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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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Local policies on climate change in a centralized State: The Example of France

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Abstract:

This article describes the efforts to implement local climate policies in France, Europe's most centralised state. Whilst the development of ambitious and effective local climate policies is essential to fight climate change and adapt to its consequences, experience from recent efforts to establish local policies to fight air pollution and land artificialisation draw a rather dark picture about the success of such initiatives, which has been to this date unable to break up the unadmitted consensus of joint inaction on both local and national levels. The complex relationship between the central state, local bodies and amongst the latter requires a rethinking of the law in its terrestrial dimensions to effectively address climate change locally, especially in consideration of climate justice. In fact, existing approaches have failed to implement comprehensive measures to share efforts equally between territories. Finally, the need to develop innovative legal instruments to ensure the compatibility of climate policy with urban and social issues is emphasized.

Keywords:

Climate change, Local authorities, Climate justice, Multi-level cooperation, French environmental law

France is undoubtedly one of the most centralised states in Europe. Thus, one might wonder about its institutional resilience if a major climatic event would affect its capital, Paris. What would happen if, for example, a heat dome covered the city of Paris – as has already happened in the north-western United States and in south-western Canada between June and July 2021¹ – causing the destruction of public buildings, ministries, the Élysée Palace, and – why not? – the Notre-Dame Cathedral (whose wooden frame was only recently rebuilt)? Would France have the resilience to face such an event and its lasting effects on crucial decision-making centres? This is not easy to ascertain, even if we realise that a good part of the government’s offices are now virtual.

On a more serious note, on the one hand, the climate-related issues affecting sub-national public authorities (at the *local* level) do not differ with respect to the form of State: mitigation, adaptation and resilience are local issues in any case.² Adaptation depends on territorial factors, just as the mitigation of greenhouse gas emission is a local issue, since around 70% of CO₂ emissions come from cities.³ On the other hand – as the last IPCC assessment report on climate change mitigation underlines: multi-level governance implies that decision-making processes on climate change are no longer within the exclusive competence of central governments, but rather involve a wide range of non-state actors such as cities, businesses and civil society.⁴

The implementation of local climate policies in a centralised State raises the question of the structural factors affecting climate governance.

At first glance, it would seem that in a centralised state sub-state public authorities can pursue their own local climate policies to the extent that the central state’s climate policy allows the local authority to do so. Many competences are centralised, thus depending on the central State to carry out an effective climate policy. For example, in terms of adaptation to climate change, risk management remains mainly of state competence through risk prevention plans. Equally the reduction of greenhouse gas emissions in essential sectors such as agriculture and energy is still of state competence, in which sub-state levels of government intervene only marginally. Finally, tax levers are mostly centralised. Interestingly, funding is identified by the latest IPCC report as one of the most critical aspects and one of the biggest barriers to climate mitigation, given the limited budgets of local and regional governments.⁵

At a second glance however, the issue is much more complex. This is illustrated by the

1 Garic, A., “Qu’est-ce que le dôme de chaleur qui étouffe les nord-ouest du continent américain”, *Le Monde*, 1 July 2021.

2 Bader, D. A., Blake, R., Grimm, A., Hamdi, R., Kim, Y., Horton, R. & Rosenzweig, C., “Urban climate science”, in Rosenzweig, C., Solecki, W., Romero-Lankao, P., Mehrotra S., Dhakal, S. & Ali Ibrahim, S., (eds.), *Climate Change and Cities: Second Assessment Report of the Urban Climate Change Research Network*, 2018, New York, Cambridge University Press, pp. 27-60.

3 Edenhofer, O., Pichs-Madruga, R., Sokona, Y., Farahani, E., Kadner, S., Seyboth, K., Adler, A., Baum, I., Brunner, S., Eickemeier, P., Kriemann, B., Savolainen, J., Schlömer, S., von Stechow, C., Zwickel, T. & Minx, J.C. (eds.), IPCC, 2014: *Climate Change 2014: Mitigation of Climate Change. Contribution of Working Group III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change*, Cambridge, United Kingdom and New York, NY, USA, Cambridge University Press, pp. 930; IPCC 2022 *Mitigation of Climate change Contribution of Working Group III to the Sixth Assessment Report 8.3.3.*

4 IPCC, 2022 *Mitigation of Climate Change. Contribution of Working Group III to the sixth Assessment Report Draft 1.9.*

5 IPCC, 2022 *Mitigation of Climate Change. Contribution of Working Group III to the sixth Assessment Report Draft 8.5.4.*

typical example of air quality and the fight against air pollution, which is closely linked to climate change⁶ and on which there have been local and national public policies in France for more than forty years. In my opinion, this example illustrates quite well the logic at work here: the creation of increasingly sophisticated legal instruments by the central state does not necessarily guarantee the success of policies at the local level. Instead, additional local policies might prove to be necessary. Moreover, it seems that the difficulties ultimately lie outside the law (section I).

