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French Yearbook of  
Public Law



Issue 1, 2023

# Presentation

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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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# Overcoming Short-Termism in Democratic Decision-Making in the Face of Climate Change: a Public Law Approach

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## **Abstract:**

The paper addresses the capacity of democracies to tackle the challenge of climate change. Even though national democracies tend to short-termism and are not always able to deal with global, complicated, and intergenerational challenges such as climate change, institutional innovations present themselves as a better solution than more technocratic or authoritarian forms of climate governance.

Firstly, the contribution examines the tension between democracy and climate change and identifies short-termism as a central problem. Secondly, from a public law perspective, the article presents different institutional solutions driven by constitutional courts and posterity impact assessments that can help democracies to overcome said challenge. Lastly, the specific case of independent climate bodies is analysed. These diverse bodies can be conceived through a series of public law criteria. Public law offers a framework for these structures to thrive as an institutional solution to the challenge of climate change.

## **Keywords:**

Institutional innovations, Independent climate bodies, Short-termism, Democracy, Climate governance

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<sup>1</sup> The author is also affiliated with the Leuven Center for Public Law of the KU Leuven. I am grateful to Chiara Armeni, Delphine Misonne, John Pitseys and the editorial team of the Yearbook for their comments on a previous version of this text. All views remain mine.

Climate change is one of the main challenges of our time. Under article 2 of the Paris Agreement, the increase in the global average temperature should be limited to well below 2, preferably 1.5, degrees Celsius, compared to pre-industrial levels in order to reduce the risks and adverse impacts of climate change. The importance of governance arrangements to achieve this goal has been highlighted by the Intergovernmental Panel on Climate Change.<sup>2</sup> Institutions and public law matter when it comes to reducing greenhouse gas emissions and mitigate climate change. Yet, there are vivid debates on the capacity of democracies to address the challenge of climate change effectively and reduce greenhouse gas emissions quickly and drastically enough. This is because climate change is a global and inter-generational challenge, requiring comprehensive action and a rapid overhaul of existing practices and ways of life, while democracies exist mostly at the national level, can be prone to short-termism, and tend to follow long and cumbersome decision-making procedures. In this paper, I will argue that, despite their flaws, democracies can rely on institutions that help them address some of these problems and, in particular, the problem of short-termism when it comes to the challenge of climate change. The focus of this article is thus the democratic tendency to short-termism and its institutional fixes, while other possible ways forward to further reconcile democracy and the fight against climate change are not examined here. I will outline how a public approach can help shed some light on the potential of these institutional fixes to democratic short-termism. Public law is here understood as the set of rules and principles regulating the use of public power and the relations between citizens and the State. I will also argue that envisaging the fight against climate change within the framework of existing public law principles may help avoiding falling into technocratic solutions to this challenge. This is because established public law principles in Western States encompass democratic and liberal values that the fight against climate change should not lead us to abandon lightly.

In the first part of the contribution, the tension between democracy and climate change is examined. Some possible institutional responses to the problem of short-termism in democratic decision-making are discussed in the second part from a public law perspective. Part III analyses in more detail one of such institutional response, namely the role played by national independent climate bodies in the contemporary governance of climate change and attempts to make sense of their variety through a series of criteria that help locate them within the broader structures of the state. In both Parts II and III, I examine the extent to which fundamental public law principles shape the design of institutional responses to the problem of short-termism to ensure that they remain within the realm of liberal and democratic values.<sup>3</sup> As far as independent climate bodies are concerned, public law principles eg guide the scope and the nature of the powers that can be granted to them. This will also allow me to highlight on several occasions the tension that can exist between institutional innovation to make democracies more resilient in the face of climate change and the public law foundations on which they rely.

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2 Working Group III of the Intergovernmental Panel on Climate Change, “Working Group III contribution to the IPCC sixth assessment report (Ar6)”, *Climate Change 2022: Mitigation of Climate Change*, 4 April 2022, pp. 1-31. Available at: <https://www.ipcc.ch/report/ar6/wg3/>.

3 Many, although not all, of the examples mentioned in this contribution are from either French or Belgian law. This is in line both with the editorial aim of the Yearbook and with my personal expertise. I do acknowledge though that many of the points made in this paper could be further illustrated by examples from other jurisdictions.

## I. Climate change and democracy

The capacity of democracies to address the challenge of climate change is debated. Several reasons suggest a difficulty for democracies to rise to the challenge,<sup>4</sup> and give rise to calls for declaration of states of climate emergencies that would include a turn to more technocratic or authoritarian forms of climate governance.<sup>5</sup> Four of these reasons are examined hereafter.

A first reason why democracies struggle with climate change is that climate change is a complicated problem to address: it has been labelled in many ways, in particular as a ‘wicked problem’ or a ‘super wicked problem.’<sup>6</sup> Climate change is a wicked problem firstly because the knowledge required to identify the measures needed to mitigate climate change is incomplete, sometimes contradictory, and often changing, even though reports such as those from the Intergovernmental Panel on Climate Change (IPCC) provide detailed assessments of the science related to climate change and identify scientific consensus on a significant number of topics.<sup>7</sup> Accordingly, there is no agreement on the best course of action for a state to adopt to prevent the worst effects of climate change from materialising. For example, the part that technological innovation should play remains disputed.<sup>8</sup> Furthermore, the actions to reduce greenhouse gases to be taken by individual citizens (reducing the use of cars, reducing plane travels, etc.) often challenge lifestyles and cultural and ideological beliefs of large segments of the population, so the cost of implementing these actions are high, both politically and economically, as well as personally for the people having to change their behaviour. At a more structural level, the changes that need to be undertaken are also significant, as they involve a drastic rethinking when it comes to the collective reliance on coal, oil, and gas, for energy purposes, reliance on intensive agriculture for food security, or on intensive production to satisfy consumers’ needs and desires to name just a few. Resistance to implementing the actions needed to address climate change is therefore to be expected. In addition, climate change is also a problem connected to other environmental hazards, such as deforestation, loss of biodiversity or overpopulation, which means that the breadth of measures to be adopted is large and that interactions between these different problems and the measures taken to address them may well produce unexpected results. These characteristics of climate change make it difficult for politicians and social movements to convince citizens of the need to drastically and urgently change their behaviours or to follow a particular course of action in order to mitigate climate change.

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4 Lindvall, D., “Democracy and the Challenge of Climate Change”, International IDEA Discussion Paper 3/2021, 20 Oct. 2021, 77 p. Available at <https://www.idea.int/sites/default/files/publications/democracy-and-the-challenge-of-the-climate-change.pdf>.

