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French Yearbook *of* Public Law

Issue 1, 2023

Presentation

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

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

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

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Issue 1, 2023

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Contents

General 9

Foreword 11

The Future of the French Model of Public Law in Europe
Sabino Cassese 13

Conceptual and Linguistic «Surprises» in Comparative Administrative Law
Jean-Bernard Auby 19

Dossier: Climate Change and Public Law 23

Climate Change and Public Law Dossier: Introduction
Jean-Bernard Auby / Laurent Fonbaustier 25

Part I: A Global Approach

The Paris Agreement: A Renewed Form of States' Commitment?
Sandrine Maljean-Dubois 35

European Union law at the time of climate crisis: change through continuity
Emilie Chevalier 51

"Transnational" Climate Change Law A case for reimagining legal reasoning?
Yseult Marique 69

Part II: Climate Change in Constitutions

Analysis of constitutional provisions concerning climate change
Laurent Fonbaustier / Juliette Charreire 89

Part III: Climate Change Litigation

Increasing Climate Litigation: A Global Inventory
Ivano Alogna 101

Climate change litigation: efficiency
Christian Huglo / 125

Climate Change Litigation and Legitimacy of Judges towards a 'wicked problem': Empowerment, Discretion and Prudence
Marta Torre-Schaub 135

Could national judges do more? State deficiencies in climate litigations and actions of judges
Laurent Fonbaustier / Renaud Braillet 165

Part IV: Cities, States and Climate Change: Between Competition, Conflict and Cooperation
Global climate governance turning translocal
Delphine Misonne ... 181

America's Climate Change Policy: Federalism in Action
Daniel Esty ... 193

Local policies on climate change in a centralized State: The Example of France
Camille Mialot ... 217

Part V: Climate Change and Democracy
Subjective Rights in Relation to Climate Change
Alfredo Fioritto ... 233

Overcoming Short-Termism in Democratic Decision-Making in the Face of Climate Change: a Public Law Approach
Emmanuel Slautsky ... 253

The Citizens' Climate Convention : A new approach to participatory democracy, and how effective it was in terms of changing public policy?
Delphine Hedary ... 271

Conclusion
Jean-Bernard Auby / Laurent Fonbaustier ... 281

Comparative Section ... 293
France
Philippe Cossalter / Jean-Bernard Auby ... 295

Germany
Philippe Cossalter / Maria Kordeva ... 311

Italy
Francesca di Lascio / Elena d'Orlando ... 337

Spain
Patricia Calvo López / Teresa Pareja Sánchez ... 357

UK
Yseult Marique / Lee Marsons ... 379

Miscellaneous ... 405
Book review: Susan Rose-Ackerman, Democracy and Executive Power. Policymaking Accountability in the US, the UK, Germany and France
Giacinto della Cananea ... 407

A Comparative Research on the Common Core of Administrative Laws in Europe
Giacinto della Cananea ... 413

fypl
french yearbook of public law
Issue 1, 2023

Global climate governance turning translocal

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Abstract:

This contribution delves into the emerging trend of localization within climate governance in Europe, offering insights from both legal and institutional perspectives. Many initiatives are interconnected through networks and imitation dynamics that transcend national borders, influencing and even constraining the decisions of individual nations. Recent developments in climate law and litigation underscore the transformation of global climate governance into a trans-local phenomenon. The shift toward the local arena has facilitated the development of complementary strategies, enhancing cohesion in recent legal advancements, which, notably, were not explicitly outlined in the Paris Agreement.

Keywords:

Global climate governance, Translocal climate governance, International environmental law

Introduction

With the adoption of the Paris Agreement on climate change in 2015, the world was at last, after years of procrastination, re-bound by common goals framing a long-term approach to global climate governance. The new treaty became an archetype of governance by goals,[1] with these goals taking centre stage and media attention, especially the reduction of temperature increase to 1.5°C that best meets the pressing demands of the scientific community.

Under the new international treaty, Parties decided to strengthen the common response to the threat of climate change by 'holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels',[2] by 'increasing the ability to adapt to the adverse impacts of climate change'[3] and by 'making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development'.[4] In order to achieve the long-term temperature goal, Parties also more concretely committed

> *'to reach global peaking of greenhouse gas emissions as soon as possible, recognizing that peaking will take longer for developing country Parties, and to undertake rapid reductions thereafter in accordance with best available science, so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century, on the basis of equity, and in the context of sustainable development and efforts to eradicate poverty'.*[5]

However, with regards to the methods used to reach these collective goals, the treaty leaves the choice entirely to the Parties, all now faced with the obligation to voluntarily position themselves via their nationally determined contributions.

