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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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Could national judges do more? State deficiencies in climate litigations and actions of judges

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Abstract:

The present article examines the complex relationship between the judicial power and the legislator in the context of climate change litigation. In this context, the ideal of a separation of powers is often advanced to promote judicial self-restraint or even judges' incompetence to rule in this matter.

By analysing various court decisions, in particular decisions of constitutional courts, the authors portray the interference of judges in the legislative function while insisting on its limits. By demanding sufficient measures of the legislator to fight climate change, courts do certainly assume a legislative role. However, it is clarified that judges are neither asked to draft laws, nor to act in place of the legislator but rather to initiate action of the legislator. The authors conclude that the decisions considered enforce the application of law and the respect of constitutional and international commitments as well as the respect of fundamental rights in accordance with the principles of the separation of powers.

Keywords:

Climate change, Climate litigation, Legislative powers, Separation of powers

One hundred years after the evocation of a 'government of judges',[1] the political actions of judges are still the subject of intense reflections,[2] which seek to clarify the obscurity that surrounds the role of the courts. The issue of climate change allows us to take a fresh look at the particular exercise of the judge's powers vis-à-vis the State. Old questions – such as the separation of powers – emerge in the context of these new litigations[3] in the face of urgent issues, which, perhaps, justify the question at the heart of the issue under consideration: "Could national judges do more?" In order to answer this question, this article will commence to outline in section one the methodological considerations, before examining the judge's room of manoeuvre and his legislative functions in section two. In a final section, we aim to provide some thoughts on the judges' jurisdictional role and argue that the latter leads to self-limitation.

I. Methodological considerations and selection of the cases to be studied

A. Purpose and scope of the study

There are many ways to approach climate change. Reducing the approach to the legal prism means viewing the law as a subject at least partially isolated from the social phenomena it is supposed to address. Such a view seems increasingly difficult to justify. Our approach, however, remains essentially juridical, in its way of examining things, but above all in its subject matter. We retain a contentious approach through the idea of a climate 'on trial'. This approach does not seek to create legal statements or rules of law. It aims to examine jurisdictional decisions rendered in the context of litigation. It is hence also irrelevant where one places jurisprudence among the sources of law. While there is a plethora of climate cases, we will not be interested in all litigation.[4] We will limit ourselves to focus on those cases in which the shortcomings and failures of States are most evident. This means that we will not consider disputes that concern specific projects, state responsibility (although threads can be tied) or certain actions that would be incompatible with the needs of the fight against climate change. In that respect, it proved helpful to turn to comparative legal studies, and particularly those which focus on national litigation in which States are charged for non-compliance with obligations or commitments to prevent and mitigate the effects of climate change. The nature of these obligations may be diverse in that they may stem from amongst others international and regional conventions, from fundamental rights derived from constitutional norms or framework laws.

There are several methods to classify litigation. A simple typology of these infringement actions makes it possible to distinguish between disputes according to their nature. One may distinguish between those cases in which it is the legislator, the government or even the State as a whole who is charged for failure to act and those in which it is private actors such as large companies like Shell or Total who are brought before Court. It

1 Lambert, E., *Le gouvernement des juges et la lutte contre la législation sociale aux États-Unis*, 1921, Paris, Marcel Giard & Cie., rééd. 2005, Paris, Dalloz.

2 Breyer, S., *The Authority of the Court and the Peril of Politics*, 2021, Cambridge, Harvard University Press.

3 The cases introduced here can be found online: http://climatecasechart.com/climate-change-litigation/ https://climate-laws.org/litigation_cases._

4 For a classification of all climate cases: Ruhl, J. B., Markell, D., "An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual ?", *Florida Law Review* 2012, pp. 30-32.

is also possible to classify litigation according to the type of failure to act: in some cases, the State will be ordered to make commitments, in others it might have to take measures to ensure compliance with existing commitments. Cases might also overlap in this respect. Sometimes, no action has been taken by the State, or it is necessary to ensure that the measures taken are consistent with the commitments or with other imperatives. The latter constitutes a separate typology, which presents disputes according to the judge's more or less imposing or pressing position towards the legislative power. The purpose, then, is not to provide a comprehensive overview of current litigation, but merely to describe and examine certain phenomena in the jurisprudence.

B. Interest in such a narrowing of the approach

As mentioned above we will limit ourselves to consider a few selected cases only. This essentially serves two purposes. First, it allows us to focus on a specific issue in a few pages and analyse a sufficient number of varied cases to establish some constructed assumptions. The analysis of different types of litigation, even in the field of climate change alone, would certainly have multiplied the biases, which are already numerous when one opts for a comparative and open approach. It seems to us, however, that the cases chosen allow us – more than others – to shed light on the relationship between law and politics. They particularly reveal, a certain vagueness in the distribution and division of legislative and judicial functions. Secondly, although some of the cases discussed here have been the subject of numerous comments, these often favour, and rightly so, the invocation of fundamental rights or responsibilities in that they do not insist on the profound and sometimes endless questions of imputability and causality.[5] Legislative measures, especially in terms of their content, procedural modalities, and translation into national, regional and international political commitments, seems to us to be rather discrete.