5 For a critical discussion of these calls, see eg. Fischer, F., *Climate Crisis and the Democratic Prospect: Participatory Governance in Sustainable Communities*, 2017, Oxford, Oxford University press; Armeni, C. & Lee, M., “Participation in a time of climate crisis”, *Journal of Law and Society* 2021, vol. 48, pp. 49-52.

6 Head, B., *Wicked Problems in Public Policy. Understanding and Responding to Complex Challenges*, 2022, Cham, Palgrave MacMillan, pp. 97-102; Levin, K. et al., “Overcoming the tragedy of super wicked problems: constraining our future selves to ameliorate global climate change”, *Policy Sciences* 2012, vol. 45, pp. 123-152.

7 See: <https://www.ipcc.ch/>.

8 Miller, J., “Climate change solutions: The role of technology”, House of Commons Library. Insight, 24 June 2020. Available at: <https://commonslibrary.parliament.uk/climate-change-solutions-the-role-of-technology/>.

A second reason why democracies struggle to effectively address climate change is that democratic decision-making tends to be slow and cumbersome. In principle, it seeks to include and give a voice to all affected parties which means that the necessary decisions may not be adopted quickly enough.<sup>9</sup> Participation, discussion, and deliberation take time, and time is lacking if the worst effects of climate change are to be averted. It could accordingly be argued that non-democratic forms of government might be better able to take effective measures to reduce greenhouse gas emissions quickly and drastically enough, as they do not rely on lengthy procedures, participation and popular consent to the same extent as democracies.<sup>10</sup>

A third reason why climate change is a challenge for democracies is that climate change is a global challenge and because democracies mostly exist at the national level. The reduction in greenhouse gas emissions must be addressed globally. Yet, democracies mostly exist at the state level and there is no world government that could decide and enforce a global reduction of the emission of greenhouse gases. Such reduction must therefore rely on international cooperation and agreements, and perhaps most importantly so does their enforcement.<sup>11</sup> Without suitable enforcement mechanisms of these international tools there remains the risk of non-compliance and free-riding by individual states. The risk for a state bearing the costs linked to the reduction of its greenhouse gas emissions, while other countries do not undertake similar efforts, is real and makes it difficult for committed governments to convince citizens and voters to accept such costs. Again, this seems to be more of a problem for democracies, in which elected officials are accountable to their (national) voters, than for other forms of government.<sup>12</sup>

A fourth reason why democracies could arguably have difficulties in addressing the challenge of climate change results from the short-termism that tends to affect democratic decision-making. Politicians can be tempted to envisage long-term challenges through short-term glasses, and to prioritize short-term benefits over the long term and future benefits when making decision in the hope to be reelected. This is the case either because citizens can themselves be prone to short-termism, reflecting this attitude in the voting ballots, because of the pressure from special interest groups, or because of an electoral dynamic which does not reward policies that have beneficial effects in the long term but bring costs in the short term.<sup>13</sup> In the case of climate change, this tendency to short-termism means that the current generation or its elected representatives might not be willing to undertake the sacrifices required to protect future generations from the adverse effects of climate change, since the interests of future generations are not given the same weight when making the decision.<sup>14</sup> Surely, climate change is no longer a problem only of the future and governments can for instance adopt measures to increase climate resilience of public infrastructures at limited costs demonstrating their benefit in the

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9 Armeni, C. & Lee, M. (2021), "Participation in a time of climate crisis", op. cit., pp. 52-56.

10 Lindvall, D. (2021), "Democracy and the Challenge of Climate Change", op. cit., pp. 31-35.

11 In this special issue, see the contributions by Maljean-Dubois, S., Chevalier, E. & Marique, Y.

12 Lindvall, D. (2021), "Democracy and the Challenge of Climate Change", op. cit., pp. 36-37.

13 MacKenzie, M., "Institutional Design and Sources of Short-Termism", in González-Ricoy, I. & Gosseries, A. (eds.), *Institutions for Future Generations*, 2016, Oxford, Oxford University Press, pp. 26-29.

14 Pitseys, J. & El Berhoumi, M., "Constitution, conscience du long terme et justice intergénérationnelle", in A., Bailleux (ed.), *Le droit en transition. Les clés juridiques d'une prospérité sans croissance*, 2020, Brussels, Presses de l'Université Saint-Louis, pp. 447-448.

short term, when floodings occur regularly. Yet, climate change is a domain where costly actions are required just as quickly, with most benefits (or decreased damage) only visible in the longer run. As is the case with other problems of intergenerational justice, democracies might therefore not be well-equipped to tackle climate change.<sup>15</sup> Current generations might be tempted to let future generations bear most of the cost.

The bleak picture painted thus far should, however, be strongly nuanced. Despite their flaws, democracies also have major assets when it comes to the fight against climate change and, when the situation is assessed globally, democracies do not fare badly compared to authoritarian regimes. For example, civic engagement, local initiatives, free media and free academic research are all assets of democratic regimes that play a major and positive role in the fight against climate change.<sup>16</sup> Although citizens or companies may at times be reluctant to change their behaviours to address the challenge of climate change, civil society and social movements have also been vocal in calling for greater efforts from their governments to reduce greenhouse gas emissions, which shows that large segments of the population are ready to change their behaviour in order to reduce their environmental footprints. Many have also already done so without any legislation compelling to change their habits and ways of life. Furthermore, democracies are more inclined towards international cooperation than authoritarian regimes, which is essential in the context of climate change mitigation in the absence of a world government.<sup>17</sup> Finally, institutional innovation at the domestic level can also help democracies reduce the risks associated with the specific problem of short-termism in democratic decision-making, as I will now discuss in further detail.

## II. Short-termism and institutional innovation

Institutions (i.e. structures, norms and procedures<sup>18</sup>) can help reduce the adverse effects of short-termism in democratic decision-making, as has been repeatedly suggested by political theorists,<sup>19</sup> economists,<sup>20</sup> as well as legal scholars.<sup>21</sup> This can be done through establishing ‘future-oriented institutions’.<sup>22</sup> Future-oriented institutions are institutions

15 González-Ricoy, I. & Gosseries, A., “Designing Institutions for Future Generations. An Introduction”, in González-Ricoy, I. & Gosseries, A. (eds.), *Institutions for Future Generations*, 2016, Oxford, Oxford University Press, p. 4.

16 Lindvall, D. (2021), “Democracy and the Challenge of Climate Change”, op. cit., p. 9.

17 Ibid, pp. 37-38.

18 Dubash, N. et al. similarly define institutions as ‘the formal or informal procedures, routines, norms and conventions embedded in the organisational structure of the polity or economy, including laws, organizations in government, and interdepartmental coordination processes’ (Dubash, N. et al., “National climate institutions complement targets and policies”, *Science* 2021, issue 6568, pp. 690-693, with a reference to Hall, P. & Taylor, R., “Political science and the three new institutionalisms”, *Political Studies* 1996, vol. 44, p. 938).