If such a renewed approach to climate governance at the global level was meant to displace the burden of choice from the global community to the individual Parties, it is because the bigger players wanted to be free to decide their own efforts, without any predetermined pressure or accountability for individualized efforts.[6] The rejection of the Kyoto Protocol-model, – characterized by numbers, deadlines and compliance mechanisms, taking into account the principle of common but differentiated responsibility –, by part of the global community, was among other reasons due to the absence of a global

1 Misonne, D. et al., "Governing by the goals. Do we need domestic climate laws?", Policy brief, 2020, Observatorio Ley de Cambio Climatico para Chile, pp. 1-6.

2 Paris Agreement, art. 2, §1, a).

3 Ibid, art. 2, §1, b). See also, with a focus on adaptation, art. 7.

4 Ibid, art. 2, §1, c).

5 Ibid, art. 4, §1.

6 Aykut, S. & Dahan, A., *Gouverner le climat? 20 ans de négociations internationales*, 2015, Paris, Les Presses de Sciences Po, 752 p.; Farber, D. & Peeters, M., *Climate Change Law*, 2016, Cheltenham, Edward Elgar.

level-playing field between the biggest competitors on the economic world stage.[7] Another driving force behind the new approach that characterizes Paris stemmed from the American political contingency and the need to make sure that the new global agreement would enter into force:[8] the content of the new text needed to appear weakly prescriptive, as a mere continuation of the original United Nations Framework Convention on Climate Change (UNFCCC) and to confirm that Parties remained in full control of their own commitments.

As a result, the pivotal centerpiece of climate governance shifted from a global and binary approach, under the previous UNFCCC and Kyoto Protocol, to a nationally determined approach under the Paris Agreement, with the paradox that the world has moved even further away from the creation of a true level playing field on the intensity of efforts to be pursued by each of the Parties. The discussions on the tenets of the revisited asymmetry keeps going and creates some confusion, as observed during the latest COP27 in Egypt.

The present contribution explores some of the implications of such a "localization" of the main determinants of climate governance, as far as it has started to materialize in Europe today, from a legal and institutional the point of view. It observes that the new scale is only relative. Most initiatives are embedded in dynamics of networking and mimetism that transcend borders and affect the inspiration, and even discretion of national decision-makers. Recent trends in climate law and climate litigation have shown how global climate governance has become trans-local. The shift to the local arena triggered the deployment of complementary scenarios, injecting cohesion into recent advances on the legal front, which were certainly not written in bold letters into the Paris Agreement.

I. Pledges made locally: the nationally determined contributions

With the Paris Agreement and by contrast to the Kyoto protocol, it is thus now up to each individual Party – either a State or a regional economic integration organization like the European Union[9] – to fix its own share in the global effort and to inform the international community thereabout. Such communication is made by registering the 'nationally determined contribution' the Party intends to achieve,[10] on a dedicated platform established by the secretariat of the Convention. Moreover, Parties should also strive to formulate and

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7 Especially due to a difference in regimes between industrialized States (the so-called "Annex I" countries under the UNFCCC) and newly emerging economies (like China, India, Brazil), due to the way the principle of common but differentiated responsibility get operationalized. See among others: Lavallée, S. & Maljean-Dubois, S., "L'Accord de Paris : fin de la crise du multilatéralisme climatique ou évolution en clair-obscur ?", *Revue juridique de l'environnement* 2016, vol. 41, pp. 19-36; Misonne, D., "L'ambition de l'accord de Paris sur le changement climatique. Ou comment, par convention, réguler la température de l'atmosphère terrestre", *Aménagement-Environnement*, 2019, pp. 8-26.

8 Wirth, D., "Cracking down the American Climate Negotiators' Hidden Code: United States and the Paris Agreement", *Climate Law* 2016, nº 6, pp. 152-170; Wirth, D., "The International and Domestic Law of Climate Change: A Binding International Agreement Without the Senate or Congress?", Harvard Environmental Law Review 2015, vol. 39, nº 2, pp. 515-566; Esty, D., "Trumping Trump : Pourquoi l'Accord de Paris survivra", *Revue juridique de l'environnement* 2017, vol. 42, pp. 49-57.