Climate change mitigation, i.e. the quantified reduction of greenhouse gas emissions, aiming at -55% of emissions in 2030 and carbon neutrality in 2050 in order to keep temperatures below 1.5-2°C, is based on an accounting logic: a principle of continuous progress⁷ in the reduction of emissions. The principle of continuous progress is more binding than the principle of non-regression known in French environmental law. This accounting logic, established at the international and European level, is applied at the national level in many strategies, but it ultimately provides few elements to translate these figures into concrete action at the local level. It is indeed up to local governments to move from words to actions. In a way, at the local level, it is less about translating figures but more about creating integrated and coherent climate policies, since the principles of adaptation and mitigation can conflict locally. For instance the densification of cities as an objective to reduce GHG emissions may conflict with the fight against heat islands as a goal of adaptation. Local climate strategies do exist in France. However, such strategies are lacking an operational dimension, since classic instruments of urban planning, mobility and waste management, are mobilized to fulfil climate targets they are not designed for. Consequently, such mobilization can only be imperfect, one of the possible evolutions may be the integration, or merging, of classic instrument and local climate strategies (section II).

Finally, there is a question, which I believe is central to adaptation and mitigation processes at the local level and which has arisen in France even more than elsewhere because the government is centralized: the question of “climate justice” or climate equity. How can the burdens of adaptation and mitigation be shared equitably between territories, populations, etc.? In my opinion, it remains an overlooked issue at the national level, with solutions to be found at the local level (section III).

I. Local climate change policies in the context of air pollution control in a centralised state.

As the IPCC reminds us in its 2014 fifth assessment report on ‘urban air quality co-benefits’⁸ that ‘[t]he potential for realizing these co-benefits depends on institutional frameworks and policy agendas at both the local and national level, as well as the interplay between the two’. In this case, the difficulties in the design and implementation of a national policy and of coherent local policies against air pollution can serve as examples of the development of local climate policies.

6 Edenhofer, O., et. a. (eds.), IPCC, 2014, op. cit., p. 975, 12.8.1.

7 Mialot, C., “La Ville face au changement climatique, nouveaux instruments juridiques”, 2020, Berger Levrault, p. 207.

8 Edenhofer, O., et. a. (eds.), IPCC, 2014, op. cit., p. 976, 12.8.1.

A. The fight against air pollution: the deployment of sophisticated state legislation that has not yet been fully implemented at local level

European air quality regulations have an exemplary value for the development of European climate policies in the last forty years, since they have implied both a quantitative (or accounting) logic and a territorialised strategy, as certain territories affected by air pollution are subject to specific obligations.

Since the early 1980s, European legislation has imposed emission limits and information requirements for air pollutants. Today, the arsenal of European regulatory instruments is quite comprehensive. In particular, Directive 2008/50/EC Clean Air for Europe has included ‘territorialised’ obligations with regards to the zones and agglomerations concerned by non-conformity with air quality standards. The Directive required the implementation of air quality plans and action plans in these zones and agglomerations, in order to effectively reduce emissions. Directive 2008/50, therefore, has a strong local dimension, even if, as we shall see, the failure to apply this Directive has never been attributed to sub-state authorities, at least in France.

First of all, it should be recalled that in France air pollution is covered by different kinds of competences, in the hands of the State, including the agricultural and industrial fields, as well as the levers of taxation. The intervention of local and regional authorities in these areas remains therefore marginal and limited.

If we focus on transport pollution, a critical aspect of air pollution in urban areas, certain competences are shared between the State and local authorities, but it was only with the law on air (30th December, 1996)⁹ that the mayors’ administrative competences were recognised. This law allows mayors to regulate and prohibit vehicle traffic to safeguard air quality, and also recognises an inter-municipal competence in transport planning, through the enactment of mobility plans. The Prefects – representing the State in the Department – have also been given specific traffic police powers to deal with pollution episodes, with measures based on the atmospheric protection plans (APP) adopted by the Prefect after consultation with local authorities.

These legal mechanisms would have been sufficient to drastically reduce the emissions of air pollutants from transportation, through the enactment of appropriate regulations and bans at the local level. However, local authorities never took up these provisions at least not to the extent they could have - to their full potential, nor did the Prefects. This led to the combined inertia of state and local levels, also due to a very low awareness of the public health issues at stake and a resistance from motorists.

Increasing the sophistication of legal tools at state level, the 2015 Law on Ecological Transition and Green Growth¹⁰ created restricted traffic zones and coupled this device to the Atmosphere Protection Plans introduced by the aforementioned 1996 law. This law integrated local air policies with climate policies in a single document at the intermunicipal level, the Plan *Climat Air Energie Territorial*. However, like previous provisions, they have not been implemented or have been insufficiently implemented.

This failure to apply European air pollution regulation – which is the result of both local and national authorities’ inaction – has paradoxically led to the condemnation by

9 L. n° 96-1236, 30 Dec. 1996, *sur l’air et l’utilisation rationnelle de l’énergie*.

10 L. n° 2015-992, 17 Aug. 2015, *relative à la transition énergétique pour la croissance verte*.

the Council of State in 2017¹¹ and a successful action for failure to act the European Court of Justice in 2019¹² for failure to comply with the aforementioned European Directive 2008/50.