C. Some methodological remarks

Tackling the consequences of climate change, a rather broad and vague subject, requires overcoming a number of difficulties. Since it is often not possible to bring cases dealing with climate change before international judges, the disputes examined depend on national systems and laws which, admittedly, include levels that literally open them up to the international arena. However, each State has its own legal system, its own legal logic, and often a specific "litigation clock", which often results in great disparities on numerous points. It is therefore necessary, as far as possible, to try to neutralise these difficulties without seeking to draw universalistic conclusions. This is why it was necessary to limit the number of cases studied. However, a selection may also give rise to bias in terms of the importance of the cases chosen. One may think that there has been a significant movement in case law when, in reality, only a few daring cases have been rendered in the last ten years.

The French academic training suggests a classic methodological orientation of comparative law. The following considerations are based primarily on the particular mechanisms of French law, which, under the influence of Western philosophical and political theories, has difficulty in understanding, for example, common law. We have therefore

5 Even though, all those issues are interdependent with the object - the German case specifically.

tried, as far as possible, to take cases from several different geographical areas.

The aim here is not to summarize the analyses of the various disputes or to make a definitive assessment of them: some are ongoing, and others are just beginning to have an impact. Rather, the point is to analyse the conception of juridical action in these very peculiar disputes. We believe that, particularly in Western societies, a mythology has formed around legal action and the judge's ability to provide solutions and to contribute more or less directly to the inflection of public/legislative action. The aim of this article is to question this mythology and to highlight the assumption underlying some disappointment and perhaps too much focus on litigation alone.

D. Challenges and issues

It must be noted that there are many climate change disputes around the world,[6] but their impact is open to debate. The length of the proceedings, the difficulty of allocating and accepting responsibility – particularly on appeal, the rather moderate results even if successful and the lack of structural and real changes essentially show that up until now, the outcome of these actions is at best half-hearted. While climate change is underway, contentious solutions still appear to be in their infancy and carbon neutrality still seems largely chimerical.

We will therefore try to provide some answers to a few questions. First, we are interested in the relationship between the judge and the legislative power. In the face of the mixed successes of the litigation studied, what could be expected a priori but what should be established a posteriori? It is the role of the national judge who renders his decisions in a global context that we question.

What does the judge's action against the State reveal? We believe that if the various disputes concerning the State's failure to comply with its commitments illustrate the various possibilities for action by the judge, it is always at the risk of the separation of powers being raised and brandished, often wrongly, as we will try to show (at least in Western democracies). Inevitably this leads us to question how much leeway the judge should be given to integrate legislative functions when resolving disputes brought before him.

Even if judges (sometimes) do a lot in theory, they are far from being the central actor in climate policies in the light of our analytical framework. However, the political strategy of a number of activists suggests the opposite: in the absence of action by the political authorities, a solution is sought in judicial action. So where does the reluctance of judges come from, and how can it be characterised? If arguments concerning separation of powers are set aside for the moment, analysing the arguments of the judges themselves might allow for different hypotheses.

II. Legislative function and the judge's room for manoeuvre

We propose a step-by-step analysis of the judge's ability to take up legislative functions. Firstly, this allows us to understand that the judge, in the exercise of his prerogatives, is constantly positioning himself in relation to the legislative power. Secondly, we will thus be able to identify the legislative functions that the judge refuses to exercise, and those that he exercises only with caution.

6 More than 1.500 as of January 2023, UN, *Global Climate Litigation Report*, 2020, Status Review.

Our analysis starts with the least intrusive insertions and extends to those that can be considered inherently and directly specific to the legislative body. The legislative function is thereby understood as any participation in the process of creating or conceptualising general and abstract norms of legislative value.[7]

A. A traditionally limited review

First, judges may decline jurisdiction to rule on a petition that requires legislative intervention. They may agree that it is not for them to interfere in such matters, as the constitution does not confer such powers on them. In such cases, this power is reserved for the respective legislative bodies. In the *Commune de Grande-Synthe* case, for example, the French supreme administrative court chose to consider that 'the fact that the executive power refrains from submitting a bill to Parliament affects the relationship between the constitutional public powers and therefore falls outside the jurisdiction of the administrative court'.[8] The reasoning behind this decision will be further examined in the following section. We shall consider the grounds on which judges may refuse to rule, or may rule only minimally. Notably, this argument is not unique to cases brought against States.[9] The importance of the claims or their purely political nature may also be a reason for judges to withdraw: 'The plaintiffs' claim fails on the grounds that some issues are so political that the courts are unable or unsuitable to deal with them'.[10]

Another, less intrusive but more 'active' approach is for judges to propose the future framework of legality. Case law can thus provide a framework or initial bases for the legislator to draw upon.[11] There are two ways of looking at the matter: either the judge proposes what seems reasonable to him, taking into account climate legislation; or, what seems to us to be more often the case, he goes beyond the legislation in place. He then warns and pre-emptively indicates the legal framework that he will consider valid. The latter interpretation clearly has a strong impact on the way in which legislation is applied, which might in turn be taken into account by the legislator when legislating. This seems to have happened in Ireland, where the Supreme Court annulled a plan because it 'lacked specificity'. The Court specified that 'an identical plan cannot be adopted in the future'.[12] A similar case can be found in Nepal,[13] where, following the litigation, a law was passed to take into account the judge's 'prescriptions'.[14]

Furthermore, judges will also be able to intervene in the legislative function when reviewing the application of a law. This is frequently the case in climate litigation.[15] On the

