currently integrated into the French Environmental Code.

The obligation is fairly general, since it is a matter of taking into account the transboundary effects of a project or plan through the Escazu Convention[18] for South America or Europe, and the AARHUS Convention.[19]

The Court of Justice itself is involved in giving substance to this impact assessment requirement in two important cases: the Gabcikovo Nagymaros case[20] and the paper mills case.[21]

The difficulty is not to confine the scope of the impact study to the immediate environmental issue alone, but also to the climate dimension, which is what is known as the analysis of the indirect effects of the project on the climate.

There are considerable technical difficulties. For example, the production of fuel from palm oil involves the deforestation of entire forest areas.

Similarly, the realisation of a classified biomass installation implies massive deforestation.

The current tendency of the courts is to consider that the issue of deforestation and an authorisation under a special legislation, that of classified installations, are two different models that do not have to be connected.

But this is not the view of foreign courts, and in particular of Australian decisions.[22]

There is no specific doctrine in French law to encourage the administration to study the indirect effects and the climate balance of a project.

This was the reasoning behind a decision by the Council of State on 30 December 2021 at the request of the City of Geneva. The latter contested the creation of a motorway segment that was to be built on the southern shore of Lake Geneva, whereas the city had invested considerably in a railway line intended to attract the cross-border population.

The real question is the cost/benefit ratio between a motorway link that emits greenhouse gases and transport by rail, with no comparison in terms of carbon footprint.

The second difficulty is that of the application of the polluter-pays principle, from which emerges the obligation to repair the ecological damage.

This question of compensation for ecological damage is the result of a very long evo-

18 Escazu Agreement, 4 March 2018.

19 AARHUS Convention, 25 June 1998.

20 ICJ, 25 Sept. 1997, *Gabcikovo Nagymaros*.

21 ICJ, 20 April 2010, *Paper Mills Case*.

22 See note by Thuillier, T., IEE Review, February 2018.

lution of case law, up to the ruling given in France in the "Erika" case.[23] This case concerned the sinking of the oil tanker Erika, which caused a huge oil slick along more than 400 km of coastline.

The Court of Cassation ruled that public authorities were entitled to compensation for the damage caused to the environment itself.

This case led to the creation in France of a provision in the Civil Code on compensation for ecological damage. The principle of compensation was recognised but limited to reparation in kind and not in money.

The difficulty of this compensation has not escaped us. Indeed, how can we compensate for climate damage since it is global and climate change is irreversible? Nor is it possible to compensate for damage caused to the high seas as a result of global warming.

French courts, such as the Administrative Court of Paris, have attempted to engage in this area by recognising the responsibility of the state for failure to act. However, it did not consider that anything more than a purely symbolic sum could be demanded in compensation.

Therefore, the principle is there and the way in which the efforts to be made will be implemented remains a delicate issue.

This question is also being considered in the litigation concerning the obligation of vigilance, which was recently reinforced for large European companies by a draft directive. Efforts remain to be made to achieve real judicial control, as the attempts made in the Total case have not yet borne fruit.

National climate litigation is, by definition, imperfect for classic and simple reasons. Climate litigation is limited to the contentious legal avenues offered by civil, criminal and administrative proceedings, which poses problems for the assessment of interest and standing, for proof and causation. This will evolve as a result of the expertise objectively provided by the work of the IPCC.

It is clear that the work of the IPCC, particularly the latest report, constitutes a series of recommendations in the same way as those of advisory bodies such as the High Committee on Climate Change. They are guidelines to be followed and implemented. They are rules of ecological transition for which the judge can be the guardian.

This is the position of the Council of State which, in the Grande Synthe ruling of the 2nd of July, gave the government a specific deadline to review its policy.

French administrative law and the Code of Administrative Justice allow for the use of coercive measures such as formal notices and penalty payments, which have already been recognised and used by the case law, notably on the issue of litigation concerning the application of the Air Directives in France.

Finally, the climate dispute can be credited with having paved the way for the obligation to guarantee a civilisation acceptable to all and under all conditions.

However, the law of the Anthropocene deserves to be translated into implementation measures that are only in their infancy.

The international situation, the weakening of multilateralism and the emergence of nationalism cannot help the situation to evolve, except for the efforts by the internal judge and European institutions. The European Union is exemplary in this respect thanks to the implementation of the Green Deal and all the other means it uses. But the support of the citizens could make it possible to change things outside the strict frame-

23 Cass. Crim., 25 Sep. 2012, Nº 10-82.938.

work of litigation.

This is probably the merit of declarations that can point the way forward, as in the case of the Declaration of the Rights of Mankind, which provides four principles, six rights and six duties for the future.

No one can doubt the usefulness of such a perspective. When we look back at history, we can only see that the great declarations of the American constitution, the 1789 Declaration of the Rights of Man and of the Citizen, and the 1948 Declaration are ways of creating and making new rights effective.