9 Paris Agreement, art. 20.

10 Ibid, art. 4, §2 & §9.

communicate their own long-term low greenhouse gas emission development strategies.[11]

Besides the fact that it must be 'nationally determined' and that the exercise must be repeated every five years, the legal nature of the contribution is not explained in the Paris Agreement - such a contribution could be literally anything.[12] The only requisites that have been formulated so far are that the contribution must be expressed in written form and that each Party's successive nationally determined contribution will represent a progression (the jargon mobilized the notion of virtuous circles) and reflect its highest possible ambition.[13] From the observation of the interim registry maintained by the secretariat of the UNFCCC, where contributions are all made available online,[14] the party contributions often consist in pledges, with a focus on the notion of ambition in relation to mitigation efforts. Their substance is much about numbers and deadlines.[15]

Without any further elaboration or demonstration of the minimal necessary conditions that should be met for making this unusual bet successful, the game was first totally open – its main goal was to keep the international community together for a common project – but also very precarious, trusting the capacity of the world to spontaneously generate adequate responses to some of the biggest challenges of our time: decarbonize the economy and adapt to climate change.

Barely six years after the entry into force of the new treaty, the new 'bottom-up' paradigm is already showing its weaknesses and raising doubts regarding its capacity to deliver its own promises. At COP26 in November 2021, the Parties to the Paris Agreement had no other choice but to point out, 'with serious concern' (based upon a report on nationally determined contributions under the Paris Agreement, as prepared by the Secretariat of the Convention) that the aggregate greenhouse gas emission level, which takes into account the implementation of every submitted nationally determined contribution, is estimated at 13.7 per cent above the 2010 level in 2030,[16] thus not on track. At COP27 in 2022, Parties even felt the need to stress, in the preamble of the final cover decision, that

> *'the increasingly complex and challenging global geopolitical situation and its impact on the energy, food and economic situations, as well as the additional challenges associated with the socioeconomic recovery from the coronavirus pandemic, should not be used as a pretext for backtracking, backsliding or de-prioritizing climate action'.*[17]

11 Ibid, art. 4, §19.

12 The Parties could not reach an agreement in Paris, at COP21, on the minimal content or standardized format of such 'NDCs'. Further aspects were addressed during the first meeting of the Parties to the Paris Agreement, which extended formally on several years, in order to finalize a rulebook.

13 Paris Agreement, art. 4, §3: 'Each Party's successive nationally determined contribution will represent a progression beyond the Party's then current nationally determined contribution and reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances'.

14 Via: https://www4.unfccc.int/sites/NDCStaging.

15 See, for an independent aggregation of such pledges: https://climateactiontracker.org/climate-target-update-tracker/.

16 Glasgow Climate Pact, 13 Nov. 2021.

17 The Sharm el-Sheikh Implementation Plan, Nov. 2022.

At the time of writing,[18] Russia's war against Ukraine shows how, 30 years after the UNFCCC and despite the new Paris Agreement, the world economy is still fully cramped in its dependency on oil, gas and coal, with major geopolitical interests at stake. The Paris Agreement is not like any other multilateral treaty on the environment or on the economy: it embeds a truly formidable challenge, which requires a solid dose of foresight and innovation capacity, as far as institutions and legal aspects are concerned.

II. The loneliness of deciding on your own

In the post-Paris scenario, Parties look like children afraid of the dark. They find more comfortable to keep sitting around the fire and discussing together than doing their uneasy homework alone.

One can observe that the global community has become addicted to the 'COP'-moments and need to keep brainstorming together. With the consequence that national action seems to remain forever dependent upon the adoption of any new 'accord', whatever that legally means, as long as there is a new negotiation ongoing. The *Glasgow Pact* of November 2021 was very symptomatic in that regard; the *Faustian* notion of 'Pact' tries to build importance to a decision that does not even need to be formally endorsed at the domestic level, but acts as a barometer indicating the degree of global political commitment. Of course, the Paris Treaty was not perfectly fine-tuned and contained sensitive loopholes when it was adopted in 2015, like on Article 6. It needed decisive pieces beyond mere details, on the emergence or resurgence of carbon-market mechanisms, that were not even known at the moment of formal ratification procedures, questioning the depth of the adhesion to the whole project and explaining why Parties might want to have a better sight on the whole new global regime.