7 The effects of the court's action must also be integrated thereupon.

8 State Council, 19 Nov. 2020, nº 427301, *Commune de Grande-Synthe*.

9 For example, Oslo District Court, 4 Jan. 2018, nº 16-166674TVI-OTIR/06, *Greenpeace Norway v. Norwegian State*.

10 Ottawa Federal Court, 27 Oct. 2020, *La Rose et al., c. Sa Majesté la Reine*, § 40.

11 Peel, J., "Issues in Climate Change Litigation", *Carbon and climate law review* 2011, vol. 5, p. 24.

12 Supreme Court of Ireland, 31 July 2020, nº 205/19, *Friends of the Irish Environment v. Irish Government*, § 9.3-9.4.

13 Supreme Court of Nepal, 12 Dec. 2019, nº 10210, *Shrestha c. Prime Minister's Office and al*, Order 074-WO-0283: 'Since the Environment Protection Act 1997 does not encompass climate adaptation and mitigation, therefore, a separate law dealing with issues related to climate change to be drafted and enacted.'.

14 Environment Protection Act, 2019 (2076).

15 For example: *Lahore High Court, 30 Aug. 2019, Sheikh Asim Farooq v. Federation of Pakistan; Supreme Court of Nepal, 25 Dec. 2019, Shrestha v. Office of the Prime Minister et al, mentioned above; Federal Supreme Court (Brazil),*

basis of a legislative or constitutional norm, the judge may also examine the necessity of actions of others.[16] In this regard, we refer to the very classic case of *Massachusetts v. EPA et al*,[17] which was the first important decision in this area. The obligation to act as requested by judges has even been described as a 'fundamental rule of constitutional democracy'.[18] A similar ruling can be found in Colombia.[19]

Similarly, judges can go so far as to condemn and hold the State accountable on the basis of the laws in place, [20] while remaining in a 'control of legality and not of opportunity".[21]

The interpretation of the law contributes to its transformation it, by attributing to it a meaning, a significance, and effects beyond or different from what the text may seem to say. This recourse to the legislative function usually occurs in more concrete legal disputes about the legality of certain projects or measures. It will be interesting – or disturbing – to observe how the Energy Charter Treaty[22] will be interpreted in five cases in which companies attack the state for adopting climate-related measures.[23]

B. The interference of judges in legislative activity

In addition to interpreting and applying the law, judges seem to have another, and arguably more creative power that must be analysed. In the first place, they may find that provisions that seemed to have no legislative or legal value have a real normative scope, or the other way around to set aside acts that appear to constrain the legislator.[24] In general, the interdependence and integration of international norms into national legal systems should be further analysed, but this is far beyond the scope of this article.

The solution will not be very different when the judge chooses to annul a law, which is most often based on a violation of a higher – constitutional or international – norm. Judges can compel the state in various ways (injunctions, fines, etc.) to complete or even amend the legal framework. The judge may thus conclude that, in view of the current legislation and according to the higher legal objectives pursued, there is an obligation to go further, to do better. This type of argument can partly be found in the jurisprudence of Urgenda,[25] the Netherlands and in Germany.[26]

PSB, et al., v. Brazil, in litigation ; 7th Federal Environmental and Agrarian Court of the Judiciary Section of Amazonas (Brazil), Laboratório do Observatório do Clima v. Minister of Environment and Brazil, in litigation.

16 However, the recipient of the obligation raises doubts: it is mainly governments, or States in general - which often makes it impossible to identify a single concrete person – to whom such requests are addressed.

17 Supreme Court of the United States, 2 April 2017, 05-1120, 549, *Massachusetts c. EPA et al.*

18 Supreme Court of the Netherlands, 20 Dec. 2019, nº 19/00135, *Pays-Bas c. Urgenda*, § 8.2.1

19 Supreme Court of Justice (Colombia), 5 April 2018, STC 4360-2018, *Claudia Andrea Lozano Barragán, et al. C. Presidency et al.*

20 For example, French State Council, 8 Feb. 2007, nº 279522, *M. Gardedieu.*

21 For example, the French-speaking Court of First Instance of Brussels, 17 June 2021, 2015/4585/1, p. 45.

22 *Energy Charter Treaty*, Lisbonne, 17 Dec. 1994.

23 In late 2022 (30 Nov. 2022) the District Court of The Hague seems to have ruled against the companies (claimants).

24 On all these questions, see in particular the arguments of the State Council, *Commune de Grande Synthe*, and the French-speaking Court of First Instance of Brussels, 17 June 2021, op. cit., § 2.3.2.

25 District Court of The Hague, 24 June 2015, C/09/456689, *Urgenda Foundation v. The State of the Netherlands*, § 4.83.

26 Federal Constitutional Court of Karlsruhe, 24 March 2021, 1 BvR 2656/18, *Federal Climate Change Act,* in this case

In *Leghari v. Pakistan*[27], a 'Climate Change' commission was set up. The judge went so far as to request the appointment of an adviser on the subject to each minister (in particular § 4). Noting that a certain number of necessary actions had finally been put in place, he dissolved this commission but set up a permanent committee, so that the effort would continue. It remains the responsibility of the competent actors to enact the concrete legislation, but the judge pushes for its adoption and for the participation of the competent authorities. This is an interesting intervention in the legislative function in this hypothesis where the judge, without substituting himself, makes it happen.