19 Bourg, D. & Whiteside, K., *Vers une démocratie écologique. Le citoyen, le savant et le politique*, 2010, Paris, Seuil; González-Ricoy, I. & Gosseries, A. (eds.), *Institutions for Future Generations*, 2016, Oxford, Oxford University Press; Smith, G., *Can Democracy Safeguard the Future?*, 2021, Cambridge, Polity Press.

20 Helm, D. et al., “Credible Carbon Policy”, *Oxford Review of Economic Policy* 2003, vol. 19, issue 3, pp. 438-450.

21 Pitseys, J. & El Berhoumi, M. (2020), “Constitution, conscience du long terme et justice intergénérationnelle”, op. cit., pp. 441-462.

22 On the discrepancy between law and environmental timescales, see Richardson, B., *Time and Environmental Law. Telling Nature’s Time*, 2018, Cambridge, Cambridge University Press.

that ‘aim, in one way or another, to correct short-term biases in political systems and produce policy outcomes that achieve a better balance between the legitimate concerns of the present and the potential interests of the future’.<sup>23</sup> Eliminating different types of short-termism when those are detrimental to the public good requires different types of future-oriented institutions. This is because short-term benefits may be prioritised over future ones for a variety of reasons, ranging from the uncertainty or the ignorance of these future benefits, leading, for example, to citizens not sacrificing their current interests for uncertain future benefits, to favoring the short-term rather than the long-term or being less closely tied to future generations.<sup>24</sup> If short-termism is caused by ignorance or uncertainty over future benefits, addressing it may require decision-making processes to be better informed about these future benefits, so that they are not too easily discarded. If short-termism results from a preference for short-term gains over longer-term ones, however, then institutional solutions should require representation of future interests in decision-making processes rather than injecting more expertise in the process.<sup>25</sup>

Proposals for and existing future-oriented institutions within democratic states are numerous and their merits and weaknesses in relation to climate change cannot all be discussed extensively here. For the purpose of the present paper, I shall therefore limit myself to highlight some of such institutions and their merits and weaknesses from a public law perspective. I will first focus on constitutional provisions and constitutional courts; secondly, on electoral rules and deliberative assemblies; and, thirdly, on climate impact assessments. A fourth and last category of future-oriented institutions in the field of climate change – independent climate bodies – will be examined in more detail in the next section.

A first category of the said institutional answers to the problem of short-termism in the context of climate change relies on constitutional provisions and constitutional courts.<sup>26</sup> An increasing number of constitutions worldwide contain provisions on the environment, climate change or, more generally, the rights of future generations.<sup>27</sup> Examples include France and Belgium.<sup>28</sup> Such provisions may prevent legislatures and governments from too readily adopting measures that are prejudicial to climate change mitigation or adaptation or, in exceptional cases, may require the elected officials to develop policies aimed at reducing greenhouse gases emissions, for example. The aim of such constitutional provisions is to steer the outcome of the legislative and executive decision-making

23 Mackenzie, M. (2016), “Institutional Design and Sources of Short-Termism”, op. cit., p. 24.

24 González-Ricoy, I. & Gosseries, A. (2016), “Designing Institutions for Future Generations. An Introduction”, op. cit., p. 5. See also the related debate on discounting and climate change: Weisbach, D. & Sunstein, C. provide a useful introduction in Weisbach, D., and Sunstein, C., “Climate Change and Discounting the Future: A Guide for the Perplexed”, *Yale Law & Policy Review* 2009, vol. 27, issue 2, pp. 433-45.

25 For a more systematic overview, see eg Mackenzie, M. (2016), “Institutional Design and Sources of Short-Termism”, op. cit., table 2.1.

26 Ekele, K., “Green Constitutionalism. The Constitutional Protection of Future Generations”, *Ratio Juris* 2007, vol. 20, n° 3, pp. 378-401.

27 González-Rico, I., “Constitutionalizing Intergenerational Provisions”, in González-Ricoy I. & Gosseries A. (eds.), *Institutions for Future Generations*, 2016, Oxford, Oxford University Press, pp. 170-182; Araújo, R. & Koessler, L., “The rise of the constitutional protection of future generations”, *Legal Priorities Project Working Paper Series No. 7-2021*, 44 p. Available at: <https://www.legalpriorities.org/research/constitutional-protection-future-generations.html>.

28 2004 French Charter for the Environment; Art 7bis of the Belgian Constitution.

ing processes.<sup>29</sup> Constitutional provisions are typically drafted in general terms, but they could contain more concrete measures and objectives to be achieved by the elected representatives.<sup>30</sup> Courts would normally enforce those constitutional provisions against the legislative or executive bodies. Reliance on constitutional law and constitutional courts in the fight against climate change is discussed elsewhere in this special issue.<sup>31</sup> This kind of institutional answer has produced some remarkable results. The German Constitutional Court, for instance, held on 24 March 2021 that the provisions of the German Federal Climate Change Act of 12 December 2019 governing national climate targets and the annual emission amounts allowed until 2030 were incompatible with the German Constitution insofar as they lacked sufficient specifications for further emission reductions from 2031 onwards.<sup>32</sup> In this case, the Court held that greater weight should have been given by the German legislature to the rights and interests of future generations.

However, such constitutional provisions to mitigate climate change are not without criticism as they raise questions of legitimacy and separation of powers. Especially if they are worded vaguely, they effectively give immense power to the judge to indirectly determine what measures are in the best (climate) interests of future generations even though judges are neither necessarily in state of determining what such measures would look like, nor are they elected.<sup>33</sup>

Other proposals for institutional fixes to short-termism in democratic decision-making include amendments to electoral rules to ensure the representation of future generations in legislative processes. Suggestions have for instance been made to ensure such representation through reserved seats for the youth in Parliament.<sup>34</sup> Such proposals attempt to modify the input of the legislative and decision-making processes, but they often raise legitimacy and constitutional concerns as they challenge the equality between citizens.<sup>35</sup> Citizens' assemblies composed of randomly selected members are also presented by political theorists as a possible approach to limit the adverse effects of short-termism in democracies, because of the deliberative merits of such assemblies, their diverse composition, the lack of partisan cleavages therein, and the absence of elector-

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29 Beckman, L. & Ugglá, F., "An Ombudsman for Future Generations. Legitimate and Effective?", in González-Ricoy I. & Gosseries, A. (eds.), *Institutions for Future Generations*, 2016, Oxford, Oxford University Press, p. 122.