As a reaction to the aforementioned judgments, Article 86 of the Law on Mobilities of 24 December 2019 was introduced and required local authorities, in which air quality standards are not regularly met, to introduce a low emission zone (LEZ) before 31 December 2020. In order to ensure compliance with the LEZs, an automatic vehicle number plate identification system may be set up with the authorisation of the Prefect. The law on mobility imposes a study of the local climate plan and of the atmospheric pollution plan to prioritise low emission mobility.

The law of 22 August 2021, known as the Climate and Resilience Act, extended the obligation to set up LEZs to all urban areas with more than 150,000 inhabitants, with the aim of not only preserving air quality, but also of reducing the use of personal mobility, thus mitigating greenhouse gas emissions.¹³

B. Lessons from the failures of local air pollution control policies

Since the Law on air of 1996, legal tools against traffic-related air pollution have been given to local police authorities by the state, with powers to restrict traffic on the grounds of poor air quality, and to Prefects, representatives of the state, with extensive police powers and planning competences through the enactment of atmospheric protection plans.

Successive legislation has only added more and more sophisticated legal tools (restricted traffic zones, low emission zones LEZ, automatic control of number plates, etc.), as these devices were imposed on local levels following the condemnation of the State by the Council of State in 2017 and the Court of Justice in 2019. But these same local levels, subject to precise obligations, have delayed the effective implementation of these devices, which have not been implemented to this date.

It is therefore not so much a problem of coordination between the state and local levels, as suggested by the aforementioned IPCC report or the French Court of Auditors' report on air quality,¹⁴ which asserts that there is a "sometimes difficult and often disrupted articulation between the national and local levels, with local instruments struggling to constitute tools for experimentation adapted to the territories despite their numerous nature".

It is rather the lack of real political willingness, at both local and national levels, that explains the aforementioned ineffectiveness of local air pollution policies. The issue is, therefore, not a legal one, but a political one: until recently, there has been a political consensus on doing nothing about it. Nevertheless, the requirements of the Mobility Orientation Law, as extended by the Climate and Resilience Law, are not respected at the local level: local authorities are slow to adopt LEZs or to apply them, as in the case of the LEZ of Paris and the Greater Paris metropolis, whose application is suspended until

11 CE, 12 July 2017, req. 394254, *Association les Amis de la Terre*.

12 CJEU, 2019, C-636/18, *Commission C/ France*.

13 Moliner Dubost, M., "La police de la circulation envisagée sous le prisme d'une approche intégrée air-climat", in Kada, N., *Droit et Climat intervention publiques locales et mobilisations citoyennes*, 2022, Dalloz.

14 Available at: <https://www.ccomptes.fr/fr/publications/les-politiques-de-lutte-contre-la-pollution-de-lair>, p. 48.

the installation of radars that can read number plates, already authorised by the Law on Mobilities. One of the new arguments put forward to delay implementation is the discriminatory aspect of these low-emission zones, which restrict access for people who do not have sufficient income to change their vehicle.¹⁵ This argument of social injustice, which seems to carry little weight in relation to the public health imperatives underlying air quality legislation, is not unrelated to the notion of ‘climate justice’ discussed below. However, the argument of ‘climate justice’ is precisely put forward, or rather hijacked, as an obstacle to the local implementation of air pollution control policies.

II. The articulation of local and national levels of climate action in a centralised state

The articulation of national and local climate policies has been relatively ambivalent to date, and it is only through the law that local levels are required to take binding climate action.

In my opinion, the excessively optimistic vision of France given in 2014 by the 5th IPCC assessment report does not reflect the implementation of local climate policies eight years later. According to this report:¹⁶

“In France, the EU objectives were adopted as national goals, and through national legislation, all urban areas over 50,000 are required to prepare “Climate and Energy Territorial Plans” to meet these goals and, additionally, to address adaptation needs (Assemblée Nationale, 2010). Since all other planning processes related to issues such as transport, building, urban planning, and energy have to conform to and support these objectives, this approach provides a powerful mechanism to mainstream climate change into local public planning. These plans also form a framework around which private voluntary action can be organized.”

The short-sightedness of the IPCC on the French case is abandoned in the 6th assessment report of 2022, which reflects the awareness of the existing distance between strategies and actions.

A. Instruments and developments of local climate policies in a centralised state

This is another paradox: while France is a centralised state from which one might expect significant streamlined action on climate change, national climate policies are essentially translated into scattered sectoral strategies that are rather weak in normative terms. At the regional and local level, however, there are integrated “comprehensive climate planning”¹⁷ tools. These tools seem to be adequate legal instruments for public action, but they suffer from weak normativity and from articulation issues with other plans.