This case allows us to draw a link with the essence of the requests made when the State failed to fulfil its obligations. What is really requested of judges, even more than the various actions seen so far, is that they order the authorities to adopt a specific law. In fact, this is where what can be considered authentic legislative action by the judge for our purposes becomes apparent. The first observation is that the judge's injunction is generally binding, either because he demands that a law be adopted or because the constraint concerns the law to be adopted. Judges do not merely ask for any kind of legislation to be made. Indeed, we have already seen in the *Leghari* decision that the judge himself constructs the framework for the design of the future policy. But he may also – and above all – take an interest in the subject matter of the future law. This will often involve finding that an obligation has not been fulfilled, that a fundamental right has been violated, or that there is a gap in the legislation, as we have already seen in the Nepal case.[28]

Traditionally, the court will rely on the violation of quantified greenhouse gas emissions reduction targets, as seen in French litigation, for example. The court may then refer to international commitments. However, it will first have to consider the normativity and binding nature of these commitments.[29]

In the sequence of justification for requiring a new law, the Hague District Court's reasoning in the *Urgenda* case is particularly interesting:

> *'The court has also established that the State has failed to argue that it does not have the possibility, at law or effectively, to take measures that go further than those in the current national climate policy'.*[30]

The requirements may be more or less binding: the judge may require that 'all appropriate measures'[31] must be taken, or specify that 'the claim discussed here is not intended

on the differences in efforts that need to be made before and after 2030 to conclude that too much effort in 2030 leads to better legislation for before, especially: § 115.

27 Lahore High Court, 25 Jan. 2018, W.P. n° 25501/2015, *Leghari v. Fédération du Pakistan*.

28 Supreme Court of Nepal, 12 Dec. 2019, *Shrestha c. Prime Minister's Office and al*, op. cit.: 'In order to combat climate change, mere enlistment of direct policies and plans is not enough, an effective structure to implement such plans is necessary, however, no such structure has been created [...]. Since the Environment Protection Act 1997 does not encompass climate adaptation and mitigation, therefore, a separate law dealing with issues related to climate change to be drafted and enacted'

29 French-speaking Court of First Instance of Brussels, 17 June 2021, op. cit., § 2.3.2.

30 The Hague District Court, 24 June 2015, *Urgenda Foundation v. The State of the Netherlands*, op. cit., § 4.99.

31 State Council, 19 Nov. 2020, *Commune de Grande-Synthe*, op. cit.

to order or prohibit the State from taking certain legislative measures or adopting a certain policy [...] to determine how to comply with the order concerned'.[32] In some cases, the extent to which elements would constitute sufficient legislation is specified. These might include:

> *'make special legal provision for promotion and development of low carbon emitting technology, technology that utilizes clean and renewable energy, reduce the consumption of fossil fuel consumption for the purpose of climate change mitigation, and includes provisions for forest conservation and expansion and addresses the usage of forest area the type of energy in vulnerable areas, [...] arrangements of legal and technological mechanisms should be made, [...] Make legal arrangements to ensure ecological justice and environmental justice to the future generation through the conservation of natural resources, heritages and environmental protection while mitigating the effects of climate change [...] for scientific and legal instruments to evaluate and compensate individual, society and others caused by pollution or environmental degradation, [...] make legal provisions and in policy highlighting the Climate Change Duties of public and private organizations'*[33].

C. The decision of the Karlsruhe Court: control of the future or future universal control?

Special attention should be given to the decision of the Karlsruhe Court in March 2021. From the German Constitutional Law, the court deduces the existence of a number of constraints for the legislator and thus decides that it is obliged to legislate in order to comply with these higher standards.

A duty of protection also exists towards future generations. The conditions of validity of the law are thus temporally extended. Article 20a of the Basic Law[34] creates a duty of climate protection for the state. The legislator has taken measures to meet this obligation, requiring that global warming remain below 2° C and preferably below 1.5° C as provided for in the Paris Agreement.

> *'[I]t is not ascertainable that the state has violated requirements incumbent upon it to avert existential threats of catastrophic or even apocalyptic proportions. Germany has ratified the Paris Agreement and the legislator has not remained inactive. In the Federal Climate Change Act, it has set down concrete specifications for the reduction of greenhouse gases [...]. These reduction targets, which have been specified until 2030, do not in themselves lead to climate neutrality but will be updated [...] in line with the long-term goal of achieving greenhouse gas neutrality by 2050'.*[35]

32 The Hague District Court, 24 June 2015, *Urgenda Foundation v. The State of the Netherlands*, op. cit., § 101.

33 Supreme Court of Nepal, 12 Dec. 2019, *Shrestha c. Prime Minister's Office and al*, op. cit., § 6.

34 [Protection of the natural foundations of life and animals] Mindful also of its responsibility towards future generations, the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order.'

35 Federal Constitutional Court of Karlsruhe, 24 March 2021, *Federal Climate Change Act*, op. cit., § 115.

However, the protection of the climate is not absolute. Instead, it must be balanced with other imperatives of equal legal value.[36] The Court considered that in the case at hand, these values have not been adequately balanced. It is not that the measures to protect the climate interfere too much with other freedoms as one might expect,[37] but it is the distribution of the effort between generations and the consequences of an intensification of the action postponed in which the court finds too great an infringement of rights and freedoms.