The crude reality anyway is that Parties must now act and move forward at their own Party level (with some latitude to do it jointly)[19] for achieving their own nationally determined contribution, whatever their content. 'Parties shall pursue domestic mitigation measures, with the aim of *achieving* the objectives of such contributions', reads article 4, §2, of the Paris Agreement. The formula imposes a best-efforts obligation, with regard to the unilateral pledge.

If these pledges are meant to deliver on their content, it is necessary, at the level of each Party, to truly embrace the new challenge and to assess the adequacy of existing laws and institutions, 'in their fundamental balances, in their essential principles, in their techniques but also in the way they apprehend the reality they intend to discipline',[20] both at the time of deciding on the content of the pledge ('the signal') and in order to guarantee its implementation ('the machinery').

Does a given State have the means to achieve its own ambitions, based upon its constitutional and institutional structures, with the tools that are already available? It might sound easy for Party Y to declare on the international scene that it shall exit coal, but does it truly have the power to materialize such pledge internally, based on its own constitutional and legislative acquis, even in the face of litigation and property rights claims?[21]

18 In April 2022, with a slight update in Nov. 2022.

19 Paris agreement, art. 4.

20 As inspired from the general orientation of the present climate change and public law dossier.

21 Misonne, D. et al. (2020), "Governing by the goals", op. cit.

There is no recipe on such key aspect in the Paris Agreement, not even in due regard of various legal traditions and kinds of political regimes. The transparency framework under article 13 of the Agreement only mentions the need to promote effective implementation, with no indication of any specific legal tool or guarantee whatsoever.

III. Is the lawmaker still in?

It can be argued that pledges become dead letter if domestic institutional frameworks are too weak to materialize them. In this kind of exercise, the activity of the domestic lawmaker is a necessity, for many reasons, both substantial and procedural, for guaranteeing the effectiveness of the new project. The mobilization of Parliaments engages with the fundamentals of our democracies. Parliaments are supposed to represent the people. Negotiations in Parliaments are observed, scrutinized. Parliaments have the power to create obligations but also to affirm new rights, with due respect to constitutional provisions. They also have the power to undo pre-existing legislation.

Under the European Convention of Human Rights and the Charter of the Fundamental Rights of the European Union,[22] any limitation on the exercise of fundamental rights and freedoms – the requirements of climate transition can bear on the rights of investors, of consumers, of individuals – must be provided for by the law and must respect the essence of those rights and freedoms. By virtue of the principle of proportionality, limitations can only be made if they are necessary and effectively meet objectives of general interest enshrined by the legislator or the need to protect the rights and freedoms of others. A mere pledge or program does not meet any of these requirements.

Law-making might also prove crucial in light of the risks of investor-state regulation under bilateral investment agreements. In its Opinion on the compatibility with the European Union constitutional framework of the Comprehensive Economic and Trade Agreement concluded between the EU and Canada, the European Court decided that the contentious arbitration mechanism was compatible with EU primary law, only because the new tribunal will not have jurisdiction to call into question 'the choices democratically made within the European Union' relating to, among others, the protection of the environment.[23] A mere pledge or strategy does not meet such requirements.

Law-making is also necessary to keep Constitutions alive and to confer concrete rights when, as in Belgium, constitutions have enshrined the protection of a healthy environment at the top of their hierarchy of norms. The actual justiciability of this constitutional guarantee however depends on what the legislature makes of it.

At last, the involvement of Parliaments in democratic countries brings all the obligations of public debate, transparency and public scrutiny, far away from closed-room discussions. They might not be open enough yet to welcome requests for stronger public participation and involvement, but proceeding without them undermines any serious intention to fight climate change. Interestingly, Parliaments have started to connect worldwide to help solving the climate crisis, share information and enhance political will.[24]

22 Charter, art. 52.

23 Opinion 1/17, ECLI:EU:C:2019:34.

24 See for instance: https://www.climateparl.net/about-us (consulted on 8 April 2022).

IV. Climate laws

In Europe, a noticeable trend after the Paris Agreement has been the adoption of 'climate laws', inspired by the UK Climate Act of 2008. The latter, conceived years before the adoption of the Paris Agreement, was admired for its novel concept: the statutory incorporation of a long-term transformation of society, trajectories based upon the notion of carbon budget, new accountability mechanisms benefiting from the support of a new independent Climate Change Committee with advisory and monitoring powers on climate governance at UK-economy wide level.[25]

The broader dissemination of the concept, as a suitable tool in the implementation of the Paris Agreement, has been one of the recurring demands of climate change activists or associations taking legal actions to advance climate protection.