30 R., Levy, "Fixed Constitutional Commitments: Evaluating Environmental Constitutionalism's "New Frontier"", *Melbourne University Law Review* 2022, vol. 46, pp. 82-122. Available at: [https://www.academia.edu/88302300/FIXED\\_CONSTITUTIONAL\\_COMMITMENTS\\_EVALUATING\\_ENVIRONMENTAL\\_CONSTITUTIONALISMS\\_NEW\\_FRONTIER](https://www.academia.edu/88302300/FIXED_CONSTITUTIONAL_COMMITMENTS_EVALUATING_ENVIRONMENTAL_CONSTITUTIONALISMS_NEW_FRONTIER).

31 See contribution by Laurent Fonbaustier.

32 BVerfG, 1 BvR 2656/18, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20 (translation borrowed from: <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2021/bvg21-031.html>).

33 González-Ricoy, I. & Gosseries, A., (2016), "Designing Institutions for Future Generations. An Introduction", op. cit., p. 19; Beckman, L. & Ugglá, F. (2016), "An Ombudsman for Future Generations. Legitimate and Effective?", op. cit., pp. 122-123. On institutional failure and the role of judges in climate cases, see eg Fisher, L., "Climate Change Litigation, Obsession and Expertise: Reflecting on the Scholarly Response to *Massachusetts v. EPA*", *Law and Policy* 2013, vol. 35, pp. 236-260.

34 Bidadanure, J., "Better Procedures for Fairer Outcomes. Youth Quotas in Parliaments", *Intergenerational Justice Review* 2015, vol. 1, pp. 4-10.

35 González-Ricoy, I. & Gosseries, A., (2016), "Designing Institutions for Future Generations. An Introduction", op. cit., p. 17.

al pressure.<sup>36</sup> These are all features that could arguably gear decision-making to giving greater weight to long-term interests, even though they do not control the substance of what results from the deliberations of the citizens' assembly. Climate change is a topic on which several citizens' assemblies have been convened, such as the French Citizens' Climate Convention active in 2019-2020.<sup>37</sup> The impact of the latter initiative is, however, disputed, and this has been attributed to the ambiguities in the role of this Convention and in the nature of its relations with the representative institutions (Parliament, President, and Government). These ambiguities result in part from the lack of a legal or constitutional framework regulating citizens' panels and other similar initiatives in France.<sup>38</sup> This concern is however not limited to the French legal system but can also be seen in systems where initiatives of deliberative and participative democracy sit uneasily in a constitutional context mostly concerned with representative democracy.<sup>39</sup>

Other institutional options to reduce the risk of short-termism in democratic decision-making include legal requirements for politicians or state authorities to declare whether and to what extent the measures that they defend or propose for adoption impact the (climate) interests of future generations.<sup>40</sup> Such 'posterity impact assessments' 'combat uncertainty about policy causation by requiring legislators to thoroughly research and publicize the long-term effects of their proposed policy for the opposing political party to scrutinize', while also holding 'legislators liable for the long-term effects of their decisions'.<sup>41</sup> There is a conceptual link between posterity impact assessments and the environmental impact assessments which are mandatory under European Union legislation for individual projects and for public plans or programmes which are likely to have significant effects on the environment.<sup>42</sup> The impact on climate change is included in the environmental assessments to be carried out under EU law.<sup>43</sup> The European Court of Justice has ruled that domestic legislators and executives fell under the duty to carry out environmental impact assessments whenever they enacted 'public plans or programmes' which are likely to have significant effects on the environment, even though

36 John, T. & MacAskill, W., "Longtermist Institutional Reform", GPI Working Paper No. 14-2020, pp. 11-12. Available at: [https://globalprioritiesinstitute.org/wp-content/uploads/Tyler-M-John-and-William-MacAskill\\_Longtermist-institutional-reform.pdf](https://globalprioritiesinstitute.org/wp-content/uploads/Tyler-M-John-and-William-MacAskill_Longtermist-institutional-reform.pdf).

37 See: <https://www.conventioncitoyennepourleclimat.fr/>.

38 Girard, C., "Lessons from the French Citizens' Climate Convention. On the role and legitimacy of citizens' assemblies", *VerfBlog*, 27 July 2021. Available at: <https://verfassungsblog.de/lessons-from-the-french-citizens-climate-convention/>.

39 On the Belgian case, see Clarenne, J. & Jadot, C., "Les outils délibératifs auprès des parlements sous l'angle du droit constitutionnel belge", *Courrier hebdomadaire du CRISP* 2021, n° 2517-2518, 58 p.

40 MacKenzie, M. (2016), "Institutional Design and Sources of Short-Termism", *op. cit.*, p. 34.

41 John, T. & MacAskill, W. (2020), "Longtermist Institutional Reform", *op. cit.*, p. 13.

42 John, T. & MacAskill, W. (2020), "Longtermist Institutional Reform", *op. cit.*, p. 14.; Dir. n° 2011/92/EU, 13 Dec. 2011, of the European Parliament and of the Council on the assessment of the effects of certain public and private projects on the environment (codification); Dir. n° 2001/42/EC, 27 June 2001, of the European Parliament and of the Council on the assessment of the effects of certain plans and programmes on the environment. See the discussion of these directives by Garcia-Ureta, A., "Environmental Impact Assessment in the EU: More than Only a Procedure?", in Peeters, A. & Eliantonio, M. (eds.), *Research Handbook on EU Environmental Law*, 2020, Cheltenham, Edward Elgar, pp. 164-178.

43 Huglo, C., *Méthodologie de l'étude d'impact climatique*, 2020, Brussels, Bruylant, pp. 60-61. See Dir. n° 2014/52/EU, 16 April 2014, of the European Parliament and of the Council amending Dir. n° 2011/92/EU on the assessment of the effects of certain public and private projects on the environment.



such plans or programmes would take the form of a regulation or of a statute.<sup>44</sup> Not all statutes or regulations are concerned, however. Public plans or programmes are understood as

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*'any measure which establishes, by defining rules and procedures for scrutiny applicable to the sector concerned, a significant body of criteria and detailed rules for the grant and implementation of one or more projects likely to have significant effects on the environment.'*<sup>45</sup>

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Environmental impact assessments must be taken into account in the final decision from the authority,<sup>46</sup> and reasons must be given to back up the decision.<sup>47</sup> Courts may review whether these duties are respected in specific cases. Another example of an existing 'climate assessment' is the climate impact assessment that should be included in executive decision-making in the Walloon Region in Belgium. However, it has yet to enter into force.<sup>48</sup>

### III. The role of independent bodies in the fight against climate change

A final example of institutional innovation that can contribute to fighting short-termism in democratic decisions-making in the context of climate change - independent climate bodies - deserves to be discussed in more detail here. Such institutions have spread worldwide in recent years, and their role has been recently recognized by the IPCC.<sup>49</sup> While these independent bodies are increasingly part of the governance of climate change,<sup>50</sup> they deserve more detailed scrutiny by public law scholars in order to make sense of their diversity and clarify their potential in constitutional terms.