> *'Another question is whether the post-2030 burdens inherently built into the framework – burdens that will entail restrictions on freedom – can be justified under constitutional law or whether the Federal Climate Change Act has inadmissibly offloaded reduction burdens onto the future and onto whomever will then bear responsibility. [..] The legislator has violated fundamental rights by failing to take sufficient precautionary measures to manage the obligations to reduce emissions in ways that respect fundamental rights – obligations that could be substantial in later periods due to the emissions allowed by law until 2030.'*[38]

The decision is highly political in that '[e]very consumed part of the CO2 allowance reduces the remaining budget, narrows the possibilities for any other CO2-relevant exercise of freedom and shortens the time left for initiating and completing a socio-technological transformation.'[39] This is a binding guideline in any future planning. The legislator's manoeuvre is thus clearly limited. It is then up to Parliament to enable the reduction of GHGs, to plan the efforts without placing a greater burden on future generations that would have a very strong impact on their rights and freedoms. 'Given the extent of the requisite socio-technological transformation, long-term restructuring plans and phase-out trajectories are considered necessary.'[40] Thus, it is not the State that is targeted here in the abstract, but rather the legislature as a body since it is "[t]he legislative process [*that*] gives the required legitimacy to the necessary balancing of interests."[41]

D. Preserving the legislator's autonomy

Although there are examples of decisions ordering the adoption of new laws or the amendment of legislative provisions,[42] the actual scope of this function seems to be limited. In a number of cases, the judge refuses to request a new law, for example, when the objective of neutrality is at stake[43] or simply when '[t]here is no reason to presume that ...

36 This is an argument that forms the basis for all his reasoning.

37 Federal Constitutional Court of Karlsruhe, 24 March 2021, *Federal Climate Change Act*, op. cit., § 142 for example.

38 Ibid, § 115, 182.

39 Ibid, § 122.

40 Ibid, § 121.

41 Ibid, § 213.

42 A number of ongoing cases are also likely to lead to similar results: Civil Court of Rome, *A Sud et al. v. Italian Government*; New Zealand High Court *Lawyers for Climate Action NZ v. The Climate Change Commission.*

43 14th Federal Court of Sao Paulo, 28 May 2021, *Six Youths v. Minister of Environment and Others.*

international protocols are not reflected in the policies of the Government…',[44] which implicitly raises the often-thorny issue of the burden of proof.

A quantitative study would undoubtedly put the current litigation movement into perspective by recalling that the decisions of significance are ultimately, at least for the time being, few in number. Here, it is only possible to conclude that the judge is certainly taking a step into the legislative function, which is not contrary to the separation of powers. Judges limit their own jurisdiction, even if they grant themselves some prerogatives at times. The line between the legislative roles that can be assigned to them to block or restrict the legislature and the legislature's own domain is thus drawn with the last two parts of the function that we will now deal with.

In fact, there is a part of the legislative function that the courts refuse to encroach upon: the sovereign appreciation of the legislature. In the context of climate litigation, this will often entail the concrete means to mitigate climate change.

In order to reach the goals set, the political actors have to retain a great deal of freedom regarding the method or means:

> *'It is relevant to note that the claim discussed here is not intended to order or prohibit the State from taking certain legislative measures or adopting a certain policy. If the claim is allowed [increase reduction targets], the State will retain full freedom, which is pre-eminently vested in it, to determine how to comply with the order concerned.'*[45]

This is the very meaning of the expression 'all useful measures' that is regularly used in French litigation.[46] GHG reductions can only be achieved if multiple sectoral policies are altered. This implies that the legislator has to integrate this interdependence of sectors within the mechanism chosen in order to provide a successful holistic strategy.[47] Unlike the broad objectives that may have been agreed on by means of the lowest common denominator – carbon neutrality or compliance with the objectives of an international treaty – the method is a purely political choice. Any interference by the judge in this area would reveal a position on values that would all too easily reveal a lack of neutrality that would in turn be seen as illegitimate within the policy-making process.

There are many examples of such self-limitations. However, judges can define the scope of possibilities by relying, for example, on a consensual reasoning around respect for human rights. In this case, they are merely repeating a classic legal requirement for laws to be valid.

If judges refrain from giving concrete guidance to the legislature as to how to achieve those rather ambitious objectives,[48] they also refrain from adopting precise legislative

44 National Green Tribunal: 'There is no reason to presume that the Paris Agreement and other international protocols are not reflected in the policies of the Government of India'.

45 The Hague District Court, 24 June 2015, *Urgenda Foundation v. The State of the Netherlands*, op. cit. § 4.101.

46 State Council, 1 July 2021, *Commune de Grande-Synthe*, op. cit.

47 This has already been stated by the Administrative Court of Paris, 2 March 2021, nº 1904967, 1904968, 1904972, 1904976/4-1, *Oxfam France et al*: 'The concrete measures likely to allow for the reparation of the prejudice may take various forms and express, as a result, choices that are subject to the free assessment of the Government'.