The term climate law, in its new meaning, does not refer to all legislation dealing with greenhouse gases or adaptation to climate change, but specifically to legislative acts that endorse long-term objectives and set out the essential governance mechanisms needed to achieve them, like an independent scientific body and new structures that favour public participation and broad social dialogue, necessary in order to prevent the surge of new '*gilets jaunes*' uproar.[26]

The main purpose in adopting climate laws is to create a new legal narrative, a systemic approach promoting legal certainty (climate neutrality becomes a legitimate but also required expectation), to ease decision-making and planning processes, to guarantee an optimal coordination between competent authorities and to foster transparency and accountability, under the rule of law, in relation to climate governance at the national or devolved (in federal countries) level.

It might be naïve,[27] but it expresses the need to 'de-soft-alize' climate governance and make it more reliable. Even if the attempt to set a fixed goal in a changing world through mere legislation is a challenge to History.

In a recent report commissioned by the European Environmental Agency,[28] Evans and Duwe affirmed that the added value of climate laws is *evident* if they contain core good governance elements:

> *'at a bare minimum, well-formulated framework laws provide a normative foundation for climate action, facilitating the integration and mainstreaming of climate priorities across governmental agencies and ministries. Not only can they formally establish a coherent sys-*

25 Stallworthy, M., "Legislating Against Climate Change: A UK Perspective on a Sisyphean Challenge", *The Modern Law Review* 2009, vol. 72, issue 3, pp. 412-436; Averchenkova, A. et al., *Trends in climate change legislation,* 2017, Edward Elgar, 217 p.; Scotford E. et al., "Probing the hidden depths of climate law: Analysing national climate change legislation", *RECIEL* 2019, vol. 28, pp. 67–81; Nash, S. L. et al., "Taking stock of Climate Change Acts in Europe: living policy processes or symbolic gestures?", *Climate Policy* 2019, 1752-7457.

26 Misonne, D., "Lois climat", in Torre-Schaub M. et al., Dictionnaire du changement climatique, 2022, LGDJ.

27 Macrory, R., "Towards a Brave New Legal World?", in Backer, I., Fauchald, O. & Voigt, C., *Pro Natura,* 2012, Universitetsforlaget, Oslo, pp. 306-322; Stallworthy, M., "Legislating Against Climate Change: a UK Perspective on a Sisyphean Challenge", *Modern Law Review* 2009, vol. 72, nº 3, p. 412.

28 Evans, N. & Duwe, M., "Climate governance systems in Europe: the role of national advisory bodies", 2021, Ecologic Institute, Berlin; IDDRI, Paris.

tem of goals (targets) and means of achievement (cycles of action and planning), but they often lead to a professionalization of political structures by clearly assigning roles and responsibilities within government and creating new coordinating institutions or advisory bodies, composed of external scientific experts, stakeholders and public officials'.[29]

Climate laws of this kind have emerged at State level or even at decentralized levels, in countries like Finland, France, Denmark, Sweden, The Netherlands, Germany, the Walloon and Brussels Regions in Belgium, etc., all of different types but with similar features.

The European Union, as a Party to the Paris Agreement, did also recently adopt – as the cherry on the cake of an already very dense legislative package[30] – a 'European Climate Law', an official nickname given to Regulation 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality.[31] The Regulation establishes a framework for the *irreversible* and *gradual* reduction of anthropogenic greenhouse gas emissions by sources and enhancement of removals by sinks regulated in Union law.[32]

The legislative act is of the same vein; it mimicks, at the scale of 27 Member States, the same systemic approach: long-term (2050) and mid-term (2030) objectives at the Union level, identification of a dedicated scientific advisory board on climate change, provisions on public participation and multilevel dialogue on climate and energy, both at Commission and Member States level. The long-term climate neutrality objective imposes that Union-wide greenhouse gas emissions and removals regulated in Union law shall be balanced within the Union at the latest by 2050, thus reducing emissions to net zero by that date, and the Union shall aim to achieve negative emissions thereafter (article 2.1). The binding 2030 climate target at Union level 'shall be a domestic reduction of net greenhouse gas emissions (emissions after deduction of removals) by at least 55% compared to 1990 levels by 2030' (article 4, §1), imposing that the relevant Union institutions and Member States shall 'prioritise swift and predictable emission reductions and, at the same time, enhance removals by natural sinks'.