Institutional options for reducing the risk of short-termism in climate decision-making include involving expert bodies - agencies, councils, ombudspersons - that operate independently from both representative institutions and private interests.<sup>51</sup> As a result of this autonomy from representative institutions, independent climate bodies are less dependent on electoral cycles or voters' preferences in their activities and assessments. They can provide the 'necessary continuity and consistency over time, which is need-

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44 CJEU, Second chamber, 27 Oct. 2016, n° C-290/15, *D'Oultremont*, ECLI:EU:C:2016:816; CJEU, Second Chamber, 7 June 2018, n° C-160/17, *Thybaut*, ECLI:EU:C:2018:401; CJEU, Second Chamber, 7 June 2018, n° C-671/16, *Inter-Environnement Bruxelles*, ECLI:EU:C:2018:403.

45 CJEU, 27 Oct. 2016, n° C-290/15, *D'Oultremont*, op. cit. § 49.

46 Art. 8 Dir. n° 2001/42/EC; Art. 8 Dir. n° 2011/92/EU.

47 Art. 9 Dir. n° 2001/42/EC; Art. 9 Dir. n° 2011/92/EU.

48 Art. 16/2 of the Walloon Climate Act of 20 February 2014.

49 Working Group III of the Intergovernmental Panel on Climate Change (2022), "Working Group III contribution to the IPCC sixth assessment report (Ar6)", op. cit., pp. 13-15 and 13-16.

50 See: <https://www.eea.europa.eu/publications/the-contribution-of-national-advisory/>.

51 Beckman, L. & Ugglä, F. (2016), "An Ombudsman for Future Generations. Legitimate and Effective?", op. cit., pp. 118-133; Lockwood, M., "Routes to credible climate commitment: The UK and Denmark compared", *Climate Policy* 2021, vol. 9, pp. 1234-1247.

ed for truly effective and sound climate policy'.<sup>52</sup> Some of these bodies already exist and their number is increasing.<sup>53</sup>

An early and influential example of a dedicated independent climate body is the UK Climate Change Committee (CCC) created under the Climate Change Act 2008.<sup>54</sup> The CCC is an independent, statutory body whose purpose is 'to advise the UK and devolved governments on emissions targets and to report to Parliament on progress made in reducing greenhouse gas emissions and preparing for and adapting to the impacts of climate change'.<sup>55</sup> The UK example inspired other countries. In France, for example, the High Council on Climate (*Haut Conseil pour le Climat*) was created in 2018, as an 'independent body tasked with issuing advice and recommendations to the French government on the delivery of public measures and policies aimed at reducing France's greenhouse gas emissions'.<sup>56</sup> In Belgium, independent climate councils were recently created, but so far only at the regional level.<sup>57</sup> A similar development also occurred at European Union level, with European Climate Law, creating a European Scientific Advisory Board on Climate Change and inviting each Member State 'to establish a national climate advisory body, responsible for providing expert scientific advice on climate policy to the relevant national authorities as prescribed by the Member State concerned'.<sup>58</sup> Although explicit, this is an open-ended invitation and Member States retain substantial room for manoeuvre. It may nonetheless be an additional step in the establishment of independent climate bodies as a part of climate change governance.

Existing and proposed independent climate bodies can be very different based on their institutional structure, location and mandate. Some criteria for classifying the different options are offered hereafter. From a public law perspective, the legal responsibilities of independent climate bodies, their powers, their composition and their independence are relevant criteria to classify them and locate them within the broader structures of the State, while also highlighting their potential and limits as tools to address the challenge of climate change. Public law principles guiding the design of these independent climate bodies may limit the risk of democratic decline towards more technocratic forms of climate change governance.

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52 Weaver, S., Lötjönen, S. & Ollikainen, M., "Overview of national climate change advisory councils", The Finnish Climate Change Panel Report 3/2019, p. 14. Available at: <https://www.ilmastopaneeli.fi/wp-content/uploads/2019/05/Overview-of-national-CCCs.pdf>.

53 Averchenkova, A., Fankhauser, S. & Finnegan, J., "The influence of climate change advisory bodies on political debates: evidence from the UK Committee on Climate Change", 2021, op. cit., p. 1219; Misonne, D., "Klimaatrechtspraak en wetenschap: jamais l'un sans l'autre", in *Liber Amicorum Luc Lavrysen*, 2022, forthcoming.

54 Part 2 of the Climate Change Act 2008.

55 See: <https://www.theccc.org.uk/>.

56 See: <https://www.hautconseilclimat.fr/en/about/>. The Council is formally established by art. D132-1 and followings of the French Code of the Environment.

57 Eg Art 1.5.1. of the Brussels Code on Air, Climate and Energy Control. For a more comprehensive overview of existing independent climate councils, see Evans, N. & Duwe, M. (2021), "Climate governance systems in Europe: the role of national advisory bodies", op. cit., 67 p.

58 Reg. (EU) n° 2021/1119, 30 June 2021, of the European Parliament and of the Council establishing the framework for achieving climate neutrality and amending Reg. (EC) n° 401/2009 and (EU) 2018/1999, Art. 3.4.

## A. Composition and independence

A first subdivision that can be used to classify independent climate bodies would refer to differences in terms of their composition and independence. Their composition would have to include some degree of scientific expertise, but the extent to which they take account of other perspectives – such as politicians, stakeholders or civil society – may vary, and accordingly affect their legitimacy. Independent climate bodies are considered legitimate due to their expertise and the way they operate rather than by means of input legitimacy which is central for representative institutions. Which disciplines are represented within the board of an independent climate body should also be considered, as well as the procedure used to appoint or remove these board members. As an example, the appointment of the members of the French High Climate Council must be based on their scientific, technical and economic expertise in climate and ecosystems science, in greenhouse gas reductions and in relation to adaptation and resilience in the face of climate change.<sup>59</sup> The appointment of the members of the UK CCC must, for its part, secure that the Committee (taken as a whole) has experience in or knowledge of (a) business competitiveness; (b) climate change policy at national and international level, and in particular the social impacts of such policy; (c) climate science and other branches of environmental science; (d) differences in circumstances between England, Wales, Scotland and Northern Ireland and the capacity of national authorities to take action in relation to climate change; (e) economic analysis and forecasting; (f) emissions trading; (g) energy production and supply; (h) financial investment; and (i) technology development and diffusion.<sup>60</sup>

As for the independence of independent climate bodies, in general terms, the European Court of Justice has ruled that in ‘relation to a public body, the term “independence” normally means a status which ensures that the body concerned can act completely freely, without taking any instructions or being put under any pressure’.<sup>61</sup> As put colourfully by A.G. Bobek, however,

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*“[i]ndependence can hardly be understood as a unitary notion, a sort of ‘off-the-rack’ single blueprint, that would provide for a set of guarantees universally applicable to all the independent bodies in exactly the same way. Independence is more like a ladder which one can climb up or down and stop at a specific rung, depending on the distance needed from given actor(s) in order to complete one’s tasks independently”.*<sup>62</sup>

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59 Art. L.132-4 of the French Code for the Environment.