48 Method and objectives may be linked in that an acceptable method that does not meet the minimum objectives

provisions by way of substitution. In *Juliana*, the Court of Appeal expressly lists all types of concrete guidance which the judges are prohibited to adopt: 'order, design, supervise, or implement the plans requested.'[49] Yet this would be the purest form of a creative legislative function. However, judges do not adopt texts, and even when they create law, when they annul provisions or render projects or behaviours legal or illegal, their decisions do not have the effect of establishing a text in the legal order.[50]

Moreover, the applicants do not ask the judge to produce law himself.[51] Even when posing the question as to whether judges should make climate change law, one does not really foresee the judge drafting a legal code. While courts might be tempted to do so, they do not have the infrastructure to carry out the conceptualization of the text. The process of drafting laws is a central element of the laws themselves: they are not only texts; they are also the result of a procedure. The Karlsruhe Court does not mean anything else when it states:

> *'If the legislator wanted to move climate change law in a fundamentally new direction, this fact would need to be recognisable as such and therefore open for political discussion. The reason behind the explicit emphasis on legislation in Art. 20a GG and the acknowledgment of the legislator's prerogative to specify the law is that the special importance of the interests protected under Art. 20a GG and their tensions with any conflicting interests must be reconciled in a democratically accountable manner, and legislation provides the appropriate framework to do this [...]. The legislative process gives the required legitimacy to the necessary balancing of interests. The parliamentary process – with its inherently public function and the essentially public nature of the deliberations – ensures through its transparency and the involvement of parliamentary opposition that decisions are also discussed in the broader public, thereby creating the conditions by which the legislative process is made accountable to the citizenry. With the help of media reporting, this process also offers the general public an opportunity to form and convey its own opinions.'*[52]

Judges do not pass laws and do not force the legislator to promulgate texts that they would have enacted.[53] As such, they are not the central actors in climate action since, at the end of the day, the rules will be established by the legislator. Even if judges also make

will be considered invalid: Federal Constitutional Court of Karlsruhe, 24 March 2021, *Federal Climate Change Act*, op. cit., § 155: 'A manifestly unsuitable protection strategy would be one that concerned itself with reducing greenhouse gas emissions without pursuing the goal of climate neutrality'.

49 US 9th Circuit Court of Appeals, 17 Jan. 2020, nº 18-36082, *Juliana v. US*.

50 The view that a court judgment completes a text or creates an applicable principle that must be considered as hard law follows a different logic, the subtleties of which will not be addressed here.

51 Supreme Court of the Netherlands, 20 Dec. 2019, *Pays-Bas c. Urgenda*, op. cit., § 8.2.3: 'This case law is based on [...] the consideration that the courts should not intervene in the political decision-making process involved in the creation of legislation'.

52 Federal Constitutional Court of Karlsruhe, 24 March 2021, *Federal Climate Change Act*, op. cit., § 213.

53 Supreme Court of the Netherlands, 20 Dec. 2019, *Pays-Bas c. Urgenda*, op. cit., § 8.2.4: 'The courts should not interfere in the political decision-making process regarding the expediency of creating legislation with a specific, concretely defined content by issuing an order to create legislation.'

political decisions that are, for us, based on (and reveal) conflicts of values, judges continue to hold a position,[54] that we would venture to describe as only modestly political, and that proceeds from a mechanical activity (irreducibility of interpretation aside): they simply apply the law in the continuity of their assigned roles. We acknowledge that this is merely our interpretation which is generally not met with praise.

The relationship between law and politics is clearly not an easy and straightforward one. Therefore, in order to better understand the real dynamics that operate in climate litigation, we seek to determine how to analyse the role that climate activists expect from the judge and the limits of his action.

III. Conception of the jurisdictional function: the self-limitation of judges

The conception of the judicial function can be observed both in the requests of the plaintiffs and in the arguments of the judges themselves. Several self-limitations characterize the legal dispute.

A. The separation of powers: mobilisation of a classic ideal

Separation of powers as an ideal is a commonplace in climate litigation. Do judges undermine this principle when they adopt bold solutions in climate litigation? Indirectly, the question then becomes one of legitimacy of the legal process.[55] In their rulings, the courts will often set out the framework within which they can act based on the principle of the separation of powers.[56]

The theory of separation of powers states that there are to be three separate powers. In order to avoid tyranny, these powers should be entrusted to three different organs: one responsible for legislating, another for executing, and the last for adjudicating. Each is to fulfil its role by strictly remaining within its own area of competence.

This is a very cartoonish and simplified reading of the separation of powers. In reality, separation of power refers rather to a *division* of powers. Montesquieu only suggested that it should not be a single institute to hold all three powers.[57] He emphasised that the different organs of the State need to be able to prevent the other powers from acting if necessary. This misunderstanding of Montesquieu's theory was already denounced by J. Madison.[58]

To put it differently: separation of power requires three different functions[59] that different organs share, but the same organ often has a role in the exercise of several functions. What is important is that the powers should be able to prevent the others from acting unilaterally and entirely alone, while at the same time having the possibility of not

54 This undoubtedly depends on the legal cultures in the various countries: The Supreme Court of the Netherlands, for example, states that its decision that it '[d]oes not mean that courts cannot enter the field of political decision making at all'.

55 Peel, J., "Issues in Climate Change Litigation", *Carbon and climate law review* 2011, vol. 5, p. 15.

56 The Hague District Court, 24 June 2025, *Urgenda Foundation v. The State of the Netherlands*, op. cit., § 4.95.

57 Montesquieu, *De l'esprit des lois*, Chapter VI, Book XI, 1748.

58 Madison, J., *The Federalist*, nº 48, 1788.

59 Eisenmann, C., «L'Esprit des lois» et la séparation des pouvoirs», in Mélanges R. Carré de Malberg, 1933, Sirey, pp. 163-192; Althusser, L., *Montesquieu, la politique et l'histoire*, 1959, rééd. 1985, Paris, PUF.

blocking the machinery.