Another nickname given to the European climate law is "the law of laws", but it is abusive; the European Law does not have a special status. A law of laws on climate change should take the form of a revision of the Lisbon Treaty or of an alternative Treaty; the nuclear energy development project still benefits from a dedicated Treaty at the scale of the European Union, while the shift to carbon neutrality by 2050 at the latest, the requisites of energy efficiency and the pressing call for an industrial priority to renewable energies still only rely on secondary law. The long-term objectives ratified by the legislative assemblies can be easily modified by norms of the same level. The issue raises the question of the right scale at which to take on the challenge of climate neutrality. The adop-

29 Idem, p. 12.

30 Peeters, M. & Misonne, D., "The European Union and its rule creating force at the European continent for moving to climate neutrality by 2050 at the latest", in Reins, L. & Verschuuren J. (ed.), *Research Handbook on Climate Change Mitigation Law*, 2nd edition, 2022, Edward Elgar Publishing, pp. 58-101.

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

32 Art. 1.1. Italics added.

tion of climate laws remains conditioned by the institutional and constitutional peculiarities of each legal order, in addition to political contingency.[33]

The existence of non-regression mechanisms can help avoid major drawbacks, at least not without an appropriate justification.[34] They could even arise in the near future from the progression clause contained in the Paris Agreement, as an element of interpretation of the laws applicable to climate matters. The recently adopted Sharm el-Sheikh Implementation Plan, as the consensually approved decision to conclude COP27 in 2022 is called, even admonishes its Parties that 'increasingly complex and challenging global geopolitical situation [...] should not be used as a pretext for backtracking, backsliding or de-prioritizing climate action.'

V. The fair share

Climate litigation[35] broke the traditional approach to climate governance which confined itself to a face-to-face discussion involving only States and the highest diplomatic relations. It is another way through which translocalism recently soaked in – showing how local action matter, especially when it is interconnected.

With the Urgenda case, the first success in a domestic Court in Europe, a non-profit organization forced the Dutch State to open its eyes and consider the people it must protect from climate change as a matter of civil liability and human rights protection for which the State is accountable by virtue of general, non-specialised law. The central argument of the action, which convinced the judges up to the Supreme Court,[36] relied first on a provision of the Dutch Civil Code and also on several provisions of the European Convention on Human Rights. The decision inspired a true wave of case-law across Europe,[37] for the analysis of which I refer to the dedicated chapters of the present yearbook. Most of them make sense together because they are somehow connected by various similarities, shaking up institutions and certainties.

In that context, important debates have occurred around the notion of 'fair share' and start being answered from the highest courts, that might help the local decision-maker in better appreciating the contours of its own responsibility.

In the aforementioned Urgenda case, the *Hoge Raad der Nederlanden* asserted that 'each country is responsible for its own share' of the global efforts expected from the international community; a State is obliged to reduce greenhouse gas emissions from its territory in proportion to its share of the responsibility. That responsibility is, according to

33 On that aspect, see in Belgium the difficulty to find an appropriate institutional 'space' to fix shared common goals, and discussions around a modification of the Constitution, as synthetized in Rolland, G. & Romainville, C., "Voyage au coeur de la notion de loi spéciale – Propositions de loi spéciale climat", 2020, Administration publique (APT), pp. 286-309; Davio, V., "La loi climat: une errance legislative face à l'urgence", *Aménagement-Environnement* 2021, pp. 6-20.

34 Prieur, M., & Sozzo, G., *La non régression en droit de l'environnement*, 2012, Bruylant, 547 p.

35 See the other contributions to the present yearbook.

36 Supreme Court of the Netherlands, 20 Dec. 2019, ecli:NL:HR:2019:2006, English translation ECLI:NL:HR:2019:2007.

37 See, among others, Torre-Schaub, M., Les dynamiques du contentieux climatiques, 2021, Mare-Martin, 462 p.; Cournil, C. (dir.), Les grandes affaires climatiques, 2020, éd. DICE, Confluences des droits. Available at : https://dice.univ-amu.fr/sites/dice.univ-amu.fr; Rochfeld, J., *Justice pour le climat ! : les nouvelles formes de mobilisation citoyenne*, 2019, Odile Jacob; Cournil, C. & Perruso, C., "Réflexions sur « l'humanisation » des changements climatiques et la « climatisation » des droits de l'Homme. Émergence et pertinence", La Revue des droits de l'Homme 2018, nº 14.

that highest Court, derived from the role model it accepted to endorse while ratifying the UNFCCC and from Articles 2 and 8 ECHR, because there is a grave risk that dangerous climate change will occur, endangering the livelihood of many people in the Netherlands.