60 Climate Change Act 2008, Schedule 1.

61 CJEU, Grand Chamber, 9 March 2010, n° C-518/07, *Commission v Germany*, EU:C:2010:125, § 18. See also CJEU, Fourth Chamber, 13 June 2018, n° C-530/16, *European Commission v Republic of Poland*, EU:C:2018:430, § 67; CJEU, Fifth Chamber, 11 June 2020, n° C-378/19, *Prezident Slovenskej republiky*, EU:C:2020:462, § 32.

62 Conclusions delivered in CJEU, Fourth Chamber, 13 June 2018, n° C-530/16, *European Commission v Republic of Poland*, EU:C:2018:29, § 32.

Analytically, the independence of a particular body can be assessed on the basis of four dimensions: institutional, personnel, financial, and functional independence.<sup>63</sup> *Institutional independence* refers to whether a public body constitutes a separate institutional unit, so that it is not a part of or subordinate to a ministry or department, and whether its existence is formally guaranteed against eg executive action.<sup>64</sup> How the heads of the public body are appointed and removed determines its *personnel's independence*. *Financial independence* refers to whether the entity has a separate budget and autonomy in financial matters. Fourthly, *functional independence* means that an 'agency does whatever it wants'.<sup>65</sup> Different institutions 'score' differently on the four dimensions of independence. Independence can further be assessed *de iure* or *de facto*: both dimensions are interrelated, but they do not always coincide.<sup>66</sup> Furthermore, even 'independent' entities do not operate in a *vacuum*: they interact with public and private bodies and define their preferences accordingly, relying on information from other actors for their operations, etc. Independence is therefore always relative.<sup>67</sup> For example, as far as the French High Council for Climate is concerned, the enabling legislation provides that the Council falls under the responsibility of the Prime Minister, but affirms also its independence and states that its members may neither seek nor receive instructions from anyone when fulfilling their duties.<sup>68</sup>

## B. Statutory functions

A second element that can be used to classify existing or suggested independent climate bodies relates to their statutory functions. For example, some can be tasked with formulating or recommending policy goals to be achieved in relation to climate change, such as carbon neutrality or a certain level of reduction of greenhouse gas emissions in a certain timeframe. It is the role of 'climate laws' to set long-term goals of reduction of greenhouse gas emissions.<sup>69</sup> In other cases, the independent body is rather active at the level of implementation of climate goals set by political representatives. Their task can then be to make decisions, monitor or give advice on how or whether general or specific measures contribute to achieving the goals set by the representative institutions, or whether additional or alternative measures should be adopted. At the implementation level, independent climate bodies contribute to avoiding politicians break long-term legal commitments when their immediate interest is to do so.<sup>70</sup> As such, their role is often to monitor whether the objectives of greenhouse gas emissions set in climate laws are likely to be achieved through assessments of existing and planned policies reported by the government.<sup>71</sup>

63 Scholten, M., "Independent, Hence Unaccountable? – The Need for a Broader Debate on Accountability of the Executive", *Review of European Administrative Law* 2011, vol. 4, p. 6.

64 *Ibid.*, p. 10.

65 *Ibid.*, p. 11.

66 Gilardi, F. & Maggetti, M., "The independence of regulatory authorities" in Levi-Faur, D. (ed.), *Handbook on the Politics of Regulation*, 2011, Cheltenham, Edward Elgar, pp. 203-204.

67 *Ibid.*, p. 202.

68 Art. L.132-4 of the French Code for the Environment.

69 Nash, S., Torney, D. & Matti S., "Climate Change Acts: Origins, Dynamics, and Consequences", *Climate Policy* 2021, vol. 9, p. 1111.

70 Lockwood, M. (2021), "Routes to credible climate commitment: The UK and Denmark compared", *op. cit.*, p. 1235.

71 McHarg, A., "Climate change constitutionalism ? Lessons from the United Kingdom", *Climate Law* 2011, vol. 2, p. 471.

Independent climate bodies may exercise their tasks with different degrees of effectiveness depending for instance on their expertise, their reputation, and the formal powers that are available to them. The latter are discussed hereafter. The responsibilities of independent climate bodies may also be more or less broad depending on the wording of the enabling legislation: some may for example have to focus on climate change mitigation while others may also have a role in adaptation.<sup>72</sup> The range of cases in which they must give advice or adopt decisions or recommendations and the conditions under which they can do so can also vary greatly. A key question here is whether they can make recommendations *ex officio* or whether they can only react to requests from the government. Moreover, independent climate bodies can also exist as separate and dedicated institutions or a climate role – however defined – can be taken up by other existing (independent) bodies or councils, such as environmental bodies or bodies competent for sustainable development.<sup>73</sup> A review of institutions in eight countries quoted in the Sixth Report of the Intergovernmental Panel on Climate Change suggests three broad processes through which climate institutions emerge: “purpose-built” dedicated institutions, focused explicitly on mitigation; “layering” of mitigation objectives on existing institutions; and “latent” institutions created for other purposes that nonetheless have implications for mitigation outcomes.<sup>74</sup> The British Committee on Climate Change is an example of a dedicated climate institution, while central banks and energy regulators are examples of non-dedicated structures that nonetheless have a role to play in addressing the challenge of climate change.<sup>75</sup>

### C. Powers

Another distinction between different sorts of independent climate bodies relates to the powers conferred to these independent climate bodies. Some may have decision-making powers in the formal sense. In such cases, independent climate bodies would be able to make binding decisions on their addressees without their consent. For example, Helm et al. have suggested the creation of independent carbon agencies as a way to solve the time inconsistency problem in climate policies and the lack of credibility of these policies. Carbon agencies would either have advisory powers or could be empowered to, for instance, set carbon taxes or emissions-trading limits to achieve a CO<sub>2</sub> reduction target set out by the government.<sup>76</sup> However, most democracies struggle with granting decision-making powers to bodies that are not directly or indirectly accountable to voters.

72 Evans, N. & Duwe, M. (2021), “Climate governance systems in Europe: the role of national advisory bodies”, op. cit., p. 12.

73 Weaver, S., Lötjönen, S. & Ollikainen, M. (2019), “Overview of national climate change advisory councils”, op. cit., p. 4.