In practice, therefore, this is a prism, an ideal, which countries implement in different ways. The body designated as the executive will often have prerogatives in judicial or legislative matters – appointing judges or initiating laws – and the same is true for the other bodies that exercise different functions.

Therefore, under the theory of the separation of powers analysed in this way, there is no prior violation of the separation of powers if judges exercise a role related to the legislative function. In reality, as mentioned above, they do so all the time when they interpret the law, decide whether or not to apply it, etc.

The real question is: are judges asked to make laws, to act in place of the legislator?[60] Are they explicitly asked to take the place of the legislator? To us, it does not seem so. The applicants ask the legislator to act and rely on the judge to assert the validity of their request, but it is always the legislator that is recognized as the key actor in this respect. As we sought to demonstrate in this article, both the applicants and the judges seem to insist on this point.[61] Conversely, the states' argument often calls for a watertight and exaggerated separation of powers.[62]

With respect to the separation of powers, judges may restrict themselves for two reasons: in order not to give the impression of somehow violating the ideal of separation, which would undoubtedly delegitimize their entire authority; but also because they do not have the means of doing the work of the political power.

In fact, it would be counterproductive for judges to take the place of the legislator. In the cases outlined here, the judge is called to oblige the State to act and to respect its commitments. It is sometimes – rarely of course – simpler for the judge to avoid the difficulties linked to the separation of powers altogether and request a state response, whatever the form and content.[63] The judge then remains in his role as an authority who must rule on legal disputes: 'the role of the courts [...] is confined to identifying the true legal position and providing appropriate remedies in circumstances which the Constitution and the laws require.'[64] The Court hence only enforces the application of the law which in our case, entails respecting of the commitments and objectives to which the State has subscribed.

Paradoxically, the rule of law and the separation of powers seem to be respected more than ever thanks to the action of the judge rather than by his withdrawal in the face of the inaction of the legislator/government. By using his powers, the judge only initiates

60 Burgers, L., «Should Judges Make Climate Change Law?», 2020; Torre-Schaub, M., «Les dynamiques du contentieux climatique: anatomie d'un phénomène émergent», in Torre-Schaub, M. et al. (dir), *Quel(s) droit(s) pour les changements climatiques ?*, 2018, Mare & martin, p. 120.

61 I. C et I. D.

62 This was the case, for example, in the *Urgenda* case, or in the judgement of the Supreme Court of Ireland, 31 July 2020, *Friends of the Irish Environment v. Irish Government*, op. cit., § 5.21. At first instance, this argument was accepted (5.23). However, the Supreme Court shade this rigidity (§ 9.1).

63 Administrative Court of Paris, 2 March 2021, *Oxfam France et al*, op. cit., § 4: 'take all measures enabling to achieve the objectives' Administrative Court of Paris, 14 Oct. 2021, nº 1904967, 1904968, 1904972, 1904976/4-1, *Oxfam France et al*, 'all useful measures'. Formally (all measures) as well as materially (useful) the judge leaves the choice to the free appreciation of the government.

64 Supreme Court of Ireland, 31 July 2020, *Friends of the Irish Environment v. Irish Government*, op. cit., § 1.1.

actions: it is up to the States, governments or legislators to put them into practice.[65] Yet, judges can also take a back seat and declare themselves incompetent: 'the judge cannot determine the content of the obligations of a public authority and thus deprive it of its discretionary power'.[66] The importance and diversity of the measures to be considered, and their *holistic* character, may lead to this:

> *'the Plaintiffs' approach of alleging an overly broad and unquantifiable number of actions and inactions on the part of the Defendants does not meet this threshold requirement and effectively attempts to subject a holistic policy response to climate change to Charter review'.*[67]

B. Considerations based on opportunity

Further aspects may be analysed for the study of the judicial activism. First, judges will not have to be bolder than necessary. It is legitimate for them to refuse to rule on politically sensitive issues or to do prejudicial work where this is not necessary to resolve the dispute brought before them. This is nicely illustrated by the German court's refusal to consider the universality of claims:

> *'The situation is different with regard to the complainants in proceedings 1 BvR 78/20 who live in Bangladesh and in Nepal. They are not individually affected in this respect. In their case, it can be ruled out from the outset that a violation of their fundamental freedoms might arise from potentially being exposed some day to extremely onerous climate action measures because the German legislator is presently allowing excessive amounts of greenhouse gas emissions with the result that even stricter measures would then have to be taken in Germany in the future. The complainants live in Bangladesh and Nepal and are thus not subject to such measures.'*[68]

Secondly, and this is related, judges undoubtedly only incorporate such findings in their decisions they deem socially acceptable: that is, they act boldly only within the limits of what seems commonly tolerable. This rather intuitive finding has also been pointed out by Duguit, in a context where sociological positivism was in the spotlight.[69] According to him the judge and the legislator can be considered the *translators* of social facts,[70] of reality: they do not create rules of law, but merely note their prior existence within society.[71]

65 Montesquieu, *De l'esprit des lois* (1748), op. cit.

66 French-speaking Court of First Instance of Brussels, 17 June 2021, op. cit., § 2.3.2.

67 Ottawa Federal Court, 27 Oct. 2020, *La Rose et al., c. Sa Majesté la Reine*, op. cit., § 40.

68 Federal Constitutional Court of Karlsruhe, 24 March 2021, *Federal Climate Change Act*, op. cit., § 132.

69 For example Fonbaustier, L., «Une tentative de refondation du droit : l'apport ambigu de la sociologie à la pensée de Léon Duguit», *RFDA* 2004, nº 6, p. 1053 ; «Léon Duguit et la mission du juge administratif (à propos de la hiérarchie entre ordres et normes juridiques)», in Bigot, G., Bouvet, M. (dir.), *Regards sur l'histoire de la justice administrative*, 2006, Litec, p. 277.