15 Mandard, S., Les zones à faibles émissions, illustration de l’inertie dans la lutte contre la pollution, *Le Monde*, 16 July 2022.

16 Edenhofer, O., et. a. (eds.), IPCC, 2014, op. cit., p. 1153.

17 For a definition of comprehensive planning see Juergensmeyer, J., *Land use planning* West academic, 2018, p. 28.

At the European level – excluding the legislation on energy, biodiversity, and the Kyoto protocol’s objectives – the European climate legislation currently in force consists mainly of Regulations 2018/841, 2018/842 and 2018/1999, most recently amended by Regulation 2021/1119, which has established the framework for achieving climate neutrality and modified the 2030 target of -55% of CO₂ emissions. For the moment, this legislation essentially reflects the aforementioned accounting logic, allocating and decreasing carbon budgets per State and determining the proper methods for accounting emissions and natural carbon sinks. The implementation of the European ‘green deal’ implies a significant reworking of this ‘skeletal’ legislation on strategic sectors such as land use, agriculture, biodiversity and energy and will include a substantial financial component. However, European climate legislation does not really identify the sub-state and local levels as levels of government bound by specific climate obligations.

At the central government level, as soon as the Paris Agreement was adopted, the 2015 law on ecological transition and green growth defined two new national climate plans: the national low-carbon strategy (SNBC) and the multi-annual energy program (PPE).¹⁸ Adopted by a simple decree for a period of five years, these planning tools are fairly general catalogues of objectives and decreasing carbon budgets by emission sector (transport, building, agriculture, waste, etc.). Their effectiveness is rather low because they are imposed on other public authorities in their planning documents, simply as a matter of ‘consistency’ and not of full compliance. *Taking into account* as a normative relationship has been defined by the administrative judge as a weak obligation. This phrase has been interpreted as follows: it ‘must not, in principle, deviate from the fundamental guidelines of the plan except, under the control of the judge, for a reason based on the interest of the operation envisaged and insofar as this reason justifies it’.¹⁹ It should be noted that the SNBC adopted in April 2020 provides for an objective of zero net artificialisation of land in 2050; however, in the absence of any real binding force, this objective remained a dead letter until the adoption of the law of 22 August 2021 on climate and resilience, as we shall see in the following section (II. B).

In addition to these two general state plans, there are numerous sectoral plans which – without any exaggeration – are as abundant as they are not prescriptive. For example, the national plan for adaptation to climate change (PNACC), adopted in 2011, is a simple guideline with merely informative content; the national strategy for managing the coastline adopted in 2012 aims to adapt to coastal erosion and is now determined by decree since the law of 22 August 2021 on “Climate and resilience”; the national forest and wood programme, the national guidelines for preserving biodiversity, the national plan for reducing atmospheric pollutants, the national waste management plan, etc. Generally speaking, these different tools have been considered by the administrative judge insufficient to reach the objectives of reducing greenhouse gas emissions in 2030.

In a case initiated by the City of Grande Synthe against the central State, the Conseil d’Etat ruled in its decision of 1st July 2021 that the State, with its actual efforts to combat climate change, was not in a position to achieve the European objectives for 2030.²⁰

18 Available at: <https://www.ecologie.gouv.fr/strategie-nationale-bas-carbone-snbc>.

19 CE, 28 July 2004, req. n° 256511, *Assoc. de défense de l’env. et a., Féd. nationale SOS env. et a.*

20 CE, 1 July 2021, req. n° 427301, *Ville de Grande Synthe*. Abstract: “(...) the need to step up efforts to achieve the objectives set for 2030 and the impossibility, with the measures adopted to date, of achieving them is not seriously contested by the Minister for Ecological Transition, who, in the briefs produced in the context of the supplemental

In addition to their inadequacy, there is also the aforementioned difficulty of developing integrated and coherent local climate policies from these scattered national plans, with different purposes and adoption agendas, which are not coherent with each other or even simply coordinated.

Well before the adoption of these national plans, as indicated in the introduction, many local authorities had already tried to integrate the objectives of sustainable development at the end of the 1990s, in particular through the local Agenda 21 following the 1994 Aalborg Charter. This purely local approach, which did not fall within any legal framework but benefited from the support of national agencies such as ADEME (Environment and Energy Management Agency), gradually gained legal status with the territorial climate energy plans referred to by the IPCC, known as territorial climate air-energy plans (PCAET) under the aforementioned 2015 law, which became compulsory for all inter-municipal public bodies with more than 20,000 inhabitants.

The territorial climate air and energy plans are the materialization at the intermunicipal level of an integrated local climate, air and energy strategy. These plans are based on the “comprehensive planning” approach mentioned above and must address the reduction of CO₂ emissions and the development and preservation of carbon sinks as well as adaptation to climate change and renewable energy. The local climate plan must contain a territorial climate strategy and an action plan.