74 Working Group III of the Intergovernmental Panel on Climate Change (2022), “Working Group III contribution to the IPCC sixth assessment report (Ar6)”, op. cit., pp. 13-15 (quoting Dubash, N. (2021), “Varieties of climate governance: the emergence and functioning of climate institutions”, *Environmental Politics* 30 Supplement 1, pp. 1-25).

75 Zilioli, C. & Ioannidis, M., “Climate change and the mandate of the ECB: potential and limits of monetary contribution to European green policies”, *Common Market Law Review* 2022, vol. 59, pp. 363-394; Art. 58 of Dir. (EU) n°2019/944, 5 June 2019, of the European Parliament and of the Council on common rules for the internal market for electricity and amending Dir. n° 2012/27/EU.

76 Helm, D. et al. (2003), “Credible Carbon Policy”, op. cit., pp. 438-450.

Surely, independent bodies are now an integral part of the governance structures of Western states. For example, independent central banks are a common feature of contemporary monetary policy, while independent economic regulators have also spread worldwide over recent decades.<sup>77</sup> At the same time, however, a comparative study has shown that the need to maintain some form of political control over non-governmental public bodies is widely recognised in Europe,<sup>78</sup> and, in Germany, legal scholars have claimed that the European requirement to create independent regulators in the electricity sector was in breach of the German constitutional identity.<sup>79</sup> They argue that the creation of new independent bodies leads to a redefinition of the respective roles of politicians, experts and citizens, in ways which may be at odds with pre-existing domestic constitutional, political and economic arrangements.<sup>80</sup> De Somer also identifies, in general terms, conflicting approaches between EU requirements that oblige Member States to create autonomous public bodies and a counter-trend at national level to restrain the use of such public bodies because of democratic concerns.<sup>81</sup> Accordingly, the creation of independent climate bodies will have to take forms that are sound and rigorous in constitutional terms, particularly if these bodies are granted decision-making powers. Some parliamentary and judicial accountability is likely to remain necessary, and the discretion granted to the independent body is likely to be restricted by statute or under government regulations.

Furthermore, the proposal from Helm et al. to create a carbon agency having the power to set carbon taxes or emissions-trading limits to achieve a CO<sub>2</sub> reduction target set out by the government is likely to face additional constitutional hurdles in many legal systems. This is because such delegation of powers would lead the carbon agency to exercise fiscal powers, which historically is, in a comparative perspective, typically an area of competence which falls under the responsibility of parliaments and that can only be delegated to third parties under strict limits.<sup>82</sup> Overall, granting wide discretionary powers to bodies outside of the realm of the representative institutions is likely to be possible, but only under strict limits set by constitutional law provisions or principles. Turning to more technocratic forms of government in the fight against climate change is likely to face constitutional hurdles and will therefore have to consider the constitutional settings in which this would take place.

In other cases, independent climate bodies would have advisory powers only, without decision-making powers in the formal sense. In such cases, independent climate bodies only give advice or make non-binding recommendations to other actors, or challenge

77 Jordana, J., Levi-Faur, D. & Fernandez-i-Marín, X., “The Global Diffusion of Regulatory Agencies” *Comparative Political Studies* 2011, vol. 44, n° 10, p. 1344.

78 Jenart, C., “Uitbesteding van regelgevende bevoegdheid aan autonome agentschappen, private en hybride actoren”, *Tijdschrift voor Bestuurswetenschappen en Publiekrecht* 2020, vol. 63, pp. 69-70.

79 See the references in Ruffert, M., “Public Law and the Economy: A Comparative View from the German Perspective”, *International Journal of Constitutional Law* 2013, vol. 11, issue 4, p. 935.

80 I have tried to show this elsewhere in relation to the Belgian case and independent economic regulators. See Slautsky, E., “Independent economic regulators in Belgium: contextualising local resistance to a global trend in the light of the Belgian economic constitution”, *REALaw* 2021, pp. 37-63.

81 De Somer, S., *Autonomous Public Bodies and the Law*, 2017, Cheltenham, Edward Elgar.

82 Jenart, C., *Outsourcing Rulemaking Powers. Constitutional Limits and National Safeguards*, 2022, Oxford, Oxford University Press, pp. 106-110.

governmental climate action or inaction. A 2021 study on climate governance systems in Europe and the role of climate advisory bodies further envisaged a combination of three key possible functions for independent climate bodies with an advisory and expert role (labeled ‘independent scientific climate councils’): a combination of watchdog, information provider and convenor functions.<sup>83</sup> The possibility for independent climate bodies to bring cases to courts could also be envisaged, by legally recognizing their standing and capacity to do so. When independent climate bodies only have advisory functions, the legitimacy and accountability concerns that result from granting powers to unelected bodies are less obvious, and political resistance to the creation of such bodies is expected to be weaker,<sup>84</sup> for the decision-making scope of the representative institutions would remain formally untouched. There might, however, be a trade-off between legitimacy and effectiveness in such case, although the extent of this trade-off should not be exaggerated given the real impact advisory bodies can have in practice on policies and specific decisions. Two reasons for this are discussed hereafter.

On the one hand, climate advisory bodies increase the transparency of the climate decisions made by the representative institutions and they increase their accountability to the public for the flaws thereof. The threat of naming and shaming further gives an incentive to the government to follow the advice from the climate bodies. For instance, in 2019, when the UK updated its 2050 target of greenhouse gas reductions from 80% to 100% compared to 1990 (a decision related to the climate ambition for the UK, therefore – not its implementation), it did so at the recommendation of the Committee on Climate Change.<sup>85</sup> This is just one example of the practical impact of this committee on UK climate policies, as the Committee has proved influential over the years.<sup>86</sup>

On the other hand, the real impact of independent advisory climate bodies also results from the fact that they increase the tools available to claimants and to judges who review legislative or executive climate action. For example, one striking feature of the decision from the French Council of State (*Conseil d’État*) in the case *commune de Grande-Synthe* is its reliance on scientific expertise and on assessments and reports from the French High Council on Climate.<sup>87</sup> On three occasions in its decision, the French Council of State relied on assessments from the High Council to decide that the efforts from the French government were not sufficient in order to achieve the target of reducing greenhouse gas emissions by 40% by 2030, as required under French legislation and EU law.<sup>88</sup> In this decision, the Council of State ordered the French Government to take

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83 Evans, N. & Duwe, M., “Climate governance systems in Europe: the role of national advisory bodies”, 2021, Ecologic Institute, Berlin; IDDRI, Paris, p. 7. Available at: <https://www.ecologic.eu/sites/default/files/publication/2021/Evans-Duwe-Climate-governance-in-Europe-the-role-of-national-advisory-bodies-2021-Ecologic-Institute.pdf>.