The fair share must also be understood in an intergenerational perspective that puts the people of today and tomorrow – and not just the States - at the center of climate law-making.

The German Constitutional Court, in a judgement of March 2021, decided that even a Climate law can be wrong in its distribution of the share of a required effort in a given country, when there is imbalance across generations:[38]

> *'when Art. 20a GG obliges the state to protect the natural foundations of life – partly out of responsibility towards future generations – it is aimed first and foremost at preserving the natural foundations of life for future generations. But at the same time, it also concerns how environmental burdens are spread out between different generations'. [...] The objective protection mandate of Art. 20a GG encompasses the necessity to treat the natural foundations of life with such care and to leave them in such condition that future generations who wish to carry on preserving these foundations are not forced to engage in radical abstinence ([...]). It is thus imperative to prevent an overly short-sighted and thus one-sided distribution of freedom and reduction burdens to the detriment of the future'.*[39]

At last, the appropriate share of each sector or of each region, in countries like Belgium that do not yet approach their climate governance policy in a wider perspective, proves to become a difficult issue that tends to be passed to the lower possible level of decision-making, under the argument of subsidiarity or due to the specific allocation of competences, not yet updated in the light of the climate challenge. In Belgium, the Brussels Court of First Instance, a lower court, held in June 2021 that the Federal State and the three regions (detaining a full legislative power) breached their duty of care, precisely because they failed to optimally coordinate their climate policies (and also failed to adequately protect the human right to life and to housing).[40] It is true that the implementation of climate policies, which is necessarily transversal in nature, is a real challenge in the Belgian federal State, in which the distribution of competences functions according to a logic of enumeration of competences attributed to the federated entities or reserved to the federal authority, and not on the basis of a distribution of objectives between the different entities, as observed by the lower Court. However, the federal structure does not exempt the federal state or the federated entities from their obligations: climate policy

38 BVerfG [Federal Constitutional Court], 24 March 2021, Case No. BvR 2656/18/1, BvR 78/20/1, BvR 96/20/1, BvR 288/20, ECLI:DE:BVerfG:2021:rs20210324.1bvr265618 (Neubauer). Available at: http://www.bverfg.de/e/rs20210324_1bvr265618en.html; Kotzé, L., "Neubauer et al. versus Germany: Planetary Climate Litigation for the Anthropocene?", *German Law Journal* 2021, vol. 22, issue 8, pp. 1423-1444, doi:10.1017/glj.2021.87; Roller, G., "Les juges peuvent-ils sauver le climat ?, in Sambon, J. & Haumont, F., L'environnement, le droit et le magistrat, 2021, Larcier, pp. 275-300.

39 Para. 193 & 194, official translation.

40 Trib. Brussels, Klimaatzaak, 17 June 2021 (appeal is currently pending).

is a shared responsibility and should therefore be exercised in the context of loyal cooperation. The Court finds that climate emergency and international and European commitments, 'gives this natural obligation of cooperation between the different entities of the country a stronger normative scope in such a way that it can be integrated into the general duty of care imposed on each of the four defendants'.[41]

VI. The rise of cities and municipalities

While Parties – States and the European Union as a whole – struggle to specify and implement their own ambition, many other actors have also become essential key drivers in the expected social transformation. Among the so-called 'non-state' actors, cities gain influence for many reasons, related to power and personal stakes: their proximity to the territorial aspects, their possibility to grasp and show the concrete results of their own efforts on local aspects such as housing, mobility and public procurement conditions, not to mention the damage they have endured and will endure from climate change – floods, heating waves, water scarcity, etc.[42]