However, this local climate plan is hardly effective: the urban planning and mobility plans must simply “be compatible with” the territorial climate air energy plan, and not fully “comply with” it (“full compliance”). In practice, the territorial climate and energy plans were adopted in a “forced march” after the aforementioned 2015 Act. Their content is fairly general and not very precise, particularly in terms of the operational tools to be mobilised to achieve their objectives. In their first generation since 2015, these plans seem to be a ‘catch-all’ local translation of the aforementioned national plans, whose general guidelines are simply repeated. In practice, these plans lack a truly local and operational dimension (see, for example, the plans of Paris,²¹ Aix Marseille Provence Métropole²² or Rennes Métropole²³). Few local authorities have been able to turn these local climate plans into real tools for improving climatic conditions.

On the other hand, many local authorities have integrated climate policies into their urban plans and strategic local urban planning (SCOT territorial coherence schemes) and have adapted tools that are not specifically climate-related,²⁴ such as the territorial coherence scheme of the Caen metropolis adopted on 18 October 2019, which includes a strong climate component.²⁵ The local urban plans of the main French metropolises have integrated climate-related development and programming guidelines and the

investigation ordered on 19 November, highlights the various measures provided for in the bill [law of august 22 2021] to combat climate change and strengthen resilience to its effects, tabled last February and currently under discussion in Parliament, as well as in the regulatory measures that should be taken, in due course, for its application, in order to maintain that they will make it possible, in total, with the measures already in force, to achieve a reduction in emissions of the order of 38% in 2030’.

21 Available at: <https://www.apc-paris.com/Plan-climat>.

22 Available at: <https://www.registre-numerique.fr/Plan-Climat-AMP>.

23 Available at: <https://metropole.rennes.fr/le-plan-climat-de-rennes-metropole>.

24 Mialot, C. (2020), *La Ville face au changement climatique, nouveaux instruments juridiques*, op. cit., p. 111.

25 Available at: <http://www.caen-metropole.fr/content/scot-revise-executoire>.

Rennes Métropole²⁶ defines the parameters of construction and climatic development in its local urban plan by using the existing legal framework for climatic purposes.

Taking up this integration logic experimented at the local level, a legislative order of June 2020²⁷ provided that the territorial climate and energy plan can be integrated into the territorial comprehensive plan (SCOT), the strategic urban planning at the inter-municipal level. This integration of the territorial climate, air, and energy plan into the inter-municipal “urban comprehensive plan” is likely to strengthen the role of both tools.

This integration of climate planning into the classic tools of strategic urban planning seems to be an interesting development: the creation of an ad hoc local climate plan, unrelated to other planning tools, seems to add an additional burden to local authorities, and consequently raises questions of temporal and material coordination of the various plans: urban planning, climate, mobility, housing, etc.²⁸

Regional comprehensive climate planning seems to be fairly exemplary of an integrated approach to scattered planning: the Regional Plans for Sustainable Development and Territorial Equality were created by the Law of 7 August 2015 on the new territorial organisation of the Republic. These regional comprehensive climate plans constitute the integration of numerous regional plans: regional sustainable development plan, regional air climate energy plan, regional inter-modality plan, regional transport infrastructure plan, regional ecological coherence plan and the regional waste prevention and management plan, etc.

The various climate strategies, which remain separate at national level, have therefore been integrated at the regional level. The regional plan, based on a comprehensive planning approach, must determine a strategy to be translated into objectives and includes a set of rules. It therefore has, at least partially, a regulatory scope. For example, the *Schéma Régional de Développement Durable et d'Égalité des Territoires de la Région Grand Est* includes a rule of compensation for soil sealing in urban areas of 150% and in rural areas of 100%. This rule is imposed on the above mentioned strategic inter municipal plans SCOT in a compatibility relationship and, in their absence, on the local urban plans in a compatibility relationship.²⁹

At this point it is probably necessary to explain why regional plans only require local plans - strategic plans and local urban plans – to be consistent with regional plans, rather than fully compliant. Article 72 § 5 of the French Constitution provides that no territorial authority may in principle exercise supervision over another. In France, the centralised nature of the State is combined with a principle of prohibiting the supervision of one territorial public authority over another, which has the effect of not establishing a hierarchy between the region and the inter-municipalities and the municipalities. This lack of hierarchy does not necessarily contribute to the articulation and effectiveness of local climate policies, and is certainly a reason for the state legislator to intervene when it seeks to impose the achievement of specific climate objectives on local authorities, as it did in the Climate and Resilience Act of 22 August 2021 with the zero net artificialisa-

26 Available at: <https://metropole.rennes.fr/consulter-les-documents-du-plan-local-durbanisme-intercommunal-plui>.

27 Ord., n° 2020-744, 17 June 2020, *relative à la modernisation des schémas de cohérence territoriale*.

28 See on this topic the research carried out by the “Ademe Ascens” program. Available at: <https://www.ademe.fr/content/ascens-articulation-strategies-climat-energie-planification-spatiale>.