84 Beckman, L. & Uggla, F. (2016), “An Ombudsman for Future Generations. Legitimate and Effective?”, op. cit., p. 118.

85 Evans, N. & Duwe, M. (2021), “Climate governance systems in Europe: the role of national advisory bodies”, op. cit., p. 43.

86 Averchenkova, A., Fankhauser, S. & Finnegan, J., “The influence of climate change advisory bodies on political debates: evidence from the UK Committee on Climate Change”, *Climate Policy* 2021, vol. 21, issue 9, pp. 1218-1233; Working Group III of the Intergovernmental Panel on Climate Change (2022), “Working Group III contribution to the IPCC sixth assessment report (Ar6)”, op. cit., pp. 13-15.

87 CE, 1 July 2021, n° 427301, ECLI:FR:CECHR:2021:427301.20210701.

88 Art. L.100-4 of the Energy Code; Annex 1 of Reg. n° 2018/842/EU, 30 May 2018, of the European Parliament and of the Council on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to

additional measures by 31 March 2022 to achieve the target of reducing greenhouse gas emissions by 40% by 2030.<sup>89</sup> Arguably, the repeated reliance of the Council of State on assessments from the High Council on Climate, next to reports from two other French environmental councils, can be understood both as a practical necessity, given the technical complexity of the case,<sup>90</sup> as well as a way for the administrative judge to increase the legitimacy of its decisions in a high-profile climate case, by grounding its assessments in institutionalised scientific advice. That references to scientific work increase the legitimacy of judicial decisions (and vice versa) is not surprising and has generally been recognised.<sup>91</sup> Nonetheless, as is the case with other forms of advisory boards, the institutionalised character of the French High Council on Climate makes it easier for the Council of State to rely on its expertise in its decisions.<sup>92</sup> There are several reasons for this.

Firstly, expert advice from a public authority such as the High Council on Climate fits well with a French tradition of creating expertise within state structures.<sup>93</sup> Secondly, expertise needs to be independent, competent, unbiased, impartial, transparent and pluralist to be legitimate.<sup>94</sup> The institutionalization of climate expertise through the creation of the High Council on Climate contributes to meeting these requirements by formalising them: the decree creating the High Council specifies its composition, affirms its independence, defines its powers, and ensures the transparency of its activities.<sup>95</sup> Procedures and transparency increase the legitimacy of expert bodies.<sup>96</sup> Finally, the control exercised by the French Council of State in the *commune de Grande-Synthe* case is specific and quite novel, as it consists in assessing the extent to which existing and projected governmental measures adopted to reduce greenhouse gas emissions are enough to achieve longer-term objectives. That kind of judicial control of the future ‘trajectory’ of greenhouse gas emissions reductions must rely on scientific assessments and projections. The existence of the French High Council of Climate contributes to

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climate action to meet commitments under the Paris Agreement and amending Reg. (EU) n° 525/2013.

89 Conseil d’État, “Greenhouse gas emissions: the Conseil d’État annuls the Government’s refusal to take additional measures and orders it to take these measures before 31 March 2022”, 2 July 2021. Available at: <https://www.conseil-etat.fr/en/news/greenhouse-gas-emissions-the-conseil-d-etat-annuls-the-government-s-refusal-to-take-additional-measures-and-orders-it-to-take-these-measures-before>.

90 Lasserre, B., “L’environnement: les citoyens, le droit, les juges”, Discourse before the *Cour de cassation*, 21 May 2021. Available at: <https://www.conseil-etat.fr/publications-colloques/discours-et-interventions/l-environnement-les-citoyens-le-droit-les-juges-introduction-de-bruno-lasserre-vice-president-du-conseil-d-etat>.

91 Chevallier, J., “L’expertise au prisme du contrôle du juge”, *Revue française d’administration publique* 2020, p. 16; Jacquemet-Gauché, A., “Le juge administratif face aux connaissances scientifiques”, *Actualité juridique. Droit administratif* 2022, pp. 443-453. In the US context, see also Jasanoff, S., *Science at the Bar. Law, Science, and Technology in America*, 1997, Cambridge Mass., Harvard University Press.

92 Delzangles, H., “Le ‘contrôle de la trajectoire’ et la carence de l’État français à lutter contre les changements climatiques. Retour sur les décisions Grande-Synthe en passant par l’Affaire du siècle”, *Actualité juridique. Droit administratif* 2021, p. 2127. See also Misonne, D., “Klimaatrechtspraak en wetenschap: jamais l’un sans l’autre”, 2022, op. cit.

93 Chevallier, J. (2020), “L’expertise au prisme du contrôle du juge”, op. cit., pp. 14-15.

94 Ibid, p. 14.

95 Arts. D.132-1 to D.132-7 of the French Code of the Environment.

96 Agacinsky, D., “Expertise et démocratie. Faire avec la défiance”, *France Stratégie*, Dec. 2018. Available at: <https://www.strategie.gouv.fr/sites/strategie.gouv.fr/files/atoms/files/fs-rapport-expertise-et-democratie-final-web-14-12-2018.pdf>, 87.



making this kind of judicial assessments possible.<sup>97</sup>

## Conclusion

The capacity of democracies to address the challenge of climate change is debated. Calls for more technocratic or authoritarian forms of climate governance have been made. This is because democracies are not always good at dealing with global, complicated and intergenerational challenges such as climate change, particularly when they require drastic measures to be taken quickly. Institutional innovations can, however, help democracies overcome this challenge. Institutions like constitutional courts and posterity impact assessments can help democracies overcome their tendency to short-termism and the problems that short-termism causes when costly measures need to be taken in the short term to prevent further damage in the longer term. This is the case for some of the measures needed to mitigate the effects of climate change.

Another institutional solution to the problem of short-termism in democratic decision-making in the context of climate change relies on independent climate bodies. These bodies can be conceived in different ways making generalisation across jurisdictions a complex exercise. However, it is possible to make sense of this diversity through a series of public law criteria: statutory functions, nature of the conferred powers, composition, and degree of independence are all criteria that can be used to classify existing or suggested independent climate bodies and locate them within the broader context of state structures. Public law further helps shed some light on the kind of powers and responsibilities that can be conferred on independent bodies such as independent climate bodies. For instance, constitutional principles in democratic states typically define the scope of action reserved to the representative institutions and, conversely, set limits to the kind of powers that can be granted to independent expert bodies. As a result, these principles also offer some counterweight to the pressure that climate change may put on democracies and in favour of less democratic forms of government.

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97 Delzangles, H. (2021), “Le ‘contrôle de la trajectoire’ et la carence de l’État français à lutter contre les changements climatiques. Retour sur les décisions Grande-Synthe en passant par l’Affaire du siècle”, *op. cit.*, p. 2126.