70 Duguit, L., *L'État, le droit objectif et la loi positive*, 1901, Paris, Albert Fontemoing, p. 15.

71 Ibid.

If the judge shows some restraint in this regard, he may himself consider direct action of the legislator to be the best solution.[72] The climate crisis for instance would then require intervention of the legislator itself. These arguments are rather straight forward even if not always explicitly stated: major climate policy actions require the intervention of the legislative power as they need to be democratic, deliberative and sovereign in essence.

The governmental and legislative bodies, therefore, have at their disposal the state machinery that enables them to fulfil their roles. This is also why it seems to us impossible for the judge to answer with precision which means should be chosen. The fight against climate change is infinitely complex and cannot be resolved by measures put in place by the judge. This discretionary power is indeed vested in the legislative and governing bodies of the State. This is what is meant by the call to 'take all useful measures allowing to stabilise, on the whole national territory, the concentrations of greenhouse gases in the atmosphere':[73] the judge can examine the validity of the objectives, but the means to achieve them require a deeper level of insight and thus rather subjective choices:

> *'While there is significant scientific consensus both on the causes of climate change and on the likely consequences, there is much greater room for debate about the precise measures which will require to be taken to prevent the worst consequences of climate change materialising.'*[74]

The interdependence of issues and the difficulty of setting priorities may even prevent the judge from assessing with precision the insufficiency of the State's action by sector:

> *'If the investigation shows that the objectives set by the State to himself have not been achieved, the gap between the objectives and what has been achieved, since the policy in this area is itself only one of the sectoral policies that can be mobilized, cannot be considered to have contributed directly to the worsening of the ecological damage for which the applicant associations are seeking compensation.'*[75]

Judges are also limited by the claims raised. The procedural legal framework and the specific demands of the applicants logically limit their room for manoeuvre. The injunctions against the State are obtained in lawsuits against members of the government, and it seems to us that there is no procedure to attack the legislator directly, so these actions are the subject of the applications. Assessing the extent to which the judge took the claimants' claims into account is more complex. The Federal Court of Ottawa for instance argued for the dismissal of an application because of 'the inappropriate remedies sought by the Plaintiffs',[76] while the Quebec Court of Appeal describes the application by

72 Federal Constitutional Court of Karlsruhe, 24 March 2021, *Federal Climate Change Act*, op. cit., § 213.
73 Administrative Court of Paris, 2 March 2021, *Oxfam France et al*, op. cit., § 1.
74 Supreme Court of Ireland, 31 July 2020 *Friends of the Irish Environment v. Irish Government*, op. cit., § 4.5.
75 Administrative Court of Paris, 2 March 2021, *Oxfam France et al*, op. cit., § 28.
76 Ottawa Federal Court, 27 Oct. 2020, *La Rose et al., c. Sa Majesté la Reine*, op. cit., § 41.

pointing out that 'the appellant seeks to force the legislator to act, without however indicating to him what she considers to be the actions to be taken and, a fortiori, the enforceable court orders that would be appropriate.'[77] While French judges are happy to entertain claims asking for 'all useful measures', in Canada, on the other hand, the vagueness of the measures requested is a ground for refusal.

Finally, it can be assumed that the judge is also limited by his actual powers. The effective coercion of the State is in fact particularly complex. It seems to us to be more about a relationship of force, of legitimacy, of authority, of the imposition of arguments than of purely legal modes of action. The injunctions, even if accompanied by a fine imposed by the judge, can theoretically be completely ignored by the State.[78]

IV. Conclusion

This is the great question for future litigation: to what extent will the State comply with the reasoning and demands of judges? It is only when the state genuinely adheres to those rulings that we can contemplate the significance of litigation in shaping a legal and political response to climate change. The courts have already shown that they are ready to rule in favour of the climate. They do have the means to encourage, prevent, or even force the legislator to take certain action. But it is a classic dogma of legal ideology that ultimately does not allow for more. Challenging this dogma, adapting it in the light of new ideals – demanding and authentically progressive – requires re-politicisation of the issue and the re-politicisation of the process of all political actions. This is what the cases studied largely fail to do. The lessons of these disputes and their shortcomings must be learned quickly. The politicisation and involvement of political actors (state, social, popular) is influenced by the hope that climate litigation represents. No doubt this is too optimistic, no doubt it is vain, but it is necessary to realise and understand that political action is not limited to legal action. Quite the contrary. Climate change litigation still serves – among other things of course – as a mirage for the real efforts that need to be made in political, social and economic reorganisation.

77 Appeal Court of Quebec, 13 Dec. 21, 2021 QCCA 1871, *Environnement Jeunesse c. Procureur général du Canada*, § 25.

78 In both Germany and France, it will be possible to observe the governmental responses to the injunctions from December 2022 onwards.