29 Available at: <https://www.grandest.fr/politiques-publiques/sraddet/>.

tion (see below). Furthermore, in its decision of 18 December 2017,³⁰ the Council of State has given a definition of compatibility: “the compatibility relationship imposes a view of the whole territory covered, taking into account all the requirements of the higher level plan, if the plan does not contradict the objectives imposed by the higher level plan, taking into account the guidelines adopted and their degree of precision, without seeking the adequacy of the plan to each particular provision or objective”. This normative relationship is far from the one of full compliance.

In short, the scattering of sectoral state climate plans is being countered by regional and local comprehensive climate planning. These local comprehensive climate plans can be strengthened by their integration into classic planning tools, but still their effectiveness is limited.

However, on certain issues, the state legislator may decide to intervene to impose certain climate principles.

B. The example of the implementation at local level of the zero net artificialisation principle and the management of coastline retreat

The Climate and Resilience Act of 22 August 2021 is the result of an unprecedented citizen consultation process. Following the Yellow Vests movement, a citizen’s climate convention, composed of 150 citizens representative of the diversity of the French population, was brought together for almost a year in 2019 and 2020 to draft a climate law.

This very extensive law, important in its content and the principles it contains, did not enable France to reduce its greenhouse gas emissions in the proportions imposed by the aforementioned European legislation by 2030 and by the *Conseil d’Etat* in its aforementioned Grande Synthe decision.

It is worth addressing two important points of this law: (1) the implementation of the principle of zero net artificialisation and (2) the management of coastline retreat.

(1) The principle of zero net artificialisation contained in the law of 22 August 2021 is certainly new, but the 2000 law on solidarity and urban renewal had already established the principle of combating urban sprawl as one of the principles of urban planning contained in the urban planning code and imposed on urban plans (territorial coherence plans SCOT and local urban plans). Since the 2010s, some local authorities, such as Rennes Metropole for example, have significantly reduced the consumption of natural and agricultural areas. However, France continues to lead Europe in terms of land artificialisation, with 50% more natural areas consumed than in neighbouring countries.³¹

The law gives at least three definitions of zero net artificialisation: it is generally the sum of artificialised land, either because of their sealing or because of the loss of their ecological functions, minus the soils restored to their natural state. The law imposes a 50% reduction in the artificialisation of soils for the decade 2021-2031 compared to the decade 2011-2021, with the eventual goal of zero net artificialisation of soils, though the timeline is not determined by the law. As there were obvious difficulties in accounting for the artificialisation of land for past consumption, the legislator considered that only the actual consumption of natural and agricultural areas would be taken into account for

30 CE, 18 Dec. 2017, req. n°395216, *Regroupement des organismes de sauvegarde de l’Oise et Le petit rapporteur mesnilois*.

31 Mialot, C. (2020), *La Ville face au changement climatique, nouveaux instruments juridiques*, op. cit., p. 130.

the coming decade compared to the past decade, i.e. areas urbanised in local urban planning documents and territorial coherence plans SCOT. To implement this rather restrictive principle, the law foresees its application at regional level in the regional sustainable development and territorial equality plans, in the territorial strategic plans SCOT and in local town planning plans by 2026 and has imposed an inventory of wasteland, economical activities areas, etc., which constitute future land banking.

However, the Law has not envisaged any mechanism to ensure equity between territories that have consumed a lot of land over the past decade and territories that have been “sober” in their land consumption. In my opinion, this could call into question the application of the law, the implementation of which has just been postponed by the law on differentiation, decentralisation, deconcentration and simplification adopted on 9 February 2022.³²

(2) With regard to the management of the retreat of the coastline, the Resilience Climate Law of 22 August 2021 seems to have organised the adaptation to the rise in sea level in a more coherent and pragmatic way. It is true that the legislator has been able to draw on local experiences, such as that of the inter-municipal body *Communauté Pays Basque*, which has been working in this direction since 2012 with the implementation of a Local Strategy for Coastal Risk Management, in conjunction with the adoption of the national strategy for managing the coastline.³³ At that time, the inter-municipal local urban plan included specific provisions anticipating the retreat of coastal line. The provisions of the aforementioned law of 2021 on climate and resilience have translated this strategy in the territorial coherence plans SCOT, which have identified the areas for relocating public facilities affected by the retreat, and in the local urban plan, which must integrate a local strategy for retreating the coastline with the design of a specific zone for the retreat within 30 years and a subsequent zone for the retreat within 30-100 years. In addition to those mechanisms, a specific right of priority for public acquisition is available to allow targeted land intervention, a mechanism that has not been provided for by the law in the case of zero net artificialisation. In a way, the legislator benefited from local experimentation, employing it in national legislation according to a bottom-up model of climate risk management.

III. Ensuring climate equity or justice in local climate policies in the context of a centralised state

A. General ideas on Climate justice

The issue of climate justice or climate equity is central to climate policies and the IPCC places it prominently in its reports since it occupies at least two specific chapters out of the 16 chapters of the 5th assessment report of 2014.³⁴ Climate justice also seems to have a legal content in that it is referred to in the treaty establishing the COPs:

32 L. n° 2022-217, 21 Feb. 2022, *relative à la différenciation, la décentralisation, la déconcentration et portant diverses mesures de simplification de l'action publique locale*.