In France, it is the municipality of Grande Synthe, near Dunkerque, which obtained an important judgement from the French Conseil d'Etat, in two phases, on 19 November 2020[43] and July 1st, 2021,[44] in which the higher administrative court found that France had substantially exceeded the first carbon budget it set for itself, and ordered the French Government to adopt additional measures by the end of March 2022 (under the threat of a possible penalty, an *astreinte*). The carbon budget must thus be interpreted as an obligation to reach a result. The locus standi of the municipality was easy to demonstrate, being exposed to increased and high risks of flooding, to an amplification of episodes of severe drought with the effect not only of a reduction and degradation of freshwater resources but also of significant damage to built-up areas given the geological characteristics of the soil. The *Conseil d'Etat* decided that 'although these concrete consequences of climate change are only likely to have their full effect on the territory of the municipality by 2030 or 2040, their inevitability, in the absence of effective measures taken quickly to prevent their causes and in view of the time frame for action by public policies in this area, is such as to justify the need to act without delay to this end'.[45] Moreover, the Paris region and the Grenoble conurbation were identified by the National Observatory on the effects of global warming as having a very high exposure index to climate risks. In this respect, the City of Paris and the City of Grenoble argued that the phenomenon of global warming will lead to a significant increase in the intensity and duration of heat peaks observed on their territory, as well as a significant increase in winter rainfall, which will raise the risk of major flooding. In those circumstances, the *Conseil d'Etat* also ruled that those two local authorities had a sufficient interest in intervening in support of the annulment of contested governmental decisions.

41 Ibid, p. 75.

42 See Misonne, D. & Sikora, A., "Why Cities Do Become Vocal and is Law Ready to Hear them? Exploration through the lens of climate governance", in Chevalier, E., Cities and Climate Change, 2023, Springer, forthcoming.

43 CE, 19 Nov. 2020, req. nº 427301, *Commune de Grande-Synthe.*

44 CE, 1 July 2021, req. nº 427301, ECLI:FR:CECHR:2021:427301.20210701.

45 CE, 19 Nov. 2020, req. nº 427301, op. cit, §4.

Cities thus emerge into the limelight by provocation (they do not hesitate to defy the State) or/and by substitution, if the State *de facto* resigns from its responsibilities, as observed in the US under the Trump presidency, where cities and States drove alternative actions, to circumvent federal inertia. Due to their transnational capacity, already installed in relation to other fields,[46] such as energy, waste or water management, cities and municipalities discuss beyond borders. They even forge alliances, coalitions, global partnerships,[47] with the result that they have progressively become much stronger together and have developed their own standardized set of concrete duties. In its April 2022 report, the Intergovernmental Panel on Climate Change admits that transnational networks of city governments are leading to enhanced ambition and policy development and a growing exchange of experience and best practices.[48]

Conclusion

The Paris Agreement is meant to enhance the implementation of the original 1992 United Nations Framework Convention on Climate Change, which aims to stabilize greenhouse gases emissions at a level that would prevent dangerous anthropogenic interference with the climate system.[49] To meet its own goals, such as balancing anthropogenic emissions of greenhouse gases by sources and their removals by sinks in the second half of this century, the Paris Agreement has chosen to rely on the pledges of its own Parties, all made in good faith, and to discuss this collection of individual efforts in episodic moments of 'global stocktaking'.[50] The formula sounds overoptimistic. It has never been tested before, and it is not even based on a foundation in human and social sciences studies where the exact and ideal recipe could be found. It is, instead, the bitter result of international diplomacy and of decades of trial-and-error processes. Against such a difficult backdrop, the reinvented reliance upon nationally determined initiatives, and therefore upon the individualized level of Parties (local, by contrast to global), bounced back. It was rapidly strengthened by transversal dynamics showing that local does not *per se* mean isolate, a fortiori in the digital age where the information is shared instantly. Inspirational models and concepts transcending borders have indeed emerged – climate laws, climate litigation, climate networks and fair share. These do help guiding or even moulding 'local' decision-making as far as legal and institutional issues are concerned. Global climate governance is turning translocal. Whether it will truly help achieving the shared goals in due time remains to be seen.

46 Like Eurocities (1986), Energy Cities (1990), Local Governments for Sustainability (ICLEI) (1991), United Cities and Local Government (UCLG) (2004).

47 Like Climate Alliance (1990), C40 - Cities Climate Leadership Group (2006), the Covenant of Mayors (2008 – Europe), the Compact of Mayors (2014), the Global Covenant of mayors, etc.

48 Working Group III contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, April 2022, E.6.3, p. 64.

49 UNFCCC, art. 2.

50 Paris agreement, art. 14 : 'The Conference of the Parties serving as the meeting of the Parties to this Agreement shall periodically take stock of the implementation of this Agreement to assess the collective progress towards achieving the purpose of this Agreement and its long-term goals (referred to as the "global stocktake"). It shall do so in a comprehensive and facilitative manner, etc'.