33 Available at: <https://www.communaute-paysbasque.fr/a-la-une-2/actualites/actualite/recul-du-trait-de-cote-un-dispositif-inedit-signé-a-saint-jean-de-luz>.

34 Edenhofer, O., et. a. (eds.), IPCC, 2014, op. cit., pp. 207-350.

“Article 2 of the United Nations Framework Convention on Climate Change [...] indicates that an ultimate objective of the Convention is to avoid dangerous anthropogenic interference with the climate system. Two main issues confronting society and the IPCC are: what constitutes “dangerous interference” with the climate system and how to deal with that interference. Determining what is dangerous is not a matter for natural science alone; it also involves value judgements - a subject matter of the theory of value, which is treated in several disciplines, including ethics, economics, and other social sciences. Ethics involves questions of justice and value. Justice is concerned with equity and fairness, and, in general, with the rights to which people are entitled.”

The last two reports of the IPCC on adaptation and mitigation continue to emphasize that no adaptation or mitigation policy can succeed in the long term without taking into account climate equity and they also cite the French example of the failure of the carbon tax and the yellow vest movement.³⁵

According to the IPCC, the question of “climate justice” finally reveals the eminent-ly *political* nature of climate policies, since the development of climate strategies and policies inevitably involves a dimension that falls within the realm of value judgment. Should “climate justice” – since it refers to the concept of justice, a concept that is far from being univocal – escape the law? Climate justice is one of these concepts (like the “right to the city”, which is not unrelated to it, since they share the idea of the Just City³⁶) which jurists seize upon with fear or delight, depending on their opinion. Its content is undoubtedly rather vague and ideologised, making it contestable or appealing, depending on one’s tastes and positions, but it in either case it is a concept which will inevitably have to be dealt with in my view, as explained in III.B and in the conclusion.

There are several definitions and multiple dimensions of climate justice, including: a social and participatory dimension, undeniably present from the outset, as climate justice was carried at the end of the 1990s by environmental and social protest movements;³⁷ an environmental and spatial dimension; an ecological dimension; and a temporal dimension, the meaning of which can be perceived in the concept of *future generations*. It also has a double dimension, both in the burdens that climate change directly imposes on populations, environments and territories exposed to climate change, which is the dimension most often addressed in the IPCC reports and the burdens that climate policies impose in response to these changes. These indirect climate burdens must not be neglected, and it is from this angle that they are most noticeable in France (see III.B).

Climate justice also involves different scales: global, as is the case of the Paris Agreement, which has established a differentiated treatment of States based on their past contribution to greenhouse gas emissions and providing mechanisms to finance the transition of developing States. The local dimension of climate justice emerged more

35 IPCC, 2022, Mitigation of Climate Change. Contribution of Working Group III to the sixth Assessment Report Draft 1.3.3.

36 Steele, W., Hillier, J., Houston, D., Byrne, J. & MacCallum, D., “The Climate Just city” in *Routledge Handbook of climate justice*, 2020, Tahseen, J. (ed.), p. 280.

37 Jafry, T., Mikulewicz, M. & Helwig, K., “Justice in the era of climate change” in *Routledge Handbook of climate justice*, 2020, Tahseen, J. (ed.), p. 2.

recently,³⁸ but it blends in with old and existing debates on the sustainable city, the just city, the right to the city.

It is in a rather unexpected dimension, i.e. a dimension of equity between territories and not between people – which does not necessarily imply a direct social dimension – that climate justice arose in France at local level in relation to the zero net artificialisation described above in II.B.

B. Elements for climate justice in local climate policies in France.

The French central state literally “broke its nose” on climate justice in 2018. When the government tried to impose a uniform additional carbon tax on fuels, it triggered the yellow vest movement: no fair mechanism for low-income people dependent on cars for their daily trips and commuting had really been put in place, and not even conceived.

Despite this failure, the Climate Resilience Act of 22 August 2021 does not really address the notion of climate justice and the mechanisms to be implemented. There is certainly a set of allowances envisaged for the energy renovation of housing and transport that can be supplemented at local level by local authorities. Nevertheless, it does not appear from the impact assessment of the law,³⁹ that the legislator has carried out a systemic analysis of the climate burdens weighing on individuals, companies and territories, before formulating the principle of zero net artificialisation.

As mentioned above, the Climate Resilience Act of 22 August 2021 imposes on local authorities a 50% reduction of the consumption of natural and agricultural areas for the decade 2021-2031 compared to the decade 2011-2021 in order to achieve neutrality by 2050. Each territorial level must translate this objective into its strategic and urban plans. However, even before implementation, a situation of injustice emerged: local authorities that had applied a real policy of ‘land sobriety’ over the decade preceding the Act – following national directives that were not very restrictive, but which existed nonetheless – saw their urbanisation possibilities severely restricted by the principle of 50% reduction. At the same time local authorities that had in some way ignored national directives and principles and had heavily consumed natural areas were in a way authorised to continue to consume, but in a more measured way. In the system set up by the Climate Resilience Act to reduce the artificialisation of land, it is therefore the “bad pupils” who were rewarded.

The law does provide for a local adaptation of the zero net artificialisation principle, but it does not lay down any principle allowing for a fair distribution of the climatic burdens, taking into account the past behaviour of local authorities in terms of land artificialisation and the nature of the artificialisation carried out in the past: economic, individual or collective housing, primary or secondary dwellings, the creation or absence of social housing in accordance with the quotas imposed by the Solidarity and Urban Renewal Act of 2000,⁴⁰ etc.

Moreover, in my opinion, there is a second gap in the implementation of the principle of zero net artificialisation. Containing urban expansion within the urban envelope

38 Moss, J. & Umbers, L., “Climate justice and non state actors” in *Climate Justice Beyond the State*, 2021, Routledge Environmental Ethics.

39 Available at: https://www.assemblee-nationale.fr/dyn/15/textes/l15b3875_etude-impact.pdf.

40 Mialot, C., “Affordable and Workforce Housing in France” in *Journal of Comparative Urban Law and Policy* 2020, vol. 4, issue 1, Art. 27, pp. 456-472. Available at: <https://readingroom.law.gsu.edu/jculp/vol4/iss1/27>.

means a scarcity of land resources and therefore, in the long term, an increase in land prices. This rise in land prices will not only be an obstacle to housing for low-income people, notably, this is the *social injustice* dimension of zero net artificialisation. It will also be an obstacle to the construction of the climate city, which is both dense and liveable, in which urban heat islands and the risks of massive rainfall events will be combated by restoring green corridors, which will require massive renaturation, etc. The climatic transformation of the city will require massive land intervention and the cost of this intervention could prove to be exorbitant in the absence of any measure to control land prices by means of either a dedicated tax system (based, for example, on the mechanism of land value capture,⁴¹ which is unfortunately unknown in French law today), or pure and simple land prices control.

In a centralised state such as France, these measures of climate justice, which eminently affect property rights, fall within the domain of the law of the central state.

IV. Conclusion

In conclusion, we can see that the relationship between the central state and sub-state levels is much more complex than a simple analysis of the margins left to the local level to develop local climate policies. Instead, it has been shown that local authorities must find tools to effectively support the central state climate policies. This can be done either by recycling existing tools – such as urban planning – or by having the legislator formulate new tools, notably by taking into account local experiences.⁴²

Local air policies that have been implemented over the past 40 years, however, paint a murky picture of how inaction can be combined with the development of increasingly complex and sophisticated legal and institutional tools that are unlikely to break the tacit political consensus on state and local inaction. This combined inaction in the field of air pollution, which is reminiscent of the combined urban logic of the state and sub-state authorities in the creation and maintenance of urban ghettos in France,⁴³ suggests that local climate policies will be difficult to put in place.

In a way, since climate change is multi-dimensional and forces us to think about public law differently, i.e. by rethinking law in its terrestrial dimensions, we should “ground” public law.⁴⁴ Considering it through this prism and its terrestrial stakes means focusing public law in the Anthropocene,⁴⁵ even if there are many realities: the city,⁴⁶ public spaces,⁴⁷ infrastructures, natural spaces, etc., which can respond to climate issues in a logic of action in the very short term, in order to achieve -55% of emissions by 2030 and carbon neutrality by 2050. In this respect, I believe that the public law of the Anthro-

41 Juergensmeyer, J., *Land use planning*, 2018, West academic, p. 9.

42 For example, the local Agenda 21, which became a territorial climate and energy plan, or the local treatment of the management of the retreat of the coastline, which became a national policy and was then incorporated into the Climate and Resilience Act.

43 Mialot, C. (2020), “Affordable and Workforce Housing in France”, op. cit.

44 Mialot, C. (2020), “La Ville face au changement climatique, nouveaux instruments juridiques”, op. cit., p. 19.

45 Auby, J-B., preface in Mialot, C. (2020), *La Ville face au changement climatique, nouveaux instruments juridiques*, op. cit.

46 Auby, J-B., “La Ville nouvelle frontière du droit administratif”, AJDA 2017, p. 853.

47 Auby, J-B., “L’espace public comme notion émergente du droit administratif”, AJDA 2021, p. 2565.

pocene is shifting to planned GHG emissions reduction and adaptation that can escape market-based approaches, as suggested by the zero net artificialisation principle that enacts a land-based approach. Climate change is indeed an event that takes place in the real world and which the law is obliged to take into account. Climate justice, however elusive and multi-dimensional it may be, is not a simple mechanism for adjusting climate policies, as it appears through social compensation mechanisms, in national and local climate policies in France. It is a constitutive element, a condition for the success or failure of these policies, as the IPCC has pointed out in its reports.

